IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

XIAOXING XI, *et al.*,	:	
Plaintiffs,	:	Civil Action
	:	No. 17-2132
v.	:	Jury Trial Demanded
FBI SPECIAL AGENT ANDREW HAUGEN, *et al.*,	:	
Defendants.	:	

ORDER

AND NOW, this _____ day of _____, 2021, upon consideration of Plaintiffs' Unopposed Motion to Certify Final Judgment, the Court finding that for the reasons stated in the Motion there is no just reason to delay the entry of final judgment as to fewer than all claims and parties, **IT IS ORDERED** that pursuant to Fed. R. Civ. P. 54(b) final judgment will be entered for the reasons stated in the Court's Memorandum Opinion and Order of April 1, 2021 (ECF 58, 59) as follows:

1. With respect to Counts I through III of the Second Amended Complaint, judgment is entered for Defendant FBI Special Agent Andrew Haugen and against Plaintiff Xiaoxing Xi; and

2. With respect to Counts IV through IX of the Second Amended Complaint, judgment is entered for Defendant United States of America and against Plaintiffs.

BY THE COURT:

_____
R. BARCLAY SURRICK, J.

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PLAINTIFFS' UNOPPOSED MOTION TO CERTIFY FINAL JUDGMENT

Plaintiffs move the Court pursuant to Fed. R. Civ. P. 54(b) for an entry of final judgment as to the claims dismissed in the Court's April 1, 2021, Memorandum Opinion and Order. Counsel for Defendants have informed counsel for Plaintiffs that Defendants do not oppose the relief requested in this Motion. Based on the lack of opposition, and, for the reasons stated in the attached Memorandum of Law, Plaintiffs respectfully request that the Court grant the Motion and enter the foregoing proposed Order.

Respectfully submitted,

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MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION TO CERTIFY FINAL JUDGMENT

Pursuant to Federal Rule of Civil Procedure 54(b), Plaintiffs respectfully move this Court to certify as final its judgments as to Counts I–IX of the Second Amended Complaint, ECF No. 26. Defendants do not oppose the relief requested in the Motion.

BACKGROUND

The federal government investigated and indicted Professor Xiaoxing Xi based on its recklessly erroneous belief that Professor Xi was stealing trade secrets to benefit China. The government dismissed the indictment when it became obvious that its accusations against Professor Xi were baseless. Professor Xi, his wife, and his daughter brought this suit to redress harms they suffered as a result of the government's abandoned prosecution. They filed the Second Amended Complaint—the operative complaint—on October 31, 2017. The Second Amended Complaint presented multiple claims for relief, which it described in Counts I through X. ECF No. 26 at 26–33.

Counts I through III sought damages against Defendant Andrew Haugen, in his individual capacity, for violations of the Constitution.[1] *Id.* at 26–28. The vehicle for the claims described in Counts I through III was the cause of action recognized by the Supreme Court in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

Counts IV through IX sought damages against the United States for the commission of state-law torts by federal employees acting within the scope and course of their employment. ECF No. 28 at 28-31. The vehicle for the claims described in Counts IV through IX was the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346.

On March 31, 2021, this Court entered an order dismissing with prejudice all claims described in Counts I through IX. ECF No. 59. First, the Court ruled that under recent developments in *Bivens* doctrine, the facts alleged in the Second Amended Complaint did not support claims against Defendant Haugen in his individual capacity.[2] ECF No. 58 at 43. Consequently, pursuant to Rule 12(b)(6), the Court dismissed with prejudice the claims described in Counts I through III. ECF No. 59 at 1. Second, the Court ruled that it lacked jurisdiction over Plaintiffs' claims under the FTCA. ECF No. 58 at 57. Consequently, pursuant to Rule 12(b)(1), the Court dismissed with prejudice the claims described in Counts IV through IX. ECF No. 59 at 1.

[1] Counts I through III also describe claims for damages against various John Doe defendants. ECF No. 58 at 1 n.1. Because Plaintiffs "have not yet identified or served process upon the John Doe Defendant(s)," *id.*, those defendants are not parties for purposes of the Rule 54(b) analysis. *See United States v. Studivant*, 529 F.2d 673, 674 (3d Cir. 1976) (holding that defendants who had not been served were "not parties within the meaning of [Rule] 54(b)").

[2] The Court further held that, even if Plaintiffs could pursue their claims against Haugen in his individual capacity under *Bivens*, Haugen would be entitled to qualified immunity. ECF No. 58 at 53, 55.

The Court has not ruled on Count X, which describes claims for injunctive relief against the Federal Bureau of Investigation, the U.S. Department of Justice, and the National Security Agency. ECF No. 58 at 31–33.

LEGAL STANDARD

When an action includes multiple claims or parties, a court "may direct entry of a final judgment as to one or more, but fewer than all, claims or parties," so long as the court "expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b).

ARGUMENT

In general, a ruling that disposes of some, but not all, claims or parties to a lawsuit is not an appealable "final judgment." 28 U.S.C. § 1291; *Elliott v. Archdiocese of New York*, 682 F.3d 213, 219 (3d Cir. 2012). Rule 54(b), however, permits a district court to "certify" such a ruling as a final judgment, enabling a party to appeal the ruling even while some aspects of the suit remain unresolved. In this way, Rule 54(b) "attempts to strike a balance between the undesirability of piecemeal appeals and the need for making review available at a time that best serves the needs of the parties." *Elliott*, 682 F.3d at 220.

To be certified as a final judgment under Rule 54(b), a ruling must meet two conditions. First, the ruling must be final with respect to either a party or a claim, but not to *all* parties or *all* claims. Fed. R. Civ. P. 54(b). Second, there must be "no just reason for delay[ing]" an appeal of the decision. *Id.* The Court's decisions disposing of the claims described in Counts I through IX, ECF No. 59, satisfy both conditions.

I. The Court's rulings represent final judgments for purposes of Rule 54(b).

A. The Court's rulings as to Defendant Haugen are final for purposes of Rule 54(b).

In multi-party litigation, a district court may certify a ruling under Rule 54(b) when the ruling is final with respect to one or more, but not all, of the parties. A ruling is final in this sense

when it "disposes of all the rights or liabilities of" a party. *Sussex Drug Prod. v. Kanasco, Ltd.*, 920 F.2d 1150, 1153 (3d Cir. 1990).

Here, the Court has ruled that Plaintiffs' claims for damages against Defendant Haugen in his individual capacity cannot proceed under the cause of action recognized in *Bivens*. ECF No. 58 at 43. All of Plaintiffs' claims for damages against Defendant Haugen in his individual capacity—*i.e.*, the claims described in Counts I through III—rely on the cause of action articulated in *Bivens*. Thus, the Court's ruling that a *Bivens* remedy is unavailable to Plaintiffs disposes of all the liabilities of Defendant Haugen in his individual capacity, and the ruling is final for purposes of Rule 54(b).

B. The Court's rulings on the claims described in Counts I through IX are final for purposes of Rule 54(b).

A ruling may also be certified under Rule 54(b) when it is final with respect to one or more, but not all, of the claims presented by the litigation. In the multi-claim context, "[f]inality is defined by the requirements of 28 U.S.C. § 1291, which are generally described as ending the litigation on the merits and leav[ing] nothing for the court to do but execute the judgment." *Sussex Drug Prod. v. Kanasco, Ltd.*, 920 F.2d 1150, 1153 (3d Cir. 1990) (quotation marks omitted).

The Court's rulings on the claims described in Counts I through IX are final within the meaning of Rule 54(b). The Court has dismissed with prejudice the claims described in Counts I through III for failure to state a claim, and has dismissed with prejudice the claims described in Counts IV through IX for lack of subject-matter jurisdiction. ECF No. 59 at 1. Generally, dismissals with prejudice for failure to state a claim or for lack of subject-matter jurisdiction end the litigation on the merits and confer appellate jurisdiction under 28 U.S.C. § 1291. *See Jaroslawicz v. M&T Bank Corp.*, 962 F.3d 701, 708 (3d Cir. 2020) (failure to state a claim);

Swiger v. Allegheny Energy, Inc., 540 F.3d 179, 180 (3d Cir. 2008) (subject-matter jurisdiction). Likewise, the Third Circuit views such dismissals as final for purposes of Rule 54(b) when they apply to some, but not all, claims. *See, e.g.*, *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1046 (3d Cir. 1977) (exercising jurisdiction over appeal from dismissal for failure to state a claim where district court certified judgment under Rule 54(b)); *Cooper v. Comm'r*, 718 F.3d 216, 220 (3d Cir. 2013); (exercising jurisdiction over appeal from dismissal for lack of subject-matter jurisdiction where district court certified judgment under Rule 54(b)); *Delaware Valley Citizens Council for Clean Air v. Davis*, 932 F.2d 256, 263–64 (3d Cir. 1991) (same).

II. There is no just reason for delay.

When a district court has made dispositive rulings as to some, but not all, parties and claims, it may certify those rulings as appealable final judgments if it "expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b). This determination is a matter of the court's discretion, to be made "in the interest of sound judicial administration." *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980).

The Third Circuit has explained that a district court exercising its discretion to certify a final judgment under Rule 54(b) "should consider":

> (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; [and] (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

Berckeley Inv. Grp., Ltd. v. Colkitt, 455 F.3d 195, 203 (3d Cir. 2006). These considerations uniformly support certification here.

First, the adjudicated and unadjudicated claims at issue here are distinct. The adjudicated claims fall into two categories: (1) claims for damages against Defendant Haugen in his individual capacity for violations of federal law, brought under *Bivens*; and (2) claims for damages against the United States for violations of state torts, brought under the FTCA. By contrast, the unadjudicated claims seek injunctive relief against specific federal agencies for violations of federal law; they have no connection to either *Bivens* or the FTCA, do not involve the recovery of damages, and do not implicate any defendants in their individual capacities.

Second, because the adjudicated claims seek damages (a retrospective remedy) and the unadjudicated claims seek injunctive relief (a prospective remedy), there is no possibility that further proceedings on the unadjudicated claims will moot the need for review of the adjudicated claims.

Third, it is unlikely that certification of the adjudication claims will oblige the Third Circuit to consider any issue twice. In summary, the issues presented by the adjudicated claims involve (1) whether Plaintiffs may seek damages from Defendant Haugen under *Bivens* and (2) whether this Court may exercise jurisdiction over Plaintiffs' claims for damages under the FTCA. The Third Circuit might also, in theory, consider (3) whether this Court correctly concluded that Defendant Haugen would be entitled to qualified immunity if Plaintiffs could press their claims under *Bivens*.[3] The same issues cannot arise in future review of the unadjudicated claims for injunctive relief, as the unadjudicated claims bear no relation to *Bivens* or the FTCA, and the defendant agencies cannot assert qualified immunity. *See Carter v. City of Philadelphia*, 181 F.3d 339, 346–47 (3d Cir. 1999) (holding that certification of final judgments

[3] The Court noted that its conclusions as to Defendant Haugen's qualified immunity were likely *dicta*. ECF No. 58 at 15.

under Rule 54(b) posed "no real risk of duplicative appeals" when judgments were adjudicated based on defenses not available to remaining defendants).

Fourth, no claim or counterclaim in this action could result in an offset against the adjudicated claims.

Finally, the delay in this proceeding has already been significant and further passage of time threatens to severely prejudice Plaintiffs as they seek redress for the government's wrongful investigation and prosecution of Professor Xi. Briefing on Defendants' motions to dismiss was completed on May 22, 2018, more than three years ago, yet the motion to dismiss Count X remains pending. While this case presents several important legal questions warranting close analysis, it is vital that Plaintiffs have the opportunity to litigate those questions in the Third Circuit before the evidence in this case grows stale. *See* ECF 58 at 52 ("To the extent that Haugen, in fact, committed these errors, it cannot be denied that Xi and his family have suffered greatly as a result."). Should Plaintiffs ultimately prevail in an appeal, discovery will proceed more quickly, efficiently, and fairly in this Court the sooner it begins. Moreover, the legal rulings that underpin the Court's decision on Counts I through IX are distinct from the central questions it is still considering with respect to Count X. There is no reason appellate review of the rulings on Counts I through IX should not get underway immediately, and certification of these rulings now will serve the interests of justice.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court grant this motion and certify as final judgments its rulings as to Counts I through IX of the Second Amended Complaint.

Respectfully submitted,

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