

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

GROCERY MANUFACTURERS)
ASSOCIATION, SNACK FOOD)
ASSOCIATION, INTERNATIONAL)
DAIRY FOODS ASSOCIATION, and)
NATIONAL ASSOCIATION OF)
MANUFACTURERS,)
))
Plaintiffs,)
))
v.)
))
WILLIAM H. SORRELL, in his official)
capacity as the Attorney General of)
Vermont; PETER SHUMLIN, in his official)
capacity as Governor of Vermont; TRACY)
DOLAN, in her official capacity as Interim)
Commissioner of the Vermont Department)
of Health; and JAMES B. REARDON, in)
his official capacity as Commissioner of the)
Vermont Department of Finance and)
Management,)
))
Defendants.)

Case No. 5:14-cv-117-cr

MOTION TO STRIKE UNAUTHORIZED SUPPLEMENTAL MEMORANDUM FILED BY
AMICI AND FOR AN ORDER ESTABLISHING RULES FOR AMICI PARTICIPATION

Plaintiffs Grocery Manufacturers Association, Snack Food Association, International Dairy Foods Association, and National Association of Manufacturers (“Plaintiffs”), by their attorneys, respectfully move this Court to strike the surreply filed by *amici curiae* Center for Food Safety (“CFC”) and Vermont Public Interest Research Group (“VPIRG”), and further request that this Court enter an order establishing rules for future *amici* participation consistent with those set forth in the Federal Rules of Appellate Procedure.

MEMORANDUM

Currently pending before the Court are Plaintiffs' motion for a preliminary injunction and Defendants' motion to dismiss the complaint. Docs. 24, 33. Several organizations have filed *amici* briefs in support of Defendants, with leave of the Court. *See* Docs. 58, 59; Text-Only Orders of Dec. 16, 2014. Plaintiffs consented to *amici* participation in the usual manner; that is, one round of briefs following the primary brief of the party that *amici* support, consistent with the Federal Rules of Appellate Procedure. *See* Fed. R. App. P. 29. (No federal civil rule of procedure directly pertains to amicus participation, so the Appellate Rules provide the closest useful guide. *See Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, No. 1:11-CV-99-JGM, 2011 WL 2173785, at *5 (D. Vt. June 2, 2011) (adopting procedures analogous to those in Fed. R. App. P. 29 in a case also involving VPIRG).) Plaintiffs and Defendants also stipulated to a briefing schedule that allowed Defendants, and only Defendants, to file a surreply, and Defendants did so as stipulated on December 15, 2014. Docs. 51, 76. Two of Defendants' *amici*, CFC and VPIRG, also filed what they entitled a surreply on the same date. Doc. 77. But these entities did not receive Plaintiffs' consent or this Court's leave to file supplemental *amici* memoranda. Their unauthorized filing should be stricken.

This Court's October 7, 2014 Order denied CFC and VPIRG leave to intervene, but held that "during the pendency of this case, the Organizations are permitted to file memoranda as *amici curiae* without seeking further permission for each such filing." Doc. No. 52 at 12. Nothing in the Court's Order, however, suggested that CFC and VPIRG were free to file briefs whenever they so chose. They were not conferred *greater* rights than the participating parties by being granted only *amici* status. To the contrary, the Court's Order indicated that CFC and VPIRG's *amici* briefs would be tied to the parties' filings when it said: "The Organizations,

however, must comply with the briefing schedule established by the parties and the court.” *Id.* The parties consented to the November 14, 2014 filing of CFC and VPIRG’s original *amici* brief, on the same date that Defendants filed their combined reply and responsive brief. Plaintiffs gave their consent with the understanding that they would have the opportunity to respond to the arguments raised by the *amici*, if necessary, in their December 15, 2014 reply brief. CFC and VPIRG’s supplemental memorandum exceeds the scope of that consent.

The *amici*’s filing also is inconsistent with standard federal practice and the Local Rules of this District. Supplemental briefs and surreplies are not permitted as a matter of course, even for the parties. *Compare* Local Rule 7(a) (allowing for only a memorandum in support, a memorandum opposition, and a reply memorandum in regular civil cases) *with* Local Rule 9(a)(5) (allowing a surreply only in Social Security appeals). If a party wishes to file such a brief, it must first seek leave of the Court; failure to do so results in the filing being stricken from the record. *See, e.g., Colomb v. Roman Catholic Diocese of Burlington, Vermont, Inc.*, No. 2:10-CV-254, 2012 WL 4479758, at *7 (D. Vt. Sept. 28, 2012) (striking unauthorized response to reply); *Davis v. Evans*, No. 12-CV-6135-CJS, 2014 WL 5529509, at *1 (W.D.N.Y. Nov. 3, 2014) (“As the Court did not authorize Petitioner to file the supplemental memoranda of law referenced in Respondent’s motions to strike, Respondent’s motions to strike are granted.” (record citations omitted)). That rule should apply even more strictly to *amici*, who lack the direct interests of the parties in the litigation.

In the stipulated briefing schedule, Plaintiffs consented to permit Defendants, and only Defendants, to file a surreply. Doc. 51. The parties carefully negotiated that briefing schedule, and a surreply was a negotiated benefit particular to Defendants because it is not otherwise allowed by the Federal Rules of Civil Procedure or the Local Rules of this District. The parties

did not stipulate to supplemental memoranda from the *amici*, and Plaintiffs did not consent to any such filings. Therefore, CFC and VPIRG's supplemental memorandum filed as document 77 should be stricken from the record.

In addition, to avoid confusion going forward, Plaintiffs request that this Court clarify the rules that will govern *amici* participation in this case. The Federal Rules of Civil Procedure do not contemplate *amici* participation at the trial level and therefore are silent as to the appropriate scope of *amici* filings. So that Plaintiffs may reasonably anticipate CFC and VPIRG's future participation in these proceedings, Plaintiffs respectfully request that this Court enter an order adopting rules analogous to those set forth in Fed. R. App. P. 29, like Judge Murtha did in *Entergy Nuclear Vermont Yankee*, 2011 WL 2173785, at *5. Specifically, Plaintiffs ask this Court to order that:

- *Amici* may participate in this case as provided in Fed. R. App. P. 29(a) and (b).
- An *amicus* memorandum must be no longer than one-half the maximum length authorized by the rules for a party's principal memorandum. *See* Fed. R. App. P. 29(d).
- *Amici* may file one round of briefing with respect to each motion, 7 days after the principal memorandum of the party being supported is filed. Where briefing for the parties on multiple motions is consolidated, *amici* briefing on multiple motions must likewise be consolidated. *See* Fed. R. App. P. 29(e).
- No supplemental, reply, or surreply *amici* memoranda are permitted without express leave of the Court. *See* Fed. R. App. P. 29(f).
- *Amici* may not participate in oral argument without express leave of the Court. *See* Fed. R. App. P. 29(g).

Counsel for Plaintiffs has consulted with Counsel for Defendants concerning the relief requested in this Motion pursuant to Local Rule 7(a)(7). Counsel for Defendants has advised that Defendants oppose the relief requested in this Motion.

WHEREFORE, Plaintiffs move this Court to strike the supplemental memorandum filed by CFC and VPIRG as document 77, and further request that this Court enter an order establishing rules for future *amici* participation consistent with those in the Federal Rules of Appellate Procedure.

Dated: December 18, 2014

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Catherine E. Stetson, counsel for Plaintiffs, hereby certify that on December 18, 2014, I electronically filed the foregoing Document through this Court's CM/ECF system, which will send notification of such filing to all registered participants.

/s/ Catherine E. Stetson
Catherine E. Stetson