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**\*E-FILED 9/8/2008\***

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

UNITED STATES *ex rel.* DONNA M.  
McLEAN and THE STATE OF CALIFORNIA  
*ex rel* DONNA M. McLEAN,

No. C05-01962 HRL

Plaintiffs,

v.

**ORDER DENYING RELATOR'S  
MOTION FOR CERTIFICATION OF  
FINAL JUDGMENT**

THE COUNTY OF SANTA CLARA, THE  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES OF SANTA CLARA  
COUNTY, KENNETH BORELLI,  
LAWRENCE GALLEGOS, EPIFANIO ("J.R.")  
REYNA, TANYA BEYERS, DR. DEE  
SCHAFFER, DR. TOMMIJEAN THOMAS,  
DR. RICHARD PERILLO and DOES 1-100,

[Re: Docket No. 237]

Defendants.

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Pursuant to Fed. R. Civ. P. 54, relator Donna McLean moves for certification of judgment on the County of Santa Clara's counterclaims. Defendants oppose the motion. The matter is deemed suitable for determination without oral argument. Civ. L.R. 7-1(b). Upon consideration of the moving and responding papers, the court denies the motion.

**I. BACKGROUND**

In this *qui tam* action, McLean claims that defendants have invented fictional children for the purpose of overbilling the state and federal governments in connection with requests for reimbursement for child welfare expenditures. The United States and the State of California

1 declined to intervene. The *qui tam* claims brought on behalf of the State of California have  
2 since been voluntarily dismissed without prejudice.

3 The County of Santa Clara (“County”) filed counterclaims against McLean for breach of  
4 contract, breach of the implied covenant of good faith and fair dealing and for declaratory relief.  
5 It contended that McLean was precluded from pursuing the instant *qui tam* action by virtue of a  
6 settlement agreement and release resolving several prior lawsuits she filed against the County.

7 McLean moved to strike the counterclaims pursuant to California’s anti-SLAPP statute,  
8 California Code of Civil Procedure section 425.16. On July 25, 2006, that motion was denied.

9 McLean subsequently filed a summary judgment motion as to the counterclaims. On  
10 April 30, 2008, this court granted her motion based on Ninth Circuit authority indicating that a  
11 pre-filing release of *qui tam* claims generally cannot be enforced to bar a subsequent *qui tam*  
12 action where the release was entered into without the government’s knowledge or consent.

13 Defendants have filed a summary judgment motion as to the *qui tam* claims. That  
14 motion is pending.

15 Pursuant to Fed.R.Civ.P. 54(b), realtor now moves for certification of final judgment as  
16 to the County’s counterclaims.<sup>1</sup>

## 17 II. DISCUSSION

18 In actions involving multiple parties or claims (whether brought as claims,  
19 counterclaims, crossclaims or third party claims), Federal Rule of Civil Procedure 54(b)  
20 authorizes a district court to “direct the entry of a final judgment as to one or more but fewer  
21 than all of the claims or parties only if the court expressly determines that there is no just reason  
22 for delay.” The United States Supreme Court has outlined a two-step analysis to be conducted  
23 in deciding Fed.R.Civ.P. 54(b) motions. First, this court must “determine that it is dealing with  
24 a ‘final judgment,’” i.e., “a decision upon a cognizable claim for relief” that is “an ultimate  
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26 <sup>1</sup> Shortly after this court granted her motion for summary judgment as to the  
27 County’s counterclaims, McLean moved for attorney’s fees pursuant to Fed. R. Civ. P.  
28 54(d)(2). (See Docket #161). The County argued that her request for fees was premature  
because, among other things, judgment had not been entered. See Fed.R.Civ.P. 54(d)(2).  
The instant motion for certification followed. At the August 5, 2008 motion hearing,  
McLean’s motion for fees was denied without prejudice.

1 disposition of an individual claim entered in the course of a multiple claims action.” Curtiss-  
2 Wright Corp. v. General Electric Co., 446 U.S. 1, 8 (1980) (quoting Sears, Roebuck & Co. v.  
3 Mackey, 351 U.S. 427, 436 (1956)). Second, this court must determine whether there is any  
4 just reason for delay in entering judgment. Id. In deciding whether there are just reasons for  
5 delay, a district court “must take into account judicial administrative interests as well as the  
6 equities involved,” and may consider “such factors as whether the claims under review were  
7 separable from the others remaining to be adjudicated and whether the nature of the claims  
8 already determined was such that no appellate court would have to decide the same issues more  
9 than once even if there were subsequent appeals.” Id. Similarity of legal or factual issues  
10 weighs heavily against entry of judgment. Morrison-Knudsen Co., Inc. v. Archer, 655 F.2d  
11 962, 965 (9th Cir. 1981).

12           Nevertheless, motions for certification of final judgment are not routinely granted.  
13 “Judgments under Rule 54(b) must be reserved for the unusual case in which the costs and risks  
14 of multiplying the number of proceedings and of overcrowding the appellate docket are  
15 outbalanced by pressing needs of the litigants for an early and separate judgment as to some  
16 claims or parties.” Id. “Whether a final decision on a claim is ready for appeal is a different  
17 inquiry from the equities involved, for consideration of judicial administrative interests ‘is  
18 necessary to assure that application of the Rule effectively ‘preserves the historic federal policy  
19 against piecemeal appeals.’” Wood v. GCC Bend LLC, 422 F.3d 873, 878 (9th Cir. 2005)  
20 (quoting Mackey, 351 U.S. at 438).

21           In this case, there is no dispute that this court has made a final decision as to the  
22 County’s counterclaims. Nonetheless, taking into account judicial administrative interests, as  
23 well as the equities involved, this court is unpersuaded that the second part of the Supreme  
24 Court’s test for the entry of Fed.R.Civ.P. 54(b) judgment is satisfied.

25           Here, the parties disagree as to whether the dismissed counterclaims are related,  
26 factually or legally, to the *qui tam* claims. Relator contends that her *qui tam* claims are entirely  
27 distinct and separate. Defendants contend that there is some overlap because (a) the  
28 government’s knowledge of McLean’s allegations was a key factor in the dismissal of the

1 counterclaims; and (b) in their pending summary judgment motion, defendants seek judgment  
2 on the ground (among others) that McLean was not the original source of the information on  
3 which her *qui tam* claims are based.

4 The pending *qui tam* claims are not directly intertwined with the counterclaims. The *qui*  
5 *tam* claims concern whether defendants have engaged in fraudulent conduct; the counterclaims  
6 primarily concern the question whether McLean properly may pursue the *qui tam* claims at all.  
7 Even so, it does not follow that her motion *must* be granted. “Not all final judgments on  
8 individual claims should be immediately appealable, even if they are in some sense separable  
9 from the remaining unresolved claims.” Curtiss-Wright Corp., 446 U.S. at 8. “The function of  
10 the district court under [Fed. R. Civ. P. 54(b)] is to act as a ‘dispatcher,’” and the determination  
11 as to when a final decision is ready for appeal rests within the sound discretion of the district  
12 court. Id. “This discretion is to be exercised ‘in the interest of sound judicial administration.’”  
13 Id. (quoting Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 437 (1956)). On this point, the  
14 Ninth Circuit has cautioned:

15 The greater the overlap the greater the chance that this court will have to  
16 revisit the same facts – spun only slightly differently – in a successive appeal.  
17 The caseload of this court is already huge. More than fifteen thousand  
18 appeals were filed in the last year. We cannot afford the luxury of reviewing  
the same set of facts in a routine case more than once without a seriously  
important reason.

19 Wood, 422 F.3d at 882. If this court were to certify final judgment on the County’s  
20 counterclaims, to a certain degree, the Ninth Circuit would still be required to review the same  
21 set of facts twice. As such, the court is not convinced that entering judgment as to the  
22 counterclaims now would spare an appellate court from duplicating its efforts if there were an  
23 immediate appeal and another one following summary judgment or trial of the *qui tam* claims.

24 Nor has relator shown sufficient cause for imposing that burden on the Circuit court in  
25 this instance. Here, McLean argues that she should not have to try her *qui tam* claims with  
26 reference to the counterclaims because “[a] *qui tam* action is ordinarily tried without a counter-  
27 claim or reference to a counter-claim.” (Reply at 3). However, the court has already  
28 determined that the counterclaims will not proceed to trial. So, entering final judgment now as

1 to them streamlines nothing. Indeed, this court finds that certifying final judgment now will  
2 only serve to unnecessarily multiply these proceedings and embroil the parties in litigation in  
3 two forums.

4 McLean nonetheless argues that the County's assertion of its counterclaims was merely  
5 a tactic designed to delay or thwart her pursuit of the *qui tam* claims (e.g., by increasing costs of  
6 this litigation, making it difficult to retain counsel, and keeping alive the threat of litigation as  
7 leverage for her pursuit of the *qui tam* claims). Even assuming that were true (and McLean has  
8 not substantiated those assertions here), none of those reasons are probative of any prejudice  
9 she would suffer if an appeal as to the County's counterclaims were brought later instead of  
10 now. McLean tacitly suggests that she will be prejudiced by a delay in payment of judgment.  
11 But she has not argued, much less shown, that delay of an appeal will inflict severe financial  
12 harm.

13 In sum, this court does not find any pressing need for immediate appeal which  
14 outweighs the costs and risks of multiplying the number of proceedings and of overcrowding  
15 the appellate docket.

16 **III. ORDER**

17 Based on the foregoing, relator's motion for certification of final judgment pursuant to  
18 Fed.R.Civ.P. 54(b) is DENIED.

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20 Dated: September 8, 2008

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23 HOWARD R. LLOYD  
24 UNITED STATES MAGISTRATE JUDGE  
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**5:05-cv-1962 Notice has been electronically mailed to:**

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**Counsel are responsible for distributing copies of this document to co-counsel who have not registered for e-filing under the court's CM/ECF program.**

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