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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

TAMMY WILHITE, Plaintiff, v. PAUL LITTLELIGHT, LANA THREE IRONS, HENRY PRETTY ON TOP, SHANNON BRADLEY, and CARLA CATOLSTER, Defendants.	Case No. CV-19-20-BLG-SPW-TJC **DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S RULE 12(f) MOTION TO STRIKE**

Defendants, Paul Littlelight, Lana Three Irons, Henry Pretty On Top, Shannon Bradley, and Carla Catolster (collectively hereinafter "Defendants"), through counsel, respectfully submit this Brief in Opposition to Plaintiff's Rule 12(f) Motion to Strike.

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INTRODUCTION

Plaintiff's counsel's Motion to Strike may not be applied to Defendants' Motion to Dismiss based on res judicata, which is a separate affirmative defense. Since Rule 12(b)(6) motions, pursuant to Rule 12(h)(2), can be raised at any time, even at trial pursuant to Rule 12(h)(2)(C), it would be futile and improper for the Court to strike Defendants' Motion to Dismiss. As stated in the Federal Civil Rules Handbook, 2017 ed., "[t]his "consolidation" provision … does not apply to motions allowed under other Rules or laws, nor does it apply to affirmative defenses (which remain preserved, even after a Rule 12 motion, if timely asserted in the responsive pleading)." *Id.*, p. 496. It further states that a Rule 12(b)(6) motion is not waived if asserted before the close of trial. *Id.*, p. 500. Rule 12(g)(2) itself excludes non-waivable motions which are set out in 12(h)(2) and include the res judicata motion Defendants have filed here. Therefore, Plaintiff's Motion to Strike is not well taken and should be denied.

Additionally, Defendants' present Motion to Dismiss based on res judicata is not one of the listed Rule 12(b) motions, nor is it a Rule 12(c), 12(e) or 12(f) motion. As such, Rule 12(g) does not apply. Simply, Plaintiff's analysis is wrong.

The Ninth Circuit U.S. Court of Appeals has recently explained that interpreting Rule 12(g)(2) to foreclose additional motions to dismiss under Rule 12(b) "can produce unnecessary and costly delays, contrary to the direction of Rule

1." *See In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 318 (9th Cir. 2017). In other words, Rule 12(g) should not be used to strike Defendants' substantive defense in this case because resolution of that motion would resolve the case. As explained below, Defendants did not file each of their Rule 12 motions to dismiss for the purposes of delay, nor to avoid word limits. Instead, Defendants filed each motion to dismiss separately because of its nature and the timing of the Defendants' receipt of supporting evidence. For the reasons set forth below, the Court should deny Plaintiff's Rule 12(f) Motion to Strike.

PROCEDURAL HISTORY

Plaintiff filed her Complaint on February 22, 2019, and Defendants timely responded to that pleading on April 15, 2019, by filing a motion to dismiss. Dkt. Nos. 1 and 4. Defendants' first motion to dismiss is based on Federal Tort Claims Act ("FTCA") exclusivity, which bars Plaintiff's claims. *See* Dkt. No. 4.

Subsequently, Defendants filed a second motion to dismiss based on res judicata as a result of dismissal of Plaintiff's identical claim in prior litigation. Dkt. 12. This is a distinct issue from Defendants' initial motion premised on FTCA exclusivity. However, either motion, if granted, will result in a similar conclusion that Plaintiff's claim should be dismissed.

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Defendants' first motion to dismiss based on FTCA exclusivity was fully briefed as of May 20, 2019. Dkt. No. 11. The Court has not yet issued an order on that motion.

Defendants' second motion to dismiss, premised on res judicata, has not yet been fully briefed. Defendants could not file that motion until they had obtained supporting affidavits. *See* Dkt. Nos. 13-6, 13-7, 13-8.

Defendants filed each of their motions to dismiss as soon as they were able and in an order that made procedural sense. They were not filed separately for purposes of delay, or to avoid word limits. Instead, Defendants filed them separately due to the timing of defense counsel's receipt of supporting documents and evidence and in an effort to facilitate the Court's consideration of each of the separate and distinct issues raised by each motion.

ARGUMENT

I. PLAINTIFF'S MOTION TO STRIKE IS IMPROPER

Plaintiff has styled her Motion as a Motion to Strike pursuant to Rule 12(f), Fed. R. Civ. P. Rule 12(f) permits the Court to strike "from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." "The standard for striking under Rule 12(f) is strict." *In re Catanella & E.F. Hutton & Co. Sec. Litig.*, 583 F. Supp. 1388, 1400 (E.D. Penn. 1984). The Ninth Circuit has held that only pleadings, not motions or exhibits to motions, are

subject to a motion to strike pursuant to 12(f), and that the purpose of a Rule 12(f) motion "is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983).

Here, Plaintiff seeks to strike Defendants' most recent motion to dismiss, arguing it is improper pursuant to Rule 12(g). Plaintiff has relied on an improper procedural mechanism, and her Motion should be denied on that ground alone. However, the merits of Plaintiff's Motion also require denial.

II. RULE 12(g) PERMITS MULTIPLE MOTIONS TO DISMISS WHEN NOT FILED FOR PURPOSES OF DELAY

Contrary to Plaintiff's use of *Apple iPhone Antitrust Litigation, supra,* that case actually supports denial of her Motion to Strike. The Ninth Circuit, in *Apple iPhone Antitrust Litigation*, examined the import and application of Rule 12(g). *Apple iPhone*, 846 F.3d at 317-20. Rule 12(g)(2) states: "Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." If a defendant omits a defense from an earlier motion based on Rules 12(b)(2) through (5)—lack of personal jurisdiction, improper venue, insufficient process, and insufficient service of process—the defendant entirely waives that defense. *Apple iPhone*, 846 F.3d at 317 (citing Fed. R. Civ. P. 12(h)(1)(A)). However, if a defendant omits a defense

under Rule 12(b)(6)—failure to state a claim for which relief can be granted—the defendant does not waive that defense. *Id.* Instead, the defendant may raise that defense in "other ways" identified in Rule 12(h)(2)—in a pleading under Rule 7, in a post-answer motion under Rule 12(c), or at trial. *Id.* at 317-18.

The Ninth Circuit considered how to interpret and enforce Rule 12(g), and it determined it was appropriate to "read Rule 12(g)(2) in light of the general policy of the Federal Rules of Civil Procedure, expressed in Rule 1. That rule directs that the Federal Rules 'be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.'" *Id.* at 318 (citing Fed. R. Civ. P. 1). The court concluded that "[d]enying late-filed Rule 12(b)(6) motions and relegating defendants to the three procedural avenues specified in Rule 12(h)(2) can produce unnecessary and costly delays, contrary to the direction of Rule 1." *Id.*

The result of denying or striking later-filed motions to dismiss, as the *Apple iPhone* court discussed and as Plaintiff argues for here, would simply result in Defendants re-filing the exact same arguments as a Rule 12(c) motion. *See Id.* at 318-19 (quoting *Allstate Ins. Co. v. Countrywide Fin. Corp.*, 824 F.Supp.2d 1164, 1175 (C.D. Cal. 2011)). "[T]he parties would repeat the briefing they have already undertaken, and the Court would have to address the same questions in several months." *Id.* (citation and internal quotation marks omitted). Addressing

Defendants' Motion to Dismiss on its merits now serves judicial economy and reflects the "practical wisdom" the Ninth Circuit recognized in *Apple iPhone*. *Id.* at 319.

The Ninth Circuit also noted that even if a motion to dismiss is filed late, so long as it does not appear to have been filed "for any strategically abusive purpose," any error in considering the motion would be harmless. *Id.* at 320. Like the defendants in *Apple iPhone*, Defendants here have properly, and as promptly as possible, moved to dismiss Plaintiff's Complaint consistent with applicable law and have not done so for any strategically abusive or improper purpose. *Id.*

Because considering and deciding Defendants' first and second motion to dismiss on is merits will "materially expedite[] the district court's disposition of the case, which [is] a benefit to both parties," the Court should deny Plaintiff's Rule 12(f) Motion to Strike. *Id.*

III. THE COURT SHOULD NOT EMPLOY LR 7.1(d)(2)(D) TO DENY DEFENDANTS' MOTIONS

Local Rule 7.1(d)(2)(D) grants the Court additional discretion to deny "serial motions" if they are filed "to avoid word limits." Plaintiff's reliance on this rule is misplaced. Defendants' motions to dismiss are based on distinct principles of law (FTCA exclusivity versus res judicata) and do not constitute "serial motions." Indeed, the local rule is designed to avoid serial motions related to the waivable defenses listed in Rule 12(b)(2-5) and Rule 12(g)(2) makes that it excepts out non-

waivable defenses (which include the separate and distinct motions Defendants have filed in this case).

Further, Defendants did not file their motions to dismiss in succession to avoid word limits or otherwise for purposes of delay. As stated above, each motion to dismiss was filed as soon as Defendants had received supporting evidence and had sufficient time to draft the motion. Moreover, each motion to dismiss is premised on completely separate legal grounds. This further demonstrates that the motions were not filed to avoid word limits.

Defendants therefore ask the Court to follow the Ninth Circuit's common sense interpretation of Rule 12(g)(2) by denying Plaintiff's Rule 12(f) Motion to Strike and considering and deciding the two pending motions to dismiss, based on the exclusive remedies provided in the FTCA and res judicata. Doing so will expedite consideration of those issues, both of which can be raised in later-filed pleadings should those motions be stricken at this time. As such, Plaintiff's Motion to Strike is simply an exercise in futility.

IV. RULE 12(g) CANNOT, AND SHOULD NOT, BE USED AS A WEAPON TO STRIKE SUBSTANTIVE AFFIRMATIVE DEFENSES.

The Plaintiff is asking this Court to strike an affirmative defense based on res judicata even before discovery is had and even before Defendants have asserted it as an affirmative defense in an Answer to the Plaintiff's Complaint. Striking an

affirmative defense based on misapplied procedural rules would violate Defendants' due process rights, because it would deny them a substantive defense guaranteed to them by existing law. Procedure does not, and should not, control over substance, particularly when the requested procedural rules do not even apply in this case. Plaintiff's Motion to Strike should be summarily denied as violative of Defendants' due process rights.

CONCLUSION

For the reasons stated above, the Court should deny Plaintiff's Rule 12(f) Motion to Strike Defendants' Rule 12 Motion to Dismiss on the grounds of res judicata.

DATED this 9th day of July, 2019.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By */s/ Evan M.T. Thompson*
Evan M.T. Thompson

Attorneys for Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that this Brief in Opposition to Plaintiff's Rule 12(f) Motion to Strike, is double spaced, is a proportionately spaced 14 point typeface, and contains 1,786 words.

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July, 2019, a true copy of the foregoing was served:

Via ECF to the following parties:

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