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February 16, 2021

Via Electronic and U.S. Mail

Special Master Michael J. Melloy
United States Courthouse
111 Seventh Avenue, S.E.
P.O. Box 22
Cedar Rapids, IA 52401
Email: TxvNM141@ca8.uscourts.gov

Re: *State of Texas v. State of New Mexico and State of Colorado*
United States Supreme Court, Original Jurisdiction No. 141

Dear Special Master Melloy:

The State of Texas (Texas) respectfully requests the Special Master's assistance with the following issues:

1. Pursuant to the Special Master's case management orders, briefing by the parties and amici on the motions for summary judgment concluded on February 5, 2021 (after an extension) with the filing of the parties' reply briefs.

On February 12, 2021, after the close of business and at the start of a three-day holiday weekend, the State of New Mexico (New Mexico) filed a thirty-five-page motion, with nineteen exhibits, entitled: "New Mexico's Objections to and Motion to Strike Texas's Late-Filed Expert Opinions" (Motion). In the Motion, New Mexico seeks to strike portions of five expert declarations filed by Texas in support of its summary judgment briefing. Three of the expert declarations New Mexico challenges were timely filed by Texas on November 5, 2020 in support of Texas's Motion for Partial Summary Judgment. Two of the expert declarations were timely filed by Texas on December 22, 2020 in response to New Mexico's several motions for partial summary judgment. New Mexico did not object to these declarations and/or otherwise challenge the propriety of these declarations during the time provided for briefing on the motions or any time prior to its February 12, 2021 Motion.

It is unclear from the contents of the Motion whether New Mexico seeks to strike these declarations, or portions thereof, for purposes of the pending summary judgment motions, or whether the request is limited to trial admissibility. To the extent that New Mexico seeks to exclude any portion of the challenged expert declarations from the Special Master and Court's consideration in the context of the pending motions for partial summary judgment, Texas requests that the Special Master strike New Mexico's Motion for any and all purposes related to the pending summary judgment motions as *untimely*. Indeed, New Mexico had ample opportunity to file any objection or request to strike portions of declarations relied upon by Texas as evidence supporting or responding to the summary judgment motions within the confines of the Special Master's briefing schedule and it failed to do so. Any objection to Texas's November 5, 2020 declarations should have been challenged by the December 22, 2020 deadline to respond to Texas's motion for partial summary judgment. Any objections to Texas's December 22, 2020 declarations should have been filed by the February 5, 2021 deadline for reply briefs. Thus, New Mexico's Motion is untimely, prejudicial, and is nothing more than gamesmanship and a delay tactic.

Texas seeks the following relief: Texas respectfully requests that the Special Master strike New Mexico's Motion as an untimely challenge to Texas's declarations as evidence in the pending motions for partial summary judgment.¹

2. On February 5, 2021, New Mexico filed three reply briefs in support of its three pending motions for partial summary judgment. In support of the reply briefs, New Mexico filed its "Final Exhibit Compendium: Index" setting forth "all exhibits submitted in its summary judgment submissions since November 5, 2020. *See* New Mexico's Final Exhibit Compendium: Index, filed Feb. 5, 2021 (Compendium). In its Compendium, New Mexico stated that "new exhibits filed in support of its replies filed on February 5, 2021, or modifications made, are indicated in green font . . ." *Id.* The new exhibits, as noted by the green font, include sixteen new declarations by New Mexico's designated experts (NM-EX No.'s 014-029). The new exhibits also include six new expert reports, and thirteen new documents, transcripts and/or pleadings (NM-EX No.'s 107A, 121A, 128-131, 353, 449-452, 551-552, 607-612).

Federal Rule of Civil Procedure 56 "requires the nonmoving party to be given notice and a reasonable opportunity to respond to the movant's summary judgment materials." *Beaird v. Seagate Tech.*, 145 F.3d 1159, 1164 (10th Cir. 1998), citing *Celotex Corp. v.*

¹ To the extent that New Mexico's Motion is intended to be limited to trial admissibility issues, the Motion is the equivalent of a motion in limine to exclude expert evidence and the Special Master has not yet set a schedule for such a motion to be filed or heard. To that end, the filing advances trial management issues without leave of the Special Master and serves to prejudice Texas by casting aspersions on Texas and its experts in the midst of the summary judgment briefing, and by prejudicing Texas's timeline for hearing preparation by injecting a new motion into the case timeline without leave to do so.

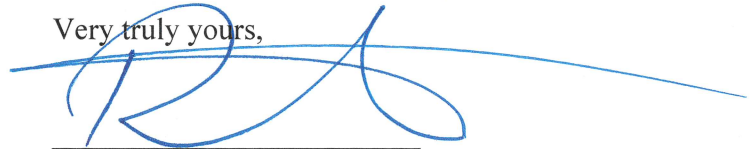
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Catrett, 477 U.S. 317, 326 (1986). Accordingly, although New Mexico, as a moving party, may submit additional evidence in a reply brief, Texas, as the nonmoving party, should be granted an opportunity to respond. *Beard v. Seagate Tech.*, 145 F.3d at 1164, citing *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 410 (1st Cir. 1985); *see also Vais Arms, Inc. v. Vais*, 383 F.3d 287, 292 (5th Cir. 2004) (“a district court may rely on arguments and evidence presented for the first time in a reply brief as long as the court gives the nonmovant an adequate opportunity to respond.”).

Texas seeks the following relief: Texas respectfully requests that the Special Master strike the additional evidence filed in support of New Mexico’s three reply briefs (as identified by NM-EX numbers above) as untimely. Alternatively, Texas requests that the Special Master develop a modified schedule for the hearing on the pending motions for summary judgment that contemplates granting leave to Texas to file a *sur-reply brief* in advance of the hearing to address the new evidence and facts submitted by New Mexico on February 5, 2021 in conjunction with its three reply briefs.

We appreciate Your Honor’s consideration of Texas’s requests.

Very truly yours,



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cc: All counsel for parties and amici
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