

No. 142, Original

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

THE STATE OF FLORIDA’S JULY 9, 2015 PROGRESS REPORT

The State of Florida respectfully submits this Progress Report to the Special Master pursuant to Section 4 of the December 3, 2014 Case Management Plan (“CMP”), as subsequently amended.

I. CHANGES IN THE GENERAL STATUS OF THE MATTER.

Since the State of Florida’s June 5, 2015 Progress Report, the States continue to make meaningful progress in discovery. Florida remains diligent in working with the State of Georgia and third parties to address discovery issues as they arise, participating in numerous and productive meet-and-confer sessions over the last month—including with several federal government agencies. Florida also continues to review and produce documents responsive to requests for production issued by Georgia in accordance with the production deadlines. Additional detail about Florida’s discovery efforts is provided in Section II below.

II. DISCOVERY EFFORTS.

A. Production of Responsive Documents to Georgia

Pursuant to Section 6.1.2 of the CMP, as amended, the States timely commenced their respective production of documents on February 11, 2015, and are continuing to produce documents on a rolling basis. As noted previously, Florida has mobilized a document review team of more than 50 attorneys to review and produce responsive information in accordance with the schedule established by the CMP. To date, Florida has produced approximately 290,000 emails (including approximately 165,000 this week), more than 100,000 pages of non-email ESI, and over 60 gigabytes of electronically produced modelling files.

The States continue to participate in meet-and-confer sessions to facilitate the discovery process and to resolve discovery issues promptly. As noted in previous Progress Reports, the States have devoted a considerable amount of time to further developing and refining the parameters of electronic discovery, and have reached agreement on an initial set of email custodians and search terms for each side. This approach has substantially reduced the scope and volume of materials the States must review and produce.

Florida expects to complete production of responsive documents within the production deadline specified in Section 6.1.2 of the CMP, as amended.

B. Written Discovery to Third Parties

Florida has continued to actively pursue responses to its written discovery from numerous non-parties, including a number of federal agencies and departments.

1. Touhy Requests and Subpoenas to Federal Agencies

Since the June 5, 2015 Progress Report, counsel for the States have jointly convened multiple productive calls with counsel representing the agencies and departments upon which they have served *Touhy* requests. These calls are part of a broader process of cooperation that

began in March when the requests were served, and that all Parties anticipate will continue. Notably, this process is bearing fruit: the States have received large productions from the U.S. Geological Survey and the U.S. Fish and Wildlife Service, and smaller productions from the U.S. Army Corps of Engineers and the U.S. Department of Agriculture. Based on conversations with counsel for the United States, the States understand that the U.S. Department of Commerce and the U.S. Department of Agriculture will make substantial productions in the near future. In addition, on July 8, 2015 Florida served a *Touhy* request on the U.S. Department of State. Florida has conferred with counsel for the United States regarding this request, and anticipates working with agency counsel to facilitate production of responsive documents as it has with the other agencies.

As this Court is aware, the 120 day period for the agencies to complete production will expire in a matter of days. Counsel for the United States has conferred with the States regarding an extension, and filed a request for a 45 day extension with this Court on Monday, July 6, 2015. The State of Florida is mindful of the challenges the agencies face in responding to the *Touhy* requests, and believes that continued cooperation would be fruitful; accordingly, it does not oppose this request. However, Florida must also emphasize that responsive information in the hands of the agencies is critical to Florida's ability to prepare its expert disclosures, and that significant delay in the production of this information beyond a 45-day period is likely to compromise Florida's ability to complete its expert disclosures by January 15, 2016. Given that this Court has made clear that "further enlargement of any deadlines will be strongly disfavored," Case Management Order No. 10 at 1 (May 11, 2015); *see also* Tr. of June 9, 2015 Tel. Conference at 4, Florida wanted to bring this issue to the Court's attention now.

2. Non-Party Subpoenas

Florida has served a total of 88 non-party subpoenas. Neither Florida nor Georgia have served additional non-party subpoenas since the last Progress Report. Attachment A to Florida's May 1 Progress Report lists all subpoenas served on non-parties to date by both parties.

Thus far, Counsel for Florida has conferred with representatives of 85 of the 88 subpoenaed entities. Florida continues to work with these subpoenaed third parties to streamline further production and resolve any outstanding issues. With the exception of one entity, noted below, these efforts have been successful. 63 subpoenaed entities have made at least a partial production of documents, yielding approximately 53,851 documents produced to date. Efforts to communicate with counsel for the remaining subpoena recipients are ongoing, and counsel for Florida will continue to make every effort to facilitate the third parties' timely, cost-efficient production of documents. However, given the scope of the search required to respond, a number of non-parties have advised Florida that they are unlikely to complete their productions within 120 days.

As noted above, the vast majority of the subpoenaed entities have worked cooperatively with Florida to produce responsive documents. However, Florida does appear to have reached an impasse with ACF Stakeholders, Inc. Florida has been working with ACF Stakeholders for some time in an attempt to resolve its objections to Florida's production requests. However, in addition to certain other objections, ACF Stakeholders appears to have taken a final position that because its various members have entered into non-disclosure agreements, certain documents and information responsive to Florida's subpoena are exempt from disclosure pursuant to Federal Rule of Evidence 408. Florida is evaluating this position and may need to seek the assistance of the court in the near future if a resolution with the ACF Stakeholders cannot be reached.

III. UNRESOLVED DISPUTES.

Currently, there are no unresolved disputes between the States. While the States have identified certain issues regarding the sufficiency of written discovery responses and the completeness of designated and identified email custodians, they continue to meet and confer on a frequent basis to resolve such issues. As noted in prior Progress Reports, Florida believes that the scope and frequency of counsel interaction has facilitated—and will continue to facilitate—resolution of the foregoing and other issues.

IV. OTHER ISSUES OF CONCERN.

A. Technological Issues with the Production of Models and Data Sets

As Florida has noted in prior Progress Reports, technological issues with models and other data sets are slowing the States' progress in discovery. The States are continuing to discuss technological issues associated with the production of certain data sets and scientific models, but the production of such documentation remains challenging. Moreover, the assimilation and analysis of the data and modeling information produced to date is time consuming for both States, and has required multiple meet-and-confer sessions regarding the accessibility and scope of what has been produced. Florida anticipates such issues will continue to arise as discovery progresses.

B. Timing

With the extensions of the discovery schedule granted by the Court on April 8, 2015 and May 11, 2015, Florida anticipates completing discovery in accordance with the schedule delineated in Sections 6 and 7 of the CMP, as amended.

V. FURTHER DISCOVERY ANTICIPATED DURING THE COMING MONTH.

Florida continues to analyze responses it received from Georgia and may serve focused additional written discovery during the coming month. As it has endeavored to do throughout

this proceeding, Florida will work to minimize the burden and narrow the scope of any additional discovery requests it issues to Georgia or any third parties.

VI. SETTLEMENT DISCUSSIONS.

Since the date of the last progress report the states met to discuss the prospect for resolution of the dispute. The states will continue their discussions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the State of Florida's July 9, 2015 Progress Report has been served on this 9th day of July 2015, in the manner specified below:

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