

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 January 12, 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.
ALLEN C. WINSOR, ESQ.
JONATHAN L. WILLIAMS, ESQ.
ANDREW D. PRINS, ESQ.

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

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

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

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1 Allon on the line as well.
2 SPECIAL MASTER LANCASTER: Thank you.
3 United States?
4 MR. GRAY: Yes. Good morning, your
5 Honor. This is Michael Gray for the United
6 States.
7 SPECIAL MASTER LANCASTER: Good morning.
8 Counsel, let's -- let me ask you whether
9 you have anything to add to your status
10 reports. Florida?
11 MR. PERRY: Your Honor, we can go into
12 much greater detail on the subject matter of
13 our status reports. Obviously there's a few
14 things in the Georgia filing that didn't --
15 we didn't anticipate; and we're happy to
16 address those. But I think the status
17 reports fairly describe most of our issues.
18 If I might, your Honor, I would like to
19 talk about the missing documentation briefly.
20 SPECIAL MASTER LANCASTER: We'll get to
21 that in a moment.
22 MR. PERRY: Okay.
23 SPECIAL MASTER LANCASTER: Georgia?
24 MR. PRIMIS: Your Honor, we have set out
25 our position in the status report. We think
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PROCEEDINGS

1 SPECIAL MASTER LANCASTER: Morning,
2 counsel.
3 MR. PERRY: Good morning, your Honor.
4 MR. PRIMIS: Good morning, your Honor.
5 MS. GRANT: Good morning, your Honor.
6 SPECIAL MASTER LANCASTER: We have the
7 usual crew here, Mr. Dunlap, Ms. Clifford,
8 and Ms. Mason.
9 Counsel, let's start with appearances.
10 Florida?
11 MR. PERRY: Your Honor, it's Phil Perry
12 for Florida. Also on the phone are Allen
13 Winsor, Jonathan Williams, and Andrew Prins.
14 SPECIAL MASTER LANCASTER: Thank you.
15 Georgia?
16 MS. GRANT: Your Honor, this is Britt
17 Grant from Georgia. Also on the phone with
18 me in Atlanta is Sarah Hawkins Warren. And
19 Mr. Craig Primis and some other colleagues
20 are on the phone in Washington. I'll have
21 them introduce themselves.
22 MR. PRIMIS: Good morning, your Honor.
23 Craig Primis from Kirkland & Ellis for
24 Georgia. And I have my colleague Devora
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1 it's fairly represented there.
2 SPECIAL MASTER LANCASTER: All right.
3 Thank you.
4 It appeared to me, as I read your status
5 reports, that there are three issues, one
6 regarding Mr. Putnam, one regarding 30(b)(6)
7 e-mail preservation, and the adequacy of
8 30(b)(6) witnesses. Have I correctly
9 summarized those matters?
10 Is there anything else, Florida?
11 MR. PERRY: Your Honor, I think you are
12 correctly summarizing them, your Honor.
13 SPECIAL MASTER LANCASTER: Georgia?
14 MR. PRIMIS: Yes, your Honor.
15 SPECIAL MASTER LANCASTER: I hope,
16 although I'm not very comfortable suggesting
17 this, that they become nonissues through your
18 meet and confer meetings. But let's start
19 with Mr. Putnam. Georgia, is that --
20 MR. PRIMIS: Yes, your Honor?
21 Yes, we requested the deposition of
22 Mr. Putnam. And, frankly, we're surprised by
23 the level of objection that we have gotten on
24 it. Mr. Putnam runs one of the critical
25 agencies that's involved in this dispute, the
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<p style="text-align: center;">5</p> <p>1 Florida Department of Agriculture and 2 Consumer Services. He's -- he plays and has 3 played a key role in Florida on both water 4 supply and fishery issues; and he's made 5 public statements and comments and created 6 documents on those issues. 7 As we said in our status report with 8 regard to water supply, Mr. Putnam in his 9 capacity as Commissioner of the Department of 10 Agriculture has made public statements about 11 the federal government's duty and in 12 particular the Army Corps of Engineers to 13 deliver to Florida the water it needs. And 14 he has attributed that duty and obligation to 15 the Army Corps of Engineers. 16 As your Honor knows, it's a key issue in 17 the case. It's already been presented in the 18 context of the 12(b)(7) motion, and we're 19 trying to develop the facts on that issue. 20 He obviously has personal knowledge of those 21 issues and can speak to them, and we're 22 entitled to establish those facts. 23 In addition, the oyster fishery issue is 24 a significant issue in the case. As we 25 attached to our letter, Mr. Putnam drafted</p> <p style="text-align: center;">THE REPORTING GROUP Mason & Lockhart</p>	<p style="text-align: center;">7</p> <p>1 individual who was trying to take a 2 deposition of a senior, typically federal 3 government official who had no personal 4 involvement and no personal knowledge of the 5 issues that were in dispute. And in those 6 cases the deposition requested was rightly to 7 be seen as harassing. 8 And the Courts have also articulated the 9 potential fear of a flood of deposition 10 notices to people who are high-ranking 11 officials. That is not the concern here. 12 This is a case that Florida chose to bring. 13 Mr. Putnam is a leader of one of the agencies 14 that has critical information with regard to 15 it. He presumably was involved in the 16 decision to bring this case. And one would 17 expect there to be depositions of senior 18 government officials in an Original Action 19 pending in the U.S. Supreme Court. 20 The -- the -- I'm sorry. There was just 21 an interruption here. 22 By allowing Georgia, what we propose to 23 address Florida's concerns about its time, a 24 four-hour deposition of a person who has been 25 involved in these issues and has</p> <p style="text-align: center;">THE REPORTING GROUP Mason & Lockhart</p>
<p style="text-align: center;">6</p> <p>1 and sent a September 2012 letter seeking the 2 declaration of a fishery failure. He sent 3 that to Governor Scott who then forwarded it 4 on to the Department of Commerce. We have 5 not sought Governor Scott's deposition. By 6 going to Mr. Putnam we actually thought we 7 were doing the right thing, which was to go 8 to a lower-level agency official with 9 responsibility for the matters rather than 10 speaking with the Governor. 11 And Florida specifically relies on that 12 request in paragraph 56 of its complaint, 13 that being the request to declare a fishery 14 failure. And we just want to take discovery 15 to those underlying facts. Mr. Putnam has 16 firsthand knowledge of that. He was involved 17 in discussions with agency officials of his 18 agency and others leading up to the sending 19 of that letter. And then he signed it and 20 made the decision to submit it. 21 This case is just not like the cases that 22 Florida cites where they say that there has 23 to be an extraordinary -- extraordinary -- 24 showing. In all of those -- cases, if you look 25 at the facts of what happened, it was an</p> <p style="text-align: center;">THE REPORTING GROUP Mason & Lockhart</p>	<p style="text-align: center;">8</p> <p>1 responsibility for the agency that supervises 2 it seems like an eminently reasonable way to 3 resolve this dispute. He has personal 4 knowledge. He's signed documents, and he's 5 made statements. That takes it out of the 6 types of cases that Florida has cited to your 7 Honor. 8 And we have cited other cases which 9 stand to the proposition that where even 10 senior government officials have relevant 11 knowledge, personal knowledge, they can stand 12 for a deposition. And we have tried to 13 accommodate any concern about the time 14 commitment by reducing the amount of time. 15 SPECIAL MASTER LANCASTER: Well -- 16 MR. PRIMIS: We have -- yes, your Honor? 17 Go ahead. 18 SPECIAL MASTER LANCASTER: No, go ahead. 19 MR. PRIMIS: I was simply going to say 20 that Florida raised this concern a couple of 21 months ago when we first noted Mr. Putnam for 22 his deposition. And we did try to obtain 23 this information from other people that we 24 believed would have information about it or 25 would be in a position to know more about the</p> <p style="text-align: center;">THE REPORTING GROUP Mason & Lockhart</p>

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1 letter and its origin. And we quoted them in
 2 our paper. We cited six or seven people that
 3 we have asked. And they are not able to
 4 cover it.
 5 But even still, as the Samsung case that
 6 we have cited points out, is that these --
 7 the types of people that Florida is now for
 8 the first time directing us to instead of
 9 Mr. Putnam are what you would call rank and
 10 file employees. They are not involved in the
 11 decision making process at the management
 12 level. They can't tell us why Mr. Putnam
 13 made statements about the Army Corps' duty in
 14 connection with this case. And they can't
 15 tell us why Mr. Putnam made the decision to
 16 seek the fishery declaration and the bases
 17 for that decision.
 18 So we tried to accommodate the request
 19 from Florida. We tried to work with them
 20 on it. We tried to minimize the time
 21 commitment. But we just can't seem to get
 22 past this and set up the deposition. And so
 23 we thought it appropriate at this time to
 24 seek the Court's assistance.
 25 SPECIAL MASTER LANCASTER: Thank you,
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1 Georgia.
 2 Hope springs eternal. I gather that
 3 this was not a nonissue after your meet and
 4 confer, so I'll call on Florida.
 5 MR. PERRY: Thank you, your Honor.
 6 I would like to start, if I might, by
 7 putting this issue in some context. Florida
 8 has already produced for depositions multiple
 9 witnesses that are playing important roles
 10 within the Florida state governmental
 11 structure. The Secretary for the Department
 12 of Environmental Protection, for example, has
 13 testified as has the Executive Director of
 14 the relevant water management district. The
 15 agricultural Commissioner is, however, on a
 16 higher and much different level than those --
 17 than those persons. He's one of three
 18 elected members of the Governor's cabinet
 19 along with the Attorney General and the chief
 20 financial officer. In other words, he's one
 21 of the highest ranking officials in the
 22 state.
 23 We could, your Honor, make a case
 24 similar to the case that Mr. Primis is making
 25 for deposing Georgia's elected agricultural
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1 Commissioner, Mr. Gary Black. He's been
 2 involved in a number of issues along the
 3 Flint River, particularly with respect to the
 4 Flint River Drought Protection Act. And we
 5 could certainly make the same type of case
 6 that -- that Georgia is trying to make for
 7 his deposition. We think, however, the case
 8 law precludes that unless you make a showing
 9 that you can't get the information elsewhere.
 10 And, frankly, we also want to stress
 11 that the type of action where we would go try
 12 to depose a high-ranking official in Georgia
 13 is likely to be divisive and likely to have
 14 impacts on how the states get along in
 15 mediation and other context going forward.
 16 So we have been careful not to be provocative
 17 in seeking high-level depositions where
 18 depositions of other people in Georgia's
 19 state government would suffice.
 20 And I think that although Mr. Primis
 21 mentioned some press articles and surmises
 22 that our agricultural Commissioner,
 23 Mr. Putnam, might have special knowledge, he
 24 hasn't tried genuinely to obtain those facts
 25 from other folks.
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1 And let me be very careful about how I
 2 describe that because I would like to be
 3 precise. Certainly, depositions have been
 4 taken so far of other people in the Florida
 5 government. None of them are in the chain of
 6 command that addressed the specific report
 7 and the specific letter that are at the core
 8 of Georgia's request for Commissioner
 9 Putnam's deposition. In fact, we have
 10 informed Georgia of the specific people that
 11 do have that type of information, the people
 12 that were the principal authors of the report
 13 and the letter. And, indeed, there is one
 14 person who I think it's fair to say is the
 15 principal author of both who is already
 16 scheduled to be deposed by Georgia in this
 17 case. That's a gentleman named Mark
 18 Berrigan.
 19 There are two other people we have
 20 identified, Mr. Berrigan's supervisor in the
 21 Division of Aquaculture, Ms. Palmer, and then
 22 the Commissioner's chief of staff,
 23 Mr. Joyner, all of whom can be deposed if
 24 Georgia wishes to take that course.
 25 Instead, it's our view, your Honor, that
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1 they're leap-frogging what their requirements
 2 are under the case law. And, indeed, their
 3 principal case requires a showing that the
 4 evidence sought is not available through less
 5 burdensome means or alternative sources. And
 6 we have supplied these alternative sources
 7 that don't provoke the type of high-level
 8 deposition that we think is inappropriate.
 9 So, your Honor, we think that we can
 10 work with Georgia cooperatively to ensure
 11 that they have the amount of time they need
 12 to conduct the depositions that are a
 13 necessary prerequisite to making a showing
 14 that they need Mr. Putnam. We would be happy
 15 to work with them on scheduling. We would
 16 be happy very specifically to try to
 17 schedule, you know, multiple people in one
 18 day if that would be helpful. But at this
 19 stage we think it's unfair and inappropriate
 20 under even their own case law to seek
 21 Mr. Putnam's deposition. And, in fact,
 22 collaterally we believe that it has the
 23 potential to be divisive when that type of
 24 provocative action is not necessary and may
 25 never be necessary.

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1 now retired; but he was a fairly low-level
 2 employee at the time who was involved down
 3 the chain in this letter. And we believe we
 4 have the right to establish, and Mr. Putnam
 5 is the only one who can tell us what the
 6 basis was as the senior manager of this
 7 division and this agency when Florida reached
 8 out and made that request and put the
 9 information that it chose before it made its
 10 request to the federal Department of
 11 Commerce.
 12 So we believe we have met the test. We
 13 don't believe we're required to go on a goose
 14 chase deposing all different kinds of people,
 15 especially when we know that none of them
 16 will ultimately be able to tell us what was
 17 on Mr. Putnam's -- what was in Mr. Putnam's
 18 head and what was his basis for making the
 19 decisions he made.
 20 MR. PERRY: Your Honor, if I might
 21 respond?
 22 SPECIAL MASTER LANCASTER: Sure.
 23 MR. PERRY: Your Honor, let me start by
 24 saying, again, that because Mr. Primis and
 25 his colleagues haven't yet taken the

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1 SPECIAL MASTER LANCASTER: Thank you.
 2 Mr. Primis, do you want to say anything
 3 else?
 4 MR. PRIMIS: Just a few responses, your
 5 Honor.
 6 First, I didn't hear any response on the
 7 Army Corps statements that Mr. Putnam has
 8 made and the positions he's taken on the
 9 necessity of federal government involvement
 10 to deliver Florida the water it needs, in
 11 particular as it relates to oysters and other
 12 species in the bay. And, second, we did ask
 13 months ago for the people who were more
 14 directly involved in that letter, the junior
 15 people. And we were told we could learn that
 16 through deposition discovery, and they
 17 wouldn't tell us. And so, now, when we tried
 18 and were unable to unearth this information,
 19 only now when we have renewed our request for
 20 Mr. Putnam did they end up telling us who
 21 they believed would be the people that should
 22 provide this information.
 23 But, nevertheless, Mark Berrigan, who
 24 is noticed for deposition, he's a fairly
 25 low-level employee of the -- of the -- he's

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1 depositions of the persons I identified, I
 2 don't think that they're in a position to
 3 summarize or explain what the testimony would
 4 be for either those individuals or for
 5 Mr. Putnam.
 6 Second, Mr. Primis cites press
 7 statements about the Army Corps. Virtually
 8 every public official in the United States
 9 makes press statements at one time or
 10 another. Press releases are made on their
 11 behalf. There are all sorts of statements in
 12 the press at public events; and, yet, this
 13 doctrine applies, this doctrine requiring
 14 that you exhaust your efforts to try to
 15 obtain the information elsewhere before you
 16 get to the level when you're actually
 17 deposing a high-level official like
 18 Mr. Putnam.
 19 So I might also note that it is true
 20 that a couple months ago we had conversations
 21 about the Commissioner of Agriculture,
 22 Mr. Putnam. And our position then was the
 23 same as it is now. You have an obligation to
 24 go out and take these depositions and see if
 25 you actually need this information. And then

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1 we didn't hear anything for two months. And
 2 last week was the first time we heard about
 3 this again.
 4 And so we are very willing to work
 5 cooperatively with Georgia to make the people
 6 available so that they can determine whether
 7 they actually need to take Mr. Putnam's
 8 deposition. But our position at this stage
 9 is that any such deposition is premature, and
 10 it may never be needed.
 11 SPECIAL MASTER LANCASTER: Thank you.
 12 Counsel, are you -- does either one of
 13 you or both of you want to submit a brief on
 14 this matter; or are you content with your
 15 summaries in your status reports and the
 16 arguments you have made today? Georgia?
 17 MR. PRIMIS: Your Honor, we can, I
 18 believe, rest on the papers we have submitted
 19 so far.
 20 SPECIAL MASTER LANCASTER: Florida?
 21 MR. PERRY: Your Honor, we could submit
 22 additional authority, if that would be
 23 helpful. I don't think we need further
 24 argument; but if the -- if additional
 25 authority would help the Court, we would be

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1 pleased to submit that.
 2 SPECIAL MASTER LANCASTER: That's your
 3 choice, counsel, not mine.
 4 MR. PERRY: Okay. Your Honor, we would
 5 like to submit additional authority. We can
 6 do it by the end of the day tomorrow, if that
 7 would be sufficient.
 8 SPECIAL MASTER LANCASTER: Georgia?
 9 MR. PRIMIS: We would like an
 10 opportunity to respond to whatever Florida
 11 submits, your Honor.
 12 SPECIAL MASTER LANCASTER: What timing?
 13 MR. PRIMIS: If we get it by the end of
 14 the day tomorrow, I would say by Monday?
 15 SPECIAL MASTER LANCASTER: Let me remind
 16 both counsel that on February 29 we hit a
 17 deadline for the final nonexpert depositions.
 18 All right. Well, let's move on then to
 19 the 30(b)(6) e-mail preservation issue. I
 20 assume that hasn't been resolved either?
 21 Florida?
 22 MR. PERRY: No, your Honor, it hasn't.
 23 This, again, is an e-mail issue that we have
 24 been pursuing for some time.
 25 I would like to describe first what the

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1 context is for the e-mails we're seeking and
 2 then why they're important. First, these are
 3 Georgia state employees' e-mails that we're
 4 seeking. They were all priority custodians.
 5 At the outset that was the agreement. Their
 6 names are Allen Barnes, Carol Couch, and
 7 Harold Reheis. There are a couple others
 8 that are not as high-ranking as those
 9 individuals, but those individuals were the
 10 directors of Georgia's Environmental
 11 Protection Division at relevant times. And
 12 that division had responsibility for state
 13 water planning, for issuing permits for
 14 irrigation in the ACF Basin and, indeed, had
 15 specific authority to mandate reductions in
 16 irrigation along the Flint River during
 17 drought years to ensure that the Flint River
 18 had acceptable flows. And, of course, the
 19 Flint, as the Court knows, is one of the key
 20 rivers that feeds the Apalachicola.
 21 We have only a few dozen e-mails for
 22 each of the people I identified. By way of
 23 comparison, for a gentleman named Greg
 24 Munson, who is a former official of our
 25 Department of Environmental Protection, we

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1 produced 5,500 e-mails. So I think there's a
 2 fairly stark comparison.
 3 We have been seeking this information
 4 from Georgia for quite a long time. Their --
 5 their response to us has essentially, as we
 6 understand it, been that there was a server
 7 migration, meaning that servers were changed
 8 at some point in time, and that a whole range
 9 of e-mail for former employees was lost.
 10 Our technical experts suggest to us that
 11 those e-mails are unlikely to be lost and
 12 that there are -- even in the event that some
 13 of the files can't be found, there are other
 14 ways to reconstruct those files. And so we
 15 have had a bit of trouble getting over the
 16 last several months a real clear explanation
 17 for what has happened.
 18 We know that Georgia has been continuing
 19 to investigate this issue for some time, and
 20 it's taken a number of steps. We just
 21 learned recently last week that their
 22 investigation has ceased. This is an issue
 23 that we raised in November, and it was,
 24 indeed, in our December status report; but
 25 it's only been very recently that Georgia has

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1 officially declined to produce a witness to
 2 explain what type of actions they have taken
 3 to preserve these e-mails or to find them.
 4 And, frankly, we want the e-mails because we
 5 think that they're going to be likely quite
 6 relevant.
 7 So Georgia, in its recent status report,
 8 says, quote, to the extent Florida can
 9 identify additional reasonable steps Georgia
 10 has not already thought of, Georgia is
 11 willing to consider them.
 12 We certainly appreciate that statement,
 13 but we don't have a sufficient understanding
 14 about what's been done and what could be
 15 done. And we have had trouble getting a
 16 clear explanation for those things. And it's
 17 a very narrowly-tailored deposition under
 18 30(b)(6) that we're proposing to use to get
 19 those answers.
 20 Among other things, we would like to
 21 determine very specifically whether Georgia
 22 has attempted to reconstruct at least the
 23 internal e-mails for these individuals by
 24 looking on the currently-used or
 25 recently-used e-mail servers for other

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1 people who received e-mails, sent e-mails,
 2 or had cc's with e-mails to these
 3 individuals. That would be a fairly easy
 4 way to start.
 5 And it appears to us from the letters
 6 we have gotten -- but we're not absolutely
 7 sure -- it appears to us they have not taken
 8 that step and that they think it's unduly
 9 burdensome.
 10 And even in the event that it's not
 11 possible to reconstruct that using the
 12 servers, the current or former servers
 13 that have been used at EPD, we think it
 14 might be possible to do the same type of
 15 reconstruction of these individuals' e-mails
 16 by looking on local e-mail archives on the
 17 computers of other people that would have
 18 commonly corresponded with the people I
 19 identified.
 20 We think that that's not incredibly
 21 burdensome, can be done fairly quickly. And
 22 we would like to take a deposition to
 23 understand what has been done and what could
 24 be done on that particular score, among
 25 others.

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1 Also our experts -- and let me pause to
 2 say, you know, part of the problem here, your
 3 Honor, is that lawyers have been talking to
 4 lawyers about technical issues. And what
 5 we -- what our deposition would do is ensure
 6 that we have an appropriately technically
 7 oriented person deposing a technical expert
 8 to figure out exactly what's been done and
 9 what could be done.
 10 Among other things, we would like to
 11 probe whether there are tape backups of the
 12 old e-mail server, whether there are tape
 13 backups that were routinely made or made --
 14 perhaps immediately made prior to the
 15 migration. Our technical experts say that
 16 would be commonplace to do, that it would be
 17 very surprising if a tape backup was not
 18 made. And so it's a logical question for us
 19 to probe.
 20 Now, without burdening the Court with
 21 too many pieces of background information, I
 22 will give one very specific example where the
 23 e-mails that we're looking for would be quite
 24 relevant. As I mentioned, there is a statute
 25 in Georgia called the Flint River Drought

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1 Protection Act, which at relevant times
 2 provided that the State would every year make
 3 a prediction of whether there would be severe
 4 drought conditions expected in the year, and
 5 if that severe drought conditions were
 6 predicted in accordance with a very specific
 7 approach, quote, the Division will determine
 8 the total number of acres of irrigated land
 9 serviced by irrigation systems located within
 10 one or more of the affected areas that must
 11 not be irrigated that year in order to
 12 maintain the acceptable Flint River
 13 streamflow. That's Georgia code 12-5-546 and
 14 547.
 15 We know, for example, during the recent
 16 drought years that the staff of EPD,
 17 Georgia's Environmental Protection Division,
 18 urged some of these individuals, particularly
 19 I'll say here Allen Barnes, to declare a
 20 severe drought, which would have triggered
 21 the provision I read. But despite the
 22 recommendation from his staff, Mr. Barnes
 23 apparently decided not to invoke that
 24 authority and not to halt agricultural
 25 irrigation.

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1 As a result -- and I'm speaking very
 2 specifically about 2011 and 2012 at this
 3 point -- there were very significantly low
 4 flows on the Flint and then some of the worst
 5 flows on record for -- down the Apalachicola
 6 in those years. And that's -- what I'm
 7 describing here is exactly the type of
 8 inequitable conduct cited in our complaint
 9 that this case is meant to address.

10 We think that Allen Barnes's e-mails
 11 would shed specific light on this topic, if
 12 we could find them. We're trying to, by
 13 seeking this deposition, get some clues to
 14 where they might exist or whether with some
 15 reasonable amount of effort they can be
 16 recreated. But we don't have his e-mails,
 17 and we're not certain.

18 So we have asked Georgia repeatedly for
 19 this deposition. We are very happy to
 20 confine it to a very narrow set of issues
 21 specifically targeted at obtaining these
 22 e-mails and are happy to work with Georgia
 23 for that purpose.

24 SPECIAL MASTER LANCASTER: Thank you.
 25 Georgia?

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1 MR. PRIMIS: Yes, your Honor. Thank you
 2 very much. This is Craig Primis for Georgia.

3 As we pointed out in our status report,
 4 depositions like this are disfavored; and we
 5 cited cases for that. They distract from the
 6 merits. And that's particularly an issue
 7 here.

8 As your Honor has acknowledged, with six
 9 weeks to go the parties have 30 depositions
 10 or more. And at the same time we're also
 11 working on expert reports that are due on
 12 February 29.

13 Florida has known about this issue since
 14 at least April 2015 when we provided the
 15 information in our interrogatory response
 16 about what happened to the e-mails for these
 17 directors. We have been transparent about
 18 it. We have informed them, and we have taken
 19 substantial follow-up efforts to try to
 20 determine whether there are ways to restore
 21 these e-mails in the manner Mr. Perry has
 22 articulated and to see if there are other
 23 sources for them.

24 These directors left the Environmental
 25 Protection Division before the leave to file

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1 this suit was even sought. Harold Reheis
 2 left in 2003, a decade before leave was
 3 sought. Carol Couch left in 2009, and Allen
 4 Barnes left in January of 2012. So these
 5 people have been gone, in Mr. Reheis's case
 6 for a long time, and all of them before this
 7 case was filed.

8 And as we told Florida, we told them in
 9 our interrogatory response and we told them
 10 in follow-up communications, in mid-2013
 11 there was, in fact, an e-mail migration to a
 12 different server. Former employee accounts
 13 were not migrated; so they didn't -- if you
 14 weren't an active employee at the time, your
 15 e-mails weren't carried over to the new
 16 server, which is not uncommon. And at that
 17 point, the old server was recycled and
 18 repurposed and used elsewhere, and the data
 19 that had previously been available on it was
 20 not available for recovery.

21 And we have asked all these questions --
 22 the lawyers have -- to try and determine
 23 whether we can obtain these e-mails and
 24 provide them to Florida for the case.

25 All of this was done in the ordinary

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1 course of business. There was nothing
 2 unusual or improper about any of this. And
 3 we have been transparent about it since April
 4 when we told Florida about it nine months
 5 ago.

6 This issue was not raised in Florida's
 7 initial 30(b)(6) notice, I would note. We
 8 didn't hear about it as a potential 30(b)(6)
 9 issue until December, eight months after we
 10 first told Florida what had happened with the
 11 e-mails.

12 And I would note at that point -- until
 13 that point, Florida had only served 13
 14 30(b)(6) topics; but then after it became
 15 apparent that we were going to proceed
 16 without a 30(b)(6), we suddenly got a belated
 17 30(b)(6) notice with 15 new topics in
 18 December, all of which we have then had to
 19 evaluate and determine who could testify to
 20 them and prepare them for. And 14 of those
 21 we have agreed to provide witnesses for.

22 We just don't think it's necessary to
 23 have an e-mail -- e-mail server deposition,
 24 especially when we have taken the efforts
 25 that we have taken; and we have told Florida

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1 that. We have searched other servers. We
 2 have searched network drives. We have
 3 searched for decommissioned computers, and we
 4 have searched hard copy documents. We have
 5 investigated the availability of backup
 6 tapes. We have consulted with Georgia's
 7 IT people and their technical consultant,
 8 their vendor. And we have searched for
 9 e-mails collected from other people who were
 10 identified as custodians to see if there were
 11 other director e-mails in there. And those
 12 are the ones where the people are going to be
 13 most likely to have e-mails from directors on
 14 the issues in this case.

15 It sounds like Florida doesn't believe
 16 us; but we have, in fact, done all of that
 17 work. And we have gone to great lengths to
 18 identify and produce e-mails.

19 And if you take a step back and look at
 20 what we have produced, we found 35 boxes of
 21 paper files from the directors, including
 22 all kinds of memos and reports and
 23 contemporaneous documents. We produced from
 24 those 14,000 pages of information. We
 25 produced 9,000 pages from Harold Reheis, even

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1 though he left the agency back in 2003. We
 2 have -- we did find on a network server an
 3 administrative assistant to the directors,
 4 her old e-mail account. And we were able to
 5 produce 4,000 pages of documents from that.
 6 All told, 24,000 pages or 23,000 pages have
 7 been produced from these former directors.
 8 And Florida has all of the official documents
 9 that bear their names that were published on
 10 behalf of the agency and represent the
 11 initiatives that they were involved with
 12 during their time in the agency.

13 So in response to providing all of that
 14 information, which we believe is a
 15 significant sign of good faith and a level
 16 of cooperation in Georgia that we would
 17 undertake here, we got this 30(b)(6) topic
 18 which we view as burdensome, not justified,
 19 and harassing. And when we objected to it,
 20 in response to that we got a letter that had
 21 28 subtopics that we were supposed to prepare
 22 people for deposition about while -- none of
 23 which relates to the merits of the case,
 24 while we're still trying to finish the
 25 remaining 30 depositions and expert reports

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1 over the next six weeks.

2 Most of the information they seek is
 3 protected attorney work product because
 4 lawyers for Georgia have been doing this
 5 work. It would cover many employees and
 6 outside consultants, many of whom are formers
 7 and don't even work there anymore given the
 8 time frame. They're seeking information
 9 spanning over 30 years back to 1983 when
 10 Mr. Reheis started. They have asked for
 11 policies and practices. They want a witness
 12 to testify on all computer crashes,
 13 disruptions and data recovery efforts, all
 14 asset registries, all file naming
 15 conventions. These are all over a period of
 16 30 years. They want somebody to testify
 17 about all record centers throughout the
 18 entire State of Georgia that conceivably have
 19 a document for any of these people. And they
 20 want technical details on all of the
 21 equipment they used, even from the '90's and
 22 2000's, much of which has already been
 23 repurposed or discarded, just given their
 24 age.

25 So we think this is an incredibly

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1 burdensome distraction from the merits of the
 2 case. We have been transparent about it. We
 3 have informed Florida of our efforts, and we
 4 have made significant effort to see what we
 5 could find. And, in fact, we have found and
 6 produced documents.

7 And the e-mail issue that has arisen
 8 here was done in the ordinary course and in
 9 good faith before this case was filed. There
 10 is just no need for a burdensome 30(b)(6)
 11 deposition.

12 As Mr. Perry articulated, we have told
 13 Florida on the phone and, again, in our
 14 status report and correspondence with them
 15 that if they have reasonable steps,
 16 additional steps that could be taken for
 17 places to look for these e-mails, we're
 18 willing to entertain that; and we have. And
 19 we have done that consistently since April
 20 when we initially told Florida in a greater
 21 level of detail than is customary in a case
 22 exactly what happened with these particular
 23 e-mails.

24 As for Mr. Perry's suggestions of what
 25 we could do further here, we're happy to look

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1 at all of those issues again. I will state,
 2 and we have told Florida, that we did run
 3 searches for people, for these directors, by
 4 looking at the servers and also the
 5 information that was collected from the
 6 custodian.
 7 I suppose we could see if it's feasible
 8 to run searches on -- throughout the entire
 9 state government of Georgia to see if there
 10 are e-mails from these three people that
 11 still exist. But we collected e-mails and
 12 documents from dozens of people, and those
 13 are the people who would be most likely to
 14 have information relating to this case and
 15 e-mails from the directors related to this
 16 case.
 17 So, again, we're always willing to
 18 entertain reasonable additional steps. If we
 19 could identify them and produce them and
 20 provide them, we would. But based on the
 21 extent of work we have done to date, we just
 22 have not been able to recreate or recover
 23 e-mails that were discarded in the ordinary
 24 course prior to the initiation of this
 25 litigation.

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1 I'm heartened to hear from Mr. Primis
 2 that he would see if it's feasible to check
 3 other noncustodian e-mail accounts to see if
 4 they can recreate the e-mail accounts for
 5 these individuals. We have not heard them
 6 say that before. I think that's important.
 7 And what they have said about checking
 8 other custodians' accounts for e-mails, for
 9 example, for Mr. Barnes, is an interesting
 10 point; but we have no e-mails, for example,
 11 between -- as far as I know, between
 12 Mr. Barnes and other key people that were --
 13 like an individual named Mr. Wei Zeng who we
 14 think corresponded daily with Mr. Barnes.
 15 For example, the point I was making
 16 about the Flint River Drought Protection Act,
 17 we know that Wei Zeng sent a memo on that
 18 very specific topic recommending that a
 19 severe drought be declared and that
 20 appropriate steps to halt irrigation be
 21 triggered. And, yet, we have no
 22 communications by e-mail from Mr. Barnes to
 23 Mr. Wei Zeng or vice versa, as far as I know.
 24 I have not seen any, and we have been looking
 25 for them.

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1 SPECIAL MASTER LANCASTER: Thank you.
 2 Florida, do you want to say anything
 3 further on this issue?
 4 Hello?
 5 MR. PERRY: Yes, your Honor.
 6 First, on the timeline point, if I
 7 might, I think we have a slightly different
 8 view than Mr. Primis about the timelines. It
 9 was our sense that they were continuing to
 10 investigate well into December and that they
 11 just concluded their investigation recently.
 12 And, indeed, we informed them, I believe it
 13 was in November and reported it on December 4
 14 in our status report, that we were going to
 15 conduct this type of deposition because we
 16 felt like we weren't making progress; and we
 17 couldn't get a straight sense of what could
 18 be done to find these e-mails.
 19 I'll say that for some of these
 20 individuals, we know they used their e-mail
 21 accounts because from time to time -- rarely,
 22 but from time to time they e-mailed our state
 23 government officials. And we received, and
 24 we sent them e-mails. So we know that these
 25 e-mail accounts were used.

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1 So with respect to custodians, I
 2 appreciate that Mr. Primis has said they did
 3 a search to see if they could recreate it
 4 among the limited universe of custodians. We
 5 got very little to suggest any result from
 6 that. And today, if I understand him
 7 correctly, he is saying that he would see if
 8 it's feasible to search among a wider group
 9 of people.
 10 Frankly, your Honor, I welcome that; but
 11 I'm not sure that that replaces the need to
 12 do a deposition and figure out technically --
 13 not lawyer to lawyer, but among technical
 14 people that understand this -- what has been
 15 done and what might be done.
 16 And we are raising this because, as I
 17 tried to indicate previously, some of these
 18 e-mails may be quite central to our case.
 19 And so we waited as long as we reasonably
 20 could. We asked for a 30(b)(6) deposition.
 21 And on the point about its intrusiveness
 22 or the unduly burdensome nature of that, it's
 23 true that one of our co-counsel sent a letter
 24 to Mr. Primis with 28 questions that we
 25 wanted to ask any deponent. And he

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1 characterized some of those as going back 30
 2 years. That wasn't the intent. The intent
 3 was to give them a full heads-up on what the
 4 questions would be, essentially a deposition
 5 outline, so they could choose the right
 6 person. In other words, we were trying to be
 7 completely transparent about the issues we're
 8 interested in probing. I don't think it's
 9 fair to say that would require an enormous
 10 amount of work. And we're very happy to
 11 negotiate that inquiry in a way that
 12 highlights very specific issues.

13 And if there is a way to get to the
 14 point where we get a meaningful deposition
 15 that lasts a period of time that's
 16 reasonable, that's fine, too. But what we're
 17 trying to do is get enough information to
 18 find the key documents in this case. And the
 19 baseline we have is that we just haven't been
 20 able to make progress.

21 And, you know, I have enjoyed working
 22 with Mr. Primis over time; so I don't mean to
 23 make any comment about, you know, our
 24 inability to get things done on a general
 25 level, but on this issue we have been unable

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1 to make progress. And we feel like we can't
 2 get a coherent answer that our technical
 3 people can understand without the type of
 4 technical deposition that we're proposing
 5 here, your Honor.

6 SPECIAL MASTER LANCASTER: Mr. Primis,
 7 do you want to say anything else?

8 MR. PRIMIS: Yes. I would just say one
 9 thing about Mr. Barnes and Mr. Zeng. They
 10 have the e-mails from Mr. Zeng. And they're
 11 correct, they have e-mails showing them
 12 communicating on a regular basis with a wide
 13 variety of people. The fact that Mr. Zeng's
 14 e-mails don't have e-mails from Mr. Barnes is
 15 just as suggestive that Mr. Barnes rarely
 16 used e-mail as it is that there is something
 17 wrong or amiss. And they have not
 18 established that Mr. Barnes, in fact,
 19 e-mailed about these issues.

20 So it's -- it's really not a basis to
 21 drill into this with the 28 topics over 30
 22 years the way they suggested, especially when
 23 counsel has been making the efforts that I
 24 have described to keep Florida informed and
 25 to do what we can to see if they exist.

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1 SPECIAL MASTER LANCASTER: Thank you.
 2 Counsel, keeping in mind my earlier
 3 comment about the deadline of February 29, do
 4 you want to file briefs on this one; or are
 5 you content to rely on the representations
 6 and materials in your status reports and the
 7 arguments that you have had today? Florida?

8 MR. PERRY: We're content to rely on
 9 what's just been said, your Honor.

10 SPECIAL MASTER LANCASTER: Georgia?

11 MR. PRIMIS: Same for Georgia, your
 12 Honor.

13 SPECIAL MASTER LANCASTER: All right.
 14 Let's turn to the third issue that your
 15 status reports discussed, the adequacy of
 16 30(b)(6) witnesses. Georgia?

17 MR. PRIMIS: Yes, your Honor. I think
 18 on this one we may be better able to work
 19 things out with Florida; but I will outline
 20 the concern that we have had.

21 We have started taking the 30(b)(6)
 22 depositions. And when we asked the kind of
 23 usual background questions about what
 24 preparation had been done and who people have
 25 spoken to, we are getting answers that

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1 indicate that there has not been an adequate
 2 level of preparation and that the witnesses
 3 are really not informed about the issues that
 4 we have identified.

5 With regard to Mr. Munson, for instance,
 6 we wanted to know the basis for Florida's
 7 allegation that Georgia engaged in bad faith
 8 in the Compact negotiations. And Mr. Munson
 9 didn't speak to anybody who was involved in
 10 those negotiations. He personally was not,
 11 and he hadn't done the work to find out what
 12 happened firsthand from these people. And
 13 we're told that the basis for the bad faith
 14 allegation is that post hoc judicial opinion
 15 that Mr. Munson had nothing to do with. So
 16 we were concerned about that. And maybe
 17 there is a way to negotiate our way through
 18 that.

19 Another issue that arose was with
 20 Mr. Cyphers. We were presented at his
 21 30(b)(6) deposition with a 35-page,
 22 single-spaced script of information that had
 23 never been previously provided before; and we
 24 were told he was going to use that as the
 25 basis for his deposition testimony. He also

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1 did have a collection of documents in a
 2 notebook.
 3 And I want to be clear. We're not
 4 objecting to providing 30(b)(6) witnesses
 5 with a collection of documents in a notebook,
 6 and we don't think that's a waiver of work
 7 product. That's very common and routine, and
 8 we have seen it happen before. We're not
 9 taking issue with that, and we have not taken
 10 issue with that with Florida. But when we're
 11 presented with this 35-page script which
 12 across the top of it says, attorney-client
 13 privilege, attorney work product, and the
 14 witness testifies that it was prepared by
 15 lawyers and that he relied on the lawyers to
 16 get all the information correct, we have a
 17 concern that we are getting lawyer-drafted
 18 and lawyer-driven information as our 30(b)(6)
 19 testimony from Florida on these issues; and
 20 we're not getting the witness's testimony.
 21 We also cannot cross-examine the witness
 22 because the witness was not involved in the
 23 preparation of that document and didn't know
 24 who had been other than the lawyers.
 25 So we're concerned that barriers are
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1 being set up to get at this information
 2 either because, in the case of Mr. Munson, he
 3 hadn't done the work and was only ready to
 4 testify about what Florida wanted him to say
 5 and was not available for cross-examination
 6 based on other issues that related to it and
 7 might have tested his testimony; and then
 8 with regard to Mr. Cyphers, we're basically
 9 asked to take on faith this lawyer-drafted
 10 script. And we're struggling with ways to
 11 get at that, especially when it's provided at
 12 the deposition for the first time. And it's
 13 35 pages of single-spaced information, all of
 14 which seems lawyer drafted and edited.
 15 So those are our issues. We are open to
 16 negotiating these points with Florida in good
 17 faith and to try to find a way to get at the
 18 actual information and to give us an
 19 opportunity to test it through
 20 cross-examination, which we just don't feel
 21 we have been able to do with regard to the
 22 initial 30(b)(6) witnesses that have been
 23 provided.
 24 Likewise, with Mr. Steverson, we had
 25 asked for a witness who could testify about
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1 Florida's efforts to mitigate the harms that
 2 Florida claims it's experiencing. And
 3 Mr. Steverson -- Steverson did no additional
 4 work and himself only had knowledge of
 5 limited areas of mitigation that Florida had
 6 engaged in. And we just couldn't explore
 7 other things through him that we had hoped to
 8 explore.
 9 So that is the basis for our concern. I
 10 think this one probably warrants some
 11 additional discussion and negotiation between
 12 the parties. But it was becoming a concern
 13 as we approached the end of our discovery
 14 period.
 15 SPECIAL MASTER LANCASTER: Florida?
 16 MR. PERRY: Thank you, your Honor.
 17 Let me start by agreeing with Mr. Primis
 18 that we could probably resolve some of these
 19 issues through negotiation. And, indeed, we
 20 have already talked about that to some
 21 extent.
 22 But on the merits of the concerns that
 23 Mr. Primis stressed, we have a different
 24 view; and I would like to explain that
 25 briefly, if I might. First, as the Court may
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1 recall, this is an issue that's been
 2 percolating for some time and was addressed
 3 in our December status report where we cited
 4 a number of cases about our concern about the
 5 scope of the request for 30(b)(6) depositions
 6 and how they were impractical and required
 7 some fairly extraordinary steps to -- to
 8 prepare a witness to comply. And, indeed,
 9 since that time Georgia has filed its own
 10 objections to our 30(b)(6)'s and made several
 11 of the almost identical objections to those
 12 we stressed in our prior status report.
 13 So moving very specifically to the three
 14 witnesses that Mr. Primis identified,
 15 Mr. Cyphers, the one Mr. Primis identified as
 16 having relied on an outline, he is the
 17 executive director of the Northwest Florida
 18 Water Management District. In other words,
 19 he has responsibility for that District's
 20 activities throughout the relevant area of
 21 Florida for this case.
 22 I think it's helpful to identify the
 23 specific requests that Georgia made for his
 24 30(b)(6) testimony. First, Florida's
 25 management of all agricultural water use,
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<p style="text-align: center;">45</p> <p>1 Florida's management of all municipal and 2 industrial water use, any and all diversions, 3 all permitting, the amount and nature of 4 consumptive uses of water within that portion 5 of the ACF Basin. In other words, your 6 Honor, their requests, which Mr. Cyphers was 7 addressing, were essentially everything the 8 District does or has done at any point to 9 manage the kind of water uses that -- that 10 the District manages in that area of Florida. 11 Admittedly, the Apalachicola is sparsely 12 populated; and there's only limited 13 agricultural activity there. And there's 14 very little water use when compared with what 15 you see upstream in Georgia, very little 16 agricultural water use, very little municipal 17 or industrial water use; but, nevertheless, 18 the amount of preparation required to address 19 all those broad topics was very significant. 20 And as the case law suggests, it's not 21 reasonably possible for a single person to 22 remember every little detail for every 23 possible question that might be asked under 24 those broad topics. And, indeed, the only 25 practical way to reasonably prepare somebody</p> <p style="text-align: center;">THE REPORTING GROUP Mason & Lockhart</p>	<p style="text-align: center;">47</p> <p>1 agricultural users do and how their permits 2 work and how they are limited and how our 3 conservation programs work for agriculture, 4 which by the way have been quite successful. 5 But all that material requires an 6 extreme degree of knowledge about detail. 7 And so we have cited in our brief -- and I'll 8 cite another case here -- examples of where 9 Courts have looked at this practice of 10 providing a notebook or an outline or other 11 materials for a witness to rely upon, if 12 necessary, when being deposed as a 30(b)(6). 13 One case is called Zeng V. EDS, Z E N G, 2007 14 Westlaw 2713805 in the Eastern District of 15 Virginia in 2007. That gives a fair summary, 16 we think, of the challenges in a situation 17 like this with a 30(b)(6) and how to comply. 18 Now, we think that there's commentary. 19 Other commentators have balanced these issues 20 and come to the conclusion, we think, that 21 what we did here was the right approach, you 22 know, faced with an incredibly broad range of 23 30(b)(6) request, trying to provide a 24 meaningful witness. And so that's how we did 25 it.</p> <p style="text-align: center;">THE REPORTING GROUP Mason & Lockhart</p>
<p style="text-align: center;">46</p> <p>1 would be to provide them with the type of 2 notebook or outline or background material on 3 which they could rely. 4 And here, the outline was not prepared 5 only by a lawyer. Certainly, a lawyer was 6 involved. But there were 16 different state 7 employees who were involved in preparing the 8 outline. And this is a 30(b)(6) deposition, 9 so Mr. Cyphers was preparing to speak on 10 behalf of the State. And those state 11 employees contributed information to the 12 outline, and we have identified every one of 13 those 16 people by name for Georgia. And two 14 of those people are already scheduled to be 15 deposed, one next week. And, certainly, next 16 week when Mr. Guy Gowens is deposed, Georgia 17 can ask him the questions about the 18 preparation of the outline. 19 And, indeed, the outline refers to other 20 documents. It covers a great deal of detail 21 including specifics on permitting, all the 22 types of permits required, how the permitting 23 system is administered, what the procedures 24 are, how water is supplied to small 25 municipalities, what the very few</p> <p style="text-align: center;">THE REPORTING GROUP Mason & Lockhart</p>	<p style="text-align: center;">48</p> <p>1 Now, Georgia's response to this was to 2 demand a deposition of the Florida lawyer who 3 was involved with those 16 state employees in 4 preparing the outline. And it's hard for us 5 to understand how that's justified, 6 particularly in light of the fact that we 7 have identified every one of the 16 people; 8 the outline itself identifies the source of 9 the information, including the documents that 10 were relied upon to put it together. I have 11 got graphs from documents. It's highly 12 detailed. And they can depose individuals 13 that we have identified about it, and they 14 are doing so. 15 So while I agree with Mr. Primis that we 16 can work out our remaining issues, I disagree 17 about the premise that I think he's advancing 18 that what we did was somehow wrong. In fact, 19 I think the way we handled this is the only 20 way to reasonably handle this type of issue 21 when it presents, you know, such huge scope 22 problems and was appropriate, as we think the 23 commentators say and the case law says, for a 24 30(b)(6). 25 Now, with respect to Mr. Munson, who</p> <p style="text-align: center;">THE REPORTING GROUP Mason & Lockhart</p>

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1 Mr. Primis also mentioned, he was called as a
 2 30(b)(6) to testify about our allegation in
 3 our complaint that Georgia acted in bad
 4 faith. And that allegation is founded on a
 5 determination by Judge Bowdre of the Northern
 6 District of Alabama in 2005 that Georgia did,
 7 indeed, act in bad faith in certain
 8 negotiation settings with Florida.
 9 And what Georgia wanted to do in that
 10 deposition was depose Mr. Munson about its
 11 counterargument. And its counterargument had
 12 to do with negotiations that followed that
 13 bad faith determination. And Mr. Munson
 14 wasn't prepared to address those because
 15 those weren't part of the topic.
 16 Now, I'll say that there are other
 17 people that have been deposed and will be
 18 deposed in this case that do have that type
 19 of knowledge. Already, Georgia has taken a
 20 two-day deposition of former Florida employee
 21 Doug Barr, who also ran the Water Management
 22 District, and has on its schedule a
 23 deposition for David Struhs, also on the
 24 negotiations it wishes to probe.
 25 So I do not think that they are lacking
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1 for any discovery on that issue. And I would
 2 disagree with Mr. Primis's premise that
 3 Mr. Munson wasn't well prepared.
 4 For Mr. Steverson, who by the way is the
 5 Secretary of the Department of Environmental
 6 Protection in Florida, I also disagree with
 7 what Mr. Primis said. Mr. Steverson is an
 8 expert on a whole wide range of topics. He
 9 ran the water quality -- the Water Management
 10 District prior to his appointment as
 11 Secretary. He is intimately familiar, in
 12 fact, with a range of conservation measures
 13 to mitigate harm to the Apalachicola, which
 14 was, of course, the 30(b)(6) request,
 15 including efforts by Florida, at the cost of
 16 hundreds of millions of dollars, to set aside
 17 land for conservation purposes along the
 18 river. He is not, however, familiar with
 19 what the deposition ended up focusing upon;
 20 and that is efforts taken to manage the
 21 harvest of oysters in Apalachicola Bay. And
 22 those issues are actually addressed by a
 23 different agency within the Florida state
 24 government, the Fish and Wildlife Commission.
 25 And there, Mr. Nick Wiley, who is the
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1 executive director is going to be deposed
 2 soon -- in fact, this Friday, I believe -- on
 3 those issues.
 4 And so, again, I do not believe that
 5 Georgia is lacking for any type of discovery.
 6 We are -- we are supplying people. And I
 7 think, your Honor, that our response to the
 8 30(b)(6) notices, although we have
 9 objections, we did the best we could to
 10 prepare. It takes a huge amount of time to
 11 do this, as evidenced by the 16 state
 12 employees that were helping prepare
 13 Mr. Cyphers.
 14 So we think that that record is not one
 15 of noncompliance. It's one of attempts to
 16 comply under difficult circumstances
 17 occasioned by extremely broad requests for
 18 30(b)(6) witnesses.
 19 SPECIAL MASTER LANCASTER: Mr. Primis,
 20 do you want to add anything to what has just
 21 been said?
 22 MR. PRIMIS: Sure. Just briefly, your
 23 Honor.
 24 I would just note that the practice, as
 25 I said, of providing a notebook or even some
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1 bullet points with historical factual
 2 information to a witness is not unusual. And
 3 the case that Mr. Perry identified had a
 4 notebook; and it said -- it's not entirely
 5 clear what the witness was provided, but it
 6 sounded like it was just clipped from
 7 interrogatory responses that had already been
 8 advanced in the case that all the parties had
 9 access to so they could be examined and
 10 tested. What we were looking at here with
 11 Mr. Cyphers was 35 pages of an advocacy
 12 piece. It was a lawyer advocacy piece. It
 13 wasn't neutral in terms of the presentation
 14 of the facts; and it wasn't an historical
 15 document, which Mr. Cyphers clearly could
 16 have been given if that would have been
 17 helpful to him to articulate Florida's
 18 testimony. This was clearly written by a
 19 lawyer.
 20 And like the Neurontin case that we
 21 cited, what is happening here is that Florida
 22 is using a witness, Mr. Cyphers, to advance
 23 the lawyer's position as it's drafted up in
 24 this 35-page advocacy piece. We can't test
 25 the information underlying it through the
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1 30(b)(6) witness like we're supposed to
 2 because we can't ask about the process that
 3 led to the creation of the document, what
 4 information was let out -- left out, and what
 5 information the 14 individuals that Mr. Perry
 6 said were canvassed, what they actually said.
 7 We have the lawyer version of what they said
 8 over which privilege was waived.
 9 So we're trying to work with Florida to
 10 find a way to get at that. If the answer is
 11 that there are other people with the
 12 knowledge, then we would suggest that they be
 13 designated as a 30(b)(6) witness so that
 14 their testimony be designated as 30(b)(6)
 15 testimony so that we don't spend all this
 16 time and effort preparing for witnesses who
 17 are just going to come in and read a
 18 lawyer's -- lawyer's single-spaced brief into
 19 the record. That's not what 30(b)(6)'s are
 20 supposed to be about. It's not a process I
 21 have ever seen before, and it's the one that
 22 was specifically criticized in the Neurontin
 23 case.
 24 So we'll continue our efforts with
 25 Mr. Perry. We'll see what we can do to work

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1 out these issues and make these more
 2 productive, but we did want to identify this
 3 as an issue for the Court.
 4 SPECIAL MASTER LANCASTER: If I heard
 5 both counsel correctly, you believe that this
 6 issue can be resolved by further
 7 negotiations. Is that correct, Georgia?
 8 MR. PRIMIS: Yes, that is certainly our
 9 hope, your Honor; and we fully believe we
 10 can.
 11 SPECIAL MASTER LANCASTER: Florida?
 12 MR. PERRY: That's our hope as well,
 13 your Honor.
 14 SPECIAL MASTER LANCASTER: So am I
 15 correct in my understanding that this is not
 16 an issue for the Court at this time?
 17 MR. PRIMIS: That's correct, your Honor.
 18 We'll continue to work on it with Florida.
 19 MR. PERRY: Yes.
 20 SPECIAL MASTER LANCASTER: So at the
 21 risk of sounding like a broken record, let me
 22 remind you, again, of the February 29
 23 deadline for completion of nonexpert
 24 depositions.
 25 With the briefing that you're going to

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1 give me, we will turn to it as soon as we
 2 can. But it will not be an instant response,
 3 and so you need to keep in mind that deadline
 4 that I mentioned.
 5 Now, let me move to my favorite topic,
 6 settlement and mediation. And here, let me
 7 begin with a note of caution. Again, as you
 8 know, this transcript will be on the docket
 9 on our website. So please be careful; please
 10 don't mention the name of the mediator, the
 11 location of the mediator, anything that would
 12 lead to further disclosures.
 13 Let me ask you; when was the mediator
 14 selected? Florida?
 15 MR. PERRY: I'm not sure I know the
 16 exact date, but it was over a week ago, your
 17 Honor. Maybe two weeks ago.
 18 SPECIAL MASTER LANCASTER: Georgia?
 19 MR. PRIMIS: My recollection is that it
 20 happened sometime over the Christmas holiday
 21 or slightly before that.
 22 SPECIAL MASTER LANCASTER: And when is
 23 the first meeting scheduled for the mediator?
 24 Florida?
 25 MR. PERRY: This is Phil Perry -- yes,

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1 this is Phil Perry for Florida.
 2 We are awaiting word from the mediator's
 3 assistant on a call to address the logistics
 4 of the mediation, which we think will not
 5 take a lot of time. So we think soon we're
 6 likely to have that call. We don't yet have
 7 a call date.
 8 And then consistent with your statement
 9 a moment ago, we will have mediation sessions
 10 that are substantive; but we're -- I think
 11 both Mr. Primis and I agree we're not
 12 inclined to disclose those on the public
 13 record with the dates or the locations or any
 14 of that information.
 15 SPECIAL MASTER LANCASTER: Do you know
 16 any of the technical setup?
 17 Do you know whether there will be
 18 written submissions required, for example,
 19 Florida?
 20 MR. PERRY: Your Honor, I think we're
 21 going to agree on written submissions that
 22 will be submitted by both parties. I think
 23 that's what we're going to address very soon
 24 with the mediator's manager.
 25 SPECIAL MASTER LANCASTER: So no

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1 schedule has been established at this date,
 2 and there is no way to predict what the pace
 3 will be?
 4 MR. PERRY: Your Honor, if I might add,
 5 we have a date picked for the first date of
 6 the substantive mediation that I think is
 7 agreed between all the parties. What I'm
 8 talking about is the logistics call that
 9 precedes that, you know, by a period of time.
 10 And I'm trying to be careful not to mention
 11 the specific date that we intend to begin
 12 substantive mediation efforts on this public
 13 transcript.
 14 SPECIAL MASTER LANCASTER: Well, I'm
 15 concerned, of course, about timing on this.
 16 Do you know who will be representing Florida
 17 at this first meeting of the mediator,
 18 Mr. Perry?
 19 MR. PERRY: Your Honor, we haven't
 20 finally determined who will attend; but I'm
 21 sure it will be somebody with authority to
 22 act.
 23 SPECIAL MASTER LANCASTER: Georgia?
 24 MR. PRIMIS: Yes, your Honor. We have
 25 senior people with authority who are prepared
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1 to attend the mediation, as well as myself.
 2 SPECIAL MASTER LANCASTER: And when
 3 you're saying senior people with authority,
 4 are you talking counsel; or are you talking
 5 State?
 6 MR. PRIMIS: No, no. I'm talking State,
 7 the state administrator who is intimately
 8 involved with this and has been for a while
 9 as well as other people who pay attention to
 10 this at a senior level within the state.
 11 SPECIAL MASTER LANCASTER: Florida?
 12 MR. PERRY: It will not be a
 13 lawyers-only mediation from our perspective.
 14 And then in addition, to the extent the
 15 mediator, on our upcoming logistical call,
 16 would want technical support there as well,
 17 we're willing to bring that as well.
 18 SPECIAL MASTER LANCASTER: I am
 19 obviously concerned about timing and the pace
 20 and whether the mediator will understand the
 21 need to move this along or whether she will
 22 simply treat it as an ordinary matter without
 23 any understanding of the need for speed.
 24 I understand you can't respond to that,
 25 and I'm not asking you to.
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1 Let me suggest -- and it's only a
 2 suggestion -- that if you want to, I would
 3 welcome a joint confidential submission about
 4 the mediation with whatever information you
 5 want to share with me. That's only a
 6 suggestion. It's not an order.
 7 Now, is there anything else from
 8 Florida?
 9 MR. PERRY: No, your Honor.
 10 SPECIAL MASTER LANCASTER: Georgia?
 11 MR. PRIMIS: No, your Honor.
 12 SPECIAL MASTER LANCASTER: Let me, if I
 13 may then, finalize this discussion with a
 14 couple of points. Several times during the
 15 course of this -- today's discussion the word
 16 "drought" appeared. And drought is something
 17 that I raised early on, drought, and the flow
 18 of water, the amount of water. I'm sure that
 19 counsel are aware of and have probably read
 20 George Mitchell's book published in 1990
 21 titled *World on Fire, Saving an Endangered*
 22 *Earth*. George, of course, is a good friend;
 23 and he's very prescient as well as well read.
 24 I would recommend that you suggest to your
 25 principals in each state that they read the
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1 book because no matter what the ultimate
 2 order is from the Court, Mother Nature will
 3 play a role in the ultimate result.
 4 And, secondly, let me make a suggestion
 5 that whoever is attending this mediation have
 6 the authority to compromise. And I emphasize
 7 the word "COMPROMISE" in capital letters
 8 because if you go in with lines in the sand,
 9 you're wasting the mediator's time; and
 10 you're wasting your time.
 11 And I know counsel understand this
 12 because you have been through it before;
 13 but I want to be sure that the state
 14 representatives who are there understand
 15 it. If they go in without the ability to
 16 compromise, this mediation is doomed to
 17 failure. And that's something none of us
 18 wants to happen.
 19 With that, Josh, anything else?
 20 MR. DUNLAP: Nothing.
 21 SPECIAL MASTER LANCASTER: Mary?
 22 MS. CLIFFORD: No.
 23 SPECIAL MASTER LANCASTER: We are
 24 finished, counsel. Thank you very much,
 25 again. I appreciate all you're trying to do
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1 here.
 2 MR. PERRY: Thank you, your Honor.
 3 MR. PRIMIS: Thank you, your Honor.
 4 (The telephone conference was concluded
 5 at 11:05 a.m.)
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1 CERTIFICATE
 2 I, Claudette G. Mason, a Notary Public
 3 in and for the State of Maine, hereby certify
 4 that the foregoing 61 pages are a correct
 5 transcript of my stenographic notes of the
 6 above-captioned proceedings.
 7 I further certify that I am a
 8 disinterested person in the event or outcome
 9 of the above-named cause of action.
 10 IN WITNESS WHEREOF, I subscribe my hand
 11 this 15th day of January, 2016.
 12
 13
 14
 15
 16
 17
 18 My Commission Expires
 19 June 9, 2019.
 20
 21
 22
 23
 24
 25

 Notary Public

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