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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.,

Federal Defendants.

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

PLAINTIFFS' OPPOSITION TO INTERVENOR-DEFENDANTS' MOTION FOR AN EXTENSION OF TIME TO RESPOND TO PLAINTIFFS' REQUESTS FOR ADMISSIONS

Introduction

The Court is well aware of this situation: on January 13, 2017, Federal Defendants made certain admissions in their answer. Promptly thereafter, both this Court and Plaintiffs attempted to determine the position of Intervenor Defendants on these admissions to determine the scope of discovery and trial. To date, and despite assurances by their counsel, Intervenor Defendants have tactically avoided taking a position on these admissions. Given the urgency of moving this case through discovery and trial, this Court should no longer countenance strategic efforts to delay and should refuse to grant any further extensions to determine the position of Intervenor Defendants on the admissions by Federal Defendants.

By their motion, Intervenor Defendants seek yet another extension of time to provide responses to Requests for Admissions ("RFAs") that parallel admissions made by Federal Defendants in their answer. For three months, this Court and Plaintiffs have been attempting to determine the position of Intervenor Defendants on these admissions in order to determine the scope of issues in dispute. In providing the rationale for their motion, Intervenor Defendants improperly omit important information from the procedural and factual bases for their motion, which Plaintiffs correct below. The motion should be denied. It is time for Intervenor Defendants to take a position on the facts.

The Procedural History Missing From Intervenor Defendants' Motion

Intervenor Defendants' motion should be denied not only for what is contained in the motion, but what is missing from the motion. Initially, what is missing is evidence of the actual reason for further delay. On May 4, 2017, during an in-person meet and confer in Portland, Oregon, counsel for Intervenor Defendants stated they had reached

consensus on the response to the RFAs and, after resolving a few remaining issues, would file the response on May 15, 2017, pursuant to Plaintiffs' agreement not to oppose an earlier extension. *See* Declaration of Julia A. Olson in Support of Plaintiffs' Opposition to Intervenor Defendants' Motion for Extension of Time to Respond to Plaintiffs' Requests for Admissions ("Olson Dec."), ¶¶ 3,4.

Thus, omitted from their motion is both the fact that this is the second request for an extension on these RFAs and any evidence as to what happened between May 4 and May 9 to require an extension.

What is also omitted is the precise nature of the requested extension. On May 9, 2017, Intervenor Defendants conferred with Plaintiffs by telephone, requesting an extension to **May 31, 2017**, not June 7, 2017, to respond to Plaintiffs' RFAs. Olson Dec., ¶ 9. The ***sole*** reason proffered at that time was Intervenor Defendants no longer had consensus as to the response to the RFAs among the members of Intervenor Defendants. Olson Dec., ¶¶ 9, 10. The point here is that Intervenor Defendants' story supporting their extension request keeps shifting, as a lack of consensus is not mentioned in their moving papers.

Another important point missing from their motion is the many efforts Intervenor Defendants have made to avoid taking a position on the admissions by Federal Defendants. The Court and Plaintiffs began attempting to get Intervenor Defendants to take a position on these admissions since at least the February 7, 2017 Status Conference. ECF 115 at 15-17.

As discussed at the Status Conference, on February 15, 2017, Plaintiffs sent Intervenor Defendants a table summary of Federal Defendants' admissions in their

answer. Olson Dec., ¶ 2. Plaintiffs even provided Intervenor Defendants with their own positions previously taken on several core facts. Olson Dec., ¶ 2.

During the March 8, 2017 status conference, ECF 124 at 40-41, Intervenor Defendants complained that Plaintiffs' summary of Federal Defendants' admissions was too extensive. Plaintiffs then agreed to serve RFAs on Intervenor Defendants, narrowing the list of Federal Defendants' admissions. *Id*. at 43. Plaintiffs served these RFAs on March 24, 2017. Olson Dec., ¶ 3.

On April 24, 2017, Intervenor Defendants sought an extension to their time to respond to the RFAs. After the meet and confer on Intervenor Defendants' request for the first extension of time, and with agreement from counsel for Intervenor Defendants that they would come to the May 4 in-person meet and confer with "information regarding the intervenors' responses that we believe will help narrow the issues of concern to plaintiffs," Plaintiffs agreed not to contest an extension to May 15. Olson Dec., ¶ 4.

On May 4, Intervenor Defendants told Plaintiffs they had reached agreement among Intervenor Defendants, assured Plaintiffs that they were taking many factual issues out of dispute and narrowing the issues for trial, and committed to Plaintiffs that they would serve and file their formal responses on May 15. *See* Olson Dec., ¶ 5. However, while not coming to the May 4 in-person meet and confer with any specific factual responses, Intervenor Defendants' counsel assured Plaintiffs' counsel that they would be happy with the substantial narrowing of issues in dispute on May 15. Olson Dec., ¶¶ 4, 5. Then on May 9, 2017, Intervenor Defendants conferred with Plaintiffs and requested an extension to **May 31, 2017**, not June 7, 2017, to respond to Plaintiffs' RFAs

and did not mention anything about this mythical possibility that "Federal Defendants will change their position" on the admissions in their answer. Olson Dec., ¶¶ 9, 10.

Without this background, one would read Intervenor Defendants' motion under the impression Intervenor Defendants are innocently coming to the Court for an initial request for an extension of time, when Plaintiffs and the Court have been trying to get Intervenor Defendants to take a position on these issues since the February status conference. Further, this motion omits the stratagems employed by Intervenor Defendants to delay responding, which tactics have resulted in unnecessary delay and breached agreements.

Finally, and perhaps most importantly, counsel for Intervenor Defendants, Frank Volpe, has consistently assured this Court and Plaintiffs that he has been working to get Intervenor Defendants to take a position on the facts, yet these assurances have not been met with follow through. Counsel failed to perform their agreement to come to the May 4 in-person meet and confer with helpful information regarding their responses to the RFAs, and provided only general assurances that have now fallen by the wayside. Olson Dec., ¶ 5. However, on May 4, Intervenor Defendants stated they were prepared to file their responses on May 15. Olson Dec., ¶ 5. Less than a week later, they requested an extension to May 31, based on a lack of consensus among members of Intervenor Defendants. Olson Dec., ¶¶ 9, 10. When Plaintiffs did not consent to that extension request, Intervenor Defendants sought an extension from the Court to June 7, supported by a completely different rationale. ECF 153.

These broken agreements, changing positions, and improper efforts at meet and confer are completely absent from the moving papers. There is no explanation of the

various shifts in proffered rationales, such as the shift from their position on May 4, or any evidence in the record to support these supposed extensive meetings with Intervenors and their members. This requested extension should be denied.

Counsel Should Not Be Allocated Additional Time to Review Intervenor Defendants' Prior Public Statements of Fact

Intervenor Defendants assert they need to review prior public statements and public comments of their own clients. This "review" should have been done when Intervenor Defendants filed their answer. Intervenor Defendants have had since August 2015 to do so, and cannot argue their failure to look at their members' own factual records on climate change as an excuse for delaying their discovery responses almost two years later. Moreover, prior public positions of Intervenor Defendants do not necessarily reflect the truth of the facts alleged by Plaintiffs because Intervenor Defendants have been behind misinformation campaigns and lobbying efforts on climate change that have denied the truth behind scientific facts. Ultimately, Intervenor Defendants' public positions may or may not be true. The issue underlying these RFAs is whether Intervenor Defendants, in a court of law where rules of perjury prevail, will contest the facts at trial, and if so, with what evidence.

Intervenor Defendants Should Not Be Allocated Additional Time to Align Their Position With Federal Defendants

Plaintiffs also served 10 requests for admissions on Federal Defendants. These 10 requests for admissions seek admissions on materially different facts than those presented to Intervenor Defendants. The motion completely omits any analysis of how the RFAs served on Federal Defendants bear on the RFAs served on Intervenor Defendants. The RFAs to Intervenor Defendants are about facts already admitted by Federal Defendants.

Thus, any responses by Federal Defendants on May 31 will have no bearing on the RFAs in front of Intervenor Defendants. There is no evidence before the Court that the RFAs at issue here have anything to do with discovery requests in front of Federal Defendants.

Intervenor Defendants also argue pure speculation of their belief, without any evidence, that Federal Defendants might change their positions. There is no evidence offered in support of this assertion. Unless Intervenor Defendants have conferred with the Trump Administration on this point, and submit evidence to that effect, this Court should not issue an order based on pure speculation. Importantly, during the May 4 meet and confer, counsel for Federal Defendants maintained that they have **no** information to suggest that the Trump Administration will seek to amend their Answer to Plaintiffs' First Amended Complaint. Olson Dec., ¶ 6.

The Court granted intervention in this matter, against Plaintiffs' opposition, because Intervenor Defendants said Federal Defendants would not be representing their position. By this motion, Intervenor Defendants seek more time to align themselves with Federal Defendants' positions, based on unsupported hopes that Federal Defendants will bail them out by amending their Answer under the Trump Administration. This coordinated strategy is obvious even to the most unsophisticated: seek all possible delay to avoid any factual resolution of the case so that the systemic fossil fuel problem can continue to further exacerbate climate change.

Conclusion

All Defendants, by their motions for interlocutory appeal, their threats of writs of mandamus all the way to the U.S. Supreme Court, and their efforts to constantly avoid responding to any discovery, make clear that their singular goal is to avoid going to trial

in this case, which they confirmed at the May 4 meet and confer. Olson Dec., ¶ 7. By granting Intervenor Defendants a further extension based on no evidence and speculation as to future tactical positions by Federal Defendants, this Court will countenance Defendants' avoidance strategy. Defendants are acutely aware that they are not in a solid position on the facts and are thus floundering in discovery, especially given that counsel for Federal Defendants cannot find experts willing to dispute Plaintiffs' disclosed scientific experts. Olson Dec., ¶ 8.

It is also clear that Federal Defendants and Intervenor Defendants are now attempting to play a "bait and switch" game with the Court: Federal Defendants previously admitted key facts of Plaintiffs' case and Intervenor Defendants refused to admit those facts. Intervenor Defendants then told Plaintiffs they would agree not to dispute many of those facts and would defer to Federal Defendants, but now Intervenor Defendants are refusing to admit or agree not to dispute many facts because the Federal Defendants might "hypothetically" seek to amend what they previously admitted.

All of this necessitates clear orders from the Court on the parameters for moving forward with discovery and trial, with clear cut-off dates that hold the Parties to firm deadlines. Plaintiffs should not be continually trying to hit a moving target. The inability of Intervenor Defendants and their members to "agree" on clear facts cannot be used to delay litigation any further.

In December 2015, counsel for Intervenor Defendants represented to the Court that their clients would speak with one voice, submit "joint submissions in all circumstances in this case operating essentially as one intervenor." ECF 53 at 9. It now appears Intervenor Defendants are using their supposed conflicts as a rationale to attempt

to further delay discovery. For months, counsel for Intervenor Defendants have represented to the Court and Plaintiffs that they would promptly address Intervenors Defendants' position on Federal Defendants' admissions. To date, they have not done that. If Intervenor Defendants will not take a position, then the Court should determine that the facts are deemed admitted by Intervenor Defendants. Alternatively, the Court should grant Plaintiffs' immediate discovery on these factual issues against Intervenor Defendants.

Plaintiffs have attempted to work cooperatively, but Defendants' strategy is delay and avoidance. Plaintiffs seek the Court's assistance so they may have as many issues as possible narrowed for a prompt trial. As a result, this motion should be denied.

Respectfully submitted this 11th day of May, 2017,

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