

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

UNITED STATES OF AMERICA

PLAINTIFF

V.

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

THE STATE OF MISSISSIPPI

DEFENDANT

**THE STATE OF MISSISSIPPI'S REBUTTAL MEMORANDUM
IN SUPPORT OF MOTION FOR CLARIFICATION
OF SPECIAL MASTER'S ROLE AND OBLIGATIONS**

Introduction

On February 24, 2021, the Court issued its Order (ECF 253) (February 24 Order) regarding moving this case toward Final Judgment. The State of Mississippi (Mississippi) sought clarification of the February 24 Order (ECF 254 and 255). In particular, the Court should clarify that (i) the Special Master's input regarding any proposed remedial plan must be in the form of a written report, (ii) the Special Master cannot provide information which is outside the record regarding mental health systems, and (iii) the Special Master is prohibited from relying on or disclosing any Rule 408 information in providing his report.

In its Response, Plaintiff agrees with (i) – *i.e.*, the Special Master's input regarding any proposed remedial plan must be in the form of a written report – but Plaintiff argues that clarification is unnecessary because the Court implied in its February 24 Order that the Special Master should submit a written report. The Court should make express what Plaintiff finds to be implied.

In its Response, Plaintiff agrees with (ii) – *i.e.*, the Special Master cannot provide information which is outside the record regarding mental health systems – but argues against such clarification. Plaintiff asserts that it would be impossible and unhelpful for Dr. Hogan to disregard his 40 years of experience in the mental health field, but Plaintiff is missing a straight

forward distinction. Dr. Hogan can rely (generally) on his experience to assert that, based on the record, Mississippi can do X in Y years. But Dr. Hogan cannot, for example, rely on his experience to assert that Mississippi can do X in Y years because New York did X in Y years, or that Mississippi can do X because Ohio did X. The Court should not allow the Special Master to provide, introduce, or discuss in his report any information regarding mental health systems that was not admitted into evidence at trial.

In its Response, Plaintiff agrees with (iii) – *i.e.*, the Special Master is prohibited from relying on or disclosing any Rule 408 information in providing his report – but argues that clarification is “unnecessary.” Plaintiff agrees that Rule 408 prohibits the Special Master from relying on or disclosing any Rule 408 information in providing his report, so the clarification sought by Mississippi should be granted.

I. Special Master’s Input Must Be In The Form Of A Written Report.

In its February 24 Order, the Court stated the following: “The Special Master is asked to weigh in on the parties’ points of disagreement – again, if any The Special Master’s input is requested by June 4, 2021” (ECF 253). Mississippi requested that the Court clarify that the Special Master’s input regarding a remedy be in the form of a written report filed with the Court.

Plaintiff knows Mississippi is correct. Plaintiff should have conceded the point and moved on. Instead, Plaintiff argued that “[g]iven the context of the Special Master’s report coming after submissions by the Parties, the logical interpretation of the Court’s February 24 Order, particularly in view of the Appointment Order,¹ is that it calls for a written report.² By asserting a “logical interpretation,” Plaintiff effectively concedes that the Court has not ordered that the Special Master submit a written report.

¹ The Appointment Order is the Order Appointing Special Master (ECF 241).

² ECF 258, Plaintiff’s Response Memorandum. p. 4.

Mississippi respectfully submits that as between a “logical interpretation” and an express directive, the Court should make an express directive for the Special Master to submit a written report.

II. No Extra-Record Evidence Regarding Mental Health Systems.

In its February 24 Order, the Court stated that “[t]he Special Master is asked to support his recommendations by reference to his vast experience and knowledge of mental health systems, rather than to any statement made by a party during settlement negotiations” (ECF 253) (emphasis added). The State objected to the italicized language above to the extent it permits the Special Master to include in his report any information that was not admitted into evidence at trial.³

On the one hand, Plaintiff seemed to agree with Mississippi in its Response: “In instructing Dr. Hogan to support his recommendations ‘by reference to his vast experience and knowledge of mental health systems,’ the Court did not invite Dr. Hogan to introduce specific facts beyond what is in evidence, as the State seems to suggest.”⁴ On the other hand, Plaintiff asserts that “[i]t would be impossible and unhelpful for Dr. Hogan to disregard his 40 years of experience in the mental health field that qualified him for the position when making recommendations about how, and by when, the State should reach full compliance.”⁵

Dr. Hogan can rely (generally) on his experience to assert that, based on the record, Mississippi can do X in Y years. But Dr. Hogan cannot, for example, rely on his experience to assert that Mississippi can do X in Y years because New York did X in Y years, or that Mississippi can do X because Ohio did X. The Court should not allow the Special Master to

³ ECF 255, Mississippi’s Memorandum in Support of Motion for Clarification, p. 2.

⁴ ECF 258, Plaintiff’s Response Memorandum. p. 3.

⁵ ECF 258, Plaintiff’s Response Memorandum. p. 4.

provide, introduce, or discuss in his report any information regarding mental health systems that was not admitted into evidence at trial.

III. Special Master Must Not Rely On Or Disclose Rule 408 Information In Providing His Input.

Mississippi asked the Court to clarify that the Special Master is prohibited from relying or disclosing any Rule 408-protected information. Plaintiff agrees that the Special Master should be so prohibited, but argues that such a clarification is “unnecessary.”⁶

Plaintiff reasons that “[p]er the terms of the Appointment Order, [settlement] offers – whether made verbally or in writing – cannot be included as the basis for the Special Master’s submission. Nothing in the Court’s February 24 Order suggests otherwise.”⁷ “Cannot be included as the basis for the Special Master’s submission” is not the standard articulated in the Court’s February 24 Order, nor is it sufficient.

The February 24 Order states that the Special Master cannot “support his recommendations by reference to ... any statement made by a party during settlement negotiations” (ECF 253). Because Rule 408 is broader than “statements made by a party during settlement negotiations,” Mississippi respectfully requests that the Court clarify its February 24 Order to state that the Special Master is prohibited from relying on or disclosing any Rule 408 information in providing his report, including any statements made by the parties, verbally or in writing, and any draft remedial plans that were made while attempting to compromise the claim. Plaintiff does not dispute – and effectively concedes – that Mississippi’s request is required under Rule 408.

⁶ ECF 258, Plaintiff’s Response Memorandum. p. 5.

⁷ ECF 258, Plaintiff’s Response Memorandum. p. 5.

Request for Relief

The State's Motion for Clarification (ECF 254) should be granted.

Dated: March 25, 2021.

Respectfully submitted,

PHELPS DUNBAR LLP

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CERTIFICATE OF SERVICE

I certify that on March 25, 2021, 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.

/s/ James W. Shelson
JAMES W. SHELSON