

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

UNITED STATES OF AMERICA'S MOTION TO AMEND BRIEFING SCHEDULE

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UNITED STATES OF AMERICA'S MOTION TO AMEND BRIEFING SCHEDULE

The United States moves to amend the briefing schedule for the States' motion to adopt their proposed settlement decree (Sp. M. Docket No. 715) so that the United States has an opportunity to address the serious confidentiality concerns presented by the States' forthcoming motion and the documentation that may be filed to support it.

Since 2016, the States and the United States have engaged in settlement discussions under the protection of a confidentiality agreement that prohibits the disclosure of any party's confidential settlement information in any proceeding for any purpose, including to the Court, the Special Master, and non-parties, without prior written consent. *See* Agreement Concerning Compromise Discussions, Exclusion of Evidence, and Confidentiality ("Confidentiality Agreement"), Exhibit 1, at 3-4, ¶¶ 4, 6. The United States has significant concerns that, despite that unambiguous prohibition and similar prohibitions in the Special Master's Orders and Federal Rule of Evidence 408, the States' forthcoming motion and accompanying documentation will disclose confidential settlement information, in violation of the Confidentiality Agreement.

To avoid the improper disclosure of its confidential information, the United States respectfully requests that, in lieu of filing their motion to approve their proposed settlement decree with the Court, the States be required to serve their motion on the United States, which will afford the United States an opportunity to determine whether it will file objections based on confidentiality. The parties can then work to resolve those objections, and if they cannot, the United States can move for a protective order or other relief as appropriate. The United States respectfully requests that the briefing schedule be amended accordingly, as set forth below. The United States gave notice of this motion to the States, *see* Exhibit 2, and the States responded that they do not agree to it. *See* Exhibit 3.

ARGUMENT

The parties have been discussing settlement of this case since 2015. *See* Ex. 1, at 2, ¶ 1. From the outset, the parties “expect[ed] and intend[ed]” that Rule 408 would limit the admissibility of their settlement communications. *Id.* at 2; *see also* Fed. R. Evid. 408 (making evidence of “conduct or a statement made during compromise negotiations” inadmissible to “prove or disprove the validity or amount of a disputed claim”). But the parties also believed that the restrictions imposed by Rule 408 were not sufficient to protect their interests, and they negotiated additional protections. In 2016, the parties executed the Confidentiality Agreement, which recites their intent “to provide broader protection” than Rule 408 would otherwise provide. Ex. 1, at 2.

The Confidentiality Agreement imposes a bar on disclosure that is stricter than the limitation on admissibility in Rule 408 and that covers a broader range of settlement communications. The Confidentiality Agreement prohibits any party from “disclos[ing], or seek[ing] to admit another Party’s confidential settlement information into evidence, in any proceeding . . . for any purpose,” *id.* at 3, ¶ 4; prohibits any party from “disclos[ing] another Party’s confidential settlement information to persons or entities not a party to th[e] Agreement,” *id.* at 4, ¶ 6; and defines “confidential settlement information” to include “any statement, conduct, document, map, electronic file, statement or nonverbal indication of position, mental impression or other information, . . . in whatever form, . . . that is disclosed by a Party or Parties, to a Party or Parties, in the course of . . . settlement discussions,” *id.* at 2-3, ¶ 2. Thus, absent the written consent of the United States, the Confidentiality Agreement and Special Master’s Orders preclude disclosure of confidential settlement information in any proceeding for any purpose, including to the Court, the Special Master, and non-parties.

The Confidentiality Agreement protects information the United States exchanged in the settlement discussions mediated by Judge Boylan. *See* Ex. 1, at 2-3, ¶ 2 (confidential settlement information includes information disclosed “in the course of the pending or potential future settlement discussions”); *id.* at 6, ¶ 13 (confidential settlement information “shall remain subject to the provisions of th[e] Agreement whether the settlement discussions end in settlement or not”). The information shared in those discussions is also protected by Rule 408 and by the Special Master’s Orders. *See E.E.O.C. v. UMB Bank Fin. Corp.*, 558 F.3d 784, 791 (8th Cir. 2009) (Melloy, J.) (agreeing that Rule 408 is “sufficiently broad to encompass certain material in addition to actual offers of settlement,” and that “[t]he spirit of the Rule . . . supports the exclusion of certain work product, internal memos, and other materials created specifically for the purpose of conciliation”); Sp. M. Docket No. 700. As recently as August, the Special Master confirmed that his order on settlement confidentiality “remains in full force and effect,” subject only to a narrow allowance for the *amici* to view particular draft settlement documents. *See* Sp. M. Docket No. 706.¹

The United States understands that the States intend to file a motion to adopt their proposed settlement decree, notwithstanding the confidentiality concerns raised by the United States at the status conference on October 25, 2022, and in a letter to the States’ counsel on November 7, 2022. *See* Oct. 25 Hr’g Tr. 24-26; Ex. 2.² The United States has not yet seen the

¹ The Special Master required the *amici* counsel to sign a confidentiality agreement that would be circulated by the United States. *See* Sp. M. Docket No. 706. With the States’ consent, the United States drew up an addendum to the Confidentiality Agreement for the *amici* counsel’s signature. *See* Aug. 24 Hr’g Tr. 14:17-24. The States’ consent to the use of the Confidentiality Agreement for that purpose confirms that they understood the Confidentiality Agreement continued to apply to the parties’ negotiations.

² On November 3, the States announced that the Rio Grande Compact Commission would hold a special meeting on November 10 to consider a “Resolution Recommending Approval of

States’ motion to adopt their proposed settlement decree or the decree and accompanying documentation. But the States sent a draft of a proposed settlement decree to the United States on October 20, 2022. And the States have represented that they “carve[d] out” their proposed settlement decree from a potential comprehensive settlement with the United States. *Id.* at 13:5. Indeed, counsel for Texas characterized the proposed settlement decree as a “carve-out decree” in open court. *Id.* at 13:4-5; *see also id.* at 61:2.

Based on the October 20 draft and the States’ representations, the United States has reason to believe that the States’ proposed settlement decree will contain numerous provisions developed or drafted by the United States, in whole or in part. The United States also has reason to believe that the appendices to the proposed settlement decree will include modified or rewritten versions of documents originally drafted by the United States’ experts. In their response to the United States’ letter of November 7, the States “reject[ed] the notion” that the “proposed Decree and related materials are the ‘work product’ of the United States as opposed to documents developed by multiple parties.” Ex. 3, at 2. But the United States did not suggest that the proposed settlement decree and related materials—which the United States has not seen—are the United States’ work product. The United States objects to the disclosure of its confidential settlement information in breach of the Confidentiality Agreement, and the States do

the Compacting States’ Proposed Decree in Original Action 141.” Agenda, Exhibit 4. The agenda includes an executive session to discuss the litigation. The United States a letter to the States on November 7, 2022, noting that the Confidentiality Agreement bars disclosure of confidential settlement information “in any proceeding . . . for any purpose” absent prior written consent, Ex. 1, at 3 ¶ 4, and requesting that the States provide the United States with all materials to be provided to the Commission, including the proposed resolution. *See* Ex. 2. In their response to the letter, the States declined to change the agenda and declined to provide the United States with the requested materials, stating that “it would be inappropriate to provide [the United States] with materials prior to the time they are available to the public in general.” Ex. 3, at 2. As of this filing, no materials for the meeting have been posted to the Commission’s public information page, at <https://www.tceq.texas.gov/permitting/compacts/riogrande.html>.

not dispute that the proposed settlement decree and related materials contain the United States' confidential settlement information. Accordingly, the United States has significant concerns that the filing of the States' motion and accompanying documentation with the Court would disclose confidential settlement information, in violation of the Confidentiality Agreement.

Notably, "confidential settlement information" under the Confidentiality Agreement encompasses "any statement, conduct, document, map, electronic file, statement or nonverbal indication of position, mental impression or other information, . . . in whatever form, . . . that is disclosed by a Party or Parties, to a Party or Parties, in the course of . . . settlement discussions." Ex. 1, at 2-3, ¶ 2. That definition is not limited to "statement[s] or nonverbal indication[s] of position," but rather encompasses "any statement . . . or other information" disclosed during settlement discussions. *Id.*, at 2, ¶ 2. The definition likewise does not exclude documents or materials that were developed collaboratively by multiple parties, but rather encompasses "any . . . document, . . . in whatever form," disclosed during settlement discussions. *Id.*; *see, e.g.*, Aug. 24 Hr'g Tr. 25:22-26:1 (Mr. Wechsler: "[W]e take [the United States'] point [that] until these settlement documents are actually signed, they remain confidential settlement discussions and negotiations . . . and, therefore, it's hard to see how they could be made public.").

The Special Master has attempted to address the United States' concerns about confidentiality by directing the States to file their motion and supporting documentation under seal, with limited disclosure to the *amici* who signed the Confidentiality Agreement. Sp. M. Docket No. 715. But the Special Master did not have the benefit of the text of the Confidentiality Agreement when he issued that order. And as explained above, the Confidentiality Agreement precludes disclosure of confidential settlement information in any proceeding for any purpose and to any non-party. Ex. 1, at 3-4, ¶¶ 4, 6. Filing the States'

motion and supporting documentation under seal would thus not prevent disclosure to the Special Master and the Court, in violation of the Confidentiality Agreement. Moreover, the sealing of the documents may be temporary. The Special Master has suggested that the sealing of the documents could be dissolved if the proposed settlement decree is “recommended for approval to the Supreme Court.” Oct. 25 Hr’g Tr. 62:20. And the decision to allow filing under seal could be subject to challenge by a member of the press or the public, potentially resulting in the unsealing of the documents after they have been filed.

At the October 25 status conference, Judge Boylan correctly noted that “[t]he confidentiality concerns of [the United States] are real” and “worthy of more thought.” Oct. 25 Hr’g Tr. 32:24-33:1. The United States relied on the protections in the Confidentiality Agreement and Rule 408 to engage in full, frank, and candid exchanges of information with the States over many years. Federal agency personnel contributed thousands of hours to the most recent effort. The purposes of Rule 408 are “to foster open discussions and out-of-court settlements and to guard against the admission of evidence that may not fairly represent the actual value or merits of a claim.” *UMB Bank*, 558 F.3d at 791 (summarizing Advisory Committee Notes to Rule 408). And the Confidentiality Agreement intended to afford broader protection. Yet the States’ motion and accompanying documentation threaten to undermine those purposes and to violate the terms of the Confidentiality Agreement—chilling future settlement efforts, including any potential future settlement negotiations with the United States in this action.

Given the significant confidentiality issues arising under Confidentiality Agreement and Rule 408, the United States should at a minimum be afforded an opportunity to consider the

materials that will be presented to the Special Master before they are filed and to seek any appropriate protective relief.

PROPOSED SCHEDULE

The United States respectfully requests that the Special Master amend the briefing schedule as follows:

1. The States shall serve the motion to adopt their proposed settlement decree on the United States, with all supporting documentation, on or before **November 14, 2022**. The motion shall not be filed with the Court or served upon the *amici* until any issues of confidentiality are resolved by the parties or by order of the Special Master or Court.

2. The United States shall file any motion for protective relief on or before **December 5, 2022**; the States shall file any responses on or before **January 6, 2023**; and the United States shall file any reply on or before **January 14, 2023**.

3. If the United States elects not file a motion for protective relief, the States shall file their motion to adopt their proposed settlement decree, with all supporting documentation, with the Court on or before **December 7, 2022**, and the schedule for response and reply briefs, including the briefs of *amici*, shall be as stated in the Special Master's Order of October 26, 2022.

For these reasons, the United States respectfully requests that the Special Master amend the briefing schedule as set forth above.

Respectfully submitted this 8th day of November 2022,

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CERTIFICATE OF SERVICE

This is to certify that on the 8th day of November, 2022, I caused a true and correct copy of the **UNITED STATES OF AMERICA’S MOTION TO AMEND BRIEFING SCHEDULE** to be served via electronic mail upon those individuals listed on the Service List, attached hereto.

Respectfully submitted,

/s/ Seth C. Allison

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