

SUPREME COURT OF THE UNITED STATES

NO. 134, ORIGINAL

STATE OF NEW JERSEY, )  
 )  
 Plaintiff )  
 )  
 V. )  
 )  
 STATE OF DELAWARE, )  
 )  
 Defendant )

ORIGINAL

TELEPHONE CONFERENCE before SPECIAL MASTER  
 RALPH I. LANCASTER, JR., ESQ., held at the law offices of  
 Pierce Atwood at One Monument Square, Portland, Maine, on  
October 3, 2006, commencing at 10:05 a.m., before  
 Claudette G. Mason, RMR, CRR, a Notary Public in and for  
 the State of Maine.

APPEARANCES:

For the State of New Jersey: RACHEL J. HOROWITZ, ESQ.  
 BARBARA CONKLIN, ESQ.  
 JOHN R. RENELLA, ESQ.  
 AMY C. DONLON, ESQ.  
 WILLIAM E. ANDERSEN, ESQ.  
 DEAN JABLONSKI, ESQ.

For the State of Delaware: DAVID C. FREDERICK, ESQ.  
 SCOTT K. ATTAWAY, ESQ.  
 COLLINS J. SEITZ, JR., ESQ.  
 MAX B. WALTON, ESQ.  
 RYAN P. NEWELL, ESQ.

Also Present: MARK E. PORADA, ESQ.

PROCEEDINGS

1  
2 SPECIAL MASTER: Good morning. We have Mark  
3 Porada and Claudette Mason here with me.

4 I would ask, as we do with each one of these,  
5 if you would enter the appearances, including  
6 those who may not have a speaking role, all people  
7 who are on the line or available starting with New  
8 Jersey.

9 MS. HOROWITZ: Yes. Thank you. This is  
10 Deputy Attorney General Rachel Horowitz. With me  
11 are Deputy Attorney General Barbara Conklin,  
12 Deputy Attorney General John Renella, Deputy  
13 Attorney General Amy Donlon, Deputy Attorney  
14 General William Andersen and Deputy Attorney  
15 General Dean Jablonski.

16 SPECIAL MASTER: Thank you, New Jersey.  
17 Delaware?

18 MR. FREDERICK: David Frederick in Boston.

19 MR. SEITZ: And this is C. J. Seitz in  
20 Delaware with Max Walton and Ryan Newell.

21 MR. ATTAWAY: And Scott Attaway in  
22 Washington, D.C.

23 SPECIAL MASTER: Thank you, counsel.

24 We will come to New Jersey's motion in a  
25 moment; but before we do that, thank you for your

1 progress reports. And let me ask, as I always do,  
2 whether, apart from New Jersey's motion, there's  
3 anything else that you want to add either in  
4 supplement or correction to the progress reports,  
5 starting with New Jersey.

6 MS. HOROWITZ: I would just like to add  
7 that we received Delaware's progress report  
8 last night with the attachment -- the 30-page  
9 attachment with some documents. We have not --  
10 never to date received anything remotely like that  
11 that was even attempting to cull out documents  
12 that had or hadn't been produced and attempting  
13 in any way to cull out what was on any disk that  
14 they had sent us in the past. So I just would  
15 like to add that.

16 SPECIAL MASTER: Thank you. Thank you,  
17 Ms. Horowitz.

18 Delaware?

19 MR. FREDERICK: This is David Frederick for  
20 Delaware.

21 We don't have anything to add save that the  
22 purpose of our adding that exhibit was simply to  
23 illustrate that New Jersey's peremptory  
24 adjournment of the deposition schedule was  
25 completely unwarranted. We attempted to explain

1 through meet and confer sessions that the  
2 documents that have been produced, although they  
3 appear voluminous by number, in fact were not  
4 substantial in substance.

5 SPECIAL MASTER: All right. Thank you very  
6 much, Mr. Frederick.

7 Now, then, let's turn to New Jersey's motion.  
8 First, I have read your very helpful submissions;  
9 and let me say at the outset, as you probably  
10 anticipate, that I'm sorry we have reached this  
11 logjam. As I have told you many times, I have  
12 been impressed by and deeply appreciative of  
13 counsels' continued cooperation; but we are where  
14 we are. And I would remind you that Maine is  
15 where the peavey was invented; and I'm confident  
16 that if we explore this matter thoroughly this  
17 morning, we can locate the king log and break the  
18 jam.

19 Now, before we begin, in fairness you should  
20 know that I'm very reluctant to extend or modify  
21 the schedule. I will do so only if I'm satisfied  
22 that there is good cause shown and that one or  
23 both parties -- one party or both parties would be  
24 prejudiced by my failure to do so.

25 With that in mind, let me summarize my

1 understanding -- my understanding -- of the  
2 sequence of events that brought us to this point  
3 since it may be helpful to you in framing your  
4 comments. You can and you should, when I'm  
5 finished, correct any errors in the rather  
6 generalized summary that I'm about to give you.  
7 So here is what I understand brought us to this  
8 point.

9 First, to a greater or a lesser degree, both  
10 parties have produced documents after the July 14  
11 cutoff date. And I assume that that was by at  
12 least implicit agreement.

13 Second, that process of post-cutoff  
14 production has continued at least through Thursday  
15 last, the 28th.

16 Third, on September 19, New Jersey raised  
17 objections to Delaware's September 15 production  
18 of its DVD and particularly to the contents,  
19 objection directed to volume, to sequence and to  
20 lack of specificity. Delaware responded that its  
21 four identifying categories were all that it had  
22 to do by way of sorting and identification.

23 Fourth, on September 24, New Jersey adjourned  
24 two depositions that had been scheduled for the  
25 25th because of an attorney's illness. Those, as

1 I understand it, have now been rescheduled.

2 Fifth, on September 26 New Jersey took the  
3 deposition of a Mr. William Streets, S T R E E T S.

4 And, sixth, on the 27th Delaware took the  
5 deposition of Kevin Broderick. Apparently both  
6 taken without major incident. On the 28th, New  
7 Jersey unilaterally, over Delaware's objections  
8 and without consulting me for a ruling, canceled  
9 the deposition of one of its witnesses scheduled  
10 for the 29th and said that it would cancel  
11 depositions scheduled for this week because of the  
12 Delaware production.

13 Now, recognizing that that brief summary is  
14 very general -- very general -- not detail driven,  
15 not specific, is it basically correct?

16 And let me start with New Jersey.

17 MS. HOROWITZ: I think it's essentially  
18 correct except that we did not cancel any  
19 depositions. We asked for new dates so that we  
20 could have an opportunity to look at the 6200  
21 pages of documents that were unidentified and  
22 served on us in the middle of deposition  
23 preparation and taking of depositions. And we did  
24 not cancel; we just asked for those to be put off  
25 or new dates.

1           SPECIAL MASTER: Those -- well, the  
2           depositions, as I understood it, that were  
3           scheduled were not held because of New Jersey's  
4           position that the production of so many documents  
5           without basic identification made it impossible  
6           for you to go forward. Is that correct?

7           MS. HOROWITZ: Yes, that's correct. We  
8           thought we would be severely prejudiced by having  
9           to go forward without any opportunity whatsoever  
10          to go through the 6200 pages of unidentified  
11          documents.

12          SPECIAL MASTER: Right. Delaware, is my  
13          generalized summary basically essentially correct?

14          MR. SEITZ: This is C. J. Seitz,  
15          Mr. Lancaster.

16          It's generally correct; but in response to  
17          the adjournment versus cancellation issue, the  
18          adjournment of the depositions by New Jersey, as  
19          they would term it, was done in conjunction with a  
20          two-month extension, not a day or two, to  
21          familiarize themselves with any of the new  
22          documents and then reconvene at deposition.

23          SPECIAL MASTER: Right, okay. Thank you for  
24          that. I just wanted to -- you to understand that  
25          I understand that basic scheduling sequence.

1           The question before me is the bottom-line  
2 basis for New Jersey's request. In other words,  
3 how has New Jersey been or how will it be  
4 prejudiced if we adhere to the present schedule,  
5 if we don't make some modifications in it. And  
6 I'm going to -- I'm going to ask counsel to argue  
7 their positions shortly. And because of the  
8 importance of this issue, obviously, to both sides  
9 I'm not going to put any time constraints on  
10 either counsel.

11           But before I ask for comments, let me --  
12 I'll add a couple more things. Let me also say  
13 that while I appreciate Delaware's representation  
14 that few, if any, of the recently-produced  
15 documents would be, to use Delaware's word,  
16 "useful" at the depositions, counsel should  
17 understand that I have tried enough cases to know  
18 that I wouldn't want the opposing party to tell me  
19 what I might find "useful" in depositions I was  
20 taking or defending. And, consequently, neither  
21 should New Jersey be required to rely on  
22 Delaware's description or characterization of its  
23 9/26 production, which was attached as Exhibit A  
24 to its eighth progress report.

25           But having said that, at least as to that



1 production I assume that New Jersey will find  
2 Delaware's characterization helpful. I assume  
3 that there was no similar breakdown furnished  
4 regarding the September 18 production.

5 Now, with that monologue behind me, let me  
6 turn to New Jersey and ask specifically --  
7 specifically now -- that you tell us how adherence  
8 to the present schedule will prejudice New Jersey.  
9 And in that process, I would ask you to address at  
10 least the following items. And I'm going to go  
11 slowly here so that there's no miscommunication.

12 First, I would like to in the course of your  
13 presentation -- and I'm not trying to direct the  
14 argument here; but in the course of your  
15 presentation I would like you to tell us which  
16 documents are new to you and, secondly, to the  
17 extent you can, what their volume is and, third,  
18 their possible significance to you in the  
19 depositions.

20 Now, if you can do that without negatively  
21 affecting your strategy. I'm not asking you to  
22 disclose why or how you think that they are  
23 important to you, although to the extent you can,  
24 that also will be helpful.

25 And then, finally, New Jersey, what you have

1 done since you received the documents to try to be  
2 able to answer those questions and thereby  
3 determine and weigh possible prejudice.

4 And finally, it would also be helpful to me  
5 if you would explain the request in terms of the  
6 need for each of the four categories you have  
7 asked to be extended; that is, the fact  
8 depositions, the expert reports, the expert  
9 depositions, and motions.

10 I have to tell you, again, from my own  
11 experience that I always hate it when a judge  
12 tries to tell me how I should structure my  
13 argument. So if you don't want to, you can feel  
14 free to ignore what I just suggested. But those  
15 are the things that -- that are obviously going to  
16 be helpful to me in trying to decide this somewhat  
17 knotty question.

18 So with that long prelude, New Jersey, why  
19 don't you tell us why we should extend the  
20 schedule.

21 MS. CONKLIN: Good morning, Mr. Frederick.  
22 My name is Barbara Conklin. I work with Rachel  
23 Horowitz, and I have been pretty much in the  
24 trenches on this case since it started.

25 And while I appreciate your acknowledgment, I

1 think you have zeroed in on what's from our  
2 perspective a very simple fundamental issue, which  
3 is that when you receive a volume of documents  
4 like this, it's not a question of looking at them  
5 or glancing at them. One is obligated to one's  
6 client to examine them, read them and analyze them  
7 in light of not only your own case, but the  
8 adversary's case and to confer with your client  
9 and figure out if any of this is relevant and what  
10 degree it's relevant and to what extent it affects  
11 your previous arguments. That is not a novel or  
12 unusual request. It's a standard obligation we  
13 owe both our clients.

14 And in this particular case, no one is  
15 suggesting that Delaware was not entitled to  
16 supplement their answers to interrogatories.  
17 Nobody is suggesting that. What we are arguing is  
18 that we are entitled to our -- our what I would  
19 say fundamental rights in discovery, which is  
20 simply a reasonable and adequate time to digest  
21 what has been sent to us.

22 What we have done since we got these CD's is  
23 that -- our experience with CD's based on the  
24 previous 4,000 documents sent to us by Delaware is  
25 that it is virtually impossible to sit and read

1 this stuff on the screen. If you tried to do it,  
2 you know how tough it is on your eyes and how  
3 ultimately it is not an effective way to review  
4 documents. So what we did was we sat down, and we  
5 printed out all of the material that was sent to  
6 us. We then brought in six or seven other  
7 deputies that broke this stuff down into four and  
8 500 document increments; and we sat there, looked  
9 at the stuff and did our own index. That has  
10 taken us up until through this weekend up until  
11 yesterday to come up with our own index, and now  
12 we are in the process right now of segregating out  
13 documents that relate to different subject areas  
14 that are being covered by different witnesses.

15 That's the part that seems to be overlooked  
16 here at Delaware's side is that you can look at  
17 something and say, yes, I have seen this before;  
18 but the question becomes, when you're in a  
19 deposition mode, which witness is going to address  
20 it? Does this affect other witnesses' testimony?

21 Again, this is not something, I'm sure, that  
22 is new to you; but it appears to be something  
23 that's being trampled in the haste to,  
24 unfortunately, bring this to a quick conclusion.

25 So we are now at the point where we're

1 segregating out documents to determine what  
2 relates to BP, what relates to Coastal Zone  
3 Management, what relates to Fish and Game  
4 enforcement, what relates to emergency management,  
5 issues which appear to be put on the table by one  
6 or both parties. We're not saying that they're  
7 relevant issues, but I know they're going to come  
8 up in depositions. We have to be prepared for  
9 these things.

10 And the simple -- the time that we have asked  
11 for is -- we believe that we were going to ask for  
12 a sufficient period of time. We knew that we  
13 couldn't keep to the schedule the court initially  
14 wanted, that you had wanted; so what we decided  
15 was to ask for the time that was necessary to  
16 schedule all of these people in a manner that is  
17 not going to force us to defend and take  
18 depositions on the same day. It's just simply  
19 ineffective; and it is prejudicial when your key  
20 counsel are forced to defend a deposition and,  
21 yet, can't be present when another deposition is  
22 taken.

23 And to bring this to a closure -- you're  
24 being very patient with me. I appreciate that.  
25 But to bring this to a closure we have -- Delaware

1 witnesses are very, very busy people. They come  
2 and give us only one date, and then the next date  
3 is two weeks later. And, you know, that may be  
4 the case. They're very busy people. But the  
5 point is we need sufficient time to apparently  
6 book Delaware witnesses because they are very busy  
7 people and apparently don't have four or five  
8 alternate days to offer us. So we felt that given  
9 the past track record here, that we would need  
10 this time to accommodate their schedules to bring  
11 them in and depose them.

12 Let's see. I'm just trying to think if I  
13 have covered everything. Oh, just the simple  
14 closure of the prejudice issue. The prejudice is  
15 all on our side, Mr. Frederick. It's not a  
16 Delaware problem. We're the plaintiff here.  
17 We're having documents being put into play here by  
18 our adversary, and we are the one that are being  
19 prejudiced. Delaware has no prejudice whether  
20 this case is concluded in one month, three months  
21 or five months. The status quo is the same to  
22 them. For us, however, the prejudice is 100  
23 percent. And, again, it is not -- and the  
24 obligation is all on our side to look at these  
25 documents. And we have to fulfill that obligation

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1 in a thorough manner.

2 We tried not to draw this out. Believe me;  
3 we want this to be brought to a closure because  
4 it's so disruptive to this office's schedule.  
5 But, unfortunately, the time that we have selected  
6 here is what we believe the minimum necessary to  
7 get this done and discharge our obligation to our  
8 client.

9 The other thing is we don't know whether  
10 Delaware is going to be coming up with more  
11 documents. Nowhere in this colloquy that we have  
12 had with counsel has there been any indication  
13 that we're not going to get another 5,000  
14 documents put on us. And, again, we're tap  
15 dancing as fast as we can here. And, quite  
16 frankly, it is now past the issue of efficiency  
17 and allocation of personnel and has gone into a  
18 simple situation of nothing but 100 percent  
19 prejudice for no reason. And that's why we're  
20 asking for the additional time.

21 SPECIAL MASTER: Thank you, Ms. Conklin.

22 Mr. Seitz? Mr. Frederick?

23 MR. SEITZ: This is C. J. Seitz. I'll be  
24 responding for Delaware.

25 First, to turn right to the questions that

1           you asked, Mr. Lancaster, which documents are new;  
2           and I think we did a pretty good job on short  
3           notice identifying that. And we identified 257  
4           pages which are potentially relevant to the  
5           depositions and that are new. And I understand  
6           your admonition that they're not required to take  
7           our word from it. But if we step back from that a  
8           little bit, the request to cancel the depositions  
9           was made in conjunction with a request to move the  
10          schedule by two months. So we didn't think that  
11          that was a reasonable request being made under the  
12          circumstances, even if they weren't going to take  
13          our representation about what the number of pages  
14          were that were potentially relevant.

15                 But back to answer your question of which  
16          documents are new, 257 pages. That answers your  
17          volume question as well.

18                 Significance to the depositions, I think we  
19          have outlined in our letters as well about whether  
20          these are actually significant to the depositions.  
21          Ms. Conklin made it seem like there was a lot of  
22          moving parts here. Frankly, the depositions that  
23          are being taken are relevant to the permitting  
24          processes in New Jersey along the New Jersey  
25          coastline; and the documents that were produced



1 recently are limited in number and are easily  
2 reviewed in advance of the depositions. We also  
3 offered the opportunity to notify New Jersey in  
4 advance if we were going to use any of those  
5 documents so that they could have them before the  
6 deposition. That apparently wasn't satisfactory.

7 I do need to comment about the scheduling  
8 issue that Ms. Conklin just raised. I think as  
9 your -- as, Mr. Lancaster, you saw from our  
10 letter, we pretty carefully negotiated a schedule  
11 for both Delaware and New Jersey witnesses. As  
12 you no doubt are aware, when you have this many  
13 depositions being taken in a short period of time,  
14 it does require some juggling. And we had a  
15 pretty darned good schedule that was put in place,  
16 and we were reluctant to move it because witnesses  
17 do have other commitments. They are public  
18 officials. And I think it's unfair to  
19 characterize us as having given only one date for  
20 witnesses. That's simply not the case. We had an  
21 agreed-upon schedule where witnesses were  
22 available and would have been able to be completed  
23 within the deadline.

24 So although the page count that New Jersey  
25 keeps referring to as 6,000 pages being the total

1 of our recent production, 4,721 of those pages  
2 were already in New Jersey's possession.

3 Now, you might be asking the question, why  
4 did we produce all these additional documents when  
5 many of these were already in New Jersey's  
6 possession?

7 Well, the Case Management Order has a Bates  
8 numbering requirement; and we didn't want to run  
9 afoul of not having Bates numbered a document and  
10 then later being precluded from using it because  
11 it hadn't been produced with a Bates number.  
12 That's why you see such a big supplement. But the  
13 other equally important reason we had such a large  
14 production at this point in time is because New  
15 Jersey made us go and locate documents that were  
16 within their possession that they refused to  
17 produce to us.

18 So in contrast to the 40,000 -- approximately  
19 40,000 pages of documents that Delaware produced,  
20 New Jersey has produced less than 6,000 pages and  
21 has refused to produce to Delaware such important  
22 documents like the Coastal Zone Management Plan  
23 for New Jersey which started back in 1980. We had  
24 to go get those documents from New Jersey's files,  
25 and those documents are now in our latest

1 production because New Jersey would not give them  
2 to us.

3 And, Mr. Lancaster, these are not trivial  
4 matters, these documents. I mean, these documents  
5 that we have retrieved and recently produced have  
6 some key discussions in them about New Jersey and  
7 Delaware regulatory authority in the coastal zone.  
8 For instance, in the 1980 Coastal Zone Management  
9 Plan that we located in New Jersey's file, there  
10 is language in that very agreement where New  
11 Jersey and Delaware agreed to coordinate reviews  
12 of any proposed development below the mean water  
13 line in the twelve-mile circle. We would not have  
14 found such a key document if we hadn't gone and  
15 looked in New Jersey's files and then recently  
16 produced it.

17 Even if some additional time is needed in the  
18 schedule for New Jersey to review the production  
19 that we had, there certainly is no two-month  
20 extension that is warranted. It bears no relation  
21 to the task before them to review what we have  
22 given them. And, indeed, it sounds like they have  
23 dedicated sufficient resources to have things  
24 wrapped up pretty quickly with the review.

25 It would be our view that if the schedule is

1 going to be extended, that fact discovery be  
2 extended by some amount necessary to get the  
3 depositions completed now, perhaps a week or two,  
4 and then let the other deadlines carry as they  
5 should.

6 If New Jersey is concerned about preparing a  
7 brief by the November 30 deadline that's currently  
8 in place for summary judgment briefing, we would  
9 propose that Delaware submit its opening brief on  
10 that date and that New Jersey answer at some  
11 predetermined date and then Delaware reply. That  
12 would take care of any crisis they may be facing  
13 for getting their brief ready by the deadline.

14 Finally, with regard to expert reports, we  
15 have worked mightily and at great expense to our  
16 client to have our expert reports prepared by the  
17 upcoming deadline. And if any deadline should  
18 remain firm, we believe it should be that  
19 deadline. There is no prejudice to New Jersey in  
20 preparing expert reports and meeting the existing  
21 deadline.

22 SPECIAL MASTER: Thank you.

23 MR. SEITZ: So that's a lot of words; but to  
24 summarize where we are, we understand the schedule  
25 is now at a cocked hat because of the deposition

1 cancellation. It's our view that whatever  
2 extension that is being given be limited and not  
3 affect the expert discovery deadlines.

4 SPECIAL MASTER: Thank you very much,  
5 Mr. Seitz.

6 Ms. Conklin?

7 MS. CONKLIN: Thank you. I'll try and keep  
8 this relatively brief.

9 The Coastal Zone Management Plan to which  
10 counsel is referring was discussed quite  
11 thoroughly in an affidavit that was part of our  
12 2005 filing in this case. So I -- we're sort of  
13 mystified why there is even some -- why there's  
14 even a representation being made that this is  
15 something that had to be dredged up out of our  
16 files. It was -- it was something that New Jersey  
17 addressed. It's in the bound volumes in this  
18 case. What we have instead here is 600 pages of  
19 public comment on a draft Coastal Zone Management  
20 Plan that was given to us. And, quite frankly, we  
21 don't know what the significance of it is.

22 The simple fact here is that we're very  
23 appreciative that now we're getting some  
24 identification or attempt to identify the new  
25 material from Delaware. Apparently having to

1 adjourn depositions is how we can apparently get  
2 some response in this regard. The simple fact is  
3 the old documents and the new documents were  
4 commingled like a deck of cards were being  
5 shuffled. And we don't understand why all of a  
6 sudden now we're finally getting this information  
7 when we had to take days and days and days to  
8 ferret it out ourselves. You simply cannot  
9 prepare for depositions and look at new documents  
10 at the same time. I'm sorry, maybe I'm just not  
11 talented enough; but, I'm sorry, when you give  
12 somebody 10,000 documents and -- you can't prep  
13 for deps at the same time.

14 And the simple fact is we didn't get any type  
15 of an index to help us do this until yesterday,  
16 apparently, at 6 o'clock. And the question  
17 becomes why were they commingled? Why didn't we  
18 get an index? Why are we -- the question is if a  
19 document is in New Jersey files, that begs the  
20 question of what relevance does it have to this  
21 case?

22 The fact that we have documents that are  
23 public record is not the issue. The question is  
24 why is Delaware producing them, and what relevance  
25 does it have to their case? And that is something

1 that we have got to find out for ourselves.

2 I have got a 600 page document here of public  
3 comment. No one has attempted on the Delaware  
4 side to cull out what pages or what chapters are  
5 relevant in this case, so we have to do that for  
6 us. Like I say, the fact that it's public record  
7 in New Jersey is simply not addressing the problem  
8 that Delaware has created here.

9 And finally, we have a lot of maps and  
10 photos, by the way, that no one has mentioned,  
11 including some movie clips here. We have printed  
12 things out. We have no idea -- at this point we  
13 finally got our arms around what they are; but  
14 we're not sure what they depict and who took them,  
15 that sort of thing. We have to present them to  
16 our people and just analyze them. That's all  
17 we're asking for is an opportunity to do what is  
18 right and fair and analyze what has been provided  
19 to us.

20 Again, going back to the prejudice issue,  
21 Mr. Frederick, quite frankly, we are mystified as  
22 to why this is being rammed down the plaintiff's  
23 throat. There is no prejudice to Delaware's  
24 efforts to produce an expert report. All their  
25 efforts are preserved. Their report is no doubt

1 sterling. No one is going to say that their  
2 report is going to be any less sterling if it is  
3 submitted a month from now. But, quite frankly,  
4 we do have problems scheduling depositions with  
5 Delaware witnesses. And the simple fact is that I  
6 don't doubt they're busy; but we have to face the  
7 fact that we have got to have adequate time to  
8 get -- (unintelligible) -- and, quite frankly,  
9 that's why we made the motion we did.

10 SPECIAL MASTER: Excuse me, Ms. Conklin.  
11 Just before -- there was some static on the line;  
12 and the reporter missed a couple of the words.  
13 You may not be able to recall them. So when the  
14 transcript comes in, there may be a blank or two  
15 there; and you're going to have to fill that in.

16 MS. CONKLIN: Right. No, I appreciate that.  
17 Thank you so much.

18 Quite frankly, though, we're looking at  
19 photos that are literally in the hundreds, maps  
20 that we have not seen before that appear to be  
21 taken from a great height; and rather than being  
22 properly scanned, were photocopied, and the  
23 quality is extremely poor. We're obviously going  
24 to have to get new ones because we can't, based on  
25 the copies -- the quality of the copies we have,



1 we don't know what they're being offered for. The  
2 photos are basically so dark you can't see what is  
3 trying to be depicted. And obviously we're going  
4 to have to coordinate with Delaware and get the  
5 originals that they obviously probably have better  
6 quality of here.

7 But, again, the question of why was it  
8 commingled? Why did we get it so late? Why was  
9 there no attempt to cull out in the detail we're  
10 now getting what the new documents were?

11 And, quite frankly, going for a protective  
12 order under such circumstances, we understand that  
13 was the proper procedure. But how else could we  
14 protect our client and go forward with these  
15 depositions?

16 So there was no disrespect intended. There  
17 was certainly no intention to circumvent the  
18 rules. But you had to understand that we were in  
19 an impossible situation, and we are now here  
20 obviously to rectify that.

21 SPECIAL MASTER: Thank you, very much,  
22 Ms. Conklin.

23 Let me say, first, that beauty is in the eye  
24 of the beholder. And so what's relevant from your  
25 perspective may or may not be relevant from

1 Delaware's perspective. And ultimately, in the  
2 first instance, I will be the one who will have to  
3 decide whether a particular document or a  
4 particular piece of evidence is relevant; and then  
5 ultimately, of course, it will be the Supreme  
6 Court, I'm sure. So I don't think we can pivot  
7 this matter on the relevance question because each  
8 side is going to determine what in its opinion is  
9 relevant to the arguments that it wants to make.

10 But let me take you back, Ms. Conklin, to the  
11 beginning where you said that, admirably, you had  
12 assigned six or seven deputies breaking it down  
13 into four or 500 documents each. How far along  
14 are you in that process?

15 MS. CONKLIN: We have completed a cursory  
16 review of all the documents. We have handwritten  
17 out an index for each of them. We are now pulling  
18 out by subject matter the documents which we  
19 believe relate to each witness's deposition. In  
20 other words, you know, the coastal people versus  
21 the permit people versus the BP people. And  
22 having done that, we are making appointments to  
23 sit down with each of them and flip through this  
24 stuff to figure out what the relevance is.

25 We are prepared -- we're trying very, very

1 hard this afternoon to meet with one of the  
2 witnesses that's scheduled for deposition tomorrow  
3 and to make that quick determination late this  
4 afternoon if we're capable of going forward with  
5 this deposition. We are trying to be optimistic  
6 and say, yes, we will. That would be Mr. Risilia.  
7 Same thing with Ms. Dietrick, another DEP person  
8 who is scheduled for Friday. And we also have a  
9 gentleman coming in from Maine, Mr. Whitney. And  
10 we anticipate that we simply can't redo his  
11 deposition. He's on track. We don't want to turn  
12 him back from travel at this point.

13 At this point it's a question, though, of  
14 pulling out all of the coastal zone stuff and  
15 everything else and sitting down to figure out  
16 what are we going to ask Delaware witnesses.  
17 We're still -- we're just getting some traction on  
18 that issue. And I'm thinking it's going to take  
19 us a good three or -- I think a good business week  
20 to get through that.

21 SPECIAL MASTER: So if I understand you  
22 correctly, you're very hopeful that you can  
23 continue the -- that you can take the deposition  
24 that you scheduled for tomorrow, hopefully  
25 Friday's deposition; and Whitney is on in any

1 event. And I'm not trying to put words in your  
2 mouth here, but that you're hopeful that in a week  
3 you will have completed this process to the extent  
4 to which you can proceed with fact witness  
5 depositions. Now, is that correct?

6 MS. CONKLIN: I'm just -- while you were  
7 speaking, Mr. Frederick, I was just looking at a  
8 calendar here. And we can also go forward with  
9 Marty McHugh's deposition, a Fish and Game  
10 gentleman. But I'm thinking just to reschedule,  
11 we're going to have to reschedule Mr. Castagna,  
12 who is a Coastal Zone Management specialist; and  
13 we're going to have to reschedule Mr. Cooksey and  
14 Mr. Whitney.

15 And I'm thinking, again, it's simply a  
16 question of defending these witnesses and then  
17 going forward with affirmative depositions. We have some  
18 people that we're losing because of Columbus Day  
19 holiday and travel. So I'm thinking by the middle  
20 of next week we should be on even ground to start  
21 going forward with depositions -- affirmative  
22 depositions. I mean, we're talking about having  
23 to reschedule forward from the 11th or the 12th.  
24 So that is essentially it. We're looking to try  
25 and reschedule -- we should be able to keep Herr

1 and Moyer on for either the 16th or the 18th.  
2 Those are affirmative depositions we are taking.  
3 And then we're going to have to reschedule three  
4 or four depositions through the week of the 16th  
5 into the 23rd -- and into the 23rd.

6 SPECIAL MASTER: All right. Let me just say  
7 to you that the names mean nothing to me, and the  
8 areas of inquiry mean nothing to me. I'm sorry, I  
9 can't be helpful on that.

10 But let me ask a question of both counsel  
11 here. Having heard what Ms. Conklin just said,  
12 would it make sense now that Delaware has provided  
13 attachment A and New Jersey has, as I said, quite  
14 admirably and under pressure put six or seven  
15 deputies down to the review of this thing -- would  
16 it make sense before we, all three of us, or  
17 however many there are get totally enmeshed in  
18 this marsh that I ask New Jersey and Delaware to  
19 spend an hour or so saying what Ms. Conklin just  
20 began to describe; that is, we can't -- Whitney is  
21 coming from Maine, and we can't reschedule him.  
22 And we're going to have to move McHugh -- well,  
23 McHugh is okay or -- et cetera, and see -- for the  
24 fact witnesses now; I'm talking only about the  
25 fact witnesses -- see where there really is a

1           problem.

2           Now, I'm trying very hard to avoid a  
3           discussion of motivation, a discussion of the  
4           complexity of the problem and to see if I can get  
5           us back on track with counsel who have shown  
6           admirable cooperation up to this point.

7           I appreciate the frustration on both sides  
8           here. And I can make some arbitrary rulings if I  
9           have to; but I think -- or let me suggest that it  
10          would make sense for us to recess for a short  
11          period while counsel confer on this topic to see  
12          just exactly whether there is a major, major  
13          problem that requires something that counsel can't  
14          work out.

15          If you can't, we'll go forward; and I'll  
16          listen to any remaining argument. I'm talking  
17          only about fact witnesses now. I'll -- and then  
18          make a ruling, hopefully today, but no longer than  
19          tomorrow.

20          But let me offer that as a suggestion to  
21          counsel. And I'll start first with Ms. Conklin.  
22          Does that make sense?

23          MS. CONKLIN: Yes, it does, Mr. Frederick.

24          SPECIAL MASTER: Mr. Seitz?

25          MR. SEITZ: Mr. Lancaster, I think it makes

1 sense. It may take a little more than an hour  
2 recess because New Jersey has technically canceled  
3 all the depositions for this week. And we have  
4 probably released some of those people.

5 SPECIAL MASTER: Sure.

6 MR. SEITZ: So it may be a little more  
7 complicated than saying, as New Jersey has, maybe  
8 we can take a deposition tomorrow.

9 SPECIAL MASTER: Okay. Well, let me  
10 interrupt you then. Let me amend my suggestion  
11 this way. Does it make sense -- just as far as  
12 the fact witnesses are concerned, does it make  
13 sense to recess this argument until counsel have  
14 an opportunity to confer further; and I will be  
15 available today, tonight, tomorrow at counsels'  
16 call to either bless whatever arrangements you two  
17 have made or to rule as necessary on New Jersey's  
18 motion. Does that make sense, Mr. Seitz?

19 MR. SEITZ: It does, Mr. Lancaster. Perhaps  
20 you could give us some guidance though. If the  
21 time period that we're looking to get these  
22 completed in would be the next several weeks, is  
23 that what is contemplated?

24 SPECIAL MASTER: You will not be surprised to  
25 hear me say that the timetable is as soon as you

1 can possibly complete it.

2 MR. SEITZ: Okay.

3 SPECIAL MASTER: And, I'm sorry, I don't mean  
4 to be facetious here. The reason that I am -- and  
5 perhaps I should explain this. The reason that  
6 I'm being sort of sticky about this is that my  
7 experience has taught me that these cases can  
8 continue and drag on for a long period of time  
9 unless counsel are totally cooperative and unless  
10 the Special Master is sort of a stickler for  
11 trying to stay with a schedule. It's just too  
12 easy to slip into a, well, we have got a problem;  
13 and so we'll just move it a month or two or three.  
14 And the next thing you know you're two or three  
15 years down the road. We haven't advanced the ball  
16 that much. And, frankly, the expense has  
17 increased substantially. And I know that you're  
18 all busy counsel, and you have a lot of other  
19 things to do. But by the same token, I want to  
20 try to move this along as much as possible. So  
21 those are my motivations.

22 Ms. Conklin, let me ask you; does that  
23 suggestion that we recess while counsel confer on  
24 the fact deposition witnesses and then resume at  
25 the call of counsel, does that meet with your



1 approval?

2 MS. CONKLIN: Mr. Lancaster, surely, it does.  
3 There is just a small footnote; and I'm going to  
4 put it on the table now just to see -- I very much  
5 appreciate your feedback. We're going in through  
6 fact witness testimony at this point. And my  
7 simple point is we're both going to have expert  
8 reports. And I see -- I see this coming down the  
9 line that we're going to have the reports that are  
10 due, I believe, on October 13; expert reports are  
11 due very shortly, and there are going to be fact  
12 depositions going on afterwards. And we're going  
13 to end up -- it's reasonable to contemplate we're  
14 going to end up with supplemental expert reports.  
15 I'm not planning on it, but we're setting  
16 ourselves up for that. And that's just a concern,  
17 and it's a big concern.

18 SPECIAL MASTER: Right. And I appreciate  
19 that. But let's stick with the fact witnesses for  
20 a moment. I'll come back to the other categories  
21 afterwards.

22 MS. CONKLIN: Very good then. Very good.

23 SPECIAL MASTER: I now understand that both  
24 counsel are in agreement that it would make sense  
25 for us to recess this conversation until counsel

1 have had an opportunity to confer, hopefully, to  
2 resolve these major sticking points, and then call  
3 me. And I will be available -- I'm looking at  
4 Ms. Mason -- we, hopefully, will be available, all  
5 of us, at your call, although I can't certainly  
6 impose on her too late into the evening.

7 Now, let's turn to the next two categories.  
8 One are the expert reports -- one is the expert  
9 reports; and the other is the expert depositions.  
10 I'm assuming that counsel have already retained  
11 their experts; and I'm assuming that those experts  
12 have at least begun the drafting of their reports  
13 in anticipation of the filing. And I understand  
14 that the additional discovery, the documents that  
15 have been produced here and, in fact, the fact  
16 depositions themselves may well add information  
17 that will require, as Ms. Conklin suggested,  
18 further revisiting with the experts and perhaps  
19 supplemental reports. And I would be sympathetic  
20 to that in the event of the need shown.

21 But going to the primary reports themselves,  
22 at this point without knowing where we're going  
23 with the fact depositions and whether it's going  
24 to be necessary to move that cutoff date, is there  
25 anything that we can realistically do about a date

1 for the cutoff of the expert reports?

2 And I'll start with Ms. Conklin.

3 MS. CONKLIN: Your Honor -- I'm sorry, I knew  
4 that was going to slip out at some point here.

5 The difficulty -- the problem as we perceive  
6 it is there are a lot of historical maps; and  
7 there are also photos of the areas that have been  
8 provided by Delaware which we have to look at and  
9 I believe that we are going to want to show our  
10 expert. So there is going to be some additional  
11 chewing involved at our end with our expert to  
12 determine the extent to which these need to be  
13 taken into account in our expert report. And I  
14 would think that we would need just a week after  
15 the conclusion of fact witnesses to at least get  
16 this information into the lap of our experts and,  
17 like I say, just get a reasonable opportunity to  
18 get our arms around it intellectually and  
19 understand whether we need to modify the report  
20 which is substantially completed at this point.  
21 So I'm thinking that we're going to need a brief  
22 delay on the expert reports to accommodate the  
23 fact witnesses of about a week.

24 SPECIAL MASTER: Okay. Mr. Seitz?

25 MR. SEITZ: Well, I'm not -- I may be

1 confused as to why they can't give that  
2 information to the expert now rather than an extra  
3 week at the end of the fact discovery period.

4 SPECIAL MASTER: Well, as I understand  
5 Ms. Conklin, what she's saying is that until they  
6 have completed the digestion of the documents,  
7 they're not sure yet whether they will be giving  
8 additional information. So it's a little bit like  
9 chicken and egg. And until you and she have  
10 conferred, resolved the present impasse or logjam  
11 on the fact witnesses, she is unwilling or unable  
12 to make an absolute commitment that she doesn't  
13 need additional time or won't need additional time  
14 to submit additional information. And that,  
15 frankly, sounds reasonable to me.

16 MR. SEITZ: Well, if it's reasonable to you,  
17 Mr. Lancaster, I wouldn't want to be in a position  
18 of disagreeing. So --

19 SPECIAL MASTER: Trust me, people disagree  
20 with me all the time; and I won't be offended by  
21 that, Mr. Seitz.

22 MR. SEITZ: So I --

23 SPECIAL MASTER: No, seriously, if I'm  
24 missing something there, point it out to me.

25 MS. CONKLIN: Mr. Lancaster, the simple fact

1 here is that the photos are barely intelligible  
2 from our end.

3 SPECIAL MASTER: I got that before.

4 MS. CONKLIN: Very good. Thank you.

5 SPECIAL MASTER: I got that.

6 MS. CONKLIN: That's a problem we can resolve  
7 relatively quickly. But having done that, we need  
8 to talk to some witnesses and find out what the  
9 relevance is.

10 SPECIAL MASTER: Yes. I understand that.

11 Let's go back, Mr. Seitz --

12 MR. SEITZ: Mr. Lancaster, just so we're  
13 clear on these photos, we sent a boat out; and the  
14 photographer took a number of photographs of the  
15 New Jersey shoreline a couple weeks ago. And  
16 rather than select the photos, we gave them all.  
17 And that's why there's a number of these.

18 SPECIAL MASTER: Right.

19 MR. SEITZ: That's the photos we have been  
20 talking about.

21 SPECIAL MASTER: I take it Ms. Conklin is not  
22 talking about the number; she is talking about the  
23 quality of the reproduction.

24 MR. SEITZ: Right.

25 SPECIAL MASTER: You can work that out when

1           you're talking about it.

2           Well, look, here is what I'm going to suggest  
3           to both of you, that we recess at this point,  
4           that you see what you can do with the depositions  
5           of the fact witnesses and rescheduling that and  
6           what realistic -- realistic -- time is needed  
7           to -- for the rescheduling; and then I think that  
8           the need to supplement expert reports to furnish  
9           information will fall in. And if there is a  
10          need to supplement that or, alternatively,  
11          unfortunately, to extend it a little bit, we  
12          can talk about that.

13          And, also, I would urge you in this process  
14          to talk about the expert depositions schedule as  
15          well so we don't come back together with a serious  
16          loose end that requires us to -- to address it  
17          independently because I think they're all  
18          interrelated.

19          I'm going to -- I have a couple of other  
20          items I want to talk to you about before we recess  
21          here that you at least should be thinking about,  
22          and I -- I know I sound like a broken record when  
23          I say this; but I have been impressed by the  
24          quality of counsel on both sides here. And I have  
25          been doubly impressed by the efforts that both

1 sides have made for -- to be cooperative and to be  
2 helpful to one another and to adhere to the  
3 schedule.

4 Now, for reasons that I prefer not to get  
5 into in detail at this juncture, we have come up  
6 against what I referred to before as a logjam.  
7 New Jersey's obvious frustration at having these  
8 documents presented in a huge volume without what  
9 they interpreted to be adequate identification,  
10 Delaware's, I believe, sincere opinion that only a  
11 few of these documents really are new or really  
12 relevant, but Delaware's, I think, now-recognized  
13 acknowledgment that New Jersey is entitled to be  
14 able to make that decision for itself by a review  
15 of the documents.

16 So I think we have moved the ball down the  
17 field, if you will forgive the mixed metaphor. I  
18 think we're at a point where this logjam can be  
19 easily resolved because I think we're really at  
20 the point where the king log has been identified.  
21 And so I -- I encourage counsel to get back to  
22 where they were before the massive Delaware  
23 production, back to where you were being collegial  
24 and cooperative, put the frustration aside at  
25 least for the moment, and let's address the

1 schedule in a realistic manner.

2 You have my number. Let me give you my home  
3 phone number, which is (207) 781-2388. I would  
4 suggest you try me here first because I'm here  
5 more than I'm at home; but in the event that you  
6 can't, you can reach me at home. I am perfectly  
7 willing to take calls either here or at home.

8 I will want to have a court reporter present;  
9 and so if you call me at 8 or 9 o'clock tonight to  
10 report, then we're going to do it tomorrow morning  
11 simply because I won't impose on the reporter.

12 But if you call me in the morning, I know  
13 Ms. Mason will have somebody available from her  
14 shop in order to be able to accommodate us.

15 So with that, unless there's something  
16 further on the issue of the motion, I would like  
17 to turn to a couple of other housekeeping items  
18 that I have on my calendar here.

19 First, we have a progress report which,  
20 hopefully, would be the final progress report  
21 scheduled for November 8 and a final conference  
22 call scheduled for November 9. If, in fact -- I'm  
23 sorry. If, in fact, we slip the schedule as a  
24 result of this conference, we may want to move  
25 that; but that's where it stands right now.



1           Now, these questions you may not be able to  
2 answer at this point; but I'm only asking as of  
3 this juncture. I'm not asking you to make an  
4 unchangeable commitment on this; but just for my  
5 own purposes, at this juncture does either party  
6 anticipate filing any dispositive motion?

7           I don't want a discussion of the specifics of  
8 the motion or what it will -- would be based on,  
9 but just a simple answer, yes or no or I don't  
10 know, at this point.

11           Ms. Conklin?

12           MS. CONKLIN: Yes, we do.

13           SPECIAL MASTER: Okay.

14           MS. CONKLIN: We do anticipate filing that  
15 motion.

16           SPECIAL MASTER: Okay. And Mr. Seitz or  
17 Mr. Frederick?

18           MR. FREDERICK: This is David Frederick.  
19 Yes, we will be filing a dispositive motion.

20           SPECIAL MASTER: Okay. Now, the next  
21 question is does either party anticipate that it  
22 will be necessary at either -- necessary before  
23 argument and ruling on the dispositive motions to  
24 present live evidence, live testimony before me?

25           MS. HOROWITZ: This is Rachel Horowitz. At

1 this point we were not anticipating that.

2 SPECIAL MASTER: Mr. Seitz? Mr. Frederick?

3 MR. FREDERICK: We were of the same view,  
4 Mr. Lancaster.

5 SPECIAL MASTER: Okay. Fine. Then we will  
6 recess at this juncture. I'm hopeful that mature,  
7 competent counsel will be able to come to  
8 reasonable agreement in a relatively short period  
9 of time. If you can't, trust me; I have no  
10 problem in ruling, and I would be happy to do  
11 that, although I prefer that counsel work out  
12 their own problems, simply in part because I don't  
13 know these witnesses. I don't know the nature of  
14 their testimony. I can't relate a particular  
15 document to a particular witness or a relevance  
16 point at this juncture.

17 So unless there's something further, we will  
18 recess for the call of counsel. I will be  
19 available for you when you need me.

20 Ms. Conklin, Ms. Horowitz, is there anything  
21 further?

22 MS. CONKLIN: Just one quick question. Until  
23 what time today would a court reporter be  
24 reasonably available at your end?

25 SPECIAL MASTER: We'll ask the court

1 reporter. We'll take just a second and let me  
2 talk to her, and I'll be right back to you.

3 MS. CONKLIN: Very good. Thank you.

4 (Discussion off the record.)

5 SPECIAL MASTER: You're never going to find a  
6 court reporter who is either as nice as, as  
7 competent as or as cooperative as Ms. Mason. She  
8 tells me she will be available at your call.

9 MS. CONKLIN: I'm very glad I asked, and I  
10 hope we don't have to make that -- make any  
11 unreasonable requests. We don't intend to.

12 Thanks. That's what I needed to know.

13 SPECIAL MASTER: Mr. Frederick?

14 MR. FREDERICK: We have nothing further.

15 SPECIAL MASTER: Okay. Thank you very much.

16 I'm encouraged by the progress we have made;  
17 and I'm hopeful that we'll make further progress  
18 yet.

19 Thank you very much, all counsel.

20 (The conference was concluded at 11:00 a.m.)

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CERTIFICATE

I, Claudette G. Mason, a Notary Public in and for the State of Maine, hereby certify that the foregoing pages are a correct transcript of my stenographic notes of the above-captioned Proceedings that were reduced to print through Computer-aided Transcription.

I further certify that I am a disinterested person in the event or outcome of the above-named cause of action.

IN WITNESS WHEREOF I subscribe my hand this 6th day of October, 2006.

Claudette G. Mason

Notary Public

My Commission Expires  
June 9, 2012.