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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

TIMBISHA SHOSHONE TRIBE, EDWARD
BEAMAN, VIRGINIA BECK, and
CLEAVELAND LYLE CASEY,

CASE NO. CV F 09-1248 LJO SMS

Plaintiffs,

**ORDER ON PLAINTIFFS' REQUEST TO
DISMISS (Doc. 42) and PLAINTIFFS'
MOTION TO STRIKE (Doc. 45)**

vs.

JOSEPH KENNEDY, MADELINE
ESTEVEES, PAULINE ESTEVES, ANGELA
BOLAND, and ERICK MASON,

Defendants.

INTRODUCTION

On February 3, 2010, plaintiffs Timbisha Shoshone Tribe, Edward Beaman, Virginia Beck, and Cleaveland Lyle Casey (collectively "plaintiffs") requested to dismiss this action voluntarily without prejudice. Because defendants Joseph Kennedy, Madeline Esteves, Pauline Esteves, Angela Boland, and Erick Mason ("defendants") filed an answer to plaintiffs' complaint, plaintiffs may only dismiss this case by order of this Court, pursuant to Fed. R. Civ. P. 41(a)(2) ("[A]n action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper."). Defendants filed an untimely opposition to plaintiffs' request. For the following reasons, this Court GRANTS plaintiffs request to withdraw the request to dismiss, DENIES plaintiffs' request to dismiss as moot, GRANTS plaintiffs' motion to strike defendants' opposition, SETS a briefing schedule on whether subject matter jurisdiction exists in this action, and NOTIFIES the parties of its intent to relate this action to *Timbisha Shoshone Tribe v. Salazar*, Case No. 1:09-cv-2230 OWW DLB.

1 **BACKGROUND**

2 Plaintiffs filed their request to dismiss on February 3, 2010. Plaintiffs' request was
3 unaccompanied by a memorandum in support of dismissal and failed to outline the terms of the dismissal
4 aside of a dismissal "without prejudice." By minute order on February 4, 2010, this Court ordered
5 defendants to file either an opposition or statement of non-opposition to Plaintiffs' request for dismissal
6 no later than February 8, 2010. The Court ordered plaintiffs to file a reply, if any, no later than February
7 11, 2010.

8 Defendants opposed plaintiffs' request for dismissal on February 9, 2010. Defendants argue that
9 dismissal of this action would cause legal prejudice to defendants. Defendants contend that they will
10 suffer legal harm if they are unable to establish the merits of their defenses in this action. Defendants
11 question plaintiffs' "shift in litigation strategy" by filing a separate lawsuit against the Department of
12 the Interior with this Court, *Timbisha Shoshone Tribe v. Salazar*, Case No. 1:09-cv-2230 OWW DLB.
13 Defendants further argue that, "when viewed in the context of Plaintiffs' plan to beggar the Tribe, the
14 costs [of this litigation] rise to the level of legal prejudice." Def. Opp., 4. In the alternative, defendants
15 request this Court to dismiss with prejudice and to award defendants costs and attorneys fees.
16 Defendants filed no request to file their opposition after the deadline, and offered no explanation as to
17 why the opposition was filed after the deadline for filing had expired.

18 On February 11, 2010, plaintiffs filed a: (1) motion to strike defendants' opposition as untimely;
19 (2) reply to defendants' opposition to their request for dismissal without prejudice; (2) request for
20 judicial notice of documents filed in *Wells Fargo Bank NA v. Timbisha Shoshone Tribe*, Case NO. 34-
21 2007-00882066-CU-MC-GDS; and (4) notice of related case. In their reply, plaintiffs offer that if the
22 Court is unwilling to issue an unconditional dismissal of this action, the Court should adopt one of the
23 following proposals: (1) determine whether federal subject matter/removal jurisdiction exists in this
24 matter and remand the action to the Inyo County Superior Court; (2) permit the instant action to be
25 related to *Timbisha Shoshone Tribe v. Salazar*, Case No. 1:09-cv-2230 OWW DLB, and allow litigation
26 of this action to continue; or (3) permit the plaintiffs to withdraw their request for dismissal.

27 Having considered the parties arguments, this Court issues the following order.

28 ///

1 DISCUSSION

2 Motion to Strike

3 Plaintiffs move to strike defendants' opposition as untimely. Plaintiffs point out that defendants
4 "have a history of missing deadlines and filing late briefs with this Court[.]" First, defendants failed
5 to respond to plaintiffs' complaint in a timely manner. On August 14, 2009, one month after a pleading
6 was due, defendants moved to file an answer to plaintiffs' complaint out of time. Defendants contended
7 that counsel's calendaring mistake constituted "excusable neglect." The parties stipulated to allow
8 defendants' to answer plaintiffs' complaint out of time on August 20, 2009. Second, defendants failed
9 to oppose plaintiffs' preliminary injunction motion in a timely manner, notwithstanding two orders to
10 extend time for defendants' opposition. Defendants moved for a one-day extension of time on August
11 14, 2009, the day after the opposition was due, based on counsel's technical difficulties in uploading the
12 motion to this Court's CM/ECF system at 11:30 p.m. on the day the opposition was due. Thus, the
13 instant untimely opposition to plaintiffs' request for voluntary dismissal is defendants' third instance of
14 filing an untimely document in this action.

15 Plaintiffs move to strike defendants' opposition pursuant to Fed. R. Civ. P. 12(f). Plaintiffs
16 correctly note, however, that Fed. R. Civ. P. 12(f) allows a court to strike material from a *pleading*.
17 Because defendants' opposition is not part of a pleading, Fed. R. Civ. P. 12(f) is inapposite.

18 Nevertheless, this Court may strike an untimely document using its inherent powers to manage
19 and control its docket and as a sanction for violating this Court's order. "District courts have inherent
20 power to control their dockets and may impose sanctions, including dismissal, in the exercise of that
21 discretion." *Hernandez v. City of El Monte*, 138 F.3d 393, 398 (9th Cir. 1998) (emphasis removed)
22 (holding that court may dismiss an action that abuses the judicial process using inherent powers to
23 control dockets); *Landis v. N. Am. Co.*, 299 U.S. 248, 254, 57 S.Ct. 163, 81 L.Ed. 153 (1936); *see also*,
24 *Frost v. Perry*, 919 F. Supp. 1459 (D. Nev. 1996) (court strikes untimely motion using inherent powers
25 to control its own docket). This Court's Local Rule 110 reads: "Failure of counsel or of a party to
26 comply with these Rules or with any order of the Court may be grounds for imposition by the Court of
27 any and all sanctions authorized by statute or Rule or within the inherent power of the Court."

28 This Court agrees with plaintiffs that because defendants "have repeatedly [failed] to observe the

1 Court's deadline[s], it is appropriate that this most recently tardy brief be stricken[.]” The defendants’
2 pattern of untimely filing is inexcusable. This Court disagrees with defendants that a calendar mishap
3 or technical difficulties experienced minutes before a filing deadline constitutes “excusable” neglect.
4 Defendants brazenly submit the most recently untimely document without acknowledging its
5 untimeliness and without a request for permission to file the untimely document. This is defendants’
6 third untimely submission. Indeed, a review of the Court’s docket demonstrates that defendants have
7 failed to file a single document within the time limits set by this Court’s local rules and this Court’s
8 orders. Defendants’ failure to abide by this Court’s orders and local rules will no longer be met with
9 patience or leniency. Accordingly, using this Court’s inherent power to control its own docket, and
10 pursuant to Local Rule 110, this Court STRIKES defendants’ opposition as untimely and filed in
11 violation of this Court’s order.

12 Request to Dismiss

13 The purpose of the Fed. R. Civ. P. 41(a)(2) voluntary dismissal rule is to permit the plaintiff to
14 dismiss without prejudice so long as the defendant will not be prejudiced. *Stevedoring Servs. of America*
15 *v. Armilla Intern'l B.V.*, 889 F.2d 919 (9th Cir. 1989). Accordingly, a district court should grant a
16 motion for voluntary dismissal under Fed. R. Civ. P. 41(a)(2) unless the defendant can show that it will
17 suffer some “plain legal prejudice” as a result of the dismissal. *Smith v. Lenches*, 263 F.3d 972, 976 (9th
18 Cir. 2001). Generally, a Fed. R. Civ. P. 41(a)(2) dismissal is without prejudice, as stated explicitly in
19 that rule. *Id.*

20 “Legal prejudice” means “prejudice to some legal interest, some legal claim, some legal
21 argument.” *Westlands Water Dist. v. United States*, 100 F.3d 94, 97 (9th Cir. 1996). Legal prejudice
22 occurs “when the dismissal of a party would have rendered the remaining parties unable to conduct
23 sufficient discovery to untangle complex fraud claims and adequately defend themselves against charges
24 of fraud.” *Id.* The threat of future litigation is insufficient to establish plain legal prejudice. *Id.*
25 Similarly, no plain legal prejudice occurs when a defendant has been inconvenienced by the
26 commencement of trial preparations, *Hyde & Drath v. Baker*, 24 F.3d 1162 (9th Cir. 1994), a defendant
27 will be unconvinced by having to defend in another forum, or a plaintiff will gain a tactical advantage
28 by the dismissal. *Smith v. Lenches*, 263 F.3d 972 (9th Cir. 2001); *Hamilton v. Firestone Tire & Rubber*

1 *Co., Inc.*, 679 F.2d 143 (9th Cir. 1982).

2 Before arguing the merits of their request to dismiss this action, plaintiffs acknowledge that “both
3 Defendants and the Court have indicated that they doubt [subject matter jurisdiction] exists in this
4 matter.” Plaintiffs explain that they have “re-examined their position” and agree that subject matter
5 jurisdiction is lacking. Plaintiffs then argue that this Court should determine that no subject matter
6 jurisdiction exists and remand this action to the Inyo County Superior Court.

7 Moreover, plaintiffs point out that a Fed. R. Civ. P. 41(a)(2) dismissal is inappropriate when
8 subject matter jurisdiction is lacking. *See, e.g., Crawford v. F. Hoffman-La Roche Ltd.*, 267 F.3d 760,
9 767 (8th Cir. 2001) (because federal subject matter did not exist, order granting Fed. R. Civ. P. 41(a)(2)
10 dismissal must be vacated, as there was “no basis for considering further the propriety of the order of
11 dismissal...all that was left was to order the case remanded to the state court.”); *Federal Election*
12 *Campaign Act Lit.*, 474 F. Supp. 1051, 1053 (D. D.C. 1979) (“If a court believe that it is without subject
13 matter jurisdiction, it is inappropriate for that court to engaged in the balancing process required by Rule
14 41(a)(2); dismissal is required and there is simply no discretion to be exercised.”).

15 Because the parties question whether subject matter jurisdiction exists, and because a Fed. R.
16 Civ. P. 41(a)(2) dismissal is inappropriate when subject matter jurisdiction is lacking, this Court
17 GRANTS plaintiffs’ request to withdraw its request for voluntary dismissal. *See Lau v. Glendora Uni.*
18 *Sch. Dist.*, 792 F.2d 929, 930 (9th Cir. 1986) (granting plaintiffs option to refuse voluntary dismissal).
19 Accordingly, this Court DENIES as moot plaintiffs’ request for voluntary dismissal, since it has been
20 withdrawn.

21 In addition, this Court will set a briefing schedule to allow the parties to raise appropriate subject
22 matter jurisdiction motions.

23 **Related Cases Request**

24 Plaintiffs filed a notice of related case and request that this case be related to *Timbisha Shoshone*
25 *Tribe v. Salazar*, Case No. 1:09-cv-2230 OWW DLB. On February 11, 2010, United States District
26 Judge Oliver W. Wanger issued the following order in *Timbisha Shoshone Tribe v. Salazar*, Case No.
27 1:09-cv-2230 OWW DLB:

28 Pursuant to the provisions of Eastern District Local Rule of Court 83-123(a)(3)

1 and (4), and 83-123(b), it appears that this case is related to *Timbisha Shoshone Tribe v.*
2 *Kennedy*, 1:09-cv-1248 LJO SMS. The case appears to involve similar subject matter,
3 law, and parties. The parties shall, within ten (10) days, provide written statements of
any cause why this case should not be reassigned to United States District Judge
Lawrence J. O'Neill.

4 Consistent with Judge Wanger's February 11, 2010 order, this Court provides notice to the parties in this
5 action of its intent to relate the instant action with *Timbisha Shoshone Tribe v. Salazar*, Case No. 1:09-
6 cv-2230 OWW DLB. No later than February 22, 2010, defendants shall file an opposition, if any, to this
7 Court's notice of intent to relate these two cases.

8 CONCLUSION

9 For the foregoing reasons, this Court:

- 10 1. GRANTS Plaintiffs' motion to strike defendants' opposition (Doc. 45)
- 11 2. DENIES without prejudice Plaintiffs' request to dismiss this action (Doc. 42);
- 12 3. GRANTS Plaintiffs' request to withdraw the request for voluntary dismissal (Doc. 46);
- 13 4. SETS the following briefing schedule on the issue of whether subject matter jurisdiction
14 exists in this matter:
 - 15 A. No later than **March 10, 2010**, each party shall file an appropriate motion to
16 dismiss based on lack of subject matter jurisdiction, if any, accompanied by a
17 memorandum to support its position.
 - 18 B. No later than **March 24, 2010**, each party shall file an opposition, if any, to the
19 opposing party's motion to dismiss.
 - 20 C. This Court will set a hearing on this motion, if deemed necessary, after
21 considering the parties' motions and memoranda in support thereof; and
- 22 5. ORDERS defendants, no later than **February 22, 2010**, to file an opposition, if any, to
23 this Court's notice of intent to relate this action with *Timbisha Shoshone Tribe v.*
24 *Salazar*, Case No. 1:09-cv-2230 OWW DLB.

25
26 IT IS SO ORDERED.

27 **Dated: February 17, 2010**

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE