THE HONORABLE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LIGHTHOUSE RESOURCES INC., et al,

Plaintiffs,

and

BNSF RAILWAY COMPANY,

Plaintiff-Intervenor,

v.

JAY INSLEE, et al.,

Defendants,

and

WASHINGTON ENVIRONMENTAL COUNCIL, et al.,

Defendant-Intervenors.

NO. 3:18-cv-05005-RJB

PLAINTIFFS AND PLAINTIFF-INTERVENOR'S PROTECTIVE MOTION FOR ENTRY OF FINAL JUDGMENT UNDER FED. R. CIV. P. 54(b)

NOTE ON MOTION CALENDAR: MAY 24, 2019

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INTRODUCTION

This Court's April 11 stay order is final and appealable. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1 (1983); *see also* Dkt. 326. Under the doctrine of merger, the Court's entry of partial summary judgment in favor of Defendant Hilary Franz (Dkt. 170) and dismissal of Plaintiffs and Plaintiff-Intervenor's (collectively, "Plaintiffs") preemption claims (Dkt. 200) are also now appealable under 28 U.S.C. § 1291. *Jones v. McDaniel*, 717 F.3d 1062 (9th Cir. 2013). Plaintiffs intend to immediately appeal all three orders to the Ninth Circuit. Nevertheless, as a precautionary measure to ensure that the Court's immunity and preemption orders are addressed by the Court of Appeals, thereby allowing all remaining issues to be tried together when the stay is lifted, Plaintiffs protectively move the Court to certify the orders at Dkt. 170 & 200 as final judgments under Rule 54(b).[1]

Before filing this motion, Plaintiffs, following the Court's admonition to "cooperate so that the merits of this case can be considered," asked Defendants whether they would consent to this motion. *See* Dkt. 258 at 2. When Defendants declined to take a position until they could review the motion, Plaintiffs provided an advance draft. Defendants summarily indicated they would oppose the motion, without explanation.

ARGUMENT

Federal Rule of Civil Procedure 54(b) allows entry of a final, appealable judgment when (1) an order in a case involving multiple claims or parties resolves one or more, but fewer than all, claims or the rights and liabilities of fewer than all parties and (2) there is "no just reason

[1] This motion is filed strictly for protective purposes. By filing this motion, Plaintiffs do not waive their position that they have the right to directly appeal the referenced orders under the merger doctrine.

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for delay." Fed. R. Civ. P. 54(b). Granting certification under Rule 54(b) "is a fairly routine act that is reversed only in the rarest instances." *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1067 n.6 (9th Cir. 2002).

When addressing a motion under Rule 54(b), a court must first determine whether the judgment at issue is "final" as to one or more "claims or parties," meaning it must be "an ultimate disposition of an individual claim entered in the course of a multiple claims action." *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7 (1980). Then the court considers whether there is any just reason for delaying issuing a final judgment as to those claims. *Id.* at 8. In making this latter determination, courts consider "judicial administrative interests as well as the equities involved." *Id.*

To determine whether "just reason for delay" exists, the Ninth Circuit has adopted a "pragmatic approach focusing on severability and efficient judicial administration." *Microsoft Corp. v. Motorola, Inc.*, No. C10-1923JLR, 2013 WL 6000017, at *2 (W.D. Wash. Nov. 12, 2013) (quoting *Wood v. GCC Bend, LLC*, 422 F.3d 873, 880 (9th Cir. 2005)). When applying this approach, courts in the Ninth Circuit consider "(1) whether the claims under review are separable from the others remaining to be adjudicated; and (2) whether the nature of the claims already determined is such that no appellate court would have to decide the same issue more than once." *Id.; see also Curtiss-Wright*, 446 U.S. at 7–10. Even where claims are not separate and independent, however, they may be "certified for appeal 'so long as resolving the claims would streamline the ensuing litigation.'" *Microsoft Corp.*, 2013 WL 6000017, at *3 (quoting *Noel v. Hall*, 568 F.3d 743, 747 (9th Cir. 2009). Emphasis on judicial administration and economy aims to "preserve[] the historic federal policy against piecemeal appeals." *Curtiss-*

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Wright, 446 U.S. at 9-10 (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437-38 (1956)).

"[A] district court must [also] take into account . . . the equities involved." *Id.* Equitable concerns are broadly drawn and "court[s] should feel free to consider any factor that seems relevant to . . . the policies the rule attempts to promote." *Angoss II Partnership v. Trifox, Inc.*, No. C-98-1459-SI, 2000 WL 288435, at *3 (N.D. Cal. Mar. 13, 2000) (citing *Bank of Lincolnwood v. Fed. Leasing, Inc.*, 622 F.2d 944, 949 (7th Cir. 1980)).

A. Because the Court's stay order is appealable, so are its immunity and preemption orders.

Under longstanding U.S. Supreme Court precedent, *Pullman* stays are final appealable under 28 U.S.C. § 1291. *See, e.g., Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 9-10 (1983) (holding that a "District Court's action [staying under *Pullman*] was final and therefore reviewable"); *Pearl Inv. Co. v. City and Cty. of San Francisco*, 774 F.2d 1460, 1462 (9th Cir. 1985) ("[w]e have jurisdiction to review a timely appeal of a *Pullman* abstention order."). As the Supreme Court explained in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, *Pullman* stays essentially "amount to a dismissal of the suit" and are therefore considered "final for purposes of appellate jurisdiction." *Moses H. Cone Mem. Hosp.*, 460 U.S. at 10. The *Pullman* stay here is no different.

Although the Court's immunity and preemption orders were not final when entered, they became so once the Court stayed this action. *See, e.g., Jones v. McDaniel*, 717 F.3d 1062, 1068 (9th Cir. 2013). That is, "a[n] [earlier] ruling on a motion for partial summary judgment merges with the final judgment." *Id.* So once the Court stayed this case, its earlier immunity

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and preemption partial summary judgment orders merged—and became appealable—with the stay order. *Id.* Nevertheless, Plaintiffs are filing the instant protective motion for the Court to issue a Rule 54(b) certification as to its immunity and preemption orders because not only do those rulings satisfy the Rule 54(b) standard, but also because a certification will preempt any collateral dispute that those rulings are immediately appealable. *See New Jersey Turnpike Auth. v. PP Indus. Inc.*, 197 F.3d 96, 102 n.5 (3d Cir. 1999) (protective Rule 54(b) certification appropriate to expedite appeal and resolve uncertainty).

B. The Court should certify its immunity order resolving all claims against Defendant Franz.

This Court's October 23, 2018 order granting summary judgment under the Eleventh Amendment (Dkt. 170) constitutes final disposition of all claims against Defendant Franz. *See Microsoft Corp. v. Motorola, Inc.*, No. C10-1923JLR, 2013 WL 6000017, at *2 (W.D. Wash. Nov. 12, 2013) (emphasis added) (citing *Curtiss-Wright*, 446 U.S. at 7–10); *see also Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th Cir. 1987) (finding Rule 54(b) certification proper where the district court judgments "completely extinguished the liability" of a particular party as to a particular claim).

Defendant Franz's dismissal also satisfies the no just reason for delay standard. First, the dismissal is readily severable from the remaining claims in this case. Jurisdictional dismissals in favor of individual parties, such as the instant dismissal is favor of Franz, are particularly well-suited for 54(b) certification. *See Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1484 (9th Cir. 1993) (affirming the district court's entry of final judgment under Rule 54(b) as to claims dismissed for lack of personal jurisdiction over certain defendants);

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Lewis v. Travertine, Inc., No. 2:17–cv–00016–CAS (JCx), 2017 WL 2989176, at *2 (C.D. Cal. July 12, 2017) ("where some, but not all, defendants are dismissed for lack of personal jurisdiction and the jurisdictional questions are independent of the merits of the underlying claims, courts routinely find no just reason for delay of entering final judgment in favor of those dismissed defendants"); *Maxwell v. City of San Diego*, No. 07-cv-2385, 2015 U.S. Dist. LEXIS 148697, at *3 (S.D. Cal. Sept. 23, 2010) (entering final judgment on the defendants' dismissal "on the grounds that tribal sovereign immunity barred suit against them"). Eleventh Amendment immunity is only applicable to Defendant Franz, meaning that question is fully severable from everything else before the Court.

Certifying appeal now "would streamline the ensuing litigation." *Microsoft Corp.*, 2013 WL 6000017, at *3 (quoting *Noel v. Hall*, 568 F.3d 743, 747 (9th Cir. 2009). Should the Ninth Circuit decide that Defendant Franz is not immune, adding her back into the litigation sooner rather than later avoids the risk of multiple trials and appeals. Delaying appeal means that the Court could be forced to hold a separate trial—years from now—on these same Commerce Clause questions. Certifying appeal of the immunity question ensures that, at trial, the Court can consider underlying facts and legal theories common to *all* Defendants at the same time, should the Ninth Circuit decide Defendant Franz is subject to suit.

C. The Court should certify its order dismissing all preemption claims.

The Court's preemption order (Dkt. 200) is also "final" for purposes of Rule 54(b) because it is an "ultimate disposition of [] individual claim[s] entered in the course of a multiple claims action." *Tsyn v. Wells Fargo Advisors, LLC*, No. 14-cv-02552-LB, 2016 U.S. Dist. LEXIS 83297, at *7 (N.D. Cal. Jun 27, 2016) (citing *Ariz. Carpenters Pension Trust Fund v.*

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Miller, 938 F.2d 1038, 1039-40 (9th Cir. 2001); *Curtiss-Wright*, 446 U.S. at 7). The preemption order eliminates Plaintiffs' Interstate Commerce Commission Termination Act and Ports and Waterways Safety Act claims and therefore resolves "at least one claim in a multiple-claim action." *Continental Airlines*, 819 F.2d at 1524; *see also Tsyn*, 2016 U.S. Dist. LEXIS 83297, at *7. Accordingly, it satisfies the final judgment requirement of Rule 54(b).

Moreover, the Court's immunity order also satisfies the no just reason for delay standard. As the Court explained, the preemption claims turn on whether "Lighthouse's proposed activities at the Terminal can be considered work done 'by, or under the auspices of, a rail carrier' and whether the Defendants' actions "control vessel traffic or navigation on the Columbia River." Dkt. 200 at 18. Those preemption questions are distinct and therefore severable from the other issues facing the Court. Whether Lighthouse's work is done "by, or under the auspices of, a rail carrier," does not answer, for example, whether the Defendants actions violate the Commerce Clause. *See, e.g.*, *San Luis & Delta-Mendota Water Auth. v. Salazar*, No. 1:09-cv-407, 2009 WL 4884228, at *2 (E.D. Cal. Dec. 10, 2009) (finding Commerce Clause claims were "sufficiently severable factually and legally" from National Environmental Policy Act and Endangered Species Act claims for purposes of Rule 54(b) certification).

Further, that the preemption claims are severable from the other claims also means that no appellate court would have to decide the same issues more than once. *See In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944 JST, 2016 WL 5815789, at *2 (N.D. Cal. Oct. 5, 2016); *see also Montes v. Rafalowski*, No. C–09–00976 RMW, 2012 WL 5392290, at *1 (N.D. Cal. Nov. 2, 2012) (noting that a partial judgment can be "sufficiently severable factually

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and legally . . . even if the judgment eliminated none of the parties"). Like the immunity issue, the preemption claims are wholly distinct from the Commerce Clause questions. There is no reason to delay consideration of the preemption issues. Delaying appeal risks a later, separate preemption trial.

D. Equitable considerations support Rule 54(b) certification.

Furthermore, equitable considerations support certification. *See, e.g.*, *Angoss II P'ship*, 2000 WL 288435, at *3-4 (explaining that, as part of the Rule 54(b) analysis, courts should consider the equitable interests of the parties including factors such as prejudice and delay). Absent consolidated appeal, Plaintiffs will not be able to vindicate some of their claims for *years*.[2] At this point, Lighthouse has sunk nearly a decade and tens of millions of dollars into permitting the Terminal. Further delay means further harm to Lighthouse, BNSF, the western U.S. coal industry, and the landlocked states desperate for export capacity.

E. Granting certification under Rule 54(b) would also promote efficient judicial administration.

When addressing a motion under Rule 54(b), courts consider whether granting certification would "serve[] the purposes of judicial efficiency." *Microsoft Corp.*, 2013 WL 6000017, at *4. Granting certification under Rule 54(b) "is proper if it will aid 'expeditious decision' of the case." *Texaco, Inc. v. Pohsoldt*, 939 F.2d 794, 797 (9th Cir. 1991). This inquiry tilts heavily in favor of certification. Certification prevents multiple appeals, piecemeal trials,

[2] As the Advisory Committee Notes to the 1961 Amendment to Rule 54(b) note, "the danger of hardship through delay of appeal until the whole action is concluded may be . . . serious" in both "multiple-parties situations" and "multiple-claims cases." *See also Rygg v. Hulbert*, No. C11-1827JLR, 2012 WL 12847007, at *2 (W.D. Wash. Sept. 4, 2012) (finding certification proper where it would "prevent further delays for these Defendants, many of whom have been in litigation over these issues for years").

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and saves the Court and parties years of effort and uncertainty. *See Crowe v. Cty. of San Diego*, No. 99CV0241 R (RBB), 2005 WL 8156612, at *5-6 (S.D. Cal. July 25, 2005) (finding Rule 54(b) certification proper where it would allow multiple appeals to be consolidated thereby conserving judicial resources); *Cain v. Salish Kootenai College, Inc.*, No. CV 12–181–GF–BMM, 2015 WL 13611313, at *2 (D. Mont. Feb. 5, 2015) (finding certification proper where denial of certification would "risk[] staggered litigation related to similar issues at cost and expense to the Parties and the Court" and granting certification would "serve the judicial administrative interest of preventing piecemeal appeals"). The alternative is a narrow stay appeal, followed by separate appeals of the immunity, preemption, and (potentially) Commerce Clause questions. Under that scenario, the Court could be forced to hold multiple trials, generating a half-dozen appeals, all relating to the same Terminal. That is exactly what Rule 54(b) aims to avoid. *See Curtiss-Wright*, 446 U.S. at 10 (courts should seek to "prevent piecemeal appeals in cases which should be reviewed only as single units."). Certification allows the Court and Ninth Circuit to consider the claims and parties together, maximizing judicial efficiency.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask the Court to certify its immunity and preemption orders for appeal alongside the Court's stay order.

Dated this 9th day of May, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2018, I caused the foregoing Plaintiffs' and Plaintiff-Intervenor's Protective Motion for Entry of Final Judgment Under Fed. R. Civ. P. 54(b) to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to all counsel of record.

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