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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

<p>RANCHERS-CATTLEMEN ACTION LEGAL FUND, UNITED STOCKGROWERS OF AMERICA, <i>Plaintiff,</i></p> <p>v.</p> <p>SONNY PERDUE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF AGRICULTURE, AND THE UNITED STATES DEPARTMENT OF AGRICULTURE, <i>Defendants,</i> MONTANA BEEF COUNCIL et al., <i>Intervenors.</i></p>	<p>Case No. CV-16-41-GF-BMM-JTJ</p> <p>PLAINTIFF'S REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO STRIKE PORTIONS OF DEFENNDANTS' AND INTERVENORS' RESPONSES TO PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS</p>
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The Government's and Intervenors' Responses in Opposition to R-CALF's Motion to Strike ("Responses") confirm the need for the Court to clean the record. They insist that rather than grant R-CALF's requested relief, the Court should be burdened with evaluating each of their non-responsive denials. *See* Int. Resp., Dkt. No. 120, at 6 ("[W]hether such a response is 'non-responsive' ... is for the Court[.]"). Intervenors make clear their hope is this will lead the Court to order an evidentiary hearing, rather than resolve the matter based on the actual state of the record—unnecessarily extending the ongoing constitutional violation. *See id.* at 2 (insisting that by Intervenors calling a fact "disputed" R-CALF's Motion for Summary Judgment should be denied).

While the Responses complain about being called to task for their misconduct, they offer no legal basis for their position. Neither cites a single case providing that R-CALF's motion is improper. In fact, in a footnote, Intervenors concede that if their responses amount to "editorial comments," "speak[ing] past the fact," or "spin" they should be stricken. *Id.* at 4 n.3. Intervenors' argument trying to compare their responses to R-CALF's is belied by the most cursory review of the two documents. The Government's claim that it shouldn't be burdened with having to properly respond to R-CALF's Statement of Undisputed Facts ("SUF") or Motion to Strike because R-CALF and the Court can untangle the

Government's mess, *see* Gov. Resp., Dkt. No. 121, at 4, flies in the face of the local and federal rules and should be rejected.

R-CALF filed its Motion to Strike to provide a proper factual record for its Motion for Summary Judgment, without Intervenors' and the Government's improper "disputes" and extraneous legal arguments. When the obfuscation is removed, it is clear that the Government and Intervenors have no factual support to oppose R-CALF's Motion for Summary Judgment and that motion can be quickly resolved in R-CALF's favor. Thus, R-CALF's Motion to Strike should be granted.

I. The Government's and Intervenors' RSUFs Obfuscate Critical Facts

Both the Government's and Intervenors' RSUFs improperly speak past R-CALF's facts to avoid necessary admissions and present legal arguments to distract from critical undisputed facts in the record. Indeed, Intervenors do not even attempt to defend their lengthy arguments on First Amendment law that they intersperse into their disputes. *See, e.g.*, Int. RSUF, Dkt. No. 97, ¶¶ 114-17. The Government itself states that such positions belong in "summary judgment filings," making it ironically at odds with Intervenors, who are purportedly engaged in government speech. *See* Gov. Resp. 6.

Review of the "factual disputes" establishes they are no more proper. For example, R-CALF's SUF, Dkt. No. 91, ¶¶ 71-72 states that (1) "[n]o provision of the Beef Act or Order empowers the Secretary or any other federal officer to

appoint or remove members of the named state beef councils,” and (2) “[t]he Government does not appoint, remove, or determine the selection procedures for the staff or directors of the state beef councils at issue here.” To both of these facts, Intervenor respond, “[d]isputed as to any implication that the Secretary and/or USDA does not have authority to ensure compliance with the Beef Act and Beef Order and control the activities of the QSBCs and other ‘persons’ as defined by the Beef Act.” Int. RSUF ¶¶ 71-72.

Intervenor thus do not dispute that the Government neither appoints nor removes the state beef councils’ board members; because they cannot dispute that fact—their cited authority provides no such power. *See* 7 U.S.C. § 2904; 7 U.S.C. § 2908; 7 U.S.C. § 2909; 7 C.F.R. § 1260.150. Notably, the Government’s response to R-CALF’s same facts is simply “[u]ndisputed.” Gov. RSUF, Dkt. No. 101, ¶¶ 71-72. Rather than make a good faith admission, Intervenor wrongly insert a legal argument that even without the power to appoint or remove board members, the Government has authority to enforce compliance with the Beef Act and Beef Order, and that should be deemed equivalent. As R-CALF explains in its briefing (where the issue belongs), Intervenor’s suggestion that the powers are comparable is incorrect. R-CALF’s Opp. Br., Dkt. No. 111, at 18-21. But, more importantly, that the Government does not appoint or remove any of the state beef councils’ board members is, on its own, dispositive. R-CALF’s Opp. Br. 15-18.

That Intervenors refuse to concede the truth that the Government does not possess that authority and instead try to misdirect in the hopes of claiming a “dispute” fully explains why R-CALF’s Motion to Strike is both warranted and necessary.

Similarly, R-CALF’s SUF ¶ 99 states that the only limits on the expenditure of checkoff funds state beef councils contribute to third parties (such as the United States Meat Export Federation) is that they “must be spent ‘for purposes allowed under the Beef Act and Beef Order.’” Intervenors dispute this fact by asserting that these contributions may be subject to the review and approval of USDA and the Beef Board *if* they are spent on programs also funded by the Beef Board. Int. RSUF ¶ 99. R-CALF rejects this separate assertion, R-CALF’s RSUF, Dkt. 113-0 ¶¶ 18-20, but, for present purposes, what is key is the response does *nothing* to dispute that state beef councils can contribute money to third parties solely based on the condition that they spend the money consistent with the Beef Act and Beef Order. Again, R-CALF demonstrates this fact, on its own, is dispositive, R-CALF’s Opp. Br. 24-27, and no one can point to anything in the record that suggests it is in dispute. Thus, that Intervenors “dispute” with a nonresponse serves no function except to distract and the “dispute” should be stricken.

Likewise, R-CALF’s SUF ¶ 91 states that “the state beef councils engage in in-person presentations, but, when the Government approves those presentations, it only seeks to approve the slides to be shown, not the speech given.” Both the

Government and Intervenors “dispute” this fact by ignoring it. The Government responds that “[t]he Beef Board and USDA review QSBCs’ budgets and marketing plans detailing their planned projects and expenditures, to include planned expenditures on in-person presentations.” Gov. RSUF ¶ 91. This response does not address the fact that the “speech given” is not reviewed. Instead, it discusses review of “expenditures.” Intervenors respond that “USDA reviews and approves QSBC requests in a manner and detail similar to that of the Beef Board.” Int. RSUF ¶ 91. While, as R-CALF explains in its brief, this assertion is unsupported by the record, R-CALF’s Opp. Br. 28, that response also does not address the asserted fact, that USDA does not review the councils’ oral communications.

As a last example, Intervenors’ dispute with R-CALF’s SUF ¶ 88 is that “there have been only ‘a few examples of where [the Government] has objected’ to QSBC language is not relevant, as the appropriate inquiry is whether USDA possess the *actual* authority to review and approve the ‘speech[.]’” Int. RSUF ¶ 88. This is clearly an improper dispute because it essentially concedes that the stated fact is true, but insists that Intervenors deem it “not relevant.” Yet, the response fails to admit the stated fact. Instead, Intervenors focus on arguing about the fact, rather than establishing the true building blocks of the case, as they were required to do in their responses.

Throughout their RSUFs, “[Intervenors and the Government] improperly interject argument and/or immaterial facts in response to facts asserted by [Plaintiff], often speaking past [Plaintiff’s] asserted facts without specifically controverting those same facts.” *Baity v. Kralik*, 51 F. Supp. 3d 414, 418 (S.D.N.Y. 2014).¹ The Government’s and Intervenors’ request that the Court overlook such misconduct is baseless. Indeed, Intervenors make plain that their goal in misleading in this manner is not to assist in resolving this matter, but to demand an unnecessary evidentiary hearing when there is no actual dispute. *See* Int. Resp. 2. Fake “disputes” should be struck not rewarded by creating undue delays, which will allow unconstitutional conduct to continue.

II. R-CALF’s Responses Are Proper

Intervenors’ attempt to salvage their responses by comparing them to R-CALF’s only highlights Intervenors’ abuse of summary judgment procedures. Intervenors’ SUF does not contain facts, rather it is full of conclusory assertions and legal argument. *See* R-CALF’s RSUF. As a result, R-CALF was required to make lengthy disputes. Even so, R-CALF’s responses contain none of the legal argument and misdirection on which Intervenors rely.

¹ Intervenors’ argument that R-CALF “incorrectly” refers to cases from outside the District of Montana is wrong, both districts share a virtually identical local rule interpreting the same federal rule. *Compare* D. Mont. Local Rule 56.1, *with* S.D.N.Y. Local Rule 56.1.

Again, just by way of example, fifteen of R-CALF's responses in R-CALF's RSUF (¶¶ 16, 32, 67, 71, 77, 81, 85, 100, 101, 102, 103, 108, 109, 116, 141) dispute Intervenors' assertions that USDA exercises "control" over the state beef councils' speech (also asserted as "oversight," "supervision," "direction," and "review and approval"). As R-CALF responded, these assertions amount to a legal conclusion regarding the very issue in dispute in this matter: USDA's "control" over the state beef councils. *E.g.*, Int. SUF, Dkt. No. 96-0, ¶ 67 (asserting that the state beef councils are "subject to the Beef Act, Beef Order, and, ultimately, USDA oversight and control"). R-CALF simply and directly responded to each that the issue of control is in dispute and pointed to R-CALF's actual facts establishing that there is not sufficient "control." *E.g.*, R-CALF's RSUF ¶ 67 (responding that "oversight and control" ... is the very issue in dispute, and is not supported by the record.").

Intervenors' SUF is akin to if R-CALF put in its SUF "the Government allowing private state beef councils to use Beef Checkoff money to fund private speech without affirmative consent is unconstitutional." If R-CALF had included such a statement in its SUF, Intervenors would have been entitled to dispute it by citing to facts that counter this legal conclusion, as R-CALF has done in its own RSUF. *See Morris v. Tanner*, 288 F. Supp. 2d 1133, 1140 n. 5 (D. Mont. 2003) ("Plaintiff filed a statement of uncontroverted facts that falls far outside the bounds

of what is appropriate under Local Rule 56.1 and contains considerable legal argument. Defendants have objected to these facts. Defendants’ objections, to the extent they refute legal conclusions, are well-founded.”). Here, R-CALF’s objections are appropriate and necessary, as they refute Intervenors’ improper abuse of the SUF.

Indeed, fully underscoring the overly simplified nature of Intervenors’ comparison, they attempt to cast *any* “dispute” by R-CALF as equivalent to the specific disputes R-CALF focused on in its Motion to Strike. Int. Resp. 8. As just discussed—even though R-CALF’s responses might be lengthy because Intervenors chose to state conclusions rather than facts—in none of these instances is R-CALF’s response “extraneous.” Contrary to Intervenors’ suggestion, that R-CALF merely chose to dispute a “fact” does not suggest it is extraneous. In contrast, R-CALF’s Motion to Strike focuses on improper disagreements, where, when they are removed, there is no response remaining, and the fact must be deemed admitted.

Intervenors have failed to establish any impropriety in R-CALF’s RSUF, but have further called attention to their pattern of violating the federal and local rules, solely with the hopes of confusing the Court and/or falsely claiming some kind of concession.

III. A Clear Factual Record Is Not A Burden

The Government's primary defense is it should not have been burdened with filing an eight page brief to explain its violation of the rules. This is an interesting position given the Government's contention that R-CALF's expenditure of resources developing educational materials and giving presentations across the country is not a diversion of resources or an injury-in-fact. *See Gov. Br., Dkt. No. 99-0, at 27.*

Moreover, the Government's rationale is, "[i]f the Court concludes that the government has not properly disputed a fact, it will treat that fact as admitted (or order other relief); it does not need a motion to strike to do so." Gov. Resp. 4. Taken to its logical conclusion, the Government's position is the federal and local rules are of no consequence because the Court can still do the work and rule correctly without aid from the parties. The Court should reject the claim that it is unreasonable for the Government to follow the rules because someone else (here the Court) can do its work for it.

The Government's additional attempt to impugn R-CALF's motion by describing it is an effort "to have the last word," is simply untrue. *Id.* There was no specific deadline for R-CALF to file its motion, but, for transparency, it did so at the same time as its Reply and Opposition. This allowed the Government and Intervenors to subsequently file their replies.

IV. Conclusion

For the foregoing reasons, R-CALF respectfully requests that the Court grant its Motion to Strike the identified non-responsive portions of Intervenor's and the Government's RSUFs and deem the related fact admitted.

RESPECTFULLY SUBMITTED this 27th day of August, 2019.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(d)(2)

I hereby certify that this brief contains 2,161 words, excluding the caption and certificate. That word count was calculated using the Microsoft Word program used to write this brief.

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