

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 MOTION FOR CONTINUANCE OF TRIAL
SETTING AND MEMORANDUM IN SUPPORT**

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August 19, 2021

**STATE OF TEXAS’S MOTION FOR CONTINUANCE OF TRIAL SETTING
AND MEMORANDUM IN SUPPORT**

The State of Texas respectfully moves the Court to continue the trial on the merits from the current setting on September 13, 2021, to a date at least six months in the future, which would be after March 21, 2022. Given the longstanding nature of this litigation, this request will not alter the ultimate relief available to the parties, nor will it provide an advantage to any party. Rather, this continuance is sought to maintain the status quo and permit Texas to have its lead counsel present at the trial on the merits—as it has always planned to do.

INTRODUCTION

This case presents complex legal issues of significant importance to all the parties involved. Texas brought this lawsuit over eight years ago and has actively litigated this case since. On numerous occasions, lead counsel for the State of Texas, Stuart Somach, has said to the Court that “Texas is ready to go to trial.” Throughout this eight-year period, Texas has worked hard to present its case before the Special Master and has worked diligently to be ready to present its case in full at the trial on the merits.

Unfortunately, now with only weeks left before trial, lead counsel for Texas, Mr. Somach, has had an unexpected, personal family emergency and is now unavailable to appear in-person for the trial in Cedar Rapids, Iowa, scheduled to begin on September 13, 2021. For this primary reason, and other auxiliary reasons set out below, Texas moves the Court to continue the trial date for at least six months. This continuance will allow Texas’s lead counsel time to address this family emergency without causing a disadvantage to Texas’s litigation. It will also provide Mr. Somach time to work with additional Texas counsel should his absence beyond six months be necessitated. Texas initiated this lawsuit

because it is suffering injury, and that injury continues—Texas would only move to continue the trial because it is important that Mr. Somach be present in the courtroom to respond to testimony and evidence as it is submitted to the Court. And if any party would suffer injury for a continuation of the trial setting, it would be Texas.

ARGUMENT

A. Texas seeks a continuance to have the opportunity to present its best case.

The decision to grant or deny a motion for continuance falls within the sound discretion of the trial court. *Daniel J. Hartwig Assocs., Inc. v. Kanner*, 913 F.2d 1213, 1222 (7th Cir. 1990). A court has this discretion as part of its inherent power to control its own docket to ensure that cases proceed before it in a timely and orderly manner. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-44 (1991). It is the very situation that has arisen here that merits the exercise of this Court’s discretion.

Texas’s lead attorney, Mr. Somach, will be unavailable for the trial in Cedar Rapids beginning on September 13, 2021, because he must be in Sacramento, California, to assist a close family member in ongoing medical treatment that is estimated to continue for four to six months. He only became aware of this need about two weeks ago. *See Smith-Weik Mach Corp. v. Murdock Mach. & Eng’g Co.*, 423 F.2d 842, 843 n.1, 845 (5th Cir. 1970) (holding abuse of discretion to deny continuance when counsel became ill on eve of trial).

Mr. Somach is necessary for the proper presentation of Texas’s case and to ensure that Texas’s case presentation is not unfairly disadvantaged by his absence. Mr. Somach has been Texas’s lead counsel since the inception of this litigation in 2012. To deprive Texas of his expertise and knowledge at this late stage would lead to an unfair advantage to the other parties. Texas’s request for continuance is minimal, particularly given the

long-standing nature of this litigation, and will permit Texas time for either Mr. Somach to be present in six months or permit additional counsel time to prepare to step in as lead counsel should that be necessary. Mr. Somach developed and filed the motion for leave to file the complaint as well as the original complaint against the State of New Mexico and successfully defended that motion against various efforts to deny Texas the ability to bring its lawsuit. He has been instrumental in leading Texas each step of this eight-year litigation through initial motions to dismiss, arguments before the United States Supreme Court regarding the decision about what claims could proceed, selection of expert and fact witnesses, massive discovery of documents and numerous depositions, and dispositive motions—all to this stage of pre-trial. This is a case with many witnesses—expert and fact—and highly technical issues. As Texas’s lead counsel, Mr. Somach is intimately familiar with each and every witness and claim. To not allow Texas’s lead counsel to be present in the courtroom, along with counsel for the opposing party, would unfairly disadvantage Texas and its claims.

Another attorney in the same firm named in the pleadings cannot handle leading the case like Mr. Somach because those attorneys have not been involved to the extent Mr. Somach has been from the beginning of the lawsuit. *See Smith-Weik Mach. Corp.*, 423 F.3d at 844-45 (recognizing that local counsel was ill-prepared to take over trial for ill counsel). Only Mr. Somach has the comprehensive knowledge of the case that Texas needs at the actual trial of this litigation. Mr. Somach’s unavailability arose only in the past weeks. With the extensive, on-going pre-trial deadlines and trial preparations, the firm’s attorneys on the case beside Mr. Somach likewise have been busy on separate trial matters. No other attorney in the firm has had time yet to take over the role that Mr. Somach has

exercised throughout the litigation. Generally, each of those attorneys have specialized their expertise with select issues, particular documents, or specific witnesses. As the lead counsel, Mr. Somach knows it all.

Mr. Somach's knowledge and expertise is critical at this time to permit Texas to put on its case in chief. While another attorney could come up to speed with enough time, given the short time frame of the upcoming trial date, the unexpected and emergency nature of this request, and the short continuance given the longstanding nature of this litigation, Texas respectfully requests that, in equity, this continuance be granted.

Mr. Somach's unavailability is no one's fault. *See Ne. Women's Center, Inc. v. McMonagle*, 939 F.2d 57, 68 (3d Cir. 1991) (holding proper to deny party's continuance when party asked counsel to withdraw). It is unplanned and certainly not meant to provide any tactical advantage to any party. The recent medical diagnosis is an unexpected—and unwelcomed—development in his personal life that requires his greatest attention currently. In essence, this family emergency not only keeps him from being present in the courtroom, but justifiably will also require his time and effort away from work altogether. Texas, and Mr. Somach, cannot reasonably adjust to these changed circumstances without a continuance. *See Daniel J. Hartwig Assocs.*, 913 F.2d at 1222-23 (citing *N. Ind. Pub. Serv. Co. v. Carbon Cty. Coal Co.*, 799 F.2d 265, 269-70 (7th Cir. 1986)). Further, granting the continuance will not in any way alter the nature of this litigation or the ultimate judgment merited.

Given the long-standing nature of this litigation, a six-month continuance will not alter the case and, obviously, is not sought for delay, but so that justice may be done. Throughout the litigation, all parties have acknowledged the preference to have an in-

person trial before the Special Master. Texas will be prejudiced without its lead counsel present in the courtroom for the trial on the merits because he will not be there to respond immediately. *See United States v. Flynt*, 756 F.2d 1352, 1359 (9th Cir. 1985) (holding refusal to grant continuance resulted in appellant suffering prejudice). Any prejudice that the other parties may face from a delay in the trial is minimal in comparison to providing the lead plaintiff in this case with its most meaningful opportunity to present all its witnesses and evidence before the Special Master in the best order and fashion, and likewise respond accordingly to the opposition's case. *Id.*

B. Additional practical considerations favor granting Texas's request for a continuance.

While no party wants to unnecessarily delay this litigation further, should this Court exercise its discretion and grant this continuance, the parties can utilize this temporary delay to continue in settlement negotiations in the hope of either continuing to narrow the issues for trial or to achieve a full, equitable resolution to this case. Further, considering the COVID-19 protocols discussed for the in-person trial, additional time may provide better conditions for the trial presentation.

In addition, if the Special Master were to seek the Supreme Court's advice on the Texas Motion for Leave to File Supplemental Complaint, a ruling of the Court on the Motion could avoid complication of the case in the future if the Court were to grant the Motion and make it part of the existing case. While Texas believes that, if granted, the Supplemental Complaint is a Compact interpretation issue subject to summary judgment, it may well be relevant to the remedy issues in this case. To delay decision on the Motion may add further delay to the remedy phase.

CONCLUSION

Given the current, emergency nature of this request, Texas respectfully requests this Court grant it an extension so that lead counsel for Texas can be present at the trial setting. This will allow Texas to fairly present its case on the merits and avoid suffering undue prejudice for the reasons set forth herein.

PRAYER

Texas requests that the Court grant this motion and enter an order continuing the trial of this case from its current setting beginning September 13, 2021, for at least six months, to March 21, 2022.

Dated: August 19, 2021

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF,
THE STATE OF TEXAS

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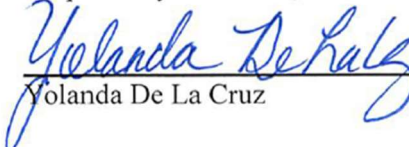
OFFICE OF THE SPECIAL MASTER

CERTIFICATE OF SERVICE

This is to certify that on this 19th day of August, 2021, I caused a true and correct copy of **The State of Texas's Motion for Continuance of Trial Setting and Memorandum in Support** 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 19, 2021

Respectfully submitted,


Yolanda De La Cruz

SERVICE LIST FOR ALL PARTIES AND AMICI CURIAE



SPECIAL MASTER

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State of Texas v. State of New Mexico and State of Colorado

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In the Supreme Court of the United States, Original No. 141
State of Texas v. State of New Mexico and State of Colorado

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State of Texas v. State of New Mexico and State of Colorado

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In the Supreme Court of the United States, Original No. 141
State of Texas v. State of New Mexico and State of Colorado

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In the Supreme Court of the United States, Original No. 141
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