

No. 142, Original

In the
Supreme Court of the United States

STATE OF FLORIDA,

Plaintiff,

v.

STATE OF GEORGIA,

Defendant.

Before the Special Master

Hon. Ralph I. Lancaster

THE STATE OF FLORIDA’S MAY 2016 PROGRESS REPORT

The State of Florida respectfully submits this Progress Report to the Special Master pursuant to Section 4 of the December 3, 2014 Case Management Plan (the “CMP”), as subsequently amended.

I. MEDIATION

The parties’ confidential mediation process continues. Over the past month, Florida and Georgia have conducted multiple additional teleconferences with the mediator and have participated in another lengthy in-person mediation session at the mediator’s offices. The parties have agreed to additional in-person session(s), and also anticipate additional communications with the mediator in advance of the next in-person meeting. Florida is committed to continuing this process and hopes that, with the expert assistance of the selected mediator, the deadlock that has prevented resolution of these disputes for two decades can be broken.

II. EXPERT DISCOVERY PROGRESS

Consistent with the Court's CMP, Florida disclosed 20 experts and provided Georgia with expert reports on February 29, 2016.¹ The Court's schedule was intended to ensure the efficient conduct of expert discovery, and thus required simultaneous exchange of expert witnesses on issues for which parties "bear the burden of proof" on February 29, with a subsequent exchange of defensive experts on May 20, 2016. Florida went further than the CMP required; on February 29, Florida disclosed experts on issues for which it bears the burden of proof as well as certain other "defensive" experts. By contrast, although Georgia bears the burden of proof for a range of issues under the Supreme Court's most recent case law and has also pled multiple affirmative defenses, Georgia chose to disclose only one expert on February 29, and no defensive experts.²

Florida does not know precisely how many experts Georgia intends to identify on May 20, or whether those experts will genuinely be "defensive." However, Georgia previously suggested that it may "designate 8-12 additional expert witnesses" by May 20. *See* State of Georgia's Consent Mot. for Extension of Expert Discovery Deadlines at 6 (Mar. 14, 2016). As indicated in Florida's April 1 Progress Report, Florida anticipates filing a motion as soon as possible after May 20 to address issues that seem likely to arise from Georgia's anticipated

¹ The CMP (as amended by Case Management Order Nos. 13 and 17), establishes that disclosures of expert testimony "in support of an issue upon which [a] party bears the burden of proof" were due "no later than February 29, 2016" and expert testimony on issues for which the party does not bear the burden are due May 20, 2016. *See* CMP §§ 7.1 and 7.2.

² As described in Florida's April 1 and March 4, 2016 progress reports, Georgia bears the burden of showing that its own upstream diversions of interstate water are equitable and reasonable and should be permitted under the doctrine of equitable apportionment. *See, e.g., Colorado v. New Mexico*, 467 U.S. 310, 317 (1984) ("[T]he burden shifted ... to Colorado to show, by clear and convincing evidence, that reasonable conservation measures could compensate for some or all of the proposed diversion and that the injury, if any, to New Mexico would be outweighed by the benefits to Colorado from the diversion."). Georgia similarly bears the burden of proof on its affirmative defenses. *See, e.g., Schaffer v. Weast*, 546 U.S. 49, 57 (2005) ("the burden of persuasion as to certain elements of a plaintiff's claim may be shifted to defendants, when such elements can fairly be characterized as affirmative defenses or exemptions").

expert disclosures.³ *See* State of Florida’s April 1, 2016 Progress Report at 3-6. That motion is likely to address: (1) whether Georgia improperly delayed disclosure of experts on issues for which it bears the burden of proof beyond this Court’s February 29 deadline, and the consequences of such an improper delay; (2) whether additional time is necessary to depose “defensive” experts Georgia discloses for the first time on May 20; and/or (3) whether in light of Georgia’s failure to timely disclose its experts under the Court’s schedule, Florida is entitled to identify additional experts to address expert theories first identified by Georgia on May 20.

As of the date of this filing, two expert depositions have been taken: Florida has deposed Georgia’s sole disclosed expert; and Georgia has deposed one of Florida’s experts. Through cooperation among counsel, all other disclosed expert depositions have been scheduled.

As indicated, Georgia received 20 expert reports on February 29, and Florida received one report. Florida issued a notice on March 8, 2016 to schedule the deposition of Georgia’s sole expert, and that expert has already been deposed for twelve hours.⁴ By contrast, Georgia did not seek to schedule any of its depositions of Florida experts until March 25, 2016, and on that date only noticed one of Florida’s 20 experts. Cognizant of the Court’s schedule, Florida wrote to Georgia on April 1, 2016 to volunteer certain expert deposition dates (even without having first received Georgia’s notices). Later that day, Georgia issued notices for the other expert depositions.

In the weeks thereafter, the parties worked to schedule the remaining 19 depositions. For several of Florida’s designated experts, Georgia sought deposition dates in late May or early

³ This motion will be ripe under the terms of the Court’s Case Management Orders after Georgia’s expert disclosures are made.

⁴ During that deposition, Georgia confirmed that its sole disclosed expert, Dr. Philip Bedient, intends to complete yet another new and different expert report, which will not be disclosed until May 20. Thus, Florida agreed to suspend the deposition pending receipt of a new replacement for that witness’s initial report.

June (including June 6 for one expert, June 8-9 for another, and mid to late June dates for a third). For other depositions, Georgia sought dates in late April or early May. Many of Florida's experts are nationally and internationally known authorities in their fields, and thus have other professional obligations to work around (including work and travel overseas). And in one case, illness has interfered with scheduling an expert deposition. Currently, ten of Georgia's remaining depositions of Florida experts are set in May, five are set in early June, and four are set in mid to late June. Florida offered to schedule four of the nine June depositions in May, but the available May dates did not fit the schedules of Georgia's counsel. Had Georgia begun to seek available deposition dates a month earlier than it did (in early March rather than April 1), it might have been possible to work out earlier dates for certain of the experts.

III. UNRESOLVED DISPUTES

No disputes are ripe for decision by the Court at this time. As indicated above and in prior progress reports, Florida anticipates a likely dispute regarding burdens of proof and the timing of Georgia's expert disclosures. This dispute will likely ripen shortly after Georgia discloses its expert reports on May 20. Georgia has previously stated:

We understand from discussions with Florida that they, likewise, would like additional time after receiving our reports; and **we don't object to that**. We think both sides should have ample opportunity, cognizant of the need for expedition, to evaluate each other's very technical and complex expert analyses.

Status Conference Tr. 12:11-18, Mar. 8, 2016 (emphasis added). Under the current schedule, Georgia has four months to evaluate and depose Florida's 20 disclosed experts. By contrast, Florida would have less than six weeks to depose Georgia experts disclosed on May 20.⁵ At this

⁵ Case Management Order No. 17 extended the deadline for deposing expert witnesses until July 1, 2016. As a matter of civility, Florida agreed to Georgia's previous request for an extension of its deadlines to depose expert witnesses and supported Georgia's prior motion for an extension. Having obtained the courtesy of that agreement from Florida in the past, we fully expect Georgia to return that courtesy now.

point, it appears that Georgia's strategic decision to delay disclosure of its experts may be inconsistent with the CMP's requirement that it identify all experts on issues for which it bears the burden of proof on February 29. Once Florida reviews Georgia's expert reports following Georgia's May 20 disclosures, depending upon the substance of those reports, Florida will promptly meet and confer with Georgia and bring necessary issues to the Court's attention for resolution.

Since February 29, Georgia consumed roughly seven weeks analyzing Florida's expert reports before beginning its depositions. Florida will attempt to perform the necessary analysis on the anticipated Georgia expert reports in a shorter period, but since Florida does not yet have Georgia's reports, Florida is not yet in a position to anticipate how much time will be required. Florida has already asked Georgia to set aside multiple weeks of time for depositions under the current schedule in June, but Florida is concerned that it may not have sufficient time under the current schedule to both analyze and address all the material Georgia intends to serve on May 20, as well as complete additional expert depositions by the July 1 deadline.

IV. PRE-TRIAL PROCEEDINGS

As the Court requested during the April 5, 2016 status conference, the parties have begun to discuss pre-trial proceedings and trial logistics. The parties had one productive call that raised several issues for additional discussion. Florida anticipates that future calls can produce agreement between the parties on certain issues raised by the Court.

V. SETTLEMENT EFFORTS

As indicated, the States are in the midst of the mediation process and plan further efforts in the coming weeks.

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CERTIFICATE OF SERVICE

This is to certify that the STATE OF FLORIDA'S MAY 6, 2016 PROGRESS REPORT has been served on this 6th day of May, 2016, in the manner specified below:

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