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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Lasse Norgaard-Larsen, et al., Plaintiffs, vs. The City of Phoenix, et al., Defendants.	No. 20-cv-02467-PHX-GMS **DEFENDANT CITY OF PHOENIX'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** (Assigned to the Honorable G. Murray Snow)

The Court should deny Plaintiffs' motion for summary judgment (Doc. 16.) As with their prior filings, Plaintiffs again have demonstrated their refusal to adhere to the Federal Rules of Civil Procedure and the Local Rules for the District of Arizona. Plaintiffs' motion is not properly supported under Rule 56(c)(1) and governing Ninth Circuit law, and Plaintiffs' failure to provide a separate statement of facts justifies denial of the motion under LRCiv 56.1(a).

If the Court determines that consideration of Plaintiffs' motion is proper, it fails for the same reasons set forth in the City's dispositive motion to dismiss. (Doc. 10.) Plaintiffs lack both Article III and prudential standing to assert the claims in their

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complaint against the City of Phoenix; Plaintiffs' legal theories uniformly fail; and Plaintiffs' claims are untimely in any event.

Even assuming the Court denies the City's motion to dismiss, Plaintiffs' motion is premature. There is no scheduling order in place and the parties have not even begun discovery. Should the Court determine that a full response from the City to Plaintiffs' motion for summary judgment is necessary, relief under Rule 56(d) is warranted. If discovery must commence, the City intends to pursue a number of factual areas of inquiry that would be essential to opposing Plaintiffs' motion for summary judgment.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Plaintiffs' Motion Is Procedurally Improper and Unsupported

LRCiv 56.1(a) requires that Plaintiffs submit a separate statement of facts that points to specific evidence in the record justifying summary judgment. Plaintiffs have not done so, and this failure justifies denial of the motion. *See* LRCiv 56.1(a) ("A failure to submit a separate statement of facts in this form may constitute grounds for the denial of the motion."); *Ghazali v. Moran*, 46 F.3d 52, 54 (9th Cir. 1995) (holding that the district court did not err in dismissing a *pro se* plaintiff's civil rights complaint for failing to comply with a local rule).

Even if not denied for a failure to comply with LRCiv 56.1(a), though, Plaintiffs' motion is unsupported and should be denied on that basis.

Where a party moving for summary judgment will bear the burden of proof at trial (i.e., Plaintiffs here), that party has the initial burden of producing evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. *C.A.R. Transp. Brokerage Co., Inc. v. Darden*, 213 F.3d 474, 480 (9th Cir. 2000). Stated differently, "[a] plaintiff moving for summary judgment must offer evidence sufficient

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to support a finding upon every element of his or her claim, which is ordinarily a heavy burden." *Martinez v. One Beacon Am. Ins. Co.*, 2020 WL 7016053, at *5 (D. Ariz. Mar. 23, 2020) (citing *Barnes v. Sea Haw. Rafting, LLC*, 889 F.3d 517, 537-38 (9th Cir. 2008)). Plaintiffs have not done so here.

As the Ninth Circuit eloquently stated some 50 years ago,

> [a] summary judgment is neither a method of avoiding the necessity for proving one's case nor a clever procedural gambit whereby a claimant can shift to his adversary his burden of proof on one or more issues. To obtain a judgment in favor of a claimant pursuant to his complaint, counter-claim, or cross-claim, the moving party must offer evidence sufficient to support a finding upon every element of his claim for relief, except those elements admitted by his adversary in his pleadings, or by stipulation, or otherwise during the course of pretrial. A plaintiff seeking summary judgment who has failed to produce such evidence on one or more essential elements of his cause of action is no more 'entitled to a judgment' than is a plaintiff who has fully tried his case and who has neglected to offer evidence sufficient to support a finding on a material issue upon which he bears the burden of proof.

United States v. Dibble, 429 F.2d 598, 601 (9th Cir. 1970) (citations omitted).

Although Plaintiffs claim that the "facts stated in the Complaint, filed December 23, 2020, have not and cannot be disputed," (Doc. 16, p. 2), Plaintiffs appear to confuse their own self-serving allegations with admissible evidence. Just as in *Dibble*, Plaintiffs cannot avoid their necessity and burden to prove their case with admissible evidence by simply filing an early motion for summary judgment. Indeed, Rule 56(c)(1) states that a party asserting that a fact cannot be genuinely disputed must support the assertion by "citing to particular parts of materials in the record."

Here, the only "evidence" presented by the Plaintiffs is their own Complaint, but this document is not sworn, and the multiple exhibits attached to the Complaint have been altered by Plaintiffs. Unauthenticated, unsworn, and altered documents are not

admissible evidence establishing Plaintiffs' entitlement to summary judgment.[1] Plaintiffs have "not met [their] summary judgment burden either in form or substance." *Imamoto v. Soc. Sec. Admin.*, 2008 WL 4657811, at *8 (D. Haw. Oct. 21, 2008). *See also James v. Scribner*, 2008 WL 686402, at *1 (E.D. Cal. Mar. 13, 2008) (a plaintiff moving for summary judgment bears the burden of "setting forth evidence establishing beyond controversy the elements of his claims").[2]

"Plaintiffs attach no evidence to the motion, and the Complaint is not verified. Without a single piece of evidence adduced to establish their claims, Plaintiffs are not entitled to offensive summary judgment." *Duffy v. Anderson*, 2011 WL 2148855, at *2 (D. Nev. June 1, 2011) (citing *Dibble*, 429 F.2d at 601). The same is true here.

Summary judgment in Plaintiffs' favor is not appropriate.

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[1] Among the many failures of Plaintiffs' motion for summary judgment is Plaintiffs' utter failure to establish which portions of Papago Park each of their purported exhibits cover. For example, Plaintiffs have yet to demonstrate which portions of Papago Park are impacted by the 1960s LWCF funds, which portion of the park is covered by the 1997 federal land patent, etc. Baldly proclaiming that these items apply to the area at issue in this lawsuit is not sufficient. Nevertheless, to the extent the Court determines that Plaintiffs' altered, unsworn, and unauthenticated exhibits to the complaint are "evidence," the City respectfully directs the Court to the 1964 land deed transferring a portion of Papago Park from the United States to Arizona. That deed is an attachment to the cities' contract and it specifically states that the land at issue is specifically allowed to be used for "the construction of a baseball stadium…." (Doc. 1-2, p. 9, para. 4; Doc. 1-2, p. 11, para g.)

[2] Plaintiffs do not get a free pass on compliance with Rule 56 simply because they are proceeding *pro se*. Indeed, "[*p*]*ro se* litigants must follow the same rules of procedure that govern other litigants." *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1986). *See also Carter v. Comm'r of Internal Revenue*, 784 F.2d 1006, 1008 (9th Cir. 1986) ("Although *pro se*, [plaintiff] is expected to abide by the rules of the court in which [she] litigates.").

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II. Plaintiffs' Motion Fails on the Merits

Plaintiffs' legal claims uniformly fail for the reasons set forth in the City's briefing on its motion to dismiss. (Docs. 10 and 14.) Plaintiffs lack both Article III and prudential standing, and they lack cognizable legal theories. Even if Plaintiffs had standing, their federal claims are untimely. In short, Plaintiffs cannot establish their entitlement to judgment as a matter of law. Fed. R. Civ. P. 56(a).

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

Plaintiffs lack both Article III and prudential standing, and this is fatal to each of their claims. As such, summary judgment in Plaintiffs' favor is not warranted.

Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Id.* (internal citations and quotations omitted). "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.*

The only possible basis upon which the Court could assert jurisdiction over this case is 28 U.S.C. § 1331 (federal question jurisdiction). But merely inserting a federal statute into a complaint does not confer federal question jurisdiction. Rather, as detailed in the motion, Plaintiffs must establish that there is a private right of action and that they have prudential standing. *See, e.g., Williams v. United Airlines, Inc.*, 500 F.3d 1019, 1022 (9th Cir. 2007) (determining that the "general federal-question jurisdiction statute is applicable only when the plaintiff sues under a federal statute that creates a right of action in federal court").

Plaintiffs cannot meet their burden to establish that their claims lie within the

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Court's limited jurisdiction.

1. LWCFA and FPASA – No Subject Matter Jurisdiction

It is well-established that there is no private cause of action for alleged violations of the Land and Water Conservation Fund Act (16 U.S.C. § 460*l*-4, et seq.)[3] or the Federal Property and Administrative Services Act (40 U.S.C. § 550(e)). *See, e.g., Friends of Roeding Park v. City of Fresno*, 848 F.Supp.2d 1152, 1160 (E.D. Cal. 2012) (stating that it is "well-accepted" that there is no private right of action under the LWCFA); *Cooper v. Haase*, 750 Fed. Appx. 600, 601 (9th Cir. 2019) ("The Federal Property and Administrative Services Act ('FPASA') does not provide for a private cause of action.").

Federal law is clear that claims under federal statutes such as LWCFA or FPASA are properly brought against the relevant federal agencies under the Administrative Procedure Act ("APA"). *See, e.g., Chrysler Corp. v. Brown*, 441 U.S. 281, 317-19 (1979) (APA is the proper method to enforce a federal agency's compliance with a particular federal statute); *Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233, 1238 (9th Cir. 2005) ("Because NFMA and NEPA do not provide a private cause of action to enforce their provisions, agency decisions allegedly violating NFMA and NEPA are reviewed under the Administrative Procedure Act[.]").

A private right of action against a municipality would utterly bypass the APA, which would thwart congressional intent as to the APA itself:

> To permit a case to proceed directly under a federal statute and bypass the APA is not without consequence. The APA includes a series of procedural requirements litigants must fulfill before bringing suit in federal court. For instance, the challenged agency action must be final. 5 U.S.C. § 704. Also,

[3] LWCFA has gone through several permutations in recent years. It is currently found at 54 U.S.C. § 100101 et seq.

> a party generally cannot seek court review until all administrative remedies have been exhausted. *Young v. Reno*, 114 F.3d 879, 881 (9th Cir. 1997).

San Carlos Apache Tribe v. United States, 417 F.3d 1091, 1098 (9th Cir. 2005). Plaintiffs have chosen not to sue any federal agencies and have utterly failed to exhaust any federal administrative remedies.

Despite filing an opposition to the City's motion to dismiss (Doc. 13) and filing their own motion for summary judgment (Doc. 16), Plaintiffs have not presented the Court with a single case in which a private right of action was approved under the relevant portions of LWCFA or FPASA, let alone that such private right of action was properly brought by a citizen against only a municipality. Instead, Plaintiffs have presented cases that support the City's argument, i.e., LWCFA cases must progress against the relevant federal agency through the APA. *See, e.g., Save the Park & Build the Sch. v. Nat'l Park Serv.*, 3:20-CV-1080-LAB-AHG, 2020 WL 4260801, at *2 (S.D. Cal. July 24, 2020) ("Under the Administrative Procedure Act . . . agency action must be set aside if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,' . . . . Without making a final determination of this issue, the Court finds that Save the Park is likely to be able to show that NPS's initial, hasty approval of the project was arbitrary, capricious, and an abuse of discretion."); *Brooklyn Heights Ass'n v. Nat'l Park Serv.*, 818 F.Supp.2d 564, 567-68 (E.D.N.Y. 2011) (analyzing National Park Service's actions under the APA); *Boston Redevelopment Auth. v. Nat'l Park Serv.*, 125 F.Supp.3d 325, 329 (D. Mass. 2015), *aff'd*, 838 F.3d 42 (1st Cir. 2016) ("The first issue is whether NPS violated the APA when it concluded that Long Wharf Pavilion falls into the 6(f) restricted area."); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), *abrogated by Califano v. Sanders*, 430 U.S. 99 (1977) (analyzing actions of the U.S. Department of

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Transportation under the APA).

Here, Plaintiffs have not sued the appropriate federal agencies and they are not bringing a claim under the APA.

Without a private right of action for alleged violations of LWCFA or FPASA, Plaintiffs' alleged injuries cannot be redressed by the Court and Plaintiffs lack Article III standing for these claims. *See Bennett v. Spear*, 520 U.S. 154, 162 (1997) (Article III standing requires that the plaintiff's injury will likely be redressed by a favorable court decision). The Court thus lacks subject matter jurisdiction over these claims. *See N. County Commc'ns Corp. v. Cal. Catalog & Tech.*, 594 F.3d 1149, 1162 (9th Cir. 2010) (holding that "[t]he district court lacked subject matter jurisdiction . . . as North County cannot establish a private right to compensation under the provisions of the Federal Communications Act").

Summary judgment in Plaintiffs' favor is inappropriate.

2. Property Clause and Contracts Clause – No Prudential Standing

Plaintiffs' next two claims are brought under two portions of the U.S. Constitution, the Property Clause and the Contracts Clause. Plaintiffs lack prudential standing to advance these claims.

The Property Clause provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belong[ing] to the United States." U.S. Const. art. IV, § 3, cl. 2. The Property Clause "precludes states and private individuals from divesting the federal government—through state laws or otherwise—of title to property without congressional consent." *Freedom Mortg. Corp. v. Las Vegas Dev. Group, LLC*, 106 F.Supp.3d 1174, 1179 (D. Nev. 2015). Claims under the Property Clause are properly brought by the federal

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government because "the federal government is the best advocate of its *own* interests." *The Wilderness Soc. v. Kane County, Utah*, 632 F.3d 1162, 1172 (10th Cir. 2011) (italics in original).

Here, Plaintiffs are not the federal government and have no standing to assert the federal government's rights in any of the deeds or land grants discussed in the complaint. Indeed, Plaintiffs' complaint indicates that the federal government has disclaimed any interest in Papago Park and has not agreed to be involved in this lawsuit either. (Doc. 1, pp. 7-8.)[4] Plaintiffs' motion for summary judgment does nothing to change this fact.

The Contracts Clause provides in pertinent part: "[N]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. The Contracts Clause can, in certain circumstances and within the Ninth Circuit, provide a private cause of action through 42 U.S.C. § 1983. *See S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 887 (9th Cir. 2003) (ruling that Section 1983 provides a private right of action premised on a Contracts Clause violation when "a State, or a political subdivision thereof, impair[s] its obligations of contract").[5] However, such a claim is properly brought by an individual whose own vested contract rights are impaired by the government. *Lazar v. Kroncke*, 862 F.3d 1186, 1199-1200 (9th Cir. 2017).

Here, the complaint alleges that the rights of the federal government (and possibly

[4] Plaintiffs do not have standing to assert the federal government's rights under the Property Clause merely because they are citizens or taxpayers. *See Schnapper v. Foley*, 667 F.2d 102, 116 (D.C. Cir. 1981).

[5] There is a circuit split on this issue. *Compare S. Cal. Gas Co.*, 336 F.3d at 887 *with Kaminski v. Coulter*, 865 F.3d 339, 347 (6th Cir. 2017) ("[A]n alleged Contracts Clause violation cannot give rise to a cause of action under § 1983.") *and Crosby v. City of Gastonia*, 635 F.3d 634, 641 (4th Cir. 2011) (same).

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the State of Arizona) in the deeds at issue are being diminished, not any contract right held by Plaintiffs themselves. (Doc. 1, p. 25.) Plaintiffs are strangers to all of the contracts mentioned in the complaint, and thus, they have no vested contract rights in these transactions. Without vested contractual rights at issue in the transactions at hand, Plaintiffs lack prudential standing. *See Dodge v. Bd. of Educ. of City of Chicago*, 302 U.S. 74, 80 (1937) (Contracts Clause challenge failed in the absence of vested contractual rights); *Lazar*, 862 at 1200 ("Because Lazar never possessed a vested contractual right, she suffered no contractual impairment" under the Contracts Clause).

Summary judgment in Plaintiffs' favor is not warranted.

B. Plaintiffs Lack Cognizable Legal Theories

Plaintiffs' claims also lack a cognizable legal theory. Without a cognizable legal theory, Plaintiffs cannot establish their entitlement to judgment as a matter of law under Rule 56(a).

1. LWCFA and FPASA

As detailed above, there is no private right of action for Plaintiffs' claims under the LWCFA and FPASA. *See Friends of Roeding Park*, 848 F.Supp.2d at 1160 (LWCFA); *Conservation Law Found. of New England*, 587 F.Supp. at 366-67 (FPASA). Even assuming Plaintiffs had standing to assert these claims here, they lack a cognizable legal theory without a private right of action. *See, e.g., Lan Thi Hoang v. Burke*, 2017 WL 4443144, at *3 (C.D. Cal. Oct. 3, 2017) ("Because Plaintiff does not have a private right of action under these statutes, she does not allege a cognizable legal theory, and her claims must be dismissed."); *325-343 E. 56th St. Corp. v. Mobil Oil Corp.*, 906 F.Supp. 669, 686 n.26 (D.D.C. 1995) ("As the court finds no express or implied private right of action for money damages, and hence no cognizable legal

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theory under which Plaintiff can seek redress. . . .").

Summary judgment in Plaintiffs' favor is not warranted.

2. Property Clause

Plaintiffs' claim under the Property Clause fares no better.

The City of Phoenix has broad power to dispose of and utilize its property. As the Supreme Court explained in *Wilcox v. Jackson*, a "state has an undoubted right to legislate as she may please in regard to the remedies to be prosecuted in her Courts, and to regulate the disposition of the property of her citizens by descent, devise, or alienation." *Wilcox v. Jackson*, 38 U.S. 498, 516 (1839). The Property Clause prevents the City from disposing of land owned or controlled by the federal government, though. *See id.* (stating that when the property is "part of the public domain of the United States[,] Congress is invested by the Constitution with the power of disposing of, and making needful rules and regulations respecting it."). "If a state were able to pass laws that could dispose of federal lands . . . the practical result . . . would be, by force of state legislation to take from the United States their own land, against their own will, and against their own laws." *Yunis v. United States*, 118 F.Supp.2d 1024, 1032 (C.D. Cal. 2000) (quoting *Wilcox*, 38 U.S. at 517) (internal quotation marks omitted).

Thus, the Property Clause "precludes states and private individuals from divesting the federal government—through state laws or otherwise—of title to property without congressional consent." *Freedom Mortg. Corp.*, 106 F.Supp.3d at 1179. Here, though, the City is not seeking to divest any property from the federal government. The transfers from the federal government to the State of Arizona happened decades ago, and Plaintiffs' complaint makes clear that the federal government has no interest in Papago Park or this lawsuit. (Doc. 1, pp. 7-8.)

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Therefore, Plaintiffs' claim under the Property Clause is not legally cognizable, and summary judgment in Plaintiffs' favor is not warranted.

3. Contracts Clause

Although the Contracts Clause is written in absolute terms,[6] the Supreme Court narrowly construes the Contracts Clause to ensure that local governments can effectively exercise their police powers. *Seltzer v. Cochrane*, 104 F.3d 234, 235 (9th Cir. 1996). State governmental entities "must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977).

As detailed above, though, Plaintiffs have no contract rights here. They are not parties to any of the contracts at issue, and they are not alleging that the City of Phoenix has otherwise impaired ***Plaintiffs' own*** vested rights in some other contract.

Moreover, even if Plaintiffs had any contract rights here, they were not impaired to a manner that would rise to the level of a violation of the Contracts Clause. Plaintiffs' claim would be legally cognizable under the Contracts Clause only if the City of Phoenix "prevents or materially limits the remedies that would be available if the contract were between private parties." *Univ. of Hawaii Prof'l Assembly v. Cayetano*, 183 F.3d 1096, 1103 (9th Cir. 1999). *Accord Charles v. Baesler*, 910 F.2d 1349, 1356 (6th Cir. 1990) ("[S]o long as governmental action does not foreclose an adequate damages or special performance remedy, a breach does not run afoul of the contracts Clause."). No such allegation is made in the complaint, nor could it be.

[6] "[N]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1.

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Summary judgment in Plaintiffs' favor is not warranted.

C. Plaintiffs' Federal Claims Are Untimely

Plaintiffs' federal claims would be time-barred even if Plaintiffs had standing to assert them.

None of the federal statutes or constitutional provisions at issue contain a statute of limitations. The appropriate statute of limitations thus appears to be the statute of limitations for personal injury claims in the forum state. *See TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999) (looking to Arizona's personal injury statute of limitations for claims under 42 U.S.C. § 1983). In Arizona, the limitations period for personal injury claims is two years. *TwoRivers*, 174 F.3d at 991; A.R.S. § 12-542 (providing that actions for personal injury must be commenced within two years after the cause of action accrues).

Although state law sets the proper statute of limitations, federal law determines when a cause of action accrues. *Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 760 (9th Cir. 1991). Under federal law, a claim accrues when the plaintiff knows or should have known of the injury through the exercise of reasonable diligence. *Knox v. Davis*, 260 F.3d 1009, 1013 (9th Cir. 2001); *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1058 (9th Cir. 2002).

The discovery rule does not apply in all instances. Rather, it properly applies to those scenarios where "[t]he injury or the act causing the injury, or both, must have been difficult for the plaintiff to detect." *Platt Elec. Supply, Inc. v. EOFF Elec., Inc.*, 522 F.3d 1049, 1054 (9th Cir. 2008). *Accord Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 590 (1995) ("[T]he important inquiry in applying the discovery rule is whether the plaintiff's injury or the conduct causing the

injury is difficult for plaintiff to detect, not whether the action sounds in contract or in tort."). This is not one of those scenarios.

As alleged in the complaint, the cities entered into the lease at issue on November 28, 2018, and the City of Scottsdale entered into its sublease with the San Francisco Giants on December 1, 2018. (Doc. 1 at 5.) However, Plaintiffs filed this lawsuit challenging the propriety of those agreements on December 23, 2020, more than two years later. These contracts were publicly voted upon and matters of public record. A person exercising reasonable diligence could have found out about these contracts contemporaneously, and the allegedly improper construction work here was open and obvious. Nothing about Plaintiffs' claims was difficult to detect or hidden, and Plaintiffs should have known of their claims no later than December 1, 2018.

III. Plaintiffs' Motion is Premature

Even assuming the Court denies the City's motion to dismiss, and instead determines that the Plaintiffs' motion for summary judgment should go forward, Plaintiffs' motion should also be denied—or, at the very least, delayed—because it is premature. The Court has not issued a case scheduling order, and the parties have not engaged in any discovery. Indeed, this case is at its infancy. Relief under Rule 56(d) is warranted.

Rue 56(d) "allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). Under Rule 56(d), "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition," the Court may issue any appropriate order, including deferring consideration of the motion for summary judgment or

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denying it, or allowing "time to obtain affidavits or declarations or to take discovery." Fed. R. Civ. P. 56(d). The party requesting relief under Rule 56(d) must set forth in an affidavit or declaration: (1) "specific facts it hopes to elicit from further discovery," (2) that "the facts sought exist," and (3) that "the sought-after facts are essential to oppose summary judgment." *Family Home & Finance Ctr., Inc. v. Fed. Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008) (discussing former Rule 56(f)).[7]

Rule 56(d) relief should generously be granted where a summary judgment motion is filed early in the litigation, "before a party has had any realistic opportunity to pursue discovery relating to its theory of the case." *Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of the Fort Peck Reservation*, 323 F.3d 767, 773-74 (9th Cir. 2003). Unless the non-moving party has failed to diligently pursue discovery, such relief should be granted "almost as a matter of course." *Id.* (internal quotation omitted).

Here, assuming the Court denies the City's motion to dismiss and determines that Plaintiffs' motion should go forward, the City intends to engage in discovery that would justify relief under Rule 56(d). *See* Declaration of Robert A. Hyde, ¶¶ 4-6.

For example, the City would seek discovery from the State of Arizona and the United States on a variety of topics, including that neither seeks to join this lawsuit or claims any ongoing property interest in Papago Park. *Id.*, ¶¶ 5-6. The City also anticipates that the State of Arizona and the United States would agree that the 1960s receipt of LWCF funds for Papago Park either does not impact the baseball facility at issue in this lawsuit or, alternatively, that a substitution of some amount of appropriate other recreational property is acceptable. *See* 36 CFR § 59.3 (discussing the procedures

[7] Rule 56(d) "carries forward without substantial change the provisions of former subdivision (f)." *See* Fed. R. Civ. P. 56(d), advis. comm. notes on 2010 amendment.

for land substitution under Section 6(f)(3) of the LWCFA).

III. CONCLUSION

The Court should deny Plaintiffs' motion for summary judgment. Plaintiffs' motion is not properly supported under Rule 56(c)(1) and governing Ninth Circuit law, and Plaintiffs' failure to provide a separate statement of facts justifies denial of the motion under LRCiv 56.1(a).

If the Court determines that consideration of Plaintiffs' motion is proper, it fails for the same reasons set forth in the City's dispositive motion to dismiss. (Doc. 10.) Plaintiffs lack both Article III and prudential standing to assert the claims in their complaint against the City of Phoenix; Plaintiffs' legal theories uniformly fail; and Plaintiffs' claims are untimely in any event.

Even assuming the Court denies the City's motion to dismiss, Plaintiffs' motion is premature. There is no scheduling order in place and the parties have not begun discovery. Should the Court determine that a full response from the City to Plaintiffs' motion for summary judgment is necessary, relief under Rule 56(d) is warranted. If discovery must commence, the City intends to pursue a number of factual areas of inquiry that would be essential to opposing Plaintiffs' motion for summary judgment.

DATED this 21st day of April, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2021, I served the attached document by mail on the following, who are not registered participants of the CM/ECF System:

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J. Arthur Deal
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Scottsdale, Arizona 85257
Plaintiff *Pro Se*

By: /s/ Carol Aparicio
RAH:ca; 2250619_1.doc

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DECLARATION OF ROBERT A. HYDE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Lasse Norgaard-Larsen, et al., Plaintiffs, vs. The City of Phoenix, et al., Defendants.	No. 20-cv-02467-PHX-GMS **DECLARATION OF ROBERT A. HYDE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** (Assigned to the Honorable G. Murray Snow)

Robert A. Hyde, being first duly sworn, upon his oath, deposes and says:

1. I am over the age of 18 years and competent to testify to the matters set forth in this Declaration. I am counsel of record for Defendant City of Phoenix in this lawsuit.

2. The parties have not begun discovery.

3. The City's motion to dismiss is pending. (Doc. 10.) Should the Court deny that motion and order discovery to proceed, the City intends to pursue a number of discovery avenues that I believe are essential to opposing Plaintiffs' motion for summary judgment. (Doc. 16.)

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4. First, I would seek written discovery and depositions of the Plaintiffs. The facts that I would expect to discover include that Plaintiffs have no hidden contractual interests in the properties and that they have not yet pursued or exhausted any administrative remedies with the relevant federal agencies. Additionally, I would explore the actual steps Plaintiffs took regarding this lawsuit and when, so that I can utilize Plaintiffs' sworn testimony and written discovery to properly evaluate Plaintiffs' allegations about the statute of limitations.

5. Second, I would seek discovery from the State of Arizona through depositions, subpoenas, and/or public records requests. Through one or more of these discovery methods, I expect to establish that: (a) the State of Arizona no longer claims any ongoing property interest in Papago Park; (b) the State of Arizona does not intend to join this lawsuit; and (c) to the extent it is involved in the determination, the State of Arizona agrees that the 1960s receipt of LWCF funds for Papago Park either does not impact the baseball facility at issue in this lawsuit or, alternatively, that the State agrees that a substitution of some amount of appropriate other recreational property is acceptable.

6. Third, I would seek discovery from the relevant federal agencies through depositions, subpoenas, and/or Freedom of Information Act Requests. Through one or more of these discovery methods, I expect to establish that: (a) the Plaintiffs have neither pursued nor exhausted any administrative remedies with the relevant federal agencies; (b) the United States no longer claims any ongoing property interest in Papago Park; (c) the relevant federal agencies do not intend to join this lawsuit; (d) the 1997 federal land patent discussed in Plaintiffs' complaint does not cover any of the baseball facility at issue in this lawsuit; and (e) the 1960s receipt of LWCF funds for

Papago Park either does not impact the baseball facility at issue in this lawsuit or, alternatively, that the relevant federal agency or agencies agree that a substitution of some amount of appropriate other recreational property is acceptable.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED this 21st day of April, 2021.

/s/ Robert A. Hyde
Robert A. Hyde

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