IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
FOR THE NINTH CIRCUIT

MARGRETTY RABANG; OLIVE OSHIRO; DOMINADOR AURE; CHRISTINA PEATO; ELIZABETH OSHIRO, Appellees, vs. ROBERT KELLY, JR.; RICK D. GEORGE; AGRIPINA SMITH; BOB SOLOMON; LONA JOHNSON; KATHERINE CANETE; ELIZABETH KING GEORGE; KATRICE ROMERO; DONIA EDWARDS; RICKIE WAYNE ARMSTRONG, Appellants.	No. 17-35427 APPELLANTS' REPLY SUPPORTING MOTION FOR VOLUNTARY DISMISSAL OF APPEAL

Appellees do not ask this Court to deny the motion to dismiss. This Court should grant the motion and, like it did in *Shellman v. United States Lines, Inc.*, 528 F.2d 675, 678 (9th Cir. 1975), direct Appellees to submit their bill of costs for an award of reasonable fees and costs.

I. REPLY ARGUMENT AND AUTHORITIES

A. Appellees do not oppose dismissal.

Appellees in their response do not resist the outcome the motion seeks: dismissal of the appeal. Nowhere do the Appellees urge this Court to deny the motion. Appellees present no substantive opposition nor do they contend that circumstances weigh against dismissal. The Court should grant the unopposed relief of dismissal.

B. Pursuant to FRAP 42(b), which does not require a prior agreement with Appellees, the Court should dismiss and direct compliance with Circuit Rule 39 to set an award of reasonable fees and costs.

Fed. R. App. Proc. 42(b) allows appellants to seek voluntary dismiss of their appeal on terms "fixed by the court." Appellants Kelly have done so. This Court should grant the motion and direct Appellants Kelly "to pay to [appellees] all reasonable costs and attorneys' fees incurred… in the preparation and other legal work incidental to its defense… on

this appeal," exactly the procedure this Court employed in *Shellman v. United States Lines, Inc.*, 528 F.2d 675, 678 (9th Cir. 1975) ("We therefore grant Hartford's motion under the provisions of Federal Rule of Appellate Procedure 42(b) for the voluntary dismissal of its appeal, and order Hartford to pay to United States Lines all reasonable costs and attorneys' fees incurred by United States Lines in the preparation and other legal work incidental to its defense against Hartford on this appeal."), cert. denied, 425 US 936, 96 S Ct 1668, 48 L Ed 2d 177 (1976). At the conclusion of the *Sherman* opinion, the Court reiterates the grant of voluntary dismissal and directs appellee's counsel to submit a bill of costs within fourteen days, permits an opposition thereto, and directs that the mandate reflect the amount awarded. *Id*. at 681.

Consistent with this authority, Appellants Kelly agreed in their motion to pay reasonable fees and costs "set by the Court." As *Sherman* demonstrates, upon the order of dismissal the Court will establish the reasonable fees and costs in due

course. Fed. R. App. P. 42(b) expresses no preference whether dismissal be sought based on terms "agreed upon by the parties or fixed by the court." Both are equally acceptable.

Circuit Rule 39-1.6 provides a procedure for an application for an award of reasonable fees. The rule requires the party entitled to fees to provide information including (1) a detailed itemization of the tasks performed each date and the amount of time spent by each lawyer and paralegal on each task, (2) a showing the hourly rates are legally justified, and (3) an affidavit of accuracy. Circuit Rule 39-1.6(b)(1)-(3). *See also* Form 9.

Fed. R. Civ. P. 42(b) does not require an appellant to agree to an uncircumscribed blank check whereby an appellee can summarily assert a six-figure number for which appellant will be responsible without any judicial scrutiny.

Appellees appear to ask for a shortcut to the determination of their reasonable attorney fees and costs, suggesting that the Court should immediately award a precise

six-figure amount of fees and costs in the dismissal order with no documentation concerning the hours and tasks, no opportunity to object to any claimed fees and costs, and no oversight by this Court as to reasonableness. The bare Affidavit of Anthony Broadman (summarily asserting total hours, rates and a lump sum figure) is an insufficient basis for this Court to set terms, and is incompatible with Circuit Rule 39-1.6.

The Court should decline Appellees' invitation to abridge this Court's procedures to determine reasonable fees and costs. The shortcut requested is unnecessary and unsupported by authority. The Court should direct dismissal and the submission of a Cost Bill under Circuit Rule 39-1.6.

C. Appellees misconstrue the 7th Circuit's decision *Margulin v. CHS Acquisition Corp.*, 889 F.2d 122 (7th Cir. 1989), which has no bearing on the proposed dismissal.

Appellees argue on the basis of a Seventh Circuit authority, *Margulin v. CHS Acquisition Corp.*, 889 F.2d 122

(7th Cir. 1989), that it is unusual for a party to move dismiss without agreeing to terms with the appellees, and appear to suggest that this warrants dismissal including an immediate award of their undocumented six-figure claim for attorney fees and costs. They misconstrue *Margulin*, which decision is consistent with Ninth Circuit authority and the plain language of Fed. R. App. P. 42(b) and Circuit Rule 39-1.6 allowing for dismissal subject to terms set by the court upon proper application.

In *Margulin*, the Seventh Circuit established that "there are three ways to dismiss an appeal voluntarily: by signed stipulation of the parties, on the appellant's motion if the parties agree about costs, or on the appellant's motion with costs 'fixed by the court.'" 889 F.2d at 123-24. "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." *Id.* at 124. Appellants Kelly pursue the third option, requesting judicial determination of costs in

the ordinary manner. This is perfectly acceptable under *Margulin*.

Appellees inaptly cite *Margulin* throughout their Response as support for their assertion that Appellants had an obligation to reach an agreement with them on an amount of fees and costs. This is a misreading of *Margulin*, which concerned particular circumstances where the court clerk had summarily granted a motion for voluntary dismissal without allowing for terms to be sought or set. In *Margulin*, the motion for voluntary dismissal fell outside all three options because the appellant obtained no consent and did not raise the issue of a judicial determination of the costs due. The court clerk improvidently dismissed the appeal as if the motion were "routine" and failed to allow a response or action by the court to set the costs due. This prompted the Seventh Circuit to remark that the clerk should not have treated the motion to dismiss as "routine" and non-adversarial, stating,

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> The Clerk should not have treated this as a routine motion. It was at least partly adversarial, and the appellees should have been given an opportunity to respond. Motions to dismiss that do not have the asset of both parties are not routine; they require a decision by the motions panel fixing the award of costs.

Id. at 124. The Seventh Circuit's use of the word "routine" in this context did not mean that motions to dismiss that lack assent are improper or uncommon, as Appellees argue. *See Response* 1, 2-3. The Seventh Circuit simply meant that the clerk of the court should not have granted the motion as if it were a "routine," non-adversarial matter that could be summarily granted by the clerk.

Margulin underscores that the present motion is proper under Fed. R. Civ. P. 42(b), and this Court should set terms in the ordinary manner.

D. Appellees cite no authority to support a bond requirement; under FRAP 42(b) it is sufficient that the Court establish the award to be included in the mandate.

Appellees request without authority that this Court require Appellants Kelly to post a bond in the District Court.

The Court should not, because Appellees offer no authority demonstrating that this is proper or necessary under Fed. R. App. P. 42(b). Neither the face of the rule nor any case law supports such a requirement. *Shellman v. United States Lines, Inc.* directs that the award be included in the mandate. 528 F.2d at 681. Appellants Kelly have acknowledged their obligation to pay the fees and costs set by this Court. Fed. R. Civ. P. 42(b) includes no additional requirement.

II. CONCLUSION

Based on the presumption in favor of dismissal, and the lack of objection to that relief by Appellees, this Court should grant the motion. This Court should direct Appellees to submit their cost bill pursuant to Circuit Rule 39-1.6 within fourteen days, permit an opposition thereto, and direct entry of the fees

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and costs awarded by the Court on the mandate issued to the lower court.

DATED this 26th day of April, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of April 2018, I electronically filed the foregoing APPELLANTS KELLY'S REPLY SUPPORTING MOTION FOR VOLUNTARY DISMISSAL with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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.

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