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 MEMORANDUM OF AUTHORITIES REGARDING GEORGIA'S REQUEST TO DEPOSE THE COMMISSIONER OF AGRICULTURE & CONSUMER SERVICES

January 13, 2016

The State of Florida respectfully submits this Memorandum of Authorities regarding the State of Georgia's request to conduct a deposition of Florida's Commissioner of the Department of Agriculture & Consumer Services, Adam Putnam. As noted in Florida's January 8, 2016 Progress Report and during the January 12 status conference, Georgia has not satisfied the burden required to depose one of the highest ranking elected officials in the State of Florida. Applicable case law leaves no doubt that Commissioner Putnam's signature on an official letter is insufficient to meet that burden, as are allegations that the Commissioner may have made generalized public statements. While Florida is mindful of the admonition that the deadline for fact discovery is approaching, the request to depose Commissioner Putnam does not advance the development of the factual record in this litigation; instead, it invites the imposition of undue burdens on senior officials from both States in violation of well-established case law.

In this context, applicable case law requires that Georgia first depose other individual(s) with the specialized knowledge Georgia now says it requires. More than adequate time remains to do so.[1] A deposition of Commissioner Putnam could only be appropriate ***if*** Georgia first conducts those depositions, and then proffers specific evidence or information demonstrating that Commissioner Putnam *has unique personal information unavailable from those other sources*. Here, Georgia has not deposed the individuals directly involved in drafting the subject letter. This is not some unlimited set of unidentified persons. Rather, Florida has identified and made available the three individuals involved directly in drafting the letter. Established principles of law mandate that Georgia must first depose these identified personnel.

Indeed, Georgia is very familiar with these principles of law; Georgia has itself invoked them to resist discovery of its own high-ranking officials in other cases. *See, e.g., Smith v. State of Ga. Dept. of Children & Youth Servs.*, 179 F.R.D. 644, 645-46 (N.D. Ga. 1998) (granting

[1] In any event, any time pressure is a result of Georgia's own inaction. Florida objected more than two months ago on November 11, 2015 that a deposition of Commissioner Putnam was premature. Rather than lay the appropriate foundation, Georgia instead chose to take its chances with its premature motion to this Court.

Georgia's motion to prevent the deposition of the highest ranking official in Georgia's Department of Juvenile Justice because plaintiffs failed to establish that the proposed evidence was essential to their case or that it was not available through an alternate source); Order at 4, *United States ex rel. Lewis v. Walker*, No. 3:06-cv-16 (M.D. Ga. Mar. 3, 2009) (ECF No. 113) (granting Georgia's request to prevent the deposition of the President of the University of Georgia, because "even if [he] has some knowledge of the topics on which [the opposing parties] seek to depose him, he is not the only—or the best—source from which that information is available.").

I. WELL-ESTABLISHED PRINCIPLES OF LAW REQUIRE A SPECIFIC SHOWING OF NEED BEFORE A HIGH-LEVEL OFFICIAL CAN BE DEPOSED

Absent extraordinary circumstances, high-ranking government officials are protected from depositions related to the performance of their official duties. Many cases—in addition to those already cited in Florida's Progress Report (at 8-10)—stand for this proposition, including:

- *United States v. Morgan*, 313 U.S. 409, 421–22 (1941): observing that the deposition of the Secretary of Agriculture should never have been allowed and strongly cautioning against the taking of depositions of high-ranking government officials;
- *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (D.D.C. 1985): affirming ALJ's refusal to allow Simplex to call top Department of Labor officials as witnesses because "top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions;"
- *Kyle Engineering Co. v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979): affirming district court's decision to vacate notice of deposition of Administrator of the Small Business Administration as "[h]eads of government agencies are not normally subject to deposition;"
- *FDIC v. Galan-Alvarez*, No. 1:15-mc-00752 (CRC), 2015 U.S. Dist. LEXIS 130545, at *15-16 (D.D.C. Sept. 4, 2015): denying request by former directors and officers of a failed bank to depose the FDIC's former Chairperson and current Senior Deputy Director because they failed to show that the officials had unique knowledge and because four other lower officials were offered for deposition;
- *First Resort, Inc. v. Herrera*, No. CV 11-5534 SBA (KAW), 2014 U.S. Dist. LEXIS 19418, at *22 (N.D. Cal. Feb. 14, 2014): denying plaintiff's request to depose the city attorney where plaintiff did not establish that the city attorney had first-hand knowledge related to the claims being litigated in this action and rejecting plaintiff's

argument that city attorney had first-hand knowledge based on statements made to public and related communications;

- *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520 LKK JFM P, C01-1351 TEH, 2008 U.S. Dist. LEXIS 70224, at *22-29 (E.D. Cal. Sept. 15, 2008): holding that the magistrate judge clearly erred in ordering the deposition of Governor and Chief of Staff where plaintiffs failed to establish "extraordinary circumstances" or that no other person possessed the information in question;
- *United States v. Wal-Mart Stores*, No. PJM-01-1521, 2002 U.S. Dist. LEXIS 6929, at *14 (D. Md. Mar. 29, 2002): granting protective order preventing the deposition of former Consumer Product Safety Commission chairperson when, among other reasons, there were at least two other persons from whom defendants could obtain relevant information; and
- *Hankins v. City of Philadelphia*, No. 95-1449, 1996 U.S. Dist. LEXIS 13314, at *2-6 (E.D. Pa. Sept. 12, 1996): denying plaintiff's motion to depose the mayor regarding the reasons for his approval of a change in job classifications because plaintiff failed to show that the information was not available from other sources or that the mayor had unique personal knowledge about the reasons for the approval.

Georgia has not denied that this well-established doctrine generally applies to Commissioner Putnam. Nor could it. Commissioner Putnam is an independent statewide elected official, one of the highest ranking in the State and one of only three elected Cabinet members. *See* Art. IV, § 4(a), Fla. Const.

II. GEORGIA HAS NOT SHOWN THAT COMMISSIONER PUTNAM HAS UNIQUE PERSONAL KNOWLEDGE UNAVAILABLE FROM OTHER SOURCES

In its Progress Report (at 15), Georgia specifically relied upon the case *U.S. v. Sensient Colors, Inc.*, 630 F. Supp. 2d 309 (D.N.J. 2009). That case, like those cited above, requires that the party seeking to depose a high-ranking government official *proffer evidence or specific information* showing that the official was personally involved in a relevant issue and has first-hand knowledge unavailable from other sources. *See id.* at 324 (relying on multiple lines of evidence to grant deposition, including emails and other communications indicating that official was heavily involved). "It is not sufficient simply to make allegations to such effect in a conclusory manner …." *Coleman,* 2008 U.S. Dist. LEXIS 70224, at *28; *see also Alexander v. FBI*, 186 F.R.D. 1, 5 (D.D.C. 1998) (requiring plaintiffs to first use interrogatories to obtain

some evidence that high-ranking government official has relevant knowledge before considering whether a deposition is appropriate).

Georgia has not come close to making the required showing. Georgia relies primarily on Commissioner Putnam's signature on the September 5, 2012 letter and his general involvement with Florida's Department of Agriculture and Consumer Services ("DACS") as the proffered rationale for requesting the deposition. But as Georgia's own case and numerous authorities show, that is not enough. *Sensient Colors*, 649 F. Supp. 2d 309 at 324 (noting that "authorities support" that "'the fact that [the official] may have signed an official appropriation request is not in and of itself a sufficient basis to take'" deposition, and requiring additional evidence (citation omitted)); *Hankins*, 1996 U.S. Dist. LEXIS 13314, at *5 ("It is not reasonable to infer from the Mayor's pro forma administrative approval of [a change in job classifications] that he was involved in or had personal knowledge about the deliberations underlying them."); *Buono v. City of Newark*, 249 F.R.D. 469, 470 n.2 (D.N.J. 2008) (noting "an official's pro forma approval of a matter without showing deliberations about it, will not justify ordering a deposition of the official"); *Coleman*, 2008 U.S. Dist. LEXIS 70224, at *27 ("When the Governor acts within the parameters of his official duties by, for example, issuing orders ..., it is likely that other lower-ranking members of his office or administration would have relevant information about his actions."). Although Georgia has baldly asserted in its Progress Report (at 16) that Commissioner Putnam "authored" the subject letter, Georgia proffers no evidentiary support for this assertion, and indeed has no idea if it is true: in fact, Georgia has scheduled but not yet taken the deposition of the person who actually was the principal author of the letter.

Georgia has also asserted that Commissioner Putnam made certain generalized public statements regarding the Army Corps of Engineers, and suggested these statements necessitate the requested deposition. Georgia has not identified how those statements demonstrate that Commissioner Putnam has unique personal knowledge unavailable from any other lower-ranking sources. Like a signature on a document, a high-ranking official's prior public statements—that might relate to a topic a party deems relevant to litigation—are insufficient to justify a deposition

of that official. ***Indeed, if that were not true, a vast number of high-ranking federal and state officials could be deposed in virtually any case where their public policy positions were arguably relevant to the subject matter of the case.***[2] *See, e.g.*, *Marisol A. v. Giuliani*, No. 95 Civ. 10533 (RJW), 1998 U.S. Dist. LEXIS 3719, at *16-17 (S.D.N.Y. Mar. 23, 1998) (quashing notice of deposition of Mayor Giuliani where his public statements related to the topic of the litigation did not establish that he had personal unique knowledge relevant to the litigation and noting that "[i]t would be improper to depose the Mayor regarding every topic that he at some point in time addressed in a public statement"); *First Resort*, 2014 U.S. Dist. LEXIS 19418, at *22 (statements made in a press release by the City Attorney were insufficient to justify compelling his deposition because it was likely that "any knowledge the City Attorney ha[d] regarding the claims being litigated derive[d] from briefing provided by support staff, summaries from counsel handling the litigation on a day-to-day basis, or other outside sources"); *Affinity Labs of Tex. v. Apple, Inc.*, No. 09-4436 CW (JL), 2011 U.S. Dist. LEXIS 53649, at *45 (N.D. Cal. May 9, 2011) (concluding, under related doctrine applicable to high-ranking corporate executives, that "[t]he mere fact that Jobs made public statements, even on issues that [plaintiff] considers relevant to its claims, are insufficient to justify his deposition. Courts have repeatedly

[2] The cases upon which Georgia relied in its January 8, 2016 Progress Report are not to the contrary. In *Sensient Colors*, the court permitted the deposition of a former EPA Regional Administrator due to the extraordinary nature of the case where the official's involvement was so "hands-on and personal, that it [was] considered so intertwined with the issues in controversy that fundamental fairness requires the discovery of factual information held by the official by way of deposition" and no interference with official duties would result since the witness was no longer a high-ranking official. *United States v. Sensient Colors, Inc.*, 649 F. Supp. 2d 309, 324, 326 (D.N.J. 2009). Similarly, in *American Broadcasting*, the court found that "unique circumstances" existed which justified the deposition of the agency director because he was the "sole person responsible for the creation of the documents in question," which were characterized as his "personal papers." *American Broadcasting Cos. v. United States Information Agency*, 599 F. Supp. 765, 767, 769 (D.D.C. 1984). Again in *Bagley*, the plaintiffs established a personal and unique connection to Governor Blagojevich, pointing to a personal conversation that went to the heart of plaintiffs' argument that their positions were eliminated by Blagojevich in retaliation against them for exercising their First Amendment rights to unionize against the wishes of one of Blagojevich's major financial contributors. *Bagley v. Blagojevich*, 486 F. Supp. 2d 786, 788 (C.D. Ill. 2007).

denied apex depositions even on a showing that the executive made public statements on relevant issues.").

Even if Georgia could show that Commissioner Putnam has sufficient personal knowledge about the topics it wishes to address, Georgia has failed to show that the information is unavailable elsewhere. "[A] party seeking to depose a high-ranking official must make a showing as to what efforts have been made to determine whether the information is otherwise available and the extent to which their efforts failed to uncover such information." *Coleman*, 2008 U.S. Dist. LEXIS 70224, at *28. Even Georgia acknowledges in its Progress Report (at 15) that it must show that "other persons cannot provide the necessary information." And courts routinely deny requests to depose high-ranking officials when other individuals possess the requisite information. *See, e.g., In re United States*, 985 F.2d 510, 512 (11th Cir. 1993) (plaintiffs did not show "extraordinary circumstances" or a "special need" for official's testimony when that testimony was available from at least two other witnesses); *Galan-Alvarez*, 2015 U.S. Dist. LEXIS 130545, at *15-16 (D.D.C. Sept. 4, 2015) (defendants failed to show that the depositions of officials was necessary because four other lower officials were offered for deposition); *Hankins*, 1996 U.S. Dist. LEXIS 13314, at *6 (plaintiffs did not establish that the mayor's testimony was "essential" as various Health Department officials were possible sources of information).

While Georgia argues in its Progress Report (at 15) that certain other witnesses were asked about the relevant letter and indicated that they lacked relevant knowledge, that is because those witnesses were not involved in drafting the letter; indeed most of those witnesses worked for other agencies,[3] and the two DACS employees deposed to date were not involved in drafting the letter. Indeed, on December 4, 2015, one of those employees (Mr. Knickerbocker) gave Georgia the names of some of the people he believed were involved in drafting the letter. And because Georgia contended in recent weeks that it wanted to know about Commissioner

[3] These individuals worked at the Northwest Florida Water Management District and the Florida Department of Environmental Protection.

Putnam's letter, Florida went even further by providing Georgia with the names of all of the individuals involved in drafting both the letter and the study it references. This list includes both individuals who reviewed the September 5, 2012 letter and supporting documents before they were presented to Commissioner Putnam for signature—Ms. Leslie Palmer (who headed the Aquaculture Division at the relevant time) and Mr. Mike Joyner (Commissioner Putnam's Chief of Staff)—as well as the principal author of the September 5, 2012 letter—Mr. Mark Berrigan, *whom Georgia is already planning to depose on February 18, 2016.*[4] Georgia has not yet taken the depositions of any, much less all, of the witnesses who Florida identified as possessing specifically relevant information, and has failed to explain why it cannot get the information it seeks from these proposed deponents.[5] Simply put, Georgia has not done the necessary groundwork to obtain the deposition it seeks, so its request is premature.

Accordingly, because Georgia cannot meet its high burden to establish the extraordinary circumstances necessary to permit the deposition of Commissioner Putnam, its request should be denied.

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[4] In addition, and in response to and consistent with its understanding of Georgia's Interrogatory No. 47 seeking information related to the fisheries disaster declaration, Florida identified a list of 17 employees who had involvement at multiple agencies during the development and pendency of the request for that declaration, including two DACS employees—Mr. Paul Zajaicek and Mr. Chris Brooks—who possessed relevant knowledge. Georgia has thus far declined to depose either Mr. Zajaicek or Mr. Brooks.

[5] Georgia's argument in its Progress Report (at 16) that "it hardly serves interests of judicial economy or efficiency" to proceed with depositions of lower ranking individuals prior to deposing Commissioner Putnam misses the point. This is a requirement of law, and in any event Georgia could conduct one or more of these depositions quickly (indeed, one is already scheduled). Moreover, even if Commissioner Putnam is deposed, any inquiry into the September 5, 2012 letter and press briefings would likely require the depositions of these very same individuals, such that no resources are actually saved under Georgia's proposal. *See, e.g., United States v. Koubriti*, 305 F. Supp. 2d 723, 755 (E.D. Mich. 2003) (finding a "meaningful inquiry" into statements made by the Attorney General at a press briefing would require inquiry of his staff because "the Attorney General surely is not the sole and exclusive, or likely even the principal, author of the statements he makes at press briefings," as "such statements undoubtedly are the product of a number of staffers").

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

This is to certify that the STATE OF FLORIDA'S BRIEF REGARDING THE PROPOSED DEPOSITION OF COMMISSIONER PUTNAM has been served on this 13th day of January 2016, in the manner specified below:

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