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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; et al.,

Defendants.

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

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' CORRECTED PROPOSED PRETRIAL ORDER

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A Pretrial Order is required by the Local Rules. Plaintiffs prepared and circulated a draft Pretrial Order. Defendants refused to provide any language for a Pretrial Order. Plaintiffs filed their draft Pretrial Order, again as required by the Local Rules and an order of this Court. In an act of chutzpah, rather than apologize to this Court for not complying with the Local Rules and an order of this Court, Defendants move to strike Plaintiffs' Corrected Proposed Pretrial Order (Doc. 394). This Motion should be denied and Defendants should be required to comply with the Local Rules.

In their attempts to claim prejudice from the filing of a Pretrial Order in this complex, constitutional case, Defendants fail to provide this Court with the full factual background leading up to the filing of the Pretrial Order. Local Rule 16-5 ***requires*** the parties to prepare and file a pretrial order to "frame the issues for trial," if "there is no court-approved stipulation or order dispensing with the need for a pretrial order." While the parties may stipulate, subject to the approval of the Court, or the Court may order, that no pretrial order need be filed, that is not what happened in this case. Nor do Defendants claim that is what happened here. Thus, the parties were required to prepare and file a Pretrial Order pursuant to the Local Rules.

Further, the parties addressed the Pretrial Order with this Court during the August 27, 2018 Status Conference. That discussion centered around the following language in the Local Rules: the parties are under an obligation to "prepare and sign a proposed pretrial order to be filed with the Court on or before the date ordered by the Court." LR 16-5. During the August 27 Status Conference, this Court ordered the parties to file the Pretrial Order on October 15. When Defendants refused to participate in the preparation of a Pretrial Order, Plaintiffs filed their version of the Pretrial Order on October 15 as ordered by this Court.

The parties are anticipating an eight to ten week trial in this case with dozens of expert and fact witnesses and over one thousand exhibits identified on each party's exhibit lists. Throughout the discovery process, Defendants have persistently refused to respond to requests for admissions or to stipulate to any facts outside of the admissions in the Answer. A Pretrial Order setting forth the parties' respective positions as to the claims and defenses that will be presented at trial and identifying the facts that are not in dispute is thus appropriate in the interests of efficiency and judicial economy. This Court should deny this Motion and require Defendants to comply with the Local Rules in filing their proposed Pretrial Order promptly.

INTRODUCTION

At the August 27, 2018 status conference, Plaintiffs' counsel raised the issue of setting the timeframe for submission of the Pretrial Order. After discussing the timeframe, this Court indicated her confidence that the pretrial order "will get filed" on October 15:

> MS. OLSON: Related to the filing of the pretrial order, Your Honor, the local rules provide that plaintiffs serve on defendants their pretrial order 30 days before the date of filing, and we were hoping to shorten the timeline for the parties back and forth on the pretrial order as well.
>
> So our proposal -- and I have not conferred with counsel on this, but our proposal would be to serve our pretrial order on them September 24th and ask that they respond by October 5th so that we could file it on October 15th.
>
> MR. DUFFY: As plaintiffs said, we haven't conferred specifically as to dates, so I will want to discuss that further with my colleagues. In principle, though, I don't foresee any major objections. So, I think that's something the parties can come to an agreement to and then let the court know.
>
> THE COURT: Well, everything -- it will be -- I am sure it's going to get worked out, and I am pretty confident it will get filed on the 15th. You can have your conferral time.

(Doc. 343).

Thus, the record is clear: Defendants represented to this Court that they would discuss the timing of the Pretrial Order amongst themselves and then initiate a meet and confer with counsel for Plaintiffs. At no time after the August 27 status conference did Defendants attempt to initiate a meet and confer with Plaintiffs before, during, or after any internal discussions they stated on the record were going to occur. Declaration of Philip L. Gregory ("Gregory Decl.") ¶ 12. In fact, Defendants did not contact Plaintiffs at all regarding the Pretrial Order until Plaintiffs served their draft on Defendants on October 5. *Id.* ¶ 13. The parties never reached agreement on a schedule for the preparation and filing of the Pretrial Order.

Plaintiffs acknowledge that, during the month of September, the parties were engaged in tremendous travel schedules and numerous discovery and other court ordered deadlines, largely due to Defendants' failure to schedule depositions of the Youth Plaintiffs and Plaintiffs' experts in a timely manner. In a good faith attempt to meet the filing deadline of October 15, Plaintiffs provided Defendants with Plaintiffs' proposed Pretrial Order on October 5, asking that Defendants provide their input and sections one week later on October 12. *Id.* ¶ 16, Exh. 1.

Six days later, Defendants finally communicated their position on the Pretrial Order. On October 11, 2018, Defendants took their initial position: a pretrial order is not required (a position in express contravention of Local Rule 16-5). Later on October 11, Defendants stated they would stipulate to only including admissions from their Answer as "agreed facts" in the pretrial order. *Id.* ¶ 17, Exh. 2. On October 12, 2018, counsel for both parties met and conferred about the Pretrial Order wherein counsel for Defendants asserted it was a waste of time to file the Pretrial Order set forth in Local Rule 16.5, claiming: "Why bother with something that does not advance us in any way. Let's go to trial." *Id.* ¶ 18, Exh. 3 (Letter to Counsel, October 14, 2018). Given that this Court had ordered the parties to file the Pretrial Order on October 15, 2018, and

given that Defendants refused to even prepare a draft of any section of the Pretrial Order, Plaintiffs filed their proposed Pretrial Order to comply with the Court's scheduling order and as a means to streamline the number of exhibits needed to be introduced through witnesses at trial.

Importantly, Defendants have never submitted any language to be included in the Pretrial Order. Their request to have this Court order the parties to confer on its contents rings hollow as Plaintiffs have no idea what specific language Defendants want in a Pretrial Order. The essential fact supporting denial of this Motion is that Defendants have made no effort to offer any specific language for inclusion in a Pretrial Order, despite the express requirements of the Local Rules and an order of this Court.

LEGAL STANDARD

The Ninth Circuit has found that "only pleadings are subject to motions to strike." *Sidney–Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir.1983). "[A] motion to strike materials that are not part of the pleadings may be regarded as an invitation by the movant to consider whether [proffered material] may properly be relied upon." *Natural Resources Defense Council v. Kempthorne*, 539 F.Supp.2d 1155, 1161 (E.D. Cal. 2008) (citing *U.S. v. Crisp*, 190 F.R.D. 546, 551 (E.D. Cal. 1999); *Monroe v. Bd. of Educ.*, 65 F.R.D. 641, 645 (D. Conn. 1975) ("[A] motion to strike has sometimes been used to call courts' attention to questions about the admissibility of proffered material in [ruling on motions].").

Motions to strike are "generally regarded with disfavor" and materials should not be stricken unless it is clear that it can have no possible bearing upon the subject matter of the litigation. *Wang v. OCZ Tech. Grp., Inc.*, 276 F.R.D. 618, 624 (N.D.Cal.2011); *see Colaprico v. Sun Microsystems, Inc.*, 758 F. Supp. 1335, 1339 (N.D. Cal. 1991) ("[M]otions to strike should not be granted unless it is clear that the matter to be stricken could have no possible bearing on

the subject matter of the litigation."). In their moving papers, Defendants fail to offer a draft Pretrial Order or provide a reason under the Local Rules as to why they have not drafted a Pretrial Order. In terms of the "Agreed Facts," Defendants fail to establish that the facts set forth in Plaintiffs' proposed Pretrial Order as "Agreed Facts" "have no possible bearing upon the subject matter of the litigation." *Wang v. OCZ Tech. Grp., Inc.*, 276 F.R.D. at 624. Nor are Defendants harmed by the identification of Agreed Facts about which Defendants have been repeatedly apprised, largely come from the government's own documents, and are quoted verbatim from their sources. Thus, the proffered material "may properly be relied upon." *Natural Resources Defense Council*, 539 F.Supp.2d at 1161.

ARGUMENT

1. Defendants' Objections to the Breadth of the Proposed Pretrial Order Are Misdirected

In terms of the content of the proposed Pretrial Order, Defendants appear to only dispute the matters identified as "Agreed Facts." Many of the Agreed Facts are admissions taken directly from Defendants' Answer, and thus are entirely appropriate for inclusion as agreed facts.[1] Gregory Decl. ¶ 14. Defendants can hardly oppose including admissions from their Answer in the Agreed Facts section. If Defendants dispute the language used by Plaintiffs to describe Defendants' admissions in the Pretrial Order, Defendants have had the opportunity to make any substantive corrections, as appropriate. Yet they have failed to make even this minimal effort.

[1] *See, e.g.*, **Corrected Plaintiffs' Proposed Pretrial Order, Doc. 394 at 7 ¶ 26 (quoting Answer verbatim)**: "Climate change is damaging human and natural systems, increasing the risk of loss of life, and requiring adaptation on larger and faster scales than current species have successfully achieved in the past, potentially increasing the risk of extinction or severe disruption for many species. Answer ¶ 213"; **Doc. 394 at 52 ¶ 164 (quoting Answer verbatim):** "The consequences of climate change are already occurring and, in general, those consequences will become more severe with more fossil fuel emissions. Answer ¶ 10."; Gregory Decl. ¶ 14.

The remaining proposed Agreed Facts are not "Plaintiffs' characterization of government documents," (Doc. 395 p. 4) but rather direct quotes of government data and information contained in the documents for which Plaintiffs sought judicial notice. *See* Docs. 270, 299, 341, 380. Moreover, the majority of the facts are framed in such a way as to specifically avoid any kind of characterization. For example, most of the Agreed Facts simply state that a government entity issued a particular document on a certain date that contained a statement provided in quotation marks. *See, e.g.*, Doc. 383, *Agreed Facts* Nos. 59-61, 63-71, 75-81. Defendants make no argument that any of the Agreed Facts may not "properly be relied upon." *Natural Resources Defense Council*, 539 F.Supp.2d at 1161. By framing the Agreed Facts in this manner, Plaintiffs intended to show the Court that government documents made certain statements on certain dates, an approach that Defendants cannot reasonably dispute.

Since the early days of this litigation, Defendants have consistently refused to admit or otherwise acknowledge the existence, let alone the veracity, of information contained in government documents, a tactic which has served to cause undue expense and effort on the part of Plaintiffs. Originally, on January 20, 2017, Plaintiffs served Requests for Admissions ("RFAs") on Defendants seeking admissions of facts that were largely extracted from government-generated documents and websites. Gregory Decl. ¶ 3. After Plaintiffs served those RFAs, Defendants complained about the language and requested that Plaintiffs reframe the RFAs during the May 10, 2018 Meet & Confer. Gregory Decl. ¶ 4. Defendants asked Plaintiffs to reframe the requests with each document indicating what the document says without getting at the truth of the matter asserted:

> However, in an effort to work with Plaintiffs, we propose that for RFAs that quote or closely track statements by the agencies, we will proceed by admitting the authenticity of the document cited for each admission rather than the truth of the underlying statements. Courts have

> recognized that a request for authenticity of a document or statement is appropriate for RFAs . . . .

See Gregory Decl. ¶ 5.

This issue was discussed further at the June 6, 2018 Status Conference with Magistrate Judge Coffin. There, Defendants' counsel proposed the following format:

> That plaintiffs issue RFAs to authenticate the subject documents, and then the court can take judicial notice of what the documents said.
>
> So on June 2011, the Forest Service report, …insert paragraph.

See June 6, 2018 Transcript 7:24-8:1, Doc. 223. That is the exact approach Plaintiffs took in drafting the Agreed Facts section in the Pretrial Order that Defendants now oppose.

Furthermore, this method tracked what was recommended by Magistrate Judge Coffin at the June 6 Status Conference: "the agreement that the documents are authentic and admissible is all that's necessary, and I won't require the government to make admissions that the documents are true because they may contest the accuracy of some of the documents, and, if so, they are free to do that at trial. But the documents come in. They are evidence. The court can consider the documents as evidence and draw whatever inferences the court will draw from those documents. So I think that solves that problem." *Id.* at 13:5-15.

Responding to Defendants' concerns and Judge Coffin's recitation of the agreement, Plaintiffs reframed each and every government-issued document in the manner Defendants preferred. Ultimately, because of Defendants' persistent refusal to respond to Plaintiffs' RFAs and based upon Magistrate Judge Coffin's recitation, Plaintiffs agreed to hold the RFAs in abeyance and instead seek judicial notice of those documents. *See* Docs. 270, 299, 341, 380. The Court granted in part and denied in part Plaintiffs' first Motion *in Limine* Seeking Judicial Notice

of Publicly Available Documents. Doc. 368. Many of the Agreed Facts come from documents of which the Court has taken judicial notice or to which Defendants have not objected as sources for judicial notice. *See, e.g.*, Doc. 368 (Court taking judicial notice of many of the documents featured in Plaintiffs' Proposed Pretrial Order); Doc. 357 (Defendants' taking no objection or no position to the majority of documents submitted for judicial notice in Plaintiffs' second Motion *in Limine* Seeking Judicial Notice, many of which are featured in Plaintiffs' Proposed Pretrial Order); Doc. 380 (same as to Plaintiffs' third Motion *in Limine* Seeking Judicial Notice). It is thus appropriate for the fact that these documents make a particular statement be included as Agreed Facts.

Defendants have been aware of many of these facts as long as they have had Plaintiffs' Requests for Admissions that were held in abeyance—approximately 21 months. Further, Defendants have had the Motion *in Limine* documents for months as follows:

— Plaintiffs' first Motion *in Limine* Seeking Judicial Notice was served on Defendants on June 28, 2018. Docs. 270, 299. Defendants reviewed and responded with objections to these exhibits on July 24, 2018, but took either "no position" or lodged "no objection" to the vast majority of these exhibits. Docs. 327, 331, 334. This Court granted in part and denied in part Plaintiffs' Motion *in Limine* on October 15, 2018, taking judicial notice of many of these documents as "not subject to reasonable dispute" under Federal Rule of Evidence 201. Doc. 368. Gregory Decl. ¶ 9.

— Plaintiffs' second Motion *in Limine* Seeking Judicial Notice was served on Defendants on August 24, 2018. Doc. 341. After receiving an extension of almost a month to respond, Doc. 356, and after indicating that the additional time would

"provide Defendants with sufficient time to review" the documents, Doc. 346, Defendants responded with objections on September 28, 2018, objecting to only two exhibits and taking either "no position" or "no objection" on the remaining exhibits. Docs. 357, 366. This Motion is still pending before this Court. Gregory Decl. ¶ 9.

— Plaintiffs' third Motion *in Limine* Seeking Judicial Notice was served on Defendants on October 15, 2018, the deadline set by this Court for filing all Motions *in Limine*. Doc. 380. Many of these exhibits were first exchanged with Defendants on September 28, 2018 in an attempt to resolve authenticity disputes prior to filing a third Motion *in Limine*. This Motion is still pending before this Court. Gregory Decl. ¶ 9.

Taking into consideration Defendants' extensive exposure to these publicly available documents through the Motion in *Limine* process requested at their behest, factual information such as titles and dates and verbatim quotations from these documents should come as no surprise to Defendants.

Plaintiffs do not disagree that the Agreed Facts are voluminous. Nonetheless, Plaintiffs believe that it is far more efficient for the parties to agree to as many facts as possible in advance of trial in order to reduce the need to introduce such uncontested facts through documentary evidence and witness testimony. At this time, the parties anticipate an eight- to ten-week trial and thus the parties should make every effort to streamline their presentations to the Court, and the Agreed Facts in the Pretrial Order is the preferred way to do that.

2. <u>Defendants' Assertions About the Prejudicial Effects of Plaintiffs' Proposed Pretrial Order Are Unfounded.</u>

None of the alleged effects articulated by Defendants about the Proposed Pretrial Order prejudice Defendants in any way. Since early 2018, Plaintiffs have attempted to work with Defendants on the admission of facts from government-generated documents, which contain much of the factual information Plaintiffs seek to introduce at trial. At no time have Defendants raised any objections as to the veracity of information contained within government documents. Pursuant to Local Rule 16-5(b), Plaintiffs have tried "to frame the issues for trial" in an efficient way by presenting their claims and facts in the manner previously suggested by Defendants themselves. Doc. 223 at 7:24-8:1.

Defendants contend that Plaintiffs' service of the Proposed Pretrial Order ten days prior to the due date is prejudicial. There is no prejudice. Many facts in the Agreed Facts section are Defendants' admissions from their Answer. The remaining facts are from government documents that have been in Defendants' possession for several months because they were the subject of Plaintiffs' RFAs and motions *in limine* seeking judicial notice of publicly available documents. Plaintiffs have remained willing to continue a productive meet and confer process; Defendants, however, have never sought to provide a *substantive* response to the Agreed Facts. Gregory Decl. ¶ 10. Nevertheless, Defendants consistently maintained the position that they were unwilling to stipulate to *any* facts outside of the Answer, which is an unreasonable position to take since the vast majority of the Agreed Facts identified by Plaintiffs are from the government's own documents and the whole purpose of a Pretrial Order is "to frame the issues for trial" in an efficient way by presenting their claims and facts. Local Rule 16-5(b).

If this Court grants this Motion and rewards Defendants for failing to meet and confer on a pretrial order, the obvious result is that both this Court and Plaintiffs will be extremely inconvenienced at trial. Plaintiffs will be forced to introduce all of these documents through

individual witnesses simply for the purpose of getting the witness to confirm that a government document makes a particular statement, a process that will only serve to lengthen trial and waste judicial resources. Since Plaintiffs merely seek to establish that government documents, many of which this Court has judicially noticed as authentic, make certain statements, this Court should deny Defendants' attempts to avoid taking a position on the uncontested facts in this case.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' Motion to Strike Plaintiffs' Proposed Pretrial Order and order such other relief as this Court deems just and appropriate.

Respectfully submitted this 2nd day of November, 2018,

_/s/ *Julia A. Olson*_____

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