UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TABITHA SPERRING, PAISLIE MARCHANT, and SALLY POSTON, individually and on behalf of similarly situated persons,

Plaintiffs,

v.

LLR, INC., a Wyoming corporation; LULAROE, LLC, a California limited liability company; LENNON LEASING, LLC, a Wyoming limited liability company; MARK A. STIDHAM, an individual; DEANNE S. BRADY a/k/a DEANNE STIDHAM, an individual; and DOES 1-30, inclusive,

Defendants.

Case No. 5:19-cv-00433-AB-SHKx

ORDER DENYING PLAINTIFFS' MOTION FOR RELIEF FROM DISMISSAL ORDER PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(b) [59]

Before the Court is Plaintiffs Tabitha Sperring, Paislie Marchant, and Sally Poston'S (collectively, "Plaintiffs") Motion for Relief from Dismissal Order Pursuant to Federal Rule of Civil Procedure 60(b). ("Motion," or "Mot.," Dkt. No. 49.) Defendants LulaRoe, LLC, LLR, Inc., Lennon Leasing, LLC, Mark Stidham, and

Deanne Brady (collectively, "Defendants") opposed, ("Opp'n," Dkt. No. 50), and Plaintiffs replied, ("Reply," Dkt. No. 51.) The Court deems this matter appropriate for decision without oral argument and vacates the hearing scheduled for September 17, 2021. *See* Fed. R. Civ. P. 78; LR 7-15. For the following reasons, the Court **DENIES** Plaintiffs' Motion.

I. BACKGROUND

The Court and the parties are familiar with the factual background of this case. It is set forth in this Court's Order Granting in Part and Denying in Part Defendants' Motion to Compel Arbitration. ("Order," Dkt. No. 32.)

After this Court's Order, Plaintiffs moved to voluntarily dismiss this action with prejudice to expedite their appeal. (Dkt. No. 33.) In their motion, Plaintiffs cited and quoted *Omstead v. Dell, Inc.*, 594 F.3d 1081, 1085 (9th Cir. 2010) ("*Omstead*"), and explained that, for them to "seek immediate appellate review of the Order," the Court must dismiss the action "with prejudice." (*Id.* at 3.) The Court granted Plaintiffs' motion to dismiss on October 10, 2019 and entered an order of dismissal. (Dkt. No. 40.)

After the Court dismissed the action, Plaintiffs filed a notice of appeal to the Ninth Circuit. (Dkt. No. 43.) After Plaintiffs filed their opening brief, Defendants moved to dismiss the appeal for lack of jurisdiction under *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017) ("*Microsoft*") on April 17, 2020. (*See* Plaintiffs' RJN, Exh. 1, ("9th Cir. Dkt."), No. 18.) The Ninth Circuit denied Defendants' motion without prejudice on June 23, 2020. (9th Cir. Dkt. No. 27.) Defendants renewed their jurisdiction argument in their Appellees' Brief. (9th Cir. Dkt. No. 32.)

On December 29, 2020—after the parties had filed their appellate briefs, but before the Ninth Circuit issued a decision—the Ninth Circuit decided *Langere v. Verizon Wireless, Servs., LLC*, 983 F.3d 1115 (9th Cir. 2020) ("*Langere*"). *Langere* held that *Omstead* had "been effectively overruled by the [Supreme] Court's decision in *Microsoft*" and, therefore, "a plaintiff does not create appellate jurisdiction by

voluntarily dismissing his claims with prejudice after being forced to arbitrate them." *Langere*, 983 F.3d at 1117. *Langere* ruled that the court of appeals lacks jurisdiction to hear an appeal of an interlocutory order, such as an order compelling arbitration, following a voluntary dismissal because the only route for an immediate appeal is under 28 U.S.C. §1292(b). *Id.*

On January 8, 2021, the Ninth Circuit requested that the parties file supplemental briefs addressing the impact, if any, of *Langere*. (9th Cir. Dkt. No. 54.) Defendants argued that the appeal had to be dismissed for lack of appellate jurisdiction under *Langere*. (9th Cir. Dkt. No. 55.)

On April 23, 2021, the Ninth Circuit issued its decision on Plaintiffs' appeal, dismissing the appeal for lack of appellate jurisdiction. (9th Cir. Dkt. No. 64.) The court held that *Langere* controlled, dismissing the appeal because there was a lack of finality. (*Id.* at 4–5.) The instant Motion followed.

II. REQUEST FOR JUDICIAL NOTICE

Courts may take judicial notice of facts that are "not subject to reasonable dispute." Fed. R. Evid. 201(b). Judicial notice is appropriate for "undisputed matters of public record, including documents on file in federal or state courts." *Harris v. City of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012).

Plaintiffs and Defendants both request judicial notice of certain public records, including the docket and filings from this action's Ninth Circuit appeal *Tabitha Sperring, et al. v. LLR, Inc., et al.*, Case No. 19-56295 and the docket in two Central District cases, *Henson v. Fidelity National Financial, Inc.*, Case No. 2:14:cv-01240-ODW-AFM and *Ponkey v. LLR, Inc. et al.*, Case No. 5:21-cv-00518-AB-SHK. ("Plaintiffs' RJN," Dkt. No. 49-2; "Defendants' RJN," Dkt. No. 50-2.) Neither party opposes the other's request. Because these documents are all undisputed matters of public record, the Court **GRANTS** both Plaintiffs' and Defendants' requests for judicial notice.

LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 60(b)(6), "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for … any [ ] reason that justifies relief." Fed. R. Civ. P. 60(b)(6). "[A] voluntary dismissal … is a judgment, order or proceeding from which Rule 60(b) relief can be granted." *In re Hunter*, 66 F.3d 1002, 1004 (9th Cir. 1995).

Rule 60(b) "allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). A movant seeking relief under Rule 60(b)(6) must show "'extraordinary circumstances' justifying the reopening of a final judgment." *Id.* at 535 (quoting *Ackermann v. U.S.*, 340 U.S. 193, 199 (1950)). An "intervening change in the controlling law" can provide a basis for granting a Rule 60(b) motion. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009) (quoting *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)). But "a change in the law will not always provide the truly extraordinary circumstances necessary to reopen a case", and "something more than a mere change in the law is necessary." *Phelps v. Alameida*, 569 F.3d 1120, 1133 (9th Cir. 2009) (internal quotations and citations omitted). "The proper course when analyzing a Rule 60(b)(6) motion predicated on an intervening change in the law is to evaluate the circumstances surrounding the specific motion before the court." *Id.* The 60(b)(6) inquiry should be conducted on a case-by-case basis, and requires courts to balance the competing interests of finality of judgments and the "incessant command of the court's conscience that justice be done in light of all the facts." *Id.* (citations and quotations omitted). "Rule 60(b)(6) is a grand reservoir of equitable power … and it affords courts the discretion and power to vacate judgments whenever such action is appropriate to accomplish justice." *Id.* at 1135.

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III. DISCUSSION

Plaintiffs request Rule 60(b) relief based on the Ninth Circuit's decision in *Langere*. Supreme Court and Ninth Circuit case law on Rule 60(b)(6) relief based on a change in law shows that certain principles must guide the Court's analysis of the instant motion. First, Plaintiffs must show that "extraordinary circumstances" justify their motion to reopen the case. *Gonzalez*, 545 U.S. at 535. Second, the Court must balance the competing interests of respect for finality of judgments with the "incessant command of the court's conscience that justice be done in light of all the facts." *Phelps*, 569 F.3d at 1124.

A. Extraordinary Circumstances

As stated, change in law alone does not constitute an extraordinary circumstance justifying Rule 60(b) relief. *Saavedra v. Eli Lilly & Co.*, 2018 WL 5905801, at *6 (C.D. Cal. July 19, 2018), aff'd sub nom. *Strafford v. Eli Lilly & Co.*, 801 F. App'x 467 (9th Cir. 2020) (citing *Phelps*, 569 F.3d at 1133 (9th Cir. 2009)). Something more is necessary. *Phelps*, 569 F.3d at 1133. Even where there is an intervening change in law, plaintiffs are not entitled to relief under Rule 60(b) where such change was foreseeable such that plaintiff "knowingly risked finality" and made a "free, calculated, deliberate choice to dismiss their case." *Strafford*, 801 F. App'x at 469 (9th Cir. 2020) (citing *Ackermann v. United States*, 340 U.S. 193 (1950).

Here, the change in law at issue resulted from *Langere*. There, the Ninth Circuit clarified that the Supreme Court's ruling in *Microsoft* overruled the then-current Ninth Circuit precedent—namely, *Omstead*. In *Microsoft*, the Supreme Court held that plaintiffs in a putative class action cannot voluntarily dismiss an action with prejudice in order to appeal an order denying class certification. 137 S. Ct. at 1706-07. Specifically, the Court states that parties "cannot transform a tentative interlocutory order into a final judgment within the meaning of § 1291 simply by dismissing their claims with prejudice." 137 S. Ct. at 1715. The Court reasoned that

such a tactic: (1) undercut the statutory regime for interlocutory appeals by giving plaintiffs the ability to obtain "an appeal of right;" (2) "invites protracted litigation and piecemeal appeals;" and (3) was one-sided as it permitted only plaintiffs and never defendants to force an immediate appeal. *Id*. at 1713-15. In *Langere*, the Ninth Circuit held that *Microsoft*'s holding clearly extended beyond the limited context of orders denying class certification and concluded that the voluntary dismissal of claims following an order compelling arbitration does not create appellate jurisdiction. 983 F.3d at 1124.

Since *Microsoft*, and prior to Plaintiffs' voluntary dismissal, other circuits have come to the same conclusion as *Langere*. *See, e.g.*, *Princeton Digital Image Corporation v. Office Depot Inc.*, 913 F.3d 1342, 1348 (Fed. Cir. 2019) (finding that *Microsoft* extends beyond the class certification context and establishes that a voluntary dismissal does not constitute a final judgment where the district court's ruling has not foreclosed the plaintiff's ability to prove the required elements of the cause of action); *Keena v. Groupon, Inc.*, 886 F.3d 360, 365 (4th Cir. 2018) (finding, in the exact procedural context as *Langere*, that *Microsoft* extends beyond the class certification context and stands for the longstanding principle that a party is not entitled to appeal from a consensual dismissal of her claims); *Board of Trustees of Plumbers, Pipe Fitters & Mechanical Equipment Service, Local Union No. 392 v. Humbert*, 884 F.3d 624, 626 (6th Cir. 2018) (relying on *Microsoft* to dismiss appeal from a "Stipulated Judgment Order" in which the parties agreed to a certain amount of damages, without waiving right to later challenge that amount, in order to facilitate appeal of district court's summary judgment order determining liability); *Bynum v. Maplebear Inc.*, 698 F. App'x 23, 24 (2d Cir. 2017) **cert. denied**, 138 S. Ct. 2581 (2018) (finding that in light of *Microsoft*, plaintiffs cannot circumvent the FAA's prohibition against interlocutory appeal from an order compelling arbitration by dismissing their claims rather than proceeding to arbitration).

Additionally, prior to Plaintiffs' voluntarily dismissal, several district courts in this circuit found that *Microsoft* extended beyond class certification orders. *See., e.g, Gayler v. Neven*, 2018 WL 505074, at *2 (D. Nev. Jan. 22, 2018) ("However, the United States Supreme Court recently abrogated the Ninth Circuit authority on the jurisdictional issue."); *Keith Manufacturing, Co. v. Butterfield,* 256 F.Supp. 3d 1123, 1129 (D. Or. 2017), vacated and remanded on other grounds by 955 F.3d 936 (considering whether a stipulated dismissal after a motion for attorneys' fees and finding that *Microsoft* "abrogated *Berger* (and, by implication *Concha*)").

Lastly, in reviewing a district court order compelling class arbitration, the Supreme Court confirmed in dicta in an arbitration case that the holding in *Microsoft* stood for the proposition that "plaintiffs cannot generate a final appealable order by voluntarily dismissing their claim." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1414 n. 2 (2019).

Defendants argue that none of the above cases or dicta are binding Ninth Circuit authority, and at the time of Defendants' voluntary dismissal, *Omstead* was still the law of the Ninth Circuit. The Court agrees with Plaintiffs that none of the above cases or dicta are mandatory authority. The Court also agrees that the Ninth Circuit had not made explicitly clear that *Omstead* overruled *Microsoft* until the Ninth Circuit's holding in *Langere*. However, again, change in law *alone* does not constitute an extraordinary circumstance justifying Rule 60(b) relief. *Phelps*, 569 F.3d at 1133. What the above cases do show is that there was nothing extraordinary about the Ninth Circuit's adherence to *Microsoft*. The decisions of our sister courts and the Supreme Court's own dicta in *Lamps Plus* explicitly foreshadowed the result in *Langere*. Indeed, the *Langere* panel even states that its decision "hardly breaks new ground," and merely "solemnize[s] what seems obvious." *Langere*, 983 F.3d at 1123.[1] Notably, Plaintiffs

[1] It is true that after making these statements, the *Langere* panel cites two Ninth Circuit cases which post-date Plaintiffs voluntary dismissal. However, these cases

were very much aware that *Microsoft* could potentially block their appeal. In their Reply Brief to the Ninth Circuit, Plaintiffs attempt to confine the scope of *Microsoft* to class certification orders. (Plaintiffs' RJN, Ex. 2 at 58.) As is the risk with any appeal, the Ninth Circuit disagreed with Plaintiffs analysis.[2]

Given the weight of authority both in this circuit and our sister circuits and Plaintiffs explicit awareness of *Microsoft*'s potential to overturn *Omstead*, the result of *Langere* was foreseeable, if not highly probable. There is a material difference between a Supreme Court case that changes Ninth Circuit law (*Microsoft*) and a subsequent Ninth Circuit case that simply applies that Supreme Court case (*Langere*). It is natural that a Supreme Court decision will have rippling consequences in the lower courts whereby the lower courts clarify their own precedent in light of new Supreme Court authority. It cannot be that each lower court decision then has the potential to open up otherwise final preexisting judgments, especially where the ultimate result was entirely foreseeable. Indeed, this procedural posture can be compared to the Supreme Court clarifying the law by resolving a circuit split—a procedural posture that the Ninth Circuit finds to be "hardly extraordinary" given the foreseeability that "the law might change in an unfavorable way." *Henson v. Fid.*

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simply follow the weight of authority in sister circuits which pre-date Plaintiffs' voluntary dismissal.

[2] Defendants also argue that the Ninth Circuit had recognized that *Microsoft* was expressly limited to denials of class certification in *Rodriguez v. Taco Bell Corp.*, 896 F.3d 952, 955. (9th Cir. 2018). However, there, the Ninth Circuit only acknowledge that *Microsoft* does not prevent appellate jurisdiction when a district court grants partial summary judgment as to some claims and grants the plaintiff's voluntary dismissal as to the remaining claims. *Rodriguez*, 896 F.3d at 955. Nowhere does the opinion explicitly state that *Microsoft* does not apply to motions to compel arbitration or that *Microsoft* is limited to class certification motions.

Nat'l Fin., Inc., 943 F.3d 434, 447 (9th Cir. 2019); *U.S. ex. rel. Garibaldi v. Orleans Parish Sch. Bd.*, 397 F.3d 334, 338–39 (5th Cir. 2005).

Ultimately, the record reveals that Plaintiffs should have known that the law might change unfavorably. They knowingly risked finality and their choice to move for a voluntary dismissal was the kind of "free, deliberate choice . . . not to be relieved from" through a Rule 60(b)(6) motion. *Strafford*, 801 F. App'x at 469 (citing *Ackermann v. United States*, 340 U.S. 193 (1950)). Accordingly, the Court determines that extraordinary circumstances are not present here. Although the Court concludes that the circumstances were not sufficiently extraordinary to justify 60(b)(6) relief, the Court nonetheless balances respect for finality with considerations of justice. *Phelps*, 569 F.3d at 1124.

B. Respect for the Finality of Judgments

In determining whether to reopen a case pursuant to Rule 60(b)(6), courts must balance respect for finality of judgments with considerations of justice. *Id.*

Here, Plaintiffs argue that Defendants' interest in finality is weak because Defendants knew that the case would not end when Plaintiffs' voluntarily dismissed Plaintiffs' case. Indeed, Defendants knew that Plaintiffs only sought dismissal in order to continue litigating their case in the Ninth Circuit. But the mere fact that Defendant *knew* the case would continue after dismissal does not mean that Defendant did not have any interest in the case's finality.

However, the Court finds that this factor is neutral. While the Court finds that Defendants indeed have some interest in finality, the prejudice they face does not appear to be any more than the "usual inconveniences any party faces when forced to re-litigate." *See Bouret-Echevarria v. Caribbean Aviation Maint. Corp.*, 784 F.3d 37, 46 (1st Cir. 2015). The Court finds that this does not necessarily amount to unfair prejudice.

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C. Whether Justice Requires Reopening Plaintiffs' Case

The Court now evaluates whether considerations of justice weigh in favor of reopening Plaintiffs' case pursuant to Rule 60(b)(6). *Phelps*, 569 F.3d at 1124. Under the circumstances of this case, considerations of justice weigh against reopening Plaintiffs' case.

Plaintiffs dismissed their case before arbitration so that the Ninth Circuit could consider this Court's Order compelling arbitration. Unlike the 60(b)(6) movants in cases such as *Gonzalez* and *Phelps*, whose cases were dismissed by courts, Plaintiffs here voluntarily sought dismissal with prejudice as a tactical maneuver. *Gonzalez*, 545 U.S. at 527; *Phelps*, 569 F.3d at 1123. Again, in the context of Rule 60(b)(6) motions, "free, calculated, deliberate choices are not to be relieved from." *Ackermann*, 340 U.S. at 198. Other courts have applied *Ackermann* to deny Rule 60(b) relief where a litigant seeks to avoid the consequences of a strategic choice that he later regrets. *Plotkin v. Pacific Tel. Co.*, 688 F.2d 1291, 1293 (9th Cir. 1982) ("calculated, deliberate choices are not to be relieved from under Fed. R. Civ. P. 60(b)"); *Wolff v. California*, 236 F. Supp. 3d 1154, 1161 (C.D. Cal. 2017) (In the context of a motion under Rules 60(b)(3) and 60(b)(6), a plaintiff "cannot be relieved" of the consequences of "a considered choice" even when "hindsight seems to indicate to him that his decision" was "probably wrong."). Moreover, as discussed in detail above, the consequences of Plaintiffs' voluntary dismissal tactic were entirely foreseeable, if not highly probable. Because Plaintiffs find themselves in this position as a result of their own tactics, considerations of justice weigh against reopening their case.

Ultimately, after determining that extraordinary circumstances are not present and balancing respect for the finality of judgments with considerations of justice, the Court finds that Rule 60(b) relief is not appropriate. The Court **DENIES** Plaintiffs' Motion based on the change in the law the Ninth Circuit announced in *Langere*.

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IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** Plaintiffs' Motion for Relief from Dismissal Order Pursuant to Rule 60(b)(6).

IT IS SO ORDERED.

Dated: September 15, 2021

HONORABLE ANDRÉ BIROTTE JR.
UNITED STATES DISTRICT COURT JUDGE