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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

KELSEY CASCADIA ROSE JULIANA;
XIUHTEZCATL TONATIUH M., through his
Guardian Tamara Roske-Martinez; et al.,

Plaintiffs,

v.

The UNITED STATES OF AMERICA;
DONALD TRUMP, in his official capacity as
President of the United States; et al.,

Defendants.

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

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO AMEND
SCHEDULE**

Expedited Hearing Opposed

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO AMEND SCHEDULE

INTRODUCTION

Plaintiffs oppose both Defendants' Motion to Amend Schedule and Defendants' request for an expedited hearing. Plaintiffs also renew their pending request that this Court defer consideration of Defendants' Motion for Summary Judgment until after the conclusion of discovery and in conjunction with trial due to the significant importance of the material facts at issue, and disputed, in this case. *See* Docs. 226, 304. In their Motion for Summary Judgment, Defendants continue to argue that Plaintiffs do not have standing and that they have not caused Plaintiffs' injuries. Both of these issues present mixed questions of law and fact that cannot be resolved without an empirical analysis considering Plaintiffs' individual situations as well as both historic factual and scientific evidence.

ARGUMENT

1. Defendants' Request Violates the Local Rules

Defendants' request to expedite hearing on their Motion for Summary Judgment through a Motion to Amend Schedule violates the Local Rules, is improper, and should be denied. Defendants' Motion to Amend Schedule is a disguised and inappropriate request for an expedited hearing on Defendants' Motion for Summary Judgment. *See* Doc. 305 ("Defendants respectfully request that this Court amend the scope of the hearing . . . to include argument on Defendants' motion for summary judgment (Doc. 207)"). Under LR 7-1(g), "[a] party seeking an expedited hearing *must* include "EXPEDITED HEARING REQUESTED" on the last line of the document's title." D. Or. LR 7-1(g) (emphasis added). Defendants failed to include the mandatory request for an expedited hearing in their original Motion for Summary Judgment, and now, well over six weeks later, attempt to evade this Local Rule by filing this Motion to Amend

Schedule seeking an expedited hearing on their Motion for Summary Judgment. *See* Defendants' Motion for Summary Judgment, Doc. 207, caption.

Further, as Defendants include “[oral] argument” in their requested addition to the hearing on July 18, 2018 for Defendants' Motion for Judgment on the Pleadings (Doc. 195), Defendants are also in violation of LR 7-1(d), which states that “[a] party seeking oral argument *must* include “Request for Oral Argument” on the last line of the caption to the motion or response.” D. Or. 7-1(d) (emphasis added). Defendants failed to include this request on the caption to Defendants' Motion to Amend Schedule. *See* Doc. 305. By these failures, Defendants have waived their right to expedited hearing on their Motion for Summary Judgment and have waived their right to oral argument on this Motion to Amend Schedule.

2. Defendants will not be Prejudiced by any Delay in Oral Argument

In addition to violating local rules, Defendants provide no good reason to change the schedule indicated by this Court.¹ Their claims of prejudice and conservation of judicial resources are unavailing and have been raised and rejected before. There is no pending discovery to which Defendants are required to respond. Docs. 247, 249. Contrary to the arguments of Defendants, the Ninth Circuit made no special exception to normal litigation practice for these Defendants and affirmed that they are and shall be treated as typical defendants, not exempt from the “normal rules of appellate procedure.” *In re United States*, 884 F.3d 830, 836 (9th Cir. 2018). In stating that “[c]laims and remedies often are vastly narrowed as litigation proceeds; we have no reason to assume this case will be any different,” the Court merely acknowledged that in many cases the issues narrow as trial approaches, but did not mandate any specific result as

¹ Although the Court has not yet scheduled a hearing for Defendants' Motion for Summary Judgment, the Court indicated that the timing of Defendants' filing of their Motion for Summary Judgment puts a scheduled hearing “way into the fall regardless.” May 23, 2018 Transcript, Doc. 243 at 17:14-15.

Defendants suggest. *Id.* at 838. To the contrary, the Court explained the importance of respecting a district court's management of its docket absent a finding of clear error and the burden it would place on the appellate courts if even decisions ultimately found to be erroneous could be appealed prior to final judgment. Moreover, the issues certainly could be narrowed if Defendants were to participate in discovery and engage with Plaintiffs in narrowing or illuminating the factual issues in dispute, but they have repeatedly refused to so participate even though discovery is not currently stayed in this matter.

Defendants will not be prejudiced by any delay in consideration of their Motion for Summary Judgment, particularly considering the Ninth Circuit's statement that Defendants were totally unable to establish any harm or prejudice resulting from this action "other than the mere cost and delay that are the regrettable, yet normal, features of our imperfect legal system." *Id.* at 835-36 (citations omitted). This action does not prejudice Defendants; hearing Defendants' Motion for Summary Judgment as part of the instant trial also would not prejudice Defendants.²

3. Defendants Seek to Burden this Court and Plaintiffs with Motion Practice

Additionally, Defendants' claim that they seek to conserve judicial resources is belied by their previous actions. Rather than participate in discovery, Defendants have clearly made the strategic decision to overburden this Court and Plaintiffs with motion practice. In the past sixty days, while refusing to participate in the normal discovery process, Defendants have filed six motions with the district court (Docs. 195 (Motion for Judgment on the Pleadings), 196 (Motion for a Protective Order and for a Stay of All Discovery), 207 (Motion for Summary Judgment), 216 (Motion to Stay Discovery Pending Resolution of Objections), 217 (Motion for Protective Order), 305 (Motion to Amend Schedule)); objections to a previous ruling (Doc. 215 (Objections

² See also Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion to Defer Consideration of Defendants' Motion for Summary Judgment, Doc. 305, Sec. V.

to Order Denying Motion for a Protective Order and Stay of Discovery)); and three petitions to a higher court to overrule the decisions of this Court (Docs. 211 (Notice of Filing Application for an Extension of Time Within Which to File a Petition for Writ of Certiorari), 246 (Notice of Filing Application for a Further Extension of Time Within Which to File a Petition for Writ of Certiorari), 308 (Notice of Filing of Petition for Writ of Mandamus and Emergency Motion for a Stay)). That litigation practice is hardly conserving the resources of the courts, or the parties, particularly when Defendants continue to make the same legal arguments they have been making since filing their motion to dismiss in 2015 without engaging with the material facts of the case. This motion is another example of Defendants' studied decision to unnecessarily overwhelm counsel for Plaintiffs and this Court with an avalanche of repetitive ancillary motions and not allow the Court the time and consideration needed to review the evidence in the case that is pertinent to its decision on Defendants' summary judgment motion, and better suited for decision after trial on the merits. *See* Docs. 177, 211, 246.

4. Defendants' Proposed Accelerated Schedule is Unreasonable and Unworkable

Most significantly, Defendants' attempt to expedite the hearing of their Motion for Summary Judgment not only shortens the time period in which Plaintiffs may prepare for oral arguments, but also the Court's time to consider the pending motions and the considerable factual evidence Plaintiffs submitted in support of their Opposition to Defendants' Motion for Summary Judgment.³ Defendants have stated they will file their Reply on July 12, 2018, on the same day they have been ordered to submit the names and topic areas of their expert witnesses. Stating that they require "additional pages to respond to all of the arguments contained in

³ As of the filing of this Opposition, Plaintiffs do not know what position Defendants will take as to the issues raised in Plaintiffs' Response on Summary Judgment. To the extent Defendants attempt to introduce any new facts or legal arguments, or object to any evidence introduced by Plaintiffs, then Plaintiffs will need additional time to address those new matters and objections.

Plaintiffs' 55-page brief," Defendants moved to file a 55-page Reply brief, 20 pages over the page limit. Doc. 309. The Court granted Defendants' motion to file excess pages. Doc. 310. Further, the parties' have a meet and confer session on July 16 and a status conference before Magistrate Judge Coffin on July 17. Such an abbreviated schedule will only give Plaintiffs three court days to participate in a meet and confer, attend a status conference, review Defendants' 55-page Reply brief, and prepare for oral argument on Defendants' Motion for Judgment on the Pleadings and Motion for Summary Judgment. Such a schedule is unreasonable, infeasible, and harmful to the interests of the Plaintiffs. Unnecessarily cramming these important matters in such a compressed time frame without good cause diminishes the ability of both Plaintiffs and the Court to consider the lengthy submissions of Defendants and Plaintiffs. *See* Doc. 253.

Moreover, Defendants' request to include consideration of their Motion for Summary Judgment at the July 18, 2018 hearing for their Motion for Judgment on the Pleadings is disruptive to the Youth Plaintiffs' rights and plans to appear at the hearing for the Motion for Summary Judgment, wherein their standing and the merits of their claims are at issue. Due to financial and travel considerations, the out-of-state Youth Plaintiffs will be unable to attend this hearing on such limited notice should the Court grant Defendants' request to expedite the hearing on their Motion for Summary Judgment at this late date. Had Defendants originally requested an expedited hearing of their Motion for Summary Judgment per the local rules and had the Court granted that request, Plaintiffs would have been able to make plans to attend. An expedited schedule would make it impossible for many of the Youth Plaintiffs to attend.

5. These Motions Should Be Argued only after Careful Preparation and Conclusion of Discovery

The instant dispute is complex, presenting intricate legal issues and novel and complicated factual issues with great significance and implications for Plaintiffs and future

generations.⁴ Where a case is complex or novel in nature, judicial time and effort expended on summary judgment tends to equal or exceed that for trial. *See Petition of Bloomfield S. S. Co.*, 298 F.Supp. 1239, 1242 (S.D.N.Y. 1969), *aff'd sub nom. Petition of Bloomfield S.S. Co.*, 422 F.2d 728 (2d Cir. 1970).⁵ An expedited hearing on Defendants' Motion for Summary Judgment would therefore prejudice both Plaintiffs and this Court by substantially diminishing the time and resources available to examine materials thus far submitted.

Finally, because discovery is ongoing, Plaintiffs will seek to submit supplemental briefing and evidence supporting Plaintiffs' opposition to Defendants' Motion for Summary Judgment after discovery is completed.

Plaintiffs have already fully stated their arguments on the issues currently in dispute in Plaintiffs' Motion to Defer Consideration and the corresponding Reply to Defendants' Opposition, which are still under advisement. *See Docs. 226, 304.* As part of its decision on the instant Motion to Amend Schedule, this Court should grant Plaintiffs' Motion to Defer and have oral argument on Defendants' Motion for Summary Judgment at trial.

CONCLUSION

This Court should deny Defendants' Motion to Amend Schedule and their request for an expedited hearing. This Court also should defer hearing Defendants' Motion for Summary Judgment until after the conclusion of discovery and in conjunction with trial.

⁴ *See Doc. 304, Sec. IV.*

⁵ "The judicial time and effort necessary [for] thorough analysis of the facts as a prerequisite to summary judgment would equal or exceed the time and effort necessary for trial and decision. Summary judgment, with ever lurking issues of fact, is always a treacherous shortcut and, in cases like these, too fragile a foundation for so heavy a load." *Petition of Bloomfield S. S. Co.*, 298 F.Supp. at 1242.

Respectfully submitted,

DATED this 10th day of July, 2018.

/s/ Julia A. Olson

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