

FILED
5th JUDICIAL DISTRICT COURT
Lea County
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NELDA CUELLAR
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**STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT COURT**

**REPUBLICAN PARTY OF NEW MEXICO,
DAVID GALLEGOS, TIMOTHY JENNINGS,
DINAH VARGAS, MANUEL GONZALES,
JR., BOBBY AND DEE ANN KIMBRO, and
PEARL GARCIA,**

Plaintiffs,

v.

**MAGGIE TOULOUSE OLIVER in her official
capacity as New Mexico Secretary of State,
MICHELLE LUJAN GRISHAM in her official
capacity as Governor of New Mexico, HOWIE
MORALES, in his official capacity as New
Mexico Lieutenant Governor and President of
the New Mexico Senate, MIMI STEWART in
her official capacity as President Pro Tempore of
the New Mexico Senate, and JAVIER
MARTINEZ in his official capacity as Speaker
of the New Mexico House of Representatives,**

Defendants,

and

**THE DEMOCRATIC PARTY OF NEW
MEXICO,**

[Proposed] Intervenor-Defendant.

**No. D-506-CV-202200041
Honorable Fred T. Van Soelen**

DPNM's RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE

Proposed Intervenor Democratic Party of New Mexico ("DPNM") hereby submits its Response in Opposition to Plaintiffs' Motion to Strike DPNM's Proposed Witness List. Rule 1-012(F) permits the Court to strike "from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Motions to strike "are not favored and, generally,

should be denied.” *Fed. Nat’l Mortg. Ass’n v. Milasinovich*, 161 F. Supp. 3d 981, 992 (D.N.M. 2016) (collecting cases applying Federal Rule 12(f)).

As an initial matter, DPNM’s Proposed Witness List is not a “pleading,” so Rule 1-012(F) does not even apply. *See id.* at 994 (collecting cases); Rule 1-007(A) (limiting “pleadings” to “a complaint,” “an answer,” “a reply to a counterclaim,” “an answer to a cross-claim,” “a third-party complaint,” and “a third-party answer”). But even if that rule did apply, the motion should be denied because there is nothing “redundant, immaterial, impertinent, or scandalous” in the Proposed Witness List.

Plaintiffs’ Motion to Strike is puzzling. As explained in the filing itself, the Proposed Witness list is just that—a *proposed* list. As DPNM promised in its Motion to Intervene and Reply, it is prepared to meet all deadlines set by the Court in this litigation. The Scheduling Order set a deadline of August 10 for Defendants to “file with the court a list of all lay and a separate list of all expert witnesses who may be called to testify via affidavit, deposition, or at trial.” Scheduling Order (July 24, 2023). DPNM filed a Proposed Witness List to comply with that deadline, and to provide the parties and the Court with timely notice of the identities of its potential witnesses.

It is common practice for putative intervenors to submit proposed filings during the pendency of a motion to intervene. *See, e.g., Cawthorn v. Circosta*, No. 5:22-cv-0050-M, ECF No. 27-1 (E.D.N.C. Feb. 7, 2022) (provisionally filing memorandum in opposition to motion for preliminary injunction during pendency of motion to intervene); *Bost v. Ill. State Bd. of Elections*, No. 1:22-cv-2754, ECF Nos. 44, 45 (N.D. Ill. Aug. 22, 2022) (provisionally filing proposed opposition to motion for summary judgment and response to statement of material facts pending adjudication of motion to intervene). This practice ensures that, if the motion to intervene is granted, the Court and the parties will have timely notice of the arguments and evidence the

intervenor will present, thereby avoiding delay. Indeed, Rule 1-024(C) *requires* a motion to intervene to be “accompanied by a pleading setting forth the claim or defense for which intervention is sought.” The purpose of that rule, like the Proposed Witness List, is to “adequately apprise the [Court] of the claims sought to be raised by intervention.” *Matter of Marcia L.*, 1989-NMCA-110, ¶ 9, 109 N.M. 420, 785 P.2d 1039.

The Proposed Witness List cannot result in any conceivable prejudice to Plaintiffs. As Plaintiffs point out, DPNM is not yet a party to this case. There is therefore nothing for Plaintiffs to “respond” to. They are free to ignore the Proposed Witness List altogether. If DPNM’s Motion to Intervene is granted, however, both Plaintiffs and the Court will have advance notice of the identities of DPNM’s potential witnesses. The entire point of the Proposed Witness List is thus to *avoid* any potential prejudice.

Plaintiffs’ Motion to Strike appears to be little more than an attempt to further litigate DPNM’s Motion to Intervene. But that Motion has already been fully briefed and is ripe for decision by the Court. Plaintiffs complain that, if DPNM is granted intervention, they will face a “4-1” ratio of expert witnesses. Mot. to Strike at 4 (Aug. 17, 2023). But it should be no surprise to Plaintiffs that, if granted intervention, DPNM would present its own fact and expert witnesses. DPNM’s Motion to Intervene and Reply explained in detail that it has unique interests in this case and is prepared to present evidence in support of those interests. *See* Mot. to Intervene at 13–14 (July 17, 2023); Reply in Support of Expedited Mot. to Intervene at 10–13 (Aug. 7, 2023). And, as DPNM also explained in its Reply, the mere burden of adding parties to the litigation is not “prejudice.” *See* Reply at 6.

The Motion to Strike is an entirely unnecessary exercise. The Court should deny the Motion, or should at least defer ruling until after the Motion to Intervene has been resolved.

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Abha Khanna*
ELIAS LAW GROUP LLP
1700 Seventh Ave., Suite 2100
Seattle, WA 98101
Telephone: 206.656.0177
akhanna@elias.law

Richard A. Medina*
Ian U. Baize*
ELIAS LAW GROUP LLP
250 Massachusetts Avenue NW, Suite 400
Telephone: 202.987.5010
Facsimile: 202.968.4498
rmedina@elias.law
ibaize@elias.law

**Pro Hac Vice*

Respectfully submitted,

DURHAM, PITTARD & SPALDING, LLP

By: /s/ Justin R. Kaufman
Justin R. Kaufman
Caren I. Friedman
Rosalind B. Bienvenu
Philip M. Kovnat
505 Cerrillos Road, Suite A209
Santa Fe, NM 87501
Telephone: (505) 986-0600
Facsimile: (505) 986-0632
jkaufman@dpslawgroup.com
cfriedman@dpslawgroup.com
rbienvenu@dpslawgroup.com
pkovnat@dpslawgroup.com

*Counsel for Proposed Intervenor-Defendant
Democratic Party of New Mexico*

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing has been e-served via electronic service and emailed to all counsel of record on the 21st day of August, 2023.

/s/ Justin R. Kaufman
Justin R. Kaufman