UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FRONT RANGE EQUINE RESCUE, THE HUMANE SOCIETY OF THE UNITED STATES, MARIN HUMANE SOCIETY, HORSES FOR LIFE FOUNDATION, RETURN TO FREEDOM, FOUNDATION TO PROTECT NEW MEXICO WILDLIFE, RAMONA CORDOVA, KRYSTLE SMITH, CASSIE GROSS, DEBORAH TRAHAN, BARBARA SINK, SANDY SCHAEFER, TANYA LITTLEWOLF, CHIEF DAVID BALD EAGLE, CHIEF ARVOL LOOKING HORSE and ROXANNE TALLTREE-DOUGLAS,

Plaintiffs,

v.

TOM VILSACK, Secretary U.S. Department of Agriculture; ELIZABETH A. HAGEN, Under Secretary for Food Safety, U.S. Department of Agriculture; and ALFRED A. ALMANZA, Administrator, Food Safety and Inspection Service, U.S. Department of Agriculture,

Defendants.

Civil No. 1:13-CV-00639-MCA-RHS

PLAINTIFFS' OPPOSITION TO DEFENDANT-INTERVENORS' MOTION TO STRIKE

Plaintiffs and Plaintiff-Intervenor the State of New Mexico (collectively "Plaintiffs") hereby respond to Defendant-Intervenors Valley Meat, LLC, Rains

Natural Meats, and Chevaline LLC's "Motion to Strike Misrepresentations From Plaintiffs' and Plaintiff-Intervenors' Amended Opening Briefs" ("Motion to Strike"). Sept. 26, 2013, ECF No. 181. In that Motion, Defendant-Intervenors claim, without any elaboration, that references in Plaintiffs' opening briefs "are impermissibly harmful" to Valley Meat, Motion to Strike at 1, and that the opening briefs contain "salacious statements" that are "either blatantly untrue or obvious mischaracterizations of the operating history of Valley Meat Company." Motion to Strike at 2. Defendant-Intervenors' Motion is frivolous and should be denied.

First, the sole basis for Defendant-Intervenors' filing is that they – for some unspecified reason – disagree with Plaintiffs' statements. Defendant-Intervenors fail to identify any Federal or Local Rule or judicial decision supporting their unusual request. This absence of authority is not surprising, because there is no mechanism for a party to "strike" portions of an opposing party's brief on the grounds that the opponent disagrees with characterizations made in that brief. Federal Rule of Civil Procedure 12(f) provides that a party may move to strike from a *pleading* "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P 12(f). Plaintiffs' briefs are not "pleadings" because under the Federal Rules, only complaints and answers fall within the definition of pleadings. *See* Fed. R. Civ. P. 7(a). In contrast, "[m]otions, briefs, or memoranda . . . may not be attacked by [a] motion to strike." *Pimentel & Sons Guitar Makers, Inc. v. Pimentel*, 229 F.R.D. 201, 203 (D.N.M. 2005) (citations and internal quotation marks omitted). Defendant-Intervenors' Motion fails for this reason alone.

Even where a motion to strike is procedurally proper – lodged against a pleading – "because a motion to strike may often be made as a dilatory tactic, motions to strike . . . generally are disfavored." *Mata v. City of Farmington*, 791 F. Supp. 2d 1118, 1139-40 (D.N.M. 2010) (citation and internal quotation marks

omitted). Indeed, "federal judges have made it clear, in numerous opinions they have rendered in many substantive contexts," that motions to strike are often "considered purely cosmetic or 'time wasters.'" *Skyline Potato Co. v. Hi-Land Potato Co.*, CIV 10-0698 JB/RHS, 2012 WL 6846386, at *5 (D.N.M. Dec. 31, 2012) (citation omitted). That characterization is certainly apt here.

Instead, "[a]rguments that the Court should not consider a brief in whole or in part should be made in a responsive brief." *Hoppe v. Lewis Univ.*, 09 C 03430, 2011 WL 4578352, at *5 (N.D. Ill. Sept. 30, 2011), *aff'd*, 692 F.3d 833 (7th Cir. 2012). This universal practice makes sense because the very purpose of a responsive brief is for a party to set forth its arguments and evidence, and to challenge the claims of its opponent. Litigation rarely proceeds without disagreement between opposing parties on at least some issues. But under Defendant-Intervenors' approach, briefing on the merits would as a matter of course be supplemented with parallel briefing on back-and-forth motions to strike any material in an adversary's brief that each party disliked or disputed. It is not difficult to anticipate the unnecessary costs and waste of judicial resources that such an approach would yield.

The outcome here should be no different if the Court construes the Federal Rules of Appellate Procedure to provide exclusive guidance over the briefing on the merits, rather than the Federal Rules of Civil Procedure. As the Court of Appeals for the Seventh Circuit recently explained:

> The Federal Rules of Appellate Procedure provide a means to contest the accuracy of the other side's statement of facts: that means is a brief (or reply brief, if the contested statement appears in the appellee's brief), not a motion to strike. Motions to strike sentences or sections out of briefs waste everyone's time . . . . [T]he motion does nothing except increase the amount of reading the merits panel must do, effectively giving each side argument on top of the [prescribed] word limit . . . Motions to strike words, sentences, or sections out of briefs serve no purpose except to aggravate the opponent – and though that may have been the goal here, this goal is not one the judicial system will help any litigant

> achieve. Motions to strike disserve the interests of judicial economy.

Redwood v. Dobson, 476 F.3d 462, 471 (7th Cir. 2007).

Here, Defendant-Intervenors have moved to strike a few sentences in each of Plaintiffs' opening briefs, rather than challenging the underlying statements in their own Brief on the Merits, which they filed just a day after the Motion to Strike. *See* Defendant-Intervenors' Consolidated Brief in Support of Agency Action, Sept. 27, 2013, ECF No. 183. This procedurally incorrect Motion to Strike "serve[s] no purpose" and "disserve[s] the interests of judicial economy." *See Redwood v. Dobson*, 476 F.3d at 471.

Second, Defendant-Intervenors do not even bother to explain, let alone establish, how the handful of supposedly offending "statements" in Plaintiffs' and Plaintiff-Intervenors' briefs are "designed only to attempt to prejudice the Court and harm the reputation of Valley Meat Company." Motion to Strike at 2. Instead, Defendant-Intervenors simply list by page and paragraph approximately eight statements that have offended their sensibilities, and leave it to the Court to divine why these statements are so exceptional that they must be excised from the briefs. Even if Defendant-Intervenors were able to articulate the basis for their stated outrage, the proper vehicle for that presentation would be in their opposition brief, not in this extraneous motion. In *English v. CSA Equip. Co., LLC*, CIV.A. 05-0312-WS-B, 2006 WL 2456030, at *2 (S.D. Ala. Aug. 22, 2006), the court addressed the same issue:

> That defense counsel may disagree with plaintiff's counsel's statements is not a proper justification for a Motion to Strike even if plaintiff's counsel is wrong at every turn. Plaintiff's counsel is entitled to make arguments in his brief, and to present his take on the record evidence. If a defendant disputes the legitimacy of those arguments or their factual or logical predicate, then its remedy is to file a [responsive] brief . . . not to file a motion seeking to blot the offending arguments from the record.

Finally, any review of the facts and analysis against which Defendant-Intervenors are seeking such a "disfavored and drastic remedy," *Begay v. Pub. Serv. Co. of N.M.*, 710 F. Supp. 2d 1161, 1185 (D.N.M. 2010), shows that the references in question are (1) highly relevant to a consideration of the legitimacy of USDA's actions that are at issue in this lawsuit and (2) amply supported by record evidence. For example, Defendant-Intervenor asks that the Court strike the following sentence from Plaintiffs' amended opening brief, ECF No. 170 at 40: "USDA knows that [Valley Meat] has repeatedly committed gross violations of New Mexico environmental laws and regulations when it was in the business of slaughtering cattle, yet it asserts that the mere existence of these laws will prevent future violations." Far from being "factually incorrect and misleading," "salacious," and an "*ad hominem* attack[]," Motion to Strike at 1-2, Plaintiffs' well-established factual statement is supported by citation to both USDA's Decision Memo for Valley Meat, and to specific underlying documents from New Mexico regulatory authorities and other sources, evidencing Valley Meat's past violations. *See* Plaintiffs' Amended Opening Brief at 40 & n.19, Sept. 23, 2013, ECF No. 170. Certainly USDA's awareness of Valley Meat's poor track record of complying with pre-existing environmental obligations is an important fact where the Court is considering whether the agency performed its due diligence in approving a vastly new scope of operations (horse slaughter) at the same facility.

For obvious reasons, Valley Meat and the other Defendant-Intervenors joining in its Motion to Strike would like the Court to ignore Valley Meat's well-documented decades of violations of environmental laws. Although the record is clear, they are within their rights – in their response brief on the merits – to try to explain away the significance of this pertinent conduct. They may not, however, subvert the already compressed scheduling order entered in this action, and bombard the Court with procedurally improper and substantively deficient filings

like the instant Motion to Strike. The Court should deny Defendant-Intervenors' Motion in its entirety.

Respectfully submitted this 7th day of October 2013.

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CERTIFICATE OF SERVICE

I certify that on October 7th, 2013, I filed through the United States District Court ECF System the foregoing document to be served by CM/ECF electronic filing on all counsel of record.

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