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October 17, 2016

By E-mail

The Honorable Ralph I. Lancaster Jr.
Special Master
PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04101

Re: *Florida v. Georgia*, No. 142, Original

Dear Special Master Lancaster:

Last Friday, Florida filed its written direct testimony. Georgia has now had 48 hours to review those submissions and it is apparent that Florida has used these written submissions to offer new, previously undisclosed expert opinions; to offer new expert analysis; and to offer new and different grounds for opinions that were previously disclosed. In fundamental ways, Florida has changed its expert case just days before trial is set to begin and days before Georgia is scheduled to submit its own responsive written direct testimony. These new opinions and analyses should be stricken, and Florida should be barred from asserting them at trial. Georgia respectfully requests an emergency hearing for the Special Master to address this matter and to grant appropriate relief.

I summarize below the primary new opinions and analyses that Florida's experts are now attempting to advance. For current purposes, it suffices to say that these new opinions are from centrally important expert witnesses and relate to critical issues in the case. In several instances, Florida's experts change their opinions substantially or rely on new methodologies and assumptions never before disclosed. These opinions, moreover, appear to have been developed in August or September, yet Florida chose not to disclose them until October 14. Florida also chose not to request permission from the Special Master to supplement its experts' opinions, in violation of the Case Management Plan and the Federal Rules.

Florida is thus disclosing these new expert opinions and analyses ***two weeks*** before the start of trial, ***eight months*** after Florida's expert reports were due, and ***two months*** after expert depositions were completed. Florida provided no notice to Georgia that it would be disclosing

entirely new expert opinions and analyses. Florida also offers these opinions without providing the backup analyses, model runs, and underlying calculations that are necessary to test the new analysis. Instead, Florida simply included its new expert opinions in its pre-filed direct testimony with no backup, perhaps hoping that it would be too late for Georgia (or the Court) to do anything about it.

The Federal Rules do not permit trial by ambush. But that is exactly what Florida has done. On the eve of trial, after nearly two years of discovery, Florida has come forward with new and different expert opinions and analyses. Those opinions and analyses should have been disclosed long ago, at which time they could have been tested through discovery and responded to by Georgia's experts. Florida should not be permitted to circumvent the Federal Rules and the Case Management Plan, while simultaneously denying Georgia a full and fair opportunity to make a full record at trial.

1. Florida's Newly Disclosed Expert Opinions And Analyses Should Be Stricken

Florida's late disclosures are highly prejudicial to Georgia. The full development of relevant factual and expert evidence is a crucial objective of original jurisdiction proceedings before the Supreme Court. *See United States v. Texas*, 339 U.S. 707, 715 (1950) ("The Court in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts."); *Nebraska v. Wyoming*, 515 U.S. 1, 13 (1995) (affording "fair opportunity" for a State to present its case). By waiting until two weeks before trial to make these very significant disclosures, Florida has deprived Georgia of a fair opportunity to put on a full defense.

Georgia has not had any opportunity to depose Florida's witnesses regarding these new opinions and analyses. Indeed, without the underlying data, models, or calculations supporting these new opinions and analyses, Georgia's own experts have no way to analyze the basis for Florida's new opinions, much less issue their own defensive opinions. And even if Florida were to belatedly attempt to remedy these deficiencies by producing the new materials and making its witnesses available for deposition, that would do nothing to remedy Georgia's prejudice: Georgia and its experts would have to review and analyze these new materials, take at least 6 depositions, and likely prepare new expert testimony for its own witnesses in a mere two weeks, while simultaneously preparing for trial to begin on October 31, 2016. In simple terms: Florida has fundamentally changed its expert case on central issues on the eve of trial, thereby depriving Georgia, the Special Master, and the Supreme Court of a full and fair record on matters like surface and groundwater hydrology, biology of oysters and other creatures in Apalachicola Bay, and the nature and cost of the remedy Florida is seeking (which now seeks a consumption cap in non-drought years that was not disclosed in discovery).

In addition to being highly prejudicial, Florida's conduct also plainly violates both the Case Management Plan and the Federal Rules of Civil Procedure. The Case Management Plan provides clear instructions regarding the disclosure of new expert opinions and analyses or new grounds to support previous opinions:

> Supplementation of Fed. R. Civ. P. Rule 26(a)(2) expert reports, to the extent that an expert has formed additional opinions or grounds to support previous opinions that have not been provided by way of expert report or deposition testimony, **will be made only when allowed by order of the Special Master if the deposition of that expert has already been completed**.

Dec. 3, 2014 Case Management Plan at 15, ¶15 (emphasis added). Florida's new expert opinions plainly were developed after their depositions. But Florida never sought leave from the Special Master (or from Georgia) to disclose these new expert opinions and analyses, even though depositions for all of these experts had been completed months ago. The new opinions thus are plainly disallowed under the Rules set out for this case.

Florida's actions also violate the Federal Rules of Civil Procedure. Florida had an obligation under Rule 26 to provide Georgia with a "complete statement of all opinions" its experts would provide at trial, all facts and data underlying those opinions, and all exhibits used to summarize or support those opinions. Fed. R. Civ. P. 26. Those directives are "mandatory and self-executing" and "not merely aspirational." *Lohnes v. Level 3 Communications, Inc.*, 272 F.3d 49, 59-60 (1st Cir. 2001). Absent harmless error or substantial justification, new expert opinions, analyses, or exhibits offered after the close of discovery must be excluded. *See, e.g.*, Fed. R. Civ. P 37(c); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) ("Rule 37(c)(1) gives teeth to these requirements by forbidding the use at trial of any information required to be disclosed by Rule 26(a) that is not properly disclosed."). Florida's belated disclosures (if they can even be called that, appearing as they do for the first time in direct testimony) are neither harmless nor justified.

Florida's new, untimely expert opinions should be stricken and disregarded. Florida has long-since missed the appropriate window for supplementing its expert reports and has been on notice of flaws in its expert opinions for months. It chose not to address these flaws the appropriate way in order to avoid further discovery and analysis of its new opinions. In so doing, it violated the Case Management Plan and the Federal Rules. In these circumstances, Rule 37(c) provides that the newly-disclosed expert opinions and analysis should be stricken: "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." *See Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 597 (4th Cir. 2003); *see also*

Yeti by Molly Ltd., 259 F.3d at 1106 ("[E]xclusion is an appropriate remedy for failing to fulfill the required disclosure requirements of Rule 26(a).") Moreover, "the ability to simply cross-examine an expert concerning a new opinion at trial is not the ability to cure" the surprise and the "rules of expert disclosure are designed to allow an opponent to examine an expert opinion for flaws and to develop counter-testimony through that party's own experts. Such was not possible here." *Southern States*, 318 F.3d at 598.

Any other remedy would reward Florida for not disclosing substantial new expert opinions and analysis. Florida had a full and complete opportunity to develop its case within the Federal Rules and the Rules of this case. Instead of playing by those Rules, however, Florida is attempting to create a new case without giving Georgia the opportunity to respond to that case. Florida should not be allowed to secretly develop new expert opinions in order to reveal them on the eve of trial; it should be held to the opinions and analyses developed over the course of the litigation and disclosed according to the Rules. The most efficient way to remedy Florida's violations would be to strike all of the pre-filed direct testimony for the experts identified below. Georgia would not object to a short extension of the length the Special Master thinks is appropriate for Florida to re-file written direct testimony that relies only on opinions, data, and exhibits included in their properly disclosed expert reports.[1]

2. Non-Exhaustive Summary Of Florida's New Opinions And Analyses

Below is a summary of opinions and analyses contained in Florida's written direct testimony that were not previously disclosed in the reports or deposition testimony of these individuals. Importantly, **these reflect brand new work or opinions**; they are not examples of instances in which Florida's experts have changed the results of prior analysis contained in their reports (which they certainly also have done in the written directs and is also objectionable given the manner and timing of their disclosure). The set of descriptions below, moreover, is merely representative of the undisclosed material, and does not include the entirety of Florida's experts' new opinions and analysis.

Dr. David Sunding. Dr. Sunding is Florida's expert on economics and water resource policy. Dr. Sunding's written testimony includes numerous new expert opinions and

[1] At a minimum, Florida should be ordered to turn over the backup for all of its new expert analysis so that it can be subjected to scrutiny by Georgia's experts and Florida's experts can be deposed. Being forced to conduct this type of analysis during trial (which is when it would have to occur given the need to first analyze and figure out what Florida's experts have done) would be incredibly prejudicial to Georgia and would likely necessitate a change in the sequencing of witnesses and presentation of evidence to avoid ships passing in the night, to allow time for depositions, and to minimize the likelihood that experts will have to be called and re-called as the picture becomes clearer as to what they have actually done.

analyses. Georgia will not burden the Special Master with a full list of the new opinions in this letter, but will highlight the completely new remedy scenarios analyzed by Dr. Sunding and the new analysis disclosed by Dr. Sunding regarding both his new and previously articulated remedy scenarios.

As background, in his initial Expert Report, Dr. Sunding identified four scenarios to achieve 1,000 cfs in peak summer streamflow savings during "dry years" at a cost of hundreds of millions of dollars based on a combination of what he calls "conservation measures." (Feb. Sunding Rep. at 9.) Dr. Sunding disclosed a second (untimely) expert report on May 20th, which included a different combination of "conservation measures," and suddenly doubled the estimated streamflow benefits from those measures to 2,000 cfs during "drought years." (May Sunding Rep. at 2.) Dr. Sunding did not estimate any of the costs associated with his new "2000 cfs" opinion. (*Id.*) Georgia deposed Dr. Sunding more than four months ago regarding these conservation measures, including questions on their streamflow impacts and whether he had estimated costs.

Now, two weeks before trial, Dr. Sunding's direct testimony proposes entirely new remedy scenarios focusing on "non-drought years," while previously he only focused on drought years. These new "non-drought year" opinions are supported by estimated costs and streamflow benefits that were not previously disclosed. (Sunding Direct at 19-34, 44-45) Dr. Sunding also disclosed a 2,000 cfs "Drought Year" remedy scenario with two brand new "conservation measures," including what Dr. Sunding calls "Irrigation Permit Buyback," and "Eliminate Unpermitted Acreage." (*Id.* at 44.) He had not disclosed those scenarios, or the costs or streamflow analysis supporting them in the four months since his deposition, yet he now includes them in his written direct.

For the conservation measures Dr. Sunding had previously disclosed, Dr. Sunding's direct testimony discloses entirely new opinions regarding the costs associated with those measures and the potential streamflow benefits Dr. Sunding believes can be achieved from them. He does not, however, disclose why or how these costs and benefits are different from the prior values that he testified to in his deposition and in his expert report. (*Compare* Feb. Sunding Rep. at 9 *and* May Sunding Rep. at 2 *with* Sunding Direct at 44.) At the same time, Dr. Sunding's direct testimony discloses (for the first time) a variety of new assumptions that he used to estimate those same cost and streamflow benefits with seemingly significant impact on his estimated streamflows and costs. (*See, e.g.*, at 15 (irrigation depths), 23-24 (connectivity values), 36 (outdoor water use estimate).)

Dr. George Hornberger. Dr. Hornberger is one of Florida's hydrology experts. Dr. Hornberger's direct testimony includes numerous newly disclosed opinions, analyses, and grounds for opinions. For example, Dr. Hornberger now purports to opine on the "feasibility" of

imposing consumption caps on Georgia and how such limitations could be "independently verifiable." *See* Hornberger Direct ¶¶ 3.j, 127-130, 134-139. Dr. Hornberger discusses newly identified proposals for implementing "irrigation controls," "third-party auditing," and other "verification programs" that he claims are "routine and reliable." *Id.* ¶¶ 134-136. None of these opinions had ever been disclosed by Dr. Hornberger, nor had he previously disclosed that he had conducted such analysis. Yet now he offers expert opinion on these issues.

Dr. Hornberger also discloses for the first time new analysis and opinions purporting to evaluate "compliance" of flows on the Apalachicola and Flint Rivers with United States EPA "Instream Flow Guidelines." *See id.* ¶¶ 57-62. Dr. Hornberger has not previously mentioned any analysis or opinions of EPA instream flow guidelines or that this analysis formed the basis of any of his existing opinions. In fact, Dr. Hornberger did not even identify the EPA guidelines as a document he considered or relied upon.

Dr. Hornberger also offers newly disclosed opinions and analysis purporting to "independently confirm" Dr. Flewelling's estimates of Georgia's consumptive use. *See* Hornberger Direct ¶¶ 3.e, 74-82. For the first time, Dr. Hornberger claims that he has personally conducted a "bottom-up accounting" of Georgia's consumptive use "from my own review of records," *id.*, instead of relying, as he previously had, on Dr. Flewelling, *see* Hornberger Tr. 146:19-20 (testifying that he "relied . . . on Dr. Flewelling's analysis of consumptive use"). Dr. Hornberger previously testified that he had not independently re-calculated Dr. Flewelling's consumptive use estimates. *See* Hornberger Tr. 219:17-21.

Until Friday, Dr. Hornberger had limited his opinions to surface water analysis, while Dr. Langseth testified to groundwater issues. Dr. Hornberger's written direct now includes multiple new pages of new opinions and analysis regarding groundwater hydrology, the impact of groundwater pumping, and the "connection between groundwater and surface water." Hornberger Direct ¶¶ 66-70. For example, Dr. Hornberger now opines that groundwater pumping reduces surface water streamflow by as much as 60%, as opposed to the prior 40% calculated by Dr. Langseth. Dr. Hornberger testified that he did not conduct any independent verification of Dr. Langseth's work and yet now apparently adopts this opinion as his own. *See* Hornberger Tr. 238:8-239:5 (admitting that he did not independently re-run the groundwater model to "verify that [he] agree[d] with" Dr. Langseth's conclusions "[b]ecause Dr. Langseth did it").

Dr. David Kimbro. Dr. Kimbro is Florida's principal oyster expert. Dr. Kimbro testified at his deposition: "I didn't analyze [Florida's] shelling data." May 12, 2016 Kimbro Dep. Tr. at 40:14. Yet now, in Paragraph 105 (and six sub-paragraphs) of his written direct, Dr. Kimbro testifies about a "rigorous analysis" he purportedly conducted of Florida's shelling data. Kimbro Direct, ¶ 105(a). This is a critical piece of new analysis, given that Florida's lack of meaningful

oyster re-shelling efforts in Apalachicola Bay is one of the principal reasons its oyster fishery collapsed in 2012. Be that as it may, Dr. Kimbro at his deposition testified that the expert opinions he intended to offer at trial did not include *any* analysis of Florida's historical oyster shelling efforts. *See, e.g.*, Kimbro Dep. Tr. 40:9-10. ("I haven't analyzed the data set on how much shell has been put and where."). Indeed, Dr. Kimbro later reiterated that he chose not to study re-shelling efforts for his expert report or to speak about them at his deposition, except to say that Florida's historical oyster re-shelling efforts "wasn't part of my research. It wasn't part of my hypothesis or the research program that I designed to test." Kimbro Dep. Tr. 42:16-21.

Also, in Paragraph 100 of Dr. Kimbro's Direct, he includes fourteen sub-paragraphs that describe additional new data and analyses relating to oyster growth which Dr. Kimbro created after his deposition. *See* Kimbro Direct Testimony at ¶ 100, sub-paragraph (m). The new data, Dr. Kimbro explained, "were not available when my Expert Report was submitted." *See* Kimbro Direct Testimony at ¶ 100, sub-paragraph (n). Dr. Kimbro provided this new data to Dr. White, another of Florida's experts. Dr. White, in turn, used these new data to reanalyze his model with purportedly "higher quality growth data." Id. at ¶ 100.

Dr. Wilson White. Another of Florida's principal oyster experts is Dr. Wilson White. In paragraph 90 of Dr. White's direct testimony, he lays out a "Revised Parameter Table" that was "updated in August 2016" to incorporate new data that Dr. Kimbro had generated through June 2016, and which purportedly documents oyster growth in Apalachicola Bay. *See* White Direct Testimony at ¶ 90, n. 5. Dr. White elsewhere testifies that "after the original February 2016 [model] run, Dr. Kimbro completed additional analysis of oyster growth in Apalachicola Bay. This updated analysis led to revised estimates of the oyster growth parameters in the [model]; the revised [model] run and figures include these updated, improved parameter values." Id. ¶ 130. The nature of White's model is such that (a) the underlying parameters themselves are inputs that drive the model's outputs; Dr. White also stated that the model itself "takes a long time to run." White Dep. Tr. 107:25-108:10. In other words, when Dr. White ran his model using Dr. Kimbro's undisclosed data, it was by Dr. White's own sworn testimony a new analysis relying on new data. Florida provided no explanation for why this was not at a minimum disclosed in August, when Dr. White appears to have done this work.

Dr. White also conducted other new analyses. At his deposition, Dr. White testified that he "wrote code to run" analysis of oyster populations on certain oyster reefs other than the one he selected (Cat Point), but chose not to run "the full model analysis." Dr. White Dep. Tr. 27:8-28:10. But Dr. White now testifies that he has conducted this analysis — the exact same analysis that he could have performed at the time he submitted his Expert Report but chose not to. *See* ¶ 123.

Dr. White also has now run additional analyses examining Florida's remedy scenarios, which he testified he had not done prior to his deposition. He notes in his direct testimony that he "reran" his model "with a very conservative 'remedy' scenario similar to the relief that Florida is requesting in this original action." White Direct ¶ 152. But at his deposition, when asked under oath whether he had modeled any remedy scenarios since February of this year, Dr. White unequivocally testified that he had not conducted such further analyses and that there was "no particular reason" why he had not done so, even though he had all the data he needed to examine the remedy scenarios and months to perform such analyses prior to his deposition. White Dep. Tr. at 53:24-54:3.

Dr. David Langseth. Dr. Langseth is Florida's groundwater expert. Dr. Langseth has identified at least three new opinions that were not disclosed in his expert report or any of his three supplemental disclosures. *First*, Dr. Langseth's original opinion was that 40% of pumped groundwater impacted streamflow. Now he claims that 60% of groundwater pumping impacts streamflow. In his expert report, Dr. Langseth opined that: "Based on review of previously developed models, I selected the model developed by Jones and Torak (2006) … as the best currently available simulation model to address this question." Now, in his direct testimony Dr. Langseth claims that "The transient simulation prepared by Jones and Torak for March 2001-February 2002 does not simulate baseflow well." Langseth Direct Testimony ¶ 81.

Second, Dr. Langseth's expert report did not quantify the impact on streamflow from reduction in groundwater levels. Neither did any of his supplemental disclosures. Now, Dr. Langseth's direct testimony includes a new opinion that purports to quantify the impact on streamflow from reduction in groundwater levels. *Id.* ¶ 44 ("340 cfs for every foot of groundwater decline for every foot of groundwater decline, or over 1,000 cfs for every 4-ft decline."). Dr. Langseth never disclosed that he relied on an analysis called "PART" in his expert report and never disclosed any related opinions. Now, Dr. Langseth's direct describes a baseflow analysis conducted using PART. *Id.*

Third, neither Dr. Langseth's expert report nor his previous three supplemental disclosures quantified any overall reduction in basin-wide groundwater levels since 1992. Now, Dr. Langseth's direct testimony claims that "on average, groundwater levels have dropped about 4.7 feet since 1992." *Id.* ¶ 40. Florida has not produced any supporting disclosure materials related to this new testimony.

Dr. Patricia Glibert. Dr. Gilbert is one of Florida's ecological experts. In paragraph 26 of her written direct, Dr. Glibert explains work done *"after my deposition." First*, she evaluated 2012-2014 ANERR water quality data "that were not initially available as I prepared my expert report," yet she provides no information about specific data reviewed, analyzed, categorized, or otherwise used. *Second*, she evaluated correlations between flow and nutrients for the very first

time at the Chattahoochee Gage "in case the Sumatra Gage had errors that affected my analysis." She then delivered a new general opinion regarding the relationship between flow, nutrients and other water quality parameters at that Gage, without supporting data or analysis.

Dr. Glibert also bases a number of new conclusions on a new, 2016 Florida State University report that was neither relied on in her expert report nor mentioned in deposition as a basis for any opinions. She states in her written direct testimony that she "also reviewed a report that became available very recently after preparation of my report that summarizes the results of field investigations done by various estuarine researchers at Florida State University, discussing phytoplankton composition during the critical 2011-2012 years" (par. 38). She then uses the report as the basis for no less than five sweeping conclusions concerning matters ranging from the prevalence of certain types of phytoplankton to ramifications of algal blooms for the oyster population. She provides no analysis or additional information supporting these conclusions.

Again, although lengthy, this is not an exhaustive list of the new opinions and analyses offered by Florida's experts in contravention of the Federal Rules and the Rules of this proceeding. But the list demonstrates the seriousness of Florida's violations.

* * *

For these reasons, Florida's new opinions and analyses should be stricken and Florida should be barred from asserting them at trial.

Respectfully submitted,

/s/ Craig S. Primis, P.C.

Craig S. Primis, P.C.

cc: Counsel for Florida