

SUPREME COURT OF THE UNITED STATES
No. 142, Original

STATE OF FLORIDA,)
)
Plaintiff,)
)
V.)
)
STATE OF GEORGIA,)
)
Defendants.)

TELEPHONE CONFERENCE before SPECIAL MASTER
RALPH I. LANCASTER, held at the law offices of Pierce
Atwood, LLP, at Merrill's Wharf, 254 Commercial Street,
Portland, Maine, on September 29, 2015, 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 Florida: PHILIP J. PERRY, ESQ.
OSVALDO VAZQUEZ, ESQ.
CHRISTOPHER M. KISE, ESQ.
JOHN COOPER, ESQ.
For the State of Georgia: BRITT GRANT, ESQ.
CRAIG S. PRIMIS, ESQ.
ANDREW L. PRUITT, ESQ.
For the U.S.A.: MICHAEL T. GRAY, ESQ.
Also Present: Mary Clifford

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1 SPECIAL MASTER LANCASTER: Mr. Winsor,
2 are you on?
3 Apparently not.
4 All right. Georgia?
5 MR. PERRY: Mr. Lancaster, just a slight
6 correction. It's Os Vazquez.
7 SPECIAL MASTER LANCASTER: Georgia?
8 MS. GRANT: Your Honor, this is Britt
9 Grant for Georgia. And I believe that Craig
10 Primis is in Washington, D.C., on the line.
11 MR. PRIMIS: Yes, your Honor. Craig
12 Primis from Kirkland & Ellis. I have my
13 colleague Andrew Pruitt on the line as well.
14 SPECIAL MASTER LANCASTER: United
15 States?
16 MR. GRAY: Yes. Good morning, your
17 Honor. This is Michael Gray for the United
18 States.
19 SPECIAL MASTER LANCASTER: Is there
20 anyone else who hasn't been identified who is
21 on the line?
22 All right, counsel. I understand what
23 the issue is. Before we get started, just to
24 make sure we're all on the same page, I'm
25 going to recite what I remember from my
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2 SPECIAL MASTER LANCASTER: Good morning,
3 counsel.
4 MR. PRIMIS: Good morning.
5 MR. PERRY: Good morning, your Honor.
6 Phil Perry for Florida.
7 SPECIAL MASTER LANCASTER: Unfortunately,
8 the case manager, Josh Dunlap, has a conflict
9 and is not here. So you will have to be
10 patient with me today because my brains are
11 not here to keep me straight.
12 Mary Clifford is here and, of course,
13 our extraordinary court reporter is here
14 also.
15 Please enter your appearances starting
16 with Florida.
17 MR. PERRY: Good morning, your Honor.
18 Phil Perry for Florida.
19 SPECIAL MASTER LANCASTER: Anyone else
20 with Florida?
21 MR. PERRY: Your Honor, we have an
22 assembled number in the conference room here,
23 none of which are planning to speak, but
24 Chris Kise, Os Fernandez, John Cooper, and
25 Allen Winsor may be on.

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1 memory without Josh here to correct me. And
2 if I'm incorrect in any respect, please
3 interrupt me.
4 My memory is that the depositions are
5 supposed to begin on June 1 of this year and
6 end on June 15 -- I'm sorry, January 15 of
7 2016. According to CMP 5.3, there should be
8 no more than three eight-hour days. And if
9 I'm doing my arithmetic correctly, in theory
10 that would mean that Georgia could take three
11 times 20 or 60, and Florida three times 44 or
12 132.
13 My memory is that Florida noticed --
14 already noticed 27 depositions and another 17
15 are anticipated.
16 Has Georgia noticed any?
17 MR. PRIMIS: Yes, your Honor. Georgia
18 has noticed 16 depositions including a
19 30(b)(6) deposition for the State of Florida.
20 SPECIAL MASTER LANCASTER: Have any
21 depositions already been taken, Florida?
22 MR. PERRY: Your Honor, they begin
23 tomorrow.
24 SPECIAL MASTER LANCASTER: Georgia?
25 MR. PRIMIS: No. Tomorrow is the first

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1 one.

2 SPECIAL MASTER LANCASTER: Do you -- let

3 me ask you; do you intend to have the same

4 attorney taking all the depositions or

5 different attorneys?

6 Florida?

7 MR. PERRY: Your Honor, we have at least

8 five attorneys who are prepared to take

9 depositions in this case and a number who are

10 prepared to defend. And we could and are

11 prepared to go forward with several

12 simultaneously on any given day.

13 SPECIAL MASTER LANCASTER: Georgia?

14 MR. PRIMIS: Your Honor, we will have

15 multiple attorneys covering the many

16 depositions that will be required, whether we

17 have a limit of 20 or some higher number.

18 SPECIAL MASTER LANCASTER: Okay. Let's

19 proceed to the argument. Florida, do you

20 want to state your position?

21 MR. PERRY: Yes, your Honor. Our

22 position is that the Supreme Court has

23 made clear that full and liberal factual

24 development is permitted in original actions.

25 And with your indulgence, your Honor, I would

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1 like to start by reading a very short quote

2 from the Texas Coastal Waters case where the

3 Supreme Court said, quote, the Court, in

4 original actions, passing as it does on

5 controversies between sovereigns which

6 involve issues of high public importance, has

7 always been liberal in allowing full

8 development of the facts.

9 Now, that's at 339 U.S. 707, 715. It

10 cites both Kansas versus Colorado and

11 Oklahoma V Texas for the same proposition.

12 And, indeed, similar statements can be found

13 both in other Supreme Court opinions and in

14 Special Master reports. One from 1996 says

15 almost the same thing, Special Master Verkuil

16 in the New Jersey versus New York case, which

17 I can read, too.

18 I will also note that we have gone back,

19 your Honor, to look at the number of

20 depositions taken in prior original actions.

21 We think 40 to 45 depositions is well within

22 the normal practice in original actions.

23 I can supply a couple of examples. In

24 the Kansas versus Colorado case in 1995 --

25 and there are several cases, Kansas versus

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1 Colorado; but this is in 1995 -- there was a

2 Compact dispute about groundwater pumping for

3 irrigation in Colorado. In the liability

4 phase of the case alone, the plaintiff Kansas

5 took 42 depositions. And collectively

6 between the parties throughout all phases of

7 the case there were, it appears, more than

8 200 depositions taken.

9 In the 1941 case, New Jersey versus New

10 York, higher salinities were alleged to cause

11 impacts on oysters in Delaware Bay that

12 resulted from reduced river flows similar to

13 some in this case. 123 witnesses were called

14 at trial in that case.

15 There are other examples. For example,

16 the Kansas versus Colorado case in 1907,

17 Arizona versus California case in 1963 where

18 the parties called more than 300 trial

19 witnesses.

20 We found only one case, your Honor, in

21 searching through the records that are

22 available where there was any kind of

23 deposition limit. And that wasn't a

24 deposition limit on the total number that

25 could be taken but, instead, on the number

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1 that applied to depositions of amici. And in

2 another state, North Dakota -- that was in

3 the Montana versus Wyoming case. And even

4 with those third-party limits, which I

5 believe were a limit of 10 for the other

6 state, for example, the total number of

7 depositions taken by the parties was more

8 than 60 between them. And that case was

9 about a Compact; and the issue was, I would

10 suggest, far more narrow than our issues

11 here. It dealt with a change in Wyoming on

12 the Yellowstone River from flood irrigation

13 to sprinkler irrigation.

14 Here I would say that the scope of the

15 activities in this case warrant at least 40

16 to 45 depositions. Let me start, if I might,

17 with Georgia's interrogatory responses. They

18 have identified 162 personnel with relevant

19 knowledge from 10 Georgia state agencies.

20 Georgia, in that same interrogatory response,

21 identified at least 20 topics relevant to

22 discovery with respect to their personnel

23 alone.

24 I can read through those, but let me

25 instead summarize that we are dealing with a

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1 dispute with a 25-year history going back
 2 decades, parties engaged in comprehensive
 3 studies together. There was a failed
 4 Compact, multiple rounds of federal agency
 5 litigation. And here we are seeking not only
 6 that historical background, but also -- as
 7 it's relevant, but also specific data,
 8 documents, and other information from 35
 9 Georgia counties, 28 water districts, on
 10 municipal, industrial, and agricultural water
 11 withdrawals and returns, water planning
 12 information, and the like.

13 And, further, with respect to some of
 14 the third-party activity we're engaged in,
 15 we believe that our discovery will show
 16 that Georgia's position in this case is
 17 contradicted by decades of analyses by its
 18 own university scientists, by some number
 19 of federal scientists, and a range of other
 20 independent analysts.

21 So, in short, there is quite a lot for
 22 us to cover here. And I might hasten to add
 23 that it's premature at this stage for us to
 24 know precisely all of the nonnoticed
 25 deponents at this stage.

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1 itself call for, we think, maybe five to
 2 seven witnesses. So I would submit, your
 3 Honor, that Georgia itself may be already
 4 near or soon to exceed its own proposed
 5 limit.

6 Thank you, your Honor.
 7 SPECIAL MASTER LANCASTER: Thank you.
 8 Georgia?

9 MR. PRIMIS: Yes, your Honor. Thank you
 10 for scheduling this hearing on such short
 11 notice. We appreciate it.

12 The Case Management Plan 5.2.8
 13 specifically contemplates that the Special
 14 Master will determine the number and length
 15 of depositions; and we have reached out to
 16 your Honor under that provision to ask that
 17 we set some reasonable depositions that will
 18 allow both sides to get the information they
 19 need, but that will provide for more focused
 20 and efficient discovery and avoid what we're
 21 concerned about, which is a scattershot
 22 approach where a lot of days and hours are
 23 spent in depositions and preparing for
 24 depositions that could have been avoided with
 25 some foresight and discussions between the

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1 Complete document discovery is due on
 2 November 10 as are interrogatory responses.
 3 And as we're beginning our depositions now,
 4 we certainly will want to follow the leads.
 5 We want to pursue information that we get
 6 from initial witnesses with others.

7 As I indicated a bit ago, we have a plan
 8 to complete all these depositions by the
 9 deadline. We're contemplating 12 to 14 in
 10 October, a similar number in November. And
 11 we think that given our staffing and Mr. Primis's
 12 staffing -- both of the states are represented
 13 by large law firms -- that we can comfortably
 14 complete that. Certainly a lot of work, but
 15 we don't have any doubt that it's doable.

16 One final note, your Honor, if I might.
 17 It's been a pleasure to cooperate with
 18 Mr. Primis in addressing this dispute
 19 together. I will note that I believe Georgia
 20 served to date 13 notices. They, I think,
 21 have others to serve. Among their existing
 22 notices are several -- I should say three
 23 30(b)(6)'s with collectively maybe 40
 24 specifications or more. The 30(b)(6) to
 25 Florida has 28 specifications and would

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1 parties and with some meaningful limits.
 2 As Mr. Perry indicated, they already
 3 noticed or identified 34 separate
 4 depositions. They have eight to 10 more,
 5 although I think Mr. Perry -- I heard him say
 6 today they believe it's at least 40 to 45.
 7 And as I suspect, with no limit they will
 8 also notice up additional people that they
 9 learn about or identify through this initial
 10 slate of 45, if time permits.

11 And as your Honor noted, the depositions
 12 under the Case Management Plan are allowed to
 13 go for up to three days. So we're looking at
 14 multiples of that. It could be two to three
 15 times the 45 minimum that they have
 16 identified. And that's not to even mention
 17 the depositions that Georgia is entitled to
 18 take and that we plan to take. And if there
 19 is no limit, which is what Florida wants, we
 20 will likely have to increase the number that
 21 we take just to counter all the discovery
 22 that Florida is taking.

23 We have been clear all along with
 24 Florida that both sides ought to be able to
 25 live within reasonable limits. We have had a

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1 lengthy meet and confer. I initially raised
 2 this limit idea back in August. We reraised
 3 it on September 11. And Florida said it
 4 would consider it. And since that time --
 5 right after I indicated that we believed
 6 there ought to be limits and that we would
 7 consider seeking that relief from the Special
 8 Master, they issued six deposition notices.
 9 On the 15th I said we should accelerate this
 10 discussion and get to the Special Master
 11 quickly if we can't resolve it. And in the
 12 next week they issued 12 more deposition
 13 notices. And so at that point we said this
 14 is getting a little out of hand, and we
 15 reached out to your Honor on September 23.
 16 In order to get all the work that needs
 17 to be done by January 15, we think it is --
 18 it is essential to have some limitation on
 19 the number of depositions. There are only 73
 20 business days left in discovery. And even
 21 with large teams from multiple law firms that
 22 are handling this case, three times 80 or 90
 23 depositions could be over 200 days of
 24 depositions. And it's just not necessary;
 25 and we shouldn't do -- undertake that kind of

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1 work just for the sake of doing it.
 2 Mr. Perry noted that we have served a
 3 30(b)(6) notice. And given the size and
 4 scope of the number of people working on
 5 these issues on each state, we think that's
 6 the most efficient way to get at the
 7 discovery that's needed. And rather than
 8 have both sides guess at who within each
 9 state's bureaucracies and organizations have
 10 pieces of information that could be relevant,
 11 we proposed to have a 30(b)(6) to compile
 12 that. And if Florida is correct that they
 13 can handle our 30(b)(6) in five to seven
 14 witnesses, that would be terrific and quite
 15 efficient because we would then get the most
 16 essential information with just five to seven
 17 people instead of searching around the State
 18 of Florida to find everyone who could have
 19 information on those issues. And I suspect
 20 that a number of those people who would be
 21 identified for those topics -- and we're
 22 still awaiting their identification -- would
 23 be people we would depose individually
 24 anyways. So we can economize and streamline
 25 by doing it that way.

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1 Instead, what we have been receiving are
 2 multiple deposition notices to the same units
 3 or the same organizations with multiple
 4 people who have overlapping information where
 5 two, three, four depositions are being
 6 noticed for information that could be easily
 7 sought from the one person who is most
 8 knowledgeable and best situated to provide
 9 it.
 10 That's happened with Georgia's hydrology
 11 unit where multiple modelers are being sought
 12 where there is one person who could likely
 13 provide all the information. The Georgia
 14 Water Resources Institute, similar multiple
 15 deposition notices. U.S. Fish and Wildlife,
 16 I believe they have indicated they want four
 17 people from that organization.
 18 And then there is this group, the ACF
 19 Stakeholders, who have done their own study
 20 of the water in the ACF Basin. And Florida
 21 ran into a snag with that group. Georgia
 22 doesn't control it. It's independent. But
 23 they couldn't get the modeling and data and
 24 information that they wanted for their
 25 experts from the ACF Stakeholders. So

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1 instead of moving to compel and just getting
 2 the data that their experts need, they
 3 noticed up everyone who was involved in
 4 conducting that study, generating yet
 5 additional duplicative depositions.
 6 So what we have proposed and tried to
 7 engage with Florida on is to set a reasonable
 8 limit, work with each other, and meet and
 9 confer to identify the people who have the
 10 greatest amount of information and will
 11 provide the biggest bang for the buck in
 12 terms of accomplishing the discovery that
 13 needs to get done.
 14 And, of course, if there are critical
 15 people or critical issues as we start to wrap
 16 up our work in January that need to get done,
 17 both sides would be reasonable and allow for
 18 some bit of additional discovery before the
 19 deadline hits. We just think it's a much
 20 more orderly and efficient way to go rather
 21 than try to get everybody who may have
 22 information and -- scheduled and done in this
 23 short time frame.
 24 The -- just to respond to one point that
 25 Mr. Perry made with regard to the limits in

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1 other cases, one of the things that original
 2 actions have been criticized for is for going
 3 on at great length and for not coming to a
 4 close. Your Honor has taken a strong stand
 5 against that with some very firm deadlines
 6 that we have all been working against. But
 7 just because some cases in the past have
 8 ballooned somewhat out of control resulting
 9 in hundreds of depositions, it's hard to see
 10 how that would be necessary or appropriate in
 11 any case; it certainly wouldn't be a
 12 precedent for the work that needs to get done
 13 here in the remaining 73 business days for
 14 discovery.

15 So we believe that both sides working
 16 together can get it done with many fewer
 17 depositions, much less cost and imposition on
 18 both the states and these third parties.
 19 That's why we raised the issue with your
 20 Honor.

21 SPECIAL MASTER LANCASTER: Thank you
 22 very much.

23 Does the United States care to weigh in
 24 on this?

25 MR. GRAY: No, your Honor. At this
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1 point no federal employees have been noticed
 2 for deposition that I know of. And I will
 3 just note that when they are noticed, each
 4 agency will have to apply Touhy regulations
 5 and process to determine whether to make
 6 them available and under what limits they
 7 might be available. Also, it's not a
 8 foregone conclusion that the federal
 9 employees will be made available for
 10 depositions even when they are noticed.

11 But other than that, our interests at
 12 this point are primarily in monitoring the
 13 proceedings.

14 Thank you.

15 SPECIAL MASTER LANCASTER: Florida, do
 16 you wish to make any comments in view of
 17 Georgia's argument?

18 MR. PERRY: Just briefly, your Honor, if
 19 I might.

20 First, we think our real number is 45.
 21 We don't currently think that we're going to
 22 go much above that. It's hard at this stage
 23 to rule out the possibility we might need to
 24 go above that. We might be below that
 25 number.

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1 We don't anticipate that many
 2 depositions will go the full three days.
 3 Many will be only one day. Perhaps the vast
 4 majority will be one day or perhaps two days.

5 Mr. Primis made a comment about the ACF
 6 Stakeholders issue. Just to clear the air
 7 briefly on that, if I might, we have hundreds
 8 of thousands of pages of material from the
 9 consultants that prepared the study that's at
 10 issue there, and that's what we're deposing
 11 people on currently. That starts tomorrow.

12 So it's not as if we are out fishing for
 13 documents. We have documents. We have many
 14 documents. They're -- there are some things
 15 that are being withheld still; and we may
 16 require some help going forward with that.
 17 But we're trying to do that in an economical
 18 fashion.

19 And, frankly, we were trying to avoid
 20 imposing a significant expense upon the ACF
 21 Stakeholder group because it has limited
 22 funding, at least that's our understanding.

23 So that's the way we're proceeding.
 24 There may be multiple people in key parts of
 25 Georgia's state framework, state agencies,
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1 that we need to depose, particularly among
 2 the modelers on hydrology because that is a
 3 critical element at the core of this case.
 4 And they have slightly different
 5 responsibilities. They may have been
 6 overlapping. But we hesitate to accept the
 7 invitation from Georgia that we just depose
 8 the people they designate.

9 So with that I would like to close, your
 10 Honor.

11 SPECIAL MASTER LANCASTER: Thank you
 12 very much.

13 You mentioned ACF. Does anyone here
 14 know Mr. Pendergrast?

15 MR. PERRY: Your Honor, it's Phil Perry
 16 from Florida.

17 And, your Honor, I have had a couple
 18 conversations with Mr. Pendergrast over time.

19 SPECIAL MASTER LANCASTER: Anybody from
 20 Georgia know him?

21 MR. PRIMIS: Your Honor, this is Craig
 22 Primis from Georgia.

23 I have not personally spoken with him.
 24 I believe some people from within the state
 25 AG's Office have dealt with Mr. Pendergrast.

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1 MS. GRANT: This is Britt Grant.
 2 And Sarah Warren, the deputy Solicitor
 3 General, has spoken with Mr. Pendergrast.
 4 SPECIAL MASTER LANCASTER: Well, I hope
 5 you weren't offended by the brief e-mail I
 6 sent him last night. His message came in
 7 when I was out of the office around 5 o'clock.
 8 And I dictated the response to him, and Mary
 9 sent it. But I meant what I said, even if it
 10 did sound abrupt.
 11 How about Russell Willard, the assistant
 12 AG in Georgia; does anyone know him?
 13 MS. GRANT: Yes, sir. This is Britt
 14 Grant in Georgia. I know Mr. Willard.
 15 SPECIAL MASTER LANCASTER: Is he --
 16 MR. PERRY: This is Phil Perry from
 17 Florida.
 18 Our team here have had a couple
 19 conversations with Mr. Willard over time.
 20 SPECIAL MASTER LANCASTER: All right.
 21 Well, I assume you don't expect me to rule at
 22 the moment. I will want to see the
 23 transcript and get the citations and take a
 24 look at them and be able to consult with my
 25 case manager, Mr. Dunlap. We'll get you a
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1 decision as soon as possible, understanding
 2 the time limits that you have and the need
 3 you have for resolution of this issue.
 4 Before we --
 5 MR. PERRY: Your Honor?
 6 SPECIAL MASTER LANCASTER: Yes, sir?
 7 I'm sorry. What did you say?
 8 MR. PERRY: I was just registering my
 9 thanks, your Honor.
 10 SPECIAL MASTER LANCASTER: Okay. Who is
 11 that? Mr. Perry?
 12 MR. PERRY: It's Phil Perry from
 13 Florida.
 14 SPECIAL MASTER LANCASTER: Thank you,
 15 Mr. Perry.
 16 While I have got you, let me -- I
 17 probably shouldn't do this; but I can't
 18 resist. You have heard me over and over
 19 compliment competent counsel -- and,
 20 thankfully, you all are competent counsel --
 21 on each progress report, which always states
 22 that you are meeting and conferring; and each
 23 report also recites the increasingly
 24 expanding number of documents, hard copies
 25 and electronic, you're chasing. From a
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1 distance -- and I readily admit that I don't
 2 know what I'm talking about here -- it
 3 appears to me that if a document contains the
 4 word "water" you each want to see it. And if
 5 a witness uses that word, you want to depose
 6 him.
 7 Now, we all know Florida wants more
 8 water; Georgia thinks Florida has enough, and
 9 that, ultimately, the Supreme Court will
 10 decide who is right and who is wrong.
 11 Stepping back, I wonder if another meet
 12 and confer session on limiting the scope of
 13 discovery would be productive. You could
 14 talk about the issues you each believe
 15 necessary to enable and inform judgment; and,
 16 if you agree, you could limit discovery going
 17 forward to those issues, hopefully, thereby
 18 limiting the scope of the entire process.
 19 The electronic discovery procedure agreement
 20 is a perfect example of what such a
 21 cooperative approach could produce.
 22 Now, there is no need to comment. This
 23 is just a suggestion on my part along with
 24 the usual suggestion about continuing further
 25 settlement talks again.
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1 Anything further?
 2 Florida?
 3 MR. PERRY: No, your Honor.
 4 SPECIAL MASTER LANCASTER: Georgia?
 5 MR. PRIMIS: No, your Honor.
 6 SPECIAL MASTER LANCASTER: United
 7 States?
 8 MR. GRAY: No, your Honor.
 9 SPECIAL MASTER LANCASTER: Thank you
 10 all. We'll get you the decision just as soon
 11 as I possibly can.
 12 MR. PERRY: Thank you.
 13 MR. PRIMIS: Thank you.
 14 MS. GRANT: Thank you, your Honor.
 15 (The telephone conference was concluded
 16 at 10:26 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 25 pages are a correct
transcript of my stenographic notes of the
above-captioned proceedings.

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 1st day of October, 2015.

Notary Public

My Commission Expires
June 9, 2019.

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