

1 for entry of judgment pursuant to Federal Rule of Civil Procedure
2 54(b). ECF No. 94 ("Mot."). The Motion is fully briefed, ECF Nos.
3 99 ("Opp'n"), 102 ("Reply"), and suitable for determination without
4 oral argument, Civ. L.R. 7-1(b). For the reasons set forth below,
5 the Motion is DENIED.

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7 **II. BACKGROUND**

8 In 2008, one of Telekenex's Washington-based competitors,
9 Straitshot Communications, Inc. ("Straitshot"), sued Telekenex and
10 a number of the other Telekenex Defendants in a case captioned
11 Straitshot Communications, Inc. v. Telekenex, Inc., et al., No.
12 C10-268 TSZ (W.D. Wash.) (the "Straitshot action"). Dec. 19 Order
13 at 4. Straitshot alleged that a number of the Telekenex Defendants
14 stole its trade secrets and confidential customer information and
15 covered up this theft by destroying evidence. Id. The jury
16 returned a \$6.49 million verdict in favor of Straitshot, finding
17 for Straitshot -- in whole or in part -- on its claims for breach
18 of contract, breach of the duty of loyalty, interference with
19 contractual relations, and violation of Washington's Consumer
20 Protection Act. Id. at 5. The Court later entered spoliation
21 sanctions against Telekenex in connection with its destruction of
22 evidence. Id. at 6.

23 The instant action arises out of a dispute over whether the
24 damages awarded and defense costs incurred in connection with the
25 Straitshot action are covered by an insurance policy Plaintiff
26 issued to Telekenex (the "Policy"). Plaintiff's amended complaint
27 asserts eight counts, including six counts for declaratory relief.
28 ECF No. 15 ("Am. Compl."). Specifically, Plaintiff asks the Court

1 to declare the following: (I) the Policy's "unlawful advantage
2 exclusion" bars coverage; (II) California Insurance Code section
3 533 bars coverage; (III) the spoliation sanctions are not covered
4 because they do not constitute a "Loss" under the terms of the
5 Policy; (IV) the finding that Defendants Mark Prudell and Joshua
6 Summers, who formerly worked for Straitshot, breached their duty of
7 loyalty to Straitshot does not trigger coverage for them or their
8 spouses; (V) IXCH is not an insured under the Policy; and (VI) the
9 proper allocation of amounts covered and uncovered by the Policy.
10 Id. ¶¶ 40-73. Plaintiff's remaining two counts seek reimbursement
11 from the Telekenex Defendants under theories of equitable indemnity
12 and restitution for amounts Plaintiff paid in connection with its
13 coverage of the Straitshot action.

14 On December 19, 2012, the Court granted in part and denied in
15 part Plaintiff's motion for summary judgment on Counts I, II, and
16 V. As to Count I, the Court found that the Policy's "unlawful
17 advantage exclusion barred" coverage for the \$6.49 million judgment
18 but not the spoliation sanctions, and rejected the Telekenex
19 Defendants' argument that Plaintiff is estopped from asserting the
20 exclusion because it purportedly failed to inform the Telekenex
21 Defendants of their right to independent counsel. Id. at 14-18.
22 With respect to Count II, the Court found that California law -- as
23 opposed to Washington law -- governed the dispute and that
24 California Insurance Code section 533 barred coverage for the \$6.49
25 million judgment but not the spoliation sanctions. Id. at 18-24.
26 The Court also ruled in favor of Plaintiff on Count V, finding that
27 IXCH is not covered under the Policy because IXCH is not named as
28 an insured and did not automatically acquire a right to coverage

1 when it agreed to purchase Telekenex's assets.² Id. at 25.

2 The Telekenex Defendants have answered Axis's Amended
3 Complaint and asserted five counterclaims. ECF No. 69 ("Telekenex
4 Answer"). The first counterclaim seeks a judicial declaration that
5 Axis is estopped from denying coverage, that Axis may not allocate
6 between covered and uncovered claims, and that Axis must fully
7 reimburse the Telekenex Defendants for the costs and damages
8 associated with the Straitshot action. Id. ¶ 56. The second and
9 third counterclaims are for breach of contract and negligence. Id.
10 ¶¶ 57-63. The fourth counterclaim asserts that Plaintiff engaged
11 in bad faith and breached its statutory and regulatory duties under
12 Washington law by, among other things, wrongfully asserting that
13 California law applies and failing to inform the Telekenex
14 Defendants of their right to independent counsel. Id. ¶¶ 64-72.
15 The fifth counterclaim, pled in the alternative, asserts that
16 Plaintiff engaged in bad faith under California law.³ Id. ¶¶ 73-
17 76.

18 The Telekenex Defendants now move under Rule 54(b) for a
19 determination that the Court's December 19 Order constitutes a
20 final judgment with respect to coverage under the Policy for the
21 \$6.49 million Straitshot judgment.

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24 ² The Telekenex Defendants subsequently moved for reconsideration
25 of the December 19 Order. ECF No. 83. That motion was denied.
ECF No. 88.

26 ³ The Telekenex Defendants recently moved for leave to amend their
27 answer to add a new counterclaim under Washington's Insurance Fair
28 Conduct Act. ECF No. 85. The Court denied that motion finding
that the proposed amendment would be futile in light of the Court's
earlier finding that California law governs this dispute. ECF No.
101.

1 **III. LEGAL STANDARD**

2 Rule 54(b) allows a district court to direct entry of final
3 judgment for the purpose of appeal as to one or more, but fewer
4 than all, claims if the court expressly determines that there is no
5 just reason for delay. Fed. R. Civ. P. 54(b). The application of
6 Rule 54(b) is governed by a two-step process. Curtiss-Wright Corp.
7 v. Gen. Elec. Co., 446 U.S. 1, 7-8 (1980). First, the court must
8 determine whether it is dealing with a final judgment. Id. at 7.
9 "It must be a 'judgment' in the sense that it is a decision upon a
10 cognizable claim for relief, and it must be 'final' in the sense
11 that it is 'an ultimate disposition of an individual claim entered
12 in the course of a multiple claims action.'" Id. (quoting Sears,
13 Roebuck & Co. v. Mackey, 351 U.S. 427, 436 (1956)). Second, the
14 Court must determine whether there is any just reason for delay,
15 "tak[ing] into account judicial administrative interests as well as
16 the equities involved." Id. at 8. This step is necessary to
17 preserve the long-standing policy against piecemeal appeals. Id.
18 Accordingly, the Court may properly "consider such factors as
19 whether the claims under review were separable from the others
20 remaining to be adjudicated and whether the nature of the claims
21 already determined was such that no appellate court would have to
22 decide the same issues more than once even if there were subsequent
23 appeals." Id. The existence of counterclaims does not render Rule
24 54(b) certification inappropriate. Id. at 9. "[Counterclaims']
25 significance for Rule 54(b) purposes turns on their
26 interrelationship with the claims on which certification is
27 sought." Id.

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1 **IV. DISCUSSION**

2 The Court finds that its December 19 Order does not fall
3 within the ambit of Rule 54(b). As an initial matter, it is not
4 clear that the December 19 Order constitutes a final judgment.
5 That order disposed of three of Plaintiff's seven counts, and the
6 Court is not convinced that the remaining four counts constitute
7 separate claims for the purposes of Rule 54(b). "The word 'claim'
8 in Rule 54(b) refers to a set of facts giving rise to legal rights
9 in the claimant, not to legal theories of recovery based upon those
10 facts." CMAX, Inc. v. Drewry Photocolor Corp., 295 F.2d 695, 697
11 (9th Cir. 1961). Thus, Rule 54(b) certification is inappropriate
12 where "[t]he 'claims' stated in the complaint are really but one
13 claim, stated in two ways, for the purpose of presenting two legal
14 theories of recovery." Id.

15 Here, in ruling on Plaintiff's Counts I and II, the Court
16 determined that the Policy's unlawful advantage exclusion and
17 California Insurance Code section 533 bar coverage for the \$6.49
18 million judgment rendered in the Straitshot action. But the Court
19 has yet to rule on Counts VI, VII, or VIII, and thus, has yet to
20 determine the allocation between amounts covered and uncovered by
21 the Policy (including defense costs) or whether Plaintiff is
22 entitled to reimbursement from the Telekenex Defendants. It may be
23 that the Court's ruling on Plaintiff's Counts I and II has a
24 dispositive impact on Plaintiff's Counts VI, VII, and VIII, at
25 least with respect to the \$6.49 million judgment, but the parties
26 have yet to fully brief that issue.

27 In any event, certifying the December 19 Order pursuant to
28 Rule 54(b) would unquestionably result in a piecemeal appeal.

1 Plaintiff's Counts I and II are interrelated with their requests
2 for reimbursement. Counts I and II are also interrelated with
3 Defendants counterclaims for breach of contract, bad faith, and
4 negligence, which are based on identical facts and raise similar
5 legal issues. Thus, a Rule 54(b) certification would result in an
6 appeal of facts and legal issues inextricably intertwined with
7 matters that are still pending before the Court. If the Court were
8 to rule on these pending issues and either party appealed, the
9 Ninth Circuit would need to address substantially similar issues
10 for a second time. This is the kind of piecemeal appeal that Rule
11 54(b) is intended to prevent. See CMAX, 295 F.2d at 697 (contrary
12 to good judicial administration "to have both [the Ninth Circuit]
13 and the district court simultaneously passing upon what is in
14 substance the identical claim, [the Ninth Circuit] dealing with one
15 theory, but basically the same facts").

16 The Telekenex Defendants argue that their right to coverage
17 for indemnity has been finally resolved by the Court's decision on
18 Plaintiff's Counts I and II. Reply at 3. However, they do not
19 address how their still-pending counterclaims might ultimately
20 affect their right to coverage. The Telekenex Defendants also
21 suggest that a Rule 54(b) certification will streamline the process
22 because if the Ninth Circuit reverses the December 19 Order, Axis's
23 Counts VII and VIII will never be litigated. Id. Even if this
24 were the case -- and it remains unclear that it is -- the Telekenex
25 Defendants once again ignore their pending counterclaims. The
26 Telekenex Defendants' argument also assumes that the Court's
27 December 19 Order will be reversed and that the reversal will be
28 filed prior to the date currently set for trial. If either of

1 these assumptions proves incorrect, then a Rule 54(b) certification
2 would likely create more work for the federal courts, not less.
3 Additionally, staying the trial pending an appeal of the December
4 19 Order could further delay the final disposition of this entire
5 matter.

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7 **V. CONCLUSION**

8 For the foregoing reasons, the Court finds that there are just
9 reasons to delay the Telekenex Defendants' appeal of the Court's
10 December 19 Order. Accordingly, the Telekenex Defendants' Rule
11 54(b) Motion is DENIED.

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13 IT IS SO ORDERED.

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15 Dated: April 24, 2013

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UNITED STATES DISTRICT JUDGE

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