

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARGRETTY RABANG, *et al.*

Appellees,

vs.

ROBERT KELLY, JR., *et al.*

Appellants,

No. 17-35427

**APPELLEES' RESPONSE TO
APPELLANTS' MOTION FOR
VOLUNTARY DISMISSAL OF
APPEAL AND APPELLEES'
REQUEST FOR
AFFIRMATIVE RELIEF**

I. AFFIRMATIVE RELIEF SOUGHT

“Motions to dismiss that do not have the assent of both parties are not routine; they require a decision by the motions panel fixing the award of costs.” *Margulin v. CHS Acquisition Corp.*, 889 F.2d 122, 124 (7th Cir. 1989). Kelly Appellants did not confer with Rabang Appellees before filing their motion to voluntarily dismiss this appeal; therefore, the Rabang Appellees move this Court for an award of attorneys’ fees in the amount of \$103,971.50 and costs in the amount of \$1,782.47 to be paid in the form of a bond to the District Court for the Western District of Washington.

II. GROUNDS

Nearly a year into this hard-fought appeal, Kelly Appellants moved this Court to dismiss their appeal without conferring with Rabang Appellees, asserting superficial “changed circumstances” as the grounds for the dismissal. Motion for Voluntary Dismissal of Appeal at 2 (“Motion”). Kelly Appellants moved to dismiss their appeal not five hours after the District Court denied their Motion for Indicative Ruling Regarding Dismissal Pursuant to CR 62.1, CR 60(B)(4) and (5), and CR 12(H)(3). *Order, Margretty Rabang, et al., v. Robert Kelly, Jr., et al., No. 17-0088 (W.D. Wash. April 11, 2018), ECF No. 153*. Rabang Appellees have invested substantial time and resources into diligently defending this appeal and should be compensated.

III. LEGAL ARGUMENT

Fed. R. App. Proc. 42(b) provides that the court “may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due[,] . . . [a]n appeal may be dismissed on the appellant's motion on terms agreed to by the parties[,]” or an appeal may be dismissed on the appellant’s motion on terms “fixed by the court.” “Two of these options allow the matter of costs to be resolved amicably before the case ends; the third contemplates judicial determination of costs in the ordinary manner.” *Margulin*, 889 F.2d at 124. Because Kelly Appellants failed to consult or notify

Rabang Appellees, dismissal falls within this Court's discretion, as does a determination on Rabang Appellees' fees and costs. *Id.*; *Albers v. Eli Lilly & Co.*, 354 F.3d 644, 646 (7th Cir. 2004) ("When the parties do not agree on terms, dismissal is discretionary with the court.").

Kelly Appellants have "wield[ed] their interlocutory appeal as both a sword and shield, using it for whatever litigation position is most expedient." Order at 6, *Rabang*, No. 17-0088 ("While the Kelly Defendants now argue that the Court should issue an indicative ruling and not 'perpetuate a purposeless stay,' they have also vigorously argued that their interlocutory appeal divested the Court of jurisdiction to adjudicate the case. They have continually resisted Plaintiffs' discovery requests on those grounds, going as far as to not attend scheduled depositions.") (citations omitted). Indeed, this dismissal—filed only after the District Court issued its order denying their Rule 62.1 motion—is just the latest attempt by the Kelly Appellants to manipulate the federal judicial system.

Although Kelly Appellants agreed to pay "all reasonable costs and attorneys' fees incurred by [Rabang Appellees] in the preparation and other legal work incidental to their defense against Appellants Kelly on this appeal," Kelly Appellants failed to confer with Rabang Appellees regarding the amount of the award as is customary. *Id.* at 1-2; *Margulin*, 889 F.2d at 124. This Court should therefore use its discretion to condition a dismissal of this appeal upon Kelly

Appellants' payment to Rabang Appellees of all costs and attorneys' fees incurred in this appeal and other legal work incidental to this appeal. *Shellman v. United States Lines, Inc.*, 528 F.2d 675, 678 (9th Cir. 1975).

Relative to this appeal, Rabang Appellees incurred attorneys' fees in the amount of \$103,971.50 and costs in the amount of \$1,782.47, for a combined total of \$105,753.97. Affidavit of Anthony S. Broadman in Support of Appellees' Response to Appellants' Motion for Voluntary Dismissal of Appeal and Appellees' Request for Affirmative Relief.¹ This Court should order Kelly Appellants to pay that amount before granting Kelly Appellants' motion to dismiss. Because Kelly Appellants' word is manifestly not their bond, and because Rabang Appellees should not be forced to waste more time or money dealing with them in this regard, Kelly Appellants should be ordered to post a \$105,753.97 bond to the District Court.

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¹ As Kelly Appellants moved to dismiss without consulting or stipulating with Rabang Appellees and short of an entry of judgment here, Rabang Appellees are not filing this Response under Fed. R. App. Proc. 39. Should this Court request, Rabang Appellees will file a request for costs and fees per Fed. R. App. Proc. 39.

DATED this 19th day of April 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document, Appellees' Response To Appellants' Motion For Voluntary Dismissal Of Appeal And Appellees' Request For Affirmative Relief, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 19, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system to the following parties:

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Signed under penalty of perjury and under the laws of the United States this
19th day of April 2018.

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