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

TEXAS'S OPPOSITION TO NEW MEXICO'S MOTION TO STRIKE TEXAS'S EXPERT DISCLOSURES ON WATER QUALITY

STUART L. SOMACH, ESQ.*
ANDREW M. HITCHINGS, ESQ.
ROBERT B. HOFFMAN, ESQ.
FRANCIS M. GOLDSBERRY II, ESQ.
THERESA C. BARFIELD, ESQ.
SARAH A. KLAHN, ESQ.
BRITTANY K. JOHNSON, ESQ.
RICHARD S. DEITCHMAN, ESQ.
SOMACH SIMMONS & DUNN, PC
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: 916-446-7979
ssomach@somachlaw.com
**Counsel of Record*

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

New Mexico's motion is an extraordinary one. In response to Texas's timely expert disclosures, which explain in detail how Texas intends to prove damages at trial, New Mexico files what is, in essence, a motion *in limine*, arguing that these disclosures "cause surprise" to New Mexico. It then, based upon an absurd and convoluted explanation of Federal Rules of Civil Procedure 8 and 26 and the Federal Rules of Evidence associated with the admissibility of evidence at trial, asks the Special Master to preclude Texas from pursuing its well pled, full and timely disclosed theory of damages during the remaining seven months of discovery. New Mexico's motion, in addition to its inexcusable mischaracterizations and omissions, ignores the fact that the issue of water quality was the subject of written discovery and was raised repeatedly in the depositions of percipient witnesses beginning in November 2018. It also ignores the amount of time afforded to New Mexico for discovery at its request: Texas's subject disclosures were made a full three months before New Mexico filed its motion, five months before New Mexico's own disclosures are due, and nearly a full year before the close of discovery.

New Mexico's motion is simply alien to the way modern civil litigation works. Pursuant to Federal Rule of Civil Procedure 8 (Rule 8), a plaintiff files a complaint with, among other things, a "short and plain" statement of factual allegations supporting the claim for relief. In this case, Texas did this and in a "short and plain statement" requested an award of damages arising from New Mexico's breach of the 1938 Rio Grande Compact, Act of May 31, 1939, Pub. L. No. 76-96, ch. 155, 53 Stat. 785 (Compact), consisting of the value of Texas's apportioned share of the waters of the Rio

Grande lost to Texas as a result of New Mexico's Compact violations "in an amount to be proven at trial." Compl. ¶ 27; *see also id.* at 16-17, prayer 3.

To avoid surprise related to Complaint allegations, Federal Rule of Civil Procedure 26(a)(2) (Rule 26(a)(2)), requires a party to disclose individuals who might have discoverable information along with the subjects of that information. In addition, a plaintiff must disclose retained expert witnesses and provide reports that detail the opinion of the expert witness and a great deal of additional information. A party must also disclose non-retained expert witnesses and the scope of their testimony. These disclosure requirements allow the defendant the ability to fully investigate the claim during the discovery process in order to learn information relevant to any claim or defense to that claim in anticipation of trial. This process of notice pleading and full discovery is designed *to avoid surprise*.

Texas served its Rule 26(a)(2) disclosures nearly one year before the end of discovery and, at New Mexico's insistence, a full five months before New Mexico's disclosures were due. Texas's Rule 26(a)(2) disclosures fully and completely adhered to the Rule 8/Rule 26 process and provided New Mexico with notice of how Texas intended to proceed at the time of trial. New Mexico, therefore, does not complain about the completeness of the disclosures. In this way, the motion is bizarre. Nowhere in New Mexico's motion does it claim that Texas failed to disclose information. New Mexico is not seeking to compel any disclosure. Instead, New Mexico complains Texas provided too much information and now attempts to drastically narrow the scope of discovery to preclude any information on the topic of "water quality." This complaint goes to the

heart of the Rule 8/Rule 26 process itself with respect to how and when disclosures take place.

Additionally, the New Mexico motion fundamentally mischaracterizes the nature of the damages that are the subject of the Texas disclosures as water quality damages. Even if Texas agreed that it could not seek damages based upon a degradation of the quality of Rio Grande waters it ultimately receives from New Mexico (which it does not), that is not at all the subject of the Texas disclosures. Texas's Complaint has, from the beginning, focused on shortages associated with New Mexico's depletion and use of water in New Mexico of water that Texas is entitled to under the Compact, and for damages, "in an amount to be proven at trial" based upon "the value of Texas' apportioned share of the waters of the Rio Grande lost to Texas as a result of New Mexico's depletions of the Rio Grande through its violation of the Rio Grande Compact and Rio Grande Project Act." Compl. ¶ 27. Texas's disclosures are consistent with this allegation and provide detailed information on Texas's theory and calculation of damages to allow New Mexico to investigate the claim for damages.

The apparent fact that New Mexico does not like the way Texas chooses to value the water taken from Texas by New Mexico is simply immaterial and, if anything, is a subject for argument, evidence, and testimony at the time of trial. New Mexico is not entitled to tell Texas that it must value the water that New Mexico has wrongly appropriated in a certain manner, without regard to the real world and without regard to Texas's efforts to mitigate the damages that have been and continue to be caused by New Mexico's conduct. Texas could, of course, simply take the total water that Texas has been deprived, place a per acre-foot value on that water, and seek damages based upon

that total. That number, without question, would be orders of magnitude higher than the damage figures that have been disclosed to New Mexico. The damages sought by Texas evaluate the value of the water taken by New Mexico by taking into account mitigation measures employed by Texas. Texas must secure replacement water in order to make up for "Texas' apportioned share of the waters of the Rio Grande lost to Texas as a result of New Mexico's depletion of the Rio Grande through its violation of the Rio Grande Compact and Rio Grande Project Act." Compl. ¶ 27.

The New Mexico motion both seeks to tell Texas how it must proceed to prove damages in this case and attacks the pleading and notice provisions and process provided in the Federal Rules. Because New Mexico ignores the five-month period provided for in the Case Management Plan (CMP) for it to respond to Texas's disclosures and the full year provided for in the CMP between Texas's Rule 26(a)(2) disclosures and the close of discovery, New Mexico's motion is also an apparent attack on the timeline established in the CMP, which now is not sufficient for New Mexico. In any event, none of these arguments are valid grounds upon which the sought-after relief can be granted. New Mexico's motion accordingly must be denied.

II. TEXAS'S THEORY OF DAMAGES

Texas alleges that New Mexico has allowed and authorized Rio Grande Project water intended for use in Texas under the Compact to be intercepted and used in New Mexico, "causing grave and irreparable injury to Texas." Compl. ¶ 4. New Mexico's allowance and authorization of the excessive diversion of Rio Grande surface water and the extraction of hydrologically connected groundwater downstream of Elephant Butte Reservoir has "a direct adverse impact on the amount of water delivered to Texas

pursuant to the Rio Grande Project authorization and the Rio Grande Compact." *Id.* ¶ 18. "New Mexico's actions have reduced Texas' water supplies and the apportionment of water it is entitled to from the Rio Grande Project and under the Rio Grande Compact." *Id.*

Texas further alleges that "[g]rave and irreparable injury will be suffered in the future by Texas and its citizens unless relief is afforded by the Court to prevent New Mexico . . . from using and withholding water that Texas is entitled to . . . ." Compl. ¶ 25. "Texas has sustained damages arising from New Mexico's breach of the Rio Grande Compact, such damages consisting of the value of Texas' apportioned share of the waters of the Rio Grande lost to Texas as a result of New Mexico's depletions of the Rio Grande through its violation of the Rio Grande Compact and Rio Grande Project Act in an amount to be proven at trial." *Id.* ¶ 27. Among other prayers for relief, Texas asks the Court to "[a]ward to the State of Texas all damages and other relief, including pre- and post-judgment interest, for the injury suffered by the State of Texas as a result of the State of New Mexico's past and continuing violations of the Rio Grande Compact and the Rio Grande Project Act . . . ." *Id.* at 16-17, prayer 3.

On April 30, 2014, New Mexico moved to dismiss Texas's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim under the Compact. On October 10, 2017, the Supreme Court denied New Mexico's motion to dismiss. *Texas v. New Mexico*, 138 S. Ct. 349 (2017).

In its expert reports served on May 31, 2019, Texas disclosed expert opinion that Texas has incurred significant economic injury as a result of excessive pumping in the Rincon and Mesilla Valleys of New Mexico. Summarized, Texas's theory of economic

injury is as follows: Texas's groundwater and surface water modeling expert, Dr. William R. Hutchison, estimates that on average between 1985 and 2016, an additional 71,000 acre-feet of surface water would have been delivered to the Texas border each year under a hypothetical scenario where New Mexico reduced its groundwater pumping by 60 percent after 1938. Declaration of Stuart L. Somach in Support of Texas's Opposition to New Mexico's Motion to Strike Texas's Expert Disclosures on Water Quality (Somach Decl.) ¶ 8. Texas's water quality expert, Dr. Lydia Dorrance, opines that if the volume of groundwater pumped in New Mexico is reduced, Texas irrigators would have more surface water to apply for irrigation, surface water that is of a better quality and lower salinity than the groundwater they rely on in the absence of adequate surface water supplies. Somach Decl. ¶ 10. Saline irrigation supplies impact crop yields, as detailed in the written opinion of Texas's agricultural expert, Dr. Joel Kimmelshue. Somach Decl. ¶ 9. In addition, reduced groundwater pumping in New Mexico would result in more surface water supply being available to urban water users in El Paso, Texas. Somach Decl. ¶ 10.

Texas's expert economist, Dr. David Sunding, then evaluates the economic damages that Texas's agricultural and urban sectors have suffered as a result of reduced surface water supplies. Somach Decl. ¶ 11. With respect to the agricultural sector, Texas farmers blend surface water and groundwater to meet their water demands. Increased surface water deliveries to Texas reduces the salinity of water that farmers apply to irrigate their lands by allowing farmers to blend a larger share of surface water. Somach Decl. ¶ 12. Higher salinity water reduces yields, increases leaching requirements, and leads farmers in Texas to plant a systematically different, less profitable mix of crops

than farmers in Rincon and Mesilla Valleys in New Mexico. *Id.* To generate a damages figure, Dr. Sunding simulates the reduction in yield based on higher salinity irrigation water supplies, applies crop price and returns data and cost studies, and models how farmers choose their long- and short-run crop mix based on crop inputs and yields. *Id.* Dr. Sunding also shows the impact to local economies in Texas caused by the reduction of farm yields and lost economic opportunities. *Id.*

With respect to urban water users, Dr. Sunding evaluates the economic injury caused by reduced Rio Grande surface water supplies delivered to El Paso Water Utility (EPWU), the City of El Paso's water utility, resulting from New Mexico's excessive groundwater pumping. Somach Decl. ¶ 13. EPWU must pump more groundwater to replace the surface water that would have been available to it if New Mexico had reduced its groundwater pumping. Costs attributable to increased reliance on groundwater include pumping costs, infrastructure investments to increase their capacity to produce groundwater and distribute groundwater to its service area, and the rehabilitation and maintenance of previously inactive wells. *Id.* Additionally, Dr. Sunding demonstrates the injury caused to EPWU's residential, commercial, and industrial customers as a result of elevated salinity in their tap water. *Id.*

In total, Dr. Sunding opines in his expert report that New Mexico's excessive groundwater pumping caused direct damages in the amount of $174.40 million in lost farm profits to Texas's agricultural water users, $76.81 million in incremental expenditures to Texas's urban water users, and $100.50 million in regional economic impacts from lost jobs and employee compensation. Somach Decl. ¶ 14.

III. ARGUMENT

A. New Mexico's Motion Is Unsupported and Not Consistent with Litigation Practice under the Rules of Civil Procedure

1. New Mexico's Motion Is Unsupported by Evidence or Authority

New Mexico's motion lacks supporting declarations, documents, and legal authority. As a consequence, it presents an incomplete and often inaccurate picture of Texas's disclosures and the discovery process to date. For example, in moving to strike Texas's expert disclosures touching on water quality, New Mexico fails to provide the Special Master the very documents its seeks to strike. *See* N.M. Mot. 8 n.2. Instead, New Mexico chooses to inaccurately summarize those reports (without the support of a declaration), and present its own spin on Texas's theory of damages.

As explained in section II, *supra*, it is not the case that "Texas's sole measure of damages is the quality of its own groundwater." *See* N.M. Mot. 3. Texas has adequately pled a Compact violation due to New Mexico's interception and use of Rio Grande water that Texas is entitled to and seeks damages for the injury caused by those actions. Among other relief, money damages are an available and accepted remedy in a compact case. *See Kansas v. Nebraska*, 135 S. Ct. 1042, 1053, 1064 (2015) (adopting the special master's recommendations to award $3.7 million in damages to Kansas resulting from Nebraska's compact violation in addition to $1.8 million in disgorgement); *see also id.* at 1052-53 (describing the Court's powers to enforce interstate compacts to include "the ability to provide the remedies necessary to prevent abuse" and "its full authority to remedy violations of and promote compliance with the agreement, so as to give complete effect to public law."). Texas is entitled to define and present its theory on damages as it

sees fit in order to obtain the relief it believes necessary to remedy its injury. The challenged disclosures do just that.

New Mexico also apparently takes issue with subpoenas served by Texas in May of 2019 to landowners in order to take soil and plant samples on farms in Rincon, Mesilla, and El Paso Valleys. N.M. Mot. 15-17. As with Texas's expert disclosures, New Mexico did not provide the subpoenas to which it apparently objects. New Mexico, nonetheless, inaccurately describes these subpoenas as "additional discovery related to water quality" and as "tardy." *Id.* at 16, 19. There is nothing "additional" or "tardy" about these subpoenas. Those subpoenas were served and the inspections completed by August 2, 2019. Somach Decl. ¶ 6. At that point, nine months were left in discovery. Indeed, at this date, fact discovery has not closed; there is still more than seven months left to conduct discovery under the current CMP. Texas, in issuing the subpoenas and undertaking the field investigations, is conducting the necessary investigations to collect evidence that it may introduce to prove its case, as it is entitled to do.

New Mexico's frequent reference to these subpoenas confuses the issues and further demonstrates how New Mexico's lack of supporting documentation for its motion has presented an incomplete picture of the discovery process to date. Despite its evident problem with these subpoenas, New Mexico has never requested a meet-and-confer on them, nor has it objected to them in any form. Somach Decl. ¶¶ 15-18. Indeed, New Mexico's motion does not ask the Special Master to take any action with respect to the subpoenas. *See* N.M. Mot. 20 (describing requested relief). Accordingly, Texas focuses its responses below to New Mexico's arguments regarding its Rule 26(a)(2) expert disclosures.

2. New Mexico Confuses the Standards for Notice Pleading, the Scope of Discovery, and the Admissibility of Evidence

New Mexico's motion is predicated upon its confusing argument that invokes concepts of notice under the pleading standard in Rule 8 to attack a plaintiff's expert disclosures, which Texas provided, pursuant to Rule 26. New Mexico then introduces evidentiary standards for admissibility at trial to claim Texas's required Rule 26(a)(2) disclosures will cause New Mexico unfair prejudice. To unwind this mess, discussion of the fundamentals of civil procedure as they apply to notice pleading, the purpose of discovery, and admissibility of evidence is instructive.

Rule 8 identifies the standard to successfully state a claim. A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A "complaint must contain sufficient factual matter, accepted as true to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[T]he complaint must supply 'enough fact[s] to raise a reasonable expectation that discovery will reveal evidence' supporting the plaintiff's allegations." *Indep. Trust Corp. v. Stewart Info. Servs. Corp.*, 665 F.3d 930, 935 (7th Cir. 2012) (quoting *Twombly*, 550 U.S. at 556).

"[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 556 U.S. at 679; *see also Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 736 (7th Cir. 2014) ("A motion to dismiss pursuant to [Rule] 12(b)(6) challenges the viability of a complaint by arguing that it fails to state a claim upon which relief may be granted."). "Determining whether a complaint states a plausible claim for

relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

Rule 26 then defines the scope of discovery. Rule 26(b)(1) allows discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense." The Supreme Court explained the relationship between the notice pleading system and the purpose of discovery under the modern Federal Rules of Civil Procedure in *Hickman v. Taylor*, 329 U.S. 495 (1947):

> The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure . . . . The [Rules] restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device . . . to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.

Id. at 500-01 (footnotes omitted); *see also Oppenheimer Fund v. Sanders*, 437 U.S. 340, 351 (1978) ("Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues.").

Federal Rule of Evidence 702 (Rule 702), which neither relates to Rule 8 nor Rule 26, controls the admissibility of expert evidence at trial. A witness "qualified as an expert by knowledge, skill, experience, training, or education" may testify and give their opinion if, among other requirements, the "expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). Even if expert evidence is relevant

under Federal Rule of Evidence 401, the court may exclude relevant evidence if its probative value is substantially outweighed by unfair prejudice. Fed. R. Evid. 403.

Discovery, unlike evidence or testimony offered at trial, is not limited by admissibility. *See* Fed. R. Civ. P. 26(b)(1) ("Information within this scope of discovery need not be admissible in evidence to be discoverable."); *Sentis Group, Inc. v. Shell Oil Co.*, 763 F.3d 919, 926 (8th Cir. 2014) ("Discovery is not limited in this manner."). "Rather, discovery is a[n] investigatory tool intended to help litigants gain an understanding of the key persons, relationships, and evidence in a case . . . even if the evidence discovery is later deemed not admissible." *Sentis Group*, 763 F.3d at 926.

New Mexico bounces between Rule 8, Rule 26, Rule 702, and Federal Rule of Evidence 403 (Rule 403), and advances arguments under each rule to claim that Texas should not be able to provide discovery to New Mexico on damages that involve a discussion of applied water quality in Texas. However, this is discovery. Rule 26(b)(1) defines the scope of discovery, and Texas is required under Rule 26(a) to provide information to the defendant on how it intends to prove its damages. That New Mexico was surprised by that theory is not relevant to the analysis of whether the discovery was proper. In fact, as courts routinely observe, that is the purpose of discovery: to allow parties to learn key information about the opposing side's case so there are no surprises *at trial*. *See, e.g.*, *Hickman*, 329 U.S. at 500-01. Regardless of which federal rule New Mexico uses to claim surprise or irrelevance, Texas's expert disclosures comply. New Mexico's motion to prevent Texas from both disclosing *Texas's theory* of *Texas's case* and from using the tools of discovery to learn of relevant information to prove its claims should be denied.

B. Texas's Complaint Adequately States a Claim for Damages in Compliance with Rule 8

New Mexico argues that Texas used a "back-door method of introducing a new water quality claim" and "[b]ecause Texas's Complaint contained no water quality allegations, New Mexico had no notice that Texas was raising a claim or seeking damages based on water quality." N.M. Mot. 10. New Mexico interprets Texas's Complaint to "only allege[] damages stemming from the value of the water lost to Texas" and claims that "nowhere in its Complaint does Texas allege New Mexico has violated the Compact by reducing the quality of water available to Texas." *Id.* at 13.

These attacks on Texas's pleadings, however, are not brought in a motion to dismiss for failure to state a claim under Rule 12(b)(6). New Mexico already brought that motion and lost. *Texas v. New Mexico*, 138 S. Ct. at 349. To the extent that New Mexico challenges the availability of damages as a matter of law, a motion to strike is an improper vehicle to do so; a Rule 12(b)(6) motion is required. *See Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973-75 (9th Cir. 2010) (explaining that Federal Rule of Civil Procedure 12(f) does not authorize courts "to strike claims for damages on the ground that such claims are precluded as a matter of law"). Such a motion would be frivolous as the Supreme Court has frequently held damages to be an available remedy for violations of an interstate compact. *See Kansas v. Nebraska*, 135 S. Ct. at 1053, 1064; *Kansas v. Colorado*, 533 U.S. 1, 7 (2001); *Texas v. New Mexico*, 482 U.S. 124, 128 (1987).

At best, New Mexico's arguments under Rule 8 can be reduced to an objection that Texas did not explicitly plead a detailed theory of damages in its Complaint. However, Texas is not required to plead a detailed theory of damages. *See Hobbs v.*

Gerber Prods. Co., No. 17-CV-3534, 2018 U.S. Dist. LEXIS 136943, at *11 (N.D. Ill. Aug. 14, 2018) (citing *Alioto v. Town of Lisbon*, 651 F.3d 715, 721 (7th Cir. 2011) ("[W]e have stated repeatedly (and frequently) that a complaint need not plead legal theories, which can be learned during discovery.")) (finding that plaintiff was not required to plead theories as to why she was entitled to damages because "it is axiomatic that plaintiffs need not plead legal theories"). Under Rule 8, all that is required is a "short and plain statement of the claim" and "a demand for the relief sought," which is included in Texas's Complaint.

Texas adequately pled a violation of the Compact based on New Mexico's actions to allow and authorize excessive diversions of surface water and excess pumping of hydrologically connected groundwater below Elephant Butte Reservoir, intercepting water that Texas is entitled to under the Compact. Compl. ¶¶ 4, 18; First Interim Report of the Special Master 193-203 (Feb. 9, 2017) (First Interim Report); *Texas v. New Mexico*, 138 S. Ct. at 349 (denying New Mexico's motion to dismiss Texas's Complaint for failure to state a claim under the Compact). These actions have reduced Texas's apportionment of Rio Grande surface water under the Compact. Compl. ¶ 18. Texas alleges that it has "sustained damages arising from New Mexico's breach of the Rio Grande Compact, such damages consisting of the value of Texas' apportioned share of the waters of the Rio Grande lost to Texas as a result of New Mexico's depletions of the Rio Grande through its violation of the Rio Grande Compact and Rio Grande Project Act in an amount to be proven at trial." *Id.* ¶ 27. Texas requests that the Court "[a]ward to the State of Texas all damages and other relief, including pre- and post-judgment interest, for the injury suffered by the State of Texas as a result of the State of New Mexico's past

and continuing violations of the Rio Grande Compact and the Rio Grande Project Act . . . ." *Id.* at 16-17, prayer 3.

Texas's Complaint thus includes all that is necessary under Rule 8: sufficient factual allegations to state a plausible claim that New Mexico violated the Compact and that Texas suffered damages as a result of New Mexico's past and continuing violations of the Rio Grande Compact. *See Iqbal*, 556 U.S. at 678-79. The cases cited by New Mexico to support its contention that Texas's Complaint does not give fair notice to New Mexico of its damages claim are not on point. *Oliver v. Ralphs Grocery Co.*, 654 F.3d 903 (9th Cir. 2011), involved a specific line of cases applicable to pleading claims under the Americans with Disabilities Act (ADA). In ADA cases, the Ninth Circuit requires plaintiffs to identify the specific architectural barriers in places of public accommodation that they allege are non-compliant to give adequate notice to defendants of the specific barriers at issue. *Id.* at 908-09 (citing *Pickern v. Pier 1 Imps. (U.S.), Inc.*, 457 F.3d 963, 968-69 (9th Cir. 2006)). This authority is not relevant to evaluating whether a plaintiff adequately pled a claim for damages. Similarly, the court in *Brown v. Califano*, 75 F.R.D. 497, 499 (D.D.C. 1977), evaluated a motion to dismiss a complaint featuring "an untidy assortment of claims" for failure to comply with Rule 8. This motion is not a motion to dismiss and Texas's Complaint is well-pled and concise.

It is clear from New Mexico's motion that New Mexico does not agree with Texas's theory of damages. New Mexico repeatedly misstates or misinterprets Texas's theory of damages as a Compact violation based on the reduction of the quality of water delivered to or available to Texas. *See* N.M. Mot. 7, 13. This is not correct. This remains a case about a water shortage problem, not a water quality problem. But *because*

of the water shortages caused by New Mexico's Compact violations, Texas must replace the surface water that New Mexico failed to deliver in order to sustain its urban and agricultural sectors. The replacement water is of lower quality than the surface water Texas would have used if New Mexico had not reduced Texas's apportionment of surface water. There are detrimental economic effects of using lower quality groundwater. Accordingly, Texas has chosen to measure the "value of Texas' apportioned share of the waters of the Rio Grande lost to Texas as a result of New Mexico's depletions of the Rio Grande through its violation of the Rio Grande Compact," Compl. ¶ 27, based on the effects of the lower quality, more saline replacement water it is forced to use "as a result of the State of New Mexico's past and continuing violations of the Rio Grande Compact," Compl. at 16-17, prayer 3. New Mexico may not agree with this theory of damages and may not want to defend against this theory of damages, but it is not up to New Mexico to define how the State of Texas chooses to present its case. *See Global Traffic Techs. v. Emtrac Sys., Inc.*, Civ. No. 10-4110 (ADM/JJG), 2012 U.S. Dist. LEXIS 195294, at *10 (D. Minn. Dec. 20, 2012) (denying defendants' motion to strike plaintiff's damages theory and stating: "Had Plaintiff told Defendants it was going to the grocery store to buy fruit, Defendants could not take issue with Plaintiff's purchase of apples.").

In sum, Texas's Complaint includes a claim for damages resulting from New Mexico's Compact violations and adequate factual allegations to support that claim. That is all that is required under Rule 8. *See Lyzer v. Caruso Produce Inc.*, No. 3:17-cv-1335-SB, 2018 U.S. Dist. LEXIS 27670, at *10-12 (D. Or. Jan. 29, 2018) (finding a complaint's prayer for relief that "requests compensation for Plaintiff's economic and non-economic damages" sufficient to meet Rule 8's pleading requirement for general

damages). New Mexico's arguments about "fair notice" under Rule 8 should therefore be rejected.

C. Texas's Expert Disclosures Relating to Water Quality Are Directly Relevant to Texas's Claim for Damages and Thus Are Relevant under Rule 26

Rule 26(b)(1) allows discovery on "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." The Federal Rules of Civil Procedure explicitly recognize that damages are necessary topics for discovery. Under Federal Rule of Civil Procedure 26(a)(1) (Rule 26(a)(1)), as part of its initial disclosures, a party must provide "a computation of each category of damages claimed by the disclosing party." Because money damages in complex litigation almost always require expert opinion from an economist, a party often must disclose its theory and calculation of damages in a written expert report in compliance with Rule 26(a)(2). Texas proceeded according to this normal process by first noting in its Rule 26(a)(1) disclosures of its intent to "fully disclose its computation of damages pursuant to the Case Management Plan timeline for expert witness disclosure and production of expert reports and supporting materials," and then producing those expert reports on the timeline set out in the CMP. Somach Decl. ¶¶ 2, 7.

New Mexico repeatedly argues that water quality information is not relevant to Texas's claim, yet ignores the significant point that the water quality information at issue is part of Texas's theory and calculation of damages. *See* sections II, III.B, *supra*. "No citation is needed to support the proposition that discovery related to a plaintiff's claim for damages is relevant." *Laudicina v. City of Crystal Lake*, 328 F.R.D. 510, 518 (N.D. Ill. 2018). Again, New Mexico may not agree with Texas's theory of damages, but that cannot affect whether Texas may present that information as part of its Rule 26(a)(2)

disclosures. Indeed, if Texas had not disclosed Dr. Kimmelshue's, Dr. Dorrance's, and Dr. Sunding's reports, then New Mexico would be arguing to the Special Master that Texas had failed to comply with Rules 26(a)(1) and 26(a)(2) by omitting necessary information on damages.

New Mexico also attempts to makes a strange point that a case about water quantity shortage can have nothing to do with water quality problems. N.M. Mot. 3-4, 18. Water quantity and water quality are always related, and have always been related on the Rio Grande. The comprehensive Rio Grande history provided by Special Master Grimsal in the First Interim Report summarized this relationship on the Rio Grande and described that the Compact drafters negotiated for both the quantity and quality of water as part of the states' apportionments. *See* First Interim Report 142, 164-67 & n.44. Ultimately, and contrary to New Mexico's assertions, Texas is not claiming a Compact violation based on the diminished quality of the water delivered to Texas. Rather, Texas has disclosed expert opinion that because New Mexico's actions have reduced the quantity of Rio Grande surface water that reaches Texas, depriving Texas of its Compact apportionment, Texas has had to replace that surface water with more saline groundwater. The higher salinity of this replacement water has adversely impacted Texas's agricultural and urban sectors. *See* section II, *supra*. The water quality information included in Texas's expert disclosures is a part of the theory of damages, not the theory of Compact violation.

As such, Texas's expert disclosures relating to water quality are relevant under Rule 26(b)(1). *See Laudicina*, 328 F.R.D. at 518; *see also Hover v. State Farm Mut. Auto. Ins. Co.*, No. 13-CV-05113-SMJ, 2014 U.S. Dist. LEXIS 131406, at *5

(E.D. Wash. Sept. 12, 2014) (explaining that for a plaintiff, the scope of discovery "extends to information and materials that may assist [the plaintiff] in proving damages at the very least"); *United States ex rel. Tyson v. Amerigroup Ill., Inc.*, 230 F.R.D. 538, 544 (N.D. Ill. 2005) ("Contention interrogatories that seek damage theory and methodology information from a plaintiff almost invariably will comport with the requirements of Rules 26(b)(1) and 33(c) of the Federal Rules of Civil Procedure, seeking as they do, information about an inherent element of the claim."). New Mexico's arguments based on Rule 26 should therefore be rejected.

D. Evidentiary Rules Are Not Applicable to this Discovery Dispute Because the Admissibility of Expert Testimony Is Not At Issue

It is unclear why New Mexico relies on the Federal Rules of Evidence or asks the Court to strike evidence in a discovery motion. This is not trial, or pre-trial, or post-trial. Texas is not introducing evidence. Texas timely disclosed the written reports required by Rule 26(a)(2) to New Mexico. Rather than proceed to prepare its own written reports required by Rule 26(a)(2) and conduct other discovery to investigate Texas's theory of damages in the year left to it, New Mexico instead chose to ask the Special Master to strike "inadmissible evidence." *See* N.M. Mot. 11 (". . . the proper procedure is to strike such inadmissible evidence on the basis of relevance . . ."); *id.* at 17 ("Evidence Pertaining to Water Quality Should be Stricken . . . ."). This request confuses the rules of evidence with the rules of discovery, and accordingly, the request should be denied.

As explained above, Rule 702 controls the admissibility of expert evidence at trial. New Mexico argues that *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), "is the leading case on the scope of evidence Rule 702 encompasses." N.M. Mot. 14. The accuracy of New Mexico's characterization of *Daubert* ends with this

statement. Thereafter, New Mexico's arguments have no merit. *Daubert* stands for the proposition that, in acting as a "gatekeeper" under Rule 702, the trial judge must use a flexible reliability standard to assess the admissibility of expert testimony under certain factors rather than the "general acceptance" test. *Daubert,* 509 U.S. at 594; *see also* Fed. R. Evid. 702 advisory committee's note to 2000 amendment. The Court's holding in *Daubert* requires the trial judge to ensure an expert's testimony is reliable (i.e., based on scientifically valid principles) and based on "reasoning or methodology [that] properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 593; *see also* Fed. R. Evid. 702(a).

New Mexico hangs its argument under *Daubert* regarding the relevance of Texas's expert disclosures on the Court's statement that the trial judge has the "task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." N.M. Mot. 15 (emphasis omitted) (quoting *Daubert*, 509 U.S. at 597). This language from *Daubert* shapes the Court's flexible standard for the trial judge to follow when *admitting* evidence at trial; it does not define a standard for a trial judge to use when evaluating the suitability of *discoverable* information. "[T]he standard of relevance in the context of discovery is broader than in the context of admissibility (Rule 26(b) clearly states that inadmissibility is no grounds for objection to discovery)." *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1992). Indeed, Rule 26(b)(1) was amended in 2015 to omit the phrase "reasonably calculated to lead to the discovery of *admissible* evidence" because of the continued problems with the phrase being used to

incorrectly define the scope of discovery. Fed. R. Civ. P. 26 advisory committee's note to 2015 amendment.[1]

The cut-off date for discovery was a year away at the time of Texas's Rule 26(a)(2) disclosures and is still more than seven months away. Once discovery closes, and pre-trial motions are scheduled, New Mexico may present arguments on the admissibility of Texas's experts' testimony to the Special Master under the rules of evidence and *Daubert*. Texas is confident that should this type of challenge be brought at the appropriate time as a trial motion, it will not be successful. Nevertheless, until that time, New Mexico's arguments on the admissibility of expert testimony are misplaced and should be disregarded.

E. New Mexico Has Not Established that It Is Entitled to the Extraordinary Relief that It Requests

New Mexico's motion presents an unusual case where a defendant asks the court to limit the information that the plaintiff ***discloses*** to that defendant during discovery, rather than to compel the disclosure of information that the plaintiff refuses to provide. Notably, New Mexico has not argued that Texas's expert reports contained insufficient information under Rule 26(a)(2), or that Texas failed to provide supporting facts or data. Instead, New Mexico claims Texas provided too much information on its claims and that it would be too burdensome or prejudicial for New Mexico "to prepare, investigate and

[1] The 2015 amendment to the Federal Rules of Civil Procedure succinctly responded to the confusion between discoverability and admissibility. However, the Advisory Committee counseled as early as 1946 that admissibility is not the proper standard for the scope of discovery. Fed. R. Civ. P. 26(b) advisory committee's note to 1946 amendment ("[S]ubdivision (b) make[s] clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters themselves inadmissible as evidence . . . . In such a preliminary inquiry admissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. ***Such a standard unnecessarily curtails the utility of discovery practice***." (emphasis added)).

defend itself against water quality claims" as part of its Rule 26(a)(2) expert disclosures. N.M. Mot. 18.

To alleviate this supposed prejudice, New Mexico asks the Special Master for the following relief: to "strike the expert disclosures of David Sunding and Lydia Dorrance in their entirety" and to "strike those portions of the expert disclosures of Joel Kimmelshue, John Balliew, Al Blair, and Art Ivey that discuss water quality or salinity." N.M. Mot. 20. That is not all. New Mexico also asks the Special Master to "enter an order precluding Texas's experts from testifying on these subjects." *Id.* If Texas wants to disclose or pursue discovery pertaining to its damages theory, New Mexico then asks the Special Master to require Texas to amend its Complaint, "refile" the subject expert disclosures, and set new deadlines for expert disclosures for all parties. *Id.* This is an extraordinary request. It is even more extraordinary given that New Mexico offers no persuasive or applicable authority to establish it is entitled to such relief. Moreover, New Mexico fails to offer the requisite legal and factual support to warrant *any* available relief under Rule 26. New Mexico's motion is just the latest in a series of delay tactics, and the motion should be denied for this reason as well.

1. New Mexico's Request for this Extraordinary Relief Is Not Supported by Authority

New Mexico offers no persuasive legal authority that its requested relief is appropriate in light of Texas's alleged discovery violations. New Mexico cites only to two cases in support of its request for relief, and neither suggest that the relief requested is reasonable to address the alleged harm.

New Mexico cites to an unpublished case for the proposition that a court may limit the scope of a subpoena to documents " 'that will shed light on those claims [against

the defendant in the case].' " N.M. Mot. 16-17 (quoting *Deluxe Financial Servs., LLC v. Shaw*, No. 16-CV-3065 (JRT/HB), 2017 U.S. Dist. LEXIS 221931, at *4 (D. Minn. Feb. 13, 2017)). New Mexico does not, however, seek to limit the scope of Texas's subpoenas. *See* section III.A.1, *supra*. Instead, New Mexico concludes from *Deluxe Financial* that "it is proper for this Court to rule that evidence related to water quality, including information derived" from Texas's subpoenas, "is not discoverable and will not be admissible." N.M. Mot. 17. It would not be appropriate for the Special Master to issue such a ruling; as explained above, discoverable information need not be admissible. *See* section III.D, *supra*. Moreover, *Deluxe Financial* does not support New Mexico's proposition that the appropriate remedy for a discovery violation is to strike such information and prevent the plaintiffs from further pursuing or presenting information related to their claims. Rather, the court in that case chose a proactive approach to limit proposed discovery, suggesting that New Mexico's motion is an untimely attempt to address its discovery concerns. *See generally Deluxe Financial*, 2017 U.S. Dist. LEXIS 221931, at *13-19.

New Mexico also cites to a special master opinion issued in *Montana v. Wyoming*, Original No. 137, to support its request that Texas be required to amend its Complaint in order to offer expert testimony on water quality issues. N.M. Mot. 17. However, the disagreement over the scope of Montana's complaint "[s]ubsequent to the filing of Montana's Complaint and the resolution of Wyoming's Motion to dismiss" is not comparable to the current procedural posture of the matter at hand where the parties have progressed to the discovery stage. *Montana v. Wyoming*, Memorandum Opinion of the Special Master On Montana's Claims Under Article V(B), at 1 (Dec. 20, 2011), *available*

at http://web.stanford.edu/dept/law/mvn/pdf/MT_v_WY_Art_V(B)_Claims_MemOp_fnal_12_20_2011.pdf. In fact, the special master in Original No. 137 explicitly stated that the "limited nature" of Montana's complaint "should not be used to try to unduly limit Montana's discovery," and that Montana would be given "reasonable latitude" to issue discovery relevant to the allegations pled. *Id.* at 18. The order in *Montana v. Wyoming* supports the conclusion that the scope of discovery is not as narrow or rigid as characterized by New Mexico, and as it relates to its existing claims, Texas's discovery efforts regarding water quality information is appropriate without amendment of its Complaint.

New Mexico, therefore, fails to provide any persuasive or applicable authority that the requested relief is an appropriate or even available remedy for the alleged discovery violations. Although the extraordinary remedies of striking expert testimony and preventing an expert from supplementing or testifying on his or her opinions are contemplated in statute, these remedies are appropriate only in those instances where a party fails to provide the information or identity of a witness as required. *See* Fed. R. Civ. P. 37(c)(1). Even then, "[d]epriving the parties of a merits disposition is serious business," and courts may use their discretion in strictly construing the Federal Rules of Civil Procedure to deprive a party of a merits-based determination. *Salgado by Salgado v. GMC*, 150 F.3d 735, 739 (7th Cir. 1998) (holding that the "egregious" violations of expert disclosure requirements after the court warned counsel of the consequences of noncompliance warranted excluding the expert witness testimony). New Mexico makes no claim and offers no evidence that Texas failed to comply with Rule 26 expert

disclosure requirements, nor any information that the circumstances particularly warrant such serious measures.[2] New Mexico's requested relief is, therefore, not appropriate.

2. New Mexico Does Not Provide the Requisite Factual Support to Obtain Relief for the Alleged Discovery Violations

Even if it sought appropriate relief for Texas's alleged discovery violations, New Mexico failed to provide the requisite evidentiary support to warrant such relief. Rule 26(b)(2)(C) provides that, "[o]n motion or on its own," a court "must limit the frequency or extent of discovery otherwise allowed by" the Rules if it determines that a party's proposed discovery is outside the scope permitted by Rule 26(b)(1). It is "[t]he court's responsibility, using all the information provided by the parties . . . to consider [all the factors] in reaching a case-specific determination of the appropriate scope of discovery." Fed. R. Civ. P. 26(b)(1) advisory committee's note to 2015 amendment. Accordingly, "Rule 26 requires 'a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.' " *Vallejo v. Amgen, Inc.*, 903 F.3d 733, 743 (8th Cir. 2018) (citation omitted); *see also* Fed. R. Civ. P. 26(b)(1) advisory committee's note to 2015 amendment (stating that a party may not refuse discovery "simply by making a boilerplate objection that [the discovery request] is not proportional").

In its effort to prove that Texas has exceeded the scope of discovery under Rule 26(b)(1), New Mexico summarily states that Texas has not previously established "that the matters regarding water quality are 'relevant to any party's claim or defense and proportional to the needs of the case.' " N.M. Mot. 17 (quoting Fed. R. Civ. P. 26(b)(1)).

[2] New Mexico complains only that it was harmed by Texas's compliance with the expert disclosure requirements because of surprise. Under Rule 26(a)(2) and the CMP, New Mexico was not owed any earlier notice of the substance of Texas's experts' opinions.

However, in the absence of affidavits or some form of sworn declarations or statements, attorney assertions in briefs are not adequate grounds to support objections to discovery. *Vallejo*, 903 F.3d at 743. In *Vallejo*, the defendant conceded that it did not provide supporting affidavits for its objections to the plaintiff's Rule 26 requests, but it argued that it did not have to, because "it provided sufficiently detailed explanations to [plaintiff]'s unduly burdensome discovery requests through its briefing to the court." *Id.* The court disagreed:

> By signing a brief, an attorney certifies that the factual assertions contained within the brief have evidentiary support. But certification that the facts have evidentiary support may not be helpful in the context of Rule 26(b)(1), where a party's burden must be quantified . . . . [T]he attorneys in this case put the onerous responsibility on the court to balance proportionality while failing to provide substantial and reasonable guidance . . . the court is being forced to wade through generalized and conflated arguments of need, burden, and relevance.

Id. at 743-44 (internal quotations omitted). Similarly, New Mexico provides no supporting declaration with information on the supposed burden it faces to defend Texas's theory of damages. And New Mexico falls short of the requirement even more so than the defendant in *Vallejo*, as New Mexico did not even provide "sufficiently detailed explanations" in its briefing.

New Mexico's Motion cites only to an unpublished case for the proposition that Texas "[has] the burden of addressing all proportionality considerations [required under Rule 26(b)(1)]," and summarily concludes that Texas has not met this burden. N.M. Mot. 16-17 (quoting *Deluxe Financial*, 2017 U.S. Dist. LEXIS 221391, at *4 (internal quotations omitted) (quoting Fed. R. Civ. P. 26(b)(1) advisory committee's note to 2015 amendment). Again, New Mexico did not provide any declarations in support of

this statement. Importantly, the unpublished case cited by New Mexico misquotes the Advisory Committee's statements. The Advisory Committee's Notes provide:

> [The 2015 amendment to Rule 26(b)(1)] *does not place* on the party seeking discovery the burden of addressing all proportionality considerations . . . . The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.

Fed. R. Civ. P. 26(b)(1) advisory committee's note to 2015 amendment (emphasis added).

The Advisory Committee further explains that the parties "may begin discovery without a full appreciation of the factors that bear on proportionality," but that such information may be gained from the parties' pretrial disclosures and discussions. Fed. R. Civ. P. 26(b)(1) advisory committee's note to 2015 amendment. For example, the Sixth Circuit looks to the " 'course of the proceedings' " to determine whether a defendant had adequate notice of the charges it was defending. *Carter v. Ford Motor Co.*, 561 F.3d 562, 569 (6th Cir. 2009) (quoting *Harris v. Bornhorst*, 513 F.3d 503, 516 (6th Cir. 2008)). In *Carter*, the court affirms the approach taken in *Harris*, stating that the court properly "reviewed statements made by the plaintiff and his counsel during depositions and concluded that they 'demonstrate[d] that both sides understood' the suit to encompass claims 'not explicitly set forth in the complaint.' " *Carter*, 561 F.3d at 569. Moreover, the court suggests that the discovery process affords a party the opportunity "to clarify the contours" of a claim which "come to light during the discovery period." *Id*.

It is incredibly unlikely, given the history of the Compact and Texas's explicit plea for damages in the Complaint, that New Mexico could have been surprised by

relevance of water quality to Texas's claims. Nevertheless, as shown below, Texas has since – on multiple, documented occasions – provided New Mexico with information about the importance of water quality considerations to its calculation of damages that counter the contention that such requests are " 'for a purely exploratory mission in search of potential new claims.' " Conversely, New Mexico offers no particular or specific facts regarding the burden or expense of preparing its own water quality experts to defend Texas's claims in support of its request for relief.

Because Texas has expressed the importance of water quality related discovery to its theory of damages, and New Mexico has not provided any detailed, countervailing information regarding the burden or expense of engaging the normal discovery process, Rule 26's relevance proportionality considerations do not support a determination that the scope of discovery should be limited to exclude water quality issues.

F. New Mexico's Motion Is Another Transparent Attempt at Delay

1. New Mexico Has Been Aware that Water Quality Has Been a Topic of Discovery for Close to a Year

New Mexico claims that it did not have notice that water quality matters were relevant to Texas's claims "at any time prior to its expert disclosures [on May 31, 2019] and recent subpoenas." N.M. Mot. 17; *see also id.* at 10. Yet, New Mexico was undoubtedly aware that Texas sought water quality information as early as November 8, 2018, when Texas served its Requests for Production, Set One, to New Mexico, seeking information relating to "salinity and total dissolved solid statistics." *See* Somach Decl. ¶ 3. In response, New Mexico objected to Texas's request seeking information relating to salinity and total dissolved solid statistics. Somach Decl. ¶ 4. Thus, New Mexico has been aware of Texas's interest in water quality information since at least November 2018.

New Mexico then participated in numerous depositions of fact witnesses over the course of six months during which water quality was a topic of questioning. Specifically, between November 16, 2018, and May 7, 2019, Texas took the depositions of Jesus Reyes, Art Ivey, George Brooks, Greg Daviet, Larry Ceballos, Bobby Kuykendall, Jerry Franzoy, Joe Paul Lack, Mike McNamee, Kary Samuel Salopek, James Salopek, Robert Sloan, Jorge Garcia, and Estevan Lopez. Somach Decl. ¶ 5. Attached as Exhibits A through N to the Somach Declaration are true and correct copies of relevant excerpts of the transcripts of the Oral Depositions of these witnesses, in which counsel for Texas asked pointed questions regarding water quality issues. New Mexico, of course, participated in the above-listed depositions, in which counsel for New Mexico also sought information regarding water quality and salinity issues in relation to the claims in this case. Somach Decl. Ex. H at 83:7-10 (questioning by Lisa M. Thompson on behalf of New Mexico of Joe Paul Lack: "[O]n the scale of your TDS [total dissolved solids] from so-so to not very good, are those wells the not very good wells or the pretty good wells down there?"); Somach Decl. Ex. I at 67:12-21, 68:12-13 (questioning by Lisa M. Thompson on behalf of New Mexico of Mike McNamee regarding the water quality of wells on the witness's property and the current levels of TDS for those wells). Given the amount of discovery that has occurred relating to water quality, it is unclear how New Mexico can suddenly claim surprise.

2. New Mexico Did Not Meet and Confer in Accordance with the CMP

New Mexico's conferral with Texas to resolve its discovery dispute was notably deficient. Under section 12 of the CMP, New Mexico was required to initiate a meet-

and-confer process "immediately following the identification of the dispute . . . ." No such conferral took place.

As described above, water quality has been a topic of requests for production of documents and depositions of fact witnesses since November 2018. New Mexico objected to Texas's document request related to salinity but did not initiate a meet-and-confer process subsequent to its written objection. Somach Decl. ¶¶ 3-4.

Texas served its Rule 26(a)(2) expert disclosures on May 31, 2019. Subsequent to service of these disclosures, Stuart Somach, counsel for Texas, received an unscheduled call from David Roman, counsel for New Mexico. Somach Decl. ¶ 15. Mr. Roman raised two issues with Mr. Somach. The first dealt with Texas's Rule 26(a)(2)(C) disclosure of individuals that Texas had listed as non-retained experts. Mr. Roman expressed a view that the disclosure was too broad to allow New Mexico to properly proceed with discovery. *Id.* The second issue concerned the nature of expert testimony disclosed in Texas's Rule 26(a)(2)(B) retained expert disclosures and reports that touched on water quality and damages. He indicated that to the extent that those reports dealt with water quality, he thought them improper. *Id.* At the end of the call, Mr. Roman indicated that he would put his concerns into a letter. *Id.*

On July 3, 2019, counsel for Texas received a letter outlining Mr. Roman's concerns related to the first of the two issues described above. Somach Decl. ¶ 16. In response, Texas served a supplemental disclosure providing more definite descriptions of the topics disclosed non-retained expert witnesses' testimony would cover. *Id.* To date, New Mexico has not further complained about the sufficiency of the supplemental non-

retained expert disclosures, except perhaps as some of the non-retained expert witnesses are dealt with in the subject motion. *Id.*

With respect to the second issue, counsel for Texas never received a letter addressing those issues. Somach Decl. ¶ 17. Counsel for the parties participate in bi-weekly conference calls to discuss ongoing discovery, coordinate schedules, and confer on other matters related to case management. Somach Decl. ¶ 18. New Mexico never raised in these bi-weekly conference calls the objections it now presents to the Special Master. *Id.* Further, during these calls before the filing of the instant motion, the parties proceeded to coordinate the scheduling of the depositions of Dr. Sunding, Dr. Dorrance, and Dr. Kimmelshue. *Id.*

Thus, New Mexico's statement that it conferred with Texas "in good faith . . . in an effort to resolve this discovery dispute and obtain the relief sought . . . without Court action" (N.M. Mot. 6), has no merit. The requirement to confer " 'requires that counsel converse, confer, compare views, consult and deliberate.' " *Williams v. Board of County Comm'rs*, 192 F.R.D. 698, 700 (D. Kan. 2000) (citation omitted) (defining what is required of counsel to reasonably confer before filing motions). "The parties need to address and discuss the propriety of asserted objections. They must . . . confer . . . with a view to resolve the dispute without judicial intervention." *Cotracom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 456, 459 (D. Kan. 1999). The "quality of the contacts" is of upmost importance. *Id.* A singular telephone call does not meet this standard.

New Mexico neither initiated a timely conferral process nor a meaningful one that satisfies its obligations under the CMP. New Mexico's motion should be denied on this basis alone.

3. The Instant Motion Is Another Example of New Mexico's Repeated Attempts to Delay Trial of Texas's Claims

It bears repeating the atypical nature of New Mexico's motion. Texas disclosed *all* of its expert reports, supporting data and documents, and model files to New Mexico more than three months ago. New Mexico has not claimed in the motion that Texas failed to provide information it is required to disclose pursuant to Rule 26(a)(2) and the parties' agreed upon procedures. This is not a motion to compel. Moreover, these disclosures were *timely*. This is not a motion claiming that Texas expanded its damages theory late in the process or disclosed a new theory of damages at the eleventh hour before trial. *See Global Traffic*, 2012 U.S. Dist. LEXIS 195294, at *8-12 (denying procedurally improper motion to strike damages theory of price erosion provided by plaintiffs in their supplemental disclosure near the end of discovery). Rather, New Mexico is seeking an order to "guard against" Texas's required disclosures and prevent Texas from conducting discovery on its theory of damages, presumably so New Mexico does not have to retain its own experts to investigate and defend that theory of damages.

Yet, discovery has proceeded according to the sequence and schedule that New Mexico requested. As the Special Master is aware, when negotiating the CMP, counsel for Texas advocated for simultaneous expert disclosures at much shorter intervals so that the case could go to trial as soon as practicable. Letter to Judge Melloy from Stuart L. Somach and James DuBois Re: *State of Texas v. State of New Mexico and State of Colorado*, Supreme Court Docket No. 141 Original-Joint Texas/United States letter

(Apr. 13, 2018), Docket No. 78. Counsel for New Mexico implored the Special Master to order sequential expert disclosures at much longer intervals, including a ten-month period between Texas's expert disclosures and New Mexico's responsive expert disclosures. Letter to Judge Melloy from Marcus Rael Re: New Mexico's Position on Disputed Appendix B to Proposed Case Management Plan (Apr. 13, 2018), Docket No. 76; Tr. of In-Person Scheduling Conference 30:6-23, 39:16-40:11, 47:8-48:1, 51:20-52:16, 67:8-9, 67:21-69:1 (Aug. 28, 2018), Docket No. 157. The Special Master adopted a CMP reflecting New Mexico's requests. New Mexico now claims this schedule is not long enough to allow it to investigate and prepare the expert disclosures required of it under Rule 26(a)(2).

Discovery in this case opened on September 1, 2018, more than five and a half years after Texas sought leave to file its Complaint. In the past year, New Mexico served a request for production of documents on Texas. Somach Decl. ¶ 19. Although New Mexico has sought discovery from third parties and the United States, to date, this is the only written discovery served by New Mexico on Texas. Somach Decl. ¶¶ 19-20. New Mexico has not noticed the deposition of any Texas party witness. Somach Decl. ¶ 19. New Mexico's first notice of deposition was issued on August 30, 2019, one year after discovery opened. *Id.* In the meantime, Texas has proceeded to propound written discovery and notice the depositions of fact witnesses, all of which concerned water quality issues. Somach Decl. ¶ 5. New Mexico has been on notice of these issues for close to a year and continues to participate in discovery related to water quality matters, including the depositions of the experts whose disclosures they move to strike. Somach Decl. ¶¶ 21-24.

New Mexico's plan for discovery is, of course, left to its discretion. However, New Mexico's progress, or lack thereof, is informative, given the instant motion in which New Mexico asks the Special Master to order Texas to amend its Complaint and set new deadlines for water quality expert disclosures for all parties. Demanding amendment of the Complaint is particularly telling. Amendment of a complaint in an original action would require leave of the Supreme Court, adding possibly another year or more to the litigation before Texas could proceed on its theory of damages. *See* Tex. Mot. to Strike or for Partial J. Re: N.M.'s Countercls. and Affirmative Defenses 8-12 (Dec. 26, 2018), Docket No. 160.

With this context, New Mexico's current motion – unsupported by affidavit, applicable authority, or the common sense informing the modern rules of civil litigation – amounts to another instance in a long pattern of seeking delay. Under the current schedule, New Mexico's responsive expert reports are due on October 31, 2019, five months after Texas disclosed its expert reports. Discovery does not close for more than seven months. This is more than enough time for New Mexico to proceed according to the sequence and schedule for which it advocated.

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IV. CONCLUSION

Based upon the foregoing, Texas respectfully requests that the Special Master deny New Mexico's motion.

Dated: September 23, 2019

Respectfully submitted,

s/ Stuart L. Somach
STUART L. SOMACH, ESQ.*
ANDREW M. HITCHINGS, ESQ.
ROBERT B. HOFFMAN, ESQ.
FRANCIS M. GOLDSBERRY II, ESQ.
THERESA C. BARFIELD, ESQ.
BRITTANY K. JOHNSON, ESQ.
RICHARD S. DEITCHMAN, ESQ.
SOMACH SIMMONS & DUNN, PC
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: 916-446-7979
ssomach@somachlaw.com

**Counsel of Record*

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

CERTIFICATE OF SERVICE

This is to certify that on this 23rd day of September 2019, I caused a true and correct copy of **TEXAS'S OPPOSITION TO NEW MEXICO'S MOTION TO STRIKE TEXAS'S EXPERT DISCLOSURES ON WATER QUALITY** 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.

Respectfully submitted,

Dated: September 23, 2019

Crystal Rivera

SERVICE LIST

SPECIAL MASTER
(Service via E-Mail and U.S. Mail)

Honorable Michael J. Melloy
Special Master
United States Circuit Judge
111 Seventh Avenue, S.E. Box 22
Cedar Rapids, IA 52401-2101
Tel. 319-432-6080
TXvNM141@ca8.uscourts.gov
Judge_Michael_Melloy@ca8.uscourts.gov

Michael E. Gans, Clerk of the Court
United States Court of Appeals – Eighth Circuit
Thomas F. Eagleton Untied States Courthouse
111 South 10th Street, Suite 24.329
St. Louis, MO 63102
Tel. 314-244-2400
TXNM141@ca8.uscourts.gov

SERVICE LIST FOR ALL PARTIES AND AMICI CURIAE

PARTIES
(Service via Electronic Mail)

STATE OF TEXAS

Stuart L. Somach*
Andrew M. Hitchings
Robert B. Hoffman
Francis M. Goldsberry II
Theresa C. Barfield
Sarah A. Klahn
Brittany K. Johnson
Richard S. Deitchman
Somach Simmons & Dunn, PC
500 Capitol Mall, Suite 1000
Sacramento, CA 95814-2403
Tel. (916) 446-7979
ssomach@somachlaw.com
ahitchings@somachlaw.com
rhoffman@somachlaw.com
mgoldsberry@somachlaw.com
tbarfield@somachlaw.com
sklahn@somachlaw.com
bjohnson@somachlaw.com
rdeitchman@somachlaw.com

Secretary: Corene Rodder
crodder@somachlaw.com
Secretary: Crystal Rivera
crivera@somachlaw.com
Paralegal: Christina M. Garro
cgarro@somachlaw.com
Paralegal: Yolanda De La Cruz
ydelacruz@Somachlaw.com

Ken Paxton
Attorney General of Texas
Jeffrey C. Mateer
First Assistant Attorney General
Brantley Starr
Deputy First Assistant Attorney General
James E. Davis
Deputy Attorney General
Priscilla M. Hubenak
Chief, Environmental Protection Division
priscilla.hubenak@oag.texas.gov
Office of the Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548
Tel: (512) 463-2012
Fax: (512) 457-4644

STATE OF NEW MEXICO

Marcus J. Rael, Jr.
David A. Roman
Special Assistant Attorneys General
Robles, Rael & Anaya, P.C.
500 Marquette Ave. NW, Suite 700
Albuquerque, NM 87102
Tel. 505-242-2228
marcus@roblesrael.com
droman@roblesrael.com

Paralegal: Chelsea Sandoval
Chelsea@roblesrael.com

Bennett W. Raley
Lisa M. Thompson
Michael A. Kopp
Special Assistant Attorney General
Trout Raley
1120 Lincoln Street, Suite 1600
Denver, CO 80302
Tel. 303-861-1963
braley@troutlaw.com
lthompson@troutlaw.com
mkopp@troutlaw.com

Hector H. Balderas
New Mexico Attorney General
Tania Maestas (ext. 4048)
Deputy Attorney General
Marcus J. Rael, Jr.*
Special Assistant Attorney General
408 Galisteo Street (87501)
P.O. Drawer 1508
Santa Fe, NM 87501
Tel. 505-490-4060
hbalderas@nmag.gov
tmaestas@nmag.gov
marcus@roblesrael.com

Tania's asst.: Patricia Salazar
psalazar@nmag.gov
Tel. (505) 490-4863 (P. Salazar)

STATE OF COLORADO

Chad M. Wallace*
Senior Assistant Attorney General
Phillip J. Weiser
Attorney General of Colorado
Eric R. Olson
Solicitor General
Colorado Department of Law
1300 Broadway
Denver, CO 80203
Tel. 720-508-6281
chad.wallace@coag.gov
eric.olson@coag.gov

Cynthia H. Coffman
Attorney General of Colorado
Karen M. Kwon
First Assistant Attorney General
Colorado Department of Law
1300 Broadway
Denver, CO 80203
Tel. 720-508-6281
cynthia.coffman@coag.gov
karen.kwon@coag.gov

Paralegal: Nan B. Edwards
nan.edwards@coag.gov

UNITED STATES OF AMERICA

Noel Francisco*
Acting Solicitor General
Jeffrey H. Wood
Acting Assistant Attorney General
Ann O'Connell
Assistant to Solicitor General
U.S. Department of Justice
950 Pennsylvania Avenue
Room 5614 NW
Washington, DC 20530
Tel. (202) 514-2217
supremectbriefs@usdoj.gov

James J. Dubois*
R. Lee Leininger
Thomas K. Snodgrass
U.S. Department of Justice
Environment & Natural Resources Div.
999 18th Street
South Terrace, Ste. 370
Denver, CO 80202
lee.leininger@usdoj.gov
Tel. 303-844-1367
james.dubois@usdoj.gov
Tel. 303-844-1364
thomas.snodgrass@usdoj.gov
Tel. 303-844-7233
Paralegal: Seth C. Allison
Seth.allison@usdoj.gov
Tel. 303-844-7917

Stephen M. Macfarlane
U.S. Department of Justice
Environment & Natural Resources Div.
501 I Street, Suite 9-700
Sacramento, CA 95814
Tel. (916) 930-2204
stephen.macfarlane@usdoj.gov

Judith E. Coleman
U.S. Department of Justice
Environment & Natural Resources Div.
P. O. Box 7611
Washington, DC 20044-7611
Tel. (202) 514-3553
judith.coleman@usdoj.gov

AMICI CURIAE
(Service via Electronic Mail)

ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY

Jay F. Stein
James C. Brockmann*
Stein & Brockmann, P.A.
P.O. Box 2067
Santa Fe, NM 87504
Tel. (505) 983-3880
jfstein@newmexicowaterlaw.com
jcbrockmann@newmexicowaterlaw.com
administrator@newmexicowaterlaw.com

Peter Auh
Albuquerque Bernalillo County Water Utility Authority
P.O. Box 568
Albuquerque, NM 87103-0568
Tel. (505) 289-3092
pauh@abcwua.org

CITY OF EL PASO, TEXAS

Douglas G. Caroom*
Susan M. Maxwell
Bickerstaff Heath Delgado Acosta LLP
3711 S. MoPac Expressway
Building One, Suite 300
Austin, TX 78746
Tel. (512) 472-8021
dcaroom@bickerstaff.com
smaxwell@bickerstaff.com

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1

Maria O'Brien*
Sarah M. Stevenson
Modrall, Sperling, Roehl, Harris & Sisk, PA
500 Fourth Street N.W.
Suite 1000 (87102)
P.O. Box 2168
Albuquerque, NM 87103-2168

Main: (505) 848-1800
Direct: (505) 848-1803
Fax: (505) 848-9710
mobrien@modrall.com
sarah.stevenson@modrall.com

Shannon Gifford – Legal Assistant
shannon@modrall.com
Leanne Martony – Legal Assistant
leannem@modrall.com

James M. Speer, Jr.
c/o El Paso County Water Improvement District No. 1
13247 Alameda Ave
Clint, TX 79836-0749

HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT NO. 1

Andrew S. "Drew" Miller*
Kemp Smith LLP
919 Congress Avenue, Suite 1305
Austin, TX 78701
Tel. (512) 320-5466
drew.miller@kempsmith.com

ELEPHANT BUTTE IRRIGATION DISTRICT

Samantha R. Barncastle*
Barncastle Law Firm, LLC
1100 South Main, Suite 20 (88005)
P.O. Box 1556
Las Cruces, NM 88004
Tel. (575) 636-2377
Fax. (575) 636-2688
samantha@h2o-legal.com

Paralegal: Janet Correll
janet@h2o-legal.com

CITY OF LAS CRUCES, NM

Jay F. Stein*
James C. Brockmann
Stein & Brockmann, P.A.
P.O. Box 2067
Santa Fe, NM 87504
Tel. (505) 983-3880
Administrative Copy
jfstein@newmexicowaterlaw.com
jcbrockmann@newmexicowaterlaw.com
administrator@newmexicowaterlaw.com

Jennifer Vega-Brown
Marcia B Driggers
City of Las Cruces
City Attorney's Office
P.O. Box 2000
Las Cruces, NM 88004
Tel. (575) 541-2128
jvega-brown@las-cruces.org
marcyd@las-cruces.org

NEW MEXICO STATE UNIVERSITY

John W. Utton*
Utton & Kery, P.A.
P.O. Box 2386
Santa Fe, NM 87504
Tel. (505) 699-1445
john@uttonkery.com

General Counsel
Hadley Hall Room 132
2850 Weddell Road
Las Cruces, NM 88003
Tel. (575) 646-2446
gencounsel@nmsu.edu

NEW MEXICO PECAN GROWERS

Tessa Davidson*
Davidson Law Firm, LLC
4206 Corrales Road
P.O. Box 2240
Corrales, NM 87048
Tel. (505) 792-3636
ttd@tessadavidson.com

Paralegal: Patricia McCan
patricia@tessadavidson.com

STATE OF KANSAS

Derek Schmidt
Attorney General of Kansas
Jeffrey A. Chanay
Chief Deputy Attorney General
Toby Crouse*
Solicitor General of Kansas
Bryan C. Clark
Assistant Solicitor General
Dwight R. Carswell
Assistant Solicitor General
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
Tel. (785) 296-2215
toby.crouse@ag.ks.gov
bryan.clark@ag.ks.gov