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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Gila River Indian Community, a federally recognized Indian tribe,

Plaintiff,

v.

Clint Cranford; Tyrel D. Cranford, David Schoebroek; Eva Schoebroek; Donna Sexton; Marvin Sexton; and Patrick Sexton,

Defendants.

No. CV-19-00407-TUC-SHR

RESPONSE TO PLAINTIFFS' JOINT MOTION TO STRIKE DEFENDANTS' MOTION TO DISMISS THE SAN CARLOS APACHE TRIBE'S COMPLAINT-IN-INTERVENTION AND MOTION FOR SANCTIONS

Defendants David Schoubroek, Eva Schoubroek, Donna Sexton, Marvin Sexton and Patrick Sexton ("Defendants") respond in opposition to Plaintiffs' Joint Motion To Strike Defendants' Motion To Dismiss The San Carlos Apache Tribe's Complaint-In-Intervention And Motion For Sanctions ("Motion to Strike").

Plaintiff the Gila River Indian Community ("GRIC") and Plaintiff-in-Intervention the San Carlos Apache Tribe ("Tribe" and, with GRIC, "Plaintiffs") claim that Defendants are causing delay and increasing fees incurred by filing the Motion to Dismiss (Dkt. 111) in response to the Tribe's Complaint-in-Intervention, while Plaintiffs themselves caused delay and increased costs by waiting until dispositive motion briefing before seeking the Tribe's intervention, and by waiting until the deadline to respond to Defendants' Motion to

Dismiss before filing a Motion to Strike. Further, the Tribe argued (in the Motion to Intervene) that certain defenses were only applicable to GRIC, and not to the Tribe, yet Plaintiffs assert that Defendants do not need any discovery to defend themselves against the Tribe specifically, and are apparently seeking a ruling that the scheduling order should not be modified to permit Defendants to conduct discovery on claims first asserted after the discovery deadline. Plaintiffs' arguments are inconsistent and baseless.

Defendants are entitled to respond to a complaint, such as the Complaint-in-Intervention, through a Rule 12(b) motion. There is nothing improper about the Motion to Dismiss. If Plaintiffs believe that these arguments have already been briefed (which, of course, they have not with respect to the Tribe), then their response should have been easy to prepare and file. Instead, Plaintiffs try to avoid Defendants' Tribe-specific arguments by moving to strike. The Motion to Strike, including the request for sanctions, should be denied. In the event that the Motion to Dismiss is denied, the Defendants should be permitted to conduct discovery on the Tribe's claims, as explained more below.

I. RELEVANT BACKGROUND

GRIC filed the Complaint on August 14, 2019. Defendants are individual landowners who maintain small family farms near Duncan, Arizona. GRIC alleges that Defendants pump waters of the Gila River from the wells on their properties to irrigate their lands. *See* Dkt. 1 at ¶ 5. GRIC claims that Defendants' pumping violates the Globe Equity No. 59 Decree ("Decree"), which is a consent Decree to which Defendants ***are not parties***. Based on these facts alone, prior to any discovery or development of the record, Defendants moved to dismiss the Community's Complaint (Dkt. 14) on September 26, 2019, arguing that the Court lacks subject-matter jurisdiction and is required to abstain in deference to the Arizona Superior Court's Gila River Adjudication ("Adjudication"). Assuming the truth of the Complaint's allegations for purposes of ruling on the first motion to dismiss, the Court denied that motion, finding that the Court has jurisdiction over the Complaint if Defendants'

wells are pumping subflow of the Gila River. *See* Dkt. 22.

As the case proceeded, Defendants disclosed and developed several defenses against GRIC. They issued public records requests where necessary to retrieve relevant documents. Among other things, Defendants (and their counsel) discovered two items that demonstrate that the Court's reasons for denying the first motion to dismiss are inapplicable. First, Defendants discovered a Judgment and Decree, entered in the Adjudication at the request of GRIC and others, that ***by its plain language*** orders that disputes between Decree parties and non-parties (such as this) over alleged violation of the Decree must be resolved in the Adjudication. *Id*. at 11:1-4. Second, Defendants discovered that their predecessors-in-interest filed Statements of Claimant in the Adjudication relating to the wells in question in this case. This means that the question of whether or not these exact wells pump river water will be determined by the Adjudication. *Id*. at 13:7-24. The Statements of Claimant also demonstrate the inaccuracy of the Court's assumption, when ruling on the first motion to dismiss, that Defendants' water right claims would not be adjudicated in the Adjudication. *See* Dkt. 22 (Order) at 13. ***Importantly, this Court has never ruled upon any jurisdictional arguments related to these documents.***

On November 9, 2021, over the Community's objections, the Court allowed Defendants to amend their Answer to more specifically plead defenses related to the Judgment and Decree, among other things. (Dkt. 70). On January 7, 2022, after dispositive motion briefing began, the Tribe moved to intervene as a plaintiff. (Dkt. 76). The Tribe also filed (not just lodged)[1] its Complaint-in-Intervention at that time, despite not yet having received leave to do so. (Dkt. 77). In the Tribe's intervention motion, it argued that

[1] Plaintiffs assert that the Tribe "lodged a complaint-in-intervention in accordance with Fed. R. Civ. P. 24(c)." Motion to Strike at 4:3. Rule 24(c) requires that a motion to intervene must "be accompanied by a pleading that sets out the claim or defense for which intervention is sought." The Rule does not mention actually *filing* the complaint without the motion to intervene first being granted. Instead, the proposed pleading should be provided as an exhibit, rather than being filed as the Tribe did.

intervention was necessary because Defendants had been allowed to amend their Answer to assert defenses related to the Amended and Restated Gila River Indian Community Water Rights Settlement Agreement, dated October 21, 2005 ("GRIC Agreement"), to which the Tribe is not a party. (Dkt. 76 at 4).

As the Court considered the Tribe's intervention motion, GRIC and Defendants briefed several summary judgment motions. One of those motions (Dkt. 89) asserted similar jurisdictional arguments as Defendants' first motion to dismiss (Dkt. 14), but added arguments relating to the Judgment and Decree and the Statements of Claimant that Defendants did not have at the time of the first motion to dismiss. At that time, all motions were focused only on GRIC, because the Court had not yet decided the Tribe's intervention motion. None of the motions or related briefs explains whether and to what extent the arguments therein are applicable to the Tribe.

The Court allowed the Tribe to intervene in an order filed May 31, 2022. (Dkt. 110). The Court stated that it would consider any motions to re-open discovery or amend the Scheduling Order, if the parties deemed them necessary. *Id*. at 7. It provided no instruction limiting Defendants' options in responding to the Complaint-in-Intervention provided by the Federal Rules of Civil Procedure. As mentioned in Defendants' second Motion to Dismiss, Defendants assumed for purposes of calculating the due date that the Tribe's Complaint-in-Intervention was deemed filed as of the date the Court permitted the Tribe to intervene, May 31, 2022. (Dkt. 111 at 1, n. 1). Accordingly, Defendants responded on June 21, 2022, by filing the Motion to Dismiss (Dkt. 111). As freely admitted in the Motion to Dismiss (at 1, n. 2), the Motion to Dismiss is similar to Defendants' summary judgment motion (Dkt. 89), but it explains how the arguments apply to the Tribe. On June 23, 2022, the Clerk of the Court re-filed the Tribe's Complaint-in-Intervention (Dkt. 112), which is identical to the Complaint-in-Intervention filed by the Tribe at Dkt. 77. The re-filed Complaint (Dkt. 112) lists May 31, 2022, as the filing date, consistent with Defendants'

assumption.

Rather than simply responding to the Motion to Dismiss and allowing the Court to rule upon the merits, Plaintiffs elected to file the instant Motion to Strike, in addition to a substantive response to the Motion to Dismiss. The Motion to Strike is baseless and a waste of time and resources. It should be denied.

II. ARGUMENT

A. Defendants did not violate a court order – they responded under Rule 12 to the Complaint-in-Intervention.

Under Fed. R. Civ. P. 12(a), a party has 21 days to serve a response to a complaint. Under Fed R. Civ. P. 12(b), a party may assert a number of defenses, including lack of subject-matter jurisdiction, "by motion." The motion asserting such defense "must be made before pleading." *Id*. Defendants exercised their option to assert their prior exclusive jurisdiction doctrine argument "by motion" in response to the Complaint-in-Intervention, as permitted by Rule 12(b)(1). Plaintiffs can point to no language, in a court order or otherwise, that expressly prohibits Defendants from taking this action.

"Motions to strike are generally disfavored and are rarely granted." *Lowe v. Maxwell & Morgan PC*, 322 F.R.D. 393, 398 (D. Ariz. 2017). Plaintiffs' argue that the Court should strike the Motion to Dismiss (and award sanctions to Plaintiffs) because the filing allegedly violates the Scheduling Order, citing to LRCiv. 83.1(f)(1)(A) and 83.1(f)(2)(E) and the Court's inherent authority to control its docket. (Dkt. 116 at 5-6). Defendants did not violate any court order.

This Court issued the Scheduling Order on September 18, 2020 (Dkt. 37), nearly two years before the Tribe intervened in this matter. Defendants and GRIC subsequently moved to amend deadlines relating to dispositive motions twice (Dkt. 72 and 98), which the Court granted on December 8, 2021 (Dkt. 73), and March 7, 2022 (Dkt. 99). Neither the original Scheduling Order, nor the amendments thereto, refer to a deadline or any restrictions on

how Defendants could respond to a not-yet-authorized Complaint-in-Intervention. The Scheduling Orders also do not include any deadlines related to motions to dismiss pleadings.

Plaintiffs insist that Defendants have violated the Scheduling Orders because Defendants filed a "dispositive motion" after the dispositive motion deadline. But, as explained above, the Motion to Dismiss was a response to the Complaint-in-Intervention in lieu of an Answer, which only became necessary after the Court granted the Tribe's intervention on May 31, 2022. The dispositive motion deadlines in the Scheduling Orders clearly related to summary judgment motions, not Rule 12 motions to dismiss pleadings. The original Scheduling Order was issued on September 18, 2020, which was after the Court already denied Defendants first Motion to Dismiss on May 12, 2020 (Dkt. 22). Moreover, Defendants and GRIC jointly moved to amend the Scheduling Order in conjunction with summary judgment briefing, even agreeing to page limitations for those specific briefs. *See e.g.*, Dkt. 72. The second request to amend the deadlines even referred specifically to the "remaining deadlines for summary judgment briefing" and to the specific summary judgment briefs that still needed to be filed. *See* Dkt. 98 at 1-2. Plaintiffs ignore Defendants' right to respond to the Tribe's Complaint-in-Intervention and the terms of the various Scheduling Orders. There was nothing in the Scheduling Orders that Defendants could have violated by filing the Motion to Dismiss, which was controlled by Fed. R. Civ. P. 12(b).

Moreover, granting the Motion to Strike would not serve the purposes such a motion is intended to serve. Generally, a motion to strike is intended 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. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010). Courts have found that motions to strike filed under Fed. R. Civ. P. 12(f) are not even applicable to motions because they are intended to strike pleadings only. *Verduzco v.*

United States Attorney's Off., No. CV-20-00049-PHX-DGC, 2020 WL 4284412, at *2 (D. Ariz. July 27, 2020) (denying a motion to strike a motion to dismiss because the motion to dismiss was authorized under Rule 12(b)(1)); *Knight v. United States*, 845 F. Supp. 1372, 1374 (D. Ariz. 1993), aff'd, 77 F.3d 489 (9th Cir. 1996) ("motions to strike apply only to pleadings"); Fed. R. Civ. P. 12(f) (permitting a court to strike allegations from "a pleading"); Fed. R. Civ. P. 7(a) (defining pleadings, which do not include motions).

Here, granting the Motion to Strike would serve no purpose because Defendants will still maintain the same affirmative defenses against the Tribe (and GRIC). The Court is ***obligated*** to dismiss this case if the prior exclusive jurisdiction doctrine applies. *Goncalves By & Through Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1253 (9th Cir. 2017) ("The prior exclusive jurisdiction doctrine is a 'mandatory jurisdictional limitation' that prohibits federal and state courts from concurrently exercising jurisdiction over the same *res*."); *Chapman v. Deutsche Bank Nat. Tr. Co.*, 651 F.3d 1039, 1043 (9th Cir. 2011) (stating that the prior exclusive jurisdiction doctrine "is no mere discretionary abstention rule. Rather, it is a mandatory jurisdictional limitation."); Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."); *Leeson v. Transamerica Disability Income Plan*, 671 F.3d 969, 976, n. 12 (9th Cir. 2012) ("when a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety."). Granting the Motion to Strike will only delay this issue.

Plaintiffs argue (at 6) that the Motion to Dismiss is part of a series of repetitive motions. But this argument ignores that the Court has never ruled upon Defendants' arguments relating to the Judgment and Decree and the Statements of Claimant, as explained above. Similarly, Plaintiffs ignore that the prior exclusive jurisdiction doctrine, upon which Defendants base their Motion to Dismiss in part, is a doctrine based on comity and is not measured only at the outset of litigation, but during the course of a case. *Cooper*

v. Tokyo Elec. Power Co., Inc., 860 F.3d 1193, 1210 (9th Cir. 2017) ("*TEPCO I*"). It is entirely proper for the Court to revisit the question if "further developments" in the case (such as those explained above) "counsel in favor of dismissing" the lawsuit in favor of another forum. *Id.* at 1210 & n.12; *see also Cooper v. Tokyo Elec. Power Co. Holdings, Inc.*, 960 F.3d 549, 568 (9th Cir. 2020) ("*TEPCO II*"). Plaintiffs also ignore that the Tribe asserted that it is not subject to the same defenses that may apply against GRIC. *See e.g.*, Dkt. 76 at 6-7 (stating, among other things, that the Tribe is not bound by the GRIC Agreement, which allegedly allows the Tribe to make different arguments). Additional explanation is therefore needed to relate the arguments to the Tribe. As a result, the Motion to Dismiss is not superfluous, repetitive argument. It responds to the Complaint-in-Intervention filed by the Tribe by properly asserting defenses under Fed. R. Civ. P. 12(b)(1) and explaining how they specifically relate to the Tribe.

B. Defendants are not seeking delay – the Court can decide <u>now</u> the arguments raised in the Motion to Dismiss <u>and</u> the Dkt. 89 summary judgment motion.

In the Motion to Strike, and in the Tribe's Response to the Motion to Dismiss (Dkt. 117), Plaintiffs argue that Defendants are seeking tactical delays by filing the Motion to Dismiss and by stating that they will seek more discovery if the Motion to Dismiss is denied. (Dkt. 116 at 7-8). This is not true. Defendants' filing of the Motion to Dismiss enables the Court to resolve efficiently the briefing pending before it. As referenced in the Motion to Dismiss (Dkt. 111 at 1, n. 2), this motion contains very similar (although not all identical) arguments as Defendants' summary judgment motion filed against GRIC at Dkt. 89. The Court can review and decide these two motions in tandem without having to rule upon the other, more factually complex and/or expert-driven, pending motions (namely, Dkt. 78 and 87). If the Court grants one of the two motions (Dkt. 89 or Dkt. 111) for reasons also raised in the other, this case may conclude without the need for any further discovery or rulings on the other motions. In addition, as further evidence that Defendants are not seeking

"tactical delay," Defendants agree with Plaintiffs that no further discovery is needed for resolution of Defendants' summary judgment motion based on claim preclusion (Dkt. 87). If the Court denies the prior exclusive jurisdiction motions (Dkt. 89 and Dkt. 111), the Court can also rule upon the claim preclusion motion (Dkt. 87) at this time because the arguments raised in that motion do not apply to the Tribe.

However, the fact that these motions (Dkt. 89, 111, and 87) are ready for a ruling does not alter the fact that ***Defendants require discovery with respect to the Tribe***. Plaintiffs pretend that Defendants' filing of the Motion to Dismiss "without aid of additional discovery amounts to an admission that additional discovery was unnecessary for filing additional dispositive motions." Dkt. 116 at 7:20. Nothing could be further from the truth. ***The Motion to Dismiss arguments did not require any further discovery***, as explained above. These are legal arguments based upon the law, the Judgment and Decree, the Statements of Claimant, and any other matters raised therein. Nothing else was necessary. The filing of the Motion to Dismiss says nothing about *other* dispositive motions that Defendants may file against the Tribe or supplemental briefing relating to the Tribe that would be required to respond to GRIC's summary judgment motion (Dkt. 78), ***which the Tribe joined***. (Dkt. 113, Notice of Joinders). Nor does the filing of the Motion to Dismiss say anything about what discovery may be necessary to prepare for a trial of the Tribe's claims.

Plaintiffs assert that the Court "should therefore proceed to decide all pending motions without any modification of the scheduling order." Motion to Strike at 8:7-9. This request should be denied. Defendants have a right to conduct discovery on claims asserted for the first time long after the discovery concluded as to GRIC's claims. The filing of the Motion to Dismiss merely acknowledges that it would be an inefficient waste of resources for the parties to go through additional discovery *now* when the Motion to Dismiss can be decided without incurring such costs. As explained above, Defendants were entitled to

respond to the Complaint with a Rule 12(b)(1) motion – and neither the Scheduling Order nor the Court's order granting intervention stated otherwise. Therefore, the most efficient way to respond to the Complaint-in-Intervention was to raise the arguments that are ready for judicial determination at this moment. If Defendants are unsuccessful, then the parties can agree to new deadlines for any necessary discovery and additional dispositive motions (or supplemental briefing) ***related specifically to the Tribe***. None of this work is needed if Defendants are successful on the Motion to Dismiss.

Plaintiffs also insist that Defendants have not and cannot explain what discovery they would need from the Tribe, which is not germane to either the Motion to Strike or Motion to Dismiss. In any event, Defendants have already explained, when responding to the Tribe's Motion to Intervene, some of the discovery that will be necessary. *See* Dkt. 81 at 11:1-13. For example, the Tribe alleges that Defendants' pumping affects the availability of surface water to the Tribe. If Defendants' Motion to dismiss is denied, Defendants should be permitted to conduct discovery to evaluate that contention, including whether the Tribe is pumping subflow. The Tribe's pumping of subflow of the Gila River would demonstrate that the Tribe is able to take Gila River water and, therefore, has suffered no injury as a result of Defendants' alleged pumping. Defendants produced an expert report, authored by Herb Dishlip, on the topic of whether Defendants' pumping has any appreciable effect on ***GRIC's*** water availability. *See generally* Dkt 92 (Notice of Filing Exhibits) at Ex. 15 (Dishlip Declaration). Defendants will likely seek to disclose at least one expert report similar to the Dishlip Report ***that relates to the Tribe***.[2] Whether additional discovery would lead to an additional motion for summary judgment motion ***with respect to the Tribe*** will not be known until the discovery occurs. But it is certainly necessary to prepare for any trial. It is also necessary in order to explain why GRIC's Motion for Summary Judgment

[2] Plaintiffs presumably will argue, as they have before, that harm to the Tribe is irrelevant. But that is not correct for reasons stated in dispositive motion briefing. Dkt. 85 at 34:4-35:10 (explaining that GRIC must show irreparable injury to obtain an injunction).

(Dkt. 78), which the Tribe joined, should be denied ***with respect to the Tribe***. Therefore, supplemental briefing on that motion will likely be necessary after discovery.

If the Tribe had been in this case from the beginning, Defendants would have been able to obtain discovery specific to the Tribe in order to develop defenses against the Tribe and prepare expert reports specific to the Tribe. If appropriate, that information would have been included in dispositive motion briefing. Justice would not be served by barring Defendants from preparing their defense only because the Tribe waited until after discovery closed to intervene.

In addition, Plaintiffs' complaints of delay ring hollow due to their own delay and tactical decision to file *both* the Motion to Strike (Dkt. 116) and a Response to the Motion to Dismiss (Dkt. 117). Plaintiffs claim that they did so to minimize any delay "caused by Defendants." Dkt. 116 at 2:4. But, by filing both documents, Plaintiffs are creating more work for the parties and the Court. Under Rule 12(f), a motion to strike must be filed *before* responding to the pleading which the party seeks to strike. Of course, if a document is stricken, then it obviates the need for any further briefing on the subject, saving resources.

Here, Defendants filed the Motion to Dismiss on June 21, 2022. Although Plaintiffs apparently believed that this filing was improper, they waited until the due date for the Response to file the Motion to Strike, July 21, 2022, one month later. Although Plaintiffs technically filed the Motion to Strike "before" they filed their Response to the Motion to Dismiss, they filed both documents on the same day. This not only destroyed the benefit of filing a Motion to Strike before the response deadline, but it actually created more work for the parties and the Court, which now have to handle parallel briefing on the same issues. *See Shuster v. Shuster*, No. 2:16-CV-03315 JWS, 2018 WL 3023288, at *1 (D. Ariz. Mar. 11, 2018) (stating that motions to strike "often act as a delay mechanism"). This delay, along with the Tribe's delay in seeking intervention, demonstrates that Plaintiffs' actions are more concerned with prejudicing Defendants than stopping delay.

C. Sanctions are inappropriate.

Plaintiffs ask the Court to sanction Defendants, by awarding attorneys' fees to Plaintiffs under Fed. R. Civ. P. 16(f)(2), as a result of Defendants' alleged violation of the Scheduling Order. This request should be denied for two reasons. First, as explained above, Defendants did not violate the Scheduling Orders. The Court did not limit Defendants' procedural options in responding to the Complaint-in-Intervention. The Scheduling Orders contain no deadline or restrictions for motions to dismiss responding to such complaints, and the deadlines associated with "dispositive motions" were set with respect to summary judgment motions between GRIC and Defendants. In fact, as mentioned above, the most recent amended Scheduling Order specifically refers to summary judgment motions, demonstrating that those deadlines were never intended to relate to motions that are responses to later-filed complaints under Rule 12. (Dkt. 99). Accordingly, the Federal Rules of Civil Procedure permitted Defendants to respond to the Complaint-in-Intervention with a Motion to Dismiss under Rule 12(b)(1).

Second, under Fed. R. Civ. P. 16(f)(2), attorneys' fees should not be awarded if noncompliance with a Scheduling Order was "substantially justified or other circumstances make an award of expenses unjust." For the reasons explained above, the Motion to Dismiss is authorized by the Federal Rules of Civil Procedure and there is no violation of any Scheduling Order. At the very least, however, nothing in the federal rules or the Scheduling Order clearly prohibited Defendants from filing the Motion to Dismiss. Defendants and counsel acted in good faith and had substantial justification for their actions. When the Court granted the Motion to Intervene, it did not provide a deadline by which Defendants had to file a particular document in response to the Complaint-in-Intervention. Dkt. 110. Although it mentioned amending the Scheduling Order, the fact remained that Defendants had an obligation to respond to the Complaint-in-Intervention. Under standard litigation procedures, pleadings get responded to before other actions are taken, such as resetting a

scheduling order. Based on Fed. R. Civ. P. 12, Defendants believed that they had 21 days to respond from the date that the Court granted the Tribe intervention, which Defendants took as the "filing date" of the already-filed Complaint-in-Intervention.

Under the rules, Defendants were permitted to file an Answer or to assert a defense as a motion under Rule 12. As explained above, the Court has never ruled on this jurisdictional defense with respect to the Judgment and Decree and the Statements of Claimant, which Defendants received during discovery. Accordingly, Defendants filed the Motion to Dismiss to assert that defense specifically against the Tribe on June 21, 2022. Defendants' conduct was not sanctionable. An award of attorneys' fees under these circumstances would be unjust.

III. CONCLUSION

For the foregoing reasons, the Court should deny the Motion to Strike. Defendants' Motion to Dismiss (Dkt. 111) is a valid response to the Complaint-in-Intervention under Fed. R. Civ. P. 12(b)(1). Defendants did not violate any court order because no provision of the Scheduling Order was applicable to Defendants' obligatory response to the Tribe's Complaint-in-Intervention. There is no just cause to strike the Motion to Dismiss, to rule that Defendants are not entitled to conduct discovery on the Tribe's claims first asserted in May 2022, or to award sanctions against Defendants.

DATED this 4th day of August, 2022.

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