

**In The
Supreme Court of the United States**

STATE OF FLORIDA,

Plaintiff,

v.

STATE OF GEORGIA,

Defendant.

Before the Special Master

Hon. Ralph I. Lancaster

**STATE OF GEORGIA’S OBJECTIONS TO
CASE MANAGEMENT ORDER NO. 19**

The State of Georgia hereby submits the following objections and requests for clarification relating to Case Management Order No. 19 (“CMO 19”).

1. Pre-Filed Written Direct Testimony

Section 1.5 of CMO 19 sets a default rule that all direct testimony will be written and pre-filed with the Special Master. No oral direct testimony will be permitted, unless “the need for such further direct testimony could not have been anticipated by the party offering it.” CMO 19 at 3. Georgia respectfully proposes an alternative way of proceeding. Georgia is concerned that submission of testimony solely through written direct examinations will encourage the submission of a large number of written directs, many of which could relate to irrelevant or only marginally relevant matters. For example, notwithstanding admonitions to keep discovery focused and efficient, Florida moved for and obtained the right to take up to 45 depositions,

significantly increasing the cost of discovery and increasing the quantity, but not necessarily the quality, of the information obtained. And when confronted with no limits on expert discovery, Florida submitted 20 expert reports—many of which were unnecessary or redundant. If Florida were to include written direct examinations from all (or nearly all) 20 of its expert witnesses and a dozen or more fact witnesses, it would significantly increase the length of trial because all of those witnesses would have to be crossed and subjected to re-direct examination. In contrast, if all direct examinations were conducted orally, it is far less likely that Florida would bring all those witnesses to testify live on direct but would instead consolidate their case through a subset of key witnesses. In that way, proceeding by live testimony—when coupled with time limits—will compel the parties to economize and focus their presentations on only the most relevant testimony. Both Florida and Georgia would be forced to call only those witnesses who are most critical to their respective cases, which would likely both shorten the time needed for trial and sharpen the disputed issues in need of resolution. Thus, proceeding by oral (not written) direct testimony will lead to a more efficient and effective trial presentation from both parties.

2. Staggered Submission of Written Directs

If the Special Master decides to proceed by written direct testimony, Georgia proposes that the submission of written testimony be staggered so that Florida—the plaintiff in this litigation and the party who bears the burden of proof on almost all issues—files its written direct testimony before Georgia. In a typical trial proceeding, Florida would present its case in chief before Georgia puts on its case in chief. Georgia would therefore have the opportunity to observe Florida’s witnesses, evaluate what issues and claims Florida has elected to advance, and then determine what witnesses it needed to call to respond to Florida’s claims. A similar approach would make good sense here even if written (instead of oral) directs are used: Georgia should have the opportunity to see what evidence Florida chooses to present before putting up its

own witnesses on direct. Otherwise Georgia is left to speculate as to which of the many evolving grounds for relief Florida will actually assert at trial. Many have been floated in fact and expert discovery. But based on deposition testimony, Georgia suspects some if not many of these grounds will change or be dropped. It is inefficient for Georgia to try and address all issues in its written directs if Florida will not be advancing some or all of those issues at trial. Georgia therefore proposes the following schedule for the submission of written direct examinations:

October 7, 2016: Florida files direct testimony

October 21, 2016: Georgia files direct testimony

3. “Hostile” Witnesses

Georgia understands that Florida will propose a procedure for handling the examination of “hostile” witnesses. Georgia believes that the designation and examination of any “hostile” witness should be conducted through live testimony in open court. Georgia opposes the submission of any kind of pre-examination written summary of the “hostile” witnesses’ expected testimony, which would only provide an opposing party the opportunity to put words in the mouth of a witness who may or may not testify as the opposing party believes. Any such written summary would be speculative and could potentially confuse the issues presented at trial.

4. Deadline for the Amicus Brief of the United States

Section 1.4 of CMO 19 invites the United States to file an amicus brief by October 21, 2016. Because the United States has not been engaged in the discovery process and is not aware of the expert testimony that has been offered to date, Georgia suggests that the parties, the Special Master, and the United States would be better served if the United States waits until after the evidence is submitted before filing an amicus brief. Georgia therefore proposes that the United States be invited to submit an amicus brief following the conclusion of trial, perhaps simultaneously with the parties’ post-trial briefs.

5. Opening & Closing Statements

Georgia has conferred with Florida and believes that both parties will jointly request time to submit short opening and closing statements to the Special Master. Georgia proposes that each side be given 75 minutes for an opening statement and 75 minutes for a closing statement.

6. Page Limits For Pretrial Briefs

Georgia proposes that pretrial briefs be limited to 40 pages. A 40-page limitation seems appropriate given that CMO 19 affords the United States 35 pages for its amicus brief.

7. Deposition Counter-Designations

CMO 19 currently does not set a deadline for the exchange of deposition counter-designations. Georgia proposes that deposition counter-designations be exchanged on September 23, 2016.

8. Objections to Pre-Filed Directs

Florida has raised the issue of when and how the parties should file objections to pre-filed written direct testimony. Georgia proposes that any objections to pre-filed written direct testimony should be submitted in writing to the Special Master, rather than made orally in court. In addition, Georgia proposes that these written objections be submitted after trial concludes, perhaps two or three weeks after the trial ends.

Dated: June 30, 2016

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CERTIFICATE OF SERVICE

This is to certify that the STATE OF GEORGIA’S OBJECTIONS TO CASE MANAGEMENT ORDER NO. 19 has been served on this 30th day of June 2016, in the manner specified below:

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