

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

UNITED STATES OF AMERICA

PLAINTIFF

VS.

CIVIL ACTION NO.: 3:16-CV-00622-CWR-FKB

THE STATE OF MISSISSIPPI

DEFENDANT

**THE STATE OF MISSISSIPPI'S MEMORANDUM
IN SUPPORT OF MOTION TO STRIKE**

Introduction

The Court conducted a telephonic hearing in this case on April 27, 2020 (April 27 Hearing). The Court authorized the United States to submit a Response and a Proposed Order regarding the limited issues concerning the Special Master that were discussed during the April 27 Hearing. But the United States' Response (Dkt. 247) and Proposed Order (Dkt. 247-2) go far beyond what the Court authorized. For example, the United States went so far as to completely rewrite this Court's Order Appointing Special Master (Dkt. 241) (Appointment Order). A complete rewrite of the Appointment Order was not discussed nor authorized during the April 27 Hearing. Because the United States' Response and Proposed Order address critical and substantive issues that were not discussed during the April 27 Hearing, they should be stricken. Local Rule 7(b) requires that any written communication that seeks relief from the Court must be presented by a motion. The United States should be required to comply with Local Rule 7(b) and to file a motion concerning any relief it seeks that was not discussed during the April 27 Hearing.

I. The Response and Proposed Order Should Be Stricken.

During the April 27 Hearing, the United States asked whether it could "file with any response to the objections a proposed order to clarify these points, if that is acceptable." The

Court authorized the United States to do so.¹ “These points” necessarily meant the points discussed during the April 27 Hearing, but the Response and Proposed Order go far beyond those points.

For example, the Proposed Order rewrites the Special Master’s duties, adds a standard of review, imposes reporting requirements on the Special Master, and broadly confers to the Special Master “all authorities specified in Fed. R. Civ. P. 53(c).” These matters were not discussed during the April 27 Hearing, nor have they been presented to the Court by motion. Mississippi has not had an opportunity to respond to these matters. The Proposed Order should be stricken.

The Comment to Rule 53 provides that when appointing a special master, “[c]are must be taken to make the order as precise as possible.” The United States’ unilateral expansion of the Special Master’s duties, to broadly include all authorities specified in Rule 53, is not properly before the Court and contrary to law.

Local Rule 7(b) requires that “[a]ny written communication with the court that is intended to be an application for relief or other action by the court must be presented by a motion in the form prescribed by this Rule.”

The Response and Proposed Order are written communications with the Court that seek relief not discussed during April 27 Hearing and not presented by motion. The Response and Proposed Order also seek to reopen the record and discovery and to literally rewrite the Appointment Order. These are substantive matters that must be presented by motion. Because they were not submitted by motion, the Response and Proposed Order should be stricken. To the extent the United States desires the expansive relief it seeks in the Response and Proposed Order, it should be required to file a motion.

¹ April 27, 2020 Hr. Tr. at 37-38.

The Appointment Order makes clear that the Special Master's first role is as a mediator to attempt to assist the parties in reaching an agreement. If mediation is not successful, then the Special Master's role is to devise a time line for implementation of a plan based on the trial record, not to devise a remedial plan from whole cloth. Based on the United States' case-in-chief, the trial record on remedy is primarily, if not exclusively, the testimony of Melodie Peet. To the extent the United States' wishes to alter the Special Master's duties as prescribed by the Appointment Order, it should be required to file a motion.

Relief Requested

For these reasons, the United States' Response (Dkt. 247), including its Proposed Order (Dkt. 247-2), should be stricken.

Dated: May 18, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 18, 2020, I electronically filed this document with the Clerk of the Court using the ECF system, which sent notification of such filing to all ECF counsel of record in this action, and emailed a copy to the Special Master.

/s/ James W. Shelson
JAMES W. SHELSON