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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Fund for Empowerment, *et al.*, Plaintiffs, v. City of Phoenix, *et al.*, Defendants.	Case No.: CV-22-02041-PHX-GMS **DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO SET RULE 16 CASE MANAGEMENT CONFERENCE**

Defendants City of Phoenix, Jeri Williams, and Michael Sullivan (collectively, the "City") oppose Plaintiff's motion to set a Rule 16 case management conference. (Doc. 122) Given the pendency of a motion to dismiss that, if granted, would be dispositive of the entire case, there is no need to start discovery or otherwise allow discovery to proceed. Moreover, Plaintiffs have not provided a legitimate or compelling basis for discovery to start or otherwise proceed.

FACTUAL BACKGROUND

In December 2022, the Court issued an Order granting in part and denying in part Plaintiffs' request for preliminary injunction. [Doc. 34]

In response to failed settlement negotiations, in May 2023, Plaintiffs filed a motion

for order to show cause, alleging that the City had violated the Order during a previous enhanced cleanup. [Doc. 59] With only a hunch that their theory was correct, Plaintiffs also sought expedited discovery for five categories of documents and information to try to prove their case. [Doc. 60 at 1 (stating that discovery was necessary "to prepare for their requested Order to Show Cause hearing" and "to support Plaintiffs' showing" that the City violated the Order)] The Court denied Plaintiffs' motion for order to show cause but granted the request for expedited discovery. [Doc. 87] The City served their responses to Plaintiffs' discovery requests on June 9, 2023. [Doc. 98] On July 7—nearly a month after the City provided documents that Plaintiffs purportedly needed on an emergency basis—Plaintiffs sent a letter identifying what they believed to be deficient responses. [Exh. 1] The City responded on July 20. [Exh. 2] Plaintiffs did not pursue the discovery issue further.

In the meantime, the plaintiffs in the *Brown v. City of Phoenix* state court proceeding moved to intervene in this case and filed a motion to dismiss. [Doc. 94] The Intervenor Defendants argue that Plaintiffs fail to state a claim for injury for which the law provides relief and that Plaintiffs lack standing. [*Id.*] The motion to dismiss is fully briefed but has not yet been ruled upon. If granted, the motion would be dispositive of Plaintiffs' claims. The City has joined in the motion in part. [Doc. 123]

Notwithstanding the pending motion to dismiss and apparent dearth of evidence to support their claims, Plaintiffs now move to set a Rule 16 case management conference. [Doc. 122] The stated purpose of the request is to allow Plaintiffs to "proceed with discovery." [*Id*. at 1, 4-5]

ARGUMENT

I. THE COURT SHOULD, IN THE EXERCISE OF ITS DISCRETION, DENY PLAINTIFFS' MOTION PENDING A DECISION ON THE MOTION TO DISMISS.

"In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences…." Fed. R. Civ. P. 16(a). Whether to utilize the case management conference procedure "lies within the discretion of the district court both as a matter of general policy and in terms of whether and when the rule should be invoked in

a particular case. There is no requirement that any pretrial conferences be held or not held in certain types of actions." Wright & Miller, 6A Fed. Prac. & Proc. § 1523 (3d ed. 2023) (internal citations omitted). It is not uncommon for courts to delay scheduling a pretrial or case management conference until it has ruled upon a motion to dismiss. *See, e.g.*, *Ballentine v. Birkett*, No. 2:12-CV-236-TLS, 2014 WL 174776 at *2 (N.D. Ind. Jan. 16, 2014) (court vacated preliminary pretrial conference pending resolution of dispositive Rule 12(b) motion). Indeed, Judge Brnovich, on the Court's own motion, recently vacated a case management conference pending resolution of a potentially dispositive motion to dismiss. *See* Exh. 3, Order, *Blunt v. Town of Gilbert*, No. CV-23-02215-PHX-SMB, Doc. 8 (D. Ariz. Dec. 7, 2023).

Closely related to this principle is the principle that courts have broad discretion to stay discovery (or, as relevant here, to not allow discovery to start or otherwise proceed) pending resolution of a motion to dismiss that may be fully dispositive. "Staying discovery pending resolution of a motion to dismiss is permissible when the motion raises only legal issues." *Lazar v. Charles Schwab & Co.*, No. CV-14-01511-PHX-DLR, 2014 WL 12551210, at *1 (D. Ariz. Sept. 19, 2014) (citing *Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987); *Rae v. Union Bank*, 725 F.2d 478, 480 (9th Cir. 1984)). "If a pending motion to dismiss is potentially dispositive of the entire case, and if the motion is not dependent on additional discovery, a stay is justified." *Id.* (citation omitted). This "furthers the goals of efficiency for the courts and litigants." *Id.* (citations omitted). The Eleventh Circuit summarized the rationale underlying this principle as follows:

> Facial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should… be resolved before discovery begins. Such a dispute always presents a purely legal question; there are no issues of fact because the allegations contained in the pleading are presumed to be true. Therefore, neither the parties nor the court have any need for discovery before the court rules on the motion.

Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1367 (11th Cir. 1997) (cleaned up).

Here, the Intervenor Defendants' motion to dismiss, in which the City has joined, seeks dismissal of the entire case on purely legal grounds. Specifically, the motion to dismiss

argues that, even accepting the allegations in the First Amended Complaint as true: (1) as to the Eighth Amendment claim, Plaintiffs fail to allege that they have ever been penalized for alleged "status crimes," fail to allege that they are involuntarily homeless, and lack Article III standing [Doc. 94 at 2-5]; (2) as to the Fourth Amendment claim, that prospective injunctive relief is inappropriate and that Plaintiffs have not adequately alleged any personal Fourth Amendment violation for deprivation of property [*Id.* at 5-7]; and (3) that the other claims fail either for lack of standing or by virtue of failure of the other claims. [*Id.* at 7-8]. As in other cases where the court found it appropriate to stay or not allow discovery pending decision on a dispositive motion, the motion to dismiss "is potentially dispositive of the case and presents purely legal arguments." *See Lazar*, 2014 WL 12551210, at *2. If the motion to dismiss does not dispose of the entire case, then it will potentially have focused the issues for eventual discovery. If the motion to dismiss does dispose of the entire case, then the parties will have saved finite resources and taxpayer expense and not engaged in wasteful discovery for which Plaintiffs have not demonstrated a legitimate need, in any event. Denying a Rule 16 case management conference pending resolution of the motion to dismiss is appropriate and reasonable.[1]

II. PLAINTIFFS HAVE NOT IDENTIFIED A LEGITMATE OR IMMEDIATE NEED FOR DISCOVERY TO PROCEED.

Even if the Court were inclined to schedule a Rule 16 case management meeting and allow discovery to proceed, Plaintiffs have not articulated a legitimate or compelling need for discovery to proceed.

First, Plaintiffs argue that discovery should proceed to "expeditiously resolve this

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[1] As the Court is likely aware, the U.S. Supreme Court is considering whether to grant a petition for writ of certiorari in *Johnson v. City of Grants Pass*. *See* SCOTUSblog, https://www.scotusblog.com/case-files/cases/city-of-grants-pass-oregon-v-johnson/ (last accessed Dec. 13, 2023). The Supreme Court requested and received briefing on the petition last week. *See id.* The possibility of a grant of writ of certiorari may not, on its own, be cause for denying Plaintiffs' motion. But combined with the other reasons for denial, the potential grant of review—and the resulting potential evisceration of the legal standard to which Plaintiffs rely in support of their claims—also warrant denial of Plaintiffs' motion.

litigation" and that there is "no reason to further delay discovery" given the conclusion of the proceedings in state court and the impossibility of discovery interfering with ongoing proceedings or with the Intervenors' interest in the case. [Doc. 122 at 4, ¶ 13] This argument misses the mark. The resolution of the underlying state court matter does not affect the arguments in the motion to dismiss at all. The motion to dismiss asserts that the First Amended Complaint fails for lack of standing because Plaintiffs have not alleged facts that are legally necessary to advance their claims, or both. [*See supra* at 3-4] Again, case law from courts in the Ninth Circuit and elsewhere is clear that where a motion to dismiss is pending that, if granted, would dispose of the entire case, the Court has broad discretion to deny a case management or pretrial conference or stay discovery proceedings pending resolution of the motion. [*See supra* at 2-3] The desire for expeditious resolution of the case is irrelevant when Plaintiffs' complaint would fail even taking the allegations as true. The resolution of parallel state court proceedings is irrelevant for the same reasons.

Second, Plaintiffs argue that the clearing of the area surrounding the Human Services Campus (which Plaintiffs refer to as "the Zone") "hampers Plaintiffs' ability to gather factual evidence to support their claims because unhoused individuals… who were previously living in the area are now even more difficult to locate." They claim that this makes discovery from the City about "its practices" and information about where unsheltered persons went after the Human Services Campus area was cleared "all the more important." [Doc. 122 at 4, ¶ 14] It is unclear how information about the City's practices (nearly all of which the City has already provided to Plaintiffs) regarding enhanced cleanups would help Plaintiffs locate any individual. Further, as the City has explained to Plaintiffs repeatedly [*see* Exh. 2 at 2], the City is not obligated to indulge Plaintiffs' fishing expedition for names of unsheltered people who moved from the Human Services Campus area or where they went immediately following relocation. There is no Plaintiff in this litigation who was allegedly aggrieved by the area cleanup. And as Plaintiffs have shown many times during this litigation, they do not know of any individual who was aggrieved as they allege, although there is nothing that prohibits them from going to talk to unsheltered persons to

find out. It is *Plaintiffs'* burden to adduce the minimum quantum of evidence to open the door to discovery. The Court should deny Plaintiffs' naked attempt to shift that burden to the City.[2]

Third, Plaintiffs claim that "the City has increased sweeps of local parks where unhoused individuals live, including people displaced from the Zone"; that unsheltered people, including people who previously lived in the area, "are increasingly being threatened with arrest or citation" by an increased law enforcement presence; that the City has conducted "sweeps" at a local park; and that based on (unidentified) "credible information," the City seized and destroyed property without notice and threatened individuals with arrest or citation despite having nowhere else to go. [Doc. 122 at 5-6, ¶ 15] In the first place, these unsupported claims cut against Plaintiffs' own argument: on the one hand, Plaintiffs say they need discovery because it is otherwise impossible for them to locate unsheltered individuals displaced by the downtown cleanup effort; on the other hand, they say that they know people displaced by the downtown cleanup effort who have been affected by alleged sweeps and the like. This inconsistency aside, Plaintiffs have not produced a single affidavit, document, or anything else—not even a name of the source of this purported "credible information"—that would tend to show that these allegations rise above rumor or speculation. Unsupported smears against the City should be disregarded as a basis for granting Plaintiffs' motion.

Fourth and finally, Plaintiffs allege that the City has failed to "fully comply" with Plaintiffs' discovery requests regarding the May 10 cleanup and refused to enter into a protective order to obtain allegedly needed information. [Doc. 122 at 6, ¶ 16] The City responded to every discovery request in full, except for one of Plaintiffs' requests where the City redacted the names of unsheltered people contacted and the locations to where they moved following the May 10 cleanup effort. [*See* Exh. 2] The City fulfilled Plaintiffs' discovery requests in June and responded to a letter regarding alleged deficiencies in July.

[2] The City also notes that Plaintiffs have already availed themselves of the public records request process, further underscoring that there is no need for discovery to proceed here. [Exh. 4, Records Request Letter from B. Rundall dated Nov. 17, 2023]

Plaintiffs never pursued the issue further. The City is unsure why, more than five months after receiving this discovery on an alleged "emergency" basis, Plaintiffs are now using their motion as a vehicle to take issue with the City's discovery responses, or why they think that redacting personal identifying and confidential information is a reason to seek other discovery about unrelated events. It suffices to say that this is not a basis to request additional discovery.

CONCLUSION

A potentially fully dispositive motion to dismiss, which is dependent only on the applying the law to the facts as Plaintiffs have alleged them, is pending decision with this Court. Case law is clear that resolution of that motion before incurring costs and expense of discovery is preferred to charging ahead with discovery for potentially nothing. The Court should deny Plaintiffs' motion to set a Rule 16 case management conference pending its ruling on the motion to dismiss.

RESPECTFULLY SUBMITTED this 20th day of December, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2023, I electronically transmitted this document to the Clerk's Office using the ECF System for filing, causing a copy to be electronically transmitted to the following ECF registrants:

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