

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 June 8, 2016, 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.
ABID R. QURESHI, ESQ.
JONATHAN L. WILLIAMS, ESQ.

For the State of Georgia: K. WINN ALLEN, 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 With me on the phone is Devora Allon,
2 also from Kirkland. And I believe that Britt
3 Grant, the Solicitor General of Georgia, is
4 also on the line.

5 SPECIAL MASTER LANCASTER: Thank you,
6 Mr. Allen.
7 United States?

8 MR. GRAY: Good morning, your Honor.
9 This is Michael Gray for the United States.

10 SPECIAL MASTER LANCASTER: Good morning,
11 Mr. Gray.

12 First, let me thank you all for
13 accommodating my crazy schedule. I'm sorry.
14 I apologize, but there was no alternative.

15 And, Mr. Perry, you should know that at
16 the reception at the Court the other night,
17 Mr. Primis and two others, I think, from the
18 Georgia Attorney General's Office, but I
19 couldn't get their names because of the
20 background noise, approached and spoke. But
21 if Mr. Primis were here, I'm sure he would
22 tell you we didn't talk about anything except
23 the weather. So there is nothing -- but I
24 wanted you to know that contact so that there
25 could be no question raised.

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1 PROCEEDINGS

2 SPECIAL MASTER LANCASTER: Good morning,
3 counsel.

4 MR. PERRY: Good morning, your Honor.

5 MR. ALLEN: Good morning, your Honor.

6 SPECIAL MASTER LANCASTER: We have a
7 full house today. We have Josh Dunlap, our
8 case manager; Mary Clifford, our legal
9 assistant; and the incomparable Claudette
10 Mason, our court reporter. We're all here.

11 So let's begin with appearances.
12 Florida?

13 MR. PERRY: Your Honor, Phil Perry for
14 Florida. And I believe also joining me on
15 the phone are Abid Qureshi and Jonathan
16 Williams of the Florida Solicitor General's
17 Office.

18 SPECIAL MASTER LANCASTER: Georgia?

19 MR. ALLEN: Good morning, your Honor.

20 This is Winn Allen on behalf of Georgia.

21 Craig Primis is, unfortunately, on an
22 airplane this morning. He wanted me to
23 apologize to you that he wasn't able to make
24 the call. But I'll be handling today's
25 status conference on behalf of Georgia.

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1 MR. PERRY: Thank you, your Honor.

2 SPECIAL MASTER LANCASTER: Thank you all
3 for your status reports. Have you anything
4 to add to them, Florida?

5 MR. PERRY: Your Honor, if I might for
6 just a moment, I think we have -- and thanks
7 to Mr. Allen and Mr. Primis, worked out
8 almost everything; and we're in agreement
9 subject, of course, to your -- your approval
10 of the schedule.

11 But there is one issue where we are not
12 in agreement, and that's as to the use of
13 prefiled direct testimony at trial. And I
14 thought I might offer a minute of background
15 on that to explain our thinking, if I might.

16 SPECIAL MASTER LANCASTER: Well, let
17 me -- we'll turn to the scheduling issue.
18 I'm talking now just about the status report
19 itself. Have you anything to add to that?

20 MR. PERRY: No, your Honor.

21 SPECIAL MASTER LANCASTER: Georgia?

22 MR. ALLEN: No, your Honor. We have
23 nothing to add to the status report.

24 SPECIAL MASTER LANCASTER: All right.
25 Then let's turn to the pretrial and trial

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1 scheduling. I appreciate your cooperation in
 2 preparing a proposed trial plan. The
 3 proposed schedule is thorough. It's quite
 4 helpful. But I haven't had time fully to
 5 digest the submissions, as you can
 6 appreciate. So today, we're not going to
 7 reach any final conclusions with regard to
 8 scheduling. But I do want to -- I will issue
 9 an Order as soon as I can establishing
 10 pretrial and trial procedures. But I'm going
 11 to have to take some time to digest and
 12 consider your proposals.

13 First, I understand that you're not
 14 going to be filing any dispositive motions;
 15 and that's very helpful. So thank you for
 16 that.

17 Let me also say that, before we turn to
 18 the schedule, I intend today to offer some
 19 preliminary views. This is just my current
 20 thinking, and it's subject to change; but it
 21 will be guided -- give you some guidance as
 22 to where we're going to go on this.

23 Now, Mr. Perry, if you want to comment
 24 before I do that, you're free to do so.

25 MR. PERRY: Yes -- yes, your Honor.
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1 Thank you very much.

2 Going back to last fall, it became clear
 3 to us from the voluminous discovery that
 4 Georgia had propounded that they had a large
 5 number of defenses. And our intent in
 6 preparing our expert case and, indeed, in
 7 preparing our lay witnesses was not only to
 8 directly prove our case, but to be prepared
 9 to address all of the various defenses that
 10 they have identified, essentially allegations
 11 that other factors other than their
 12 consumption upstream caused our harm.

13 So we have a large number of experts
 14 that we have prepared to testify. A subset
 15 of them are, we think, necessary live to
 16 prove our case; but there are many that will
 17 depend upon what it is that Georgia is
 18 actually arguing in their defenses.

19 And so we thought, looking at this
 20 practically and referring back to what Judge
 21 Kayatta did in a prior case, that with
 22 respect to those witnesses that may not be
 23 necessary strictly to prove our case, but
 24 were designed to be defensive in nature, that
 25 we would propose to employ prefiled direct

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1 testimony subject to live cross-examination
 2 by Georgia of those witnesses. We thought
 3 that was a practical solution to address the
 4 amount of time necessary at trial.

5 We won't probably know exactly which of
 6 those witnesses could be necessary until we
 7 hear Georgia start to put on its case. And
 8 we think if we employ prefiled direct for
 9 some witnesses, the number of witnesses we
 10 have can be confined, trial can be
 11 accomplished in four to five weeks.

12 And I know they have objected to the use
 13 of prefiled direct on essentially two
 14 grounds. One, that it may not be necessary.
 15 Certainly if it's not necessary, they don't
 16 need to cross those witnesses that are
 17 presented in that way; and it won't take
 18 trial time.

19 I think they have also objected that it
 20 may introduce irrelevant material to trial.
 21 And there I would say I think that depends
 22 upon what defenses they have and are ready to
 23 present. We just don't know that at this
 24 point.

25 So, your Honor, we were trying with our
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1 proposal for prefiled direct to come up with
 2 a practical solution to economize the amount
 3 of trial days and, yet, to make live
 4 witnesses available on the things we're
 5 certain we need to present.

6 SPECIAL MASTER LANCASTER: Thank you.
 7 Mr. Allen, do you want to respond to
 8 that?

9 MR. ALLEN: Yes, your Honor, I do.

10 One is I don't think I agree with
 11 Mr. Perry that some of the issues he would
 12 describe as defenses are really defenses. I
 13 think they're part of Florida's case in chief
 14 such as they mean to show that it's Georgia
 15 who is responsible for their alleged harm and
 16 not someone else.

17 The other thing I -- the other point I
 18 make, your Honor, is that we actually think,
 19 pretty strongly believe, that all testimony
 20 in this case should be by live testimony.
 21 The reason is is we think that's actually the
 22 best way to force the parties to economize
 23 their presentation to be as efficient as
 24 possible and to kind of cut to the chase on
 25 each of their issues.

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1 You know, your Honor has consistently
 2 throughout the time we have been together
 3 emphasized to the parties a number of times
 4 to really try to be efficient and economize
 5 their presentation. So far I don't think we
 6 have seen that from Florida. We have gotten
 7 20 expert reports, and they noticed upwards
 8 of 40 depositions.

9 We think that that's the way to force
 10 the parties to economize and to be efficient
 11 is to have live, direct testimony with time
 12 limits at trial. We think that's the best
 13 way to force both sides to really sit down
 14 and think, you know, what is it that's
 15 critical to my case? What is it that's
 16 important? What is it that I really need to
 17 get in the record, and to focus on that
 18 stuff.

19 So, you know, sometimes people think
 20 that while written directs can actually be a
 21 way to economize, I actually think it's the
 22 opposite here. I think if there are written
 23 direct examinations, we can be looking at,
 24 you know, 5, 10, 15 written directs from
 25 Florida that actually focus on issues that

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1 your Honor.

2 I think if you -- if you take a look at
 3 the witness lists that are in the respective
 4 submissions from Monday, you will find that
 5 there are a number of witnesses we have
 6 identified that will be presented through
 7 deposition designations and a number of
 8 others that will be presented essentially to
 9 establish what we need to establish under our
 10 burden in this case.

11 I think once you sort that out, the
 12 number of witnesses identified on both
 13 parties' submissions are about the same. I
 14 believe that there are 25 for Georgia and,
 15 excluding people we expect to use deposition
 16 designations for, just over 25 for us. So I
 17 think we are equivalently economizing,
 18 particularly in a way that is aimed towards
 19 proving the portion of the case where we bear
 20 the burden.

21 And I'm very happy to hear Mr. Allen say
 22 that we would have the opportunity to put on
 23 some of these witnesses as rebuttal witnesses
 24 once we understand what their defenses will
 25 be. But I think the better way to do it is

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1 are irrelevant or that are marginal to the
 2 case.

3 So we think the better way to force the
 4 parties to economize is to really put on live
 5 testimony with time limits that both sides
 6 need to adhere to.

7 The other point I would make is
 8 Mr. Perry said that he wants to use written
 9 directs because he's not sure what Georgia is
 10 going to say in its case in chief. And I
 11 would submit to your Honor that's what
 12 rebuttal is for. If there's issues that come
 13 up during Georgia's case in chief that
 14 Florida would like to respond to, they can
 15 call rebuttal witnesses live at trial to
 16 address those matters.

17 So, again, we think that the much more
 18 efficient and economical approach here is to
 19 actually do live testimony with time limits
 20 because it will force the parties to really
 21 streamline their presentation.

22 SPECIAL MASTER LANCASTER: Thank you.

23 Mr. Perry, do you want to say anything
 24 in addition to what Mr. Allen just said?

25 MR. PERRY: If I might. If I might,

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1 through prefiled direct. And, in fact, we
 2 think that we can be economical in using
 3 prefiled direct here. I don't think it's 15
 4 witnesses. It's probably fewer.

5 SPECIAL MASTER LANCASTER: Thank you,
 6 both. I appreciate those comments. As I
 7 said, I will try and get out an Order
 8 shortly.

9 And let me share with you some
 10 preliminary thoughts. And these are, I want
 11 to emphasize, only preliminary. I simply
 12 haven't had the time to digest all the
 13 materials you have submitted, but I think
 14 this may be helpful to you to give you my
 15 current thinking.

16 On pretrial motions, I'm inclined to
 17 permit the parties to provide -- to file
 18 procedural pretrial motions; but you should
 19 be very sparing in addressing the issues.
 20 This is a nonjury trial. I have the
 21 responsibility to compile a record for
 22 independent review. I do want to have a full
 23 evidentiary hearing because, among other
 24 things, I don't want to give you the
 25 opportunity to complain to the Court that you

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1 didn't have an opportunity to present
 2 something to me because I cut you off. I'm,
 3 therefore, very, very unlikely to preclude
 4 any testimony prior to trial. If there are
 5 motions in limine, I'm very likely to reserve
 6 my rulings until after the trial is complete.
 7 So let's talk about pretrial briefs.
 8 I'm currently inclined to permit short,
 9 concise pretrial briefs. They probably won't
 10 be required. But let me just warn you; you
 11 should not expect to have 50 pages -- no way
 12 should you expect to have 50 pages, as
 13 someone suggested here. If they are filed --
 14 if pretrial briefs are filed, you should
 15 focus on legal issues to highlight what will
 16 be important at trial.
 17 Now, you know that I was contacted by
 18 one group seeking an opportunity to
 19 participate by filing an amicus brief. Let
 20 me ask -- let me pause and ask; are you aware
 21 of any other entities that you expect will
 22 ask to participate as amici?
 23 Florida?
 24 MR. PERRY: Your Honor, I'm not
 25 currently aware of any; but I expect that
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1 once it's clear that somebody has asked to
 2 participate, others will do so as well.
 3 SPECIAL MASTER LANCASTER: Georgia?
 4 MR. ALLEN: I'm in the same boat, your
 5 Honor. I'm not currently aware of any, but I
 6 suspect there will be some once it becomes
 7 clear that amicus briefs are permitted.
 8 SPECIAL MASTER LANCASTER: Well, you saw
 9 my response to the lawyer who submitted the
 10 request.
 11 Let me ask the United States; do you
 12 intend to ask to participate by submitting
 13 briefs or doing anything else, Mr. Gray?
 14 MR. GRAY: Yes, thank you, your Honor.
 15 I think it will depend on developments
 16 in the briefs filed by the parties. If we're
 17 looking at short pretrial briefs that address
 18 legal issues, we'll have to evaluate whether
 19 the legal issues implicate an interest of the
 20 United States that we would want to address.
 21 And then, you know, again, post-trial I think
 22 we will be focused more on that.
 23 At this point, we don't have any plans
 24 to participate at all during trial; but we
 25 may, depending on what's raised, seek to file
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1 a brief to address those sorts of legal
 2 issues.
 3 SPECIAL MASTER LANCASTER: Thank you.
 4 Let me revisit the amici question. Do
 5 you have any objections to permitting amici
 6 briefing before or after trial, Florida?
 7 MR. PERRY: No.
 8 SPECIAL MASTER LANCASTER: Georgia?
 9 MR. ALLEN: No, your Honor. No
 10 objection.
 11 SPECIAL MASTER LANCASTER: Okay. Thank
 12 you.
 13 You both suggested, if my memory is
 14 correct, that we start on October 31; is that
 15 correct, Florida?
 16 MR. PERRY: That's correct, your Honor.
 17 SPECIAL MASTER LANCASTER: Georgia?
 18 MR. ALLEN: That's correct, your Honor.
 19 SPECIAL MASTER LANCASTER: I take it I
 20 shouldn't draw any inference from the fact
 21 that that happens to be Halloween.
 22 That was a joke. It's okay to laugh.
 23 MR. PERRY: My children may object, but
 24 nothing from the State of Florida.
 25 SPECIAL MASTER LANCASTER: Okay. Well,
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1 let's talk about the length of trial. If I
 2 understand correctly, you're both suggesting
 3 it's going to take four to six weeks
 4 possibly. You have got Georgia proposing 12
 5 to 15 witnesses.
 6 Florida, did you estimate the number of
 7 witnesses you think you need to call?
 8 MR. PERRY: Your Honor, I think live
 9 witnesses will depend in part on this
 10 prefiled direct point that we just discussed.
 11 I would expect if we're permitted prefiled
 12 direct, that we would have something like 15
 13 to 18 live witnesses. You know, if, as
 14 Mr. Allen suggests, rebuttal witnesses can be
 15 used after they put on their case, that may
 16 expand that number and expand the time of
 17 trial rather than using prefiled direct.
 18 And I think a large number of the people
 19 that we have listed on our submission will be
 20 the subject of deposition designations.
 21 SPECIAL MASTER LANCASTER: I may have
 22 missed it, because I only scanned your
 23 material, but did either of you or both of
 24 you suggest length for trial days?
 25 Florida?
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1 MR. PERRY: We said weeks, your Honor;
 2 and we were thinking perhaps four trial days
 3 every week.
 4 SPECIAL MASTER LANCASTER: And how long
 5 a trial day do you anticipate?
 6 MR. PERRY: Well, your Honor, we're
 7 flexible on that. I think I would just off
 8 the cuff say 9:00 to 4:00, but we haven't
 9 conferred with Georgia on that.
 10 SPECIAL MASTER LANCASTER: Georgia?
 11 MR. ALLEN: Yes, your Honor. We haven't
 12 conferred with Florida on that either. But I
 13 suspect that those -- those time estimates
 14 we're probably roughly in agreement with,
 15 four days a week, 9:00 to 4:00, 9:00 to 5:00,
 16 with a little time for lunch built in there.
 17 I think that would be about what we would be
 18 willing to do.
 19 We're also happy to discuss more with
 20 Florida or with your Honor if you have
 21 different preferences.
 22 SPECIAL MASTER LANCASTER: And you
 23 suggest -- you both suggested Washington.
 24 Let me ask you; we -- last time we went down,
 25 we were in the Circuit Court. Since this is
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1 a trial, do you think you would be better off
 2 in the District Court, if we could get one,
 3 Florida?
 4 MR. PERRY: That might be mildly
 5 preferable, your Honor.
 6 SPECIAL MASTER LANCASTER: Georgia?
 7 MR. ALLEN: Your Honor, I tend to agree,
 8 just because I suspect both sides will have
 9 demonstratives they want to use that I
 10 suspect the District Court courtrooms are
 11 probably more easily set up to display things
 12 like that. So it might be preferable to be
 13 in the District Court.
 14 SPECIAL MASTER LANCASTER: Okay. Now,
 15 thinking ahead, four to six weeks, my
 16 preference will be to ask Claudette to join
 17 us down there for that period, as she did
 18 before. Not only is she tremendously
 19 talented, but she's also thoroughly familiar
 20 with everything that's been going on. I'm
 21 just telling you that so that you can
 22 anticipate the additional expense that would
 23 be involved.
 24 I'll encourage you to stipulate to
 25 exhibits to the extent possible; and I'm
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1 going to require -- I know I'm going to
 2 require you to submit an exhibit list that
 3 will have all -- and I want to repeat that,
 4 all proposed exhibits, separate, joint,
 5 doesn't matter, noting those that have been
 6 stipulated. Is that understood?
 7 MR. PERRY: Yes, your Honor.
 8 MR. ALLEN: Yes, your Honor.
 9 SPECIAL MASTER LANCASTER: Thank you.
 10 I'm also going to probably permit
 11 post-trial briefs in order to summarize the
 12 most important evidence for me. But that
 13 post-trial briefing won't be set until at or
 14 after the trial.
 15 Let me just say that I'm going to be
 16 very liberal -- very liberal -- as to the
 17 basis for submissions of witnesses, the
 18 number of witnesses, the kinds of documents,
 19 the schedule, et cetera, so that when it's
 20 all over, you won't be in a position where
 21 you can complain that you were denied the
 22 opportunity to submit a witness or an
 23 exhibit.
 24 But let me just add on that score, you
 25 have all -- you're all, including Mr. Primis,
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1 who is absent today, very capable, very
 2 competent, experienced, national counsel.
 3 And while I'm going to be as liberal as I
 4 can, I think you understand that if you
 5 present 15, 20, 30 experts saying the same
 6 darned thing, or you present hundreds of
 7 documents showing the same darned thing, it's
 8 going to be counterproductive.
 9 I'm not going to limit you. You can do
 10 what you want to do. But you have been
 11 around long enough to know that after a
 12 while, a judge turns you off if you're in
 13 that circumstance.
 14 And, I'm sorry; I'm lecturing a little
 15 bit here, but I want to make it clear that
 16 while I'm not going to restrict you, I may
 17 not be listening as closely as I should after
 18 the expert has testified and is being
 19 followed by another dozen.
 20 I'm sure you understand what I'm saying,
 21 gentlemen; so we'll leave it at that.
 22 MR. PERRY: Sure.
 23 SPECIAL MASTER LANCASTER: Let me
 24 finally wind down my side of this with one
 25 last thing. Again, you won't be surprised to
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1 know that I'm encouraging you to pursue
 2 settlement and mediation. I want to say that
 3 again; I'm encouraging you to pursue
 4 settlement and mediation. If you can settle
 5 this thing, everybody is going to be at least
 6 well-served. And I can almost guarantee you,
 7 as I have told you so many times before,
 8 you're probably both going to be unhappy with
 9 my recommendation no matter what.
 10 Okay?
 11 Anything else, Florida?
 12 MR. PERRY: No, your Honor.
 13 SPECIAL MASTER LANCASTER: Georgia?
 14 MR. ALLEN: No, your Honor.
 15 SPECIAL MASTER LANCASTER: United
 16 States?
 17 MR. GRAY: No, your Honor.
 18 SPECIAL MASTER LANCASTER: Josh?
 19 MR. DUNLAP: Nothing further.
 20 SPECIAL MASTER LANCASTER: Thank you.
 21 And we'll be in touch. You will have an
 22 Order as soon as I can get my schedule under
 23 wraps.
 24 Thank you.
 25 MR. PERRY: Thank you.
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1 MR. ALLEN: Thank you.
 2 (The telephone conference was concluded
 3 at 10:24 a.m.)
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 2 CERTIFICATE
 3 I, Claudette G. Mason, a Notary Public
 4 in and for the State of Maine, hereby certify
 5 that the foregoing 22 pages are a correct
 6 transcript of my stenographic notes of the
 7 above-captioned proceedings.
 8 I further certify that I am a
 9 disinterested person in the event or outcome
 10 of the above-named cause of action.
 11 IN WITNESS WHEREOF, I subscribe my hand
 12 this 9th day of June, 2016.
 13
 14
 15 _____
 16 Notary Public
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 19 My Commission Expires
 20 June 9, 2019.
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