Philip J. Perry
Direct Dial: 202.637.2244
phil.perry@lw.com

555 Eleventh Street, N.W., Suite 1000
Washington, D.C. 20004-1304
Tel: +1.202.637.2200 Fax: +1.202.637.2201
www.lw.com

LATHAM & WATKINS LLP

October 18, 2016

VIA EMAIL

The Honorable Ralph I. Lancaster Jr.
Special Master
PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04101

Re: Response to Georgia's Request to Strike Pre-Filed Direct Testimony

Dear Special Master Lancaster:

Florida writes in response to and in strong disagreement with Georgia's October 17th letter complaining about supposedly "new" information in the pre-filed direct testimony of Florida's expert witnesses. None of Florida's expert witnesses are new; none of Florida's expert opinions are new; and Georgia's letter is an improper attempt to use such erroneous allegations tactically as a sword to try to suppress elements of Florida's trial presentation. Florida can establish in enormous detail, using lengthy expert reports, deposition transcripts and many other discovery materials where each of its expert opinions originates, and why each is within the appropriate scope of expert testimony in this case. Nothing in Florida's pre-filed direct testimony should genuinely be a surprise. An examination of even a selection of these materials demonstrates that Georgia's many accusations are incorrect and hyperbolic, and in fact that Georgia itself is responsible for certain of the issues it is now identifying as problematic. Had Georgia raised these issues with Florida as required by Section 11 of the Case Management Plan before dispatching its "emergency" ten-page letter to the Court, Florida would have explained the points below, and this dispute could have been avoided.

Florida respectfully requests the Special Master reject Georgia's invitation to prevent the presentation of a full record on particular scientific and technical issues underlying this equitable apportionment proceeding. Georgia's claim is especially bold because, long after its own experts submitted reports and long after they were deposed, Georgia has continued to supplement, modify, and in some instances, completely revamp its own expert opinions. These evolutions are particularly challenging in light of Georgia's strategic decision to defer identification of almost

all of its experts *until after* many of Florida's experts had submitted reports and provided deposition testimony.[1] Nevertheless, Florida has persevered and will be prepared to present its case at trial.

Although it is difficult to discern from the accusatory tone of Georgia's letter, Georgia's many allegations actually focus on a very small percentage of the pages of Florida's pre-filed expert testimony. This letter provides an initial response to each such allegation, demonstrating why each is false. Although Florida can provide substantially more detail on each of these issues if necessary (including further citation to its thousands of pages of expert reports, data runs and analyses), this letter seeks to explain quickly why Georgia's many procedural attacks are factually incorrect.

Legal Standard

As an initial matter, Florida notes that—like any expert testimony at trial—its pre-filed direct testimony summarizes far more lengthy and detailed expert reports, expert depositions, and discovery materials; puts that information in the appropriate context; and presents all the information in a format Florida believes will be most helpful for the finder-of-fact. Contrary to Georgia's suggestion, courts provide experts with latitude in discussing their opinions and reflecting on the issues raised by the adversary's experts:

> [Fed. R. Civ. P.] 26(a)(2)(B) does not limit an expert's testimony simply to reading his report. No language in the rule would suggest such a limitation. The rule contemplates that the expert will supplement, elaborate upon, explain and subject himself to cross-examination upon his report.

Thompson v. Doane Pet Care Co., 470 F.3d 1201, 1203 (6th Cir. 2006); *see also Minebea Co. v. Papst*, 231 F.R.D. 3, 8 (D.D.C. 2005) (holding that defendant's objections to the testimony of plaintiffs' expert took "a far too narrow view of what is acceptable direct expert testimony," because an expert's testimony is not limited to the line-by-line language in his report, rather an expert is permitted a certain degree of latitude to "explain the opinions and conclusions in his expert report"); *Emcore Corp. v. Optium Corp.*, Civ. A. 6-1202, 2008 WL 3271553, at *4-5

---

[1] Pursuant to Case Management Order No. 17, initial disclosures of experts were required on February 29, 2016 while disclosure of defensive experts was required by May 20, 2016. Georgia failed to comply with this schedule. *See e.g.* Dkt 423 at 2-3, Florida's May 2016 Status Report (describing Georgia's failure to comply with expert disclosure requirements). Although it carries the burden on several issues in this litigation, including all of the affirmative defenses it raised in its Answer, Georgia disclosed only one expert report on February 29, waiting until May 20 to disclose a series of rebuttal expert reports. Consistent with the Special Master's guidance in June 2016, Florida took a practical approach to these Georgia failures, focusing on the substantive content of the expert opinions rather than seeking to exclude them all for procedural reasons.

(W.D. Pa. Aug. 5, 2008) (holding that although statements in an expert's declaration were not exactly what he stated in his report, they were not beyond the scope of his report because they did not express a "new opinion" but were "an elaboration of and consistent with an opinion/issue previously addressed in [his] report"); *see also Maine Human Rights Com'n v. Sunbury Primary Care, P.A.*, 770 F. Supp. 2d 370, 389 (D. Vt. 2011) ("[H]ere the supplemental designation states only that the expert may adjust her testimony to the evidence presented at trial. This is neither unusual nor unexpected, and is a variation of the proponent's obligation to make continuing expert disclosures. . . . During trial, experts are frequently asked to apply their general opinions to evolving fact patterns.").

In addition, courts regularly permit an expert to assess or critique other experts' substantive testimony, including the reliability of those opinions. *See, e.g.*, *Jewell v. Life Ins. Co. of N. Am.*, 508 F.3d 1303, 1312 (10th Cir. 2007); *United States v. Mitchell*, 365 F.3d 215, 247 (3d Cir. 2004) (error to exclude testimony of qualified opposing expert provided testimony meets criteria for admission under Rule 702); *United States v. Velasquez*, 64 F.3d 844, 852 (3d Cir. 1995) (error to exclude expert testimony that called into doubt reliability and credibility of opposing expert's testimony); *Benedict v. United States*, 822 F.2d 1426, 1429 (6th Cir. 1987) (expert testimony which directly disproves accuracy of opposing expert methodology and data is proper rebuttal). Here, Georgia wishes to prevent Florida's experts from doing exactly that.

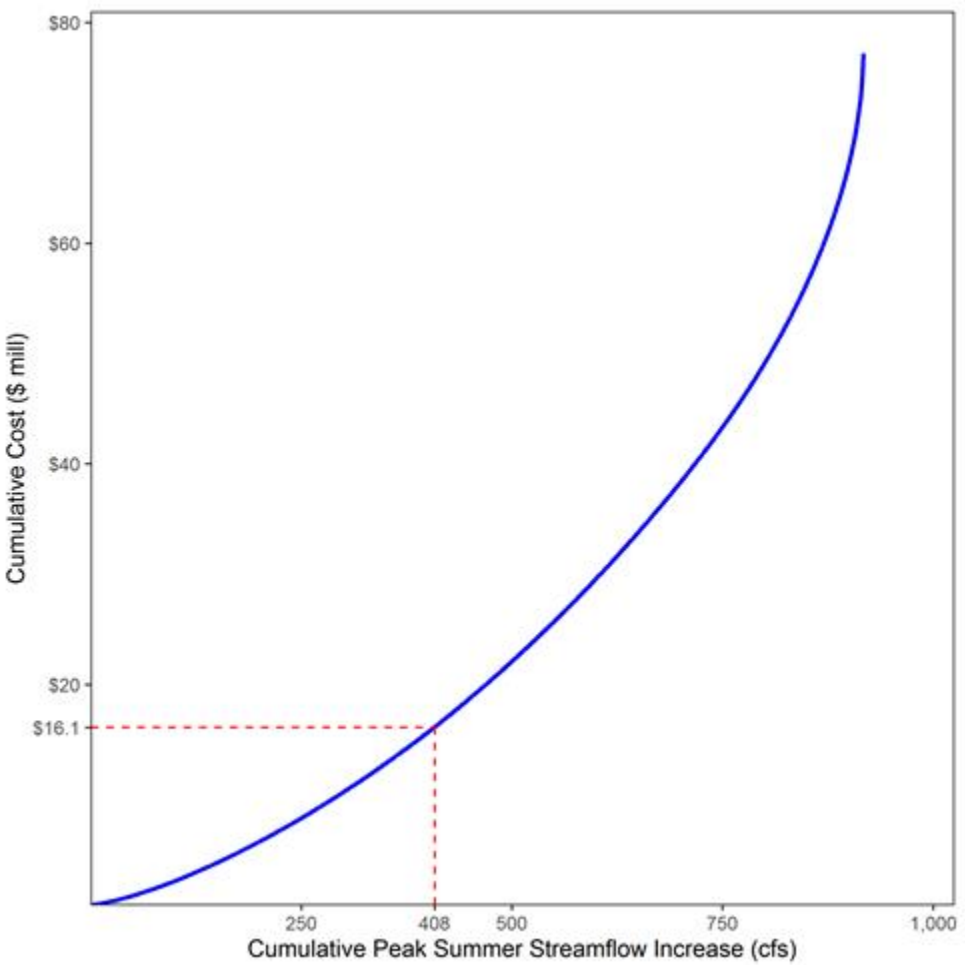
Particular Expert Opinions

Dr. Sunding

Dr. Sunding is Florida's expert on agricultural economics, natural resource economics and other economic issues. He relies upon hydrologic analyses by Dr. Hornberger and others to offer a large number of reasonable options available to Georgia to reduce its upstream consumption and to create additional flows to the Apalachicola River. A review of both Dr. Hornberger's and Dr. Sunding's pre-filed direct testimonies will supply the Court with a sense for how the two sets of opinions work in tandem, particularly pages 44-45 of Dr. Sunding's Pre-Filed Direct Testimony and pages 52-58 of Dr. Hornberger's Pre-Filed Direct Testimony.

Dr. Sunding submitted a lengthy Initial Report to Georgia on February 29, 2016, along with multiple appendices, modeling codes, and data sets, and was deposed for multiple days, and also submitted a Defensive Report on May 20, 2016. Among many other topics, Dr. Sunding explained in enormous detail how Georgia could reasonably rely on multiple economically feasible conservation tools already employed by other states (including Florida). In particular, Dr. Sunding's analyses supplied a host of examples of how those tools could be used in combination with each other, even identifying a non-exclusive list of multiple hypothetical Georgia solutions for consumption reductions that would achieve additional flows of 1,000 cubic

feet per second (cfs) (Dr. Sunding's Initial Report at 9), 1500 cfs (*id.* at 8, 86) and 2000 cfs (Dr. Sunding's Defensive Report at 2). Each of these scenarios drew upon his Reports' appendices, code and data sets, which in turn provided a detailed analytical predicate for creating yet further hypotheticals and selecting among the identified conservation mechanisms to achieve the identified results. Dr. Sunding's Initial Report at 6, 79-80, 85 ("This adjustment to the 1992 baseline indicates the adaptability of the analytical approach to estimating conservation costs across a range of contexts."). In particular, Dr. Sunding's code was created so that one could dial up or down various cutbacks in water consumption. Georgia has had all of the necessary deficit irrigation, deeper aquifer, irrigation buyback, leak abatement, and outdoor water use code since February 29, 2016. In other words, there is a cost curve for each of these hypothetical conservation measures, and Dr. Sunding has analyzed different points on those cost curves. As an example, below is the cost curve for Dr. Sunding's deficit irrigation analysis.



First, employing dramatic rhetoric at page 4-5 of its letter, Georgia attempts to suggest that Dr. Sunding's combination of cfs scenarios "suddenly doubled" and that it lacks enough information to understand and address those allegations in the next two weeks before its own

expert testimony is due. That is not remotely accurate: Georgia already has the analytical basis and methodology for all such hypotheticals in Dr. Sunding's original expert materials, which itself was the foundation for any number of particular hypothetical scenario runs at each of the levels specified in the report submitted by Georgia expert Dr. Robert Stavins.[2] And Dr. Sunding's reports expressly identify 1000, 1500 and 2000 cfs scenarios, with specific subparts identifying the relative cfs contribution of each conservation measure. Dr. Sunding's Initial Report at 8-9, 86 (Feb. 29, 2016); Dr. Sunding's Defensive Report at 2 (May 20, 2016). In short, Dr. Sunding's testimony is not a new opinion: it is a summary of the analytical work Dr. Sunding previously disclosed in his Reports and in multiple deposition days.

Second, Georgia argues that Dr. Sunding has identified new "conservation" scenarios not previously mentioned in his prior Expert Reports, including "Irrigation Permit Buyback." Dr. Sunding's "Irrigation Permit Buyback" conservation measure is explicitly addressed in his report. Dr. Sunding's expert report included ***16 pages of text*** detailing the "hedonic" analysis he used to estimate the value of irrigation permits. Accompanying this analysis were hundreds of lines of code. Georgia discussed the hedonic analysis in the context of an irrigated acreage buyback program at length during Dr. Sunding's deposition. As Dr. Sunding explained, he determined that $864 was the market value of an irrigation permit, and therefore the cost of removing any given acre from irrigation permanently. This equation gives one flexibility in evaluating different scenarios; to determine the price of an irrigated acreage buyback, one simply multiplies the desired number of acres by $864. *See, e.g.*, Sunding Dep. Tr. at 42:3-43:15 59:1-60:19 ("[T]hat's why I laid the results out this way – []so that one could look at a variety of scenarios. We could calculate the cost of 25 percent or 40 percent or any other number you would like."). Florida cannot understand why Georgia would now allege that this is somehow "new." Indeed, Georgia itself has frequently proposed internally that it could employ exactly this type of remedy to try to alleviate the problems caused by Flint basin irrigation, including as recently as 2014. *See, e.g.*, FX-71, Georgia EPD, Drought Protection in the Lower Flint Basin Stakeholder Meeting Summary, Nov. 21, 2014 ("EPD's initial analysis has suggested several options for further evaluation: [] Acquiring easements for permanent removal from irrigation.")

Third, Georgia argues that Dr. Sunding recently invented a new undisclosed category of conservation measures identified as "Eliminate Unpermitted Acreage." This is also incorrect. A bit of background is appropriate to explain the origin of this particular issue.

---

[2] In footnote 1 of its letter, Georgia suggests that the Court should "at a minimum" require all the backup material to be provided. Florida does not believe it is deficient in any respect for the reasons just mentioned, but can certainly supply the specific calculations for any of the hypotheticals that Georgia believes it cannot duplicate using the original report materials.

On February 26, 2016, months after the close of document discovery and on the eve of the February 29th due date for Dr. Sunding's first expert report, Georgia produced its new "Wetted Acreage Database" to Florida without explaining whether the database was significant to Georgia's case or its anticipated expert analyses. One of Georgia's experts, Dr. Suat Irmak, mentioned the Wetted Acreage Database in a footnote of his discussion of irrigated acreage in his May 20, 2016 report, but provided no information as to how he used that database (if at all). On July 29, 2016—after four requests from Florida for more information—Georgia finally provided a memorandum outlining Georgia's analysis using the new "Wetted Acreage Database."

As Dr. Hornberger's pre-filed direct examination explains, part of Florida's analysis utilized Georgia's own incomplete agricultural water consumption data to provide a highly conservative under-accounting of Georgia's irrigation related consumption, through "bottom up" analysis. *See* Dr. Hornberger Pre-Filed Direct Testimony at 35-40. But Georgia had not disclosed until July 29, 2016 that it was actually relying on the newly disclosed Wetted Acreage Database for its own agricultural water consumption information. This very late Georgia disclosure required Florida's experts to adjust their analyses slightly to account for Georgia's newly disclosed data. *See* Dr. Sunding Pre-Filed Direct Testimony at 22-23. In addition, the new Georgia Wetted Acreage Database was different in material respects from Georgia's own agricultural permitting databases. In preparing to depose Dr. Irmak in early August, Florida (working with Dr. Sunding) determined that Georgia's new database proved that many Georgia farmers were illegally irrigating far more irrigation acres than their permits indicated. Much of this information was captured in a chart and disclosed on the record to Georgia during the Irmak deposition on August 4, 2016. The disclosure can be found at pages 545-50 of Dr. Irmak's deposition transcript, and in Exhibits 50 and 51 introduced during that deposition.

Q [Florida Counsel]: Okay. Sir, that's fair. What we will do after the deposition is over is we will supply to Georgia's counsel a detailed list of all the permits that are addressed by this chart. And in addition to that, for all the 90,000 acres we've identified to date that are illegally being irrigated in Georgia, we will provide a list of permits and the wetted acreage dated – wetted acres being irrigated and the ability for – and we will supply the ability for Georgia to go audit each of those farmers.

So I understand, sir, that it's a little hard for you to answer this question, but we will supply that information to your counsel.

A [Dr. Irmak]: Okay.

Irmak Dep. Tr. at 549:18-550:10. Indeed, Florida provided Georgia with the complete list of all illegally irrigated acres on August 11, 2016. Thus Dr. Sunding's conservation scenario to halt illegal unpermitted irrigation is not new at all, and was disclosed as soon as it was discovered in

reviewing late-produced Georgia documents. With this context, it is again very difficult to understand why Georgia would argue that Dr. Sunding cannot rely upon this information.

Fourth, Georgia argues that Dr. Sunding does not disclose why projected costs associated with his conservation scenarios differ somewhat between his Expert Reports and his pre-filed direct testimony. A principal reason, recited just above, is that Dr. Sunding had to readjust those figures when Georgia first disclosed that it was relying on its new Wetted Acreage Database in July 2016. This again was a result of Georgia's late disclosure of its own material, and was not the fault of Florida or Dr. Sunding. *See discussion above*. Georgia also seems to complain that Dr. Sunding's scenario charts at 44-45 of his Pre-Filed Direct Testimony have a column anticipating a ground water impact of 0.6, in addition to the groundwater impact of 0.4. Again, Dr. Hornberger's Pre-Filed Direct Testimony at 46-48 explains that issue clearly. In short, Georgia's own expert, Dr. Sorab Panday admitted during his August 1-3 deposition that his own prior analysis of groundwater in the ACF recognized that the 0.6 multiplier was correct, rather than the 0.4 (or lower number) Georgia now employs. Drs. Hornberger and Sunding are not barred from recognizing in their testimony admissions made by Georgia's experts that support Florida's opinions. It would be a peculiar rule indeed if Florida experts could not explain in their testimony how Georgia's own experts (who were deposed later) actually support the Florida opinions. *See, e.g.*, *Jewell*, 508 F.3d at 1312; *Mitchell*, 365 F.3d at 247; *Velasquez*, 64 F.3d at 852; *Benedict*, 822 F.2d at 1429. Yet Georgia wishes to suppress this information.

Dr. Hornberger

Georgia's arguments for Dr. Hornberger suffer many of the same flaws and their arguments for Dr. Sunding.

First, to put Dr. Hornberger's testimony in context, we refer the Court to pages 3 (¶3e-f), 6 (¶11), 34 (¶71), 35-38 (¶¶74-77), 54-55 (¶¶118, 120) of his Pre-Filed Direct Testimony which explain that he reviewed, relied upon and independently confirmed the work of other hydrologists on the Florida team, including Drs. Flewelling, Langseth, Shanahan and Lettenmaier. Dr. Hornberger made similar statements throughout his Expert Reports and during his three days of deposition, and expressly and repeatedly relied on their data analyses. *See, e.g.*, Hornberger Initial Report at 1-2, 4, 12-14, 31, 42-43, 45-47, 51-52, 74, 93-94 (Feb. 29. 2016); Hornberger Dep. Tr. at 94:5-12, 145:16-146:2, 146:15-147:10, 159:8-14, 233:9-16, 238:8-239:8, 243:13-21, 362:12-22, 407:7-408:11. There is nothing new about this. Moreover, as the Court recommended during its June 8, 2016 Status Conference, Florida has chosen to streamline its expert presentations through Dr. Hornberger, rather than presenting the overlapping testimony of Drs. Flewelling and Langseth, both of whom were deposed for multiple days and have only been identified as "provisional" witnesses. *See* October 14, 2016 Letter from P. Perry to Special

Master Lancaster at 1, 6. There was nothing new or improper about this. And indeed, most of the material Georgia is citing in Dr. Hornberger's pre-filed direct testimony is of this nature.

Second, Georgia seeks to prevent Dr. Hornberger from explaining how all of his prior analyses can be employed in a practical manner by the Court in entering a consumption cap remedy. *See* Georgia Letter at 5-6. Again, none of that material is new. Dr. Hornberger's Expert Report and his multi-day deposition addressed in great detail all the measurement tools, and tools of hydrology can be used to understand exactly how to quantify Georgia consumption and how to measure how that consumption is affecting streamflow. He described why those tools are reliable, and how hydrologists employ them. *See, e.g.*, Hornberger Initial Report at 8-9; Hornberger Dep. Tr. at 14-17, 64-70:10, 92:10-93-17, 292:4-293:4, 309:9-20. It is again difficult to understand why Georgia thinks this information cannot be put in a practical context for the Court in Dr. Hornberger's testimony. This is simply translating pre-existing analyses from a complex Expert Report into practical terms that can be employed to arrive at an Order in this case.

Third, Georgia complains that Dr. Hornberger's testimony refers to joint 1999 instream flow guidelines for the ACF Basin from the U.S. Environmental Protection Agency ("EPA") and U.S. Fish and Wildlife Service ("FWS") identifying flow levels on the Apalachicola and Flint Rivers that "represent a determination of flow regime features that are necessary for maintaining the present structure and function of the riverine ecosystems." FX-599 at 1. This exhibit is important because it represents what those agencies believed the absolute minimum flows should be, and the information is clearly identified on the exhibit in chart format. For example, the 1 day minimum for July on the Flint River at Bainbridge, GA is 1,905 cfs (FX-599 at App. A, p. 2); the Bainbridge Gage on the Flint River **never** failed to meet this criteria before 1970, but since 2002 has failed to meet it more than one of every three summer months. *See* Hornberger Pre-Filed Direct Testimony at 25.[3] Dr. Hornberger does not offer a new expert opinion on the federal guidelines. His testimony only puts his findings in context. Indeed, his pre-filed direct testimony simply compares his own prior analyses on low flow periods in the historic record at the river gages at Chattahoochee, FL and Bainbridge, GA, which were laid out in his expert report and deposition. *Compare* Hornberger Initial Report at 1-2, 16-22, 24 *with* FX-599. This is simply an exercise in comparing flow numbers side by side and could readily be done in a demonstrative exhibit at trial. It does not require a new expert opinion. And there is certainly nothing new about the EPA/FWS guidelines. They have been in both parties' possession for roughly 17 years and were produced during document discovery more than one year ago.

---

[3] Georgia's argument is that Florida only needs enough water to prevent certain endangered species from being eradicated from *all* locations in the Apalachicola River Basin. EPA and FWS's guidelines address the overall ecological health of the River Basin, not whether some subset of an endangered species may continue to exist in discrete locations if flows dramatically decline.

Georgia does not like the 1999 EPA/FWS guidelines, but it has no basis at all to suppress them, or otherwise prohibit their use at trial.

Fourth, Georgia suggests that the "bottom up" under-accounting mentioned in Dr. Hornberger's expert report is somehow new. Georgia Letter at 6. That is also false. Dr. Hornberger addressed that issue repeatedly in his expert report and deposition, including at pages 12 to 13 of his February 29, 2016 expert report. Drs. Flewelling and Langseth did as well in their February 29 expert reports. Furthermore, contrary to Georgia's assertions, Dr. Hornberger testified that he did independently review Dr. Flewelling's consumptive use estimates and the data on which they are based:

Q [Georgia Counsel]:And -- and -- and did you do independent analysis to verify whether his [Dr. Flewelling's] consumptive use numbers were accurate?

A [Dr. Hornberger]: Because I was involved in sort of the evolution of the case, and discussing it with Sam [Flewelling], yes, of course there was independent analysis.

Hornberger Dep. Tr. at 218:9-16; *see also id.* 216:19–217:10; 227:6–229:6.

Fifth, Georgia argues that the discussion of 60% groundwater impact in the Georgia portion of the ACF basin—pages 47 to 49 of Hornberger's Pre-Filed Direct Testimony—is improper. But that percentage was what Georgia's own expert Dr. Panday previously used in his own prior analyses of these issues. *See* FX-594 at 25 (1998 groundwater report regarding seasonal pumping in the ACF Basin). Dr. Panday admitted at his deposition that he wrote this report (FX-594). *See* Panday Dep. Tr. at 466:8-12. He also testified regarding the 60% streamflow reduction factor. *See* Panday Dep. Tr. at 486:16-488:13 and 499:23–500:9.

Dr. Langseth

Georgia's arguments for Dr. Langseth are similarly without merit. Dr. Langseth is Florida's groundwater expert and Florida has designated him as a provisional witness it may call at trial. Georgia attacks his testimony, arguing that it contains new opinions. But these so-called "new opinions" are nothing more than Dr. Langseth's elaboration on his basic underlying opinion that the groundwater model Georgia relies upon is conservatively low. This work was previously disclosed during expert discovery, including the ***four*** days of Dr. Langseth's deposition, which extended past the close of discovery to August 18.

First, Georgia quotes portions of Dr. Langseth's key opinion, but edits out important context relating to one specific type of groundwater analysis he performed. When the complete excerpt is reviewed, Georgia's allegations fall flat:

> This model, the Jones and Torak MODFE model (Jones and Torak, 2006), has been used by Georgia to evaluate the impacts on streamflow of pumping. I expect this model to produce ***conservative estimates*** of streamflow depletions related to pumping because it does not represent all streams in the modeled area, it cannot directly represent the potential influence of karst solution channels, and some of the boundary conditions create the potential for mathematical generation of water in the absence of a physical source. This model is nevertheless the best currently available simulation model for the Upper Floridan aquifer in the ACF Basin and produces ***credible, albeit biased low***, results.

Langseth Initial Report at SS-7 (emphasis added). Additionally, Georgia's allegations regarding the 60% groundwater impact in the Flint basin are without merit for the reasons discussed above for Drs. Sunding and Hornberger. Florida's experts certainly are not barred from recognizing in their testimony admissions made by Georgia's experts that support Florida's opinions. *See supra* at 7. Moreover, Georgia specifically deposed Dr. Langseth at length about the 60 percent impact factor. *See, e.g.*, Langseth Dep. Tr. at 1157:12-1162:4 (discussing deposition exhibit 38 (FX-594) and testifying that "the 60% average annual conductivity factor" is "a perfectly valid number").

Second, Georgia contends that "Dr. Langseth never disclosed that he relied on an analysis called 'PART' in his expert report and never disclosed any related opinions." Not so. Indeed, Georgia counsel deposed Dr. Langseth at length concerning his reliance on the work of Georgia State Geologist's, Dr. James Kennedy, which was based on application of the USGS PART method. *See* Langseth Dep. Tr. at 128:4–132:12 (discussing a July 17, 2014 memorandum by Dr. James L. Kennedy that calculates annual stream base flows "from stream flow data from 1938 to 2012 on the USGS National Water Information System web site using the USGS PART base flow separation program") (FX-590 at 5). Dr. Langseth's deposition clearly reveals his reliance on PART. *See, e.g.*, Langseth Dep. Tr. at 1172:10–1174:7 (discussing use of the USGS PART method to create Florida Trial Ex. No. FX-593).

Third, contrary to Georgia's claims, Dr. Langseth did quantify groundwater-level declines in his expert report. *See* Langseth Initial Report at SS-6 ("Groundwater pumping has caused long-term declines in average groundwater levels in the Upper Floridan aquifer up to about 1 ft/yr, but declines during the 2010-2011 drought period ranged up to 17 ft/yr."); *id*. at 31–33 (relying upon Dr. Langseth's own data analysis as well as a number of studies to conclude that "groundwater levels in the Upper Floridan aquifer are generally declining.") Dr. Langseth also testified in his deposition that he had conducted a quantitative analysis of groundwater declines using the wells identified by Dr. Panday in his expert report. *See* Langseth Dep. Tr. at 486:24–487:4. Significantly, Dr. Panday in his deposition was presented with this analysis and did not dispute Dr. Langseth's conclusion that the average annual decline in groundwater levels

since 1992 was approximately 4.7 feet. *See* Panday Dep. Tr. at 562:25–563:6; Exs. 58-62, FX-548–FX-552.

Dr. Kimbro and Dr. White

As Georgia is aware, Dr. Kimbro was retained by the State of Florida as part of an ongoing research project to collect data about oysters in Apalachicola Bay. Each period, Dr. Kimbro collects additional information about the oyster population and updates his analysis accordingly. He explicitly informed Georgia of this fact during his deposition. *See* Kimbro Dep. Tr. at 44:5-9. Recent data he collected was disclosed to Georgia more than a month ago, on September 12, 2016. But nothing about this data altered his opinion in any way: he conclusively affirms that the cause of the 2012 collapse of the oyster population in Apalachicola Bay was a reduction in freshwater flow from Apalachicola Bay. That reduction led to high salinity conditions promoting disease, predation, and recruitment failure. These opinions are not new. *See* Kimbro Dep. Tr. at 55:14-56:7.

Dr. Kimbro also reflects on a criticism leveled by Georgia's expert on oysters, Dr. Rom Lipcius. In his February 29, 2016 Expert Report, Dr. Kimbro explained that Florida was actively engaged in re-shelling of oyster bars in Apalachicola Bay in an attempt to restore the oyster population. *See* Kimbro Dep. Tr. at 38:21-42:1. Georgia attempts to challenge this claim by organizing the re-shelling data in an arbitrary manner to suggest a decline in re-shelling effort. Using the very same data that Georgia has possessed for several months, Dr. Kimbro presents it in a principled fashion to demonstrate precisely what he detailed in his February 29, 2016 Expert Report: Florida has engaged in active re-shelling of oyster bars in Apalachicola Bay. *See* Kimbro Initial Expert Report at 4.

Dr. White's model uses a variety of inputs, including oyster growth data obtained from Dr. Kimbro. *See* White Dep. Tr. at 217:2-217:17. After Dr. Kimbro provided the updated growth data described above, Dr. White ran his model with additional data, all of which has been provided to Georgia. These results relate to no new opinions and his direct testimony merely reiterates what he detailed in his Initial Report and earlier deposition: results of his model confirmed that high salinity conditions contributed to reductions in the Apalachicola Bay oyster population. *See* White Dep. Tr. at 48:18-49:4.

Dr. Glibert

Similarly, Dr. Glibert offers no new opinions or conclusions in her pre-filed direct testimony. The information about which Georgia complains merely confirms analyses presented in Dr. Glibert's Initial Report provided on February 29, 2016, and is responsive to questioning by Georgia in Dr. Glibert's deposition.

First, Georgia is wrong to suggest that the mere six sentences Dr. Glibert devotes to the Chattahoochee Gage constitute a "new general opinion." As Dr. Glibert explained to Georgia's counsel during her deposition, she used flow records from the Sumatra Gage for the analysis in her Initial Report, comparing the results using both Sumatra and Chattahoochee Gage records for one particular station (located at 'Cat Point' in Apalachicola Bay). She testified there were no differences in the trends between the two gages. *See* Glibert Dep. Tr. at 175:9-175:20; Glibert Initial Report at 68-70. In her pre-filed direct testimony, Dr. Glibert simply extended this explanation to all stations in Apalachicola Bay, *cf.* Glibert Dep. Tr. at 516:2-516:5, and confirmed that the trends remained the same. The opinions expressed in Dr. Glibert's Pre-Filed Direct Testimony thus rely exclusively on the Sumatra Gage analyses previously disclosed in her Initial Report.

Second, Georgia mischaracterizes the two sentences of Dr. Glibert's pre-filed direct testimony where she confirms that post-2012 data that were not available as she prepared her expert report shows the same trends as the 2002-2012 data she evaluated in her February 29, 2016 report. In these two sentences, Dr. Glibert simply reflects on Georgia's expert, Dr. Charles Menzie. Georgia can hardly feign surprise that Dr. Glibert went back to perform these confirmations to put to rest any questions regarding the validity of her opinions. Again, she confirmed that these data "do not change [her] opinion in any way." The opinions expressed in Dr. Glibert's pre-filed direct testimony are based only on the analyses of data contained in her Initial Report.

Finally, Dr. Glibert's pre-filed direct testimony cites a draft report on phytoplankton that Florida obtained this summer from one of the authors. Georgia neglects to advise the Special Master that Florida promptly disclosed this draft report to Georgia on September 9 and produced it to Georgia on September 12, 2016. As Dr. Glibert explains, this draft report "reaffirmed" the analyses contained in her Initial Report. Dr. Glibert's opinions have simply not changed, and Florida's disclosure of a document provided to it in September 2016 was timely and appropriate.

Georgia Omits Any Reference to its Own Evolving Expert Case

Florida has not engaged in the behavior Georgia alleges. But, absent from the almost ten-page correspondence submitted by Georgia is any reference to its own ever-changing expert case. Months after its experts submitted reports and, in some instances, weeks after these experts testified, many of them submitted additional information, analyses, and opinions. For example, more than ten days after the close of expert discovery (on August 16, 2016), Georgia expert, Dr. William McAnally, submitted additional analyses and opinions. These additional materials sought to minimize the significance of deposition testimony he had provided just weeks prior in which he conceded that any increase in sea level would likely have ***no impact*** on salinity in Apalachicola Bay. Recognizing that such a concession was fatal to Georgia's position, Dr.

McAnally calculated "new" error bounds on his salinity model to reach conclusions more consistent with arguments Georgia will likely make at trial.

Similarly, Georgia provided photographs and news articles evaluated by its oyster expert (Dr. Rom Lipcius) in connection with providing his opinions, approximately three months after his expert report was submitted, and one month after his deposition was taken.

On July 26, 2016, nearly one month *after* the last deposition day of Georgia's hydrology expert, Dr. Philip Bedient, he produced a 19-page memorandum containing new information and analyses. Georgia provided no explanation for submitting these materials after Dr. Bedient's deposition. Similarly, and also on July 26, 2016, Georgia's groundwater expert, Dr. Sorab Panday, produced a memorandum that purported to respond to Florida's experts and provided new analysis on the impact of groundwater pumping from several aquifers in the Georgia portion of the ACF.

* * * *

As explained above, much of this dispute apparently flows from Georgia's flawed initial assessment of Florida's pre-filed direct testimony—an issue that could have been resolved with a telephone call. In asking this Court to strike proper testimony, Georgia hopes to prohibit Florida's experts from explaining opinions summarized in their reports, evaluating the contentions advanced by Georgia, and relying on the admissions and concessions its experts made. But neither the Case Management Plan nor the Federal Rules of Civil Procedure contemplate such a result, particularly when there is nothing "new" in the testimony just submitted.

Very truly yours,

/s/ Philip J. Perry
Philip J. Perry
of LATHAM & WATKINS LLP

cc: Counsel for Georgia