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13 **UNITED STATES DISTRICT COURT**
14 **DISTRICT OF ARIZONA**

16 Fund for Empowerment, *et al.*,

17 Plaintiffs,

18 vs.

19 City of Phoenix, *et al.*,

20 Defendants.

Case No. CV-22-02041-PHX-GMS

PLAINTIFF’S REPLY IN
SUPPORT OF MOTION TO SET
RULE 16 CASE MANAGEMENT
CONFERENCE

21 For the reasons outlined below, Plaintiffs respectfully request this Court grant
22 Plaintiffs’ Motion to Set Rule 16 Case Management Conference (“Motion”).

23 **I. Factual Background**

24 Summarizing the facts previously raised in their Motion, the pertinent facts are as
25 follows:
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1 Plaintiffs, members of the unhoused community, filed suit on November 30, 2022.
2 On December 15, 2022, this Court issued a preliminary injunction enjoining the City of
3 Phoenix from enforcing its Camping and Sleeping Bans “as long as there were more
4 unsheltered individuals in Phoenix than shelter beds available” (later modified to “if there
5 are no other public areas or appropriate shelters where those individuals can sleep”),
6 seizing property from unhoused individuals without notice, and seizing property from
7 unhoused individuals without first storing the property for thirty days. ECF No. 32 at 2;
8 ECF No. 119 at 3. Following, the court set a Case Management conference for April 11,
9 2023. On March 22, 2023, Plaintiffs and Defendants filed a Joint Case Management
10 Report setting forth their agreed-upon proposed discovery schedule, under which
11 discovery would close on January 31, 2024. ECF No. 52.

12 On April 4, 2023, the parties notified the Court that the case had settled in principle
13 after an all-day mediation. The Case Management Conference set for April 11, 2023 was
14 vacated and no discovery deadlines were scheduled. The parties, however, failed to reach
15 a settlement. The parties initially agreed to update the Case Management Report after the
16 court’s ruling on Intervenor’s (and, now, Defendants’) Motion to Dismiss. At this time,
17 however, given that the Complaint was first filed over a year ago, that the Intervenor
18 were granted the relief they sought in their state court action against the City, and the
19 other reasons outlined in Plaintiff’s underlying Motion, Plaintiffs believe discovery
20 should now proceed. After a telephonic meet and confer to schedule a Rule 26 conference,
21 Defendants refused to voluntarily move forward with discovery.

22 **II. Legal Arguments**

23 **A. A Stay of Discovery is Not Justified.**

24 A court has “wide discretion in controlling discovery.” *Michael v. FCA US LLC*,
25 No. CV-22-00254, 2022 WL 3598249, at *2 (D. Ariz. Aug. 23, 2022). Although a court
26 is free to stay discovery, “district courts look unfavorably upon such blanket stays of
27 discovery.” *Mlejnecky v. Olympus Imaging Am., Inc.*, No. 210-CV-02630, 2011 WL
28

1 489743, at *6 (E.D. Cal. Feb. 7, 2011). This is so even when there is a pending dispositive
2 motion because “the Federal Rules of Civil Procedure does [sic] not provide for automatic
3 or blanket stays of discovery when a potentially dispositive motion is pending.” *Id*; see
4 also *Skellercup Indus. Ltd. v. City of L.A.*, 163 F.R.D. 598, 600-01 (C.D. Cal. Sept. 25,
5 1995) (“Had the Federal Rules contemplated that a motion to dismiss under Fed.R.Civ.P.
6 12(b)(6) would stay discovery, the Rules would contain a provision for that effect. In fact,
7 such a notion is directly at odds with the need for expeditious resolution of litigation.”).

8 Defendants’ Opposition improperly attempts to shift the burden to Plaintiffs.
9 However, “[a] party seeking a stay of discovery carries the heavy burden of making a
10 ‘strong showing’ why discovery should be denied. The moving party must show more
11 than an apparently meritorious 12(b)(6) claim.” *Espinoza v. Trans Union LLC*, No. CV-
12 22-01670, 2023 WL 3994846, at *2 (D. Ariz. June 14, 2023) (citation omitted and
13 emphasis added) (quoting *Turner Broad. Sys., Inc. v. Tracinda Corp.*, 175 F.R.D. 554,
14 555 (D. Nev. July 28, 1997)). Even though the parties may have initially agreed to a
15 limited stay of discovery, any such need has been obviated based on the clearing of the
16 Zone.

17 Regardless, Plaintiffs have sufficiently detailed the exigency and necessity of this
18 case moving forward with a Rule 16 Case Management Conference. ECF No. 122. In
19 addition to the importance of receiving discovery in order to expeditiously prosecute their
20 case, obtaining discovery from the City is particularly urgent now because:

21 The clearing of the Zone further hampers Plaintiffs’ ability to gather factual
22 evidence to support their claims because unhoused individuals—one of the
23 only sources of information about the facts alleged in Plaintiffs’ complaint
24 absent discovery from the City—who were previously living in the Zone are
25 now even more difficult to locate. This makes discovery from the City,
26 including about its practices towards unhoused individuals during its sweeps
of the Zone and where unhoused individuals living in the Zone were
displaced to, all the more important.

27 ECF No. 122, ¶14.

1 The City seems to argue, again without making a motion, for a *de facto* stay of
2 discovery based on the pending motion to dismiss. But the Intervenors' motion to dismiss
3 (which, seven months later, Defendants now apparently join) does not justify either a stay
4 of discovery or a denial of the requested Rule 16 conference. As detailed in Plaintiffs'
5 opposition to that motion, Intervenors' arguments for dismissal are unavailing at best and
6 do not justify bringing this case to a standstill. *See* ECF 104. "[A] bald assertion that a
7 motion to dismiss will probably succeed, without more, is insufficient" to stay discovery.
8 *Espinoza*, 2023 WL 3994846, at *2. "In fact, such a notion is directly at odds with the
9 need for expeditious resolution of litigation." *United States v. CDS, P.A.*, No. 4:14-CV-
10 00301, 2015 WL 5257132, at *1 (D. Idaho Sept. 3, 2015).

11 Further counseling against a stay, the City's joinder to the Intervenors' motion to
12 dismiss seems to be nothing more than gamesmanship to avoid discovery. The City never
13 moved to dismiss Plaintiffs' complaint in the time allotted for it to do so and made no
14 effort to join the motion when it was first filed (or in the seven months since). But, perhaps
15 aware that courts have declined to find "good cause shown" to stay discovery against a
16 defendant who "has neither filed a Motion to Dismiss nor joined in the Motion to Dismiss
17 filed by" another party, the City changed course the day before filing its opposition to
18 Plaintiffs' motion for a Rule 16 conference. *White v. Am. Tobacco Co.*, 125 F.R.D. 508,
19 510 (D. Nev. 1989); ECF 123.¹ Simply put, the City's last-minute joinder to a motion to
20 dismiss does not make the "strong showing" needed to prevent discovery from
21 proceeding. *Espinoza*, 2023 WL 3994846, at *2.²

22 ¹ The City's joinder of this motion is also improper. *See Bergen v. French*, No. C05-5722, 2006 WL 8455996, at
23 *2 (W.D. Wash. Jan. 30, 2006), *report and recommendation adopted*, No. C05-5722, 2006 WL 8455997 (W.D.
24 Wash. Mar. 3, 2006) (rejecting a defendant's attempt to join another defendant's motion to dismiss after filing
an answer and explaining "[m]otions to dismiss after the filing of an answer may be properly brought under Fed.
R. Civ. P. 56 (c) or under Fed. R. Civ. P 12 (c), but the time for properly filing a motion that challenges only the
sufficiency of the complaint has past.").

25 ² Defendants' argument that Plaintiffs' public records requests somehow negate Plaintiffs' need for discovery
26 under Fed. R. Civ. P. 26 is unavailing because "public records requests are not the same as discovery."
27 *Blocktree Props., LLC v. Pub. Utility Dist. No.2 of Grant Cty., Wash.*, No. 2:18-CV-390, 2019 WL 2437468, at
28 *3 (E.D. Wash. June 11, 2019) (noting that Rule 26 recognizes fewer exemptions than state's public records
law); *see also Wood Expressions Fine Custom Cabinetry, Inc. v. Cinn. Ins. Co.*, No. 2:12-cv-01171, 2013 WL
12190508, at *5 n.54 (D. Ariz. Nov. 27, 2013) (noting difference between Arizona Public Records request and
Fed. R. Civ. P. 26 discovery).

1 **B. This Court Should Exercise its Broad Discretion and Grant Plaintiffs’ Motion**
2 **for a Pre-Trial Conference Under Rule 16, Regardless of Whether Such Need**
3 **is Legitimate, Immediate, or Compelling.**

4 First, City Defendants attempt to improperly shift the burden and establish their
5 own standard for granting Plaintiffs’ Motion, alleging without citation that the Motion
6 should be denied because “Plaintiffs have not articulated a legitimate or compelling need
7 for discovery to proceed.” ECF No. 124 at 4. City Defendants later contradict this self-
8 imposed standard by conceding that “the Court has broad discretion” to grant or deny
9 Plaintiffs’ Motion. *Id.* at 5; *see also Fed. Deposit Ins. Corp. v. Glickman*, 450 F.2d 416,
10 419 (9th Cir. 1971) (“A district judge is given broad discretion in supervising the pre-trial
11 phase of litigation, with a view toward sifting the issues in order that the suit will go to
12 trial only on questions involving honest disputes of fact or law.”).

13 Here, Plaintiffs seek to do just that—gather evidence relevant to prove Plaintiffs’
14 allegations in the First Amended Complaint and identify whether and, if so, to what
15 extent, City Defendants have violated this Court’s preliminary injunction, which enjoins
16 the City from (1) enforcing its Camping and Sleeping Bans against individuals who
17 practically cannot obtain shelter if there are no other public areas or appropriate shelters
18 where those individuals can sleep, (2) seizing property of unsheltered individuals without
19 providing proper notice absent certain circumstances, and (3) destroying seized property
20 without first storing it for thirty days. ECF No. 119 at 3. Central to this determination is
21 whether individuals displaced during the City’s sweeps were provided with shelter,
22 whether the City Defendants conducted individualized assessments to determine if the
23 shelter offered was adequate for the specific needs of each displaced individual, whether
24 the City Defendants gave proper notice before seizing the property of unhoused
25 individuals, and finally whether unabandoned property seized by the City Defendants was
26 stored properly pursuant to this Court’s preliminary injunction and constitutional due
27 process requirements. *See also Lavan v. City of Los Angeles*, 693 F.3d 1022, 1032 (9th
28 Cir. 2012) (noting that “[b]ecause homeless persons’ unabandoned possessions are
 ‘property’ within the meaning of the Fourteenth Amendment, the City must comport with

1 the requirements of the Fourteenth Amendment’s due process clause if it wishes to take
2 and destroy them.”).

3 Second, the discovery Plaintiffs seek regarding displaced individuals previously
4 living in the Zone (provided as just one example of more urgent discovery Plaintiffs will
5 request) is far from a “fishing expedition.” ECF No. 124 at 5. Contrary to City
6 Defendants’ assertion, Plaintiffs have participated in consistent outreach and spoken with
7 several unsheltered persons who have been aggrieved as alleged and at least one of those
8 individuals has died during the pendency of this litigation. *See Exhibit 1 -Declaration of*
9 **William Lewis**. The location of displaced individuals is incredibly time-sensitive due to
10 the transient nature of such individuals as well as volatile health conditions exacerbated
11 by the City’s practice of displacement.³ Further, such information is pertinent to the
12 disposition of the case, as Plaintiffs have been unable to locate specific individuals
13 displaced from the Zone who previously provided declarations confirming Plaintiffs’
14 allegations and were willing to testify to the same at any future evidentiary hearings,
15 because several of those individuals do not have consistent access to a phone or other
16 means of communication. Thus, Plaintiffs currently have no way of determining where
17 the City Defendants forcibly relocated witnesses who were willing to testify on behalf of
18 Plaintiffs.

19 Third, City Defendants misstate Plaintiffs’ argument—the issue is not that
20 Plaintiffs are unable to find individuals who have generally been aggrieved as alleged,
21 but rather that Plaintiffs are unable to relocate *specific* individuals previously living in the
22 Zone who were willing to testify to their experience. Due to many of the displaced
23 individuals’ negative interactions with the City and the legal system at large, it is very
24 difficult to locate affected individuals who are willing to testify to their experience in
25 court. This process is now nearly impossible when the only way Plaintiffs were able to
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27 ³ *See Cruel Summer: When Basic Survival Can Become Illegal*, The Marshall Project (Aug. 6, 2023, 12:00 PM),
28 <https://www.themarshallproject.org/2023/08/26/heat-police-arizona-phoenix-homeless> (noting “[i]nteractions
with police frequently add stress and complications to unhoused people’s efforts to survive deadly temperatures.”).

1 locate such individuals was by finding their tent near the Human Services Campus, which
2 City Defendants have now displaced and refuse to provide information sufficient to
3 determine where such individuals were relocated.

4 Finally, Defendants' unwillingness to work with Plaintiffs to provide necessary
5 information about individuals displaced by its May 10 Sweep in response to the expedited
6 discovery requests granted by this Court underlines the need for formal, ongoing
7 discovery. As this Court noted during the May 26, 2023, status conference, Plaintiffs'
8 "discovery requests [were] quite reasonable requests," and this Court saw no reason "why
9 the City cannot respond in a rapid fashion." May 26 Tr. at 10:22-25. As such, the Court
10 hoped there was no reason "good lawyers with good faith can't work that out without
11 having to involve this formalized proceeding." *Id.* at 17:13-15.

12 During the status conference, City Defendants claimed to be concerned with
13 responding to Plaintiffs' discovery requests due to the privacy interests of displaced
14 individuals. May 26 Tr. at 14:24-15:6. At the same time, however, the City Defendants
15 agreed they would be comfortable with disclosing the pertinent identifying and medical
16 information so long as it was "under the designation 'for attorneys['] eyes only.'" *Id.* at
17 15:1-3. City Defendants now backtrack and explicitly admit that they "redacted the names
18 of unsheltered people contacted and the locations to where they moved following the May
19 10 cleanup effort," without attempting to work with Plaintiffs to designate the materials
20 "for attorneys' eyes only," which would easily negate the need for such extensive
21 redaction. ECF No. 124 at 6. City Defendants' repeated and protracted efforts to conceal
22 such information suggests its importance to Plaintiffs' claims and the need for this matter
23 to continue to discovery without further delay.

24 **III. Conclusion**

25 Accordingly, for the foregoing reasons, Plaintiffs respectfully request the Court
26 grant Plaintiffs' Motion to Set Rule 16 Case Management Conference.

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28 RESPECTFULLY SUBMITTED this 8th day of January, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2024, I electronically filed the foregoing with the Clerk of the Court for the U.S. District Court for the District of Arizona by using the

1 CM/ECF System. All participants in the case, who are registered CM/ECF users, will be
2 served by the CM/ECF system.

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6 /s/ Averyanna James

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