

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
November 9, 2006, commencing at 10:00 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.
 DEAN JABLONSKI, ESQ.
 EILEEN P. KELLY, ESQ.
 AMY C. DONLON, ESQ.

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

Also Present: MARK E. PORADA, ESQ.

PROCEEDINGS

1
2 SPECIAL MASTER: Good morning, counsel. This
3 is Ralph Lancaster.

4 Who else is on the line, please?

5 MS. HOROWITZ: This is Deputy Attorney
6 General Rachel Horowitz and Dean Jablonski, Deputy
7 Attorney General; Eileen Kelly, Deputy Attorney
8 General; and Amy Donlon, Deputy Attorney General.

9 SPECIAL MASTER: Thank you.

10 MR. FREDERICK: David Frederick and Scott
11 Attaway.

12 SPECIAL MASTER: Mr. Frederick --

13 MR. SEITZ: And C. J. Seitz --

14 SPECIAL MASTER: Mr. Frederick --

15 MR. SEITZ: -- and Max Walton.

16 SPECIAL MASTER: Mr. Frederick, is my memory
17 correct that you're on the West Coast?

18 MR. FREDERICK: No. I'm in Texas today, sir.

19 SPECIAL MASTER: You're in Texas. Well, I
20 knew you were somewhere other than here.

21 Here we have Mark Porada -- we have Mark
22 Porada and Claudette Mason. And I gather we now
23 have the appearances of all counsel.

24 We have a fairly full agenda today. We have
25 the -- excuse me. We have the New Jersey

1 privilege log questions. We have the location and
2 timing of oral argument. We have the suggestion
3 for a deferred appendix. And I want to raise with
4 you the possibility or probability of having you
5 confer and file a joint statement on issues of
6 material fact.

7 So let's start, if we may, with the questions
8 on the New Jersey privilege log. First, I
9 appreciate the revised copy which I was sent,
10 which now contains a column showing details.

11 Have -- Mr. Frederick, have you seen that and
12 reviewed that -- that listing?

13 MR. FREDERICK: I'm not sure I understand
14 what you mean, Mr. Lancaster.

15 SPECIAL MASTER: Well, Mr. Attaway in your
16 absence sent me last night a privilege log which
17 contained six columns; and then you sent an e-mail
18 containing a privilege log that has seven columns.
19 And I have referred to that as a revised privilege
20 log.

21 MR. FREDERICK: I forwarded to you what
22 Ms. Horowitz had sent to me. And I have reviewed
23 that. We have reviewed that on our side, sir.

24 SPECIAL MASTER: Okay. Well, let me begin by
25 asking you; there are some -- by my count, some 59

1 different documents here. Having what I didn't
2 have before, that is, the column that is captioned
3 Details, is it Delaware's position that all 59 of
4 these are still discoverable and should be
5 produced; or has the addition of the Details
6 column clarified the privilege requests to the
7 extent where you perhaps are not going to press
8 all of them?

9 MR. FREDERICK: Well, Mr. Lancaster, we would
10 appreciate the opportunity to study the additional
11 column and to prepare a short written presentation
12 that would be more delineated. The issues of
13 deliberative process and attorney-client privilege
14 in this context, I think, require somewhat more of
15 a nuance discussion document by document than an
16 oral presentation on this call would facilitate.
17 And if you would be amenable to the suggestion, we
18 would propose that we would file a very short,
19 perhaps no more than five-page, letter on Monday
20 that would specify our objections to the specific
21 grounds articulated for the particular documents.

22 We simply wanted to raise in the progress
23 report this issue and to initiate a process by
24 which it could be resolved.

25 SPECIAL MASTER: Right. Let me ask you; when

1 did you get what I have called the revised
2 privilege log, Mr. Frederick?

3 MR. FREDERICK: I received that on the road
4 yesterday.

5 SPECIAL MASTER: Okay.

6 MR. SEITZ: Mr. Lancaster, this is C. J.
7 Seitz. To be fair, we did receive that from New
8 Jersey earlier than yesterday. And what happened
9 was in the version that Mr. Attaway had attached
10 to his letter, he had used an earlier version.

11 So we have had the revised version for a few
12 days. I don't have the exact date when New Jersey
13 sent that to us. But that was sent after our meet
14 and confer on the privilege log issue.

15 SPECIAL MASTER: Ms. Horowitz, are you able
16 to tell me when you sent that to Delaware?

17 MS. HOROWITZ: Yes. We had sent Delaware a
18 privilege log in October 2005. In October 2006
19 they raised the issue of some of the entries on
20 the log. And we conferred and said we would send
21 them more details. And we did that on November 3.
22 We got Delaware's privilege log on November 1 or
23 2, I believe.

24 SPECIAL MASTER: Okay. Well, let me -- I am
25 concerned, as always, about anything that's going

1 to stretch the schedule. And if I have the
2 assurance of counsel that this -- addressing this
3 issue or these issues in the way that
4 Mr. Frederick has suggested will not stretch the
5 schedule, then I'm certainly amenable to that
6 suggestion. On the other hand, if the inevitable
7 result of going much further out will stretch the
8 schedule, then I am concerned about that.

9 So let me ask both counsel, starting with
10 Delaware, whether you think that if we wait until
11 next Monday to get something in writing and then
12 probably a response from New Jersey and then
13 confer again to deal with it, we're going to be --
14 I'm going to be faced with a request that the
15 schedule be stretched again.

16 MR. FREDERICK: Mr. Lancaster, this is David
17 Frederick.

18 We would not propose that the schedule be
19 adjourned in any fashion. This is a discrete
20 number of documents. We have an idea of where
21 they fit into the issues that would be presented;
22 and we anticipate that you would resolve the issue
23 in a fashion that would not necessitate us
24 requesting any additional time.

25 SPECIAL MASTER: Ms. Horowitz?

1 MS. HOROWITZ: We don't anticipate that this
2 will necessitate a change in the schedule at this
3 point.

4 SPECIAL MASTER: All right. Well, then it's
5 agreeable to -- and we will put it in a Case
6 Management Order. It's agreeable that Delaware
7 will have until the close of business on Monday to
8 file a writing.

9 Now, before I get to what I assume will be
10 New Jersey's response, let me just talk to you a
11 little bit about the privilege question because I
12 think it may be helpful to both counsel to have
13 some sense of what my reaction was to this -- to
14 the privilege log. And when I'm finished, I hope
15 counsel will share with me any concerns about my
16 probably very limited understanding of the areas
17 under which privilege is claimed, particularly --
18 or especially the -- the claim of deliberative
19 process privilege, which I see as something of a
20 marsh, frankly. But let me just in a stream of
21 consciousness way address that.

22 First of all -- and this is, again,
23 uninformed and without any research, just off the
24 top of my head. My understanding of the
25 deliberative process privilege is that it's a

1 qualified privilege, that it protects -- although
2 the -- I don't think the courts are unanimous in
3 this, that it protects only deliberative material;
4 that is, opinions, advice or recommendations, that
5 it does not protect facts per se, and that those
6 opinions, recommendations, et cetera, have to be
7 predecisional; that is, they were prepared or
8 given in order to assist the ultimate decision
9 maker in making a decision.

10 My further understanding is that the burden
11 is on the withholding party to show, as was
12 suggested in Mr. Attaway's letter, the precise and
13 certain reasons to preserve confidentiality, and
14 that once that showing is made, if it is, then the
15 party seeking the production has to show need. By
16 need I mean relevance, of course, and that it's
17 unavailable from other sources, and that in the
18 process of making a ruling, that I have to weigh
19 policy, in this case, particularly the effect on
20 future candor by employees.

21 But that's my general horseback, off the cuff
22 understanding of what the deliberative process is.
23 And when I'm finished here, I'm going to ask you
24 both to comment on that.

25 And then attorney-client privilege is

1 something I am sure we're all thoroughly familiar
2 with. It has to be a communication between an
3 attorney and client for the purpose of either
4 giving or receiving legal advice and not published
5 beyond those parties or entities who are involved
6 in the process of giving or obtaining that legal
7 advice.

8 And then, finally, there is work product
9 here -- claim. And my understanding is the work
10 product isn't a privilege per se. It's, rather,
11 an immunity. The document has to be a -- have
12 been prepared in anticipation of litigation and
13 contain mental impressions and -- and assuming
14 those showings are made, then the one seeking the
15 production must show substantial need.

16 I -- now, that's obviously a very overly
17 simplistic and general summary of my understanding
18 of where we are here or what the rules would be
19 that I would be applying.

20 As I said earlier, there are some 59
21 documents listed of which, by my count, 44 in --
22 are just pure deliberative process. So that's
23 where the rubber really meets the road. Seven of
24 them are pure attorney-client privilege, and three
25 involve both work product and attorney-client

1 claims. Then there's one that involves
2 deliberative process and attorney-client claims.
3 And then, frankly, there are four that -- listed
4 as confidential under the U.S. Coast Guard
5 protocol. And I haven't addressed that because I
6 haven't the foggiest ideas of what that is.

7 Now, I'm going to drop my voice and ask
8 counsel to comment on my sense of what we're
9 talking about here. And I'm going to start --
10 because the motion is with Delaware I'm going to
11 start with Mr. Frederick or Mr. Seitz or
12 Mr. Attaway.

13 MR. SEITZ: Mr. Lancaster, this is C. J.
14 Seitz. I would add an addendum to your review of
15 the state of the law. I think that you captured
16 it exactly. And in particular, we would emphasize
17 the document by document requirement of proving
18 that the confidentiality concerns of the public
19 are balanced against the disclosure preference
20 that the courts view these kind of privileges.
21 And that's the reason why they're viewed narrowly.

22 And just as an add-on to your recitation of
23 law, I would also say that the privilege can be
24 waived. And, indeed, we will be making an
25 argument about how the deliberative process was

1 waived because witnesses were allowed to freely
2 answer questions about these types of things in
3 depositions. And I think we'll also show that
4 some documents have been produced which fall
5 within the same category that are on the privilege
6 log.

7 SPECIAL MASTER: Okay. Thank you.

8 Ms. Horowitz?

9 MS. HOROWITZ: I think we're generally in
10 agreement with the law as you have stated it.

11 SPECIAL MASTER: Okay. I would find -- I
12 would find it helpful, Ms. Horowitz -- and I'm not
13 going to require this; but I'm going to ask you to
14 consider it. I would find it helpful if you --
15 and I think you're the one to respond for New
16 Jersey -- if you would look at the Details column
17 that you furnished to us -- well, look at the
18 privilege log that has been furnished here and
19 help me to -- with a little more information.

20 For example, on the first page I haven't the
21 foggiest idea who Trudie is. The -- there's a
22 reference to Ruth Ehinger and others like that,
23 just a name. I don't know who they are.

24 There are references in the Details section
25 to things like policy discussion or notes

1 commenting on something. And if I am going to
2 have to -- put waiver aside for the moment, but if
3 I'm going to have to rule in the deliberative
4 process area, particularly on whether these are
5 opinions and recommendations being made in the
6 process of enabling a final decision maker to make
7 a decision, I'm going to have to have some more
8 flesh on that skeleton; or I'm not going to be
9 able to make a meaningful ruling. And if I can't
10 make a meaningful ruling, because I think it is
11 New Jersey's burden, then the ax is going to fall
12 on the New Jersey neck, I'm afraid.

13 So I'm asking you -- and if you do that --
14 and I hope you don't think this is impertinent or
15 too burdensome; but I would like it in the form of
16 an affidavit. I would like to know that somebody
17 in a position of responsibility of New Jersey has
18 looked carefully at these documents and has -- and
19 is willing to say under oath that there are
20 recommendations, there are opinions in here.

21 Now, if you prefer to wait until you have
22 seen the waiver argument, that's acceptable, too.
23 But I do think it's important that I have some
24 substantive basis for making an informed ruling.

25 So I'm making that as a suggestion. I'm not

1 making it a requirement. But I think you can
2 understand why I would find it helpful in making a
3 decision document by document, as I'm being
4 requested to do, if I had that additional
5 information.

6 And I'll drop my voice on that, and you can
7 respond or not as you see fit.

8 MS. HOROWITZ: I think we have -- we would
9 want to see what Delaware presents. And if it
10 seems appropriate to have an affidavit in
11 response, then we will certainly do that.

12 SPECIAL MASTER: All right. Let's talk about
13 scheduling then. Delaware said it will file
14 something in writing -- brief writing by next
15 Monday -- close of business next Monday. How much
16 time would you require, Ms. Horowitz, to respond?

17 MS. HOROWITZ: I think another day.

18 SPECIAL MASTER: Is one day enough?

19 I don't want to press you here, and I don't
20 want to have you scurrying around at the last
21 minute. If that's fine, then Tuesday is good. If
22 Wednesday is better, we'll do it Wednesday.

23 MS. HOROWITZ: Well, if Wednesday is fine
24 with you, then Wednesday would be preferable.

25 SPECIAL MASTER: All right, fine. So

1 Delaware will file on Monday, and New Jersey will
2 respond on Wednesday.

3 And then --

4 MR. FREDERICK: Mr. Lancaster?

5 SPECIAL MASTER: Yes, sir?

6 MR. FREDERICK: This is David Frederick. If
7 New Jersey does submit an affidavit on Wednesday,
8 we would like to have the opportunity for a very
9 brief reply that might address the need for your
10 decision on particular documents.

11 SPECIAL MASTER: Friday?

12 MR. FREDERICK: That would certainly be fine.

13 SPECIAL MASTER: All right. It will be
14 Monday, Wednesday and Friday then.

15 All right. That addresses, although it does
16 not resolve, the privilege log question.

17 Let me, now, raise with you the possibility
18 and reasonableness of you meeting and conferring
19 and filing an uncontested joint statement of --
20 I'm sorry, a joint statement of material
21 uncontested facts. I'm working a little bit in
22 the dark here because I don't know the shape or
23 substance of your motions; but it occurs to me
24 that there have to be some facts on which both
25 parties will agree. And if we could get a

1 document that said these are uncontested,
2 agreed-upon material facts, it would save me, and
3 particularly Mr. Porada, the burden of thrashing
4 through the appendix and the briefs to determine
5 where the parties were in agreement.

6 So let me ask you whether that makes sense
7 and whether you are willing to do it. And I'll
8 start with Ms. Horowitz.

9 MS. HOROWITZ: That makes sense to us.

10 SPECIAL MASTER: Mr. Frederick?

11 MR. FREDERICK: Yes.

12 SPECIAL MASTER: Okay. Thank you.

13 Then along with or in anticipation of the
14 submission of your briefs, if you will give us a
15 joint statement of uncontested material facts,
16 material facts as to which there is no dispute,
17 that will make our lives a much -- much, much
18 easier; and I thank you for your willingness to do
19 that. And we will put that also in the -- in the
20 change order.

21 Now --

22 MR. FREDERICK: Sorry, Mr. Lancaster. Just
23 to be clear, you would want this filed on the day
24 the dispositive motions are filed?

25 SPECIAL MASTER: Sure.

1 MR. FREDERICK: All right.

2 SPECIAL MASTER: That would be -- I think
3 that would be reasonable. It gives you enough
4 time to work on it. It isn't anything that I need
5 before the motions and briefs are filed -- main
6 briefs are filed. So that works for me; and we'll
7 put that date in the order.

8 Now, in Mr. Attaway's letter he suggested
9 that there be a deferred appendix. And, first,
10 let me ask for a little clarification because I
11 may -- I may have misread the letter; but the last
12 sentence of the penultimate paragraph reads, under
13 this process, final briefs and the joint appendix
14 would be due shortly after the filing of the reply
15 briefs.

16 My understanding -- and I think my order --
17 was that the reply briefs are the end of the
18 briefing. So I'm a little confused by the
19 language that says final briefs and the joint
20 appendix would be due shortly after the filing of
21 the reply briefs. And perhaps you could -- or
22 would clarify that for me, either Mr. Attaway or
23 Mr. Seitz or Mr. --

24 MR. FREDERICK: Well -- this is David
25 Frederick. Let me explain what we have in mind.

1 Because we have now produced so many documents
2 back and forth, we're into, you know, well over
3 40,000 pages of documents, it struck us as a
4 prudent and efficient use of both states'
5 resources to cite to materials in our brief --

6 SPECIAL MASTER: Mr. Frederick?

7 MR. FREDERICK: -- by the Bates numbers.

8 SPECIAL MASTER: Mr. Frederick, excuse me for
9 interrupting you. I'm going to get to the
10 question of the joint appendix or the deferred
11 appendix in a minute. My question was directed to
12 this sentence that seems to suggest that some
13 other briefs are going to be filed after the reply
14 briefs are filed.

15 MR. FREDERICK: That's what I was hoping --
16 I'm sorry if I was a bit long-winded in getting to
17 it. The point would be that the final briefs
18 would have citations to the joint appendix, but
19 that there would be no change in the briefs
20 substantively at all. The final briefs merely
21 would be a cross-reference to citations to the
22 appendix so that you would be able to identify
23 where in the appendix the particular document was
24 located.

25 SPECIAL MASTER: All right. Then what you're

1 saying is that the -- the suggestion is that a --
2 another copy of the main brief, reply brief, would
3 be filed which would have a reference to the
4 appendix in it?

5 MR. FREDERICK: That's correct.

6 SPECIAL MASTER: Let me ask you both -- well,
7 first of all, does -- what is New Jersey's
8 position on this?

9 MS. HOROWITZ: I think we were okay with the
10 suggestion. It's our understanding that everyone
11 would cite to things by Bates numbers and so on.
12 And, really, when you file the final briefs, it's
13 to substitute the joint appendix citations for
14 what you have already put in there instead.

15 SPECIAL MASTER: All right. Now, let me ask
16 you as a mechanical matter why it is impossible to
17 prepare the joint appendix contemporaneously with
18 the preparation of the final briefs or the initial
19 briefs and cite in the initial briefs to that
20 pagination?

21 MR. FREDERICK: Well, if I could address
22 that, Mr. Lancaster, it would be a very difficult
23 feat of coordination simultaneously with the
24 filing of each state's brief also to be stating
25 what is in the joint appendix and to be making

1 references to those joint appendix cites. And
2 when we see each other's briefs, there undoubtedly
3 will be additional material that we would want to
4 include in the joint appendix to respond to the
5 particular points and arguments made by the other
6 state. And having already prepared the appendix
7 would be -- we would have to file a supplemental
8 joint appendix. And our experience in briefing
9 these kinds of complex cases in, for instance, the
10 D.C. circuit, which routinely does the defer of
11 joint appendix method in the way that we have
12 proposed and is also encapsulated in Federal Rule
13 of Appellate Procedure 30, I think is the number,
14 this struck us as an efficient way to proceed for
15 both states.

16 SPECIAL MASTER: The one difference here is
17 that the Court of Appeals will take two years to
18 decide, so they don't care when they get their
19 documents. This Special Master does care when he
20 gets his documents because he wants to, A, have
21 read the briefs in a meaningful fashion promptly
22 upon filing and, B, be prepared for oral argument
23 by having digested them. And he is not looking
24 forward to stretching out the period between the
25 filing and the oral argument.

1 So let me go at it another way. Suppose --
2 as the briefs are being prepared, certainly,
3 counsel are going to have some sense -- a very
4 good sense of which documents they're going to
5 refer to. So it seems to me logical that a joint
6 appendix can be prepared in advance of the
7 finalization of the initial briefs.

8 Now, there may be at the last minute a sudden
9 inspiration that says, oh, what about document
10 XDXY? Maybe we ought to refer to that, too. And
11 it slips because of that. But I -- knowing good
12 counsel and thorough counsel, I think that is
13 extremely unlikely. And to the extent that one
14 party or the other cites to a document that
15 somehow is not thought through and a reference
16 needs to be made to another document in the reply
17 brief, a supplemental joint appendix or single
18 appendix, if it's only one side, could be added.

19 Now, I'm not trying to make your life more
20 difficult. So if this is impossible or too
21 onerous, please -- both of you please weigh in and
22 tell me so.

23 What I'm trying to accomplish here is a
24 schedule that gets all of the documents to me by
25 the final date, the date of the reply brief, which

1 by my schedule is February 15. And then having
2 had the main briefs in hand from December 22 and
3 having thoroughly digested them, I will be
4 prepared for oral argument shortly after the 15th
5 of February.

6 Anyway, tell me why I'm wrong.

7 MR. FREDERICK: Well, Mr. Lancaster -- this
8 is David Frederick -- I have -- I would like to
9 respectfully disagree about the efficiencies of
10 trying jointly to prepare an appendix midway
11 through the initial briefing process and then
12 trying to use the documents to anticipate what we
13 would be writing and arguing in response.

14 I appreciate your concern to have the
15 documents promptly upon the completion of the
16 reply briefs. And another way, which is commonly
17 done in Courts of Appeals, would be for each side
18 to prepare an appendix to its brief. And that way
19 you would have before you the initial brief, the
20 initial underlying appendix documents. But the
21 coordination for a task of this magnitude in terms
22 of the number of documents involved and in the
23 range of historical issues involved, would consume
24 quite a lot of additional resources on the part of
25 each state to do it in a joint fashion before the

1 briefing was completed.

2 SPECIAL MASTER: Ms. Horowitz?

3 MS. HOROWITZ: I agree that -- with what was
4 just stated. I think it's possible perhaps to
5 have a joint appendix when the opposition briefs
6 are filed; but it becomes difficult to do it in
7 advance of that because obviously you do not know
8 what the other side is going to say in the first
9 round of briefing and what documents you may need
10 to respond to those. And that's -- I think that's
11 the primary difficulty here.

12 SPECIAL MASTER: All right. Well, let me try
13 this, as suggested by Mr. Frederick, that each
14 party file with its initial brief its own
15 appendix. That does run the risk of some
16 duplication; but I think that's a minor concern.
17 And that each party then, to the extent necessary,
18 file a supplemental appendix with its reply brief.

19 Mr. Frederick?

20 MR. FREDERICK: Well, we appreciate your
21 willingness to accommodate our concerns. That
22 would be a perfectly satisfactory way to proceed
23 for Delaware.

24 SPECIAL MASTER: Ms. Horowitz?

25 MS. HOROWITZ: That sounds good. And just so

1 I understand, each side would do its own appendix
2 on the initial brief and also on the opposition
3 brief?

4 SPECIAL MASTER: Yes.

5 MS. HOROWITZ: As well as on the reply to the
6 extent that that was also necessary?

7 SPECIAL MASTER: The problem, of course, is
8 that we're going to have -- potentially we're
9 going to have multiple appendices; but I'm willing
10 to bear that burden in order to be able to be up
11 to speed when the -- when the final briefs are
12 filed.

13 So we'll put that in the -- in the change
14 order as well.

15 Let's see. That leaves us --

16 MR. FREDERICK: Mr. Lancaster, if I could
17 just interject for a moment. I would propose that
18 we consult with New Jersey to fashion a numbering
19 system and a way of presenting the appendices so
20 that it's as easy as possible to handle.

21 SPECIAL MASTER: That certainly is --
22 anything you can do to make it easier for me, I
23 appreciate. And I'm sure New Jersey does, too.

24 That brings us to the question of oral
25 argument, where, when, how long?

1 I, frankly, have no preference as to -- and I
2 appreciate your graciousness in suggesting that it
3 be held wherever I want it. I have no preference
4 in that. The considerations are that if we -- if
5 we do it outside of Portland, we will not have the
6 pleasure of Ms. Mason's company; and you won't get
7 to meet her. And she's thoroughly familiar with
8 this. On the other hand, there are only two of
9 us; and there are legions of you who will have to
10 travel.

11 I'm perfectly willing to go to Philadelphia.
12 Mark and I can get there fairly easily. We can do
13 it here. We can do it there. We can do it in
14 Washington. We can do it at any venue, any site
15 that is easiest for you with all -- everything you
16 will have to carry with you and with the numbers
17 that you have. All I ask is that you let me know
18 where you want to do it so that I can arrange for
19 a courtroom with the -- with the local court.

20 MR. SEITZ: Mr. Lancaster, this is C. J.
21 Seitz. We would be delighted to come to Portland.

22 SPECIAL MASTER: It's February.

23 MR. SEITZ: We would be delighted to come to
24 Portland in February.

25 SPECIAL MASTER: Okay. Ms. Horowitz?

1 I really -- if you prefer to talk to each
2 other, I have no personal preference here. I
3 don't have a dog in this hunt, so it doesn't
4 really matter.

5 MS. HOROWITZ: I think New Jersey's ideal
6 location would be Philadelphia. But, of course,
7 we'll go wherever we need to go.

8 SPECIAL MASTER: All right. Let me ask you
9 to talk to each other and pick a location. And if
10 you can't, then I will decide between the two of
11 you. But I -- I really have no preference here.
12 It doesn't matter.

13 Now, secondly, when. The briefs will be --
14 final briefs will be filed on the 15th. I will
15 have had your main briefs for a substantial period
16 of time, and I will be available for oral argument
17 shortly after you file. Let me suggest the date
18 of February 22, which is one week after the reply
19 briefs are filed. If that is not convenient, just
20 tell me; and we'll look for another date.

21 Ms. Horowitz?

22 MS. HOROWITZ: That sounds fine.

23 SPECIAL MASTER: Mr. Frederick?

24 MR. FREDERICK: I think that's a fine date.

25 SPECIAL MASTER: Okay. February 22 it is.

1 And that will be in the order.

2 Now, you both have requested that I set aside
3 a day; and I will do that. I have been stifled
4 enough in oral argument by the courts to cause me
5 to be perhaps overly generous in setting time. So
6 we will have a -- we will have a full day; and we
7 will work out the time that you each think you
8 need after the briefs have been submitted.

9 But please keep in mind that when we meet, I
10 will have fully digested your extensive and, I'm
11 sure, very well written briefs. Please also keep
12 in mind that my experience is that few souls are
13 saved after the first 15 minutes. And please keep
14 in mind that one of you at least -- one of you at
15 least will be telling the Supreme Court that I
16 lost my way in this process. And this will be a
17 great opportunity for you to rehearse and practice
18 condensing your argument to fit that court's much
19 less generous allocation of time for oral
20 argument.

21 But we will reserve the full day for that
22 process. So if you will let me know whether you
23 have been able to agree on a location within the
24 next week or 10 days. And if not, then I will
25 tell you where we're going to meet.

1 That pretty much completes my agenda. Is
2 there anything else, Ms. Horowitz?

3 MS. HOROWITZ: No, nothing here. Thank you.

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

5 MR. FREDERICK: No. That's all for Delaware.
6 Thank you.

7 SPECIAL MASTER: Thank you both very much.
8 Thank you all very much. I look forward to
9 getting your filings on Monday and Wednesday and
10 Friday of next week.

11 Thank you. Have a nice day.

12 MS. HOROWITZ: Thank you.

13 MR. FREDERICK: Thank you.

14 (The conference was concluded at 10:35 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 13th day of November, 2006.

Claudette S. Mason

Notary Public

My Commission Expires
June 9, 2012.