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 REPLY IN SUPPORT OF THEIR 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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1. INTRODUCTION

Defendants' opposition hinges on a single, exceptionally unlikely proposition: that the Ninth Circuit, for the first time ever, and contrary to Supreme Court precedent, will find that a *Pullman* stay is not immediately appealable. That presumption is unsupported and unsupportable.

Furthermore, Defendants' argument that a Pullman stay is only appealable under 28 U.S.C. § 1291 if its "sole purpose and effect . . . is precisely to surrender jurisdiction of a federal suit to a state court," is self-defeating. Here, this Court's order staying the federal suit specifically so that state tribunals can render issue-preclusive findings constitutes "surrender[ing] jurisdiction of a federal suit to a state court."

In all events, regardless of whether the Ninth Circuit does or does not find the Court's stay order immediately appealable, which the Ninth Circuit should, equity and efficiency still support certification. Because certification likely reduces the number of potential trials and appeals, and likely shaves years off this litigation, the Court should grant Plaintiffs' motion.

II. ARGUMENT

A. Unambiguous Ninth Circuit precedent establishes that the stay order is a final appealable order.

Though Defendants contend otherwise, *Pullman* stays are immediately appealable final orders even where, as here, they contemplate future federal proceedings after state proceedings end. *See Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 9-10 (1983) (*Pullman* stays are appealable *even though* they are "entered with the expectation that the federal litigation

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will resume . . . ."); [1] *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1102 (9th Cir. 2005) ("absolute certainty [that a federal case will be mooted] is not required in order to put a party 'effectively out of court' within the meaning of the *Moses H. Cone* doctrine."). [2] Defendants do not cite a ***single case***, Ninth Circuit or otherwise, rejecting an immediate appeal of a *Pullman* stay. [3] In fact, according to Plaintiffs' research, no Court has ever done so.

Furthermore, Defendants admit that *Moses H. Cone* means, at a minimum, that a stay order is final and appealable when its "sole purpose and effect . . . is [] to surrender jurisdiction of a federal suit to a state court." Defendants' Opp. at 5, n.3. That is exactly what the stay order does here. In the Court's eyes, the "sole purpose and effect" of the stay is to allow "the state courts to act," theoretically resolving much of, if not all of, Plaintiffs' Commerce Clause claims. [4]

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[1] Defendants suggest this case is "sharply distinguishable" from *Moses H. Cone*, where the state proceedings could work res judicata in the federal case. *See* Defendants' Opp. at 5-6. For reasons explained below—that the Court sees the state proceedings as resolving most or all of the federal litigation—Defendants are wrong.

[2] *See also Porter v. Jones*, 319 F.3d 483, 489 (9th Cir. 2003) ("[t]he district court's decision to abstain under *Pullman* is immediately appealable."); *Pearl Inv. Co. v. City and Cty. of San Francisco*, 774 F.2d 1460, 1462 (9th Cir. 1985) (*Pullman* stay appealable even where related state court challenge under California building code wouldn't resolve plaintiffs' federal section 1983 claims); *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092, n. 1 (9th Cir. 1976) (*Pullman* stay appealable even though the district court "retain[ed] jurisdiction for the federal claims asserted by the plaintiffs, pending resolution of the state issues in the state courts").

[3] What they do cite actually supports Plaintiffs' position. *See* Defendants' Opp. at 5, n. 3. *Badham v. U.S. Dist. Ct. for N. Dist. of Cal.*, 721 F.2d 1170 (9th Cir. 1983), went on to analyze the *Pullman* stay as an appealable final order. *Stanley v. Chappell*, 764 F.3d 990 (9th Cir. 2014), a non-*Pullman* case, only proves Plaintiffs' point that "stay orders that impose a lengthy or indefinite delay, *even absent the risk that another proceeding will have res judicata effect on the federal case*... [are] appealable final decision[s]." *Id* at 995. Finally, *Confederated Salish v. Simonich*, 29 F.3d 1398 (9th Cir. 1994) is inapposite because it apparently concerned an appeal noticed under the interlocutory appeal statute.

[4] Defendants also disingenuously argue that a stay order isn't final "merely because it may have the practical effect of allowing a state court to be the first to rule on *a* common issue." Defendants Opp. at 5 (quoting *Moses H. Cone*) (emphasis added). Just weeks ago, however, Defendants argued that the issue preclusion concerns driving the stay reached far more than a single common issue; they claimed Plaintiffs' *entire case* could be precluded by the related state proceedings. *See* Dkt. 312 at 4-5 ("[D]efendants submit there is nothing left to do at trial at all.").

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See Dkt. 326 at 6; Dkt. 309 at 5-6. While Plaintiffs see things differently, Defendants and the Court—whose view of the stay is dispositive—agree that "the object of the stay is to require all or an essential part of the federal suit to be litigated in a state forum." *See Moses H. Cone*, 460 U.S. at 10, n.11. *See also* Dkt. 309 (after the state proceedings end, "there might not be much left to do [in federal court], except, perhaps, a *Pike* balancing."). Staying a federal case specifically so that state tribunals can make findings which this Court has ruled will be issue preclusive is the very definition of "surrender[ing] jurisdiction of a federal suit to a state court." *See Moses H. Cone*, 460 U.S. at 10, n.11.

B. Plaintiffs' motion satisfies the Rule 54(b) factors regardless of whether the stay order is appealable.

Even if the Ninth Circuit does not find the Court's stay order immediately appealable, which it should, the preemption and immunity orders satisfy Rule 54(b). In fact, Defendants concede most of the 54(b) analysis. For example, they concede that the immunity order satisfies the Rule 54(b) criteria—making no specific arguments to the contrary—and that the immunity and preemption orders meet the finality prong of the Rule 54(b) test. *See* Defendants' Opp. at 8. In all events, because certification of the preemption and immunity orders would likely consolidate, not multiply or duplicate, the proceedings—and do so without causing prejudice to Defendants—the Court should grant the motion.

i. 54(b) certification would re-unify the parties, claims, and issues, allowing for a single trial and post-trial merits appeal.

Far from "increasing the likelihood of piecemeal appeals," Defendants' Opp. at 7, certification would likely eliminate the possibility of later piecemeal trials and appeals. Absent

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certification, the Ninth Circuit will not pass on the preemption and immunity questions until after any Commerce Clause trial, creating the potential for multiple trials (e.g., an Inslee- and Bellon-only Commerce Clause trial, followed by an all-Defendant preemption trial and/or a Franz-only Commerce Clause trial) and multiple appeals (e.g., the instant stay appeal, an Inslee- and Bellon-only Commerce Clause trial appeal, and an appeal from a later preemption-only and/or Franz-only Commerce Clause trial). Certification avoids that, making a single trial and a single post-trial appeal possible. *See Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1484 (9th Cir. 1993) (granting a 54(b) motion to "obviate the need for a second trial, and thus aid with the expeditious decision of the case" is not an abuse of discretion).[5] Defendants' reliance on *Wood v. GCC Bend, LLC*—"a routine [employment discrimination] case [where] the facts on all claims and issues entirely overlap"—is misplaced.[6] The preemption and immunity orders here are wholly distinct from the pending Commerce Clause issues, so this case is nothing like the garden-variety mix of state and federal adverse treatment claims that were at issue in *Wood*, and that, as the Ninth Circuit observed, are often pleaded with great substantive overlap. *See Wood. v. GCC, Bend, LLC*, 422 F.3d 873, 879 (9th Cir. 2005). *See also id.* at 883 (further observing that the court did "not mean to suggest that claims with overlapping facts are foreclosed from being separate for purposes of Rule 54(b)," particularly where, as here, "the case is complex").

[5] Based on conversations with Millennium's state proceeding counsel, Ms. Beth Ginsberg, Plaintiffs understand that trial in the PCHB appeal is not yet set, and likely won't be held until sometime in 2020. That means the Washington Court of Appeals may not decide any appeal until sometime in 2021 or 2022. An eventual petition for review before the Washington Supreme Court is likely, meaning the PCHB appeal may not fully resolve until as late as 2023. In all events, the Ninth Circuit is likely to resolve this appeal well before the state proceedings end, putting any potential preemption or immunity remand in front of the Court before any Commerce Clause trial, allowing the Court to avoid multiple trials.

[6] *Morrison-Knudsen Co. v. Archer*, 655 F.2d 962 (9th Cir. 1981), and *Jack v. Borg-Warner Morse Tec., LLC*, No. C-17-0537JLF, 2019 WL 130301, at *2 (W.D. Wash. Jan. 8, 2019), are inapposite for the same reason; namely, that they posed no "unusual or compelling circumstances" supporting certification. *Archer*, 655 F.2d at 966.

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Nor would certification create duplicative review on appeal. *See* Defendants' Opp. at 78. None of the "four salient issues" identified by Defendants are duplicative of the stayed Commerce Clause claims.[7] The Court's immunity and preemption orders, which are largely legal decisions based on ICCTA, the PWSA, and the Eleventh Amendment, do not implicate the Commerce Clause claims, e.g., whether Defendants discriminated against the Terminal in purpose or effect. For that reason, there is little evidentiary overlap between the preemption and immunity appeal and any eventual Commerce Clause appeal.

ii. Postponing appeal harms Plaintiffs, not Defendants.

Defendants claim Plaintiffs "unreasonably delayed their Rule 54(b) request." Defendants' Opp. at 9-10. But Plaintiffs only seek certification to maximize the efficiency of their stay appeal, not to "circumvent" section 1291's finality requirement, which the stay order independently satisfies under *Moses H. Cone*. For that reason, *Birkes v. Tillamook County*, No. 3:09-CV-1084-AC, 2012 WL 2178964, at * 3 (D. Or. June 13, 2012)—where the movant waited a *year* to seek certification and there was "virtually no possibility of securing an appellate opinion" before the trial of the substantially similar plaintiff's case—and *King v. Newbold*, 845 F.3d 866, 868 (7th Cir. 2017)—a case involving a Seventh Circuit rule not followed in the Ninth Circuit that prohibits trial courts from granting Rule 54(b) motions filed more than thirty days after the entry of the at-issue order—are distinguishable. *See* Defendants' Opp. at 9-10.

Granting the motion would not prejudice Defendants. First, Defendants' argument that granting certification would create a "parallel appellate process" is wrong and hypocritical.

[7] Three issues are plainly ICCTA- and PWSA-specific, while the fourth issue—redressability—is already before the Ninth Circuit through the stay order. *Compare* Dkt. 200 at 9-10 (questioning whether the "Court has the 'remedial power to issue' such [requested] relief]") *with* Dkt. 326 at 5 ("[i]t is also apparent that the Court can not give Plaintiffs. . . the broad relief they request.").

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Defendants' Opp. at 10. Defendants invited such a process when they argued in favor of the federal court stay, which is immediately appealable under *Moses H. Cone*. Furthermore, while Defendants complain about parallel appellate litigation here, they are multiplying the ongoing state litigation by seeking multiple interlocutory appeals to Washington's appellate courts in the PCHB litigation, rather than simply proceeding before the Superior Court.

On the other hand, denying certification would harm Plaintiffs, who would be forced to appeal their preemption and immunity claims in 2020 or 2021 at earliest, after the stay dissolves or is overturned, and after the post-trial Commerce Clause bench order issues.[8] That means, should Plaintiffs prevail on appeal, any preemption- or Defendant Franz-specific trial likely would not start until 2022 or 2023. Denying certification would therefore cost Plaintiffs at least two years of time for a project that has been mired in permitting and litigation concerning that permitting for seven years. Additional delay only serves to bleed Plaintiffs out of more time and money. *See Blue Cross and Blue Shield of Ala v. Unity Outpatient Surgery Ctr.*, 490 F.3d 718, 724 (9th Cir. 2007) (that "plaintiffs may go out of business awaiting recovery or face irreparable harm during the time that their suits are on ice" supports immediate appeal).

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 24th day of May, 2019.

[8] Footnote 5 explains Plaintiffs' understanding of the state proceeding timeline.

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 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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