IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

DR. RACHEL TUDOR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 5:15-CV-00324-C
	)	
SOUTHEASTERN OKLAHOMA STATE UNIVERSITY,	)	
	)	
and	)	
	)	
THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA,	)	
	)	
Defendants.	)	

PLAINTIFF DR. RACHEL TUDOR'S REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO STRIKE[1]

Dr. Tudor respectfully replies to Defendants' opposition **RESPONSE** (ECF No. 331) to her **MOTION TO STRIKE** (ECF No. 318) Defendants' untimely **MOTION FOR JUDGMENT AS A MATTER OF LAW, OR ALTERNATIVELY NEW TRIAL** (ECF No. 316). Defendants' opposition is fatally flawed for four reasons: (1) the December 11, 2017 motion deadline is a valid oral order; (2) this Court has the power to shorten default deadlines set forth in the Fed. R. Civ. P.; (3) this Court is empowered to strike untimely

[1] Dr. Tudor makes the following correction to her Motion to Strike (ECF No. 318): Throughout that filing, the undersigned indicated that Defendants' Motion (ECF No. 316) was filed 159-days past the December 11, 2017 deadline set by this Court. That was a mistake—the Motion was filed on July 5, 2018, making it *206-days late*.

motions; and (4) the operative scheduling order was never and could not have been altered off-record and *ex parte* by Deputy Clerk Goode.

I. DECEMBER 11, 2017 DEADLINE IS VALID ORAL ORDER

Defendants misapprehend the force of the December 11, 2017 deadline. At the November 20, 2017 post-trial hearing, in response Defendants' request for a date certain to file any motions challenging the jury verdict, the Court set the December 11 deadline.[2] The Court's oral deadline order at an on the record hearing is a valid scheduling order.[3] As such, any request from a party to modify the scheduling order must be formally made to and ruled upon by the Court. *See, e.g.*, *Hughes v. Z, Inc.*, 2006 WL 290576 at *1 (W.D.Okla. Feb. 6, 2006) (Cauthron, J.) ("Once set, the scheduling order may only be modified by leave of Court upon a showing of good cause.").

The Court should reject Defendants' invitation to treat the December 11 deadline as a nullity. In their Response, Defendants imply that they orally moved for a special deadline and, *after* the special deadline was set by this

[2] *See* ECF No. 262 at 873–74:

> THE COURT: Anything else? I don't know if I asked that or not.
>
> MS. COFFEY: Your Honor, is this the appropriate time, or do we submit it at some point later, for judgment notwithstanding the verdict on behalf of defendants?
>
> THE COURT: I would say if you want to file a written motion, the same schedule would apply. Fourteen days from Monday [December 11, 2017] would be your opening brief on that.

[3] To the extent Defendants claim an oral order is invalid, that position wholly lacks merit. *See, e.g.*, *Dreith v. Nu Image, Inc.*, 648 F.3d 779, 787 (9th Cir. 2011) ("an oral order of a district court, though perhaps imposed quickly at the conclusion of a hearing, is nonetheless binding on the parties").

Court, they realized that if they had followed the Fed. R. Civ. P.'s default deadline their motion would be due later (Resp. at 3–4). But an attorney's misapprehension of the consequences of their own motion does not make the order granted in response a nullity. "[A] party who simply misunderstands or fails to predict the legal consequences of his deliberate acts cannot later, once the lesson is learned, turn back the clock to undo those mistakes." *Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir. 1999).

Defendants' suggestion that they were mistaken about the most prudent course of action when they requested the special deadline to file their motion is also immaterial. The Court can and must assume that when counsel makes an oral or written motion that the request is genuine and thus a party must be held to the consequences of her counsel's mistakes. Indeed, it is axiomatic that "[c]ourts will not grant relief when the mistake of which the movant complains is the result of an attorney's deliberate litigation tactics." *Federated Towing & Recovery, LLC v. Praetorian Ins. Co.*, 283 F.R.D. 644, 651 (D.N.M. 2012) (*citing Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 397 (1993)).

Moreover, it is imperative that this Court enforce its deadline in this instance. At the invitation of Defendants, the Court promulgated a special deadline for motions challenging the verdict. Not enforcing that deadline simply because Defendants now prefer a later deadline, sought without leave

of court, threatens to interfere with judicial process. *See Thomas v. Office of Juvenile Affairs*, 2006 WL 931939 at *2 (W.D.Okla. Apr. 10, 2006) (Cauthron, J.) (ignoring deadline is "substantial interference with the judicial process") (cleaned up) (*quoting Jones v. Thompson*, 996 F.2d 261, 265 (10th Cir. 1993) (ignoring deadlines "hinder[s] the court's management of its docket and its efforts to avoid unnecessary burdens on the court and the opposing party"). Indeed, "[i]f [Defendants] could ignore court orders here without suffering the consequences, then [the district c]ourt cannot administer orderly justice, and the result would be chaos." *Thomas*, at *2 (*quoting Ehrenhaus v. Reynolds*, 965 F.2d 916, 921–22 (10th Cir. 1992)).

II. COURT EMPOWERED TO SHORTEN DEFAULT DEADLINES

Defendants argue, without legal support, that this Court lacks the authority to shorten default deadlines set by the Fed. R. Civ. P. Not so. Though the Fed. R. Civ. P. set default deadlines for certain motions, those deadlines can be shortened so long as there is proper notice. *See, e.g.*, *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1153–54 (10th Cir. 2001) (no abuse of discretion where district court shortened default time for preliminary injunction hearing); *Am. Benefits Life Ins. Co. v. United Founders Life Ins. Co.*, 515 F.Supp. 800, 802 (W.D.Okla. 1980) (district court can shorten default deadlines set by Fed. R. Civ. P. so long as parties are given actual notice of new deadline). Here, there is no

question that all parties were given notice—indeed, it was Defendants who requested the special deadline in the first instance—thus shortening of the default deadline is permissible.

Defendants' contention that even if some default deadlines can be shortened, that this Court cannot shorten deadlines for motions seeking judgment notwithstanding the verdict and/or new trial is also unsound. Neither Rule 50(b) nor 59 expressly bars shortening deadlines. This silence indicates that the Advisory Committee did not intend to forbid shortening those deadlines. Where the Committee intends to bar specific modifications to default deadlines it does so expressly. For example, Fed. R. Civ. P. 16(b)(2) expressly prohibits *extensions* of the default deadline for Rule 50(b) and 59 motions. This example makes clear that if the Committee desired to impose an absolute bar on *shortening* the deadlines it would have been done expressly. *See Marx v. General Revenue Corp.*, 568 U.S. 371, 384 (2013) (*quoting Small v. United States*, 544 U.S. 385, 398 (2005) (Thomas, J., dissenting) (explaining that "Congress' explicit use of [language] in other provisions shows that it specifies such restrictions when it wants to do so")).

III. COURT EMPOWERED TO STRIKE UNTIMELY MOTIONS

As a threshold matter, Defendants' suggestion that Tudor did not point to legal authorities supporting the notion that this Court is empowered to strike motions is untrue. *See* Mot. to Strike at 6–9 (citing authorities pointing

to the Court's inherent authority). Moreover, this Court's inherent power to strike non-pleadings is well-established and not reasonably disputed.[4]

Defendants' claim that Fed. R. Civ. 12(f) implicitly prohibits this Court from striking motions lacks legal support. It is true that Rule 12 expressly addresses the striking of pleadings. However, it does not follow that the existence of a rule expressly dealing with striking of pleadings creates a silent, implicit prohibition on the striking of motions.[5] Defendants point to no express statement in the Rules nor any comment of the Advisory Committee supporting their interpretation. Given that it is the default rule that district courts may strike motions for non-arbitrary reasons, the Fed. R. Civ. P. do not prohibit the striking of non-pleadings. *See Marx*, 568 U.S. at 381–84

---

[4] *See, e.g.*, *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 322 Fed.Appx. 630, 633–34 (10th Cir. 2009) (unpublished) (finding no error in district court's exercise of inherent authority to strike Rule 59(e) and 60(b) motions for non-arbitrary reasons); *In re Hopkins*, 1998 WL 704710, at *3 n.6 (10th Cir. 1998) (holding that since party's "briefs were non-complying [] it was well within the discretion of the district court to strike them"); *ACLU of Ky. V. McCreary Cnty., Ky.*, 607 F.3d 439 (6th Cir. 2010) ("based on district court's power to manage its own docket, the court had ample discretion to strike Defendants' late renewed motion for summary judgment"); *McCorstin v. U.S. Dep't of Labor*, 630 F.2d 242, 243–44 (5th Cir. 1980) (finding no abuse of discretion in district court's striking of several non-pleading documents); *Original Talk Radio Network, Inc. v. Alioto*, 2014 WL 5018809 at *2 (D.Ore. Oct. 7, 2014) (striking untimely JMOL motion filed 16 days late); *Baylis v. Wal-Mart Stores, Inc.*, 2012 WL 5354540, at *2 (N.D.Miss. Oct. 29, 2012) (striking untimely JMOL motion filed 4 days late); *Thymes v. Verizon Wireless, Inc.*, 2017 3588657 at *2 (D.N.M. Jan. 9, 2017) (finding inherent power to strike non-pleading); *Davis v. Mountaire Farms, Inc.*, 598 F.Supp. 582, 590 (D.Del. 2009) (denying motion for JMOL filed 1 day late, effectively striking it). *See also Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 841 (10th Cir. 2005) (invoking court's inherent power to disregard abusive filings, an exercise of court's power to strike non-pleading); *Stump v. Gates*, 211 F.3d 527, 533 (10th Cir. 2000) (declining to rule on issues first raised in reply brief, functionally striking).

[5] *See Lowen v. Via Christi Hospitals Wichita, Inc.*, 2010 WL 4739431 at *3 (D.Kans. Nov. 16, 2010) (explaining that the "rules silence" on a particular issue "does not mean this practice is contrary to the rules or somehow prohibited by them"). *See also Marx v. General Revenue Corp.*, 568 U.S. 371, 381 (2013) ("The force of any negative implication, however, depends on context. We have long held that the *expression unius* canon does not apply 'unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it' and that the canon can be overcome by 'contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion.") (cleaned up).

(explaining in context of attorneys' fees that where traditional practice points in one direction, so long as neither Fed. R. Civ. P. nor statute expressly prohibit that course, traditional course is not barred). *See also* authorities cited *supra* note 4, collecting cases evidencing inherent power of courts to strike non-pleadings for non-arbitrary reasons.

IV. SCHEDULING ORDER COULD NOT BE MODIFIED IN MANNER DEFENDANTS CLAIM

Defendants' contention that they privately requested scheduling relief from Deputy Clerk Goode and ultimately received it off the record and *ex parte* is not supported by evidence and is otherwise legally unsound.

Defendants' claim that they mistakenly requested a deadline certain to file during an on the record hearing, then later realized it conflicted with the Fed. R. Civ. P. default deadlines, and then furtively sought "clarification" from Deputy Clerk Goode which had the effect of modifying the deadline *ex parte* and off record strains credulity. Tellingly, Defendants fail to point to evidence corroborating their version of events. To wit, Defendants proffer no sworn statements from Attorney Coffey or Goode in support. Nor do Defendants point to any evidence that they narrowly requested a deadline certain only for Rule 50(b) motions challenging a "jury issue not decided by a verdict" (Resp. at 3).[6] Defendants failure to establish the accuracy of the

[6] Moreover, Defendants do not explain how even that limit renders their Motion timely.

events giving rise to their opposition is enough reason to find their Motion is untimely.[7]

Defendants' attempts to place blame on Deputy Clerk Goode for the missed deadline are also untenable. Though court personnel do vital and important work, they are not empowered to give legal advice to counsel let alone to make binding decisions modifying scheduling orders set by the Court. Thus, even if Deputy Clerk Goode had granted scheduling relief to Defendants, that extension is a nullity. *See, e.g.*, *Midwestern Developments, Inc. v. City of Tulsa, Okla.*, 319 F.2d 53, 53 (10th Cir. 1963) ("[deputy clerk] is a ministerial officer and may not assume judicial powers [;] [t]he purported order [] is a nullity").

Moreover, even if Deputy Clerk Goode had given incorrect advice to Defendants about the interplay between the special December 11 deadline and the default deadline provided under the Fed. R. Civ. P., Defendants' reliance is no excuse. Reliance on the representations of non-judicial officers as to deadlines cannot excuse late filing. *See, e.g., Kraft, Inc. v. U.S.*, 85 F.3d 602, 609 (Fed.Cir. 1996) ("We do not find counsel's explanation compelling that its failure to file a timely notice of appeal can be blamed on the clerk's office.") (*citing Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179 (1989)

[7] *Cf. Blake v. Aramark Corp.*, 498 Fed.Appx. 267, 268 (10th Cir. 2012) (Gorsuch, J.) (unpublished) (conclusory claim of filer that appeal timely filed where no sworn statement under penalty of perjury attesting to events substantiating timely filing is proffered is reason to find failure to prove timeliness).

(assurance must be given by "judicial officer")).

There are also good reasons to disbelieve Defendants' version of events. The most obvious is that Deputy Goode would not grant scheduling relief vis-à-vis *ex parte* communications let alone fail to memorialize the relief on the record. Additionally, Deputy Clerk Goode—an experienced, skilled, and thoughtful civil servant—would not have neglected to inform Tudor about a modification of a scheduling order that impacted her. After all, the deadline at issue here is one that was equally applicable to Tudor and Defendants. To wit, if Tudor had desired to file her own motion challenging the loss of her hostile work environment claim, that motion would be subject to the December 11, 2017 deadline set by the Court.

Further, Defendants' original claim that their Motion is timely because it was submitted within 28-days of entry of final judgment (Defs. Mot., ECF No. 316 at 2) is contradicted by their Response. Defendants now claim that the text of Rule 50(b) makes plain that Rule 50(b) and 59 motions may be combined *and* if the "motion addresses a jury issue not decided by a verdict" then it is due "no later than 28 days after the jury was discharged" (Resp. at 3). It is beyond dispute that Defendants' Motion raises several jury issues not expressly decided by the verdict,[8] meaning the default deadline would have

[8] *See* Fed. R. Civ. P. 50 advisory committee's note 2007 (an explicit time limit is added for making a posttrial motion when the trial ends without a verdict or with a verdict that does not dispose of all issues suitable for resolution by verdict"). Defendants' Motion seeks to challenge fact issues

been December 18, 2017—28 days after the jury's discharge. Defendants filed their combined Motion on July 5, 2018—199 days *after* the deadline Defendants now claim controls. Defendants motion is thus undisputedly and inexcusably untimely and should be struck.

Lastly, while scheduling relief is available for most motions, it must be formally requested via motion, which Defendants failed to do. *See* Local Rule 7.1(h) (requiring formal motion for extension of time and delineating requirements). Defendants' failure to seek scheduling relief via motion prior to missing the December 11 deadline is thus fatal unless they prove excusable neglect. *See* Tudor Mot. to Strike, ECF No.318 at 7–9 (explaining standard for excusable neglect). Defendants' Response does not contend the missed deadline amounts to excusable neglect let alone point to facts supporting that finding. Thus, under *Pioneer*, this Court is justified in striking Defendants' Motion.

CONCLUSION

Dr. Tudor respectfully requests that the Court strike Defendants' Motion as untimely.

---

implicitly but not expressly resolved by the verdict, thus if the special deadline does not govern, it falls with the 28-day of discharge default deadline. *See, e.g.*, Defs. Mot., ECF No. 316 at 7–10 (arguing Tudor failed to present evidence supporting *prima facie* case of discrimination); *id.* at 11–16 (arguing Tudor failed to present evidence of pretext); *id.* at 16–19 (arguing some witnesses are more credible than others and some evidence should have been given more weight—both of which are matters for the jury to decide); *id.* at 19–20 (arguing Tudor failed to make a *prima facie* case of retaliation); *id.* at 25–28 (attacking credibility of Dr. Parker—a matter for the jury to decide).

Dated: August 15, 2018

/s/ Ezra Young
Ezra Young (NY Bar No. 5283114)
Law Office of Ezra Young
30 Devoe, 1a
Brooklyn, NY 11211
P: 949-291-3185
F: 917-398-1849
ezraiyoung@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2018, I electronically filed a copy of the foregoing with the Clerk of Court by using the CM/ECF system, which will automatically serve all counsel of record.

/s/ Ezra Young
Ezra Young (NY Bar No. 5283114)