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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

WINNEMEM WINTU TRIBE, in their tribal
and individual capacities; Caleen Sisk, et al.,

Plaintiffs,

v.

United States Forest Service,

Defendant.

CASE NO. 2:09-cv-01072 KJM KJN

**NOTICE OF MOTION AND
MOTION TO STRIKE SIXTH
CLAIM FOR RELIEF IN THIRD
AMENDED COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: December 14, 2012
Time: 10:00 a.m.
Place: Courtroom 3, 15th Floor
501 I Street, Sacramento
Judge: Hon. Kimberly J. Mueller

NOTICE OF MOTION AND MOTION

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that defendant United States Forest Service hereby moves to strike the Sixth Claim For Relief in plaintiffs' Third Amended Complaint under Federal Rule of Civil Procedure 12(f) because it asserts new claims and theories of liability that exceed the scope of the Court's July 27, 2012 order granting leave to amend, and it violates Rule 15(a)(2) of the Federal Rules of Civil Procedure which authorizes amendments only with the opposing party's written consent or the court's leave .

The parties are in the process of meeting and conferring regarding possible resolution of this motion. Defendant's counsel was reminded of the Court's meet and confer requirement just prior to the motion filing deadline, when reviewing the Court's available hearing dates. Defendant's counsel has

requested that plaintiffs agree to withdraw the Sixth Claim for Relief and has provided plaintiffs' counsel with the legal bases for the request, which are also set forth in the following memorandum of points and authorities. Given the belated timing of the request, the parties could not complete the meet and confer process prior to the motion filing deadline.

The motion is based on this notice, the following memorandum of points and authorities, pleadings on file in this case, and matters of which the Court may or must take judicial notice.

DATED: November 5, 2012

BENJAMIN B. WAGNER
United States Attorney

By: /s/ Lynn Trinka Ernce
LYNN TRINKA ERNCE
Assistant United States Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

Introduction

Plaintiffs originally filed this action on April 19, 2009 – more than three-and-a-half years ago – but the case still remains at the pleading stage. Most recently, the Court granted in part and denied in part defendants' motion to dismiss plaintiffs' second amended complaint ("SAC"). The Court's order has substantially narrowed the claims in the case, and the only defendant remaining is the United States Forest Service ("USFS"). The only claim for which the Court granted leave to amend was plaintiffs' claim in the SAC under the Archaeological Resources Protection Act ("ARPA") against USFS related to the Antler's Bridge Replacement Project.

However, the Court did not grant plaintiffs leave to assert new claims or theories of liability against USFS related to Antler's Bridge. Yet, in their third amended complaint ("TAC"), plaintiffs have abandoned the ARPA claim that they asserted in the SAC, and they now are asserting new claims related to Antler's Bridge against USFS under the Native American Grave Protection and Repatriation Act ("NAGPRA") and ARPA in their sixth claim for relief.

The Court should strike plaintiffs' new Antler's Bridge claims because they exceed the scope of leave to amend granted in the Court's order. Also, the amendments violate Rule 15(a)(2) of the Federal Rules of Civil Procedure, because USFS does not consent and plaintiffs have not sought leave of Court to amend. Requiring USFS to respond to a moving target at this late date would be unfair and prejudicial.

Applicable Standards

Rule 12(f) provides the Court with the authority to strike from a pleading an “insufficient defense or any redundant, immaterial, impertinent or scandalous matter.” Fed. R. Civ. P. 12(f). “The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial.” *Whittlestone, Inc. v. HandiCraft Co.*, 618 F.3d 970, 973 (9th Cir. 2010) (quoting *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev’d on other grounds*, 510 U.S. 517 (1994)). The Court may act to strike a pleading on its own, or on a motion made by a party before responding to a pleading. Fed. R. Civ. P. 12(f). As an additional basis for striking improper pleadings, a district court has “inherent power over the administration of its business. It has inherent authority . . . to promulgate and enforce rules for the management of litigation . . .” *Spurlock v. F.B.I.*, 69 F.3d 1010, 1016 (9th Cir.1995) (citations omitted).

Under Rule 15(a) of the Federal Rules of Civil Procedure, a party may amend a pleading as a matter of course within 21 days after serving it. Fed. R. Civ. P. 15(a)(1). But “[i]n all other cases, a party may amend its pleading only with the opposing party’s written consent or the court’s leave.” Fed. R. Civ. P. 15(a)(2).

Argument

The Court should strike the Sixth Claim for Relief in its entirety because it asserts new claims under NAGPRA and ARPA that exceed the scope of leave to amend granted by the Court and because the unauthorized claims violate Rule 15(a)(2), which requires leave of court to amend.

In the SAC, plaintiffs alleged that USFS violated the ARPA by failing to act proactively during the initial site management phase of the Antler’s Bridge project. *See* SAC, ¶ 160. They claimed that the USFS failed to exercise responsibility by allowing CalTrans to violate its Memorandum of Understanding (MOU) with the Winnemem. *See id.*, ¶ 161. The SAC alleges that USFS did not adequately preserve midden material removed from the site to determine if human remains could be found. *See id.*, ¶ 162. And they alleged that the USFS retained possession of artifacts recovered the site without a record or plan and refused to disclose the disposition of the artifacts to the Winnemem. *Id.*

In its order on the motion to dismiss the SAC, the Court stated that the only allegations in the SAC which “appear to come close to stating a claim under ARPA” was the allegation that, at Antler’s Bridge,

“the USFS has retained possession of artifacts recovered from the site without plan or record as required by ARPA and refuses to disclose the disposition of these items to the Winnemem Wintu Tribe.” Docket 82 (Order), at 20-21. However, the Court explained that, “[a]s pleaded, the activity leading to discovery of the artifacts falls under an ARPA exclusion because it was in conjunction with a separately authorized project that was not directed to unearthing archaeological resources.” *Id.* at 21. The Court stated that, “Plaintiffs do not articulate the importance of the Memorandum of Understanding with CalTrans or why USFS should be responsible for the actions of a third party.” *Id.* Therefore, the Court granted plaintiffs leave to amend to attempt to cure the foregoing deficiencies because “the SAC is the first opportunity plaintiffs have had to allege this claim.” *Id.*

Rather than addressing the specific deficiencies in the ARPA claim identified by the Court, the TAC asserts new Antler’s Bridge claims against USFS under NAGPRA. Specifically, plaintiffs claim that USFS violated NAGPRA because it allegedly:

- Did not halt work in the Antler’s Bridge area after Caltrans workers inadvertently discovered “sacred objects” there (TAC, ¶ 71);
- Did not consult with the Winnemem about the “sacred objects” (*Id.*);
- Did not return the objects as required by NAGPRA (*Id.*);
- Did not inform the Winnemem about how the midden was handled and placed (*Id.*); and
- Did not inform the Winnemem if the midden was sifted for remains, what items were found, where the items are stored, and who has custody (*Id.*).

Presumably based on the Court’s finding that “the activity leading to discovery of the artifacts falls under an ARPA exclusion,” (Order at 21) plaintiffs have abandoned their ARPA claim from the SAC and they are now asserting the foregoing alleged acts by USFS violate NAGPRA.

The TAC also asserts a new ARPA claim based on allegations that USFS excluded them from: meetings regarding “the inadvertent effects of the excavation” at Antler’s Bridge, consultation leading to the granting of an ARPA permit to CalTrans for further excavation at Antler’s Bridge, and consultation regarding planned excavation pursuant to the permit. TAC, ¶ 72.

The Court should strike the new NAGPRA and ARPA claims for Antler’s Bridge in their entirety. Both of these claims, which are being raised for the first time in the TAC, exceed the scope of leave to amend granted by the Court in its order dismissing the Antler’s Bridge ARPA claim in the SAC.

1 Additionally, the Court should strike the new claims because plaintiffs did not seek and obtain leave of
 2 court to assert the new claims under Rule 15. *See Crane v. M. Yarborough*, 2012 WL 1067965, *13 and
 3 n.14 (C.D. Cal. Feb. 6, 2012) (stating that it would be appropriate to strike plaintiff's first amended claim
 4 "because the addition of such claim which has been raised for the first time in the [SAC] exceeds the
 5 scope of leave to amend" and because they had not obtained leave of court under Rule 15) (citing
 6 *Kennedy v. Full Tilt Poker*, 2010 WL 3984749, *1 (C.D. Cal. 2010) (same); *PB Farradyne, Inc. v.*
 7 *Peterson*, 2006 WL 2578273, *3 (N.D. Cal. 2006) (striking new theory of liability without leave to amend
 8 because it was outside scope of leave to amend granted by court); *Serpa v. SBC Telecommunications, Inc.*,
 9 2004 WL 2002444, *3 (N.D. Cal. 2004) (striking new claim asserted for first time in amended complaint
 10 because it exceeded scope of leave to amend)); *Concerned Citizens for a Safe Community*, 2011 WL
 11 2971000, *2 (D. Nev. 2011) (striking new claims in SAC because they exceeded the scope of leave
 12 granted by court and plaintiffs had not requested or obtained leave under Rule 15(d); *cf. Siskiyou Reg'l*
 13 *Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545, 559-60 (9th Cir. 2009) (affirming district court decision
 14 to strike intervenor's answer when answer "exceeded the bounds" of limited intervention granted).

15 Finally, the Court should strike the new claims because, requiring USPS to respond to claims that
 16 amount to a moving target, after having been involved in this litigation for three-and-a-half years so far
 17 without getting past the pleading stage is unfair and prejudicial.

18 Conclusion

19 For all of the foregoing reasons, the Court should strike plaintiffs' Sixth Claim for Relief in their
 20 TAC in its entirety.

21 DATED: November 5, 2012

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