

No. 141, Original

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO AND
STATE OF COLORADO,

Defendants.

OFFICE OF THE SPECIAL MASTER

**THE STATE OF TEXAS'S PRETRIAL CONFERENCE STATEMENT
PURSUANT TO SECTION VI OF THE APRIL 9, 2021 TRIAL
MANAGEMENT ORDER**

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August 25, 2021

Pursuant to the Special Master’s April 9, 2021 Trial Management Order (TMO), Section VI, the State of Texas (Texas) hereby submits its Pretrial Conference Statement. Texas’s Pretrial Conference Statement addresses the Texas witness list, exhibit list, deposition designations and the status of discussions between the Parties regarding a statement of stipulated facts. Texas does not address issues outside the scope of the content identified in Section VI of the TMO but will do so upon further direction and/or order of the Special Master.

I. TEXAS’S FINAL WITNESS LIST

Pursuant to Sections III and VI of the TMO, Exhibit A (attached) sets forth Texas’s final list of trial witnesses. The witnesses are identified according to who will be called and present at trial (Will-Call Witness) and witnesses who may be called (May-Call Witness), along with a “short general summary statement of the testimony intended to be elicited from each witness.”

Each witness listed herein that is called to testify is expected to testify live, either in-person or by remote/Zoom testimony. The mode of each witness’s testimony will be disclosed at least five-days prior to the witness’s testimony, unless otherwise directed by the Special Master.

The witnesses are listed in Exhibit A alphabetically, and the lists are not intended to represent the order of presentation at trial. Texas reserves the right to call each, and every witness identified by any other party in this case. Witnesses may testify, in addition to the areas listed for each witness, to any subject touched upon during their deposition, or any declaration submitted in connection with this case. Texas reserves the right to designate rebuttal or impeachment witnesses as necessary, including the presentation of rebuttal and/or impeachment testimony through the witnesses identified herein. Texas also reserves the right to seek leave to amend or supplement this disclosure with the Special Master, in accordance with Section VI of the TMO.

II. TEXAS'S FINAL EXHIBIT LIST

Pursuant to Sections V(6) and VI of the TMO, Texas submits its Final Exhibit List attached hereto as Exhibit B.

In addition to the documents identified on Texas's Final Exhibit List, Texas reserves the right to use all documents identified by The State of New Mexico (New Mexico), the State of Colorado, and the United States on their respective exhibit lists. Additionally, Texas reserves the right to designate rebuttal, impeachment, and/or demonstrative exhibits, as necessary. Texas also reserves the right to seek leave to amend or supplement this disclosure with the Special Master, in accordance with Section VI of the TMO.

The Parties have previously exchanged voluminous back-up support data for their respective models, as well as data, files, reference materials and/or support for their retained experts' opinions ("back-up information"). Some non-retained experts also produced data, files, reference materials and/or support for their opinions during the course of discovery, although not mandated to do so pursuant to Federal Rule of Civil Procedure 26(a)(2) ("supporting information"). In the interest of efficiency, the Parties have agreed to not separately list these materials relied upon by experts, but to have these materials available at trial should any part of it be needed for questioning. The Parties agree that no Party will object to the introduction of back-up information or supporting information at trial on the basis that the same was not listed on the Party's respective exhibit list. The materials will be available at trial in electronic format should they be the subject of questioning. At that point, any item used will be assigned a trial exhibit number and added to the appropriate party's exhibit list. These materials remain subject to evidentiary challenges by the Parties.

Texas coordinated with the parties to develop and finalize the Joint Exhibit List, to be submitted by New Mexico on behalf of the Parties. Texas reserves the right to object to any document listed on the Joint Exhibit List on the grounds of admissibility.

III. DEPOSITION DESIGNATIONS

A. Texas's Affirmative Designations

1. The Designated Testimony to be Offered into Evidence

In accordance with Section IV of the TMO, Texas exchanged deposition designations on June 30, 2021. Texas designated portions of transcripts from New Mexico Rule 30(b)(6) designated witnesses Peggy Barroll, John Longworth, Estevan Lopez, and Cheryl Thacker. On July 20, 2021, New Mexico provided counter-designations for these four witnesses. A list of the deposition designations that Texas offers into evidence (Texas Designations), along with New Mexico's counter-designations, is set forth in Exhibit C, attached hereto. The transcript excerpts containing the deposition lines to be admitted into evidence by Texas, as well as the counter-designations by New Mexico, are attached hereto as Exhibits C.1 through C.4.¹

The deposition designations are identified herein according to the name and description of the deponent, the volume and date of the deposition, and the page and line number of the portions of the depositions. Texas's designations are shown in blue. New Mexico's counter-designations are shown in green.

2. Statement of Unresolved Objections to the Texas Designations

On July 20, 2021, New Mexico objected to the Texas Designations in their entirety as cumulative to live testimony to be offered at trial. New Mexico also re-asserted objections asserted by counsel during the course of the depositions. Regarding the Cheryl Thacker deposition, New Mexico objected to the designation of any Thacker testimony related to "Topic C" and the first bullet of "Topic D" of the Rule 30(b)(6) deposition notice by the United States, joined by Texas.

¹ Exhibit C.1: Peggy Barroll, designated by New Mexico as a Rule 30(b)(6) witness; Exhibit C.2: John Longworth, designated by New Mexico as a Rule 30(b)(6) witness; Exhibit C.3: Estevan Lopez, designated by New Mexico as a Rule 30(b)(6) witness; and Exhibit C.4: Cheryl Thacker, designated by New Mexico as a Rule 30(b)(6) witness.

The Parties met and conferred pursuant to Section IV of the TMO. A primary feature of the dispute regarding the Texas Designations is the process by which a party is to submit deposition designations that are offered into testimony pursuant to Federal Rule of Civil Procedure 32(a)(3). In its June 30, 2021 deposition designations, Texas expressly stated that it was designating testimony of New Mexico’s Rule (30)(b)(6) witnesses. Texas did so pursuant to Rule 32(a)(3), which expressly states that “[a]n adverse party may use *for any purpose* the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6)” (Emphasis added).

Thus, Texas designated certain (limited) portions of the testimony of New Mexico’s Rule 30(b)(6) witnesses, to be moved into the record in addition to live testimony. Texas’s position that an adverse party can use Rule 30(b)(6) deposition testimony for any purpose at trial, regardless of the availability of the witness, is well supported. *See, e.g., Estate of Thompson v. Kawasaki Heavy Indus.*, 21 FRD 297 (2013, N.D. Iowa). Rule 32(a)(3) permits the use of 30(b)(6) testimony “for any purpose” and, as such Texas does request that the designated Rule 30(b)(6) testimony be admitted into evidence, in addition to any live testimony during the trial. New Mexico disputes the process by which Texas submitted these designations, stating that the intent of the TMO was for parties to identify testimony to admit in lieu of live testimony.

In the meet and confer process, Texas advised New Mexico that it used the TMO Section IV designation procedure to designate the Rule 32(a)(3) testimony out of an abundance of caution, because Texas did not want to be challenged later for failing to use the TMO procedure, and potentially risk a waiver of its right to designate testimony pursuant to Rule 32(a)(3). In light of New Mexico’s objection, Texas offered to withdraw the designations of Rule 30(b)(6) testimony and to instead lodge the designations during trial pursuant to Rule 32(a)(3). New Mexico did not agree to that proposal.

Although the New Mexico position is not clear to Texas, it appears to argue that Section IV of the TMO precludes a Rule 32(a)(3) offering under any circumstance. To that end, Texas seeks the Special Master's direction regarding whether a party is permitted to offer a deposition designation pursuant to Rule 32(a)(3), intended to be moved into evidence in addition to live testimony.

B. New Mexico's Affirmative Designations

1. The Designated Testimony to be Offered into Evidence

On June 30, 2021, New Mexico designated testimony from Texas witnesses Cari Michael La Caille, Robin Cypher, and Temple McKinnon (New Mexico's Designations). On July 20, 2021, Texas provided counter-designations for these three witnesses. A list of New Mexico's Designations, along with Texas's counter-designations, is included in Exhibit C, attached hereto. The transcript excerpts containing the deposition lines to be admitted into evidence by New Mexico, as well as the counter-designations by Texas, are attached hereto as Exhibits C.5 through C.7.² New Mexico's designations are shown in green. Texas's counter-designations are shown in blue. Texas does not object to admitting the designated testimony for these three witnesses.

New Mexico also designated portions of the deposition testimony of Rosalba Montes. Texas did not counter-designate and does not object.

New Mexico also designated portions of the deposition testimony of United States retained expert Nicolai Kryloff. Texas did not counter-designate and objects as set forth below.

2. Statement of Unresolved Objections to the Texas Designations

On July 20, 2021, Texas objected to the entirety of the Nicolai Kryloff testimony designated by New Mexico, including admission of the Kryloff expert report, marked as

² Exhibit C.5: Cari Michel La Caille; Exhibit C.6: Robin Cypher; and Exhibit C.7: Temple McKinnon.

Exhibit 2 to the subject deposition. During the meet and confer process, Texas withdrew its objections to the admission of the designated testimony in an effort to streamline the dispute. Texas did not withdraw its objection to New Mexico’s attempt to admit into evidence the full expert report of Kryloff, marked as Exhibit 2 to the subject deposition.

Nicolai Kryloff is an expert historian retained and disclosed by the United States. As of the date of service of the preliminary witness lists, neither the United States, nor any other party, has identified Kryloff as a witness that will be called to testify live at trial. As such, Mr. Kryloff will not offer testimony to authenticate and/or otherwise provide foundation to admit the report into evidence, and will not be subject to cross-examination. Additionally, Texas identified Scott Miltenberger, Ph.D., an historian, as a “will-call” witness at trial, who will be presented in the integrated case with the United States, and subject to cross-examination. New Mexico identified Jennifer Stevens, Ph.D., an historian, as a “will-call” witness at trial, who will be subject to cross-examination.

The Kryloff expert report is impermissibly cumulative, lacks evidentiary foundation, authentication and constitutes inadmissible hearsay. Fed. Rule of Civ. Proc., Sections 801, 901, and 403. The Kryloff expert report, referred to in the designated testimony as “deposition exhibit 2”, should not be admitted into evidence.

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IV. STATEMENT OF STIPULATED FACTS

The Parties continue to meet and confer regarding whether there is agreement on a statement of stipulated facts. To the extent that the Parties reach an agreement, the Parties will seek leave from the Special Master to file a statement of stipulated facts in advance of trial.

Dated: August 25, 2021

Respectfully submitted,

s/ Stuart L. Somach

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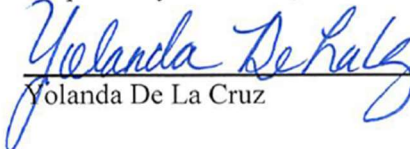
OFFICE OF THE SPECIAL MASTER

CERTIFICATE OF SERVICE

This is to certify that on this 25th day of August 2021, I caused a true and correct copy **The State of Texas’s Pretrial Conference Statement Pursuant to Section VI of the April 9, 2021 Trial Management Order** to be served upon all parties and *amici curiae*, by and through the attorneys of record and/or designated representatives for each party and *amicus curiae* in this original action. As permitted by order of the Special Master, and agreement among the parties, service was effected by electronic mail to those individuals listed on the attached service list, which reflects all updates and revisions through the current date.

Dated: August 25, 2021

Respectfully submitted,


Yolanda De La Cruz

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