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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

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

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO STRIKE PLAINTIFFS' TRIAL EXHIBIT LIST, OR, IN THE ALTERNATIVE, OBJECTIONS TO PLAINTIFFS' TRIAL EXHIBIT LIST

Introduction

Flowing from its inherent authority to manage its docket and oversee the orderly and efficient presentation of evidence at trial, the district court has ample discretion to require Plaintiffs to provide an exhibit list that credibly reflects the admissible evidence Plaintiffs anticipate introducing at trial. Plaintiffs' massive trial exhibit list of 1,938 exhibits[1] cannot possibly represent the exhibits Plaintiffs actually intend to offer into evidence at trial. Plaintiffs' exhibit list is objectionable as a whole, both because of its size and its content. There are many red flags, including (1) at least fifty-one newspaper articles; (2) an extremely large volume of purported expert reliance materials having limited probative value; and (3) twenty-seven videos and films, including four self-serving YouTube videos produced by Plaintiffs' counsel. It would be well within the trial court's discretion to require Plaintiffs to submit a new exhibit list or to strike facially objectionable exhibits at the outset. Indeed, this Court has granted motions to strike non-pleading documents such as exhibits. *See, e.g., Concerned Friends of Winema v. U.S. Forest Serv.*, No. 1:14-cv-737-CL, 2017 WL 5957811, at *1 (D. Or. Jan. 18, 2017) (adopting magistrate judge's recommendation that declaration be stricken); *Vejo v. Portland Pub. Sch.*, 204 F. Supp. 3d 1149, 1160-62 (D. Or. 2016) (granting in part motion to strike declarations and exhibits), *rev'd in part,* 737 F. App'x 309 (9th Cir. 2018).

Without a reasonably targeted exhibit list, Defendants faced significant challenges in compiling meaningful document-specific objections by the October 19 deadline. The fact that Plaintiffs had previously moved for judicial notice of 1,336 of the nearly 2,000 documents and other media on their exhibit list did not remove this burden. Defendants had previously reviewed the 1,336 documents in three tranches of 300, 584, and 452 documents, respectively, *only* for

[1] The final exhibit list Plaintiffs submitted to the court on October 19, 2018 contained 1,938 exhibits. ECF No. 402-1.

purposes of ascertaining Defendants' position on authenticity. Defendants did not make (or waive, for that matter) any other objections with respect to these documents. *See* Defs.' Resp. to Mot. in Limine Seeking Judicial Notice, ECF No. 327; Defs.' Resp. to Second Motion in Limine Seeking Judicial Notice, ECF No. 357; Defs.' Resp. to Third Mot. in Limine Seeking Judicial Notice, ECF No. 431. Plaintiffs' motions did not disclose and Defendants did not assume that Plaintiffs would seek to move all 1,336 of the judicial notice documents into evidence at trial. This information came as a surprise.

Plaintiffs attempt to deflect the Court's attention away from the burdens they placed on Defendants by arguing that Defendants' production of their trial exhibits was somehow prejudicial. The argument is specious. Defendants had no legal obligation to identify their trial exhibits before the October 12 deadline to exchange exhibit lists on, and Defendants provided Plaintiffs with electronic copies of their exhibits by overnight mail shortly thereafter on October 17 and October 19, in the absence of any court-imposed deadline to do so. By contrast, Defendants did not receive a set of Plaintiffs' exhibits until November 5. Thus, even if the parties' relative burdens were relevant here, that would not absolve Plaintiffs of their duty to provide an exhibit list reasonably reflecting the evidence they intend to introduce at trial.

I. The Court Should Require Plaintiffs to Provide a New Exhibit List Reflecting the Admissible Evidence Plaintiffs Anticipate Introducing at Trial.

Plaintiffs' pretrial exhibit list fails to provide the Court and the United States with sufficient guidance regarding the exhibits Plaintiffs intend to introduce at trial. Without the pressure of a looming trial date, there is no reason for the Court not to strike it and require Plaintiffs to file a new exhibit list that includes only exhibits which Plaintiffs reasonably intend to introduce at trial. Plaintiffs argue that only pleadings are subject to motions to strike, but this Court has granted motions to strike non-pleading documents, including exhibits, pursuant to its

inherent authority to manage its docket and the orderly and efficient procession of litigation. *See, e.g., Concerned Friends of Winema*, 2017 WL 5957811, at *1 (adopting magistrate judge's recommendation that declaration be stricken); *Vejo*, 204 F. Supp. 3d at 1160-62 (granting in part motion to strike declarations and exhibits). The purpose of pretrial submissions, such as witness and exhibit lists, is to streamline the trial process, sharpen the issues, and reduce the amount of time spent resolving evidentiary issues during trial. The exhibit list filed by Plaintiffs misses this mark by a mile and the Court can and should send Plaintiffs back to the drawing board.

If it is indeed true that "Plaintiffs have narrowed their exhibit list to those exhibits reasonably anticipated for use at trial," then trial will last considerably longer than fifty days. Pls.' Resp. in Opp'n to Defs.' Mot. to Strike Pls.' Trial Ex. List 9, ECF No. 413 ("Pls.' Resp."). Plaintiffs have listed 47 potential fact witnesses and 21 potential expert witnesses and projected 182 hours of direct trial testimony, which amounts to more than 30 court days of purely direct testimony assuming the court hears testimony for six hours each day. *See* Pls.' Am. Witness List, ECF No. 387.[2] Even if Plaintiffs were to spend less than six minutes on average per exhibit (including time spent laying a foundation for the admission of the exhibit) their direct examination time would be used up *in full* introducing the 1,938 exhibits they have on their exhibit list. Plaintiffs would have no time left to elicit any other testimony, which they no doubt intend to do.

An exhibit list containing nearly 2,000 exhibits will unnecessarily prolong the trial and waste the time of the Court. It should be stricken and doing so now would not delay the trial, because no trial date has been set. In the event the Court declines to issue an order striking

[2] Defendants inadvertently stated that Plaintiffs anticipated 296 hours of testimony in their opening brief. Defendants filed an Errata (ECF No. 426) and include the correct number of hours of testimony and court days in their Reply.

Plaintiffs' exhibit list outright, it should nonetheless exclude facially objectionable documents before trial begins.

II. The Newspaper Articles Are Not Evidence and Should Be Stricken.

Plaintiffs list no fewer than fifty-one newspaper articles on their exhibit list, including twenty-one *New York Times* articles alone. Plaintiffs also include articles from *E&E News*, *The Washington Post*, *The Wall Street Journal*, *CNN*, *Bloomberg*, *Reuters*, *Scientific American*, *The Economist*, *The Bend Bulletin*, *The Oregonian*, *Reveal News, Climate One*, *The Conversation*, *Business Insider*, *Foreign Affairs*, *The Register-Guard*, *KMTR*, *KOIN 6*, and *KVAL*. The fact that a newspaper article is self-authenticating does not render it admissible. Newspaper articles are inadmissible hearsay (or double hearsay), unless an exception applies. *See, e.g., United States v. Bellucci*, 995 F.2d 157, 160 (9th Cir. 1993) ("The fact that a document may be self-authenticating does not render it admissible if it is hearsay in the absence of a recognized exception to the rule against hearsay."); *Logan v. City of Pullman*, 392 F. Supp. 2d 1246, 1252 (E.D. Wash. 2005) ("Although a newspaper article is self-authenticating under Federal Rule of Evidence 902(6), it is hearsay under Federal Rule of Evidence 801(d) and is inadmissible unless it falls within an established exception to the rule against hearsay"). *See also Kesey, LLC v. Francis*, No. CV. 06-540-AC, 2009 WL 909530, at *50 (D. Or. Apr. 3, 2009) (admitting old newspaper articles under ancient document exception but excluding plaintiffs' statements made therein as hearsay), *opinion adopted by* Civil No. 06-540-AC, 2009 WL 1270249 (D. Or. May 5, 2009).

There is no conceivable non-hearsay purpose that would justify admitting these articles into evidence and they should be excluded now before trial begins. Plaintiffs first suggest that the articles would assist the Court in evaluating their experts' opinions and are therefore

admissible under Rule 703. Pls.' Resp. 10. But Rule 703 applies only to materials an expert relies upon in forming his or her opinion, all of which must be included in the expert's written report under Rule 26(a)(2)(B), and those reliance materials are only admissible for purposes of assessing what weight to give the expert's opinions, not for the truth of the matters asserted therein. Further, Plaintiffs may not introduce news articles not identified in their experts' reports as expert reliance materials. Fed. R. Civ. P. 37(c)(1). Plaintiffs also may not introduce articles quoting or describing the views of other experts in an attempt to buttress their own experts' views. The statements of other experts quoted in news articles are hearsay within hearsay and must be excluded, even if the articles themselves are admissible for a limited purpose under Rule 703.

Next, Plaintiffs suggest that the news articles can properly be admitted because they will be used to refresh the Plaintiffs' recollections of their injuries. *See* Pls.' Resp. 10. This is incorrect. A document need not be admissible in order to be used to refresh a witness's recollection, and the fact that it successfully refreshed the witness's recollection does not mean the document is then admitted into evidence. *See Fraser v. Goodale*, 342 F.3d 1032, 1037 (9th Cir. 2003). Plaintiffs may use inadmissible documents to refresh the Plaintiffs' recollection at trial (provided they have laid a proper foundation under Rule 612), but those documents do not belong on Plaintiffs' exhibit list and will not be admitted into evidence. Further, Plaintiffs cannot use news articles to buttress the youths' testimony, i.e., to prove the existence, nature, and extent of Plaintiffs' injuries under the guise of refreshing recollection.

Lastly, Plaintiffs argue that the newspaper articles are somehow relevant to the government's knowledge about climate change. *See* Pls.' Resp. 11. This is also incorrect. The articles are irrelevant to the government's knowledge unless Plaintiffs can establish the relevant

government decision-maker read the article. Furthermore, Plaintiffs and Defendants include hundreds of government documents and reports on their exhibit list; these are the only reliable documentary evidence of the government's knowledge.

But even if Plaintiffs could identify a proper, non-hearsay purpose (and Defendants aver they cannot), the probative value of newspaper articles is substantially outweighed by the dangers of unfair prejudice to Defendants resulting from their inability to cross-examine the declarant(s), wasting the Court's time, and needlessly presenting cumulative evidence. Fed. R. Evid. 403. In a case where Plaintiffs will offer nearly one hundred hours of expert testimony from qualified experts, there is no need for the Court to rely on journalistic reporting to weigh the facts.

III. Plaintiffs Should Be Precluded From Offering Copious Expert Reliance Materials Into Evidence.

Plaintiffs list copious expert reliance materials on their exhibit list, including (i) more than one-hundred scientific articles, *e.g.*, thirteen articles published in *Science*, thirteen articles published in *Nature*, and eleven articles published by *Science Direct*; (ii) at least forty-five statements from foreign and domestic non-governmental organizations and state agencies; and (iii) at least thirty exhibits relating to the Early Republic Period (1780-1830), *e.g.*, documents relating to George Washington's Mount Vernon, Thomas Jefferson's Monticello, and James Madison's Montpelier. Plaintiffs represent all of these documents are expert reliance materials. *See* Pls.' Resp. 11-12, 15.

To the extent any of these documents were not disclosed in Plaintiffs' written expert reports under Rule 26(a)(2)(B), they are inadmissible for any reason. Fed. R. Civ. P. 37(c)(1). To the extent they were disclosed in Plaintiffs' expert reports, they are theoretically admissible under Rule 703 for the limited purpose of assisting the Court in deciding what weight to give

those opinions. They are not admissible for their truth (because they are hearsay) and therefore have limited probative value. Accordingly, the indiscriminate admission of copious expert reliance materials for a very limited purpose under Rule 703 is substantially outweighed by considerations of wasting the Court's time in a trial *conservatively* estimated to last at least fifty days and needlessly presenting cumulative evidence.

For example, there is little probative value in allowing Plaintiffs to offer dozens of articles through their climate scientists. These articles could only be offered to assist the trier-of-fact in assessing the credibility of Plaintiffs' experts. But Plaintiffs' climate scientists will offer testimony on matters largely not in dispute, obviating the need for the Court to dive deeply into matters of credibility for these experts by combing through expert reliance materials. As Defendants explain in their Motion in Limine to Exclude Certain Testimony of Six Experts (ECF No. 371), the resolution of complex questions of climate science at trial is not necessary to dispose of the claims in this lawsuit, nor would opining on such matters be appropriate in this forum where, for purposes of this litigation, the government's answer does not dispute the effects of greenhouse gas emissions and climate change.

Similarly, the Court should not admit the more than forty statements from foreign and domestic non-governmental organizations and trade associations, *e.g.*, World Climate Programme, Solar Energy Industry Association, Solar Energy Research Institute, International Renewable Energy Agency, and UNICEF, that Plaintiffs claim "*are all* tethered to Plaintiffs' expert witnesses . . ." Pls.' Resp. 11 (emphasis added). Again, these documents are only admissible if Plaintiffs' experts in fact relied on them as evidenced by what is disclosed in their expert reports, and if so, only for the limited purpose of assisting the trier-of-fact in evaluating the credibility of Plaintiffs' experts. In such case, the little probative value these materials do

have must be weighed against the volume of material, considerations of wasting the court's time, and presenting cumulative evidence. These conditions weigh in favor of ordering Plaintiffs to cull their reliance materials in advance of trial.

Lastly, it would be a mistake for the Court to admit dozens of exhibits from the Early Republic Period (1780-1830), including documents concerning the personal homes of the Founding Fathers, maps and other documents authored by the Prussian naturalist Alexander von Humboldt in the early 1800s, and at least one artifact – a "reproduction of Jefferson's mould board." Plaintiffs aver that "these historical exhibits were references to Plaintiffs' expert witness Andrea Wulf's expert report and directly underpin her anticipated testimony at trial . . . 'that a balanced order of nature and humanity's connection with nature, including the climate system, is deeply embedded in the history and tradition of the United States.'" Pls.' Resp. 15. Documents about Mount Vernon, Monticello, and Montpelier are not relevant to Plaintiffs' claims that Defendants have injured them in the twenty-first century and should not be admitted into evidence even for the limited purpose of assessing Ms. Wulf's credibility.[3] Fed. R. Evid. 401.

Their relevance even to legal questions of Constitutional interpretation is highly suspect, but if Plaintiffs' wish to rely on Monticello's vegetable terrace, for example, to interpret the Constitution, the appropriate place to address those legal questions is in the post-trial briefs.

[3] Defendants did not seek to exclude or limit the testimony of Andrea Wulf, because Ms. Wulf's deposition occurred one business day before motions in limine were due on October 15. In the event a trial date is set, Defendants reserve their right to ask the Court to limit or exclude Ms. Wulf's testimony at trial.

IV. Plaintiffs' Videos and Films, in Particular the YouTube Videos Produced by Plaintiffs' Counsel, Are Not Evidence.

Plaintiffs list at least twenty-seven videos on their exhibit list. They are all objectionable, but perhaps none so much as the four YouTube videos produced by Our Children's Trust. Defendants address the different types of videos in turn, beginning with the YouTube videos.

Plaintiffs intend to introduce four self-promotional YouTube videos produced by Our Children's Trust in 2012 into evidence. The "Trust Oregon" film features Plaintiff Kelsey Juliana.[4] The "Trust Colorado" film features Plaintiff Xiuhtezcatl.[5] The "Trust Arizona" film features Plaintiff Jamie, who Plaintiffs have indicated may not testify at trial.[6] And the "Trust Alaska" film does not feature a Plaintiff in this federal lawsuit.[7] These films are inadmissible hearsay (or hearsay within hearsay where Plaintiffs are repeating things they've heard from others). Fed. R. Evid. 801(c), 802. They also contain mostly expert opinions, not facts within the subject's personal knowledge, and should also be excluded on that basis. Fed. R. Evid. 602. Further, the admission of these self-serving videos from six years ago would unfairly prejudice Defendants, especially so if all of the declarants in the film do not testify, and would waste the Court's time with evidence not likely to assist it in evaluating the merit of Plaintiffs' claims of injury. Fed. R. Evid. 401, 403.

Plaintiffs' arguments in support of admitting the four videos all fail and they should be excluded before trial even commences. Plaintiffs unconvincingly argue that they would be incapable of accurately describing "particular geographical features and impacts" and that the videos "are a helpful and efficient way to demonstrate the physical impacts of climate change

[4] https://www.youtube.com/watch?v=-Z8pCyqGa-w
[5] https://www.youtube.com/watch?v=IC2fjZSUu_E
[6] https://www.youtube.com/watch?v=c97dQ_LpRu4&t=11s
[7] https://www.youtube.com/watch?v=Lmhv_ioYTFg&t=31s

occurring near Plaintiffs' homes . . . ." Pls.' Resp. 14. Plaintiffs are capable of testifying about their injuries without showing the Court YouTube videos, and indeed, the eighteen Plaintiffs who were not the subject of a "Trust" video will have to do just that, including some of the youngest Plaintiffs. Defendants also submit (and Plaintiffs' counsel would no doubt not dispute) that all of the Plaintiffs who have been deposed thus far were articulate and poised and so testified without video aids. The videos are not evidence of "the physical impacts of climate change occurring near Plaintiffs' homes" and cannot be offered as such. Whether a particular geographic feature has been impacted or altered by climate change is the province of expert testimony, and so any testimony offered by the Plaintiffs on this topic would exceed the limits imposed on lay witnesses under Rule 602.[8] Any statements made within the videos themselves about "the physical impacts of climate change" are not only improper expert testimony outside the Plaintiffs' personal knowledge but also inadmissible hearsay. Plaintiffs throw out the present sense impression hearsay exception, but the videos are staged and contain audio narrations paired with the video footage that are not "nearly contemporaneous with the incident described and made with little chance for reflection." *See Bemis v. Edwards*, 45 F.3d 1369, 1372-73 (9th Cir. 1995); Fed. R. Evid. 803(1).

The videos are not, as Plaintiffs aver, "extremely relevant and probative to Plaintiffs' claims of injury . . . ." Pls.' Resp. 14. For example, there is no probative value in watching Plaintiff Kelsey Juliana walk through a forest in the snow as she opines that Oregon has not

[8] The same argument would apply to the five videos of Plaintiff Levi's home and surrounding area and Plaintiff Jamie's sheep barn. To the extent those Plaintiffs opine about the relationship between climate change and/or Defendants and particular geographic or environmental features, those opinions fall outside the limits of the Plaintiffs' personal knowledge under Rule 602, are the province or expert testimony under Rule 702, and thus cannot be admitted into evidence even if not hearsay.

gotten enough snowfall. Even the portions of that video showing fire-damaged trees are not probative: It cannot be determined from watching the video when that fire occurred, what caused it, or the extent of the damage. Nor are the videos of three of the twenty-one Plaintiffs and one non-plaintiff necessary for the Court to "understand[]" Plaintiffs' injuries. *Id.* The Court will have approximately forty hours of in-person testimony from the Plaintiffs in addition to nearly one hundred hours of expert testimony about Plaintiffs' alleged injuries. The addition of outdated promotional films containing hearsay statements and improper expert testimony from lay witnesses is not only unnecessary, but harmful.

Plaintiffs also intend to introduce network news compilations and news reports. These videos are inadmissible hearsay and have no relevant non-hearsay purpose. Fed. R. Evid. 801(c), 802, 401. And even if admissible, watching video compilations of network news represents a prejudicial waste of time for both the parties and the Court. Fed. R. Evid. 403. Plaintiffs attempt to justify their admission by arguing that the news segments "report on actions and inactions of Defendants, demonstrate the extent of Defendants' knowledge of global warming in the 1980s, and feature statements by federal government representatives and researchers." Pls.' Resp. 13. Using the news segments to prove government "actions and inactions" would be offering them for their truth and would be prohibited under Rule 802. As to Plaintiffs' suggestion that the news segments are relevant to Defendants' knowledge about climate change, they are not, unless Plaintiffs can prove that a government decision-maker watched them. Government reports and documents (e.g., the EPA report that is the subject of one of the news segments) are the only reliable documentary evidence concerning what the government did or did not know. With respect to statements by government representatives, NASA is not a party to this lawsuit, making any statements by NASA personnel inadmissible hearsay.

Finally, the thirteen C-SPAN videos of former Presidents have little relevance as "[t]his lawsuit is, at its heart, a challenge to the environmental and energy policies of the federal government as expressed through the action (or inaction) of federal agencies." Op. & Order 14-15, ECF No. 369. Further, even assuming some of the statements were relevant, the probative value of showing more than a dozen videos is substantially outweighed by considerations of wasting the Court's time and needlessly presenting cumulative evidence. Fed. R. Evid. 403. Plaintiffs cannot neutralize these concerns by promising to trim the videos and only show excerpts. The trier-of-fact would gain little probative information from watching cherry-picked snippets chosen by the Plaintiffs and the presentation of video evidence in that manner would be prejudicial to Defendants. In the event the Court is inclined to allow Plaintiffs to show some or all of these videos, Defendants request that the Court order Plaintiffs to produce the actual videos Plaintiffs intend to play so that Defendants have the opportunity to object to the manner in which Plaintiffs have edited the videos.

V. The Court Should Limit Pre-Johnson Administration Evidence.

Plaintiffs also list more than fifty documents from the presidential libraries as well as other documents from presidential administrations dating back to George Washington. Documents generated before the Lyndon B. Johnson administration (1963-1969) are not relevant to Plaintiffs' claims or what little relevance they have is substantially outweighed by considerations of wasting the Court's time, and needlessly presenting cumulative evidence. The crux of Plaintiffs' claims is that Defendants have known for more than fifty years that carbon dioxide from the burning of fossil fuels was causing global warming. *See* First Am. Compl. ¶ 1, ECF No. 7. Based on Plaintiffs' own allegations, nothing probative can be gained from reaching

back into documents generated before the middle of the last century, e.g., into the Hoover administration.

Plaintiffs argue that they "have included evidence from earlier federal administration[s] and any such evidence is *extremely relevant* and probative as to Defendants' longstanding knowledge of climate change." Pls.' Resp. 15 (emphasis added). Plaintiffs are wrong. Taking just three examples, from the Herbert Hoover administration, proves the point: President Hoover's "Address to the White House Conference on Child Health and Protection" (Pls.' Exh. 822) does not mention greenhouse gases, climate change, or pollution from fossil fuels. Neither does President Hoover's "Statement on Plans for a White House Conference on Child Health and Protection" (Pls.' Ex. 821), or President Hoover's "Remarks at the First Meeting of the White House Child Health Conference Planning Committee" (Pls.' Ex. 820). Just because some of the Plaintiffs are children and these statements from the late 1920s and early 1930s mention "children" and "health" (e.g., protecting children from typhoid) does not mean they are relevant to this case. They certainly are not "*extremely* relevant and probative as to Defendants' longstanding knowledge of climate change." Pls.' Resp. 15 (emphasis added).

Furthermore, documents from later presidential administrations are not automatically relevant or admissible as Plaintiffs suggest they are; they must bear on facts in dispute in this case in order to be relevant. For example, general interest speeches about "children" are not relevant or admissible, e.g., President Nixon's "Statement Announcing the White House Conference on Children and Youth" (Pls.' Ex. 824) and "Remarks at the Opening Session of the White House Conference on Children (Pls.' Ex. 825) (stating "[t]he great issue concerning family and child welfare in the United States is the issue of family income").

The Court should limit Plaintiffs to presidential documents authored during the Johnson and subsequent administrations, and exclude documents from any administration that do not even mention carbon, emissions, climate change, greenhouse gases, or fossil fuels.

Conclusion

Defendants respectfully request that the Court issue an order striking Plaintiffs' exhibit list and requiring Plaintiffs to submit a new exhibit list containing only those documents and things reasonably likely to be offered (and admitted) into evidence during their case-in-chief. Doing so would not delay any trial, because no trial date is set. In the event the Court declines to issue an order striking Plaintiffs' exhibit list, Defendants request that the Court sustain their objections to Plaintiffs' exhibits, including precluding Plaintiffs from offering the news articles and YouTube videos into evidence.

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Respectfully submitted,

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