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**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION**

KELSEY CASCADIA ROSE JULIANA, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

Case No. 6:15-cv-01517-TC

**DEFENDANTS' RESPONSE IN
OPPOSITION TO PLAINTIFFS'
MOTION TO EXTEND TIME TO
RESPOND TO MOTION FOR
SUMMARY JUDGMENT**

Introduction

Plaintiffs' motion for an extension of time should be denied, because it would effectively prevent this Court from resolving Defendants' motion for summary judgment, which has the potential to resolve all the claims in this case, sufficiently in advance of the potential trial that is currently scheduled to begin on October 29, 2018. In denying Defendant's petition for a writ of mandamus without prejudice, the Ninth Circuit indicated that it expects the claims and remedies in this case will be "vastly narrowed as litigation proceeds." *United States v. U.S. Dist. Court for Dist. of Or.*, 884 F.3d 830, 838 (9th Cir. 2018). Specifically, it contemplated that the United States would move to "dismiss the President as a party," reassert a "challenge to standing," and seek "summary judgment on the claims." *Id.* at 835-36 (citations omitted). It also noted that Defendants could continue to "raise and litigate any legal objections they have," including by "asking the district court to certify orders for interlocutory appeal of later rulings" and by "seeking mandamus in the future." *Id.* at 837-38.

The extension that Plaintiffs seek—"at a minimum, an additional forty-five (45) days to submit" a response—would prevent this Court from resolving the potentially dispositive motion for summary judgment in a timely manner, and would unnecessarily impede any effort by the Defendants to seek certification for interlocutory appeal or mandamus in the event of an adverse ruling, as contemplated by the Ninth Circuit. Indeed, Plaintiffs separately seek an extension to "defer briefing and hearing on Defendants' Motion for Summary Judgment . . . until after the conclusion of discovery and in conjunction with trial." Pls.' Corrected Mot. to Ext. Time to Resp. to Defs.' Mot. for Summ. J. 4, ECF No. 233 ("Mot. to Ext."); *see also* Defs.' Mot. for Summ. J., ECF No. 207 ("MSJ"). That proposal, however, is profoundly wasteful and inefficient, because the motion for summary judgment has the potential to eliminate the need for

further discovery and trial. Plaintiffs' clear intent is to derail the process contemplated by the Ninth Circuit and to prevent this Court from addressing Defendants' requests to narrow or dispose of the case in advance of trial. Plaintiffs' maneuvers are improper and their motion for an extension should be denied. If the Court is inclined to grant some extension, however, Defendants request that it also enter a continuance, extending the trial date by the same number of days it extends briefing on the motion for summary judgment.

Procedural Background

The United States moved for judgment on the pleadings on May 9, 2018, based on three threshold legal issues: (1) that the claims against the President must be dismissed, (2) that the Administrative Procedure Act ("APA") provides the sole mechanism for Plaintiffs to bring claims (including constitutional claims) against the federal agency defendants, and (3) that, even if the Court were to conclude that Plaintiffs had stated cognizable claims outside the APA framework, adjudicating those claims would violate the separation of powers. Defs.' Mot. for J. on the Pleadings 7-10, 11-21, 22-25, ECF No. 195. Plaintiffs' response to that motion, which was initially due May 23, 2018, has been extended and is now due June 15, 2018 (Order of May 24, 2018, ECF No. 210) and oral argument on the motion is scheduled for July 18, 2018. Order of May 30, 2018, ECF No. 214.

The United States also moved for summary judgment on May 22, 2018, asserting as a threshold matter that Plaintiffs lack Article III standing to bring their claims. MSJ 6-14. Turning to the merits, Defendants explained that they are entitled to summary judgment because Plaintiffs' claims are based on a due process right that does not exist and a public trust doctrine that the Supreme Court has explained derives solely from state law and does not bind the federal government. *Id.* at 25-30. Plaintiffs' response to the motion for summary judgment was due

June 12, 2018, and under the current schedule will be full briefed by June 26, 2018. LR 7-1(f)(1). Given that, the motion could be heard on July 18, 2018, in conjunction with the motion for judgment on the pleadings that is already scheduled to be heard that day.

Argument

The dispositive motions address threshold legal questions for which there is no need for additional discovery and which are logically antecedent to any further discovery and trial. They should accordingly be decided before the parties proceed further into discovery and well before any potential trial, which is currently scheduled for October 29, 2018. *See* Order of April 12, 2018, ECF No. 192. That is what the Ninth Circuit contemplated when it stated that the United States would “have ample opportunity to raise and litigate any legal objections they have” and observed that “[c]laims and remedies often are vastly narrowed as the litigation proceeds.” *U.S. Dist. Court for Dist. of Or.*, 884 F.3d at 837-38. The most efficient path forward (and most consistent with the Ninth Circuit’s direction) is for the parties to finish briefing the motion for summary judgment so that oral argument on that motion can take place on July 18, 2018—the same day this Court will hold oral argument on the motion for judgment on the pleadings. This would allow the Court to narrow the remaining issues and would enable the United States to prepare its defense for any claims that remain for a potential trial.

In their motion for an extension of time, Plaintiffs admit that they have not begun working on their response to the motion for summary judgment, which they attribute to their need to “prepar[e] and fill[e] other opposition papers,” to meet and confer with Defendants, to participate in a joint status conference before Magistrate Judge Coffin, and to participate in an IT training. Mot. to Ext. 3-4. However, while counsel’s other case responsibilities may warrant a modest extension of a week or two, that is not what Plaintiffs seek in their motion. Rather, they

seek “at minimum” an extension of “forty-five (45) days” to submit their response. *Id.* at 2. And they seek to start the clock for this extension not on the date that their brief was due (June 12, 2018), but instead on the date of the Court’s resolution of a motion they filed simultaneously, which seeks to defer ruling on the motion for summary judgment “until trial or the close of discovery.” *Id.*; see Mot. to Defer Consideration of Defs.’ Mot. for Summary Judgment, ECF No. 226, (“Mot. to Defer”). Given the October 29, 2018 trial date and the need for the Court to address Defendants’ arguments for narrowing or dismissing the claims in this case well before trial, granting the extension that Plaintiffs’ request would effectively nullify Defendants’ motion for summary judgment and deny Defendants a meaningful “opportunity to raise and litigate any legal objections they have.” *U.S. Dist. Court for Dist. of Or.*, 774 F.3d at 837.

An extension of the length sought by Plaintiffs here would significantly prejudice the United States. As Defendants have stated during previous status conferences, the United States has moved for summary judgment in order to narrow or eliminate the issues for trial. *See* March 26, 2018 Hrg. Tr. 13:7-11, ECF No. 190 (“summary judgment can be useful, if for no other reason, to narrow the issues for trial and to make the trial itself a little bit more manageable, reduce the number of witnesses, and to focus the issues.”). To push off briefing by one to two months (or more) would effectively prevent the Court from deciding which claims, if any, survive summary judgment until September or October. If this Court or a higher Court has not dismissed the case by that time, the parties will be preparing, or will have prepared, pre-trial memoranda and will be in the process of preparing witnesses for trial.

Moreover, none of the grounds Plaintiffs offer justifies an extension of the length Plaintiffs seek here. Plaintiffs have elected to prioritize responding to non-dispositive motions over dispositive motions. And they have prioritized the task of propounding requests for

admissions concerning publicly-available, agency documents when—as Magistrate Judge Coffin has observed—they could have easily accomplished the same end via a request for judicial notice. June 6, 2018 Hrg. Tr. 7:4-9, ECF No. 223. While it is Plaintiffs’ prerogative to allocate their time and resources as they see fit, their decisions to prioritize other matters are not good cause for the extension they now seek to respond to Defendants’ motion for summary judgment.

And insofar as Plaintiffs seek an extension to allow time for consideration of their concurrently-filed motion to defer a decision on summary judgment, Plaintiffs fail to explain why they waited until June 8, 2018—four days before their response on summary judgment was due—to file that motion. Given that Defendants moved for summary judgment on May 22, 2018, Plaintiffs’ motion to defer a decision on summary judgment could have been briefed and decided on a much earlier timeline. Plaintiffs—not Defendants and the Court—should bear the prejudice of Plaintiffs’ decision to wait until June 8, 2018, to file their motion.

Plaintiffs’ remaining grounds—that they need time to prepare expert and Plaintiffs’ declarations and complete fact discovery—will be more fully addressed in the context of Defendants’ response to Plaintiffs’ motion to defer (ECF No. 226), which Defendants will file in accordance with the time-limits set forth in the local rules, *i.e.* no later than June 22, 2018. *See* LR 7-1(e)(1). Those grounds are baseless, however. While Plaintiffs complain that undisclosed experts “must prepare declarations . . .” in support of Plaintiffs’ response in opposition, and some of these experts are “presently unavailable,” Mot. to Ext. 3, Plaintiffs have had three weeks to prepare the Plaintiffs’ declarations and to locate any experts they believe will need to submit declarations in support of their response brief. And Plaintiffs do not explain what they mean by “unavailable” in this context, which requires merely that each expert have access to his or her computer. Preparing declarations should be no hardship here, as Plaintiffs’ experts have already

prepared expert reports that could easily be edited to suit Plaintiffs' asserted need for declarations. More fundamentally, generic claims that unidentified experts may have to prepare declarations and are unavailable for unspecified reasons fall far short of the good cause that would be required to justify an extension under the current circumstances. More broadly, Plaintiffs' generalized desire to engage in additional discovery against the United States is not an adequate basis for extending Plaintiffs' deadlines. The motion for an extension should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for an extension of time to respond to the motion for summary judgment. To the extent the Court grants any extension it should be for a short duration of about a week to allow the parties to complete briefing on the motion in a time-frame that allows for oral argument on the motion simultaneously with the already-scheduled oral argument on the motion for judgment on the pleadings on July 18, 2018. Finally, to the extent the Court grants any extension of the briefing schedule on the motion for summary judgment, it should continue the trial date by the same number of days so as not to prejudice Defendants.

Dated: June 13, 2018

Respectfully submitted,
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