United States District Court
for the District of Arizona

Lasse Norgaard-Larsen, et al., **Plaintiffs** **v.** **City of Phoenix, et al.,** **Defendants**	**No. CV20-02467-PHX-GMS** **PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS** **(Assigned to the Honorable G. Murray Snow)**

Plaintiffs, Lasse Norgaard-Larsen et al, submit the following Brief in Opposition to the Motion to Dismiss by the City of Phoenix, filed February 01 and received February 03, for the reasons set forth below. The Plaintiffs request that this Court deny the Motion to Dismiss in its entirety. This response will answer the Defendants' claims, as presented under each of the topic headings in their Motion.

I. RELEVANT FACTS

The Defendants summary of the essence of the case is entirely correct: The cities of Phoenix and Scottsdale have leased public land to a private entity for its exclusive use and the plaintiffs believe that that decision is in direct violation of formal deeds and conveyances, as well as U.S. legislation relating to the ongoing protection of public lands, specifically those used as parks, particularly Papago Park. That simple statement of fact is then entirely ignored in the subsequent thirteen pages of their Motion. The Defendants, instead, descent into a muddled compilation of legal terminology and

theory to justify not only the denial of Plaintiffs' rights but also to reject this Court's jurisdiction over a matter that is clearly outside the realm of local and state law.

II. LEGAL ARGUMENT

The Defendants consider the action "both procedurally and substantively deficient." They contend the plaintiffs have no standing and lack cognizable legal theories. They then add, somewhat contradictorily, that "even if Plaintiffs had standing, their federal claims are untimely." They ask that the Court dismiss the case with prejudice, so that the Plaintiffs' right to relief is permanently denied, and their actions are removed from public scrutiny.

Note that a motion to dismiss under Rule 12(b)(6) should be granted only if it appears beyond a doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Conley v. Gibson, 335 U.S. 41, 48 (1957)* and *Bell Atlantic Corp v. Twombly, 550 U.S. 540, 570 (2007).* The keywords here are 'set of facts,' which certainly apply not only to legal standards and court rules, but even more so to the circumstances of the case, i.e., that the Defendants have given control of public lands to a private party for its exclusive use.

A. The Complaint Is Procedurally Improper and Improperly Formatted

The defense states that the complaint lacks a "short and plain statement of the claim showing that the pleader is entitled to relief" and that "the very prolixity of the complaint makes it difficult to determine just what circumstances were supposed to have given rise to the various causes of action."

The plaintiffs disagree. At the very beginning of the Complaint, the following statements are found: “The Defendant and Co-defendant, in collusion, have allowed a corporation to illegally build an enclosed, private facility on public land, in a historic park, with terms and conditions that are disreputable and improvident“ and “The Defendant and Co-defendant are therefore in noncompliance with the terms and conditions found in all deeds, patents, certificates of sale or transfer, indentures and instruments of conveyance relating to ownership of Papago Park. These require that Papago Park be used solely as a public park for park and public convenience purposes. The defendants are also in violation of the Land and Water Conservation Fund Act (LWCF) as well as the Federal Property Act, using Papago Park lands for purposes other than outdoor recreation.

These statements are a clear and precise exposition of the reason for the claim and of the motive for which it was filed. The relief requested is also clear: the plaintiffs want a meeting, under the supervision of the court, to attempt to work out differences in a manner agreeable to all, within a specific time period. The Plaintiffs requested this, rather than an immediate reversion to the United States, because they are reasonable people, sensitive to the jobs and investments linked to the project. There are administrative and legislative options that allow this. Should said meeting not yield an agreement, the Complaint calls for the execution of the reversionary provisions.

The Defendants, in their Motion to Dismiss, treat the complaint as a Law 101 exam or an exercise in legal composition, rather than a matter of the actual intent of the law. This case is not about the Plaintiffs deficiencies in legal formatting or their crude

understanding of Federal Rules of Civil Procedure; it is, once again, about a situation fostered by the defendants which have, despite clear legal prohibitions, violated the public trust, giving control of public land to a private corporation. Courts have recognized that they have a duty to ensure that *pro se* litigants do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements. *Borzeka v. Heckler, 739 F.2d 444, 447 n.2 (9th Cir. 1984)*.

As to the prolixity of the complaint, this is entirely the fault of the defendants, due to the numerous infractions committed by their actions. May the Court note that there are nine different items in the Complaint relating to violations of covenants and US legislation pertaining to parks (Items III.G.1 – III.G.8). There are an additional three items relating to possible administrative irregularities perceived to be present in the arrangements between the defendants and their client (Items III.G.9 – III.G.11), which were included because they are vital factors in understanding how the inconceivable proposition that a private compound could be built in a public park. The Plaintiffs consider the transgressions to be so egregious that a comprehensive, detailed explanation of charges was necessary, as well as a presentation of similar judicial cases involving park lands, to substantiate the assertions in the arguments.

Under FRCP Rule 8 (b) (A), in responding to a pleading, a Defendant must state in short and plain terms its defenses to each claim asserted against it. In their response, the defendants ignore all eleven claims made by the defendant, and instead focus on procedural rules and abstract “recognizable legal theories” to avoid the essence of the issue: their irresponsible disregard for land in the public domain.

The plaintiffs recognize their deficiencies in legal knowledge and experience. They petitioned the court for an appointed counsel, but this was denied, as is usual in civil cases. They approached seven different attorneys but were turned down by all, supposedly because of the case's complexity, conflicts of interest, lack of experience in federal land legislation, an unwillingness to antagonize special interests and a general reluctance to get involved in litigation with no certain financial reward. To date, the sum of the plaintiff's formal legal education consists of one thirty-minute free legal clinic sponsored by this district court. Contrast this to more than thirty certified lawyers, with many years of experience, available to the Defendants.

B. Relevant Legal Standards under Rules 12(b)(1) and 12(b)(6)

The Defendants allege that the Complaint does not state a claim upon which relief can be granted and that it lacks subject matter jurisdiction pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

It has been noted that "the primary objective of the law is to obtain a decision on the merits of any claim; and that a case should be tried substantially on the merits rather than technically on the pleading." *Rennie & Laughlin, Inc. v. Chrysler Corp., 242 F.2d 208, 213 (9th Cir. 1957)*. In a 12(b)(6) motion, the defendant bears the burden of persuading the Court that no claim has been stated. *Gould Elecs., Inc. v. United States, 220 F3d 169, 178 (3d Cir. 2000)*. Finally, courts must construe the complaint in the light most favorable to the plaintiff. *Russell v. Landrieu, 621 F.2d 1037, 1039 (9th Cir.1980)*. Accordingly, courts must accept as true all material allegations in the complaint, as well

as reasonable inferences to be drawn from them. *NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir.1986)*.

The detailed catalog of perceived violations in the Complaint and the voluminous content in the attached Exhibits -- characterized by the Defendants as 'prolixity' and implied to be confusing ("...difficult to determine just what circumstances were supposed to have given rise to the various causes of action") – are nothing but the bare facts of the case and a detailed description of the circumstances relating to it. The Plaintiffs have no doubt as to the clarity and factual basis of the allegations. It is for the Court to judge the accuracy of those claims and their merits.

C. Plaintiffs Lack Standing / There Is No Subject Matter Jurisdiction

The defendants provide a long list of judicial cases to substantiate its position that citizens do not have a private right of action to enforce federal law. That duty -- of providing assistance, oversight, specialized expertise, and enforcement required by law – is given to diverse federal agencies under the terms of their legislative charters. The relationships between those federal agencies are governed by the APA (Administrative Procedures Act) and "the APA does not apply to the City of Phoenix because a city is not an 'authority of the Government of the United States.'" The Defendants also deny the applicability of any contractual obligation to the case (referring to the restrictions in the instruments of conveyance or irregularities in the Lease) because the Plaintiffs have no vested contractual relationships in these transactions.

The Defendants omit an important fact: The courts can and do allow individuals to take legal action when agencies tasked to uphold rules and laws fail to do so. A

private cause of action, or right of action, allows a private plaintiff to bring an action (i.e., to have standing in court) based directly on a public statute, the Constitution, or federal common law. Implied private rights of action are not created by Congress but are granted by courts when the nature of the plaintiff's injury and remedy sought is consistent with the legislative purpose.

The Private Right of Action issue is complex and controversial. It was established to protect the court from an overload of casework. The Courts recognize, however, there are occasions which it should be permitted in the pursuit of justice if other legal mechanisms have failed. Perhaps the Holy Grail of 'Private Right of Action' cases is *Spokeo, Inc. v. Robins*, *578 U.S. 330 (2016)* and related cases. The issue was so complex that the case bounced from District Court to the Court of Appeals for the Ninth Circuit, back to District and then finally ending up at the Supreme Court, which ruled that the Constitution's Case or Controversy Clause, based upon Article III, requires that plaintiffs' injury-in-fact allegations satisfy both a particularity and concreteness analysis, yet also postulates that even intangible harms arising from alleged procedural statutory violations can rise to the level of concrete injuries if the harm is one that Congress sought to address and the violations caused a material harm to the plaintiff.

The harm inflicted by the actions of the defendants on the plaintiffs, as well as the public, is real, physical, concrete and tangible. The denial of access to a public space is intrinsically related to basic rights derived from the US Constitution (freedom of expression, of assembly, of information, of movement, etc.) and historically covered under common law principles (access to areas known as 'public forums,' including

sidewalks, parks, and town squares) The right to access public forums is not absolute, but it must not be discriminatory. It may be regulated by time and purpose, but all persons are entitled to the full and equal enjoyment of the goods, services, facilities, privileges, and rights in places of public accommodation. To deny a person access to a public park because that area has been reserved for the exclusive use of a private entity is to deny that person a basic civil and human right.

In *Cort v. Ash,* the Supreme Court developed a four-factor test to determine whether a private action could be implied from a federal statute *(https://www.luc.edu/media/lucedu/law /students/publications/llj/pdfs/vol-49/9_Newcombe%20(117-147).pdf)* These factors are (1) whether the plaintiff is part of a class "for whose special benefit the statute was enacted[;]" (2) whether there is an indication of any legislative intent to deny or create such a remedy; (3) whether the remedy would be consistent with the "underlying purposes" of the legislation; and (4) whether the subject of the cause of action was one "traditionally relegated to state law" so that it would be inappropriate to imply a new action based on federal law. With regard to these factors, the Plaintiffs respond: (1) Certainly the plaintiff is a member of the public and the public is the expressed object is the term "public park," (2) the multitude of regulations found in federal statutes relating to the protection and preservation of public lands is a clear indication of legislative intent, (3) the penalties, or remedies for those violations, are indicative of the intent to protect the declared purpose of the parks – that is of recreation and leisure by the general public, and (4) because the cause of action is a

violation of federal laws on lands that with protections enacted by federal legislation, state laws and courts are an inappropriate forum.

While no Court or single judicial source has yet, to the knowledge of the Plaintiffs, elaborated a formal, official guide to resolve this issue beyond *Cort v. Ash*, the same linked article identifies some of the factors which have consistently emerged as guidelines for the creation of implied private rights of action:

Factor 1. Type of Statute. A court is more likely to base an implied private right of action on a prohibitory statute, rather than a disclosure statute. A prohibitory statute is one that forbids a certain action, such as using public lands for non-public purposes. A court has found that a prohibitory statute "implies a private right of action to enforce those protections. *Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173 (2005)*.

Factor 2. A statute must identify a particular group it is designed to benefit. This needs no elaboration; U.S. legislation relating to federal parks and related lands, including former park lands, are proclaimed to be done to benefit present and future generations.

Factor 3. A Statute must confer a "Right" on the Plaintiff. Legislation setting aside public lands for recreational purposes implies the land is to be used for that purpose and therefore equally implies the public, individually and collectively, have a right to use those lands for the intended purposes. While there may be no law that specifically states "people have a right to use a public park" or that "children have a right to play in a park," the very definition of the term 'public' in 'park' implies that individuals have that right.

Factor 4. The conduct of the defendant(s) must be intentional. In this case, mere negligence is not enough to support an implied private right of action. The building of a

private training facility did not just happen; it was a planned and elaborate action conducted over a considerable period by individuals who chose to ignore the title documents in their own Lease.

Factor 5. Statutory Purpose. Denying or interfering with a private rights of action would, in this case, hurt the overall statutory purpose of legislation intended to protect public parks and guarantee the use of those lands for recreation and leisure purposes. The Complaint filed by the plaintiffs – to safeguard public lands – is consistent with the underlying purposes of the US legislation and national park policy.

Factor 6. Legislative Intent and Enforcement Provisions. An important issue in seeking to obtain a private right of action is whether the statute at issue already provides an enforcement mechanism. In this case, the statutes do not. The prohibitions are clear, as are the provisions in case of violation, but there is no comprehensive plan to ensure that public lands remain in the public domain. Perhaps the reason for this is that nobody thought it necessary to include such mechanism because the possibility that a government entity would give public park lands to a private corporation was alien.

Factor 7. The problem of "Remediless". To deny a plaintiff a private cause of action or, more simply, the ability to pursue justice in a court of law, would leave such a plaintiff "remediless." This occurs when a government agency tasked with enforcing a statute refuses to do so. *Franklin v. Gwinnett County Public Schools* provides an example of the Supreme Court deciding to imply a private remedy from a federal statute after the public agency tasked with enforcing it failed to do so.

The "lack of standing" argument by the defendants may have merit under some circumstances, but certainly not in this case. The Court should be aware that this lawsuit was forced upon the Plaintiffs, who, after many months of toil and grief, had exhausted all possible other remedies to protect an area that rightfully and legally should be reserved for public use.

D. Plaintiffs Lack Cognizable Legal Theories

The Defendants state that Dismissal under Rule 12(b)(6) is proper if a plaintiff lacks a cognizable legal theory. They cite *Balistreri, 901 F.2d at 699* as the primary source for this legal opinion. They link this stance, once again, to their view that the Plaintiffs have no standing or a private right of action. This then is then applied to the LWCFA and FPASA laws, the Contracts clause, and to the Property clause used by the Plaintiffs in their Complaint. The plaintiffs would like to remind that the defendants that federal courts have a long history of hearing cases relating to the abuse and misuse of public parks for non-public purposes, including cases brought by citizen groups (*Save the Park and Build the School (SPBS) v. National Park Service, Brooklyn Heights Association (BHA) v. National Park Service(NPS), Boston Redevelopment Authority (BRA) v. National Park Services (NPS) and Sally Jewell, Friends of the Shawangunks, Inc. v. Clark, Citizens to Preserve Overton Park, Inc. v. Volpe).* Even some of the legal precedent cases cited by the defendants were adjudicated in federal courts. The Defendants, in this instance, claim the Complaint does not meet the basic criteria of viability to be tried before this tribunal. The Plaintiffs state, however, that federal laws and properties with federal protections can only be adjudicated in a federal court.

The Plaintiffs find it amusing that the Defendants should use *Balistreri v. Pacifica Police. Dep't, 901 F.2d 696, 699 (9th Cir. 1990)* as the initial reference for their defense in this item. This case is a classic cautionary tale about a battered person who feels betrayed and ignored by officials who, in the opinion of that person, not only refused to faithfully execute their official duties, but, but as agents of the state, actively conspired to deprive that person of due process and equal protection of the law. The Appeals Court found that Balistreri's complaint alleges no facts suggesting that defendants subjected her to any search, seizure, or use of force, lawful or otherwise, and that there was no allegation that Balistreri's husband was a state agent, or that his acts were ratified, condoned, or instigated by the state.

The circumstances of the Plaintiffs case are entirely different. Defendants are state agents, in the broad sense of the word, and their actions – blatant violation of federal law and disregard of title covenants – were expressly permitted by the omission of state and federal authorities who were aware of those transgressions yet condoned the abuse inflicted on public lands by an entity (the Giants) acting under a deceptive contract (the Lease) with those initial state agents. The harm to the Defendants consists of the very real and physical barrier to free movement in areas in the public domains, depriving them of access to those areas for public recreation and convenience.

E. Plaintiffs' Federal Claims Are Untimely

The Defendants assert that the Plaintiff's claims are untimely – with the caveat "Even assuming that Plaintiffs have standing" – due to the two-year limit in Arizona's

Statute of Limitations law. This presumption is based upon the period from the signing of the Lease in November 2018 and the filing of the Complaint in December 2020.

Without a federal limitations period, the federal courts borrow the statute of limitations applicable to personal injury claims in the forum state. *Wilson v. Garcia, 471 U.S. 261,279-80 (1985*). However, in borrowing a state statute of limitations for a federal cause of action, it should "borrow no more than necessary." *West v. Conrail, 481 U.S. 35, 39-40 (1987)*. Consistent with this maxim, federal, not state, law determines when a civil rights claim accrues. *Elliott v. City of Union City, 25 F3d 800-802 (9th Cir. 1994)*. The general common law principle is that a cause of action accrues when the plaintiff knows or has reason to know of the injury that is the basis of the action and the cause of that injury. *Bonneau, 666 F.3d at 581; TwoRivers, 174 F.3d at 991; TRW Inc. v. Andrews, 534 U.S. 19, 27 (2001).*

A “I am curious about what is happening at the Papago Park Sports facility” email was first sent to city officials on September 27, 2019, asking for documentation about the project. It was at this point that the Plaintiffs became aware of the true nature of the Project and the injury being inflicted. By November, the Giants project had become a major issue, as demonstrated in the emails of Exhibit D in the Complaint. In another an email sent on April 23, 2020, one of the plaintiffs writes “This controversy goes back to November of last year when I noticed a long green construction fence around the old baseball facility at 64th and McDowell. The fence encompassed not only the said facility but quite a bit more, to the extent that some of the trails I habitually walked were blocked.”

As mentioned above and demonstrated in the emails included as Exhibit D in the Complaint, for six months the Plaintiffs did everything possible to alert city officers that the Lease and building activity violated U.S. Law and title restrictions. At one point, the Plaintiffs asked Phoenix to simply commit to not destroy any more of the native habitat of the park. After six months of futile efforts with local governments, the Plaintiffs turned their attention to the Arizona State Parks agency and the U.S. Department of the Interior (DOI), requesting that they exercise their legal prerogatives, investigate the matter, and respond accordingly. They washed their hands of this is a manner that would have made Pilate proud.

There may be another important concept at play in this case: the discovery rule is subject to the doctrine of fraudulent concealment. It can be argued that, in the Lease, the City of Phoenix knowingly incorporated misleading information about the true nature of the project. Nowhere in the lease is it stated that the Facility is in a public park. Nowhere in the Lease does it actually portray the true extent of the construction that was undertaken. What is described as an 'enhancement' of a former facility turned out to be a bulldozing not only at that area, but of approximately 15 additional acres of desert habitat, stripping it of all native vegetation. The true extent of the project can only be surmised from an analysis of the diagrams attached to the Lease, and even those are misleading because the facility as built is not that in those diagrams.

Beyond the obfuscation of the Defendants, the Plaintiffs also had to deal with a) the quasi-criminal response by the DOI, which used invalid 'official' documents, citied repealed laws and ignored the protective clauses of Land Patents, and b) the "no intention

of responding or getting involved in this issue" position taken by Arizona State Parks agency, which accepted an overlay of a 2019 Google Earth map to justify their non-action relating to a 1967 "outdoor recreation only" grant. This information was obtained from a FOIA request to the that state agency, made on December 30, 2020. A similar request to the DOI, made at the same time, has not been honored, although the legal normal response time is twenty working days.

Federal, not state, law determines when a civil rights claim accrues. *Elliott v. City of Union City, 25 F.3d 800, 801-802 (9th Cir.1994)*. Under federal law, a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action. Knowledge of the full extent of the injury -- misuse of public lands, barred to the public -- occurred between September and December 2019, as documented in the Complaint. The civil action was filed in December 2020, well within the parameters of the statute of limitations cited by the Defendants.

It must also be stressed that, apart from the presumptions above related to timeliness, the use-restrictions in the title documents do not expire unless revoked by the bestowing party, and US laws are valid until revoked. "Acts of Congress granting lands are laws as well as grants, and are operative until repealed; ...The delay in the assertion of a right is not conclusive against its existence…" *Oregon & California R. Co. v. U.S.* 238 U. S.393, 1.36, 4.38, (1915). The untimeliness contention of the Defendants is unfounded.

III. CONCLUSION

Rather than focus on the allegations in the complaint, *i.e.*, that the cities of Phoenix and Scottsdale have illegally given control of a public park to a private corporation, or to attempt to justify the unsavory elements in the Lease, the Defendants instead simply attempt to strip the plaintiffs of the right to bring an alleged wrongdoing before the court and, at the same time, deny that the court has the right to hear and rule on those allegations.

The plaintiffs wish to express their absolute awe as to the sublime and often subjective nature of the law; it is based upon the certainty of the written word and the flexibility of adapting that to the infinite variations and interpretations of human conduct. It has given the Plaintiffs a deep respect for the lawyers and judges who navigate the often subtle waters of the legal process. This process has been an exhausting experience for the Plaintiffs, requiring hundreds of hours of toil in an unfamiliar environment, in which the old adages *modicum sapere periculosum* and "fools rush in where angels fear to tread" often come to mind.

The Plaintiffs therefore respectfully request that the Court reject the Defendants Motion to Dismiss. Let the case be decided in a court of law, based upon statutes and facts.

Signed and dated this 18th day of February of 2021.

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CERTIFICATE OF SERVICE

The Plaintiffs hereby certify that on February 18, 2021, they served the attached document by mail on the following defendants:

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By

_____ _____
Lasse Norgaard-Larsen J. Arthur Deal