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IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES FIDELITY & GUARANTY COMPANY,	)	No. CV-F-99-5583 OWW/SMS
	)	
	)	MEMORANDUM DECISION AND
	)	ORDER GRANTING MOTIONS FOR
Plaintiff,	)	CERTIFICATION OF JUDGMENT
	)	PURSUANT TO RULE 54(b),
vs.	)	FEDERAL RULES OF CIVIL
	)	PROCEDURE (Docs. 885 & 886)
	)	
	)	
LEE INVESTMENTS LLC dba THE ISLAND, et al.,	)	
	)	
	)	
Defendants.	)	
	)	
	)	

Before the Court are the motions for certification of judgment pursuant to Rule 54(b), Federal Rules of Civil Procedure, filed by Plaintiff and Counter-Defendant United States Fidelity & Guaranty Company ("USF&G"), Counter-Defendants American Specialty Insurance Services, Inc. and American Specialty Risk Management, LLC) ("American Specialty"), and Third-Party Defendant Aon Risk Services of Central California Insurance Services (Aon). These motions are opposed by Lee Investments LLC (Lee).

1 Rule 54(b) provides in pertinent part:

2 When more than one claim for relief is  
3 presented in an action ... or when multiple  
4 parties are involved, the court may direct  
5 the entry of a final judgment as to one or  
6 more but fewer than all of the claims or  
parties only upon an express determination  
that there is no just reason for delay and  
upon an express direction for the entry of  
judgment.

7 In certifying an appeal pursuant to Rule 54(b), the district  
8 court must first determine that it has rendered a "final  
9 judgment," i.e., a judgment that is "'an ultimate disposition of  
10 an individual claim entered in the course of a multiple claims  
11 action.'" *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S.  
12 1, 7 (1980).

13 The court must then decide whether there is any just reason  
14 for delay. Factors that must be considered are judicial  
15 administrative interests as well as the equities involved.  
16 *Curtiss-Wright, supra*, 446 U.S. at 8. The Supreme Court  
17 considered whether certification would result in unnecessary  
18 appellate review; whether the claims finally adjudicated were  
19 separate, distinct, and independent of any other claims; whether  
20 review of the adjudicated claims would be mooted by any future  
21 developments in the case; whether an appellate court would have  
22 to decide the same issues more than once even if there were  
23 subsequent appeals; and whether delay in payment of the judgment  
24 would inflict severe financial harm. *Id.* at 5-6.

25 In considering judicial administrative interests, the  
26 district court may properly consider (a) the separateness of the

1 claims for relief and whether the claims are separable, and (b)  
2 whether the nature of the claims already determined was such that  
3 no appellate court would have to decide the same issues more than  
4 once even if there were subsequent appeals. *Curtiss-Wright,*  
5 *supra.* As explained in *General Acquisition, Inc. v. Gencorp,*  
6 *Inc.*, 23 F.3d 1022, 1030 (9<sup>th</sup> Cir. 1994):

7           Although '[n]o precise test exists for  
8 determining whether there is a just reason to  
9 delay,' ... this court has articulated the  
10 following 'nonexhaustive list of factors  
11 which a district court should consider when  
12 making a Rule 54(b) determination':

13           (1) the relationship between the  
14 adjudicated and unadjudicated  
15 claims; (2) the possibility that  
16 the need for review might or might  
17 not be mooted by future  
18 developments in the district court;  
19 (3) the possibility that the  
20 reviewing court might be obliged to  
21 consider the same issue a second  
22 time; (4) the presence or absence  
23 of a claim or counterclaim which  
24 could result in set-off against the  
25 judgment sought to be made final;  
26 (5) miscellaneous facts such as  
delay, economic and solvency  
considerations, shortening the time  
of trial, frivolity of competing  
claims, expense and the like.

20           In *Wood v. GCC Bend, LLC*, 422 F.3d 873, 880-882 (9<sup>th</sup> Cir.  
21 2005), the Ninth Circuit cautioned that the interrelationship of  
22 the facts is critical to a Rule 54(b) determination:

23           [T]he practical effect of certifying the  
24 constructive discharge issues in this case is  
25 to deconstruct her age discrimination action  
26 so as to allow piecemeal appeals with respect  
to the same set of facts. On one theory the  
facts might show that GCC Bend constructively  
discharged Wood because of her age and

1 opposition to the company's age  
2 discrimination; on another theory, they might  
3 show that she was demoted for the same  
4 reasons. Either way, her legal right to  
5 relief stems largely from the same set of  
6 facts and would give rise to successive  
7 appeals that would turn largely on identical,  
8 and interrelated facts. This impacts the  
9 sound administration of justice.

10 Another way of looking at the same thing is  
11 that certification in this case effectively  
12 severs trial on different theories of adverse  
13 treatment arising out of the same factual  
14 relationship. There is little doubt that  
15 severance in a straightforward case such as  
16 this would never occur as it would strain,  
17 rather than serve, the interests of sound  
18 judicial administration. This is yet another  
19 indicator that the issues and claims at stake  
20 are not truly separable, and should not be  
21 separated artificially, for purposes of Rule  
22 54(b).

23 We do not mean to suggest that claims with  
24 overlapping facts are foreclosed from being  
25 separate for purposes of Rule 54(b).  
26 Certainly they are not. Both the Supreme  
Court and our court have upheld certification  
on one or more claims despite the presence of  
facts that overlap remaining claims when, for  
example, counterclaims are involved that  
arise out of the same transaction or  
occurrence as the certified claim, or the  
case is complex and there is an important or  
controlling legal issue that cuts across (and  
cuts out or at least curtails) a number of  
claims. However, the circumstances in this  
case are not similar to those in which  
certification has been approved even though  
the remaining claims entail proof of the same  
facts involved in the claims that have been  
dismissed. This is neither a complex case  
nor one in which the only remaining claim is  
a counterclaim; the factual issues overlap  
entirely - not just substantially; and the  
only legal right asserted is the right not to  
be discriminated against on account of age.  
In these circumstances, the guiding principle  
is that '[a] similarity of legal or factual  
issues will weigh heavily against entry of

1 judgment [under Rule 54(b)] ....' ....

2 The greater the overlap the greater the  
3 chance that this court will have to revisit  
4 the same facts - spun only slightly  
5 differently - in a successive appeal. The  
6 case-load of this court is already huge.  
7 More than fifteen thousand appeals were filed  
8 in the last year. We cannot afford the  
9 luxury of reviewing the same set of facts in  
10 a routine case more than once without a  
11 seriously important reason.

12 In 1999 USF&G filed a complaint against Lee for rescission  
13 of a workers' compensation policy on the ground that Lee made  
14 misrepresentations in procuring the policy. Lee answered and  
15 counterclaimed against USF&G. USF&G filed a third party  
16 complaint against Aon for indemnity. Lee filed a counterclaim  
17 against Aon alleging *inter alia* claims of fraud and negligence.  
18 Aon asserted counterclaims and cross-claims to the third-party  
19 complaints of USF&G and Lee. As to Lee, Aon asserted  
20 counterclaims for fraud, negligent misrepresentation,  
21 negligence/tort of another, and declaratory relief. USF&G filed  
22 an amended and supplemental complaint, which added alter ego  
23 allegations against Richard K. Ehrlich, Rexford Properties, LLC,  
24 and Rexford Development Corporation. The Rexford Defendants  
25 answered USF&G's amended complaint and asserted cross-claims  
26 against Aon. Aon answered and asserted the same counterclaims  
against the Rexford Defendants that Aon had asserted against Lee.

Prior to commencement of trial, the Court ordered that the  
case would be heard in two phases. In the first phase, the jury  
would hear USF&G's rescission claim against Lee, Lee's third-

1 party complaint against Aon and Aon's counterclaim against Lee.  
2 In the second phase of the trial, a separate jury would hear  
3 alter ego claims against Richard K. Ehrlich, Rexford Properties,  
4 LLC, and Rexford Development Corporation, in the event USF&G  
5 prevailed on its rescission and restitution claims.

6 The first phase of the trial concluded with jury verdicts in  
7 favor of USF&G and against Lee and against Lee in every respect  
8 on all Lee's claims and affirmative defenses. On March 1, 2007,  
9 the Court entered a Rule 54(b) Partial Judgment on Jury's

10 Verdicts Upon Multiple Claims Involving Multiple Parties:

11 This case was tried before a jury commencing  
12 January 29, 2007, and concluded upon the  
13 return, by the jury, of its verdicts on  
14 February 26, 2007. The case involves more  
15 than one claim for relief, including counter-  
16 claims and third-party claims and involved  
17 multiple parties. The parties have reserved,  
18 by written stipulation and order: USF&G's  
19 alter ego claims against Richard K. Ehrlich,  
20 an individual, et al., the determination of  
21 the amount of attorneys' fees and interest  
22 claimed by USF&G; and the claim of Aon Risk  
23 Services Inc. of Central California Insurance  
24 Services ('Aon') for relief based on the tort  
25 of another. All other claims of the parties  
26 were adjudicated by the jury, including  
USF&G's claim for rescission based on fraud;  
all claims of Lee Investments LLC, dba The  
Island, a California limited liability  
company. Any claims as to Diane Conley have  
been determined by the parties' stipulation.

22 Due to the prior delay in, complexity and  
23 contentiousness of this litigation, to avoid  
24 uncertainty and inconsistent verdicts, there  
25 is no just reason for delay and partial  
26 judgment should now therefore be entered.

25 Based on the jury's written verdicts returned  
26 in open court February 26, 2007, the  
following verdicts were rendered:

1 A. The jury's verdicts finding in favor of  
2 USF&G on its claim for rescission finding  
3 fraud and intentional concealment; finding  
4 against Lee on all Lee's defenses of  
5 statutory waiver, common law waiver,  
6 estoppel, unreasonable delay, wrongful  
7 conduct, and awarding USF&G restitution  
8 damages in the amount of \$875,034.99.

9 B. On Lee's claims against USF&G, American  
10 Specialty and Aon, finding in favor of USF&G,  
11 American Specialty, and Aon and against Lee  
12 on all Lee's claims for fraud/intentional  
13 misrepresentation; concealment; conspiracy;  
14 negligent misrepresentation; and negligence.  
15 Finding against Lee and in favor of Aon on  
16 Lee's claim for breach of an oral contract  
17 against Aon. Finding in favor of USF&G,  
18 American Specialty and Aon and against Lee on  
19 all their defenses to Lee's claims based on  
20 fraud of Lee; negligent misrepresentation by  
21 Lee; estoppel against Lee; wrongful conduct  
22 by Lee; common law waiver against Lee; as to  
23 Aon against Lee due to Lee's intentional tort  
24 as superseding cause; as to Aon, no  
25 unreasonable delay by Lee; and in favor of  
26 Aon and against Lee on Aon's defense of  
assumption of risk.

C. On all Aon's claims against Lee, finding  
in favor of Aon and against Lee on Aon's  
claims for intentional misrepresentation,  
negligent misrepresentation and that Lee was  
100% comparatively at fault; in favor of  
Aon's claim of negligence against Lee; that  
Aon was not negligent. Finding in favor of  
Aon and against Lee on all Lee's affirmative  
defenses to Aon's claims, including fraud,  
negligent misrepresentation, estoppel, no  
wrongful conduct by Aon; no common law waiver  
by Aon, no unreasonable delay by Aon.

Accordingly, on each of these claims and  
defenses, JUDGMENT IS ENTERED AS FOLLOWS:

1. In favor of USF&G and against Lee for  
rescission and USF&G shall recover from Lee  
restitutionary damages of \$875,034.99;

2. Against Lee on all Lee's defenses to  
USF&G'S claims for rescission;

1           3. Against Lee on all its claims and in  
2 favor of USF&G, American Specialty and Aon  
3 against Lee and in favor of USF&G, American  
4 Specialty and Aon on all their affirmative  
5 defenses to Lee's claims;

6           4. In favor of Aon on all its claims and  
7 against Lee; and against Lee in favor of Aon  
8 on all on [sic] Lee's affirmative defenses to  
9 Aon's claims; and

10          5. USF&G, American Specialty and Aon shall  
11 recover costs of suit.

12           Lee filed an appeal from the Partial Judgment. During the  
13 pendency of that appeal, the Court conducted a bench trial on  
14 April 4-6, 2007 regarding Aon's damages relating to its claim  
15 against Lee for tort of another; USF&G's right to recover  
16 restitution of amounts paid pursuant to the workers' compensation  
17 policy and of attorneys' fees paid by USF&G to Lee's counsel,  
18 Dowling, Aaron & Keeler, as *Cumis* counsel in Diana Conley's  
19 workers' compensation proceeding before the California Workers'  
20 Compensation Appeals Board; and prejudgment interest on amounts  
21 paid to counsel for Lee and on behalf of Diana Conley. The Ninth  
22 Circuit dismissed Lee's appeal from the Partial Judgment for lack  
23 of jurisdiction.

24           The trial Court entered an Order pursuant to stipulation for  
25 dismissal of the counterclaims and third-party complaint of USF&G  
26 and American Specialty against Aon and the dismissal of Aon's  
counterclaims against USF&G and American Specialty.

          Lee's post-trial motions for new trial, to alter or amend  
the Partial Judgment, and for judgment as a matter of law were  
denied (with minor exceptions not relevant to the resolution of

1 the instant motions).

2 The Court granted USF&G's and American Specialty's motion  
3 for an injunction enjoining Lee from proceeding with its request  
4 for arbitration or other adjudication of USF&G's complaint for  
5 rescission before the California Workers' Compensation Appeals  
6 Board; granted USF&G and American Specialty's motion for summary  
7 judgment on the remaining claims of Lee in Lee's second amended  
8 counterclaim and on the claims asserted by the Rexford Parties in  
9 their counterclaim and cross-claim; and granted Aon's motion for  
10 judgment on the pleadings or summary judgment as to the claims of  
11 the Rexford Parties against Aon.

12 Lee filed a Notice of Appeal of the Order granting the  
13 injunction "and from all interlocutory rulings and orders that  
14 are inextricably intertwined therewith, or necessary to insure  
15 meaningful appellate review." Among the issues raised by Lee on  
16 this second appeal is that the Partial Judgment is not final for  
17 purposes of res judicata. Lee moved the Ninth Circuit to  
18 bifurcate the appeal to consider whether the Partial Judgment is  
19 res judicata on the determination of the WCAB as to the  
20 rescission of the worker's compensation policy and that other  
21 issues be deferred. The Ninth Circuit denied Lee's motion and  
22 also denied USF&G and Aon's motion that the appeal be stayed.

23 Lee's counsel has advised Aon and USF&G that Diana Conley  
24 has sued Lee and is demanding that Aon and USF&G tender the  
25 claims under the USF&G worker's compensation policy.

26 On August 5, 2009, the Court issued its Findings of Fact and

1 Conclusions of Law re the Court Trial conducted on April 4-6,  
2 2007. All issues have now been tried and decided except the  
3 alter ego claims of USF&G against the Rexford Defendants.

4 The moving parties argue that certification under Rule 54(b)  
5 is appropriate and necessary because the entirety of the dispute  
6 is resolved now that the Court has resolved all the issues tried  
7 to it on April 4-6, 2007. With all substantive issues resolved,  
8 the moving parties contend, there is be no just reason for delay,  
9 which is now approaching ten years. The moving parties contend  
10 that USF&G's alter ego claims against the Rexford Parties are  
11 entirely severable and need not be decided until the appeal is  
12 concluded:

13 The alter ego issues have nothing to do with  
14 the first phase of this case. The first  
15 phase of this case related to the issuance of  
16 the insurance policy, the basis for  
17 rescission and the negligence, fraud and  
18 contract related claims asserted between Lee,  
19 USF&G and Aon. In the second phase, the only  
20 claims remaining are alter ego claims, and  
21 those claims involve the Rexford Defendants,  
22 not Lee. Indeed, any judgment in the second  
23 phase would not impact Lee, as judgment is  
24 sought against the Rexford Defendants, not  
25 Lee.

26 USF&G contends that there is no just reason for delay because the  
determination of alter ego by this Court could and should be made  
after the entry of a judgment even if alter ego liability is not  
alleged in the complaint under California law. See *Katzir's  
Floor and Home Design, Inc. v. M-MLS.com*, 394 F.3d 1143, 1148  
(9<sup>th</sup> Cir.2004) (permitting the use of California statutory  
procedure to amend a judgment to add additional judgment debtors

1 under alter ego). USF&G argues that the fact it sought to add  
2 the Rexford Parties as alter egos before the trial instead of  
3 after the judgment should not make any difference. Further,  
4 USF&G contends, if Lee files a bond on its appeal of the  
5 certified judgment or pays the judgment amount to USF&G, the  
6 determination of alter ego will be unnecessary.

7 Lee, acknowledging that USF&G could have pursued the Rexford  
8 Parties as alter egos after entry of judgment, contends that  
9 USF&G has caused "the predicament they now face:"

10 Movants, for strategic reasons, named the  
11 alter egos as parties to the action prior to  
12 trial. Because the alter egos were named  
13 prior to judgment, the Final Judgment Rule  
14 prevents entry of judgment until the claims  
15 against them are finally resolved. Movants  
16 made their bed; they should be required to  
17 lie in it.

18 The moving parties argue that, upon resolution of the bench  
19 trial, certification under Rule 54(b) will streamline the issues  
20 on appeal because it the only means to allow more prompt final  
21 resolution on Lee's appeal of the claims against it and preclude  
22 duplicative litigation. USF&G argues that entry of judgment  
23 under Rule 54(b) is appropriate because it is suffering financial  
24 loss from the non-payment of the Partial Judgment by Lee, in that  
25 the financial solvency of Lee, who previously threatened to file  
26 bankruptcy, is in issue.

Lee argues that the moving parties have not met their burden  
under Rule 54(b). Lee contends that certification under Rule  
54(b) will result in multiple appeals because Lee has already

1 appealed the issuance of the injunction. Lee argues that the  
2 parties have not yet conducted discovery on the alter ego issues:

3 The discovery and trial of those issues will  
4 likely require delving into how the park was  
5 constructed, how the park was operated, how  
6 the accident occurred, and the relationship  
7 of the parties and entities, all of which  
8 either overlap, or have the potential to  
9 overlap with factual issues that have already  
been tried and which may be an issue on  
appeal. Thus, certifying the pending ruling  
would likely result in three separate  
appeals: 1) the injunction; (2) this  
certified judgment; and 3) judgment after the  
alter ego trial.

10 Lee argues that certification will not streamline or shorten  
11 this litigation by eliminating Lee's argument that the Partial  
12 Judgment is not final for res judicata purposes:

13 While Lee does contend that the judgment was  
14 not certified and that as a result it could  
15 not support an injunction, Lee contends with  
16 equal force that even if it was certified and  
17 appealable, under federal and California law  
applicable to diversity jurisdiction, it  
would not be final for purpose of supporting  
an injunction until Movants prevail on  
appeal.

18 Lee complains that the Moving Parties do not otherwise explain  
19 how certification will streamline or shorten the remaining  
20 litigation.

21 Lee argues that mere delay in payment of a judgment does not  
22 compel certification unless the delay results in severe financial  
23 harm and contends that USF&G has presented no such evidence.

24 However, the delay Lee is encouraging is causing extreme  
25 prejudice as Lee is attempting to resurrect in the state workers'  
26 compensation proceedings, USF&G's rescission and restitution

1 rights, which have been tried to and decided by a jury, which  
2 would undermine the U.S. District Court's jurisdiction and would  
3 thwart or defeat the efficacy of the judgment on the jury  
4 verdicts that followed a 16 day jury trial and a three day bench  
5 trial that has consumed hundreds of hours of the parties' and the  
6 Court's time.

7       The moving parties' motions for certification pursuant to  
8 Rule 54(b), Federal Rules of Civil Procedure, are granted based  
9 on the specific findings that the requirements of Rule 54(b) are  
10 satisfied and that there is no just reason for delay. All  
11 claims between Lee, USF&G and Aon have been substantively  
12 resolved. The only claim remaining to be resolved in this  
13 litigation is USF&G's claim against the Rexford Defendants for  
14 liability as the alter ego of Lee, which is wholly collateral to  
15 the claims already litigated and resolved in this action, bearing  
16 only on enforcement and satisfaction of USF&G's judgment.  
17 Preventing the appeal from the judgments entered on the jury  
18 verdicts and bench trial decisions from going forward will  
19 unnecessarily perpetuate and multiply the litigation in state and  
20 federal fora and will frustrate and practically negate the very  
21 substantial investment of time and effort by the parties and the  
22 Court in this federal litigation for almost ten years. The  
23 certification will not result in unnecessary appellate review and  
24 review of the adjudicated claims will not be mooted by any future  
25 developments in the case.

26       For the reasons stated:

1           1. The motions for certification of judgment pursuant to  
2 Rule 54(b), Federal Rules of Civil Procedure, filed by Plaintiff  
3 and Counter-Defendant United States Fidelity & Guaranty Company  
4 ("USF&G"), Counter-Defendants American Specialty Insurance  
5 Services, Inc. and American Specialty Risk Management, LLC)  
6 ("American Specialty"), and Third-Party Defendant Aon Risk  
7 Services of Central California Insurance Services (Aon), are  
8 GRANTED;

9           2. The Partial Judgment on Jury's Verdicts Upon Multiple  
10 Claims Involving Multiple Parties filed on March 1, 2007 and the  
11 Judgment entered on August 5, 2009 are certified for appeal  
12 pursuant to Rule 54(b), Federal Rules of Civil Procedure.

13 IT IS SO ORDERED.

14 Dated: August 5, 2009

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE