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Attorneys for Plaintiffs

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

DECLARATION OF PHILIP L. GREGORY IN SUPPORT OF PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' PROPOSED PRETRIAL ORDER

I, Philip L. Gregory, hereby declare and if called upon would testify as follows:

1. I am an attorney admitted *pro hac vice* before the United States District Court for the District of Oregon and an attorney of record for Plaintiffs herein. I have personal knowledge of the facts stated herein, except as to those stated on information and belief, and if called to testify, I would and could testify competently thereto.
2. All of the documents attached as exhibits are true and correct copies of the documents they purport to be.
3. Originally, on January 20, 2017, Plaintiffs served Requests for Admissions on Defendants seeking admissions of facts that were largely extracted from government-generated documents and websites.
4. After Plaintiffs served those RFAs, Defendants complained about the language and requested that Plaintiffs reframe the RFAs during the May 10, 2018 Meet & Confer.
5. Defendants asked the Plaintiffs to reframe the requests with each document indicating what the document says without getting at the truth of the matter asserted. This procedure tracked the one proposed by Defendants' counsel in their May 21, 2018 letter to Plaintiffs:

> "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…

6. This issue was discussed further at the June 6, 2018 Status Conference. There, Defendants' counsel proposed the 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 Case Mgmt. 7:24-8:1, Doc. 223.

7. 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.

8. 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.

9. 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.

— 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.

— 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.

10. Plaintiffs have remained willing to continue a productive meet and confer process; however, Defendants never sought to provide a *substantive* response to the Agreed Facts.

11. 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 timeframes, 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. No. 343.

12. At no time after the August 27 status conference did Defendants confer with Plaintiffs before, during, or after any internal discussions they stated on the record were going to occur.

13. In fact, Defendants did not contact Plaintiffs at all regarding the Pretrial Order until Plaintiffs served it upon them on October 5.

14. Many of the Agreed Facts are admissions taken directly from Defendants' Answer, and thus are entirely appropriate for inclusion as agreed facts.[1]

15. Plaintiffs acknowledge they did not serve Defendants with the Pretrial Order on

[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."

September 24 as they had hoped to do. In the midst of tremendous travel schedules and numerous discovery and other court-ordered deadlines, largely due to Defendants' failure to schedule depositions of the Plaintiffs and Plaintiffs' experts in a timely manner, Plaintiffs were simply unable to meet the proposed September 24, 2018 deadline.

16. In a good faith attempt to meet the joint filing deadline of October 15, on October 5, Plaintiffs provided Defendants with Plaintiffs' proposed pretrial order, asking that Defendants provide their input and sections one week later on October 12. *See* **Exhibit 1**.

17. 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. **Exhibit 2**.

18. 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." **Exhibit 3**.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 2nd day of November, in Eugene, Oregon.

/s/ Philip L. Gregory
PHILIP L. GREGORY (*pro hac vice*)

Exhibit 1

From: **Andrea Rodgers** <andrearodgers42@gmail.com>
Date: Fri, Oct 5, 2018 at 8:01 PM
Subject: Juliana v. United States, Plaintiffs' Proposed Pretrial Order
To: Singer, Frank (ENRD) <frank.singer@usdoj.gov>, Piropato, Marissa (ENRD) <Marissa.piropato@usdoj.gov>, Duffy, Sean C. (ENRD) <sean.c.duffy@usdoj.gov>, Norman, Erika (ENRD) <Erika.Norman@usdoj.gov>, Boronow, Clare (ENRD) <clare.boronow@usdoj.gov>
Cc: Julia Olson <juliaaolson@gmail.com>, Philip Gregory <pgregory@gregorylawgroup.com>

Counsel-

Attached is Plaintiffs' Proposed Pretrial Order for you to add your sections so that this can be filed with the Court on October 15. We have included those facts which we believe are not in dispute, as they are admissions from the answer or factual statements from federal government documents. To facilitate your review of the agreed facts, we have provided footnotes with citations to the relevant document, including the motion in limine exhibit number, if applicable. Pursuant to Local Rule 16-5(b)(3), please put an asterisk by those facts where relevance is disputed, and we will do the same with any agreed facts that you include.

Given our deadline of October 15, please provide us with your sections to include in the proposed pretrial order by close of business on October 12, 2018. Please let us know if you have any questions.

Thanks,
Andrea K. Rodgers
Attorney
Law Offices of Andrea K. Rodgers
andrearodgers42@gmail.com
T: (206) 696-2851

Exhibit 2

From: Boronow, Clare (ENRD) <Clare.Boronow@usdoj.gov>
Sent: Thursday, October 11, 2018 6:18 PM
To: Julia Olson <juliaaolson@gmail.com>
Cc: Andrea Rodgers <andrearodgers42@gmail.com>; Philip Gregory <pgregory@gregorylawgroup.com>; Duffy, Sean C. (ENRD) <Sean.C.Duffy@usdoj.gov>; Piropato, Marissa (ENRD) <Marissa.Piropato@usdoj.gov>; Singer, Frank (ENRD) <Frank.Singer@usdoj.gov>; Norman, Erika (ENRD) <Erika.Norman@usdoj.gov>
Subject: RE: Juliana v. United States, Proposed Pretrial order

Counsel,

We disagree with your interpretation of the August 27 conference. Plaintiffs' decision to provide Defendants a 175-page proposed pretrial order one week before the purported deadline is extremely prejudicial and in violation of the Local Rules. At no point did Defendants agree to, or the Court order, anything less than the 14 day period of review provided by the Local Rules. And at no point did Plaintiffs confer with Defendants regarding a schedule other than the one they proposed at the August 27 conference, under which Plaintiffs would have served their proposed pretrial order on Defendants on September 24.

As noted in our prior email, Defendants object to the over 700 "agreed facts" that you have included in your proposed order. These statements are not facts but rather cherry-picked characterizations of agency documents. Not only do we lack the time to review every alleged "fact", we also do not believe a 175-page document is useful for the Court in framing the issues for trial or what the Local Rules contemplate. We also note that the effect of a pretrial order is to amend the pleadings. LR 16-5(d). We intend to stand by our pleadings and see no reason to amend them with additional "facts." To the extent Plaintiffs wish to put these sorts of characterizations before the Court, they can do so in their trial memorandum.

To resolve this issue, we are prepared, for purposes of this case only, to include in the "agreed facts" section of the pretrial order statements that are quoted completely and verbatim from Defendants' Answer. We will not agree to statements derived from any other documents, nor would we agree to any attempt by Plaintiffs to characterize the statements in Defendants' Answer.

If Plaintiffs agree to this approach, you can send us a revised draft that limits the "agreed facts" section to complete, verbatim quotations from our Answer. If Plaintiffs insist on including over 700 statements from Plaintiffs' own assortment of sources, we want to be clear, you may not represent that those contentions are "agreed facts." Further, we will oppose the pretrial order and request that the Court order that no pretrial order need be filed pursuant to Local Rule 16-5(a).

Thank you,
Clare

Exhibit 3

GREGORY LAW GROUP
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October 14, 2018

VIA EMAIL

Sean C. Duffy
Frank Singer
Marissa Piropato
Clare Boronow
Erika Norman
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Re: *Juliana v. United States*, 6:15-cv-01517-AA, Discovery Meet and Confer

Dear Sean, Frank, Marissa, Clare, and Erika,

I wanted to confirm our discussion on Friday concerning: (a) Defendants' responses to Plaintiffs' Interrogatories; (b) Plaintiffs' responses to Defendants' Interrogatories; (c) Defendants' Motions *in Limine* re. expert issues; and (d) miscellaneous items.

(a) **Defendants' responses to Plaintiffs' Interrogatories**: Counsel for Plaintiffs reiterated that Defendants' responses fail to set forth complete answers as to any facts, witnesses, or documents. Counsel for Plaintiffs stated that such responses fail to comply with the Federal Rules. 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. Thus, the parties met and conferred on the responses and Defendants refused to amend or supplement their responses except as indicated below.

Counsel for Defendants wanted to walk through each interrogatory to confer on whether they could answer them as an iterative process such that Plaintiffs would redraft each of the interrogatories. Given the short time frame before commencement of trial, Plaintiffs saw no value

in a further iterative process. Without any basis in fact, counsel for Defendants also claimed that Plaintiffs were meeting and conferring after Plaintiffs had drafted their motion to compel. Counsel for Defendants went so far as to accuse counsel for Plaintiffs of having drafted the motion to compel earlier in the week and having it ready to file before ever meeting and conferring. Counsel for Plaintiffs stated that accusation was false and declared to counsel for Defendants that such speculation was completely disrespectful and unprofessional.

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. As to interrogatories requesting the identities of witnesses and documents, counsel for Defendants stated they will 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 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.

(b) **Plaintiffs' responses to Defendants' Interrogatories**: Counsel for Defendants indicated they anticipate filing a motion to compel with respect to Plaintiffs' responses to Defendants' interrogatories but will not be prepared to meet and confer with respect to that motion until early next week. In response to Defendants' suggestion that the parties jointly file their respective motions to compel at some point next week, counsel for Plaintiffs stated they would proceed independently.

(c) **Defendants' Motions *in Limine* re. expert issues**: Earlier on Friday, Defendants indicated for the first time that they were anticipating filing three motions on Monday to exclude testimony by the following experts at trial:

(1) Jefferson

(2) Smith

(3) Hansen

(4) Hoegh-Guldberg

(5) Rignot

(6) Running

(7) Trenberth

(8) Wanless

Defendants also indicated that the experts listed as Nos. 3-8 above will be the subject of one motion. Defendants also stated these motions would not challenge the experts' qualifications.

During the call, counsel for Defendants could not state the basis for the motion to exclude climate scientists (the experts listed as Nos. 3-8) other than generally stating these experts are cumulative of the admissions in Defendants' Answer and, in part, of each other. Counsel could not articulate a single example of the cumulative nature of the experts' testimony. When asked if Defendants would stipulate to the facts and opinions in the expert reports of these climate scientists, counsel for Defendants would not agree to stipulate to any of those facts and opinions, claiming these expert reports are redundant of what Defendants have admitted, but "they are not exactly the same." Counsel for Defendants finally gave examples of redundancy: in their Answer, Defendants admit to sea level rise, admit to ocean acidification, and admit to temperature increase, therefore the Court does not need to hear from Drs. Hansen, Hoegh-Guldberg, Rignot, or Wanless. Counsel specifically stated the Court did not need to hear from Dr. Rignot for coral reefs.

As to Dr. Jefferson, Defendants will be filing a separate motion to strike her expert report, claiming her opinions are improper rebuttal testimony offering new opinions that were never before disclosed due to her opinions as to the four Plaintiffs. It supposedly is new testimony because Drs. Paulson and Pacheco never looked at the medical records or talked to the four Plaintiffs. Defendants also asserted her opinions are duplicative of Drs. Paulson and Pacheco. Defendants will move under Federal Rule 37(c) that her opinions not be allowed to be presented at trial.

As to Ms. Smith, Defendants will move to exclude her testimony because she allegedly is offering purely legal opinions and conclusions that are the province of the court and not proper expert testimony under Federal Rule 702.

Defendants were not able to state any additional grounds for any of these motions.

(d) **Miscellaneous items**:

1. **No other motions**: Counsel for Defendants stated Defendants will not be making any other Motions *in Limine*, except for a motion for judicial notice of documents in a separate process. They will meet and confer about those documents before making the motion.

2. **Pre-Trial Order**: Counsel for Defendants asserted it was a waste of time to file the Pre-Trial 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." Counsel for Defendants stated Defendants will make that same argument before Judge Aiken if Plaintiffs file the Pre-Trial Order. Plaintiffs indicated they believed a pre-trial order was appropriate in this case and would be filing their version on Monday.

Please get back to me if I have incorrectly written what was stated during our meet and confer session.

Regards,

/s/

Philip L. Gregory

cc: Julia A. Olson

Andrea Rodgers