

United States District Court  
For the Northern District of California

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**FILED**

AUG 13 2002

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JUDI BARI, by DARLENE COMINGORE,  
Executor of the Estate of JUDI BARI,  
and DARRYL CHERNEY,

Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

No. C 91-01057 CW

ORDER FOR ENTRY  
OF PARTIAL  
JUDGMENT

(F.R.C.P. 54(b))

Plaintiffs move for entry of partial judgment pursuant to Federal Rule of Civil Procedure 54(b). The Federal Defendants and Oakland Defendants oppose the motion. The matter was submitted on the papers. Having considered all of the papers filed by the parties, the Court grants Plaintiff's motion for entry of partial judgment (Docket Nos. 590, 595).

PROCEDURAL HISTORY

This suit was brought in 1991, alleging violations of Judi Bari and Darryl Cherney's rights under federal and State law due to their arrest after a bomb exploded in their car in Oakland, California in May, 1990.

Since its filing eleven years ago, this case has been the subject of two interlocutory appeals. In 1994, the Ninth Circuit

1 Court of Appeals rejected an interlocutory appeal filed by the  
2 Defendant FBI agents, who challenged this Court's denial of their  
3 motion to dismiss on the ground of qualified immunity. Mendocino  
4 Envtl. Ctr. v. Mendocino County, 14 F.3d 457 (9th Cir. 1994)  
5 (Mendocino I). In 1999, the Ninth Circuit affirmed this Court's  
6 denial of Defendant Oakland police officers' motion for summary  
7 judgment on qualified immunity grounds, and reversed this Court's  
8 grant of summary judgment to the Oakland police officers on  
9 Plaintiffs' First Amendment and conspiracy claims, finding that  
10 disputed issues of fact exist precluding summary judgment.  
11 Mendocino Env'tl. Ctr. v. Mendocino County, 192 F.3d 1283 (9th Cir.  
12 1999) (Mendocino II). In the meantime, Judi Bari died of cancer in  
13 1997, leaving the case to be pursued by the executor of her estate.

14 After extensive pre-trial litigation, including the  
15 interlocutory appeals described above, and eight amended  
16 complaints, the case consisted of Plaintiffs Darryl Cherney and  
17 Judi Bari's First Amendment claims, Fourth Amendment claims based  
18 on their arrests and the searches of their homes (one search of  
19 Plaintiff Cherney's home and two searches of Plaintiff Bari's  
20 home), and conspiracy claims against six FBI agents (the Federal  
21 Defendants) and three Oakland police officers (the Oakland  
22 Defendants).

23 The trial in this action began on April 8, 2002, and lasted  
24 six weeks. The jury reached its verdict on June 11, 2002, after  
25 more than three weeks of deliberation.

26 ANALYSIS

27 The Court directs entry of a partial judgment. The jury was  
28

1 unable to reach a verdict as to Plaintiff Cherney's Fourth  
2 Amendment claim based on his arrest.<sup>1</sup> That claim will remain  
3 stayed in this Court pending the outcome of any appeal of the  
4 claims upon which judgment now enters.

5 The Court enters partial judgment pursuant to Federal Rule of  
6 Civil Procedure 54(b), which provides:

7 When more than one claim for relief is presented in an  
8 action, whether as a claim, counterclaim, cross-claim,  
9 or third-party claim, or when multiple parties are  
10 involved, the court may direct the entry of a final  
11 judgment as to one or more but fewer than all of the  
12 claims or parties only upon an express determination  
13 that there is no just reason for delay and upon an  
14 express direction for the entry of judgment.

15 The Court expressly determines that there is no just reason for  
16 delay, and directs the Clerk to enter judgment on the claims upon  
17 which the jury entered a verdict.

18 The Supreme Court in Curtiss-Wright Corporation v. General  
19 Electric Company, 446 U.S. 1 (1980) described the analysis a  
20 district court should conduct in deciding whether to enter partial  
21 judgment under Rule 54(b):

22 [T]he district court must . . . determine whether there  
23 is any just reason for delay. Not all final judgments  
24 on individual claims should be immediately appealable,  
25 even if they are in some sense separable from the

26 The jury was unable to reach a verdict with respect to  
27 whether Defendants Frank Doyle, John Reikes, Philip Sena, Clyde M.  
28 Sims or Michael Sitterud violated Plaintiff Cherney's Fourth  
Amendment rights in connection with his arrest, or whether the  
facts support a finding that any of these Defendants deserve  
qualified immunity. However, the jury did find that the facts  
support a finding that Defendant Robert Chenault deserves qualified  
immunity with respect to this claim. Therefore, Plaintiff  
Cherney's arrest claim is resolved with respect to Defendant  
Chenault (he is entitled to qualified immunity with respect to the  
claim), but is unresolved with respect to the other Defendants  
listed above.

1 remaining unresolved claims. The function of the  
2 district court under the Rule is to act as a  
3 "dispatcher." It is left to the sound judicial  
4 discretion of the district court to determine the  
5 "appropriate time" when each final decision in a  
6 multiple claims action is ready for appeal. This  
7 discretion is to be exercised "in the interest of sound  
8 judicial administration."

9 Thus, in deciding whether there are no just reasons  
10 to delay the appeal of individual final judgments in  
11 setting [sic] such as this, a district court must take  
12 into account judicial administrative interests as well  
13 as the equities involved. Consideration of the former  
14 is necessary to assure that application of the Rule  
15 effectively "preserves the historic federal policy  
16 against piecemeal appeals." It was therefore proper  
17 for the District Judge here to consider such factors as  
18 whether the claims under review were separable from the  
19 others remaining to be adjudicated and whether the  
20 nature of the claims already determined was such that  
21 no appellate court would have to decide the same issues  
22 more than once even if there were subsequent appeals.

23 Id. at 8 (quoting Sears, Roebuck & Co. v. Mackey, 351 U.S. 427,  
24 435-38 (1956) (internal citations omitted). In its review of the  
25 district court's consideration of judicial administrative  
26 interests, the Supreme Court focused on the district court's  
27 determination that the appealed claims were separable from those  
28 remaining to be adjudicated, and that the nature of the claims was  
such that no appellate court would have to decide the same issues  
more than once even if there were subsequent appeals. See id. at  
8.

The Ninth Circuit has described the standard for entering  
partial judgment under Rule 54(b) as follows:

Judgments under Rule 54(b) must be reserved for the  
unusual case in which the costs and risks of  
multiplying the number of proceedings and of  
overcrowding the appellate docket are outbalanced by  
pressing needs of the litigants for an early and  
separate judgment as to some claims or parties. The  
trial court should not direct entry of judgment under  
Rule 54(b) unless it has made specific findings setting

1 forth the reasons for its order. Those findings should  
2 include a determination whether, upon any review of the  
3 judgment entered under the rule, the appellate court  
4 will be required to address legal or factual issues  
5 that are similar to those contained in the claims still  
6 pending before the trial court. A similarity of legal  
7 or factual issues will weigh heavily against entry of  
8 judgment under the rule, and in such cases a Rule 54(b)  
9 order will be proper only where necessary to avoid a  
10 harsh and unjust result, documented by further and  
11 specific findings.

12 Morrison-Knudsen Co. v. Archer, 655 F.2d 962, 965 (9th Cir. 1981)

13 (internal citations omitted). Therefore, the primary factors at  
14 issue in deciding whether to enter partial judgment under Rule  
15 54(b) are those of judicial administration, including whether the  
16 appellate court will be required to address similar legal and  
17 factual issues multiple times, and the equities of the parties.

18 First, the Court finds that entry of a partial judgment will  
19 further efficient judicial administration. This order will not  
20 result in the Ninth Circuit being required to address similar legal  
21 and factual issues in multiple, piecemeal appeals. Entry of  
22 partial judgment will not multiply the number of appeals that may  
23 occur in this case. Plaintiffs have represented to the Court that  
24 they will not pursue Plaintiff Cherney's arrest claim in the event  
25 that appeal of the claims upon which judgment is entered today does  
26 not result in remand to the district court for re-trial. In other  
27 words, Plaintiffs would dismiss Plaintiff Cherney's arrest claim if  
28 their claims are affirmed in all respects by the Ninth Circuit, or  
if their claims are reversed and judgment is entered in favor of  
Defendants in all respects. Plaintiff Cherney's arrest claim will  
only be tried by this Court, and subject to potential appeal, if  
other claims are remanded by the Ninth Circuit for re-trial.

1 Plaintiff Cherney's arrest claim would then be tried along with  
2 those claims remanded for re-trial, and there would be a single,  
3 consolidated appeal of that second trial, if any. Such a re-trial,  
4 and likely second appeal, would occur in the event that any claims  
5 are remanded for re-trial, whether or not the Court enters partial  
6 judgment.<sup>2</sup>

7 Further, if the Court does not enter partial judgment on the  
8 claims upon which the jury reached verdicts, the Court and the  
9 parties will be forced to re-try Plaintiff Cherney's arrest claim  
10 alone, before proceeding to an appeal. While this claim is a minor  
11 part of the case as a whole, the facts of the case are such that it  
12 would take nearly as long to try as did the entire case. This  
13 would require a multiple-week trial that would unnecessarily burden  
14 the resources of this Court, the United States, the City of  
15 Oakland, the individual Defendants and Plaintiffs. The  
16 wastefulness of an immediate re-trial of Plaintiff Cherney's arrest  
17 claim would be even further exacerbated in the event that an appeal  
18 results in remand and another (third) trial.

19 Therefore, a review of the judicial administrative interests  
20 at stake reveals that entry of partial judgment is appropriate

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21  
22 <sup>2</sup>Defendants argue that entry of partial judgment would result  
23 in multiple appeals and piecemeal litigation. However, the Court  
24 finds that this is not the case. Upon the Court's entry of partial  
25 judgment, Plaintiff Cherney's arrest claim will only be re-tried,  
26 and appealed, if other claims must be re-tried, which will also be  
27 appealed. No additional appeal will occur as a result of the re-  
28 trial of Plaintiff Cherney's arrest claim along with other,  
remanded claims. If the claims upon which judgment is entered  
today are not remanded to the district court for re-trial,  
Plaintiffs have agreed that they will not independently pursue  
Plaintiff Cherney's arrest claim, so no further appeal could occur  
in that case either.

1 because "no appellate court would have to decide the same issues  
2 more than once even if there were subsequent appeals." Curtiss-  
3 Wright, 446 U.S. at 8. Because this is the case, the separability  
4 of the claims, factually and legally, is not particularly relevant.  
5 Plaintiff Cherney's arrest claim will not be pursued independently,  
6 and therefore it will not be appealed separately, from the claims  
7 upon which judgment is entered today.

8 An examination of the equities also favors entry of partial  
9 judgment. This case is eleven years old and has already been the  
10 subject of two pre-trial appeals. A re-trial of Plaintiff  
11 Cherney's arrest claim will only further delay the case, and result  
12 in higher costs to all parties involved, both government and  
13 individual.

14 The Court considered an alternative course of action, which  
15 would have permitted Plaintiffs to dismiss Plaintiff Cherney's  
16 arrest claim without prejudice to re-filing it only in the event  
17 that a re-trial of other, remanded claims became necessary.  
18 However, even if the parties were to stipulate to such an  
19 agreement, the Ninth Circuit has disapproved of such agreements as  
20 a manipulation of the finality requirement. See, e.g., James v.  
21 Price Stern Sloan, Inc., 283 F.3d 1064, 1066 (9th Cir. 2002)  
22 (citing cases finding no appellate jurisdiction where finality was  
23 artificially manufactured by dismissal without prejudice);  
24 Dannenberg v. Software Toolworks, Inc., 16 F.3d 1073 (9th Cir.  
25 1994) ("We see this as a clear, and impermissible, attempt to  
26 circumvent Rule 54(b). . . . [L]itigants should not be able to  
27 avoid the final judgment rule without fully relinquishing the

28

1 ability to further litigate unresolved claims."; Cheng v. Comm'r,  
2 878 F.2d 306 (9th Cir. 1989) (same).

3 The stipulations that were rejected by the Ninth Circuit in  
4 Dannenberg and Cheng provided, as Plaintiffs proposed here, that  
5 the unresolved claim be dismissed without prejudice, and be revived  
6 only if the Ninth Circuit remanded other claims for re-trial. Such  
7 a stipulation would be a reasonable method of resolving the dilemma  
8 that faces the Court today, because it would prevent duplicative  
9 appeals as well as unproductive litigation to resolve a claim that  
10 may otherwise never need to be tried. Because Ninth Circuit law  
11 disallows this solution, entry of partial judgment provides the  
12 next most efficient resolution.

#### 13 CONCLUSION

14 Because the Court believes that it would be an extreme misuse  
15 of judicial resources to re-try the single, remaining claim when  
16 Plaintiffs are willing to forgo the claim in the event that no re-  
17 trial becomes necessary after appeal, and because the type of  
18 agreement made in Dannenberg and Cheng has been rejected by the  
19 Ninth Circuit, the Court believes that entry of partial judgment  
20 pursuant to Rule 54(b) is the course of action that will produce  
21 the most expeditious and fair resolution to this case.<sup>3</sup>

22  
23 <sup>3</sup>The Federal Defendants argue that the Court should not enter  
24 judgment at this time, because Plaintiff Cherney's arrest claim may  
25 be resolved by a post-trial motion for judgment as a matter of law  
26 or motion for a new trial. However, post-trial motions for  
27 judgment as a matter of law under Rule 50(b) and motions for a new  
28 trial under Rule 59 may only be made after judgment has been  
entered. Rule 50(b) and Rule 59(b) both expressly state that such  
a motion may be filed no later than 10 days after entry of  
judgment. Therefore, the argument of the Federal Defendants on  
this issue is not well taken. If the Court grants judgment as a



1 Therefore, the Court finds that there is no just reason for  
2 delay and directs the entry of partial judgment under Rule 54(b) as  
3 stated above. A partial judgment shall enter as follows:

4 That Plaintiff Judi Bari shall recover of the following  
5 Defendants the following amounts, as to all of her claims against  
6 all Defendants, with interest thereon as provided by 28 U.S.C.  
7 Section 1961:

8 Defendant Frank Doyle: \$420,875 (10% of \$235,000 + 70%  
9 of \$190,000 + 22.5% of \$1,175,000) in compensatory  
damages and \$300,000.00 in punitive damages;

10 Defendant Clyde M. Sims: \$799,000 (10% of \$235,000 +  
50% of \$1,175,000) in compensatory damages and \$400,000  
in punitive damages;

11 Defendant Robert Chenault: \$57,000 (30% of \$190,000) in  
compensatory damages;

12 Defendant John Reikes: \$264,375 (22.5% of \$1,175,000)  
in compensatory damages and \$600,000.00 in punitive  
damages;

13 Defendant Philip Sena: \$58,750 (5% of \$1,175,000) in  
14 compensatory damages.

15 That Plaintiff Darryl Cherney shall recover of the following  
16 Defendants the following amounts, as to all of his claims against  
17 all Defendants except his Fourth Amendment claim against Defendants  
18 Frank Doyle, John Reikes, Philip Sena, Clyde M. Sims and Michael  
19 Sitterud in connection with his arrest, with interest thereon as

20  
21 matter of law in favor of either party on Plaintiff Cherney's  
22 arrest claim, the partial judgment entered today would be amended  
and would be a full judgment, for all claims would be resolved.  
23 If, on the other hand, the Court grants a motion for a new trial on  
Plaintiff Cherney's arrest claim, the new trial will likely be  
24 required on the claims upon which the Court has entered judgment as  
well, and a re-trial of those claims would occur prior to appeal.

25 Similarly, Plaintiffs' suggestion that the Court enter  
judgment as a matter of law in favor of Plaintiff Cherney on his  
26 Fourth Amendment arrest claim, and therefore avoid the issue  
whether to enter a partial judgment, is also not appropriate at  
27 this time. To the extent that this could be considered a motion  
for judgment as a matter of law by Plaintiffs, it is denied.

1 provided by 28 U.S.C. Section 1961:

2 Defendant Frank Doyle: \$175,000 (70% of \$50,000 + 17.5%  
of \$800,000) in compensatory damages and \$100,000 in  
3 punitive damages;  
4 Defendant Robert Chenault: \$15,000 (30% of \$50,000) in  
compensatory damages;  
5 Defendant John Reikes: \$140,000 (17.5% of \$800,000) in  
compensatory damages and \$300,000 in punitive damages;  
6 Defendant Philip Sens: \$40,000 (5% of \$800,000) in  
compensatory damages;  
7 Defendant Clyde M. Sims: \$400,000 (50% of \$800,000) in  
compensatory damages and \$250,000 in punitive damages;  
8 Defendant Michael Sitterud: \$80,000 (10% of \$800,000)  
in compensatory damages.

9 Plaintiffs shall also recover their costs of the action.

10 Post-trial motions shall be filed in accordance with the  
11 schedule determined at the previous case management conference.  
12 The Oakland Defendants' motion for extension of time to file post-  
13 trial motions, with which the Federal Defendants join, is denied.

14 IT IS SO ORDERED.

15 Dated: AUG 13 2002

16   
17 CLAUDIA WILKEN  
United States District Judge

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19 Copies mailed to counsel  
20 as noted on the following page  
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