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SUPREME COURT OF THE UNITED STATES
No. 142, Original

STATE OF FLORIDA,)
))
) Plaintiff,))
))
V.))
))
STATE OF GEORGIA,))
) Defendants.))

TELEPHONE CONFERENCE before SPECIAL MASTER
RALPH I. LANCASTER, held at the law offices of Pierce
Atwood, LLP, at Merrill's Wharf, 254 Commercial Street,
Portland, Maine, on December 8, 2015, commencing at
10:00 a.m., before Claudette G. Mason, RMR, CRR, a
Notary Public in and for the State of Maine.

APPEARANCES:

For the State of Florida: PHILIP J. PERRY, ESQ.
ALLEN C. WINSOR, ESQ.
OSVALDO VAZQUEZ, ESQ.

For the State of Georgia: CRAIG S. PRIMIS, ESQ.
DEVORA W. ALLON, ESQ.
BRITT GRANT, ESQ.

For the U.S.A.: MICHAEL T. GRAY, ESQ.

Also Present: JOSHUA D. DUNLAP, ESQ.
MARY CLIFFORD

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1 from Kirkland & Ellis, LLP, for the State of
2 Georgia. I also have with me my colleague
3 Devora Allon.
4 MS. GRANT: And, good morning, your
5 Honor. Britt Grant is also on the line from
6 Georgia.
7 SPECIAL MASTER LANCASTER: Thank you.
8 Mr. Allen, will you be the spokesperson
9 for Georgia?
10 MR. PRIMIS: This is Craig Primis. I'll
11 be the spokesperson for Georgia.
12 And just to clear up any confusion, we
13 have two people with the last name Allen on
14 our team. I believe you may be referring to
15 Winn Allen, who has spoken in the past. This
16 is an unrelated person named Devora Allon.
17 SPECIAL MASTER LANCASTER: Thank you,
18 Mr. Primis, for clarifying that.
19 United States?
20 MR. GRAY: Yes, your Honor. Good
21 morning, your Honor. This is Michael Gray
22 for the United States.
23 SPECIAL MASTER LANCASTER: Mr. Gray,
24 having looked at the progress reports, I
25 don't think there is anything that will call

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2 PROCEEDINGS
3 SPECIAL MASTER LANCASTER: Good morning,
4 counsel.
5 MR. PERRY: Good morning, your Honor.
6 SPECIAL MASTER LANCASTER: We have the
7 usual suspects here, Josh Dunlap, the case
8 manager; Mary Clifford, the legal assistant;
9 and the incomparable Claudette Mason, our
10 reporter.
11 Let's start again with appearances,
12 please. Florida?
13 MR. PERRY: Phil Perry for Florida, your
14 Honor.
15 MR. WINSOR: Good morning. This is
16 Allen Winsor. I'm on the line as well.
17 SPECIAL MASTER LANCASTER: Anyone else
18 for Florida?
19 MR. VAZQUEZ: Good morning, sir. This
20 is Os Vazquez from Florida as well.
21 SPECIAL MASTER LANCASTER: Mr. Perry,
22 will you be the spokesperson today?
23 MR. PERRY: I will, your Honor.
24 SPECIAL MASTER LANCASTER: Georgia?
25 MR. PRIMIS: Your Honor, Craig Primis

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1 for your comments; but you should feel free
2 to jump in if there is anything that is
3 subject to your thoughts or comments. And
4 let me say on an ongoing basis -- I won't
5 repeat this again -- but you should
6 understand that that invitation stands at
7 each conference. Clear?
8 MR. GRAY: Yes. Thank you very much.
9 SPECIAL MASTER LANCASTER: Let's start,
10 if we may, with my favorite -- this will be
11 no surprise -- the mediation and settlement
12 sections of your progress reports.
13 Let me remind you that whatever you do,
14 whatever you say will be part of a
15 transcript. So you should be circumspect in
16 responding to my questions.
17 First, both progress reports indicated
18 that you have begun the mediation discussion.
19 I'm not clear, however, exactly what is going
20 on. When is the last time that you met or
21 discussed mediation?
22 Florida?
23 MR. PERRY: Your Honor, I believe it was
24 last week. And Mr. Primis and I have been
25 having that discussion, and we have been in

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1 the process of arranging for all the
 2 logistics that are required for a
 3 confidential mediation process, including the
 4 selection of the mediator.
 5 SPECIAL MASTER LANCASTER: Georgia, do
 6 you agree?
 7 MR. PRIMIS: Yes, your Honor -- Craig
 8 Primis -- I do agree.
 9 To put a little more color on that, the
 10 parties agreed shortly after the call last
 11 month to exchange proposed mediator names. I
 12 am mindful of your Honor's comments at the
 13 beginning. I won't identify who we
 14 identified to each other, but we did exchange
 15 names. And both sides have had an
 16 opportunity to evaluate whether the people on
 17 those lists would be appropriate.
 18 They were all reputable attorneys. So
 19 in our view it was a good faith exchange of
 20 names. And we're trying to come to ground on
 21 selecting one of those people. That was the
 22 conversation that Mr. Perry and I had last
 23 week.
 24 I believe he was going to take some
 25 steps this week to further evaluate one of

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1 the candidates, and Georgia stands ready to
 2 move expeditiously once he's done that.
 3 SPECIAL MASTER LANCASTER: I take it
 4 then that this is by phone conference rather
 5 than in person, Mr. --
 6 MR. PRIMIS: Yes. In terms of selection
 7 of a mediator and logistics, we have been
 8 doing that by phone conference. I think once
 9 we have a mediator selected, I'm just
 10 anticipating that at that point we'll all
 11 agree that it will be important to the
 12 process to get key people meeting in person.
 13 But at this point, just for efficiency
 14 purposes, we're moving through with telephone
 15 conferences.
 16 SPECIAL MASTER LANCASTER: And when will
 17 the next discussion of mediation take place,
 18 Florida?
 19 MR. PERRY: Your Honor, Phil Perry for
 20 Florida.
 21 Mr. Primis is correct that we are
 22 engaged in an effort to make progress in the
 23 mediator selection, and we hope that we'll
 24 have another discussion on that topic with
 25 Georgia by the end of this week.

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1 SPECIAL MASTER LANCASTER: Georgia?
 2 MR. PRIMIS: Yes, we're ready to talk
 3 whenever Mr. Perry finishes with his due
 4 diligence. So certainly this week would be
 5 acceptable to us. And from our perspective,
 6 the sooner the better.
 7 SPECIAL MASTER LANCASTER: Will the
 8 decision on a mediator be done by outside
 9 lawyers or by consensus process, or how is it
 10 working, Florida?
 11 MR. PERRY: Your Honor, my sense is that
 12 it may well be by a consensus process. Right
 13 now, without disclosing any of the details,
 14 there is a potential that we could agree on
 15 an individual that both entities, both states
 16 know of and are familiar with. And so that
 17 was, I think, what Mr. Primis was describing
 18 a moment ago. And so that's a good
 19 development, and we're working on that now.
 20 SPECIAL MASTER LANCASTER: Georgia?
 21 MR. PRIMIS: Yes, your Honor. The --
 22 the assumption that Georgia has been
 23 proceeding on, I think it's been explicitly
 24 stated between the parties, is that the
 25 agreed mediator would be somebody acceptable

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1 not only to outside counsel, but also to the
 2 decision makers within the states because
 3 it's important for there to be buy-in both
 4 among clients and counsel for the process and
 5 for the mediator.
 6 And so we have been driving towards a
 7 voluntary and consensual selection process,
 8 which appears to be moving fairly quickly,
 9 and, hopefully, will be resolved soon.
 10 SPECIAL MASTER LANCASTER: You said lead
 11 mediator?
 12 MR. PRIMIS: No. I -- there would just
 13 be one mediator. I'm sorry if I said that.
 14 Maybe I meant lead to a mediator, but we are
 15 only focusing on and aiming to select one.
 16 SPECIAL MASTER LANCASTER: Let me just
 17 suggest that a consensus decision, that is a
 18 decision by the outside lawyers and
 19 representatives of the states and God knows
 20 who else, is doomed to failure. There should
 21 be one person on each side; and it should be
 22 one of -- in my opinion it should be one of
 23 the outside lawyers who has the authority to
 24 make that decision. Otherwise, you're never
 25 going to get there.

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1 Now, that's just my comment; but I'm
 2 going to suggest to you that you -- because
 3 you are experienced, talented lawyers -- that
 4 you suggest to your state clients that they
 5 delegate the authority to select the mediator
 6 to you. You can obtain whatever information
 7 they want to give you; but in the end, you
 8 make the decision.

9 That's just a suggestion. I have no
 10 power to order you to do that, and I wouldn't
 11 do it anyway. But I suggest from my
 12 experience as an independent counsel that if
 13 you try to do things by consensus, you're
 14 doomed to failure.

15 Well, I would hope -- I'm very pleased
 16 that you have begun making progress on the
 17 mediation. And I'm hopeful that you will get
 18 to the decision very quickly.

19 Do you intend to set a time limit for
 20 the mediation to conclude, Florida?

21 MR. PERRY: Your Honor, we would like to
 22 speak with the mediator in a little more
 23 detail on our options for format and process.
 24 It may be that we want to approach this in a
 25 way that allows us to initially mediate a

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1 couple of the core issues fairly quickly to
 2 see where we get and see if there's a road
 3 forward and then schedule further sessions
 4 thereafter. But we want to do it in a way
 5 that maximizes the potential for success,
 6 your Honor.

7 And so we appreciate your suggestion and
 8 your comments very much, and for our part or
 9 for Florida's part we are trying to find a
 10 way to maximize the potential success by
 11 arranging a process that allows us the
 12 flexibility to move quickly, but also
 13 recognizes the complexity involved.

14 SPECIAL MASTER LANCASTER: Georgia?

15 MR. PRIMIS: Yes. I think we agree with
 16 one part of what Mr. Perry said, which is
 17 that it's important to get the mediator's
 18 suggestions and input on logistics. We
 19 intend to be very flexible, and the mediators
 20 that we have exchanged by name are all
 21 experienced and have their own developed
 22 methodologies for going about doing this.

23 So I think the first step -- and this
 24 should happen rapidly -- would be for the
 25 parties to get together with the mediator,

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1 get an overview of the case, the issues that
 2 are centrally in dispute, and then get that
 3 person's take on the best way forward,
 4 obviously with input from the parties given
 5 our superior knowledge of the facts of the
 6 case at this point.

7 But that would be the recommended first
 8 step. And I think we would want to secure
 9 time with the mediator at the mediator's
 10 earliest convenience.

11 And these are usually busy people, so it
 12 might take a bit of time to get that person
 13 up to speed and to get on their calendar, but
 14 move it forward quickly and assess where it's
 15 heading and how the mediator can keep the
 16 process moving forward.

17 We would be open to discussing an end
 18 point for it, but in my experience these
 19 sometimes evolve organically and are very
 20 iterative processes. And while time pressure
 21 would be good to keep people focused, we
 22 wouldn't want it to become an impediment if
 23 progress is being made in the interim.

24 SPECIAL MASTER LANCASTER: Two things,
 25 and then we'll switch to something else.

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1 First, feel free to share with your clients
 2 my suggestions as to giving you authority to
 3 make these decisions rather than doing it by
 4 consensus. And, secondly, I anticipate that
 5 the next status report will reflect that the
 6 parties have agreed to a mediator and a
 7 timing for the mediation.

8 Any questions about that?

9 MR. PRIMIS: No, your Honor.

10 SPECIAL MASTER LANCASTER: Georgia --
 11 Florida?

12 MR. PERRY: No. No, your Honor.

13 SPECIAL MASTER LANCASTER: All right.
 14 Then, let's turn to other issues which have
 15 been raised in the progress report. Florida
 16 has said that it is continuing to seek
 17 documents by subpoena of various professors
 18 at the Georgia universities. Do the parties
 19 have anything to add to that?

20 Florida?

21 MR. PERRY: Yes, your Honor. We have
 22 attempted to only seek documents that we
 23 think are critical to our case for trial.
 24 And after your order ordered the production
 25 of Dr. Kistenmacher's e-mails a few weeks

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1 ago, we have, of course, spent a lot of time
2 with that; and we have continued his
3 deposition. And that has taught us quite a
4 bit about the case.

5 Those e-mails are invaluable to us, and
6 we have been able also to very specifically
7 tailor the additional e-mails we will need.
8 And we have only identified three professors
9 from Georgia universities that have e-mails
10 that we would like to pursue. One is a
11 gentleman named Dr. Georgakakos, who is the
12 supervisor of Dr. Kistenmacher. And we have
13 offered search terms to Georgia for
14 Dr. Kistenmacher focused on the same very
15 specific issues we think will help us with
16 this case.

17 Dr. Georgakakos is the director of an
18 entity that advertises itself as in close
19 partnership with the Georgia State
20 Environmental Protection Division on
21 hydrology issues and integrally involved in
22 Georgia state water planning. And so our
23 search terms were very narrowly confined to
24 those issues that we think will yield fruit
25 for us.

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1 We understand from Georgia that they
2 have run those search terms for two different
3 accounts for Dr. Georgakakos. The first
4 account is his account -- his e-mail account
5 for Georgia Tech University. And our search
6 terms narrowed the field to -- of his e-mail
7 inbox to a subset which I understand is about
8 3,000 e-mails.

9 The second e-mail inbox he has is one he
10 has used with Dr. Kistenmacher. We know
11 this, of course, because we have the
12 Kistenmacher e-mails now. I won't identify
13 the e-mail address, but we have several dozen
14 e-mails from Dr. Georgakakos's private e-mail
15 address. And so we're aware that he does a
16 good portion of his business from that
17 address.

18 We are still waiting to hear from
19 Georgia on what the search results were for
20 that e-mail inbox. And if the numbers are
21 similar to the numbers we got from the
22 Georgia Tech e-mail inbox, we think that's
23 probably a reasonable production for them to
24 make, not an incredible burden to produce
25 those e-mails.

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1 And, in fact, what we have also learned
2 from the Kistenmacher e-mails is that these
3 Georgakakos e-mails will not only be relevant
4 to Dr. Georgakakos's deposition, but there
5 are communications in those e-mails to a
6 whole range of people that we are seeking to
7 depose. And those e-mails address a great
8 range of issues that we believe are relevant
9 to this case.

10 When we first talked about the
11 Dr. Kistenmacher e-mails, I made a comment
12 that the documents we received prior to that
13 point were essentially an unassembled
14 automobile engine, parts in a box with no
15 explanation how to reassemble them. The
16 e-mails have shown us exactly what the
17 relevance was of all those documents.

18 It has been an incredibly helpful
19 exercise to read them, and we're confident
20 that we will have the same reaction to the
21 e-mails for Dr. Georgakakos.

22 The other two individuals for whom we're
23 seeking e-mails are Dr. Mark Masters from
24 Albany State University. And he is relevant
25 as the director of the Georgia Water Planning

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1 and Policy Center, which is focused very
2 specifically on agricultural water use in the
3 Flint River Basin in particular. The other
4 is Dr. James Hook, who is retired, but has a
5 similar focus. He's a University of Georgia
6 professor.

7 Again, we would like to depose both of
8 them soon. Dr. Mark Masters is January 6
9 to 7. And so we are putting some premium on
10 speed here.

11 We recently heard back from Georgia as
12 to the scope of our search terms for
13 Dr. Masters, and they appropriately pointed
14 out that our search terms were too broad for
15 him. So we are going to very soon, and
16 probably this afternoon, change our search
17 terms to much more narrowly define what we
18 need from him.

19 So we reduced their burden and focused
20 more specifically on what's likely to be
21 important. And we will do the same for
22 Dr. Hook.

23 But, again, all of these e-mails are
24 important to a whole range of our
25 depositions. So that's why we're pursuing

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1 them.

2 SPECIAL MASTER LANCASTER: Georgia?

3 MR. PRIMIS: Yes, your Honor. Craig

4 Primis for Georgia.

5 The background on these e-mails is that

6 these were not original e-mail custodians

7 agreed to by the parties, and there were

8 initially agreements that university e-mails

9 would not be produced. In response to the

10 subpoena duces tecum that we received with

11 their deposition notices, as well as in light

12 of the Court's ruling on the Dr. Kistenmacher

13 e-mails, we have been endeavoring to work

14 with Florida to narrow what is a very large

15 universe of e-mails that they have been

16 seeking.

17 And so, as Mr. Perry indicated, we have

18 been applying search terms trying to find

19 reasonable ways to narrow these because our

20 burden objections are serious; and they are

21 important. But if we can find a way to

22 address them, we will do that. And we have

23 been attempting to do that.

24 We were surprised by some of the

25 statements in the status report from Florida

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1 which suggested that we had not been

2 responding to Florida, because we have been

3 engaged with them in an ongoing process and,

4 in fact, had provided them additional

5 information on Thursday and Friday of last

6 week that wasn't reflected in their report.

7 So we are presently reviewing and aiming

8 to produce the Dr. Georgakakos e-mails

9 subject to the narrow search terms from his

10 Georgia Tech account. His AOL e-mail box

11 presented some separate issues because it's

12 his personal e-mail account, and he was in

13 Africa for much of the month of November.

14 But now that he's back, we're endeavoring to

15 do for those e-mails what we did with the

16 Georgia Tech ones with the search terms.

17 With regard to Dr. Masters and Dr. Hook,

18 Dr. Masters did -- does have a very large

19 amount of e-mail. And we have been engaged

20 with Florida to try to narrow that universe.

21 We have been transparent about what the

22 search terms are yielding, and Mr. Perry

23 indicated that.

24 And so once we get Mr. Perry's narrowed

25 search terms, we will quickly apply them.

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1 And assuming that it results in a reasonable

2 number to review and produce, we will go

3 ahead and do that.

4 So we're being responsive. We are

5 evaluating it as it comes and meeting and

6 conferring with Florida on these issues.

7 SPECIAL MASTER LANCASTER: Counsel --

8 yes, sir?

9 MR. PERRY: Your Honor, if I may

10 respond. It's Phil Perry.

11 Mr. Primis, I think, indicated at the

12 outset of his explanation a moment ago that

13 there was an agreement not to share

14 university e-mails. Of course, we addressed

15 that during the argument on the motion to

16 compel for Dr. Kistenmacher, and we disagree

17 with that.

18 I would say in addition that our

19 University -- not represented by the same

20 counsel, but the University of Florida has

21 produced e-mails to Georgia. And Georgia --

22 for University of Florida professors. And

23 Georgia has been using those e-mails in

24 depositions. So I think it would be

25 inequitable if there were some situation

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1 where Georgia didn't have to produce e-mails

2 that we did.

3 I would say that I'm happy to hear that

4 with respect to the Georgia Tech account that

5 the information will be available soon. And

6 I hope the same result will be -- will be

7 forthcoming with respect to the account for

8 Dr. Georgakakos's personal e-mails.

9 As your Honor is incredibly aware and

10 reminds us every time we have these calls, we

11 have a strict schedule. And, you know, we

12 have been trying to arrange our depositions

13 in a way where we can get these documents and

14 use them sufficiently soon that they're

15 valuable for our depositions. And we have

16 arranged the schedule for January and

17 February contemplating that these e-mails

18 would be something we can get very soon.

19 So I just would like to, if I might,

20 your Honor, put that point on the e-mail

21 discussion.

22 SPECIAL MASTER LANCASTER: Mr. Primis,

23 do you want to respond to any part of that?

24 MR. PRIMIS: Well, I just simply note

25 first that there's a give and take on these

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1 things. And when we ask for search terms,
 2 they're not always expeditiously provided.
 3 When they are provided, we run them
 4 expeditiously. And so it's inaccurate to
 5 suggest that there's been a delay on
 6 Georgia's part. We are working with Florida
 7 to try and do this in a reasonable and
 8 efficient manner.

9 As well, with regard to the e-mails from
 10 Dr. Kistenmacher, it is true a number of them
 11 were marked at day two of his deposition.
 12 But based on my review of the transcript, it
 13 was largely a rehash of what had happened at
 14 day one of his deposition, just using the
 15 e-mails to tee up the same issues that had
 16 been explored through the reports and other
 17 documents for Dr. Kistenmacher that had been
 18 previously provided.

19 So while we're engaging in this give
 20 and take and are agreeable to producing
 21 these search-term-narrowed sets of e-mail,
 22 I think that the value of that has been
 23 overstated. We'll do it, but it's not like
 24 there were magical moments in day two of
 25 Dr. Kistenmacher's deposition. It was

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1 essentially a replay of day one.
 2 We're proceeding in good faith, and we
 3 will continue to do so.

4 SPECIAL MASTER LANCASTER: Thank you.
 5 I recognize that volume in this instance
 6 is as heavy as it is in everything else
 7 attached to this matter. But I also note
 8 that this issue -- these issues have been the
 9 subject of meetings and conferring for
 10 months. You look at the progress reports;
 11 you review the transcripts. At some point it
 12 has to come to an end.

13 So I'm going to suggest -- in fact, I'm
 14 going to tell you that I want you to report
 15 at the next status conference that the
 16 issues -- these issues have either been
 17 resolved or that there is a dispute ripe for
 18 resolution. Do you have any questions about
 19 that order?
 20 Florida?
 21 MR. PERRY: Phil Perry for Florida.
 22 No, your Honor.
 23 SPECIAL MASTER LANCASTER: Georgia?
 24 MR. PRIMIS: No, your Honor.
 25 SPECIAL MASTER LANCASTER: All right.

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1 Georgia has identified or raised the question
 2 that Florida hasn't yet provided witnesses or
 3 dates for a number of 30(b)(6) topics. Is
 4 there anything to be added to that, Georgia?
 5 MR. PRIMIS: Yes, your Honor. We have
 6 been trying to pursue our 30(b)(6)
 7 deposition, which we served in September. So
 8 it was -- it's been pending for several
 9 months. And we have been trying to secure
 10 both the date and identity of witnesses.

11 There -- we have obtained witnesses by
 12 name and for date for some of the topics.
 13 And we have been able to depose one
 14 individual on one topic. But with regard to
 15 in particular the injury 30(b)(6) topics,
 16 which we discussed last time and which we
 17 have now revised to try and compromise with
 18 Florida in terms of the scope, we still don't
 19 have dates or witnesses.

20 In addition, there are some topics for
 21 which Florida has indicated that they have
 22 dates; but they won't identify which
 23 individuals in Florida are going to testify
 24 to those topics, which makes preparation for
 25 those depositions very difficult. And so it

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1 continues to be a source of concern.
 2 We do regularly exchange e-mails and
 3 meet and confer on deposition dates. And a
 4 number of depositions have been scheduled.
 5 But on the 30(b)(6), we still seem to be
 6 having difficulty.

7 SPECIAL MASTER LANCASTER: Florida?
 8 MR. PERRY: Your Honor, I believe
 9 there's two more 30(b)(6) depositions
 10 scheduled the week of December 14 to 18 on
 11 multiple topics, if I'm not mistaken.
 12 If I might, your Honor, I would like to
 13 address this a little more broadly. We -- on
 14 a few of the topics which we saw as
 15 incredibly broad, we asked Georgia to narrow
 16 those topics both, practically, because it
 17 would be very difficult to prepare a witness
 18 on those topics, and because the topics
 19 called essentially for premature disclosure
 20 of expert testimony. We have no problem
 21 putting forth a witness on underlying factual
 22 material so long as the question isn't what
 23 will your expert testimony be when the
 24 deadline arrives.
 25 We have -- and we intend to provide

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1 witnesses in January for the most part for
 2 those topics that have been in some dispute.
 3 The reason we're able to do so now is because
 4 Georgia very recently narrowed its topics.
 5 And the narrowed topics assist us to find the
 6 right person and schedule the 30(b)(6)
 7 depositions.
 8 One point that I might remark on in
 9 Georgia's status report is this; they argue,
 10 I think, on page 2 that Florida pivoted from
 11 its initial and long-standing focus on a 2012
 12 oyster collapse, and it now appears to claim
 13 that the entire Apalachicola Bay and nearly
 14 every plant and animal species will be
 15 harmed.
 16 Your Honor, if I might address that
 17 briefly, what we have is an argument called a
 18 productivity argument, a loss of
 19 productivity, essentially an argument that
 20 the unique estuarine environment in
 21 Apalachicola Bay is shrinking and that the
 22 productivity of the area that is still the
 23 optimal mix of salinity is far smaller than
 24 it used to be. And that is caused in part by
 25 low flows, a change in the nature of the

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1 nutrients, and higher salinities.
 2 This is not a novel argument. It's an
 3 argument we raised in our complaint at
 4 paragraph 57. It's an argument that was
 5 raised in the motion for leave to file our
 6 complaint at page 6 and in the attached
 7 declaration at paragraph 7 where the
 8 declarant explained that the reduced nutrient
 9 impacts and higher salinity levels will
 10 reduce estuarine productivity in general, and
 11 then went on from there to explain what that
 12 meant.
 13 Our interrogatory responses to the
 14 contention interrogatories on this have been
 15 very fulsome, including by explaining that
 16 oysters are an example of the loss of -- of
 17 the type of harm we're suffering, but more
 18 broadly, that the increases in salinity
 19 levels and reduction in nutrient levels in
 20 the bay will alter the entire structure of
 21 the community of various species. And then
 22 we have identified exactly what those species
 23 are, what the phytoplankton and zooplankton
 24 are, and so forth.
 25 And so there is a way to get at that

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1 argument that gets at the facts and doesn't
 2 seek premature expert testimony. And that's
 3 by taking depositions regarding data on
 4 the -- on the amount of species found or the
 5 number of species found at various points in
 6 the bay over time, the salinity levels,
 7 nutrient measurements, and all that sort of
 8 material that is already in our interrogatory
 9 responses.
 10 We're very happy to supply witnesses on
 11 those factual issues. And I'm generalizing
 12 here because there are a great number of
 13 specifications in their 30(b)(6) subpoena.
 14 There are essentially 29 of them -- 28 with a
 15 subpart. And so we have satisfied a great
 16 number of those already with -- either with
 17 the deposition that occurred or the
 18 depositions that will occur this month and
 19 those that are already scheduled. It's just
 20 as to these remaining topics where there's a
 21 mix of expert testimony and underlying facts,
 22 we're trying to discipline the process so we
 23 get a clarity at the outset that these will
 24 be about the underlying factual issues and
 25 not a call for expert testimony.

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1 And I might add that we identified a
 2 number of cases in our status report. Not
 3 because we think we have a dispute that
 4 currently needs resolution now, but because
 5 we wanted to identify for the Court the
 6 reason why we have for a couple weeks been
 7 going back and forth on the scope of these
 8 designations and the 30(b)(6) notice. It's
 9 because there's case law that recognizes that
 10 sometimes 30(b)(6) notices can be overbroad,
 11 and the impact of those can be improper, and
 12 contention interrogatories can better serve
 13 the party's needs.
 14 Here we think we have largely worked
 15 that out, and we expect that we will soon be
 16 able to have dates and witness names for
 17 Georgia, mostly in, if not all in January.
 18 SPECIAL MASTER LANCASTER: Mr. Primis?
 19 MR. PRIMIS: Yes, your Honor.
 20 I think Mr. Perry's discussion just now
 21 confirmed why we are entitled to 30(b)(6)
 22 testimony on those issues. We don't have to
 23 take Mr. Perry's word for it or his
 24 description, and I don't think Georgia has to
 25 wait until they find an expert to say what he

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1 just said. If there are people within the
 2 State of Florida who study these issues and
 3 have factual information that support what
 4 Mr. Perry just said, we are entitled to take
 5 their deposition in the 30(b)(6) context.
 6 And that's all we have been seeking from the
 7 beginning. We haven't sought contention
 8 interrogatories through 30(b)(6) topics. We
 9 haven't sought expert testimony through
 10 30(b)(6) topics. We just want to understand
 11 what the factual basis is for the things that
 12 Mr. Perry just said.

13 And based on our review of the documents
 14 and the thrust of the complaint, while it
 15 does mention the overall ecology of
 16 Apalachicola Bay, when we have looked for
 17 documents and pressed Florida on what has
 18 actually been harmed, what species in the bay
 19 at present have been harmed due to Georgia,
 20 the only one that we can identify that they
 21 have taken the position in internal documents
 22 is due to Georgia are the oysters. And the
 23 complaint references some other species, but
 24 it doesn't ever say they have been harmed due
 25 to Georgia's water use.

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1 So we have simply been trying to get at
 2 what exactly it is that Florida is claiming
 3 in this case. And the -- and their harm.
 4 And over time, the benefit -- one benefit of
 5 our asking these questions is that Mr. Perry
 6 has identified reduced ecological
 7 productivity as one -- as their principal
 8 alleged harm. And so, now, we're trying to
 9 explore the factual basis for that and
 10 determine whether anyone in Florida who
 11 studied these matters for the state has ever
 12 said that.

13 And so it sounds like we're on a path to
 14 get those witnesses, which is a good thing.
 15 I think the cases identified in Florida's
 16 status report are totally inapposite and are
 17 directed at different issues where a party is
 18 seeking to gain another party's work product
 19 through a contention interrogatory type
 20 deposition request or to get expert testimony
 21 in a patent case. That's not what we're
 22 talking about here. Florida has asserted
 23 that certain plants and animals have been
 24 harmed and that certain businesses have been
 25 harmed due to Georgia's water use. And we

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1 would like to depose a representative on
 2 behalf of the state who has the information
 3 on what those specific items are.

4 SPECIAL MASTER LANCASTER: Mr. Perry, do
 5 you want to comment further; or is this
 6 discussion done?

7 MR. PERRY: Only briefly, your Honor.

8 And I -- and I may disagree with
 9 Mr. Primis; but I think we have got our
 10 issues mostly worked out.

11 I will say just in closing on this issue
 12 that this isn't a new argument. It was in
 13 our complaint. It was in all the papers we
 14 filed at the outset, as I cited.

15 I will also say that there is a
 16 considerable amount of authority out there
 17 explaining the use of these theories.
 18 They're well grounded scientifically. The
 19 U.S. Fish and Wildlife Service has addressed
 20 these types of productivity arguments in many
 21 cases, including the consolidated delta smelt
 22 cases. And, of course, EPA and NOAA have
 23 brought forth theories of this type in
 24 various different regulatory and litigation
 25 context.

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1 And so to the extent that Mr. Primis is
 2 suggesting that there's somehow been a change
 3 here, I think that's not the way we see it;
 4 and I don't think that documents bear that
 5 out.

6 So with that, I'll close on this topic,
 7 your Honor.

8 SPECIAL MASTER LANCASTER: Thank you.

9 Counsel, I can't overemphasize the
 10 importance of prompt identification of
 11 witnesses and scheduling of depositions. So
 12 I'm directing that at your next progress
 13 report, next status conference, you should
 14 tell me that you have completed identifying
 15 the witnesses; and you have proposed
 16 deposition dates for all of them who are
 17 under your control.

18 Any questions about that, Florida?

19 MR. PERRY: No, your Honor.

20 SPECIAL MASTER LANCASTER: Georgia?

21 MR. PRIMIS: No, your Honor.

22 SPECIAL MASTER LANCASTER: Anything else
 23 you want to add, status reports, Florida?

24 MR. PERRY: No, your Honor.

25 SPECIAL MASTER LANCASTER: Georgia?

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MR. PRIMIS: No, your Honor.
SPECIAL MASTER LANCASTER: Thank you very much. We are done.
MR. PERRY: Thank you, your Honor.
MR. PRIMIS: Thank you.
(The telephone conference was concluded at 10:35 a.m.)
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CERTIFICATE

I, Claudette G. Mason, a Notary Public in and for the State of Maine, hereby certify that the foregoing 33 pages are a correct transcript of my stenographic notes of the above-captioned proceedings.
I further certify that I am a disinterested person in the event or outcome of the above-named cause of action.
IN WITNESS WHEREOF, I subscribe my hand this 10th day of December, 2015.

Notary Public

My Commission Expires
June 9, 2019.

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