

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 SET A DATE CERTAIN
FOR DISCLOSURE OF SUPPLMENTAL EXPERT REPORTS
AND TO REQUIRE COMPLIANCE WITH FRCP RULE 26(e)(2)**

◆

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July 22, 2020

Defendant State of New Mexico (“New Mexico”) moves the Special Master to require the parties to comply with Federal Rule of Civil Procedure 26(e), specifically by (1) setting a date certain for all Parties for filing any further supplemental expert reports, and (2) confirming the limited scope of any such supplemental reports. New Mexico has sought the position of all Parties. New Mexico has discussed this issue with Texas and the United States, and Texas and the United States are willing to discuss the issue further at the July 24, 2020 Status Conference. Colorado could not be reached to discuss the motion or issues therein; Colorado was provided with the motion in advance of filing. In support hereof, New Mexico states as follows:

BACKGROUND

The parties in this litigation have been engaged in expert discovery for well over a year. The history of the deadlines for the Parties’ expert reports is as follows:

- On September 6, 2018, the Special Master adopted a case management plan that included deadlines for disclosure of expert reports. Texas and the United States were required to disclose their expert reports on February 1, 2019. New Mexico’s expert disclosures were required on July 1, 2019. Texas and the United States were required to file their expert rebuttals on September 1, 2019. New Mexico was required to file its rebuttal reports on November 1, 2019.
- This schedule was then amended: first, by request of Texas and the United States, *see* Letter to Judge Melloy from the State of Texas and the United States of America (Nov. 6, 2018) *and* November 21, 2018 Amendment to Case Management Plan; and second, in response to the federal government shutdown of early 2019, *see* January 31, 2019 Amendment to Case Management Plan.

- Following these amendments, Texas’s and the United States’ initial expert disclosure deadline was May 31, 2019, New Mexico’s initial expert disclosure deadline was October 31, 2019, Texas’s and the United States’ rebuttal expert disclosure deadline was December 30, 2019, and New Mexico’s expert rebuttal disclosure deadline was March 27, 2020. Texas and the United States filed their rebuttal disclosures on December 30, 2019 and added ten (10) new retained experts and non-retained experts to their disclosures.
- Due to the delays caused by COVID-19 and the amount of discovery (including expert depositions) left to be accomplished, the Special Master amended the Trial Management Schedule, setting New Mexico’s rebuttal disclosure deadline to June 15, 2020. *See* May 5, 2020 Order and Amendment to Trial Management Schedule.

The very same week that the Special Master issued his Amendment to Trial Management Schedule, Texas and the United States each produced “supplemental” expert reports¹ that offered an assortment of *new opinions* about New Mexico’s Integrated Lower Rio Grande Model, which had been fully disclosed on October 31, 2019 and ostensibly addressed by Texas and the United States in their December 30, 2019 rebuttal reports. New Mexico immediately raised concerns about the propriety of these reports being characterized as supplemental, and the Special Master considered the issue at the May 15, 2020 status hearing. In the interest of developing a full record, New Mexico did not move to strike these reports as untimely, but instead requested an additional extension of its rebuttal deadline until July 15, 2020 specifically to allow the New Mexico modeling experts sufficient time to address the *newly raised* issues from Texas and the

¹ On May 6, 2020, Texas disclosed a 91-page “Supplemental Rebuttal Report” by Adolph (Shane) Coors. On May 6, 2020, the United States disclosed a 23-page “Second Supplemental Disclosure” by Jean M. Moran.

United States . The Special Master granted New Mexico’s request. *See* May 15, 2020 Hearing Tr. at 35:3-18; May 26, 2020 Order.

New Mexico filed its non-modeler expert rebuttals on June 15, 2020 and its modeler expert rebuttal reports on July 15, 2019.

However, New Mexico has reason to believe that *at least Texas intends to file yet more “supplemental” expert reports with new analysis or opinions.* On May 28, 2020, New Mexico resumed the deposition of Texas expert Bill Hutchison, a Texas modeling expert who had filed his rebuttal report on December 30, 2019. During this deposition, Dr. Hutchison repeatedly indicated that his analysis was ongoing and that his analyses were incomplete. *See, e.g.,* May 28, 2020 Depo. Tr. at 10:20-25; 70:18-71-19; 150:17-22; 174:20-175:9 (attached as **Exhibit A**). Similarly, on June 8, 2020, New Mexico took the deposition of Texas expert Scott Miltenberger. During this deposition, he too indicated that his analysis was ongoing and could be subject to supplementation if he were presented with additional topics to consider by Texas. *See, e.g.,* June 8, 2020 Depo. Tr. at 134:15-137:2; 151:17-23 (attached as **Exhibit B**). In light of this deposition testimony, New Mexico has serious concerns that *Texas and the United States are still not done providing new and untimely expert opinions.*

Therefore, New Mexico requests that the Special Master (1) set a date certain for submission of any supplemental expert reports, and (2) confirm the limited scope of any pending supplemental expert opinions must be consistent with what is permitted by the Federal Rules of Civil Procedure and the relevant case law..

LEGAL STANDARD

Rule 26(a)(2)(B)(i) requires that a testifying expert provide a written report containing “a complete statement of all opinions the witness will express and the basis and reasons for them . .

. .” The purpose of this rule is to prevent unfair surprise at trial and to permit the opposing party to prepare rebuttal reports, depose the expert in advance of trial, and to prepare for depositions and cross-examination at trial. *Minebea Co., Ltd. v. Papst*, 231 F.R.D. 3, 5-6 (D.D.C. 2005). Rule 26(e)(1)(A) permits a party to supplement an expert report if the party “learns that in some material respect the information disclosed is incomplete or incorrect” The “narrow purpose” of allowing supplementation is to “correct[] inaccuracies or add[] information that was not available at the time of the initial report.” *Id.*; *Coles v. Perry*, 217 F.R.D. 1, 3 (D.D.C. 2003) (same); *Keener v. United States*, 181 F.R.D. 639, 640 (D. Mont. 1998) (same). In short, a party may not offer new opinions under the guise of supplementation. *See, e.g., Beller ex rel. Beller v. United States*, 221 F.R.D. 689, 695 (D.N.M. 2003) (striking “supplemental” report that did not correct errors or inaccuracies in the initial report but instead offered “broader” and “different” opinions than those previously offered); *see also In re Ready-Mixed Concrete Antitrust Litig.*, 261 F.R.D. 154, 160 (S.D. Ind. 2009) (“*Ready-Mixed Concrete*”) (striking new expert opinion offered as a supplement); *Akeva L.L.C. v. Mizuno Corp.*, 212 F.R.D. 306, 310 (M.D.N.C. 2002) (striking new opinion by previously disclosed expert). It is black-letter law that Rule 26(e) “does not grant a license to file a supplemental report merely because one wants to.” *U.S. ex rel. McBride v. Halliburton Co.*, 272 F.R.D. 235, 237 (D.D.C. 2011). *See also Minebea Co. Ltd.*, 231 F.R.D. at 6 (holding that Rule 26(e) “does not permit parties to file supplemental reports whenever they believe such reports would be ‘desirable’ or ‘necessary’ to their case”). Failure to enforce the provisions of Rule 26(e)(1) “would create a system where preliminary reports could be followed by supplementary reports and there would be no finality to expert reports, as each side, in order to buttress its case or position, could ‘supplement’ existing reports and modify opinions previously given.” *Beller*, 221 F.R.D. at 695.

ANALYSIS

Although there are no current supplemental expert disclosures that raise concerns inasmuch as the Special Master allowed New Mexico experts to address the new materials and opinions from Texas expert Shane Coors and United States expert Jean Moran in New Mexico's July 15 rebuttals, this motion seeks to address New Mexico's significant concern that the Texas and the United States intend to continue to disrupt the orderly expert disclosure process contemplated by the Special Master by continuing to submit new opinions in the guise of "supplemental" reports. Based on Texas and the United States' Coors and Moran May 2020 "supplemental" reports, and the comments of Texas deponents Hutchison and Miltenberger, Texas and the United States apparently believe they can continue to provide new opinions by any of their twenty-six (26) disclosed expert witnesses at any time. This circumvention of the clear intent of the Special Master's Trial Management Schedule and the Federal Rules of Civil Procedure should not be allowed.

I. The Special Master Should Enforce the Standard for Proper Supplemental Opinions

As outlined above, a supplemental report is proper only where (a) the expert is correcting inaccuracies in his/her previously-submitted report, or (b) the expert is adding or modifying previously-stated opinions that was not available when the report was drafted. *E.g., Halliburton Co.*, 272 F.R.D. at 237. That is, the scope of a supplemental report is directly tied to previously-expressed expert opinions, and New Mexico does not dispute the valid use of supplemental opinions. Courts have regularly held that supplemental reports and supplemental rebuttal reports should be struck when they are not based on newly disclosed or discovered information. For

example, the plaintiff in *Ready-Mixed Concrete* served a supplemental expert report as an attachment to its response to the defendant's *Daubert* motion. 261 F.R.D. at 158. The court found that the supplemental report offered "a host of new detailed analyses . . . none of which was developed in the original report" and "reaches new conclusions." *Id.* at 159. The court concluded that the report was not supplemental, but instead contained "entirely new expert opinions which therefore must be stricken." *Id.* at 160. The court also noted that "the purpose of supplementary disclosures is just that – to supplement. Such disclosures are not intended to provide an extension of the expert designation and report production deadline." *Id.* at 159 (internal quotation marks and citations omitted).

As another example, the court in *Beller* struck a supplemental expert report where the Texas and the United States' expert attempted to offer opinions that were not stated in her prior report. In that case, the expert's initial opinions were based on a theory that the agency defendant had no policies in place prohibiting the use of government vehicles by intoxicated employees. *Beller*, 221 F.R.D. at 691. After realizing that policies prohibiting the conduct at issue did exist, the expert "changed the thrust of her opinion," claiming that the agency violated its policy by permitting the employee to drive a government vehicle. *Id.* at 691-92. The court struck the supplemental report, stating:

Plaintiffs argue that [the expert] does not offer new opinions. This is simply not the case. New opinions are offered, and those opinions did not appear in the [previous] expert report. This is not a case where the [expert] has retracted an opinion previously offered, or set out to correct an error; rather, as [the defendant] argues, [the expert's] opinions have simply been 'strengthened,' 'broadened' and 'expanded.'

Id. at 692. (internal citations omitted). The *Beller* court continued, noting that ***permitting a litigant to offer new opinions under the guise of supplementation "would create a system where preliminary reports could be followed by supplementary reports and there would be no***

finality to expert reports, as each side, in order to buttress its case or position, could ‘supplement’ existing reports and modify opinions previously given.” *Id.* at 695 (emphasis added).

The problem identified in *Beller* is exactly what has occurred already in this case and seems likely to continue. As with the “supplemental” reports of Shane Coors and Jean Moran, the deposition testimony provided by Texas’ experts indicates that new opinions are still being formulated. While the Special Master remedied this problem with respect to Coors and Moran by giving New Mexico an extra month to digest and rebut the new opinions, this solution is not sustainable and constitutes an abuse of the normal course of the submission of expert opinions as well as this Court’s Trial Management Schedule. New Mexico therefore requests that the Special Master enter an order confirming that any supplemental report filed from this day forward be stringently limited to either (a) correct inaccuracies in a prior report, or (b) modify a previous report based on information that was not available at the time of the expert’s initial or rebuttal report, and that any supplemental report that expands upon these narrow purposes will be subject to strike. *Minebea Co.*, 231 F.R.D. at 5-6.

II. The Special Master Should Set a Date by which All Supplements Must Be Provided

As outlined above, expert discovery has been ongoing in this case for more than a year, and Texas and the United States have had possession of New Mexico’s experts’ reports and the Integrated Lower Rio Grande Model since October 2019. While the purpose of discovery is to permit the parties to develop their theories of the case and supporting evidence, Texas and the United States’ expert opinions/analyses as to the relevant issues, and specifically the Integrated Lower Rio Grande Model, should not be moving targets for New Mexico simply because the Texas and the United States are not happy with the results of New Mexico’s integrated model.

Texas and the United States' current posture seems to indicate that supplement after supplement expressing new opinions – that is, sur-rebuttal after sur-rebuttal – is to be expected absent guidance from the Special Master.

To assure the orderly progress of the expert disclosures and discovery in this case, New Mexico requests the Special Master require all parties submit final supplemental expert reports, limited in scope as required and as set forth above, on or by September 15, 2020. This date gives all parties adequate time to digest all discovery exchanged by the discovery deadline of August 31 and have their experts address it as necessary within the confines of appropriate supplementation. Setting such a deadline in this complex litigation will benefit all parties by providing finality as to the expert opinions to be considered and presented at trial and promoting efficiency by obviating the need for an undetermined but potentially large number of follow up depositions after the close of discovery and during the six (6) weeks scheduled for motion practice.

CONCLUSION

For the foregoing reasons, New Mexico respectfully requests that the Special Master enter an order granting the requested relief as follows:

1. Requiring any supplemental expert reports be filed on or by September 15, 2020; and
2. Mandating that the scope of any further supplemental reports be limited to correcting inaccuracies in former reports or is adding information related to the stated opinions that was not available when the report was drafted.

Respectfully submitted,

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OFFICE OF THE SPECIAL MASTER

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STATE OF NEW MEXICO'S CERTIFICATE OF SERVICE

◆

This is to certify that on the 22nd of July, 2020, I caused a true and correct copy of the **State of New Mexico's Motion to Set a Date Certain for Disclosure of Supplemental Expert Reports and to Require Compliance with FRCP Rule 26(e)(2)** to be served by e-mail upon all counsel of record and interested parties on the Service List, attached hereto.

Respectfully submitted this 22nd day of July, 2020.

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