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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

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

Plaintiffs,

v.

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

Defendants.

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

PLAINTIFFS' MOTION TO COMPEL RESPONSES TO INTERROGATORIES

Expedited Hearing Requested

PLAINTIFFS' MOTION TO COMPEL RESPONSES TO INTERROGATORIES

Pursuant to Rule 37 of the Federal Rules of Civil Procedure, Plaintiffs hereby seek an order compelling Defendants to provide complete responses to interrogatories on or before October 25, 2018. As required by Fed. R. Civ. P. 37 and the local rules, Plaintiffs' counsel has conferred or has made reasonable effort to confer with opposing counsel concerning the matter in dispute prior to the filing of this Motion to Compel. Plaintiffs' counsel has communicated numerous times with Defendants' counsel who continue to fail to revise or otherwise supplement full and complete responses to the attached interrogatories.

As this Court is well aware, Plaintiffs originally propounded notices of depositions pursuant to Fed. R. Civ. P. 30(b)(6) and Requests for Admissions ("RFAs"). Defendants objected to producing agency witnesses pursuant to Fed. R. Civ. P. 30(b)(6) and responding to the RFAs. As a result, the parties, along with Magistrate Judge Thomas M. Coffin, through meet and confer efforts, agreed to hold the depositions pursuant to Fed. R. Civ. P. 30(b)(6) and the RFAs in abeyance while Plaintiffs propounded and Defendants responded to contention interrogatories. Plaintiffs then served these contention interrogatories. The issue before this Court is, while the parties reached agreement that discovery would be conducted through use of contention interrogatories, Defendants' responses primarily consist of objections to this format and are substantively unresponsive, evasive, and untimely. In light of the parties' agreement to use contention interrogatories as a discovery tool, Defendants' failure to provide full and complete responses to any of the contention interrogatories require an order of this Court to obtain such substantive responses prior to trial starting on October 29. In light of the background of discovery in this action, and the commencement of trial on October 29, this Court should order

Defendants to fully and completely respond to the contention interrogatories on or before October 25, 2018.

STATEMENT OF FACTS

The following procedural background is set forth in the Declaration of Philip Gregory ("Gregory Decl."), filed herewith.

On May 4, 2018, Plaintiffs propounded notices of depositions pursuant to Fed. R. Civ. P. 30(b)(6) and RFAs on some Defendants.

On May 9, 2018, counsel for Defendants objected to producing agency witnesses pursuant to Fed. R. Civ. P. 30(b)(6) and responding to the RFAs. Defendants filed a Second Motion for Protective Order. (Doc. 196.)

In order to resolve Defendants' objections, the parties met and conferred. Further, counsel discussed this issue during the course of Status Conferences before Magistrate Judge Coffin.

As a result of the meet and confer efforts, the parties, along with Magistrate Judge Coffin, through meet and confer efforts, agreed to hold the depositions pursuant to Fed. R. Civ. P. 30(b)(6) and the RFAs in abeyance while Plaintiffs propounded and Defendants responded to contention interrogatories. Plaintiffs also agreed to seek judicial notice of documents.

On August 16, 2018, Plaintiffs and Defendants submitted a Joint Status Report, which set forth their finalized agreement to hold the process of depositions pursuant to Fed. R. Civ. P. 30(b)(6) and the RFAs in abeyance while Plaintiffs propounded and Defendants responded to contention interrogatories. As part of this discussion, Plaintiffs agreed any responses of Defendants to outstanding discovery requests (the pending depositions pursuant to Fed. R. Civ. P. 30(b)(6) and the RFAs that were the subject of the Second Motion for Protective Order, as

well as the subsequent sets of depositions pursuant to Fed. R. Civ. P. 30(b)(6) and the RFAs that were served after Defendants filed their Second Motion for Protective Order) would be held in abeyance during the same time period. (Doc. 336). The relevant August 16, 2018 status conference discussion is:

> MR. GREGORY: If I may, Your Honor, it's their contention -- and we were trying to avoid the Rule 30(b)(6) [24] deposition issue, which they asked us to not do 30(b)(6) depositions but, rather, do interrogatories. So the issue is, okay, we are not going to do the 30(b)(6) depositions. That's fine. But we want to get to your fact witnesses and your documents, and we also want to know the basis for some of their responses to our complaint. And that's why the number because it has to be, according to them, for each agency defendant . . .
>
> MS. PIROPATO: That plaintiffs serve us with a set of the interrogatories on the United States. We review them and let them know if they need to be broken out and propounded on an agency-by-agency basis.
>
> MS. OLSON: And then, Your Honor, it's still plaintiffs' intention to withdraw the 30(b)(6) deposition notices and the requests for admissions, but we are waiting to serve the contention interrogatories, and we are waiting for Judge Aiken's decision on the motion in limine requesting judicial notice of government documents before we withdraw the request for admissions.
>
> THE COURT: Okay.

Reporter's Transcript of Proceeding, Case Management Conference Before Judge Coffin, pgs. 23-29 (Aug. 16, 2018). On August 17, 2018, Plaintiffs served their First Set of Interrogatories on Defendants. A true and correct copy of Plaintiffs' First Set of Interrogatories is attached as **Exhibit 1** to the Gregory Declaration.

Per Federal Rule of Civil Procedure 33(b)(2), Defendants' responses to these interrogatories were due within 30 days, by Monday, September 17, 2018. On Thursday, September 13, 2018, counsel for Defendants requested an extension to respond to the interrogatories. Plaintiffs granted the extension as long as Defendants provided substantive

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responses. A true and correct copy of that email correspondence is attached as **Exhibit 2** to the Gregory Declaration.

On September 28, 2018, Defendants served their Partial Responses to Plaintiffs' First Set of Interrogatories. A true and correct copy of Defendants' Partial Responses to Plaintiffs' First Set of Interrogatories is attached as **Exhibit 3** to the Gregory Declaration.

On October 7, 2018, Defendants served their Amended Responses to Plaintiffs' First Set of Interrogatories. A true and correct copy of Defendants' Amended Responses to Plaintiffs' First Set of Interrogatories is attached as **Exhibit 4** to the Gregory Declaration. On October 12, 2018, after a series of discussions by email, counsel for Plaintiffs and Defendants held a Meet & Confer via conference call. A letter sent by counsel for Plaintiffs to counsel for Defendants memorializing this call is attached as **Exhibit 5** to the Gregory Declaration. During the call, counsel for Plaintiffs reiterated that Defendants' responses to the interrogatories failed to set forth answers as to any facts, witnesses, or documents. Counsel for Plaintiffs stated that such responses also failed to comply with the Federal Rules as, on the eve of trial, the purpose of contention interrogatories is to know what the party will present during trial so that the other party knows, before the Pre-Trial Conference, what evidence addresses what claim or defense. Counsel for Defendants refused to amend or supplement their responses except as indicated below.

a. Counsel for Defendants wanted to walk through each interrogatory to confer on whether there could be an iterative process such that Plaintiffs would redraft each interrogatory. Given the short time frame before commencement of trial, Plaintiffs saw no value in a further, lengthy iterative process, which in the past has not resulted in substantive responses from Defendants.

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b. Counsel for Defendants indicated that, as to Interrogatory No. 8, Defendants do not intend to introduce any documents. Counsel for Plaintiffs requested a supplemental response on this interrogatory.

c. As to interrogatories requesting the identities of witnesses and documents, counsel for Defendants stated they would be serving the exhibit list and the witness list and wanted Plaintiffs to accept those lists in lieu of a supplemental response. Counsel for Plaintiffs replied that a witness or exhibit list was unacceptable as a supplemental response to the interrogatories and Defendants needed to supplement their responses with the identities of witnesses and documents. Defendants did not take a position on whether they would so supplement.

On October 12, 2018, Defendants also notified Plaintiffs they would be providing approximately1,600 documents or 80,000 pages worth of possible trial exhibits. Defendants did not disclose these exhibits in either Defendants' Partial Response or Defendants' Amended Responses nor have they provided the documents in their entirety by electronic or linked versions to Plaintiffs. *See* Exhibits 3 and 4.

Given Defendants' failure to provide substantive responses to the contention interrogatories, and the commencement of trial on October 29, this Court should order Defendants to fully and completely respond to the contention interrogatories on or before October 25, 2018.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 26(b)(1) provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defenses and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). A party may propound

interrogatories relating to any matter that may be inquired to under Rule 26(b). Fed. R. Civ. P. 33(a). A responding party is obligated to respond to the fullest extent possible, and any objections must be stated with specificity. Fed. R. Civ. P. 33(b)(3)-(4). "[I]f the information sought is contained in the responding party's files and records, he or she is under a duty to search the records to provide the answers." *U.S. ex rel. Englund v. L.A. Co*., 235 F.R.D. 675, 680 (E.D. Cal. 2006) (citing *Govas v. Chalmers*, 965 F.2d 298, 302 (7th Cir.1992)).

Federal Rule of Civil Procedure 33 governs the use of contention interrogatories– interrogatories that seek the facts, witnesses and documents supporting the factual basis for allegations in a complaint. Rule 33(a)(2) specifically provides that interrogatories may relate to any matter that may be inquired into under Rule 26 and is not objectionable "merely because it asks for an opinion or contention that relates to fact to the application of law to fact." Fed. R. Civ. P. 33(a)(2). The Advisory Committee Notes to the 1970 Amendments to Rule 33 state that "requests for opinions or contentions that call for the application of law to fact . . . can be most useful in narrowing and sharpening the issues, which is a major purpose of discovery." *See* Advisory Committee Notes of the 1970 Amendments Subdivision (b).

Under the Federal Rules, a party may move to compel discovery provided that she "has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." Fed. R. Civ. P. 37(a)(1). Under Rule 37(a)(4), "an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer or respond."

ARGUMENT

1. Plaintiffs' Contention Interrogatories Are Consistent with Discovery Envisioned by the Federal Rules

Courts uphold the use of contention interrogatories, so long as the interrogatories are related to the facts of the case or call for responses that contain mixed questions of law and fact. *See e.g.*, *Nestle Foods Corp. v. Aetna Cas. and Sur. Co.*, 135 F.R.D. 101, 111 (D.N.J. 1990) (stating that the objective of contention interrogatories is to "ferret out and narrow the issues"); *Leksi, Inc. v. Fed. Ins. Co.*, 129 F.R.D. 99, 107 (D.N.J. 1989) (concluding that "[i]nterrogatories seeking to elicit what a party's contentions will be at the time of trial are not objectionable, as responses to these questions will help narrow the issues to be tried"). *In re Convergent Technologies Sec. Litig*., 108 F.R.D. 328, 332 (N.D. Cal. 1985), provides examples of four common contention interrogatories: (1) those that begin, "Do you contend that . . . "; (2) those that ask for all the facts on which a contention is based, which often begin with "Describe in detail . . . "; (3) those that ask a party to take a position and then explain or defend that position with respect to how the law applies to the facts; and (4) those that ask a party to explain the legal position behind a contention. Contention interrogatories, if properly answered, would be the most reliable and cost-effective discovery device and less burdensome than depositions at which contention questions are propounded. *McCormick–Morgan, Inc. v. Teledyne Industries, Inc.*, 134 F.R.D. 275, 287 (N.D. Cal. 1991) (holding appropriately framed and timed contention interrogatories rather than depositions was most appropriate vehicle for establishing contentions). Here, for purposes of providing a sample to the Court, Plaintiffs offer properly framed contention interrogatories by requesting all facts on which a contention is based, to which Defendants provide improper responses:

> **Interrogatory No. 1.**
>
> Describe the factual bases that support DEFENDANTS' contention that Plaintiffs' claims are barred by a lack of standing as set forth in DEFENDANTS' Affirmative Defense No. 2.

Response to Interrogatory No. 1:

The United States objects to this interrogatory because it is directed to purely legal issues on which the United States has sought summary judgment and to which Rule 33 does not require a response.

Interrogatory No. 2.

Identify all documents that DEFENDANTS intend to introduce at trial to support DEFENDANTS' contention that Plaintiffs' claims are barred by a lack of standing as set forth in DEFENDANTS' Affirmative Defense No. 2.

Response to Interrogatory No. 2:

The United States objects to this interrogatory because it is directed to purely legal issues on which the United States has sought summary judgment and to which Rule 33 does not require a response. The United States further objects on the grounds that this interrogatory is premature and unduly burdensome where the Court has set an upcoming deadline for the Parties to exchange trial exhibit lists and a substantial number of potential trial witnesses have yet to be deposed.

Interrogatory No. 3.

Identify all witnesses by name, address, and phone number who DEFENDANTS intend to have testify at trial in support of DEFENDANTS' contention that Plaintiffs' claims are barred by a lack of standing as set forth in DEFENDANTS' Affirmative Defense No. 2.

Response to Interrogatory No. 3:

The United States objects to this interrogatory because it is directed to purely legal issues on which the United States has sought summary judgment and to which Rule 33 does not require a response. The United States further objects on the grounds that this interrogatory is premature and unduly burdensome where the Court has set an upcoming deadline for the Parties to exchange trial witness lists and a substantial number of potential trial witnesses have yet to be deposed.

Plaintiffs' contention interrogatories are consistent with both the broad discovery envisioned by the Federal Rules, but also the Rules' purpose of narrowing the factual issues to be resolved at trial and ensuring that all parties to litigation are possessed of relevant facts. *See*, e.g., *Shelak v. White Motor Co.*, 581 F.2d 1155, 1159 (5th Cir. 1978) (federal discovery rules are designed to narrow and clarify issues and to give parties mutual knowledge of all relevant facts,

thereby preventing surprise). Plaintiffs recognize Local Rule 33-1(d) limits overly broad interrogatories, such as those that "ask an opposing party to 'state all facts on which a contention is based' or to 'apply law to facts . . . .'" L.R. 33-1(d). However, the prohibition under Local Rule 33-1(d) "against overly broad interrogatories that ask for the general application of law to fact" was not inconsistent with Fed. R. Civ. P. 33, which allows a party to pose "an interrogatory that calls for a factual opinion or contention relating to the facts of the case or the application of law to the facts of the case." *EEOC, et al. v. U.S. Bakery*, 2003 U.S. Dist. LEXIS 25529, 2003 WL 23538023 at *2 (D.Or. Nov. 20, 2003). In *U.S. Bakery*, the plaintiff requested "the factual and legal basis [the defendant] relie[d] on in its third affirmative defense." *Id.* at *5. "[LR] 33.1(d) is not inconsistent with the Federal Rules of Civil Procedure ... Although interrogatories may not extend to legal issues unrelated to the facts of the case, a party may appropriately pose an interrogatory that calls for a factual opinion or contention relating to the facts of the case or the application of law to the facts of the case." *Id*. at *6–*7 (emphasis in original). Judge Haggerty characterized the then-existing L.R. 33.1(d) as prohibiting only "overly broad interrogatories that ask for the general application of law to fact." *Id*. at *7. The court ordered the defendant to respond to this interrogatory. *Id*.

Plaintiffs and Defendants determined that discovery would proceed by way of the exchange of contention interrogatories. Plaintiffs' contention interrogatories are narrowly drafted to seek documents and information that are highly relevant to the allegations in the complaint and Defendants' affirmative defenses. Defendants are obligated to provide good faith complete answers to Plaintiffs' Interrogatories.

2. Defendants' Responses to Plaintiffs' Interrogatories Are Wholly Inadequate

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Defendants provided wholly inadequate responses to nearly all interrogatories. Incredibly, as evidenced above in the sampling of Interrogatories Nos. 1-3, Defendants failed to provide responses to interrogatories indicating documents and witnesses they plan on relying on during the trial in contravention of Federal Rule 33. Instead, on October 12, 2018, counsel for Defendants stated they would be serving the exhibit list and the witness list and wanted Plaintiffs to accept those lists in lieu of a supplemental response. Plaintiffs informed Defendants this procedure is unacceptable. Quite unexpectedly, at the same time, Defendants notified Plaintiffs they would be listing approximately 1,600 documents or 80,000 pages as potential exhibits in the course of providing their exhibit list. These documents are clearly responsive documents to Plaintiffs' contention interrogatories. It is wholly improper for Defendants to proffer 80,000 pages of documents without disclosing them as supplemental responses to their Partial Response or Amended Responses to Plaintiffs' Interrogatories. At the time of filing this motion, 12 days before trial and after several requests, Defendants had not provided copies of approximately 700 documents, which Defendants aver they may use at trial and which are responsive to these contention interrogatories. It defies credulity that Defendants could reasonably believe they are compliant with the Federal Rules and are acting in good faith.

Under Civ. R. 37(a)(4), "an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer or respond." Discovery typically is "accorded a broad and liberal treatment. . . . This broad right of discovery is based on the general principle that litigants have a right to every man's evidence and that wide access to relevant facts serves the integrity and fairness of the judicial process by promoting the search for the truth." *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) (internal quotations and citations omitted). Plaintiffs

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are being unfairly prejudiced by Defendants' disregard for the discovery process and their failure to respond fully, completely, and timely to discovery and pre-trial obligations.

Accordingly, not only must Defendants respond adequately, Plaintiffs request that this Court order Defendants to respond in an expeditious fashion. Specifically, given that trial is 12 days away, Plaintiffs request that Defendants provide responses by October 25, 2018, and at the latest a date certain to respond before trial commences on October 29, 2018.

CONCLUSION

For the foregoing reason, pursuant to Federal Rule 37, this Court should grant an order compelling Defendants to promptly, fully, and completely respond to Plaintiffs' Interrogatories on or before October 25, 2018.

DATED this 17th day of October, 2018

Respectfully submitted,

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