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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 MOTION TO STRIKE PLAINTIFFS' CORRECTED PROPOSED PRETRIAL ORDER

The Local Rules state that, "[u]nless modified by the Court, . . . [t]he plaintiff will, at least 30 days before the filing date, prepare and serve on all parties a proposed order." LR 16-5(c). There is no question that Plaintiffs violated this rule when, in the absence of a court order altering the schedule, they served their proposed pretrial order on Defendants on October 5 with the expectation that it be filed on October 15. But instead of recognizing the prejudice inherent in that timeline and working with Defendants to reach a mutually agreeable solution to the parties' disagreements, Plaintiffs rebuffed every attempt at compromise, filed a procedurally improper document over Defendants' express objections, and now attempt to blame Defendants for those choices. Not only does Plaintiffs' response to Defendants' Motion to Strike Plaintiffs' Corrected Proposed Pretrial Order (ECF No. 411) continue to misrepresent Defendants' conduct regarding the pretrial order; it also brazenly claims that Defendants are not prejudiced by the admission of 728 alleged "facts" hand-picked by Plaintiffs with no regard for evidentiary requirements and many of which mischaracterize the cited government documents. Plaintiffs should not be allowed to benefit from their decision to steamroll through the pretrial order process at the expense, and over the objections, of Defendants and in violation of the Local Rules. Defendants ask this Court to strike Plaintiffs' proposed pretrial order (ECF No. 394) and either find that no pretrial order is necessary pursuant to Local Rule 16-5(a) or order the parties to meaningfully confer and cooperate in the preparation of a joint pretrial order that accurately reflects the positions of both parties.

I. This Court Has Authority to Strike Plaintiffs' Proposed Pretrial Order

Plaintiffs begin by questioning this Court's authority to strike their proposed pretrial order. ECF No. 411 at 5-6. Although a motion to strike under Federal Rule of Civil Procedure 12(f) is traditionally limited to the pleadings, the effect of a pretrial order is to amend the

pleadings. LR 16-5(d). For that reason, the Ninth Circuit has found that a district court may properly strike new claims from a proposed pretrial order. *Polar Bear Prods., Inc. v. Timex Corp.*, 244 F. App'x 150, 151 (9th Cir. 2007). Likewise, district courts have stricken proposed pretrial orders that were untimely filed and/or prejudiced the opposing party. *See Ravendo v. PMG Holdings, Inc.*, No. 2:07-cv-00554-HDM-PAL, 2008 WL 11388679, at *2, *4 (D. Nev. Nov. 19, 2008) (striking proposed pretrial order filed after deadline provided by local rules); *Brooks v. City of Wichita*, No. 05-1110-MLB, 2006 WL 1580938, at *1 (D. Kan. June 2, 2006) (striking new evidence presented for first time in proposed pretrial order); *Ripps v. Powers*, No. 07-0832-CG-B, 2010 WL 3000875, at *1 (S.D. Ala. July 28, 2010) (striking proposed pretrial order filed "unilateral[ly]" by defendant without "any input from plaintiff"). Moreover, this Court has granted motions to strike non-pleading documents indicating that it does not view its inherent authority to manage the docket as restricted by Rule 12(f) to only pleadings. *See, e.g.*, *Concerned Friends of Winema v. U.S. Forest Serv.*, No. 1:14-cv-00737-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 on other grounds*, 737 F. App'x 309 (9th Cir. 2018).

Even if Plaintiffs are correct that a document "should not be stricken unless it is clear that it can have no possible bearing upon the subject matter of the litigation," ECF No. 411 at 5 (citing *Wang v. OCZ Tech. Grp., Inc.*, 276 F.R.D. 618, 624 (N.D. Cal. 2011)), that standard is met here. Plaintiffs' proposed pretrial order has no possible bearing upon the litigation because, as explained in Defendants' motion (ECF No. 395) and below, it is an improper document submitted in violation of the Local Rules that asks the Court to deem alleged "facts" admitted

over Defendants' objections and without regard to any evidentiary requirements. In short, it represents an effort to circumvent the proper method of establishing facts at trial.

II. Plaintiffs' Delay in Providing a Draft Pretrial Order to Defendants, Refusal to Meaningfully Confer, and Refusal to Allow Defendants a Reasonable Amount of Time to Review Their Draft Violated the Local Rules and Prejudiced Defendants

In their response brief, Plaintiffs continue to allege that "Defendants refused to participate in the preparation of a Pretrial Order" and "refused to even prepare a draft of any section of the Pretrial Order," whereas "Plaintiffs have remained willing to continue a productive meet and confer process." ECF No. 411 at 2, 5, 11. These representations are false and are directly rebutted by the correspondence attached to Defendants' motion.

As described in Defendants' motion, Defendants made multiple attempts to confer with Plaintiffs regarding the pretrial order, all of which were either rebuffed or ignored. ECF No. 395 at 3-5. Specifically:

- After receiving Plaintiffs' 175-page draft proposed pretrial order for the first time on Friday, October 5 at 8:02 pm Pacific time, on Thursday, October 11, Defendants explained that they would not have time to review Plaintiffs' 716 alleged "agreed facts" by October 12 and instead offered to stipulate, per the local rules, that no pretrial order is necessary. ECF No. 395-3.
- After Plaintiffs refused such a stipulation, ECF No. 395-4, Defendants offered to include complete and verbatim quotations from Defendants' Answer in the "agreed facts" section of the pretrial order. ECF No. 395-5.
- After Plaintiffs refused to limit the "agreed facts" section of the pretrial order to complete and verbatim quotations from the Answer, Defendants offered to send Plaintiffs their sections of the pretrial order during the week of October 15 and to

continue to confer with Plaintiffs regarding the "agreed facts" section of the order. ECF No. 395-6. Plaintiffs did not respond to this offer and instead unilaterally filed their proposed pretrial order on October 15.[1]

As is clear from the parties' correspondence, Defendants made multiple attempts to reach a compromise on the content and timing of the pretrial order, including offering to provide their portions of the pretrial order during the week of October 15—within the two weeks that they have to review the proposed order under Local Rule 16-5(c). In contrast, Plaintiffs provided their draft only ten days before they hoped to file, in violation of Local Rule 16-5(c); refused to acknowledge that their delay in sharing a 175-page draft containing over 700 alleged "facts" prejudiced Defendants; refused to allow Defendants any additional time to review the draft and prepare their own portions of the order; rejected the compromises that Defendants offered; and failed to offer a single potential compromise of their own. Indeed, Plaintiffs' sole response to Defendants' attempts to confer was an ultimatum: "Plaintiffs are prepared to and will file their version of a pre-trial order on October 15." ECF No. 395-4; ECF No. 412 at 15 ("Plaintiffs indicated they believed a pre-trial order was appropriate in this case and would be filing their version on Monday.").

[1] Plaintiffs attach as an exhibit their October 14, 2018 letter to Defendants in which they summarized an October 12 telephonic conferral between the parties. ECF No. 412 at 12. In that letter, they allegedly quote counsel for Defendants as stating, in regards to the pretrial order, "Why bother with something that does not advance us in any way. Let's go to trial." *Id.* at 15. Plaintiffs' presentation of that statement as a quotation is misleading. The conferral was telephonic and that statement represents Plaintiffs' counsel's interpretation of Defendants' position. It is not a quotation of what counsel for Defendants actually said on the call and does not provide a complete summation of everything said by the parties regarding the pretrial order. To avoid any misunderstandings of the sort reflected in Plaintiffs' letter, after the call, Defendants memorialized their position on the pretrial order in an email sent on October 14. ECF No. 395-6. Plaintiffs ignored this email in their subsequent letter. *See* ECF No. 412 at 15.

Plaintiffs go so far as to suggest that Defendants should have provided their portions of the pretrial order to Plaintiffs *after* Plaintiffs refused to meaningfully confer and unilaterally filed their own proposed order. ECF No. 411 at 5, 11. But Plaintiffs' failure to respond to Defendants' October 14 email offering to provide Defendants' portions of the pretrial order during the week of October 15 sent a clear message that, having unilaterally filed their own proposed pretrial order, Plaintiffs were not interested in engaging with Defendants on these issues. *See* ECF No. 395-6.

Plaintiffs also attempt to shift the blame for their delayed service of a draft pretrial order to Defendants, claiming that Defendants agreed to "initiate a meet and confer with counsel for Plaintiffs" to discuss the pretrial order. ECF No. 411 at 4. Defendants never made such an agreement, as is evident from the portion of the August 27 transcript quoted in Plaintiffs' brief. *Id.* at 3; ECF No. 395-1 at 7 (In response to pretrial order dates proposed by Plaintiffs for first time at status conference, counsel for Defendants stated "I think that's something the parties can come to an agreement to and then let the court know."). More importantly, this argument obfuscates the true issue. Under the Local Rules, absent a court order otherwise, Plaintiffs have an obligation to prepare and circulate a draft proposed pretrial order thirty days before the filing date, which they did not do. LR 16-5(c). And while Defendants are sympathetic to Plaintiffs' many other pretrial obligations and would have been willing to agree to alter the schedule for the pretrial order so long as that schedule did not prejudice them, Plaintiffs absolutely refused to consider any option other than filing their proposed order unilaterally on October 15. As the correspondence between the parties amply demonstrates, it is Plaintiffs who refused to participate in any meaningful conferral regarding the pretrial order and affirmatively prevented Defendants from having adequate time to review and respond to their proposed pretrial order.

III. Defendants Are Severely Prejudiced By Plaintiffs' Unilateral Submission of 728 Alleged "Facts"

Separate and apart from their misrepresentations regarding the conferral process, Plaintiffs now make the bold claim that their 728 alleged "facts" are not prejudicial to Defendants because they are statements taken from Defendants' Answer and government documents, many of which were produced as part of Plaintiffs' motions in limine seeking judicial notice. To the extent Plaintiffs seek to include statements from Defendants' Answer in the pretrial order,[2] Defendants offered to agree to that approach so long as the statements consisted of complete and verbatim quotations. ECF Nos. 395-5, 395-6. However, Defendants strenuously object to Plaintiffs' suggestion that they should be entitled to unilaterally choose 564 statements from over 100,000 pages of alleged government documents to include as "agreed facts" in the pretrial order.[3]

Allowing Plaintiffs to unilaterally choose the "facts" in the pretrial order is highly prejudicial because "once a matter has been agreed to in the pretrial order, neither party may offer evidence at trial to prove or disprove it." *United States v. Cal. Franchise Tax Bd.*, 9 F.3d 1555, at *2 (9th Cir. 1993) (citation omitted); *see also United States v. First Nat'l Bank of Circle*, 652 F.2d 882, 886 (9th Cir. 1981) ("[A] party need offer no proof at trial as to matters agreed to in the [pretrial] order, nor may a party offer evidence or advance theories at the trial which are not included in the order or which contradict its terms."). Thus, Plaintiffs essentially ask the Court to adopt as incontrovertible facts of the case 564 cherry-picked statements allegedly taken from over 1,400 cherry-picked documents, devoid of context, and without

[2] Of Plaintiffs' 728 alleged "facts," 164 are allegedly based on statements from Defendants' Answer.

[3] In Plaintiffs' three motions in limine, they seek judicial notice of over 1,400 documents, which together total over 100,000 pages. *See* ECF Nos. 254, 340, 380.

providing Defendants an opportunity to contest the accuracy or admissibility of those statements. As is clear from their brief, Plaintiffs are trying to litigate their case through the pretrial order to avoid the burden of having to do so at trial. *See* ECF No. 411 at 11–12 (If the Court does not accept Plaintiffs' proposed pretrial order in toto, "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 . . . ."). That is an improper use of the pretrial order.

Plaintiffs appear to argue that Defendants' decision not to object to a document's authenticity in response to their judicial notice motions should be deemed an admission of all statements contained within that document. *See id.* at 7-10. This argument misunderstands the purpose and limits of judicial notice. As this Court explained in its order on Plaintiffs' First Motion in Limine, "[w]hen the Court takes notice of a public record, including websites, it does so 'not for the truth of the facts recited therein, but for the existence of the [record] which is not subject to reasonable dispute over its authenticity.'" ECF No. 368 at 2 (quoting *Vesta Corp. v. Amdocs Mgmt. Ltd.*, 129 F. Supp. 3d 1012, 1021 (D. Or. 2015)); *see also United States v. Flattum*, No. CR 91-349-2-FR, 1992 WL 365334, at *2 (D. Or. Nov. 25, 1992) ("The court will not admit into evidence any evidence of which it takes judicial notice prior to a showing of its admissibility and relevance at trial."); *Bagley v. City of Sunnyvale*, No. 16-CV-02250-JSC, 2017 WL 5068567, at *3 (N.D. Cal. Nov. 3, 2017) ("There is a distinction between whether the Court may take judicial notice of a fact and whether that fact is admissible."); *Romero v. Securus Techs., Inc.*, 216 F. Supp. 3d 1078, 1084 n.1 (S.D. Cal. 2016) ("While matters of public record are proper subjects of judicial notice, a court may take notice only of the existence and authenticity of an item, not the truth of its contents."); *Shaterian v. Wells Fargo Bank, Nat'l*

Ass'n, No. C-11-920 SC, 2011 WL 2314151, at *1 n.3 (N.D. Cal. June 10, 2011) ("[T]he Court may not take judicial notice of the truth of the facts recited within a judicially noticed document." (citation omitted)). It also ignores Defendants' repeated refrain that they have not conceded the admissibility or the truth or accuracy of any of those documents. *See* ECF No. 327 at 3-4 (explaining that judicial notice goes only to a document's authenticity and objecting to any attempt to construe Defendants' decision not to object to judicial notice as an admission regarding the truth or accuracy of a document's contents); ECF No. 357 at 2-4 (same); ECF No. 397 (Defendants' objections to Plaintiffs' exhibits, including documents the authenticity of which Defendants did not contest in response to motions in limine).

Plaintiffs claim their 728 "facts" are not prejudicial because they are merely seeking to establish the fact that a particular document contains a particular statement, and not an admission of the truth of that statement. ECF No. 411 at 9, 12. But that is simply not true. Nowhere does Plaintiffs' proposed pretrial order state that it seeks an admission of only the existence of a statement. ECF No. 394. And many of Plaintiffs' alleged "facts" are not even framed as a quotation from a government document,[4] but rather represent Plaintiffs' interpretation or summary of the information allegedly contained in a document. *See, e.g.*, ECF No. 394 ¶¶ 6-21, 184-194, 197-201, 388-394, 521-522, 580, 672, 684, 691-692, 694-696, 707-708. A close inspection of Plaintiffs' alleged "facts" reveals that many materially mischaracterize and misrepresent the cited documents and their contents. For example:

[4] Some of the cited documents are not even government documents. For example, Plaintiffs cite a 1969 article by a BLM employee published under his own name in Environmental Science & Technology, a private journal. ECF No. 394 ¶¶ 44-45. There is no indication that this document represented the views of BLM or any other government agency.

- Plaintiffs cite Defendants' Answer as the source for their statement that "A substantial portion of every ton of CO_2 emitted by humans persists in the atmosphere for as long as a millennium or more." ECF No. 394 ¶ 17. This is not a quotation from Defendants' Answer. In fact, the cited paragraph of Defendants' Answer states in pertinent part, "for a given amount of CO_2 emissions reaching the atmosphere, atmospheric concentrations will remain elevated by 15 to 40 percent of that given amount for a millennium or more." ECF No. 98 ¶ 206. Plaintiffs' characterization of Defendants' Answer is subjective and imprecise and does not represent what Defendants actually averred in their Answer.

- Plaintiffs state that "Coal produced from federal lands is responsible for roughly 10% of United States greenhouse gas emissions." ECF No. 394 ¶ 184. But they omit that that estimate was made by the Department of the Interior in 2016. Should the Court adopt Plaintiffs' proposed pretrial order, it would be treating an outdated estimate of greenhouse gas emissions from coal produced on federal lands as an incontrovertible fact that Defendants would not be able to disprove, even if more recent estimates or estimates produced by other agencies or sources differ.

- Plaintiffs state that "A May 1990 report from the United States Naval War College, *Global Climate Change and Implications for the United States Navy*, contained the following statement: 'Naval operations in the coming half century may be drastically affected by the impact of global climate change.'" ECF No.

394 ¶ 597.[5] This is false. The paper referenced was not a report produced by the U.S. Naval War College but instead a paper by an individual, Mr. Terry P. Kelley. The document contains an express disclaimer that "the views contained herein are those of the author, and publication of this research by the Advanced Research Program, Naval War College, does not constitute endorsement thereof by the Naval War College, the Department of the Navy, or any other branch of the U.S. government." P00000035550. Equally misleading is the fact that Plaintiffs quote only the first sentence of a forty-nine-page document (not including appendices)—which is itself a prognostication, not a statement of incontrovertible truth—and treat it as a standalone "fact."

- Plaintiffs state that "The Department of the Interior has considered that a fixed, global carbon budget may require purposefully limiting U.S. oil production." ECF No. 394 ¶ 672. However, the cited document nowhere states that "a fixed, global carbon budget may require purposefully limiting U.S. oil production." Rather, that is Plaintiffs' interpretation of a fifty-six-page document published by the Bureau of Ocean Energy Management in November 2016 to demonstrate a "new analytical approach to estimate the combined upstream and downstream GHG emissions for OCS [Outer Continental Shelf] oil and gas resources." P00000024505. It is not clear to Defendants what portion of the document could

[5] Defendants have repeatedly objected to Plaintiffs' request for judicial notice of this document (Ex. 299 to Plaintiffs' First Motion in Limine) due to its inadequate foundation, belying any suggestion that Defendants have conceded the authenticity of every document cited in Plaintiffs' proposed pretrial order. ECF No. 327-1 at 45; ECF No. 334-1 at 3; ECF No. 351-1. Notably, the Court agreed with Defendants that Plaintiffs did not provide an adequate foundation for this document and did not take judicial notice of it. ECF No. 368 at 6.

be read to support Plaintiffs' statement. It is also notable that Plaintiffs' unsupported interpretation of that document omits a range of important information contained in the document including the ten assumptions relied upon, P00000024532-35, and the fact that the document is limited to a discussion of offshore development of the outer continental shelf.

These examples are by no means comprehensive but they illustrate why Plaintiffs' proposed "facts" are not actually "facts"—or even accurate quotations from government documents—but rather Plaintiffs' characterizations of various documents and their contents. This Court's adoption of 728 misleading characterizations as binding facts of the case that Defendants have no opportunity to disprove would severely prejudice Defendants.

Equally problematic, Plaintiffs are not seeking admission of all statements that the government has ever made about climate change. Rather, they want the Court to deem admitted 728 specific statements allegedly taken from hundreds of different documents and cobbled together, without context, to create their own narrative. Such an approach is an attempt to build their own case by framing their own issues via their own alleged facts. It is not an attempt to reach agreement with Defendants on a subset of facts uncontested by both parties, and is therefore not a proper pretrial order.

CONCLUSION

Plaintiffs violated the Local Rules when they sent their pretrial order to Defendants ten days before they wished to file and demanded Defendants' response within one week. LR 16-5(c). They violated the Local Rules when they refused to compromise on any of their 728 "facts" and refused to allow Defendants' a reasonable time to review their 175-page proposed pretrial order. LR 16-5(b). And they violated the Local Rules when they unilaterally filed a

proposed pretrial order representing only their own positions. *Id.* Try as they might, Plaintiffs cannot shift the blame to Defendants, who made multiple attempts to confer and compromise but were rebuffed at every turn.

Because Plaintiffs' Corrected Proposed Pretrial Order (ECF No. 394) was submitted in violation of the Local Rules, materially misrepresents Defendants' actions and position during the conferral process, and would severely prejudice Defendants if adopted by the Court, Defendants respectfully ask this Court to strike it. Defendants believe that no pretrial order is necessary in this case but remain willing to confer with Plaintiffs on a joint proposed pretrial order that includes only facts to which both parties actually agree, should this Court so order.

Dated: November 16, 2018

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