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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Gila River Indian Community,

Plaintiff,

v.

Clint Cranford, et al.,

Defendants.

No. 4:19-cv-00407-SHR

Plaintiffs' Reply in Support of Joint Motion to Strike Defendants' Motion to Dismiss the San Carlos Apache Tribe's Complaint-in-Intervention and Motion for Sanctions

The Gila River Indian Community (Community) and the San Carlos Apache Tribe (Tribe) hereby reply in support of their motion to strike Defendants' motion to dismiss the Tribe's complaint-in-intervention and motion for sanctions (Doc. 116). Defendants filed their motion to dismiss the Tribe's complaint-in-intervention in contravention of the Court's scheduling orders, which required that all Defendants' dispositive motions be filed by February 18, 2022. *See* Docs. 37, 73, 99, 110. In granting the Tribe intervention, the Court did not modify its scheduling orders to re-open that deadline, but instead ordered the parties to work cooperatively if either party believed it necessary to seek a modification of the scheduling order. *See* Doc. 110 at 5. The Court thus retained control over how the litigation schedule might be altered by intervention, if at all. Defendants disregarded the Court's instruction, failed to consult with Plaintiffs, failed to seek any modification of the scheduling order, and instead have purported to unilaterally dictate their own preferred ordering of the litigation. They seek to have the Court decide their unauthorized, repetitive dispositive motion first, followed by some as-yet unspecified discovery, followed by an opportunity for yet more dispositive motions on unspecified grounds. They argue that this is self-evidently efficient and that they were not required to consult with Plaintiffs about this proposed schedule. Nothing in the court's orders or the Federal Rules allows them that unilateral authority over scheduling.

Under Rule 12, Defendants were required to file an *answer* to the complaint. Although Rule 12 permits timely motions to dismiss and provides that such motions suspend the answering deadline, it does not authorize the filing of such motions in disregard of court orders imposing a dispositive motion deadline, and Defendants point to nothing in the language of Rule 12 to that effect. As discussed further below, Rule 12 does not automatically supersede or allow violations of a scheduling order that limits when such motions must be filed, and it certainly does not authorize motions that seek to revisit issues already decided by the Court in granting intervention, such as subject-matter jurisdiction.

In disregarding the scheduling order, Defendants have attempted to create tactical advantages for themselves: they ask the Court to elevate and prioritize consideration of

one of their dispositive motions above all other pending motions. Then, if they lose on their motion to dismiss the complaint-in-intervention—which is nearly identical to existing briefing—they will seek discovery and obtain further delay before filing *additional* dispositive motions related to the Tribe. *See* Doc. 119 at 10. All the while, the longer they delay, the longer they continue pumping waters of the Gila River in disregard of the Globe Equity No. 59 Decree. Nothing justifies this self-serving attempt to unilaterally override the Court's orders.

ARGUMENT

I. RULE 12 DOES NOT AUTHORIZE DEFENDANTS' REPETITIVE MOTION SEEKING UNTIMELY RECONSIDERATION OF THIS COURT'S PRIOR ORDERS.

Defendants' motion to dismiss is a dispositive motion. It is not authorized by the Court's scheduling orders or its order on intervention, and Rule 12 does not override those orders.

A. Defendants' motion to dismiss is a dispositive motion subject to the Court's deadlines.

The operative scheduling order setting Defendants' dispositive motion deadline was issued on December 8, 2021, stating, "Defendants' dispositive motion deadline . . . shall be Friday, February 18, 2022." Doc. 73 at 1. That provision has never been modified. Defendants attempt to justify their unauthorized filing by arguing that their motion is not dispositive, but Ninth Circuit law and legal usage are both to the contrary. Even the narrowest use of the term "dispositive" includes motions to dismiss. A motion is "literally dispositive" when it "'bring[s] about a final determination.' This would include motions to dismiss, for summary judgment, and judgment on the pleadings . . . ." *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1098 (9th Cir. 2016) (quoting Black's Law Dictionary 540 (10th ed. 2014)). Defendants' argument that the dispositive motions deadline in the Court's orders relates only to summary judgment motions (*see* Doc. 119 at 12) is meritless. The Court's later order referring to response and reply briefs for pending summary judgment motions merely acknowledged that the only timely, pending dispositive motions that had been filed were the specific summary judgment motions named in the

order. *See* Doc. 99 at 1.

B. A motion to modify the scheduling order was required before filing any motion to dismiss.

In the Ninth Circuit, defendants must move to modify a scheduling order and show good cause before filing a motion to dismiss after the dispositive motions deadline. *See Crowley v. Boothe*, 648 F. App'x 733 (9th Cir. 2016) (mem.) (upholding order finding good cause to modify scheduling order to allow filing of motion to dismiss). "A scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril." *Johnson v. Mammoth Recreations, Inc*., 975 F.2d 604, 610 (9th Cir. 1992) (citation omitted). Where a scheduling order provides a deadline for motions, any late-filed motion can be denied summarily "absent a request to modify the order." *Id.* at 610 n.7.

The Court's order granting intervention to the Tribe on specified, limited terms contemplates and requires continued adherence to the scheduling order absent modification. In granting the Tribe intervention, the Court held that "any delay caused by the Tribe's intervention would minimally prejudice the existing parties," Doc. 110 at 5, because "the Court will not allow the Tribe to file its own dispositive motion or pleadings responding to any of the pending motions, other than to join the Community's existing motion and pleadings." *Id.* at 7. In its order, the Court expressly recognized the possibility that the scheduling order could be modified *on motion* to address the only specific scheduling issue raised by Defendants during briefing on the motion to intervene: Tribe-specific discovery followed by Tribe-specific dispositive motions, if necessary. As the Court noted in granting intervention, Defendants represented that they "may need to file additional dispositive motions related to the Tribe after further discovery." *Id*. at 5. Thus, the Court noted it "will consider a motion to amend the Scheduling Order to accommodate discovery related to the Tribe, and strongly encourages the parties to work cooperatively, as they previously have, to reach agreement on the subject." *Id.* at 5 n.3. Nothing in the order granting intervention operated to automatically modify the scheduling order deadline

for dispositive motions. "Particularly in a complex case such as this, a district judge's decision on how best to balance the rights of the parties against the need to keep the litigation from becoming unmanageable is entitled to great deference." *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 380 (1987) (citing Fed. R. Civ. P. 24(b)(2)); *see also Dep't of Fair Emp. & Housing v. Lucent Tech., Inc.*, 642 F.3d 728, 742 (9th Cir. 2011) (district court had discretion to place limits on intervention).

Changed circumstances such as intervention can be a reason for seeking to modify a scheduling order—as the Court invited Defendants to do here. But changed circumstances do *not* justify disregard of, and failure to seek modification of, a deadline that has already passed. For example, in *U.S. Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099, 1104 (9th Cir. 1985), *superseded by statute on other grounds as recognized in Simpson v. Lear Astronics Corp.*, 77 F.3d 1170 (9th Cir. 1996), the Ninth Circuit upheld a district court's denial of an untimely dispositive motion (summary judgment on grounds of res judicata) even though the circumstance that served as the basis for the motion (the court's dismissal of a related complaint) occurred after the motion deadline. "Although we note that the district court did not dismiss the [related] action until six weeks after the deadline for filing preliminary motions in the present action, the record reveals that the defendants never requested a modification of the pretrial order to allow the filing of their motion. Accordingly, we conclude that the district court properly denied the motion as untimely." *Id.*

Further, Rule 12 provides no excuse for Defendants' failure to seek a modification of the scheduling order, because it does not affirmatively require or authorize motions that are otherwise untimely under court orders. Rule 12(a) requires only that a defendant "must serve an answer . . . within 21 days" after being served with the complaint, and under Rule 12(b), the answer must contain "[e]very defense to a claim for relief." Fed. R. Civ. P. 12(a), (b). Rule 12(b) only *permits* certain specified defenses, including lack of subject-matter jurisdiction, to be raised by a *timely* motion: "a party *may* assert the following defenses by motion. . . ." If such a motion is filed, then, "[u]nless the Court sets a different time," the

deadline to file an answer is deferred until 14 days after court action addressing the motion. Fed. R. Civ. P. 12(a)(4). However, as always, motion practice is subject to regulation by the Court under its inherent authority to control its docket. "It is well established that district courts have inherent power to control their docket." *Ready Transp., Inc. v. AAR Mfg., Inc.*, 627 F.3d 402, 404 (9th Cir. 2010) (alterations and quotation marks omitted). Where such Rule 12(b) motions are untimely under existing scheduling orders, leave must be sought before filing. "The binding effect of a motion-filing deadline stands as an exception to the general rule that, absent extraordinary circumstances, a court has no power to prevent a party from filing a motion authorized by the Federal Rules of Civil Procedure." 3 Moore's Federal Practice – Civil § 16.13[1][b] (2022).

C. The motion to dismiss is repetitive.

Defendants' motion to dismiss is repetitive. As Defendants admit, they have already briefed their repetitive prior exclusive jurisdiction argument that seeks to overturn the Court's prior ruling. Doc. 119 at 4. Although they purport to "explain[] whether and to what extent the arguments therein are applicable to the Tribe," *id.*, they are simply rehashing prior legal arguments. Here, there was and is no reason for Defendants to file another motion to dismiss for lack of subject-matter jurisdiction because the Tribe's complaint-in-intervention is substantively identical to the Community's, and because the Court's own order granting intervention held that the Court has subject-matter jurisdiction over it. In opposing intervention, Defendants failed to raise their prior exclusive jurisdiction argument, Doc. 81 at 16 n.9, and, in their response, Defendants ignore this Court's jurisdictional determination regarding the Tribe's complaint-in-intervention. *See* Doc. 110 at 3. As the Court noted, "Defendants offer no argument as to why the Court would lack jurisdiction over the Tribe's claims when those claims are identical to the Community's." *Id.* Therefore, the Court found "there are independent grounds for jurisdiction over the claims in the Tribe's proposed complaint-in-intervention." *Id.* Defendants provide no justification for reconsideration of that order, and no excuse for failing to raise the issue before. *See Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d

877, 890 (9th Cir. 2000) (reconsideration is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources").

Further, Defendants' efforts to distinguish this Court's earlier rejection of their prior exclusive jurisdiction argument in favor of the Gila Adjudication fail. "Surely a court that has decided that it has jurisdiction is not duty-bound to entertain thereafter a series of repetitive motions to dismiss for lack of jurisdiction." *Ferreira v. Borja*, 93 F.3d 671, 674 (9th Cir. 1996). Defendants' attempt to use Rule 12 to evade the stringent standards for seeking reconsideration of this ruling should be rejected. This Court has already held "the Gila Adjudication is not inclusive of the issues raised by this case." *Gila River Indian Cmty. v. Cranford*, 459 F. Supp. 3d 1246, 1257 (D. Ariz. 2020). "The Gila Adjudication court lacks jurisdiction to determine mainstem rights. Since this case involves Defendants' alleged use of mainstem water, this Court has exclusive jurisdiction." *Id.* at 1256. Defendants mischaracterize this holding as an "assumption." Doc. 119 at 3. In doing so, Defendants continue to "misapprehend the scope of the Gila Adjudication," *Cranford*, 459 F. Supp. 3d at 1256, which is unaffected by the decades-old statements of claimant and judgment and decree. For the reasons stated in other briefing, neither the statements of claimant nor the judgment and decree can expand the jurisdiction of the Gila Adjudication, especially when doing so would divest this Court of its exclusive jurisdiction over the Gila River mainstem. As Defendants themselves put it, the Court has already found that it "has jurisdiction over the Complaint if Defendants' wells are pumping subflow of the Gila River." Doc. 119 at 2–3.

Defendants cannot use Rule 12 to seek unlimited reconsideration of the Court's previous orders and flout the Court-imposed limitations on intervention. The Court should therefore strike their motion to dismiss.

II. DEFENDANTS SHOULD BE ESTOPPED FROM DELAYING THESE PROCEEDINGS, AND THE COURT SHOULD PROCEED TO DECIDE ALL TIMELY DISPOSITIVE MOTIONS.

After purporting to protest that intervention by the Tribe would unduly delay this case, Defendants now seek multiple rounds of dispositive motions and discovery to delay

these proceedings. The Court's order allowing intervention contemplated only *one* additional round of dispositive motions, if necessary, after any needed Tribe-specific discovery. As the Court noted in granting intervention, Defendants previously represented that they "may need to file additional dispositive motions related to the Tribe *after* further discovery." Doc. 110 at 5 (emphasis added). Defendants have no legitimate reason for deviating from that sequence without so much as seeking leave of court. To the extent Defendants wished to raise any non-duplicative issues specific to the Tribe by dispositive motion, the Court was willing to consider a change to the scheduling order allowing such a motion *after* any needed discovery.

Despite failing to raise any jurisdictional arguments in briefing on intervention, defendants are now unilaterally attempting to add yet another layer of briefing. They essentially ask the Court to hold open the time for requesting a modification of the scheduling order for additional discovery while their untimely motion to dismiss is decided. Then, if they lose that issue, they will seek additional discovery and then file additional dispositive motions. *See* Doc. 119 at 10 ("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.") (emphasis omitted). They argue that "it would be an inefficient waste of resources" to have only a single possible round of dispositive motions related to the Tribe, after any discovery, rather than the possible *two* rounds they propose. *Id*. at 9. To the extent they wanted to raise this baseless argument, Defendants should have raised it with Plaintiffs and, if necessary, the Court in seeking a modification of the scheduling order—not seek to impose it by fiat, in violation of the order. Further, their two-round approach makes no practical sense. Indeed, in an analogous situation in a related matter, when the Community's Goodwin Wash claims were consolidated with the Daley change in use proceedings (in Case No. 31-cv-0059, "DGW"), the Court specifically ordered that separate motions to dismiss the Community's Goodwin Wash claims must *not* be filed, and that motion to dismiss arguments must be raised instead at the summary judgment stage to avoid delay and conserve judicial resources. DGW, Doc.

8393 at 2–3. Such procedure is exactly what was suggested here by Defendants themselves in their briefing on the motion to intervene, and what the Court said it *might* allow on a motion to modify the scheduling order. Now, in contrast, Defendants seek to impose their own multi-part dispositive motion briefing schedule on the Court, without consulting Plaintiffs and without seeking modification of the Scheduling Order.

There is no reason Defendants could not have sought to justify any proposed further discovery and *then* briefed *all* matters related to the Tribe at one time, as specifically contemplated by the Order granting intervention. Instead, the Court is faced with a pending motion to dismiss raising the same issue as an existing motion for summary judgment, in addition to other pending dispositive motions—while Defendants attempt to preserve the possibility of more discovery and dispositive motions *after* their motion to dismiss is decided. In response to Defendants' protestations about potential delay, the Court ordered that the Tribe's intervention was limited, yet Defendants are now attempting to use intervention to further delay. They should be estopped from doing so and their motion stricken.

More than two months have passed since the Court granted the Tribe's motion to intervene and offered to consider a motion to modify the scheduling order to accommodate further discovery. Defendants have never contacted Plaintiffs regarding any proposed modification of the scheduling order to accommodate discovery. Having delayed thus far, they should be estopped from profiting from the delay, and the time to accept the Court's offer to entertain a modification of the scheduling order has passed. Having chosen to attempt a tactical delay rather than diligently asserting all further discovery they might seek, they should be held to that choice.

III. THE MOTION TO STRIKE IS TIMELY AND WAS PROPERLY FILED.

Defendants attempt to shift attention away from their delay tactics by accusing the Community and Tribe of delay in filing their motion to strike. Defendants do not, however, seriously dispute that the motion to strike is timely. In addition, although Plaintiffs' counsel did diligently attempt to file it sooner, ultimately that was not possible due to a serious

family medical issue which impacted Plaintiffs' counsel during the period following Defendants' unexpected filing of the unauthorized motion to dismiss. In any event, it would have been impossible to have the motion to strike fully briefed and decided before a response to the motion to dismiss was due, without extending deadlines. In these circumstances, although a motion to strike is an imperfect remedy, it is fully warranted.

Defendants also argue that motions to strike under Rule 12(f) may not be used to strike motions such as their motion to dismiss (*see* Doc. 119 at 6), but they are looking at the wrong rule. Under Rule 16, "if a party or its attorney . . . fails to obey a scheduling or other pretrial order," the Court "may issue *any just orders*, including those authorized by Rule 37(b)(2)(A)(ii)-(vii)." Fed. R. Civ. P. 16(f). Rule 37(b)(2)(A)(iii) recognizes the Court's authority to issue orders "striking pleadings in whole or in part." Further, irrespective of any particular rule, the Court has inherent authority "to strike items from the docket as a sanction for litigation conduct." *Ready Transp.*, 627 F.3d at 404.

IV. DEFENDANTS HAVE NOT MET THEIR BURDEN TO AVOID AN AWARD OF FEES AND COSTS FOR VIOLATION OF THE SCHEDULING ORDERS.

Defendants have not shown that their failure to consult with Plaintiffs' counsel and seek modification of the Scheduling Order prior to filing their dispositive motion was "substantially justified" or that an award of expenses would be "unjust." Fed. R. Civ. P. 16(f)(2). There is no ambiguity in the term "dispositive motion" in the Court's December 8, 2021 order (Doc. 73). The Court's order on intervention made clear that any deviations from the scheduling orders to address the Tribe's intervention would require consultation among the parties and a motion. Rather than follow that course, Defendants chose to attempt an unauthorized tactical maneuver to force a more extended litigation timeline, to multiply dispositive motion practice, and to elevate consideration of one of their dispositive motions. Sanctions in these circumstances would not be unjust.

CONCLUSION

The Court should grant Plaintiffs' Motion to Strike and Motion for Sanctions.

RESPECTFULLY SUBMITTED this 11th day of August 2022.

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