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

STATE OF NEW MEXICO'S MOTION TO EXCLUDE THE UNITED STATES' EXPERT TESTIMONY OF IAN M. FERGUSON

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September 5, 2019

COMES NOW the State of New Mexico and respectfully moves that, pursuant to Federal Rule of Civil Procedure ("Rule") 37(c)(1), the Special Master exclude the expert testimony of Ian M. Ferguson, an expert witness disclosed by the United States on May 31, 2019, for the United States' failure to provide an expert disclosure that meets the requirements of Rule 26(a)(2)(C). As grounds therefor, New Mexico states as follows:

FED. R. CIV. P. 37(a)(1) CERTIFICATION

In accordance with Rule 37(a)(1) and Section 12 of the Case Management Plan dated September 6, 2018, as amended ("CMP"), undersigned counsel for the State of New Mexico certify that they conferred in good faith with counsel for the United States in an effort to resolve this discovery dispute and to obtain the discovery sought by this Motion without Court action. Counsel for New Mexico states that the parties were unable to come to an agreement regarding the relief sought by this Motion.

I. BACKGROUND

On May 31, 2019, the United States filed its disclosure of three expert witnesses in this matter. United States of America's Disclosure of Expert Witnesses (May 31, 2019) ("U.S. Disclosure"), attached hereto as Exhibit A. Among the three experts the United States disclosed was Dr. Ian M. Ferguson, a hydrologic engineer currently employed by the United States at the Bureau of Reclamation's Technical Service Center, Water Resources Engineering and Management Group. Unlike the United States' other two disclosed experts, Dr. Ferguson did not produce and submit a written expert report pursuant to Rule 26(a)(2)(B). Instead, citing Rule 26(a)(2)(C), the United States included in its disclosure three brief paragraphs about Dr. Ferguson's anticipated expert testimony. The first, entitled "Subject Matter," stated as follows:

> Under Fed. R. Civ. P. 26(a)(2)(C)(i), Dr. Ferguson will provide testimony on the current operations of the Rio Grande Project ("Project") including the following: (1) Project operations under the 2008 Operating Agreement for the Rio Grande Project and the Rio Grande Project Water Accounting and Operations Manual; (2) Procedures for allocating Project water, including the use of the D-1 and D-2 curves; (3) Procedures for Project water accounting, including the determination of Project allocation charges and credits; (4) and the Project's release and delivery of water from storage to Project districts and Mexico. *See* Fed. R. Civ. P. 26(a)(2)(C)(ii).

U.S. Disclosure at 2-3. Next, the United States offered a four-sentence "Summary of the Facts":

> The allocation procedure under the Operating Agreement ties the allocation to the United States of water for delivery to Mexico and to the El Paso County Water Conservation District No. 1 ("EPCWID") to historical conditions through the D1 and D2 curves, respectively. Both curves are based on historical data from 1951-1979 and thus reflect historical conditions during this period. Under the Operating Agreement, allocations to the Elephant Butte Irrigation District ("EBID") employ a diversion ratio adjustment that, in effect, "charges" EBID for the difference between the amount of water that would be available for diversion in a given year under historical conditions, as estimated by the D2 curve, and the amount of water that is available for diversion during that year. The "charge" is factored into the allocation procedure rather than applied as an allocation charge in Project accounting, which ensures that allocations to EPCWID and Mexico remain consistent with historical conditions.

Id. at 3. Finally, a paragraph entitled "Summary of Opinions" said that Dr. Ferguson would offer unspecified opinions on two questions and one of the general topics of this litigation:

> Dr. Ferguson will offer opinions on whether the D1 and D2 curves are an appropriate basis for determining Project allocations to EPCWID and Mexico consistent with historical conditions, and whether the diversion ratio adjustment is a reasonable and appropriate methodology for determining Project allocations to EBID. Dr. Ferguson will also offer opinions on the allocation and accounting of Project water under the 2008 Operation [sic] Agreement, including carryover accounting.

Id.

II. ARGUMENT

Rule 26(a)(2) of the Federal Rules of Civil Procedure[1] creates two classes of experts that have different disclosure requirements:

- First, expert witnesses "retained or specially employed [by the disclosing party] to provide expert testimony in the case or one[s] whose duties as the party's employee regularly involve giving expert testimony" are required to submit written expert reports, Rule 26(a)(2)(B), and therefore colloquially are called "reporting experts."

- Second, witnesses that are not retained or specially employed to give expert testimony or whose regular duties do not involve giving expert testimony need not submit expert reports (and thus are called "non-reporting experts"), but in lieu of an expert report, Rule 26(a)(2)(C) requires the disclosing party to state in the disclosure "(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and (ii) a summary of the facts and opinions to which the witness is expected to testify." Rule 26(a)(2)(C)(i)–(ii).

As further explained herein, the United States' disclosure of Dr. Ferguson as a non-reporting expert is deficient under the Rule and causes ambiguity and surprise to New Mexico. Specifically, the United States has failed to comply with the summary disclosure requirements of Rule 26(a)(2)(C) by not adequately disclosing the subject matter, facts, and opinions about which Dr. Ferguson will testify. This failure makes it difficult for New Mexico to assess the validity and reliability of Dr. Ferguson's opinions or know how it needs to depose Dr. Ferguson, request documents relevant to his testimony, or retain a rebuttal witness for his expected testimony. New Mexico likewise cannot determine whether it should challenge the admissibility of Dr. Ferguson's expert testimony under the *Daubert* line of cases. To sanction the United States' failure to satisfy Rule 26(a)(2)(C) and to remedy the prejudice it causes to New Mexico, the Special Master should exclude Dr. Ferguson's expert testimony from trial in accordance with Rule 37(c)(1).

[1] *See* September 2018 Case Management Order, ¶ 8 (Rule 26(a)(2) generally applies to this case).

A. The United States' summary expert disclosure of Dr. Ferguson violates Rule 26(a)(2)(C) by failing to disclose his actual opinions and failing to adequately summarize the subject matter of his expected testimony and the facts upon which it will rely.

By not listing the actual opinions Dr. Ferguson will offer at trial or providing details about the facts (including calculations) upon which those opinions are based, the United States' summary disclosure violated Rule 26(a)(2)(C) and failed to inform New Mexico and the other parties about his expected testimony. For expert witnesses like Dr. Ferguson who are designated as non-reporting experts, a party must disclose the subject matter, facts, and opinions to which the expert will testify. Rule 26(a)(2)(C). This "summary disclosure" requirement for non-reporting experts was added by amendments to the Rule promulgated by the Court in 2010, and while these summary disclosures are meant to be "less extensive" than the expert reports required by Rule 26(a)(2)(B), Fed. R. Civ. P. 26, Advisory Committee's Note to the 2010 Amendments, they nonetheless are designed to serve the same purposes as full expert reports: to efficiently disclose the substance of any expert opinions to the opposing parties and thereby remove any surprise, *Skyeward Bound Ranch v. City of San Antonio*, 2011 WL 2162719, at *2 (W.D. Tex. Jun. 1, 2011).

In order to serve that purpose, a Rule 26(a)(2)(C) summary disclosure must state with particularity the opinions to which the expert will testify and the specific facts upon which such opinions are based. *See Meredith v. Int'l Marine Underwriters*, 2012 WL 3025139, at *8 (D. Md. July 20, 2012) ("[T]he Court understands the rule's reference to 'facts' to include those facts upon which the witness' opinions are based, and 'opinions' to include a precise description of the opinion, rather than vague generalizations."); *Pineda v. City & Cty. of San Francisco*, 280 F.R.D. 517, 523 (N.D. Cal. 2012) (excluding ten non-reporting witnesses and requiring supplemental disclosures for three others for failure to provide sufficient Rule 26(a)(2)(C) summary disclosures of the facts and actual opinions to which the experts will testify). As the district court stated in

Cooke v. Town of Colorado City, 2013 WL 551508, at *5 (D. Ariz. Feb. 13, 2013), "[a]n opposing party should be able (and be entitled) to read [a Rule 26(a)(2)(C)] expert disclosure, determine what, if any, adverse opinions are being proffered[,] and make an informed decision as to whether it is necessary to take a deposition and whether a responding expert is needed." Expert disclosures also enable an opposing party to determine whether to move to disqualify expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its successor cases. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999); *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 757–58 (7th Cir. 2004).

In *Cooke*, the plaintiffs disclosed several medical witnesses and stated that each would testify "concerning the medical condition of Plaintiff Ronald Cooke, their diagnoses, the physical limitations on Mr. Cooke, [and] the facts establishing the extent of his disability. . . ." *Cooke*, at *4. However, the district court ruled that the disclosure, by merely revealing that "the witness[es] *will* have opinions in certain areas . . . fail[ed] to state *what the opinions are*, and the factual basis for those opinions." *Id.* (first emphasis added). Because they did not even attempting to inform the opposing party of the opinions the experts would offer on the described topics, or even state the facts supporting those opinions, the court ruled that the plaintiffs' disclosures were "woefully inadequate and violate Rule 26(a)(2)(C)." *Id.*

Other courts have ruled similarly when a party fails to disclose an expert's actual opinions or does not fully summarize the facts on which the expert relies. *Gorrell v. Sneath*, 2013 WL 4517902, at *3 (E.D. Cal. Aug. 26, 2013); *see also Davis v. GEO Grp.*, 2012 WL 882405, at *3 (D. Colo. Mar. 15, 2012) (finding that a disclosure that an expert "'is expected to offer testimony about his evaluation of Plaintiff and Plaintiff's emotional distress' . . . states nothing about the facts and opinions to which [the expert] will testify."); *Little Hocking Water Ass'n, Inc. v. E.I.*

DuPont de Nemours and Co., 2015 WL 1105840, at *6 (S.D. Ohio Mar. 11, 2015) (stating that a summary of an opinion "expresses a judgment"). In *Gorrell*, for instance, a magistrate judge ruled that "although the defendants identified the general topics to which [its experts] would testify, they failed to provide any facts or opinions regarding the topics." *Gorrell*, at *3. In so ruling, the court concluded that disclosing that an expert would testify as to "whether [certain] medications can cause a 'false positive,'" but not disclosing the experts' actual opinions on that question or describing their methodologies in reaching those opinions, failed to satisfy Rule 26(a)(2)(C) and required supplemental disclosures summarizing the facts and opinions to which the experts would testify. *Id.* at *3–4. More egregiously, in *Continental Casualty Co. v. F-Star Property Management, Inc.*, 2011 WL 2887457, at *7 (W.D. Tex. Jul. 15, 2011), the party's expert disclosures included the subject matter that certain non-reporting experts would testify about but wholly failed to summarize the facts and opinions to which the expert would testify, even after the opposing party requested supplemental disclosures. The court thus concluded without difficulty that the party's disclosures were deficient under Rule 26(a)(2)(C)(ii) and warranted exclusion of those experts' testimony. *Id.* at *7–8.

In this case, the United States' summary disclosure for Dr. Ferguson fails to satisfy Rule 26(a)(2)(C) in several respects. Most crucially, the United States fails to even disclose what Dr. Ferguson's expert opinions will be. The summary disclosure states that Dr. Ferguson "will offer opinions" about *whether* the D-1 and D-2 curves and the diversion ratio adjustment are an appropriate basis for determining Project allocations. U.S. Disclosure at 3. But a proper disclosure would how Dr. Ferguson will answer these stated questions and disclose the basis for his answer, not simply state that he "will offer opinions" about them. *See Cooke*, at *4; *Gorrell*, at *3–4. Likewise, the United States notes that Dr. Ferguson "will offer opinions" about "the allocation and

accounting of Project water under the 2008 Operat[ing] Agreement, including carryover accounting." U.S. Disclosure at 3. But stating that Dr. Ferguson "will offer opinions" about this general topic fails to state what Dr. Ferguson's opinions actually are, leaving New Mexico in the dark. *See Ogle v. Koorsen Fire & Security, Inc.*, 336 F. Supp. 3d 874, 877 n.2 (S.D. Ohio 2018) (fact that a party can depose an expert to learn the substance of the expert's expected testimony does not excuse noncompliance with Rule 26(a)(2)). These omissions demonstrate that the United States has failed to comply even with the low bar set by Rule 26(a)(2)(C)(ii).

Additionally, the United States' summary of the facts about which Dr. Ferguson will testify provides general statements about historical Project allocations, about the D2 curve, and about the 2008 Operating Agreement, but it does not provide any calculations or other underlying facts concerning historical allocations, the D2 curve allocation procedures, or the 2008 Operating Agreement. In the absence of the actual opinions Dr. Ferguson will proffer, the United States' disclosure also does not demonstrate whether or how the few disclosed facts are connected to and form the basis for each of Dr. Ferguson's anticipated opinions on these stated topics of testimony. To comply with Rule 26(a)(2)(C), the United States must not only disclose Dr. Ferguson's expert opinions, but also include a summary of all of the facts upon which his opinions rely so that New Mexico can satisfactorily analyze his anticipated testimony and seek discovery on relevant issues.

Another major consequence of the United States' non-compliance with Rule 26(a)(2)(C) is that New Mexico cannot determine whether it should challenge the admissibility of Dr. Ferguson's expert testimony under Federal Rule of Evidence 702 and the *Daubert* line of cases. Without a summary of Dr. Ferguson's anticipated expert opinions and the facts upon which they rely, New Mexico simply is unable to assess whether those opinions are based on scientific, technical, or other specialized knowledge or skills that he possesses and whether those opinions

will help the trier of fact to understand or determine a fact in issue. Fed. R. Evid. 702(a). Without knowing the opinions about which Dr. Ferguson will testify and the facts upon which they are based, New Mexico also is unable to know whether a meritorious argument can be made that those opinions are not based on sufficient facts or data, are not the product of reliable principles or methods, or were not arrived at through a reliable application of such principles or methods to the facts of this case. Fed. R. Evid. 702(b)–(d).

Summary disclosures under Rule 26(a)(2)(C) concededly can be less extensive than full expert reports, but the United States' three-paragraph disclosure—particularly in a case of this magnitude and for an expert who apparently intends to offer opinions on a wide range of topics that are hotly disputed in this case—does not satisfy the Rule and fails to serve the Rule's purposes of providing informative disclosures and preventing surprise. Therefore, as discussed in Section II.B below, the Special Master should exclude all of Dr. Ferguson's expert testimony.

B. To sanction and remedy the United States' discovery violations pursuant to Rule 37(c)(1), the Special Master should exclude the expert testimony of Dr. Ferguson or require amended expert disclosures that comply with Rule 26(a)(2).

To remedy the United States' Rule 26(a)(2) violations, New Mexico moves the Special Master to issue sanctions under Rule 37(c)(1) by excluding Dr. Ferguson's expert testimony. Under Rule 37(c)(1), "if a party fails to provide the information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." The party that violates Rule 26 bears the burden of demonstrating that the violation was substantially justified or harmless such that exclusion is not required. *R&R Sails, Inc. v. Ins. Co of Penn.*, 673 F.3d 1240, 1246 (9th Cir. 2012); *Eldridge v. Gordon Brothers Grp., L.L.C.*, 863 F.3d 66, 85 (1st Cir. 2017). Otherwise, a court may exclude the expert witness of a party who provides

a disclosure that is insufficient under Rule 26(a)(2) or, alternatively, order that the party supplement the disclosure to comply with Rule 26(a)(2)(B) or (C), as applicable. *See Pineda*, 280 F.R.D. at 520, 523; *Gorrell*, at *3; *see also Vanderberg v. Petco Animal Supplies Store, Inc.*, 906 F.3d 698, 703 & n.3 (8th Cir. 2018) (exclusion is discretionary and a court may order additional or alternative sanctions). *But see* 1 Steven S. Gensler, *Federal Rules of Civil Procedure: Rules and Commentary* at 1107 (2019) (noting that some courts have held that exclusion is automatic and mandatory). Excluding the testimony of an expert witness as a sanction for Rule 26(a)(2) violations, or alternatively ordering a party to supplement its expert disclosures, helps to achieve the goals of Rule 26, which are to increase efficiency, reduce unfair surprise and prejudice, and deter discovery violations generally and in the specific case at hand. *See Schultz v. Ability Ins. Co.*, 2012 WL 5285777, at *5 (N.D. Iowa Oct. 25, 2012); *Skyeward Bound Ranch*, at *2; *Bake v. Ace Advertisers' Serv., Inc.*, 153 F.R.D. 38, 40 (S.D.N.Y. 1992).

As stated above, it is the United States' burden to show that its violations of Rule 26(a)(2)(C) were substantially justified or harmless and therefore do not warrant sanctions. *See R&R Sails*, 673 F.3d at 1246. The United States cannot meet either standard. First, the United States has offered no justification for its non-compliance with Rule 26(a)(2), especially its failure to disclose Dr. Ferguson's actual opinions, contrary to the text of the Rule and well-established precedent requiring it. Second, the United States' violations are not harmless, as New Mexico is left guessing about the substance of Dr. Ferguson's expert testimony, whether it needs to depose him about his undisclosed expert opinions, and whether it could challenge his testimony under *Daubert*. These uncertainties will require additional expenses from New Mexico to prepare for trial, an outcome Rule 37(c)(1) is meant to protect litigants against. The United States' tactical

decision to provide insufficient information about its non-reporting expert witnesses thus has and will prejudice New Mexico and impede its ability to prepare its case for trial.

Exclusion of Dr. Ferguson's testimony is the proper remedy in this instance because it eliminates any surprise that may result from Dr. Ferguson's testimony and serves the deterrence goals of Rule 37. During the conferral process for this Motion, the United States refused to supplement its disclosures to provide additional detail about Dr. Ferguson's anticipated testimony under Rule 26(a)(2)(C). Based on what little information the United States did disclose, Dr. Ferguson's testimony appears to be central to some of the hotly disputed issues in this case, yet the United States' refusal to supplement obfuscates the basis of Dr. Ferguson's anticipated expert opinions, not to mention withholds what those opinions even are. Based on that refusal, New Mexico remains vulnerable to surprise at trial if Dr. Ferguson provides expert opinion testimony. Thus, New Mexico urges the Special Master to exclude Dr. Ferguson's expert testimony in its entirety.

However, if the Special Master decides not to implement Rule 37(c)(1)'s exclusion sanction, then at a minimum the Special Master should order the United States to amend its disclosures and supplement them as required by Rule 26(a)(2)(C), and to furnish New Mexico a reasonable opportunity after the supplement occurs to depose Dr. Ferguson, request other discovery related to his expected expert testimony, and designate rebuttal witnesses as needed.

III. CONCLUSION

By withholding information about Dr. Ferguson's anticipated expert testimony that is required to be disclosed by Rule 26(a)(2)(C), the United States' disclosure creates a risk of surprise and leaves New Mexico guessing as to the substance of Dr. Ferguson's expected expert testimony, which is contrary to the goals of the Federal Rules of Civil Procedure and the Case Management

Order in this case. The Special Master therefore should exclude the expert testimony of Dr. Ferguson as a sanction for the United States' actions.

Respectfully submitted: September 5, 2019.

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EXHIBIT A

No. 141, Original

In the

SUPREME COURT OF THE UNITED STATES

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Plaintiff,
v.

STATE OF NEW MEXICO and
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OFFICE OF THE SPECIAL MASTER

UNITED STATES OF AMERICA'S DISCLOSURE OF EXPERT WITNESSES

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EXHIBIT A

Pursuant to Section 6.2.2 of the September 10, 2018 Case Management Plan, as amended, and Fed. R. Civ. Pro. 26(a)(2), the United States of America ("United States") respectfully discloses its expert witnesses, as follows:

I. Jean M. Moran, P.G., C. Hg., Senior Hydrogeologist, Stetson Engineers, Inc., 785 Grand Ave., Suite 202, Carlsbad, CA 92008. Ms. Moran will provide expert testimony on the subjects of surface water-groundwater interaction, hydrogeologic modeling with respect to the Rincon and Mesilla Valleys including the Rio Grande Project area, and the impacts on Rio Grande flows of groundwater pumping in New Mexico. Pursuant to Fed. R. Civ. P. 26(a)(2)(B)(i)-(vi), a written report prepared and signed by Ms. Moran is submitted concurrently herewith. Electronic copies of the references listed in her report, including model code and files that she reviewed, have been transmitted directly to Veritext on a hard or flash drive for uploading to the Veritext Vault.

II. Nicolai Kryloff, Project Historian, Historical Research Associates, Inc., 419 Seventh Street, NW, Suite 403, Washington, D.C., 20004. Mr. Kryloff will provide expert testimony on the history of the Rio Grande Compact, the history of the Rio Grande Project, and the history of surface water and groundwater development below Elephant Butte Reservoir. Pursuant to Fed. R. Civ. P. 26(a)(2)(B)(i)-(vi), a written report prepared and signed by Mr. Kryloff is submitted concurrently herewith. Mr. Kryloff has not previously testified as an expert at trial or by deposition.

III. Ian M. Ferguson, Ph.D., P.E. Dr. Ferguson is a Hydrologic Engineer from the Bureau of Reclamation's Technical Service Center, Water Resources Engineering and Management Group, in Denver, Colorado, whose ordinary duties do not include providing expert testimony. For his work on this matter, Dr. Ferguson has received no compensation in addition to the salary he receives as a federal employee.

A. <u>Subject Matter</u>

Under Fed. R. Civ. P. 26(a)(2)(C)(i), Dr. Ferguson will provide testimony on the current operations of the Rio Grande Project ("Project") including the following: (1) Project operations under

the 2008 Operating Agreement for the Rio Grande Project and the Rio Grande Project Water Accounting and Operations Manual; (2) Procedures for allocating Project water, including the use of the D-1 and D-2 curves; (3) Procedures for Project water accounting, including the determination of Project allocation charges and credits; (4) and the Project's release and delivery of water from storage to Project districts and Mexico. *See* Fed. R. Civ. P. 26(a)(2)(C)(ii).

B. Summary of the Facts

The allocation procedure under the Operating Agreement ties the allocation to the United States of water for delivery to Mexico and to the El Paso County Water Conservation District No. 1 ("EPCWID") to historical conditions through the D1 and D2 curves, respectively. Both curves are based on historical data from 1951-1979 and thus reflect historical conditions during this period. Under the Operating Agreement, allocations to the Elephant Butte Irrigation District ("EBID") employ a diversion ratio adjustment that, in effect, "charges" EBID for the difference between the amount of water that would be available for diversion in a given year under historical conditions, as estimated by the D2 curve, and the amount of water that is available for diversion during that year. The "charge" is factored into the allocation procedure rather than applied as an allocation charge in Project accounting, which ensures that allocations to EPCWID and Mexico remain consistent with historical conditions.

C. Summary of Opinions

Dr. Ferguson will offer opinions on whether the D1 and D2 curves are an appropriate basis for determining Project allocations to EPCWID and Mexico consistent with historical conditions, and whether the diversion ratio adjustment is a reasonable and appropriate methodology for determining Project allocations to EBID. Dr. Ferguson will also offer opinions on the allocation and accounting of Project water under the 2008 Operation Agreement, including carryover accounting.

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EXHIBIT A

Respectfully submitted this 31st day of May, 2019,

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STATE OF NEW MEXICO and
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Defendants.

_____♦_____

OFFICE OF THE SPECIAL MASTER

_____♦_____

STATE OF NEW MEXICO'S CERTIFICATE OF SERVICE

_____♦_____

This is to certify that on the 5th of September, 2019, I caused true and correct copies of the **State of New Mexico's Motion to Exclude the United States' Expert Testimony of Ian M. Ferguson** to be served by e-mail and U.S. Mail on the Special Master and by e-mail to all counsel of record and interested parties on the Service List, attached hereto.

Respectfully submitted this 5th day of September, 2019.

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