NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Angel Lopez-Valenzuela; Isaac Castro-Armenta, Plaintiffs, vs. Maricopa County; Joseph Arpaio, Maricopa County Sheriff, in his official capacity; William G. Montgomery, Maricopa County Attorney, in his official capacity, Defendants.	No. CV 08-660-PHX-SRB **ORDER**

Pending before the Court is Plaintiffs' Motion to Dismiss Count Four Without Prejudice and Motion for Final Judgment ("MTD") (Doc. 249).

I. BACKGROUND

Plaintiffs' Complaint contains seven claims challenging Arizona's Proposition 100, one of which remains. Plaintiffs claim that Proposition 100 and its implementing procedures are unconstitutional because they: (A) violate the substantive due process guarantee of the Fourteenth Amendment (Count One); (B) violate the procedural due process guarantee of the Fourteenth Amendment on account of the probable cause standard (Count Two) and the procedures at the initial appearance (Count Three); (C) violate the Fifth Amendment right against self-incrimination (Count Four); (D) violate the Sixth Amendment right to counsel

(Count Five); (E) violate the Excessive Bail Clause of the Eighth Amendment (Count Six); and (F) violate the Supremacy Clause (Count Seven). (*See* Doc. 1, Compl. ¶¶ 55-82.) The Court dismissed Count Seven in an Order signed by the Court on December 8, 2008. (*See* Doc. 47, Dec. 8, 2008, Order at 10-14.) In an Order dated March 29, 2011 (the "Summary Judgment Order"), the Court granted summary judgment in favor of Defendants on Counts One, Two, Three, Five, and Six of the Complaint. (*See* Doc. 246, Summ. J. Order at 16-17.) Unlike the facial challenges contained in their other claims, Count Four targets the implementation of Proposition 100. (Compl. ¶¶ 66-70.) Plaintiffs reserved Count Four for trial. (Summ. J. Order at 4.) Plaintiffs now move to amend the Complaint to dismiss Count Four, the only remaining claim in this action, without prejudice. (MTD at 1.) Plaintiffs also seek entry of final judgment on Counts One, Two, Three, Five, Six, and Seven. (*Id.*)

II. LEGAL STANDARDS AND ANALYSIS

Plaintiffs move to dismiss Count Four without prejudice so that they can pursue an appeal of the Summary Judgment Order. (MTD at 2.) Under Federal Rule of Civil Procedure 15(a), the Court may grant Plaintiffs leave to amend the Complaint in order to dismiss one or more claims. *See Hells Canyon Pres. Council v. United States Forest Serv.*, 403 F.3d 683, 689 (9th Cir. 2005). Rule 15(a) states that leave to amend a pleading "shall be freely given when justice so requires." *Accord Foman v. Davis*, 371 U.S. 178, 182 (1962) (leave to amend should be freely granted absent an apparent reason such as undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice, and futility of amendment); *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir. 1989) (same).

Defendants argue that the Court should deny Plaintiffs leave to amend because a dismissal without prejudice will lead to a lack of finality and the potential for "piecemeal litigation." (Defs.' Resp. in Opp'n to MTD at 2.) Defendants analogize to a motion for judgment pursuant to Rule 54(b). (*Id.*) However, Rule 54(b) is implemented in situations in which a party seeks a final judgment on certain claims or against certain defendants so that an appeal can proceed, while another portion of the case continues in the district court. *See*

Fed. R. Civ. P. 54(b); *see also Adonican v. City of L.A.*, 297 F.3d 1106, 1107-08 (9th Cir. 2002) (explaining that Rule 54(b) is the proper mechanism to obtain a judgment on some, but not all, of the claims in a case before proceeding with the rest of the case).

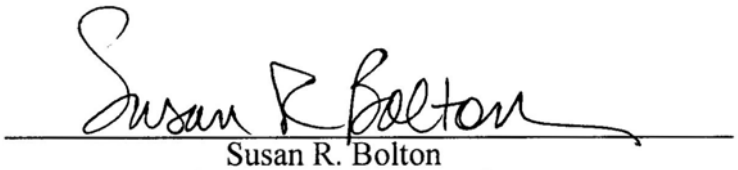
Here, Plaintiffs do not seek appellate review of the Summary Judgment Order while continuing to pursue Count Four. Instead, they state that they may or may not refile their claim challenging the implementation of Proposition 100 after they pursue their appeal of the Summary Judgment Order. (MTD at 3.) While there is some overlap between the considerations involved in applying Rules 15(a) and 54(b), Defendants' analogy is unpersuasive. Plaintiffs wish to forgo litigation on Count Four, not pursue it in the district court while their other claims move through the court of appeals. A motion under Rule 15(a) is the appropriate manner in which to do this. *See Hells Canyon*, 403 F.3d at 689 (explaining that a Rule 41(a) voluntary dismissal of part of an action is properly labeled an amendment under Rule 15 because Rule 41(a) only encompasses dismissal of an entire action or an entire defendant).

A motion for voluntary dismissal should be granted "unless a defendant can show that it will suffer some plain legal prejudice as a result." *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001) (citations omitted). "[L]egal prejudice means prejudice to some legal interest, some legal claim, some legal argument." *Id.* at 976 (internal quotation and citation omitted). Defendants have not shown that they will experience plain legal prejudice if the Court grants Plaintiffs' Motion. Defendants might be inconvenienced by a dismissal without prejudice and the possibility of future litigation of Count Four, but that does not justify denying Plaintiffs' request to amend their Complaint in order to effectuate a voluntary dismissal of the one remaining claim in this action. *See Mechmetals Corp. v. Telex Computer Prods., Inc.*, 709 F.2d 1287, 1294 (9th Cir. 1983) ("The Supreme Court has stated that 'the mere prospect of a second lawsuit' is not the type of prejudice that should prevent the district court from granting voluntary dismissal without prejudice . . . ." (quoting *Cone v. W. Va. Pulp & Paper Corp.*, 330 U.S. 212, 217 (1947)). The decision regarding how to proceed with this action at both the district court and appellate court levels is Plaintiffs' to make.

IT IS THEREFORE ORDERED granting Plaintiffs' Motion to Dismiss Count Four Without Prejudice and Motion for Final Judgment (Doc. 249).

IT IS FURTHER ORDERED directing the Clerk to enter judgment of dismissal without prejudice as to Count Four and to enter final judgment on Counts One, Two, Three, Five, Six, and Seven.

DATED this 13th day of May, 2011.



Susan R. Bolton
United States District Judge