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

ORDER

November 4, 2019

I. Summary

New Mexico moves to strike Texas's expert disclosures on water quality. New Mexico argues Texas's complaint alleges water-quantity-based Compact violations but that recent disclosures suggest Texas may be attempting to assert water-quality-based claims. New Mexico characterizes the disclosures during discovery as raising a "surprise" theory of the case amounting to an amendment of the complaint without leave of the Court. As such, New Mexico asks for relief similar in kind to a motion to suppress or a partial motion to dismiss.

The current motion nominally addressing a discovery issue is somewhat unusual—New Mexico does not ask the Special Master to compel the disclosure of anything, protect it from having to disclose anything, or amend any deadlines. Rather, New Mexico seeks an express limit on the issues and theories that may be addressed within the scope of the current complaint. According to New Mexico, such a limit would excuse New Mexico from having to choose whether to present an expert as to water-quality questions. Although unusual, New Mexico's approach is understandable in the context of an original jurisdiction action where the Court itself has granted leave for a complaint. Even under a system of notice pleading, certain matters raised in discovery may be so far removed from a complaint as to amount to a de facto enlargement of a complaint. New Mexico argues this is such a case and seeks to limit the issues in the case absent Supreme Court approval of an expanded complaint.

Texas argues in response that the disclosures New Mexico finds objectionable relate to a theory of damages or mitigation of damages consistent with Texas's complaint. Specifically, Texas describes mitigation efforts as requiring Texans to rely upon higher salinity groundwater due to shortfalls in the amount of Rio Grande surface water that New Mexico allows to reach Texas. In arguing that the water-quality disclosures are consistent with its complaint, Texas emphasizes that the

purpose of discovery is to allow parties to investigate and better understand their opponent's case, develop and disclose information concerning matters and theories to be addressed at trial and, in general, flesh out the case beyond the skeletal information relayed through the process of notice pleading. According to Texas, the disclosed information is nothing more than the disclosure of a proposed method for measuring the value of missing Rio Grande surface water.

I conclude that Texas has the better argument. As explained below, the information Texas disclosed, as described by the parties, is consistent with and relevant to a broad understanding of its complaint. It is also consistent with the purpose of civil-litigation discovery following notice pleading. New Mexico has not demonstrated that Texas is attempting to alter its theory of liability from one alleging water-quantity-based Compact violations to one alleging water-quality-based Compact violations. New Mexico's motion is denied.

II. Background

Texas's complaint alleges New Mexico has breached and is breaching the Rio Grande Compact by failing to allow Texas's share of the Rio Grande to reach Texas. The complaint, therefore, alleges Compact breaches resulting in water-quantity shortcomings. Texas does not allege expressly that upstream states are causing changes in the quality of Rio Grande water reaching Texas. Texas does not disavow such a theory, but no such arguments are suggested by the current complaint. Further, the complaint at several paragraphs makes it abundantly clear that a key technical question in this case will address the interactions between Rio Grande surface water, irrigation return flows, and hydrologically connected groundwater.

As to its quantity-based allegations, Texas asks for declaratory and injunctive relief as well as damages. Texas's complaint does not spell out a proposed method for measuring damages. Rather Texas describes its damages as "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." Complaint at ¶ 27. Texas asks the Court to "[a]ward to the State of Texas all damages and other relief . . . 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." Complaint at Demand For Relief ¶¶ 3 & 4.

In the course of discovery, in late 2018, Texas propounded interrogatories to New Mexico including several questions concerning various water-quality issues. New Mexico objected to the written discovery requests concerning water-quality issues, and Texas did not move to compel responses. During several depositions, Texas posed questions to witnesses concerning water-quality issues. New Mexico did not object to the deposition questions, and in fact, asked follow-up deposition questions as to water-quality topics. According to New Mexico's counsel, the purpose for the deposition questions was unclear, so, rather than objecting, counsel participated with follow-up questions to explore the matter and understand why it was being raised.

Then, in its disclosure of expert witnesses in spring 2019, Texas disclosed experts who address various issues concerning water quality. Texas also provided notice of its intent to issue subpoenas as to water-quality issues. Throughout summer 2019, Texas, in fact, issued several subpoenas to various persons and entities, including landowners in Texas and New Mexico. According to Texas, these subpoenas have been served and information requested under these subpoenas has been collected.

In September 2019, New Mexico moved to strike Texas's water-quality-related disclosures. In doing so, New Mexico did not provide the objected-to disclosures for the Special Master's review. The parties' descriptions of those

disclosures, however, are largely consistent with one another. The parties' disagreement and differing interpretations appear to relate to the perceived purposes for the disclosures.

In general, Texas describes its experts as addressing a practice by Texans of using groundwater to make up for shrinking surface water deliveries. Given a general alleged difference in quality between Rio Grande surface water and the groundwater sources, this practice allegedly has forced expensive changes in crop selection, reductions in crop size and quality, increased water treatment costs, and increased costs to update and maintain equipment. Texas characterizes this proposed expert witness subject matter as speaking to the issue of mitigation of damages and/or directly to a possible measurement of the value of lost water: increased costs imposed upon Texas allegedly caused by the failure of New Mexico to abide by the Compact and allow Texas to receive a quantity of Rio Grande water consistent with its Compact apportionment. Texas also argues New Mexico has been aware of Texas's pursuit and disclosure of water-quality information for a substantial amount of time such that the current motion is untimely. Further, because New Mexico is asking the Special Master to "strike" information that Texas has already disclosed, Texas argues there is no actual discovery issue for the Special Master to address.

New Mexico interprets the purpose of Texas's expert disclosures differently. According to New Mexico, Texas is attempting a belated and de facto amendment of its complaint by alleging a new theory of harm and injecting the issue of water quality into this action long after its inception. New Mexico asserts various arguments and sources of authority as to why Texas's disclosures are improper and at times characterizes Texas's disclosures as raising water-quality-based Compact breaches. I address these arguments in turn.

III. Discussion

New Mexico asserts arguments based upon Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), and Federal Rule of Evidence 702 concerning the requirement that expert testimony rest "on a reliable foundation" and be "relevant to the task at hand." Daubert, 509 U.S. at 597. New Mexico also asserts arguments based on Federal Rule of Civil Procedure 8, concerning notice pleading, and Rule 26(b)(1), which provides, in part, that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Then, citing a district court case that limited the scope of subpoenas, New Mexico characterizes Texas's expert witness disclosures and subpoenas as part of a "fishing expedition" to expand the case and lay the groundwork for new claims. Deluxe Fin. Servs., LLC v. Shaw, No. 16-CV-3065, 2017 WL 7369890, at *5 (D. Minn. Feb. 13, 2017). Based on these sources of authority, New Mexico argues that water quality is not relevant to any pending claim or defense in the case and asks the Court to "rule that evidence related to water quality, including information derived from land inspections conducted pursuant to Texas's subpoenas, is not discoverable and will not be admissible because it is not relevant to Texas's existing claims."

New Mexico seeks to apply its cited authority out of context. Whether information disclosed by Texas to New Mexico may ultimately be admissible at trial is a question for a later day. It is not a discovery question. Discoverable materials need not be limited to materials that will be admissible at trial. Fed. R. Civ. P. 26(b)(1) ("Information within this scope of discovery need not be admissible in evidence to be discoverable."); see also, e.g., Sentis Grp., Inc. v. Shell Oil Co., 763 F.3d 919, 926 (8th Cir. 2014) ("[D]iscovery is [an] investigatory tool intended to help litigants gain an understanding of the key persons, relationships, and evidence in a case and, as this case well illustrates, the veracity of those persons and purported evidence, even if the evidence discovered is later deemed not admissible.").

In fact, it is somewhat unclear what is meant by the request that the Court "strike" or not "consider" materials Texas has already disclosed. Discovery, after all, is conducted by the parties. The Court does not consider or otherwise receive, address, or comment upon materials disclosed by a party unless and until a party requests more substantive relief. The ongoing process of discovery simply does not call upon the Special Master to "consider expert disclosures" at all. Rather, in the future, perhaps at the stage of dispositive pre-trial motions, motions in limine, or at the trial itself, the Special Master may be called upon to decide whether it is appropriate to consider a party's evidence. Absent a motion to compel or resist discovery, then, it is less than clear what, at the discovery phase, it means for the Special Master to "decline[] to consider expert disclosures."

New Mexico argues otherwise, stating that, "Courts have declined to consider expert disclosures that discuss allegations not pleaded in a complaint." Mot. Strike at 12 (citing Oliver v. Ralphs Grocery Co., 654 F.3d 903, 909 (9th Cir. 2011)). In Oliver, a plaintiff sued under the ADA alleging a defendant grocery store failed to maintain proper access to its facilities. The Ninth Circuit ultimately affirmed a lower court's refusal to allow the plaintiff to use an expert to address access issues not raised in the complaint. In their current briefing, the parties disagree as to whether Oliver speaks only to unique pleading requirements for injunctive-relief claims alleging lack of access to facilities under the ADA, or whether Oliver speaks more broadly to the relationship between notice pleading and limits on the introduction of topics and theories through expert disclosures. Such arguments miss the point. The salient aspect of Oliver is that the court was being called upon to address a motion for summary judgment. As such, the case did not involve a request at the discovery stage to "strike" information that a party had disclosed. Rather, the court was asked to review the record as developed for summary judgment purposes and determine what materials could and could not be included

in that record. Nothing in Oliver speaks to the propriety of cutting off the fact-finding process of discovery.

Moreover, to the extent New Mexico seeks to quash or limit Texas's subpoenas, Texas asserts that it already has served its subpoenas and collected the desired information. In short, New Mexico does not ask the Court to protect it from a pending discovery request, quash an outstanding subpoena, or force Texas to comply with a pending discovery request.

To the extent, however, that the current motion to strike may be construed as a discovery motion, I deny the motion. Notice pleading requires only a short and plain statement of the facts and a demand for relief. Fed. R. Civ. P. 8(a). The complaint need not set forth detailed theories for measuring damages or explanations as to a complicated concept such as the value of alleged water shortfalls spanning many years. Such matters are revealed through discovery, as the point of discovery is "to narrow and clarify the basic issues between the parties, and . . . ascertain[] the facts, or information as to the existence or whereabouts of facts, relative to those issues." Hickman v. Taylor, 329 U.S. 495, 501 (1947). Revelation of theories and facts during discovery, following mere notice pleading, is designed specifically so that "civil trials in the federal courts no longer need be carried on in the dark." Id. In a sense, the point of discovery is to get the surprises out of the way prior to trial.

Discoverable materials, nevertheless, are limited to those "nonprivileged matter[s] . . . relevant to any party's pending claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). Here, relevancy is broad concept and the gravity of the case suggests proportionality should allow liberal discovery. For example, because the interconnectedness of groundwater, irrigation return flows, and surface water in the Compact area is an obvious source of disagreement in this case, it seems clear that technical modeling of water flows may factor largely

in the trial. The characteristics of these various water sources, including salinity, may factor into this modeling. At this point, the Special Master is simply unaware of what data may be necessary for model construction or model inputs. Further, Texas's pleaded damages could conceivably and reasonably be measured in many different ways. Texas pleads as damages 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." Most intuitively, it would seem this "value" would be measured as quantity shortcomings at different times. Also, intuitively, it would seem a defendant would argue any such figure should be subject to adjustment for mitigation efforts or the absence of mitigation efforts. The currently objected-to disclosures, as described by the parties, plainly are relevant to these issues. And, there is nothing asserted in the pending motion to suggest the disclosed material is somehow disproportionate "to the needs of the case." In fact, it seems unusual that a defendant would object to the disclosure of information the sets forth a description of what appear to be the plaintiff's mitigation efforts.

To the extent the current motion is not, in substance, a discovery motion, but rather, a partial motion to dismiss, I deny the motion. Because there is no pending discovery dispute that actually require the Special Master's attention, it seems clear that the true heart of the matter is New Mexico's desire to obtain an express ruling as to the permissible scope of the pending complaint *for all purposes*, not merely for discovery purposes. New Mexico has already challenged the United States' complaint, and the Court rejected that challenge. There are currently pending motions by Texas and the United States to dismiss New Mexico's counterclaims, and the Special Master will rule upon those motions in due course. As per the extant Case Management Plan, discovery remains open until May 2020 and dispositive motions are due in June 2020. In short, much is left to be developed, and opportunities will arise to address in a substantive manner the parties' actual, pleaded claims.

New Mexico may well be correct that hypothetical claims alleging Compact breaches based on the quality of water reaching Texas might fall outside a broad and reasonable interpretation of Texas's pending complaint. But Texas does not characterize its inquiries and disclosures into water quality as relating to allegations that New Mexico has harmed Texas by changing the quality of Rio Grande water that reaches Texas. Texas does not disavow such a theory, but no such theory is presently asserted. And New Mexico has provided nothing to the court showing otherwise. New Mexico, therefore, is presently seeking limitation of the complaint against claims not presently being asserted. I decline to enter an order akin to partial dismissal based upon hypothetical concerns.

New Mexico argues such an order is appropriate and necessary and compares the present situation to Montana v. Wyoming, Original 137, Mem. Op. of the Special Master on Montana's Claims Under Article V(B) (Dec. 20, 2011) (http://web.stanford.edu/dept/law/mvn/pdf/MT_v_WY_Art_V(B)_Claims_MemOp_final_12_20_2011.pdf) (Special Master's Docket available at https://web.stanford.edu/dept/law/mvn/). The special master's order in that case did, in fact, speak to the limits of a pending complaint. The order, however, was not in the nature of a discovery order. Rather, it was in the nature of a motion to amend, with directions from the special master for the parties to "submit a list of the issues of fact and law that [they] currently believe[] the Supreme Court will still need to resolve in reaching a final decision in this case." Orig. 137, Mem. Op. at 3 (Dec. 20, 2010).

There, Montana had filed a complaint on the Yellowstone River Compact and broadly alleged, as a legal matter, claims based on "Article V" of the compact. Article V included subdivisions V(A) and V(B). The special master determined that, although the complaint broadly cited "Article V", the facts as alleged related only to Article V(A). As such, the special master ruled that the pending complaint, as allowed by the Supreme Court was limited to claims arising under Article V(A).

Importantly, however, the special master in that order was careful to distinguish between his conclusions as to the permissibility of claims, on the one hand, the scope of discovery, on the other. That special master stated:

> Finally, the limited nature of Montana's current Complaint should not be used to try to unduly limit Montana's discovery. As noted already, Article V is an integrated allocation scheme, and information relevant to portions of the Compact other than Article V(A) will often be relevant to a resolution of Montana's allegations regarding pre-1950 uses. Montana, of course, must limit its discovery to information relevant to the allegations that it has currently pled, but Montana will be given reasonable latitude subject to that constraint.

Orig. 137, Mem. Op. at 18 (Dec. 20, 2011).

For the reasons already stated, Texas's disclosures appear relevant to pending claims and proportionate to the gravity of the case.

IV. Conclusion

For the reasons stated, I will deny New Mexico's motion to strike Texas's expert disclosures on water quality. Having said that, the current motion highlights the fact that the evidence necessary to prove damages may be substantially different than that required to prove breach or liability. As such, I am giving serious consideration to the issue of whether it may be appropriate to bifurcate this proceeding into separate phases to address the issues of (1) breach and liability and (2) damages. If Texas and the United States are unable to prove a breach or any liability by New Mexico, the issue of damages obviously becomes moot. If liability is established, I can foresee the issue of damages becoming extremely complicated, with issues including how to measure damages, mitigation, laches, and a myriad of other potential issues. While there may be some overlap between liability and damages, it would seem that the issues are reasonably

distinct and it may be more efficient to first determine liability (with Supreme Court review) and then move on to the damages issue if liability is established.

I want to emphasize I've made no decision on this issue but raise it only to alert the parties for their consideration and discussion. It is my intent to schedule a status conference at a later time at which all the parties will be given an opportunity to present their views on bifurcation, as well as other trial management issues.

Dated: November 4, 2019.

Honorable Michael J. Melloy
Special Master
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