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 JANUARY 8, 2016 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 (the "CMP"), as subsequently amended.

I. GENERAL STATUS OF THE MATTER

During the Court's December 8, 2015 telephone status conference, the Court identified three specific topics to be addressed by this report:

1. Whether confidential mediation efforts are making progress (Tr. 12:4-7);
2. Whether dates have been set for requested depositions (Tr. 22:13-17); and
3. Whether document production issues continue to exist, or whether they have been resolved (Tr. 32:14-17).

Florida is pleased to report that the parties have indeed made progress with their confidential mediation in this matter: a mediator has been jointly identified, and the parties are working productively on the logistics necessary to move that mediation process forward. Florida is also pleased to report that nearly all depositions have now been scheduled. In addition, most (although not all) documents sought have been produced.

Although Florida is pleased to report this progress, Florida regrets having to report that, in some respects, Georgia counsel is becoming unnecessarily aggressive and contentious. For example, Georgia is seeking to depose a member of Florida's counsel team, and also seeking to depose a high-ranking elected official (without first deposing more knowledgeable persons). Florida has been attempting to resolve these and other issues with Georgia and will continue to do so in the days before the January 12, 2016 status conference. The discrete issues currently under discussion can be broken down into four categories, addressed in more detail below: (1) both parties' 30(b)(6) depositions; (2) Georgia's refusal to designate a 30(b)(6) witness to testify regarding missing email files for multiple key Georgia employees that have apparently been destroyed or deleted; (3) email files for another key Georgia witness that appear to be missing; and (4) Georgia's premature request to depose a high-level elected Florida official without first conducting depositions of other lower-level personnel Florida has identified with relevant knowledge.

In sum, the States have been working cooperatively and have made significant progress on some important issues, but the States are still working to resolve a number of discovery-related issues. The States have met and conferred about these issues and will continue to do so.

II. POTENTIAL DISCOVERY ISSUES

As the November 10 date for written discovery has passed, this Progress Report discusses only specific outstanding issues.

A. Scope of 30(b)(6) Depositions

In recent Progress Reports, Florida has raised concerns about the appropriate use of the 30(b)(6) deposition mechanism in this case and cited many authorities about the potential for misuse of 30(b)(6). *See, e.g., December 4, 2015 Progress Report* at 10-11 (citing authorities). Florida objected to Georgia's 30(b)(6) topics primarily because they were vastly overbroad and, in many cases, appeared to call for deposition testimony on complex, scientific topics to be addressed by expert witnesses. *See id.* at 9. The States are continuing to struggle with the appropriate scope of 30(b)(6) in this case. In response to Florida's amended 30(b)(6) requests, Georgia recently raised objections that are very similar, if not substantially identical, to those Florida has previously articulated, including that certain requests prematurely seek expert opinion testimony, or are vague, overly broad, or unduly burdensome. In Florida's view, Georgia's objections validate Florida's longstanding position on the proper purpose and scope of 30(b)(6) testimony in this matter. While Florida has nevertheless attempted to accommodate Georgia's 30(b)(6) requests by providing responsive witnesses, Georgia takes its arguments further than Florida by refusing to produce any witness at all in response to some of Florida's topics (discussed in detail below).

More generally, Florida is concerned that Georgia may be attempting to misuse the 30(b)(6) deposition as a game of "gotcha," rather than a legitimate device to discover relevant facts and contentions. Specifically, in correspondence Georgia has unfairly faulted Florida when certain 30(b)(6) witnesses have been unable to answer every conceivable question related to Georgia's incredibly broad 30(b)(6) topics. It is well-established, however, that 30(b)(6) depositions are not memory tests. *Equal Employment Opportunity Comm'n v. Am. Int'l Grp., Inc.*, 1994 WL 376052, at *3 (S.D.N.Y. July 18, 1994) ("Rule 30(b)(6) is not designed to be a memory contest. It is not reasonable to expect any individual to remember every fact in an

EEOC investigative file."); *McCormick-Morgan, Inc. v. Teledyne Indus.*, 134 F.R.D. 275, 286 (N.D. Cal. 1991) ("in a case like this, no one human being can be expected to set forth, especially orally in deposition, a fully reliable and sufficiently complete account of all the bases for the contentions made and positions taken by a party"); *U.S. ex rel. Fago v. M & T Mortgage Corp.*, 235 F.R.D. 11, 25 (D.D.C. 2006) ("Without a photographic memory, Attig could not reasonably be expected to testify as to the loan numbers . . . for sixty three different loans."); *Promega Corp. v. Applera Corp.*, 2002 WL 32340886, at *4 (W.D. Wis. Nov. 27, 2002) ("it appears unrealistic to expect a [Rule 30(b)(6)] deponent to be intimately familiar with the details of every individual transaction")). To attempt to make the 30(b)(6) depositions more productive given the extreme breadth of Georgia's requests, Florida's 30(b)(6) witnesses have begun to bring outlines prepared in advance with the assistance of multiple state agency employees containing specific details drawn from the discovery record about areas that Florida guesses Georgia will inquire about. Georgia has also faulted Florida for that practice, even though it is well-accepted in complex 30(b)(6) depositions. *See, e.g.*, *Zeng v. Elec. Data Sys. Corp.*, 2007 WL 2713905, at *4 (E.D. Va. Sept. 13, 2007) ("[G]iven the duty of a corporate designee to testify to all information reasonably known to the corporation, including matters beyond the designee's personal knowledge, a well-prepared deposition notebook has the potential to enhance the accuracy and depth of a designee's testimony. As such, use of a notebook is not indicative of a designee's unpreparedness; nor is it evidence of witness coaching.").

For example, Georgia recently conducted a 30(b)(6) deposition of Brett Cyphers, the Executive Director of the Northwest Florida Water Management District (NWFWMD), who testified regarding certain of Georgia's very broad 30(b)(6) topics (which each, it turns out, included many undisclosed subtopics). As the head of the NWFWMD, Mr. Cyphers was already

an expert in many of the subject matter areas to be addressed. He prepared for the deposition by speaking with his staff, reviewing documents, and reviewing an outline of specific details prepared by a number of other state employees with the assistance of Florida's counsel. Georgia's counsel has now taken the unduly aggressive position that Georgia is entitled to depose the member of Florida's counsel team who worked with the state employees to prepare the outline, even when the outline itself was made available to Georgia's counsel at the beginning of the deposition, Florida has disclosed the specific state employees who primarily authored the outline's contents, and Florida has offered to assist Georgia in locating the record material on which the outline is based. Indeed, there is no mystery as to the source of the contents of the outline: the outline contained a detailed list of source documents (which were produced in discovery) as a bibliography. Using such an outline was the only practical way to cope with Georgia's broad 30(b)(6) requests, and Florida is puzzled by Georgia's continuing objections on this point.

Georgia has also raised objections regarding its 30(b)(6) deposition of Greg Munson, who Florida designated to testify regarding "[t]he basis for Florida's allegation that 'Georgia's bad faith caused … negotiations to disintegrate, resulting in the demise of the ACF Compact in 2003." Specifically, Georgia claims that Mr. Munson was inadequately prepared to discuss that topic because he could not testify in detail about the substance of the negotiations that took place among the States. But that was not what the 30(b)(6) topic called for. Mr. Munson testified at length regarding *the basis for Florida's allegation*: Georgia conducted secret negotiations, and entered a settlement agreement, with the U.S. Army Corps of Engineers, which violated both the court-ordered stay in the parties' ongoing litigation and the "live and let live" provisions of the parties' agreements regarding disputed water rights. Mr. Munson explained that the factual

bases for Florida's position are largely set forth in findings entered by United States District Court Judge Bowdre in *Alabama v. United States Army Corps Engineers et al.*, Case No. 1:90-cv-01331 (N.D. Ala. 1990), in orders that Mr. Munson reviewed in preparation for his deposition and that were provided to Georgia's counsel. For example, Judge Bowdre found that:

- In January 2003, Georgia engaged in secret negotiations with the U.S. Army Corps. of Engineers regarding the allocation of disputed water rights. (Order re: Motion to Dissolve Preliminary Injunction at 172, dated February 18, 2005.)

- "[T]he court ***did find an inference of bad faith*** based on the fact that, while the Corps and Georgia were engaged with Alabama and Florida in discussions and negotiations involving allocation of water in Lake Lanier, they never mentioned to Alabama and Florida that they were simultaneously engaged in settlement discussions in the D.C. case that involved some of the same issues . . . [and thus] robbed Alabama and Florida of the opportunity to participate in the negotiations or to litigate their objections with the benefit of timely notice and compliance with the discovery requirements." (*Id*. at 174-75.)

While Georgia may not agree with Judge Bowdre's factual findings regarding Georgia's bad faith negotiations (and Florida's reliance on many of those same facts), that is not a legitimate basis to claim that Mr. Munson's testimony on this issue was deficient. Florida is not obligated to prepare and produce a 30(b)(6) witness to testify regarding *Georgia's potential counterarguments*. To the extent that Georgia wishes to depose someone familiar with the negotiations among the States, Georgia already has already taken a two-day deposition of Florida's former employee, Mr. Douglas Barr, who was personally involved in the above-referenced negotiations and testified comprehensively about these issues. Georgia also has noticed the deposition of Mr. David Struhs, who is similarly knowledgeable regarding these negotiations.

Although the States are continuing to work constructively to address 30(b)(6) issues, Florida respectfully identifies the appropriate scope of 30(b)(6) in this case as an issue that may ultimately require judicial resolution once the meet-and-confer process runs its course.

B. 30(b)(6) Deposition Regarding Missing or Deleted Emails from Former Georgia EPD Directors

Georgia has refused to make a witness available for two 30(b)(6) topics related to the issue of deleted data from multiple former directors of the Georgia EPD that Florida noted in its December 4, 2015 Progress Report. *See December 4, 2015 Progress Report* at 4-5. Florida's Topics 14 and 15 regard the preservation, collection, and destruction of documentation and data that is highly salient to the issues in this litigation, including the emails of Allen Barnes, Carol Couch, and Harold Reheis—all designated as priority "email custodians," and all former directors of Georgia EPD with direct involvement in, and responsibility for, matters relevant to this litigation and the long-running dispute between the States. Florida believes the missing emails are likely to be highly relevant to proving Georgia's inequitable conduct in this case, and can provide the Court specific examples of what the emails would be likely to address. Georgia has refused to designate a 30(b)(6) witness for these topics primarily on the grounds that these topics are "duplicative of Georgia's responses to Florida's interrogatory requests" and presenting a witness would be unduly burdensome. In brief, Georgia's position as articulated in its interrogatory responses is that the emails would have been destroyed during the migration of Georgia EPD's email servers to a new platform in 2013. That response is—at best—incomplete. As a matter of technical practice, complete backups are usually made prior to major migrations and then often retained. In addition, there are many other technical ways that much of this data could potentially be located, even if complete backups do not exist. To reduce the burden on Georgia, Florida has provided a list of specific areas that it will ask about in the 30(b)(6) deposition—akin to a deposition outline—so that the Georgia witnesses with the most relevant knowledge can be easily identified and prepared. Nonetheless, as of the time of this filing Georgia continues to refuse to designate any witnesses on these topics.

Having provided Florida with general statements regarding its investigation into the missing data and possible efforts for recovery, Florida is entitled to ask specific questions regarding the same topics. As Florida noted in its December 4, 2015 Progress Report, it "hopes to move forward quickly with th[is] inquiry, and plans to depose the subject individuals once it is determined whether any additional emails can be identified." *Id.* at 5. To date, that effort has been obstructed. Further delays in scheduling this 30(b)(6) testimony will adversely impact Florida's ability to depose the relevant individuals regarding these documents and complete its discovery in a timely manner.

C. Potential Missing Email from Additional Georgia EPD Official

In preparing for the January 14, 2016 deposition of Tim Cash, Assistant Branch Chief in the EPD's Watershed Protection Division from approximately 2004 to March 2012, and a part-time employee since January 2013, it came to Florida's attention that there appears to be large gaps in the email that Georgia produced from Tim Cash's custodial files. Cash is one of the States' agreed-upon email custodians, and—with the exception of the March 2012 to January 2013 period—has worked for Georgia EPD since 1988. Given Mr. Cash's longstanding role in water management, Florida expected to receive much more email from Mr. Cash's custodial files than has been produced to date. The States are continuing to meet-and-confer on this issue.

D. Georgia's Improper Proposed Deposition of High-Ranking Florida Government Official

Georgia is seeking to depose Adam Putnam, Commissioner of Florida's Department of Agriculture and Consumer Services ("DACS"). The DACS Commissioner is a statewide elected official—one of only three elected cabinet members in Florida's government[1]—and the head of an important state agency. Georgia appears to be seeking to depose Mr. Putnam because of his

[1] The others are the Attorney General and the Chief Financial Officer. *See* Art. IV, § 4(a), Fla. Const.

involvement in a letter submitted by Florida to the U.S. Department of Commerce requesting that the federal government declare a commercial fishery failure in the Apalachicola Bay pursuant to the Magnuson-Stevens Fishery Management and Conservation Act. That letter referenced multiple possible factors impacting oysters in Apalachicola Bay; overharvesting of illegal and sub-legal oysters was mentioned as a potential contributing factor in damaging the stressed oyster population. After careful additional study, the Florida agency with primary authority over oysters subsequently determined that low river flow—and not overharvesting—was the predominant cause of the oyster population collapse, and provided those results as a supplemental submission to the federal government. After evaluating all the relevant information, the U.S. Secretary of Commerce determined that the disaster was predominantly caused by reduced river flows that led to increased salinity and a persistent occurrence of oyster predators—*i.e.*, not overharvesting.

Florida has objected to Mr. Putnam's deposition as premature, based on well-established law that, absent extraordinary circumstances, high-ranking government officials are protected from depositions related to the performance of their official duties. *See, e.g.*, *Lederman v. New York City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1510 (2014) (upholding protective order barring deposition of current and former Mayor because plaintiffs failed to show exceptional circumstances, including that the relevant information could not be obtained elsewhere); *In re United States*, 624 F.3d 1368, 1374 (11th Cir. 2010) ("there must be a showing of special need before a high-ranking executive official can be compelled by the judiciary to appear"); *In re United States (Holder*), 197 F.3d 310, 313 (8th Cir. 1999) (quashing subpoenas for Attorneys General because petitioner did not establish exceptional circumstances); *In re FDIC*, 58 F.3d 1055, 1060 (5th Cir. 1995) (rejecting subpoenas

for testimony of three members of FDIC's board of directors absent finding of exceptional circumstances); *In re United States*, 985 F.2d 510, 512 (11th Cir. 1993) (declining to compel Commissioner of the FDA to testify). To establish extraordinary circumstances, a party must show (1) the necessity of the information sought; (2) the relevance of that information; and (3) the inability to obtain the information from elsewhere. Even assuming Georgia can establish elements (1) and (2), it cannot establish (3)—inability to obtain the information elsewhere. Indeed, despite Florida's requests that Georgia make a showing of requisite need, Georgia has not even made a genuine effort to do so. Florida objected to Mr. Putnam's deposition on November 11, 2015, explaining that the deposition was premature. To date, Georgia has deposed only one DACS employee, Mr. Knickerbocker. This employee is not a direct report to Mr. Putnam and did not know the information Georgia seeks, but he identified others above him in the chain of command with more relevant responsibilities. Florida has also specifically identified to Georgia other employees with much more relevant knowledge than Commissioner Putnam—including the 3 individuals who actually drafted, edited, and submitted the letter for Commissioner Putnam's signature, one of whom Georgia is already intending to depose on February 18, 2016. In addition, Florida responded to an interrogatory related to the subject matter of this letter identifying multiple DACS and other state employees other than Mr. Putnam and Mr. Knickerbocker who had at least some role in oyster disaster issues. Notwithstanding these facts, to date, Georgia is attempting to leap frog the required process and depose a high-ranking official without making the necessary showing of need—*i.e.*, that it cannot obtain the information from any other witness.

Florida is sensitive to the deadlines in this case, and is willing to work with Georgia to ensure that it has adequate discovery relating to this issue between now and February 29, 2016.

However, despite recent requests, Georgia has not even attempted to make the showing necessary to compel Mr. Putnam to appear.[2] Again, Florida hopes this issue can be resolved amicably before the Court's status conference.

III. STATUS OF OTHER DISCOVERY

A. Interrogatories and Requests for Admissions

Since the December 4, 2015 Progress Report, the States have corresponded regarding the sufficiency of certain responses to written discovery, and both States have served supplemental responses. For example, Georgia served its Third Supplemental Response to Florida's First Set of Interrogatories the evening of December 4, 2015, and Florida served its First Supplemental Responses to Georgia's Requests for Admission on December 30, 2015.

Florida further supplemented its Responses to Georgia's Requests for Admission on January 4, 2016. Minutes before filing this Progress Report, Florida received a letter from Georgia's counsel regarding some of those revised Responses; however, Florida has not yet had an opportunity to evaluate the letter. This Court's Case Management Plan requires the parties to meet-and-confer before raising this issue with the Court.

Florida will continue to revise or supplement its responses to written discovery as additional facts are developed in discovery.

B. Production of Responsive Documents

The States completed productions of responsive documents on November 10, 2015. Since the December 4, 2015 Progress Report, both States have made supplemental productions (including of third party materials[3]) and Georgia has served its privilege log. Florida has also

[2] Although Georgia raised the prospect of Mr. Putnam's deposition multiple months ago, it appeared in recent months to have dropped the request. Until earlier this week, Florida believed that Georgia would, as required, conduct the depositions of other relevant personnel before re-raising this issue.

[3] Florida will continue to produce to Georgia third party documents it receives on a rolling basis.

received a number of productions from subpoenaed third parties—including ARCADIS, Atkins, and multiple Georgia universities—and understands that production of documents from these third parties is close to complete, with one potential exception. Specifically, while Florida has received much of the email it sought from Georgia university professors, Florida has received a limited email production from James Hook, a retired professor at the University of Georgia who has extensively studied agricultural water use and irrigation practices in the Flint River Basin, their impact on groundwater, and on water conservation and sustainable irrigation practices. Dr. Hook was served a subpoena duces tecum on October 8, 2015. Florida received a production of materials related to Dr. Hook on December 23, 2015; however, this production contained only approximately 600 of Dr. Hook's emails, far fewer than expected given his extensive work on water resources issues in Georgia. Florida will meet-and-confer with Georgia about this issue.

In addition, Florida has identified a small subset of documents and other data produced by Georgia that must be re-produced in native form with accompanying metadata in order to be fully usable. Florida will meet-and-confer with Georgia about this issue.

Since the December 4, 2015 Progress Report, the States have also cooperated extensively in the identification of potentially-privileged documents and clawback of documents under Case Management Order No. 6.

C. Touhy Requests to Federal Agencies

The States are continuing to cooperate with the Federal agencies and departments upon which they have served *Touhy* requests. Since the December 4, 2015 Progress Report, Florida has followed up with counsel for the State Department regarding its response to Florida's July 8, 2015 *Touhy* request for production of documents, and regarding specific interview topics and dates for select U.S. government employees.

IV. UNRESOLVED DISPUTES

Florida is earnestly trying to find common ground with Georgia on the open issues identified herein. Florida hopes to make and report progress before the upcoming status conference, but is not certain it will be able to do so.

V. SETTLEMENT EFFORTS

The States have agreed on a mediator and have had continued discussions regarding the schedule and format for mediation.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

This is to certify that the STATE OF FLORIDA'S JANUARY 8, 2016 PROGRESS REPORT has been served on this 8th day of January 2016, in the manner specified below:

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