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 MOTION
FOR LEAVE TO FILE REBUTTAL MEMORANDUM

The State of Mississippi of seeks leave to file the Rebuttal Memorandum attached as Exhibit 1 as follows:

1. The Court conducted a telephonic hearing in this case on April 27, 2020 (April 27 Hearing).

2. 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.

3. But the United States' Response (Dkt. 247) and Proposed Order (Dkt. 247-2) go far beyond what the Court authorized.

4. 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. The United States' Response also addresses matters that occurred after Mississippi filed its Objections to Special Master's Request for Extra-Contractual Interviews, as well as matters not discussed during the April 27 hearing.

5. Mississippi requests that the requirement of a separate memorandum be waived.

Relief Requested

For these reasons, the State of Mississippi should be permitted to file the Rebuttal Memorandum attached as Exhibit 1.

Dated: May 18, 2020.

Respectfully submitted,

PHELPS DUNBAR LLP

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CERTIFICATE OF SERVICE

I certify that on May18, 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

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UNITED STATES OF AMERICA **PLAINTIFF**

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

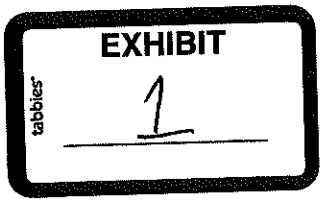
THE STATE OF MISSISSIPPI **DEFENDANT**

THE STATE OF MISSISSIPPI'S REBUTTAL MEMORANDUM IN SUPPORT OF OBJECTIONS TO SPECIAL MASTER'S REQUEST FOR EXTRA-RECORD INTERVIEWS

Introduction

The proposals to reopen the record and discovery and to grant the Special Master's request for extra-record interviews on the terms dictated in the United States' Response (Dkt. 247) and Proposed Order (Dkt. 247-2) should be denied.

- The record and discovery should not be reopened because:
  - The United States disavowed post-trial discovery during trial.
  - This Court has ruled that post-trial discovery is not needed.
  - The United States' post-trial discovery proposal is impermissibly boundless.
  - The United States' new position regarding post-trial discovery encourages litigation instead of negotiation.
  - The United States' proposal diminishes the Rule 408 protections the Court built into its Order Appointing Special Master (Dkt. 241) (Appointment Order).
  - The United States is unnecessarily creating an adversarial litigation relationship between the Special Master and the Parties.
- The United States' Response regarding the Special Master's interviews of Party Representatives is inaccurate.
- The United States was not authorized to rewrite the Appointment Order.



I. The Record and Discovery Should Not Be Reopened.

Without filing a motion, the United States now wants to reopen the record and discovery. The United States proposes that "the Special Master may request and consider written materials outside the record from the Parties."[1] This request should be denied for the reasons discussed below.

A. The United States disavowed post-trial discovery during trial.

During trial on June 13, 2019, the Court noted the following: "I have the impression that if the court finds for the United States, there will have to be some sort of subsequent hearing or hearings on remedy, because I have not heard anything from any expert or otherwise about a specific remedy to address any of the particular problems other than more money or more – I have heard from time to time shifting the current money around, but nothing about specific remedy."[2]

The United States responded, in part, as follows: "As far as sort of the remedy phase and how that would work, what we would recommend to the court is after all the evidence is in, if the court finds for the United States, then we would enter sort of a remedial phase. We do not believe that additional evidentiary hearings are necessary for that. ***We believe that the facts that will be established throughout this liability, this trial, will then be the facts that will be able to be used to craft a specific remedial order.***"[3] Mississippi stated its position that a failure to show a remedy is a failure of proof.[4]

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[1] Dkt. 247-2, Proposed Order, at 2.
[2] Trial Tr. at 1221:15-22.
[3] Trial Tr. at 1223:5-13 (emphasis added).
[4] Trial Tr. at 1234:23-1235:1.

After this exchange between the Court and the Parties, the United States called two witnesses – Kevin O'Brien and Melodie Peet.[5] Mr. O'Brien did not testify regarding a remedy, but Ms. Peet did. After calling Ms. Peet, the United States rested on June 19, 2019.[6] The evidence regarding a remedy from the United States' case-in-chief is largely – if not exclusively – the testimony of Ms. Peet.[7] As the United States conceded in June 2019, the trial record should be the source of the facts used to craft a specific remedial order.

B. The Court has ruled that post-trial discovery is not needed.

In its Appointment Order, the Court found "[w]e do not need additional discovery."[8] What the United States euphemistically calls "information sharing" is what the United States disavowed during trial – *i.e.*, post-trial discovery. The United States has not sought reconsideration of the Court's Appointment Order which ruled that post-trial discovery is not needed. The United States has not shown an intervening change in law or an error of law which warrants the Court reversing itself on its prior ruling that post-trial discovery is not needed. The Court's prior ruling should stand.

C. The United States' post-trial discovery proposal is impermissibly boundless.

The United States' proposal that the Special Master may request and consider written materials outside the record from the Parties has no discernable limits and therefore is impermissibly boundless. It is not tied to any showing that the trial record is insufficient for the Special Master to discharge his mandate. Such a showing should be the minimum prerequisite for even entertaining a motion to reopen the record and discovery. Nor are there any limits

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[5] Trial Tr. at 1243:20-1473:7.
[6] Trial Tr. at 1482:7-8.
[7] The United States should not be permitted to seek a remedy beyond the scope of what Ms. Peet testified is sufficient.
[8] Dkt. 241, Appointment Order at 3.

regarding what "written materials outside the record" the Special Master can request. Nothing in the United States' proposal prevents the United States from attempting to funnel post-trial discovery requests of its own through the Special Master. Nothing in the United States' proposal subjects any post-trial discovery requests to the discovery provisions of the Federal Rules of Civil Procedure. The Court should not reverse its prior ruling that post-trial discovery is not needed, especially since the United States is proposing post-trial discovery without limit.

D. The United States' new position regarding post-trial discovery encourages litigation instead of negotiation.

During the hearing on December 2, 2019, Mississippi shared with the Court its concern that this stage of the process should not be used to disadvantage Mississippi's legal position in the event that a settlement agreement is not reached and an appeal is taken – a step Mississippi hopes to avoid. Mississippi came to this stage of the process to negotiate, but the United States continues to litigate and attempts to skew what should be a mediated negotiation process to its tactical legal advantage. This is demonstrated by, among other things, the United States' attempt to rewrite the Appointment Order in its entirety, and by the United States' efforts to reopen the record and discovery without even filing a motion. Massive discovery has occurred. An extensive trial record was made. The parties have rested. The Court has found post-trial discovery is not needed. The United States should move on to negotiation.

E. The United States' proposal diminishes the Rule 408 protections the Court built into its Appointment Order.

The United States has already used discussions protected by Rule 408 to request post-trial discovery information from the State. The United States now suggests that "[t]o the extent that Dr. Hogan's communications with DOM or DMH staff during the mediation process yield documents or information that he or the Parties believe should be made part of the record, the

United States recommends that the Parties confer regarding a proposal for supplementation or, alternatively, raise the matter for the Court."[9] This is an open invitation to turn the Rule 408 mediation process into a post-trial discovery process. The better practice is to not allow the Rule 408 mediation and negotiation process to be used to formulate post-trial discovery requests. To do otherwise is to not meaningfully apply Rule 408.

F. The United States is unnecessarily creating an adversarial litigation relationship between the Special Master and the Parties.

The United States' proposal to impose preservation and record keeping requirements on the Special Master is not benign. It is a hedge against having to potentially cross examine the Special Master. The United States is proposing a path that unnecessarily creates an adversarial litigation relationship between the Parties and the Special Master by making the Special Master the primary requestor of post-trial discovery and his "interviews" subject to discovery. Subjecting the Special Master's interviews of DMH and DOM employees to discovery is also inconsistent with Rule 408. The United States is proposing a path which will likely make the Special Master a fact witness.

II. The United States' Response Regarding The Special Master's Interviews of Party Representatives Is Inaccurate.

The United States cites several cases for the proposition that "[c]ourts have on occasion authorized informal communications between the special maters and third parties."[10] But as the United States concedes, the cases it cites are "in the context of monitoring compliance with court-ordered remedies."[11]

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[9] Dkt. 247, United States' Response at 6.
[10] Dkt. 247, United States' Response at 4.
[11] Dkt. 247, United States' Response at 4.

For example, in *Ruiz v. Estelle*, 679 F.2d 1115, 1170 (5th Cir. 1982), the court appointed a special master to observe, monitor, find facts, report or testify as to his findings, and make recommendations to the court concerning steps which should be taken to achieve compliance with a remedial order which had been entered by the court. Here, there is no remedial order at this time, and the Special Master has not been tasked to do any of the things, such as find facts, that the special master was tasked to do in *Ruiz*. Special Master Hogan is not charged with monitoring compliance with a remedial order and should not be treated as though he were.

On March 6, 2020, the United States sent an email to the Court which summarizes the "shared understanding" of the Parties regarding ex parte communications with the Special Master.[12] The Parties agreed that the Special Master can have ex parte discussions with Party representatives "if counsel of record consent to that communication."[13] Under this agreement, if counsel of record for a Party does not consent to the Special Master communicating ex parte with a Party representative, then the communication cannot occur.

In its Response, the United States ignores the consent condition and adds a condition the Parties never agreed to or even discussed and that is contrary to how the Special Master is conducting negotiations. The United States notes that Mississippi does not oppose the Special Master interviewing Party representatives if the interviews are subject to Rule 408 and counsel for Mississippi is present.[14] But the United States omitted the consent requirement set forth in the March 6 email. And the United States adds the condition "that counsel for the United States also be present for those discussions in the interest of fairness and transparency."[15]

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[12] The email is Dkt. 247-1.
[13] Dkt. 247-1, March 6, 2020 email.
[14] Dkt. 247, United States' Response at 5.
[15] Dkt. 247, United States' Response at 5-6.

This condition would foreclose the Special Master from talking with Mississippi's representatives without the United States being present. The Special Master has routinely held sessions with the United States without Mississippi being present and with Mississippi without the United States being present. It is Mississippi's understanding that the Special Master has structured the negotiation process such that he can communicate with the Parties separately when he desires to do so. The United States' proposal forecloses that structure. Moreover, consistent with the March 6 email, Mississippi does not consent to the United States participating in every discussion the Special Master has with Mississippi.

"[T]here are appointments that practically demand free and easy, off the record, communications between the master and the parties. For example when a master is appointed to facilitate settlement, it is difficult to see how he or she can perform the assigned task without the ability to talk individually and off the record with the parties." 9 *Moore's Federal Practice*, § 53.21[3] (3d Ed.). The United States' proposal would effectively eliminate "off the record" discussions between the Parties and the Special Master.

There is nothing fair or transparent about prohibiting the Special Master from speaking with Mississippi's representative without the United States participating, but allowing the United States to communicate with the Special Master without Mississippi participating. Doing so is not conducive to negotiating a settlement. If the Special Master is prohibited from communicating with Mississippi without the United States' participating, then the Special Master should likewise be prohibited from communicating with the United States without Mississippi participating.

The United States suggests that Mississippi "has also provided Dr. Hogan with written information regarding Mississippi's mental health service system that is outside the trial

record,"[16] but that is misleading. At the Special Master's request, the Parties each submitted a proposal to the Special Master regarding a remedy. Both proposals are forward-looking from trial in that they propose ways to expand Mississippi's community-based services. In making its proposal to the Special Master, Mississippi identified the services it has expanded since trial, as well as other services it proposes to add going forward. If the United States truly believes that added community-based services should not be discussed with the Special Master because that information is allegedly outside the trial record, then it should raise that issue with the Court, preferably by motion.

At least 90% of the United States' proposal to the Special Master regarding a remedy is "outside the trial record" as the United States is interpreting it. For example, the United States proposes that PACT teams in Mississippi have the capacity to serve at least "X" number of individuals by "Y" date. The "X" and the "Y" are not in the trial record, but the issue of whether Mississippi has sufficient PACT capacity is in the trial record. Under the conception of "outside the trial record" the United States is advancing now, all of the "X" and "Y" type proposals the United States has made to the Special Master are outside the trial record. We hope the United States is not serious about that position because it effectively forecloses negotiating a remedy.

III. The United States Was Not Authorized To Rewrite The Appointment Order.

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.[17] "These points" necessarily meant the points discussed during the April 27 Hearing, but the Proposed Order goes far beyond those points.

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[16] Dkt. 247, United States' Response at 5.
[17] April 27, 2020 Hr. Tr. at 37-38.

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 did the United States discuss them with Mississippi before the United States filed its Response. That is unfortunate because the parties likely could have agreed on some of the issues. As it is, Local Rule 7(b) requires these issues be presented to the Court by motion. Mississippi has separately filed a motion to strike the United States' Response and Proposed Order for the United States' failure to comply with Local Rule 7(b) (Dkt. 248).

Relief Requested

For these reasons, the Special Master's request to conduct extra-record interviews should be denied.

Dated: May __, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May __, 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