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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' OPPOSITION TO
DEFENDANTS' MOTION *IN LIMINE*
TO EXCLUDE CERTAIN TESTIMONY
OF SIX EXPERTS AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF, ECF No. 371**

INTRODUCTION

In this Motion *in Limine*, Defendants fail to describe with any degree of specificity how its partial admissions to Plaintiffs' allegations in the First Amended Complaint ("FAC"), ECF No. 7, justify excluding the testimony of six of Plaintiffs' expert witnesses. Defendants also fail to specifically identify *any* of the "Certain Testimony" it now seeks to exclude. During the parties' meet and confer on this motion, Plaintiffs asked whether Defendants would stipulate to the facts and opinions stated in the six expert reports they sought to exclude and Defendants rejected that offer and would not agree to stipulate to any of the facts and opinions stated in Plaintiffs' expert reports. Declaration of Julia A. Olson ("Olson Decl."), ¶ 1. For the reasons described below, the Court should deny the motion and allow Plaintiffs' experts to fully testify as to the opinions contained in their respective expert reports. Such a ruling will not preclude Defendants at trial from objecting to specific questions on the grounds that the question calls for a response on a matter which has been admitted by Defendants.

SUMMARY OF THE OPPOSITION

*The Scope and
Content of
Plaintiffs' Expert
Witnesses'
Opinions*

What
U.S.
Admits
in
Answer

BACKGROUND

The FAC contains 53 paragraphs generally describing the current state of global climate change, ocean acidification, and how our Nation’s climate and citizenry will be impacted by that change in the future. *Id.* at ¶¶ 202-255. Defendants’ Answer, ECF No. 98, responds to parts of these general allegations. For instance, while Defendants admit the allegations contained in the first two sentences of Para. 202 of the FAC,¹ they “lack sufficient knowledge or information to form a belief about the truth of the remaining allegations in the third sentence.” ECF No. 98 at ¶ 202. That third sentence reads: “The fossil fuel emissions have led to an energy imbalance and consequent dangerous disruption of the climate system upon which our nation and Plaintiffs’ depend.” Whether and to what extent Defendants are responsible for that imbalance and its “dangerous disruption” of the climate system goes to the very heart of the testimony of Plaintiffs’ experts - testimony that Defendants now seek to exclude based on incomplete and partial admissions to allegations in the FAC.

Indeed, Defendants’ Answer is replete with similar half-admissions and denials, that, when compared with Plaintiffs’ expert reports, show that there is no basis to exclude the scientific testimony of Plaintiffs’ experts that Defendants seek to keep from this Court:

- FAC Para. 208 alleges: “Emissions must be rapidly and systematically reduced to well below the natural rate of draw-down into Earth’s forests, soils, and crust in order to restore energy balance and avoid crossing tipping points that set in motion disastrous impacts to human civilization and nature.” Defendants’ Answer states that “stabilizing atmospheric CO₂ concentrations will require deep reductions,” but they do not admit that

¹ The first two sentences of ¶ 202 read: “There is a scientific consensus that climate change endangers humanity and nature. Present climate change is a consequence of anthropogenic GHGs, primarily CO₂, derived from the combustion of fossil fuels.” ECF No. 7 at ¶ 202.

CO₂ reductions must be “systematically reduced to well below the natural rate of draw-down[.]” ECF No. 98 at ¶ 208 (emphasis added). *Compare with* ECF No. 274-1 (Dr. Hansen Expert Report at 25-29, 46-47).

- FAC Para. 210 alleges that present temperature increases are “equivalent to the maximum temperatures in the Holocene era, the period of climate stability over the last 10,000 years that enabled human civilization to develop. Warming is expected to hit 1° C in 2015-2016.” Defendants’ Answer denied those allegations. ECF No. 98 at ¶ 210 (admitting only that “Earth has now warmed about 0.9°C above pre-industrial temperatures). *Compare with* ECF No. 274-1 (Dr. Hansen Expert Report) at 14-15, 25, 30, 34-35.
- FAC Para. 212 alleges: “Cessation of Defendants’ actions in permitting, authorizing, or otherwise subsidizing fossil fuel projects, along with cessation of government actions that limit carbon sequestration in soils and forests, could reduce the earth’s energy imbalance, the severity of our disruption of the climate system, and the severity and pace of ocean acidification, within the lifetime of Youth Plaintiffs.” Defendants’ Answer denied this allegation. ECF No. 98 at ¶ 212 (“Federal Defendants lack sufficient information to determine the truth of the allegations in this paragraph and on this basis deny them.”). *Compare with* ECF No. 274-1 (Dr. Hansen Expert Report) at 41-43.
- FAC Para. 223 alleges, in part, that, with “less sea ice, less solar radiation is reflected back to space,” creating a “positive feedback loop” that will “amplify regional and global warming.” Defendants’ Answer denied that allegation. ECF No. 98 at ¶ 223. *Compare with* ECF No. 274-1 (Dr. Hansen Report) at 12-16, 29.
- FAC Para. 229 alleges: “Increased wildfires, shifting precipitation patterns, higher temperatures, and drought conditions threaten forest industries and private property.”

Defendants' Answer only admitted that increased wildfires threaten forest property. ECF No. 98 at ¶ 229. *Compare with* ECF No. 264-1 (Dr. Running Report) at 6-21.

- FAC Para. 231 alleges that ocean acidification is impacting ocean wildlife, such that the “loss of some of these species can cause entire food webs to collapse.” Defendants' Answer denied that allegation. ECF No. 98 at ¶ 231. *Compare with* ECF No. 260-1 (Dr. Hoegh-Guldberg Report) at 6, 8, 12, 14-16, 24.
- Both the second and third sentences of FAC Para. 233, concerning impacts to coral reefs and the importance they play for sheltering a quarter of all marine species, were denied in Defendants' Answer. *Id.* at ¶ 233. *Compare with* ECF No. 260-1 (Dr. Hoegh-Guldberg Report) at 24-28.
- Defendants' Answer denied that the severity of impacts to coral reefs will “be felt across our country, and by future generations.” *Id.* at ¶ 234. *Compare with* ECF No. 260-1 (Dr. Hoegh-Guldberg Report) at 7, 9, 12, 14, 18, 25, 28.
- Defendants' Answer denied all of FAC Para. 236, concerning impacts of climate change on salmon species, for lack of sufficient knowledge. *Id.* at ¶ 236. *Compare with* ECF No. 264-1 (Dr. Running Report) at 3, 10-11.
- FAC Para. 240 alleges that, by 2025, “40% of the world's population will be living in countries experiencing significant water shortages, while sea-level rise could cause displacement of tens, or even hundreds, of millions of people.” The Paragraph describes how these changes will impact immigration, refugee, and foreign aid policies. Defendants' Answer denied these allegations for lack of sufficient knowledge. *Id.* at ¶ 240. *Compare with* ECF No. 275-1 (Dr. Wanless Report) at 7, 30-31.

- Defendants’ Answer denied the allegations that sea ice is projected to disappear by 2100. *Id.* at ¶ 246 (only averring that temperature increases present an increased risk of extinction to many terrestrial, freshwater, and marine species). *Compare with* ECF No. 262-1 (Dr. Rignot Report) at 2-3, 14-16.
- Defendants’ Answer denied for lack of sufficient knowledge the allegation that climate change impacts on rivers and streams “threaten to eliminate up to 40% of remaining Northwest salmon populations by 2050.” *Id.* at ¶ 249. *Compare with* ECF No. 264-1 (Dr. Running Report) at 3, 10-11.
- FAC Para. 257 alleges: “Global atmospheric CO₂ concentrations must be reduced to below 350 ppm by the end of the century in order to limit the period of CO₂ overshoot and stabilize our climate system. Defendants’ denied this allegation and averred “that there is no scientific consensus that 350 ppm is the maximum safe level of atmospheric CO₂ concentration that is necessary to restore a stable climate system.” *Id.* at ¶ 257. *Compare with* ECF No. 274-1 (Dr. Hansen Report as to restoring Earth’s energy balance) at 4, 22-29; ECF No. 260-1 (Dr. Hoegh-Guldberg Report as to restoring ocean health) at 8-9, 17-19.

Plaintiffs have proffered six expert witnesses that are the target of this Motion *in Limine*. In accordance with Fed. R. Civ. P. 26(a)(2)(B), each of these witnesses prepared an expert report explaining, in detail, their expert opinions.² Defendants do not contest that those reports were timely served on Defendants on April 13, 2018. The authors and content of their respective reports are briefly described as follows:

² These experts’ reports have already been submitted into the record.

Dr. James E. Hansen, Ph.D., ECF No. 274-1. Dr. Hansen is one of the Nation's foremost experts on climate change and global warming. His expert report is 49 pages long, excluding exhibits. In it, Dr. Hansen details how anthropogenic climate change had been identified and ignored by Defendants for decades, with reference to specific governmental publications and scholarly work. After providing a thorough history of climate change research, Dr. Hansen critiques Defendants' process of permitting, subsidizing, and otherwise encouraging fossil fuel exploitation without regard for the impacts that greenhouse gas emissions will have on present and future generations. He will opine on the maximum level of atmospheric CO₂ needed to restore the Earth's energy balance and stop catastrophic climate change. According to Dr. Hansen, Defendants must take immediate steps to lower United States' emissions and increase carbon sequestration in line with the scientific prescription of bringing atmospheric CO₂ concentrations back down to levels of 350 ppm or less, if we are to avert permanent and catastrophic changes to our Nation's climate. *See id.* at pp. 6-8.

Dr. Harold R. Wanless, Ph.D., ECF No. 275-1. Dr. Wanless is a Professor of Geological Sciences at the University of Miami, where he is an expert on climate change's influence on sea level rise. Dr. Wanless' 32-page expert report explains how young people, including individual Youth Plaintiffs, are *already* experiencing dangerous sea level rises from observed and measured ocean warming caused by increased concentrations of greenhouse gases. Dr. Wanless' report explains present-day understanding of ocean temperature fluctuations, how our oceans absorb the atmospheric heat produced by buildup of greenhouse gases, and the paleo-record evidence that evinces why sea level rise is occurring faster today than any climate models predict, with specific focus on sea level rise in Florida. Finally, Dr. Wanless offers his expert opinion that sea level rise impacts are further exacerbated by storms of increasing strength, particularly on the eastern

seaboard and in the Gulf of Mexico putting coastal communities at grave risk. *See id.* at pp. 4-5 (executive summary).

Dr. Kevin E. Trenberth, Sc.D., ECF No. 276-1. Dr. Trenberth is a Distinguished Senior Scientist at the National Center for Atmospheric Research in Boulder, CO. Dr. Trenberth's 25-page expert report focuses on how atmospheric levels of CO₂ and other greenhouse gases are causing increasingly severe weather events, which have and will continue to impact the Youth Plaintiffs and future generations. Dr. Trenberth specifically describes how global warming and climate change have caused "super" storm events and other changing climactic conditions in the water cycle, which directly impacting Plaintiffs Jayden, Levi, Xiuhtezcatl, Journey, Victoria, Jacob, Jaime, Zealand, and Nathan. *Id.* at pp. 23-25.

Dr. Steven Running, Ph.D., ECF No. 264-1. Dr. Running is a Professor Emeritus of Global Ecology in the College of Forestry and Conservation at the University of Montana, where he has taught since 1979. Dr. Running's 30-page expert report summarizes the opinions he will proffer at trial. Chiefly, Dr. Running's testimony describes how climate change is negatively affecting terrestrial ecosystems in the western United States, and how those ecosystems will be devastated if immediate steps are not taken by Defendants to reduce emissions and concentrations of greenhouse gases. Specifically, as to the Youth Plaintiffs and future generations, Dr. Running outlines nine impacts that pose serious risks of present and future harm, including longer, more active wildfire seasons, decreased snowpack, larger and more robust insect populations, and lower streamflows, which will increase stream temperatures to lethal levels for coldwater fish like trout and salmon. *See id.* at pp. 15-22.

Dr. Ove Hoegh-Guldberg, Ph.D., ECF No. 260-1. Dr. Hoegh-Guldberg is a Professor of Marine Studies and the Director of the Global Change Institute at the University of Queensland,

and is also the Deputy Director of the Australian Research Council Centre for Excellence for Reef Studies. His 30-page expert report and testimony focus on how human-caused CO₂ emissions affect ocean life and negatively impact coral reefs, including reefs important to the Plaintiffs' lives. In particular, Dr. Hoegh-Guldberg will testify that climate change and ocean acidification are placing coral reefs in conditions not experienced in the past 740,000 years, if not longer. He will opine that these changing conditions are occurring at rates that dwarf even the most rapid changes over the past 65 million years. He will opine on the levels of atmospheric CO₂ we need to return to in order to protect coral and prevent their extinction. These changes are contributing to coral reef losses, which in turn impacts untold species that rely upon coral reef ecosystems. *See, e.g., id.* at pp. 5-12 (executive summary).

Dr. Eric Rignot, Ph.D., ECF No. 262-1. Dr. Rignot, a glaciologist, is the Donald Bren Professor of Earth System Science and the Chair of the Department of Earth System Science at the University of California, Irvine. Based on the opinions contained in his 19-page expert report, Dr. Rignot will testify about the interactions between human-caused global warming and ice. Dr. Rignot will place special emphasis on how increasing temperatures are causing unprecedented and irreversible melting of ice, from places like Montana, Alaska and Greenland to the West Antarctic ice sheet. He will also testify that climate change and melting ice is causing current impacts on youth Plaintiffs, and threatens to cause serious injury to the Youth Plaintiffs and future generations if not immediately abated and he will testify about the levels of atmospheric CO₂ needed to restore the ice sheets to equilibrium and stop an irreversible disintegration that will cause meters of sea level rise. *See id.* at pp. 4-5 (executive summary).

ARGUMENT

Defendants ask the Court to exclude unspecified “Certain Testimony” of the aforementioned expert witnesses pursuant to Fed. R. Evid. 403. The apparent basis of the Motion is that such testimony will be unnecessarily duplicative and cumulative.³ At no point, however, do Defendants actually articulate *what specific expert testimony* should be excluded. *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2012 WL 2571332, at *11 (N.D. Cal. June 30, 2012) (rejecting motion to exclude testimony as cumulative where Defendants had “not submitted a more narrowly tailored request to exclude” and because exclusion as cumulative “is an issue better resolved at trial.”). As described *supra*, Defendants’ Answer to the FAC is littered with half-admissions and half-denials. Plaintiffs’ expert reports, on the other hand, contain hundreds of pages of detailed facts, scientific research and analysis, and expert opinions from the world’s leading scholars on discrete aspects of global climate change. The breadth and specificity of these expert reports is simply incomparable to the stunted and equivocal admissions made by Defendants in their Answer. It is Defendants’ burden to identify what *exactly* in those expert reports and in an expert’s testimony will be unnecessarily

³ Defendants cite to Fed. R. Evid. 702 and the *Daubert* standard outlined in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), but it is evident from their motion that Defendants are not making a *Daubert* challenge to the qualifications of Plaintiffs’ experts or the reliability of their scientific opinions. Even if Defendants had sought to exclude Plaintiffs’ expert testimony under *Daubert*, the Ninth Circuit has confirmed that the better approach to *Daubert* in a bench trial is to permit contested expert testimony and “allow ‘vigorous cross-examination, presentation of contrary evidence’ and careful weighing of the burden of proof to test ‘shaky but admissible evidence.’” *Fierro v. Gomez*, 865 F. Supp. 1387, 1395 n.7 (N.D. Cal. 1994), *aff’d* 77 F.3d 301 (9th Cir. 1996), *vacated and remanded on other grounds*, 519 U.S. 918 (1996), *modified on other grounds on remand*, 147 F.3d 1158 (9th Cir. 1998) (quoting *Daubert*); *see also United States v. Flores*, 901 F.3d 1150, 1165 (9th Cir. 2018) (citing numerous cases for the principle that the *Daubert* gatekeeper function is less relevant in a bench trial). For these reasons, Plaintiffs have not brought *Daubert* motions to exclude Defendants’ experts and will contest their testimony at trial during cross-examination.

duplicative of, or needlessly cumulative with, Defendants’ partial admissions in their Answer. As it stands right now, all the Court has before it is a conclusory, generalized motion *in limine* to exclude unidentified expert testimony that may, or may not, touch upon the partial admissions made by Defendants in their Answer. That is hardly a sufficient record to exclude Plaintiffs’ expert witnesses from testifying at trial.⁴

Beyond failing to identify any actual testimony to be excluded, Defendants also have not provided the Court with a single case supporting their position that partial admissions in an answer to a complaint may be used to exclude expert testimony. The *Thames* case cited by Defendants contains only a court’s ruling on a motion *in limine*, which excluded evidence concerning a piece of property that was not subject to the dispute. *Thames v. Miller*, No. CV04-00644 DAE/LEK, 2007 U.S. Dist. LEXIS 32521, at *7 (D. Haw. May 2, 2007) (“The Court GRANTED Defendant's motion *in limine* to preclude Plaintiff from producing any testimony or evidence pertaining to a property that was not in dispute.”). The *Diviero* court cited by Defendants affirmed the exclusion of an expert witness under Fed. R. Evid. 702 because that witness could not “dismiss various other possible causes of” tire failure, and due to the witness’ “lack of knowledge about adhesion failures generally, and his ability to satisfactorily explain the reasoning behind his opinions.” *Diviero v. Uniroyal Goodrich Tire Co.*, 114 F.3d 851, 853 (9th Cir. 1997). It was not, as Defendants put it, because that expert’s testimony “would not assist the trier of fact.” Motion at 5. Finally, the *Perfect 10* court excluded an expert witness because, *inter alia*, that witness was also the sole shareholder of the plaintiff, Perfect 10, Inc., thereby calling

⁴ Defendants ask the Court to exclude “numerous assertions” by Plaintiffs’ experts concerning “effects of GHG emissions and climate change” which are allegedly not in dispute by virtue of Defendants’ Answer. Motion at 5. Even though Plaintiffs’ expert reports are on the public docket in this case, Defendants apparently could not identify even *one* such “numerous assertion” with specific docket and page citation.

into question the witness' reliability and integrity. *Perfect 10 v. Giganews, Inc.*, No. CV 11-07098-AB (SHx), 2014 U.S. Dist. LEXIS 185066, at *19 (C.D. Cal. Oct. 31, 2014). *None* of these cases offer support for Defendants' position that partial admissions in an answer can serve as a basis to exclude an unspecified portion of expert witness testimony at trial.

The most obvious evidence that Plaintiffs' climate science experts are not providing cumulative evidence already admitted by the Defendants is that when asked whether they would stipulate to the facts and opinions stated in these six expert reports, Defendants refused to stipulate to any of the facts or opinions stated therein. Olson Decl., ¶ *. If Defendants will not stipulate to material facts stated in Plaintiffs' expert reports, Plaintiffs have the right to present their immensely qualified expert witnesses to testify at trial so that the facts stated therein can be heard, weighed and, where appropriate, found by the Court.

CONCLUSION

The Court should deny Defendants' Motion and allow Plaintiffs' expert witnesses to testify at trial about the matters contained in their expert reports. If, during that testimony, Defendants contend an issue being discussed is fully and unambiguously admitted for purposes of the litigation, then they may make an appropriate Rule 403 objection at the time.

DATED this 2nd day of November, 2018.

Respectfully submitted,

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