

No. 142, Original

**In the
SUPREME COURT OF THE UNITED STATES**

STATE OF FLORIDA,

Plaintiff

v.

STATE OF GEORGIA,

Defendant

OFFICE OF THE SPECIAL MASTER

CASE MANAGEMENT ORDER NO. 15

January 20, 2016

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In the parties' January 8, 2016 status reports and at the status conference held on January 12, 2016, the parties notified the Special Master of a dispute regarding Georgia's proposed deposition of Mr. Adam Putnam, Commissioner of Florida's Department of Agriculture and Consumer Services. The parties presented oral argument on this issue at the January 12, 2016 status conference and subsequently provided the Special Master with supplemental briefing.

As set forth in its written submissions and as stated at the status conference, Georgia argues that it should be permitted to depose Mr. Putnam because he played a "critical role in two of the key issues presented in this case: Florida's water supply and the causes of the 2012 oyster fishery failure." Georgia maintains that Mr. Putnam has first-hand knowledge regarding those issues generally, and specifically with regard to a letter signed by him and sent to Governor Rick Scott relating to the declaration of an oyster fishery failure in the Apalachicola Bay. Georgia further asserts that it has been unable to obtain testimony on these issues from other witnesses.

Florida responds by arguing that Mr. Putnam, in his role as Commissioner of Florida's Department of Agriculture and Consumer Services, should not be deposed because he is a high-ranking elected official who serves as the head of a state agency. Florida contends that Georgia has not demonstrated the "extraordinary circumstances" needed to depose a cabinet member such as Mr. Putnam, and that Georgia's deposition request is (at best) premature.

The parties agree that the issue of whether Florida should be compelled to produce Mr. Putnam is ripe for resolution pursuant to Paragraph 11 of the Case Management Plan.

The Supreme Court has strongly urged caution in compelling the attendance of a high-ranking official for testimony in a judicial proceeding. *United States v. Morgan*, 313 U.S. 409, 421-22 (1941). Heeding this warning, courts have noted that "subjecting a cabinet officer to oral

deposition is not normally countenanced.” *Simplex Time Recorder Co. v. Sec’y of Labor*, 766 F.2d 575, 587 (D.C. Cir. 1985) (internal quotation marks omitted). See *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007); *Kyle Eng’g Co. v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979). As a general matter, therefore, “top executive department officials should not, absent extraordinary circumstances, be called to testify or deposed regarding their reasons for taking official action.” *Bogan*, 489 F.3d at 423. “The reason for requiring exigency before allowing the testimony of high officials is obvious. High ranking government officials have greater duties and time constraints than other witnesses.” *In re United States*, 985 F.2d 510, 512 (11th Cir. 1993). However, “[d]epositions of high ranking officials may be permitted where the official has first-hand knowledge related to the claim being litigated” and “where it is shown that other persons cannot provide the necessary information.” *Bogan*, 489 F.3d at 423.

The parties do not dispute that Georgia must meet this test. Georgia concedes that Mr. Putnam is a high-ranking cabinet member. However, the parties dispute whether Georgia has made the required two-part showing. I conclude that Georgia has not done so at this time.

First, Georgia has not shed much light on the extent of Mr. Putnam’s first-hand knowledge. Georgia has not carried its burden to show the degree to which Mr. Putnam was involved in the drafting of the letter to Governor Scott. Georgia has only provided the Special Master with an email between two different state employees (neither of whom were members of the Department of Agriculture and Consumer Services) suggesting that Mr. Putnam had met with a third state employee, Mr. Nick Wiley, “about the oyster industry problems.” The email does nothing to show that Mr. Putnam had first-hand knowledge regarding the facts underlying the letter, as opposed to having simply provided a *pro forma* signature – particularly given that Mr. Wiley’s deposition testimony shows that he did not even know who drafted the letter signed by

Mr. Putnam. At this time, therefore, I have no basis to conclude that the meeting between Mr. Putnam and Mr. Wiley had anything to do with Mr. Putnam's letter, much less that the meeting demonstrates Mr. Putnam's first-hand knowledge of its underlying facts. Further, Mr. Putnam's publicly-reported statements regarding water flow in the ACF Basin are no more conclusive as to the extent of his knowledge, as public officials make proclamations as a matter of course without necessarily having first-hand knowledge. The mere existence of Mr. Putnam's letter and the fact of his public statements, therefore, do not by themselves establish that Mr. Putnam has first-hand knowledge of relevant facts.

Second, and more importantly, Georgia has not carried its burden to show that other Florida witnesses cannot provide the information that it seeks to garner from Mr. Putnam. Georgia concedes that Florida has proffered three witnesses who, according to Florida, participated in the drafting of Mr. Putnam's letter and have knowledge of the facts underlying Mr. Putnam's letter. Florida represents that these witnesses include two employees within the Florida Department of Agriculture and Consumer Services who had substantial authority, namely the then-head of the Division of Aquaculture as well as Mr. Putnam's chief of staff. Florida has also proffered another individual, Mr. Berrigan, with the representation that Mr. Berrigan was the principal author of the letter. Georgia has yet to depose any of these individuals, all of whom are likely to have first-hand knowledge of the facts that Georgia is seeking. Depositions of these individuals will show whether Mr. Putnam is likely to have any unique first-hand knowledge, and may in fact render Mr. Putnam's deposition unnecessary.

IT IS HEREBY ORDERED THAT: Georgia's request to compel Florida to produce Mr. Putnam as a witness is DENIED.

Dated: January 20, 2016

/s/ Ralph I. Lancaster

Ralph I. Lancaster
Special Master

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