

SUPREME COURT OF THE UNITED STATES

NO. 134, ORIGINAL

ORIGINAL

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

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
May 5, 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.
 WILLIAM E. ANDERSEN, ESQ.
 DEAN JABLONSKI, ESQ.
 AMY C. DONLON, ESQ.

For the State of Delaware: DAVID C. FREDERICK, ESQ.
 SCOTT K. ATTAWAY, ESQ.
 COLLINS J. SEITZ, JR., ESQ.
 MATTHEW F. BOYER, ESQ.

Also Present: MARK E. PORADA, ESQ.

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PROCEEDINGS

SPECIAL MASTER: Well, I think we're all assembled then.

I have Mark Porada and Claudette Mason with me here.

And I would ask that we begin, as usual, with you identifying all of those who are present. And I would ask that when you speak, you identify yourself for the record by name.

We'll start with New Jersey.

MS. HOROWITZ: Yes. This is Deputy Attorney General Rachel Horowitz. And also with me are Deputy Attorney General William Andersen, Deputy Attorney General Dean Jablonski, and Deputy Attorney General Amy Donlon.

SPECIAL MASTER: Good morning, counsel.

MS. HOROWITZ: Good morning.

COUNSEL: Good morning.

SPECIAL MASTER: Delaware?

MR. FREDERICK: David Frederick and Scott Attaway in Washington, D.C.

MR. SEITZ: And C. J. Seitz and Matthew Boyer in Wilmington, Delaware.

SPECIAL MASTER: Good morning to all of you. Again, counsel, thank you for your progress

1 reports. We appear to be right on track, right on
2 schedule; and I'm very hopeful that we will be
3 able to continue to stay the course. As I have
4 said before, this progress has to be due to -- has
5 to be due to your continued cooperation with and
6 civility toward one another. And I thank you for
7 that.

8 Turning to your progress reports, which I
9 again thank you for, I see nothing in New Jersey's
10 that requires discussion.

11 Ms. Horowitz, am I correct?

12 MS. HOROWITZ: Just one minor item that I
13 spoke with Mr. Frederick about earlier this
14 morning. It's not on the progress report. It
15 relates to the date by which interrogatories,
16 document requests and third-party discovery has to
17 be served of May 29, which is Memorial Day. So I
18 talked to Mr. Frederick this morning about, with
19 your permission, moving that to the Wednesday,
20 which is the 31st, since the 29th is Memorial Day.

21 MR. FREDERICK: We have no objection,
22 Mr. Lancaster, to that shift.

23 SPECIAL MASTER: That would apply to both
24 parties, and that certainly is reasonable; and I
25 will accommodate that in my next change order.

1 Anything else, Ms. Horowitz?

2 MS. HOROWITZ: No. There is nothing else.

3 Thank you.

4 SPECIAL MASTER: I note from Delaware's
5 progress report that it plans to file its brief
6 today. We're looking forward to that. New Jersey
7 is scheduled to reply on the 22nd. And I will
8 then promptly advise you if I believe oral
9 argument is necessary.

10 I'm assuming from prior conversations that at
11 least one counsel intends to request it. Am I
12 correct in that?

13 New Jersey?

14 MS. HOROWITZ: I think that will depend on
15 what we receive from Delaware.

16 SPECIAL MASTER: Mr. Frederick?

17 MR. FREDERICK: I tend to think that oral
18 argument will assist in providing further answers
19 to questions that the court might have, but
20 certainly would defer to your wish on this,
21 Mr. Lancaster.

22 SPECIAL MASTER: It broke up just a little
23 bit.

24 Claudette, did you get that?

25 No.

1 I'm sorry. She didn't get that. Would you
2 say that again, please, Mr. Frederick, the --
3 there is some static we're getting on this end.
4 And I will -- I may ask you to repeat things.

5 Claudette, interrupt if you're not getting it
6 so that we know.

7 I'm sorry, Mr. Frederick, would you repeat
8 what you just said.

9 MR. FREDERICK: Certainly. My general view
10 is that oral argument helps in resolving issues
11 where there can be further elaboration from what
12 is in the papers and in answering questions that
13 the court might have, but that we would certainly
14 defer to your wishes as to whether you thought
15 that that would materially assist your decision in
16 the matter.

17 SPECIAL MASTER: We're going to hang up and
18 call you back to see if we can get a clear line
19 because, once again, I'm sorry to say that broke
20 up. And if we're going to have a complete
21 transcript, we need to have a clear line.

22 So, forgive me. Hopefully, it's on our end;
23 and we'll place the call immediately.

24 MS. HOROWITZ: Okay.

25 MR. FREDERICK: Do you want us to call back

1 into this number, Mr. Lancaster?

2 SPECIAL MASTER: No, I think you -- well,
3 you're on -- I don't know enough about technology
4 to know. If we hang up --

5 MS. HOROWITZ: Mr. Lancaster, I'm not at my
6 normal office number because we're in a conference
7 room. So I will have to get that number.

8 COUNSEL: Just give us a second. I'll get
9 the number.

10 SPECIAL MASTER: All right. Well, I'm --

11 MR. FREDERICK: Mr. Lancaster, we're at a
12 dial-in number --

13 SPECIAL MASTER: Right.

14 MR. FREDERICK: -- provided by your
15 assistant.

16 SPECIAL MASTER: Right.

17 MR. FREDERICK: And we can dial that number
18 in again.

19 SPECIAL MASTER: Well, let me try it with
20 just us hanging up and calling back in. You --

21 MS. HOROWITZ: Okay. Mr. Lancaster, if you
22 could give us just a moment, we just need to get
23 the number for this phone we're at. It's not on
24 the phone.

25 SPECIAL MASTER: Right. Ms. Horowitz?

1 MS. HOROWITZ: Yes?

2 SPECIAL MASTER: I --

3 MS. HOROWITZ: It's 609 --

4 SPECIAL MASTER: Yes. Hold on just a minute.

5 I am the most technologically unqualified person
6 on this conference; but I think that if you people
7 just stay on the line, I will hang up.

8 MS. HOROWITZ: Okay.

9 SPECIAL MASTER: And then I will call back
10 in, and we'll see if it clears up. If that
11 doesn't work, then we'll all have to hang up and
12 try again.

13 MS. HOROWITZ: Okay. But the number that
14 we're at, for your information, is 633-0698.

15 SPECIAL MASTER: All right. Fine.

16 MS. HOROWITZ: This is Rachel Horowitz.

17 SPECIAL MASTER: All right. Fine. Thank
18 you.

19 MS. HOROWITZ: Thank you.

20 SPECIAL MASTER: We'll be right back.

21 (Discussion off the record.)

22 SPECIAL MASTER: Counsel, I'm back on line.

23 I still hear a little buzzing; but we'll try it
24 again and see if -- if we can -- if we can get
25 through it without having to require everybody to

1 hang up.

2 Now, Mr. Frederick, for the third time would
3 you please make your comment with -- I apologize
4 for the need to do it; but it's necessary for the
5 record.

6 MR. FREDERICK: Certainly. Mr. Lancaster, my
7 point was that I generally find oral argument to
8 be helpful, but that we would defer to your wishes
9 as to whether it would facilitate your decision in
10 the matter.

11 SPECIAL MASTER: That's fine then. I, as I
12 said, will review the materials as soon as they're
13 complete; and I will advise you promptly. And
14 we -- if necessary, we can schedule oral argument
15 at a mutually convenient time.

16 Now, I noticed from Delaware's progress
17 report that it anticipates filing a motion to
18 compel production from BP. I'm pleased to see
19 that there's been partial success. And as I
20 always do, I again urge counsel to continue
21 discussions with BP's counsel to try to resolve
22 any remaining issues that have arisen.

23 Now, my -- my following comments may simply
24 be because of my unfamiliarity with what has
25 occurred to date. But as I understand it -- and

1 you correct me if I'm wrong, Mr. Frederick --
2 Delaware filed -- served a subpoena on BP which
3 required the production of documents. Some
4 documents have been produced in response to that
5 subpoena, but issues have arisen regarding the
6 production of certain other documents, including
7 at least an issue regarding common interest. And
8 the question I have for you, Mr. Frederick, is
9 whether the procedure to be followed here is for
10 Delaware to file a motion to compel production or
11 rather pursuant to the terms of the Case
12 Management Plan, and particularly section 13, the
13 ball is not in BP's court to file a motion either
14 for partial quashing of the subpoena or objecting
15 to the portion and breadth of the subpoena.

16 So I refer you to the section 13 of the Case
17 Management Plan, and particularly to the preamble
18 and section 13.2.

19 MR. FREDERICK: Thank you, Mr. Lancaster.
20 We -- we will raise that with BP.

21 SPECIAL MASTER: Well, that's fine. But it
22 seems to me that -- and I suppose you could say
23 that it doesn't matter which barn you -- well,
24 which door you enter into as long as you get in
25 the barn. On the other hand, we have a specific

1 procedure pursuant to Rule 45 for the processing
2 of problems with subpoenaed parties, including --
3 including subpoenas served on nonparties to this
4 process. And I think it makes sense to follow
5 that process, but I'm just trying to avoid
6 potential problems here. So it seems to me that
7 it is -- the ball is in BP's court. But, of
8 course, counsel are free to do whatever they want
9 to subject, of course, to my reaction if the
10 process is not correctly followed.

11 Now, in either event, assuming something
12 is -- has to be placed before me, the suggestion
13 is made in Delaware's progress report that the
14 motion, whether filed by Delaware or filed by BP,
15 in whatever form, would be served on May -- filed
16 and served on May 15 along with an accompanying
17 brief, and that Delaware and BP have agreed that
18 the schedule would be with a reply on June 9 and a
19 further reply on June 22. And I -- again, I'm not
20 familiar with the complexity of the matter; but I
21 wonder aloud why it's necessary to have
22 approximately 25 days between the filing of
23 whatever motion is filed and the first reply
24 brief.

25 It seems to me these issues were foreshadowed

1 at least in April because I remember that in the
2 progress report that was filed in April it was
3 mentioned that this might be a possibility. And
4 knowing that at least on Delaware's side --
5 because I don't know -- well, I guess I do. Is it
6 Stuart Raphael who is representing BP in this
7 matter?

8 MR. FREDERICK: Yes.

9 SPECIAL MASTER: Then -- then I can say with
10 confidence I think that there's competent counsel
11 on both sides of this issue. And I would be very,
12 very surprised if competent counsel discussing
13 this issue had not had the issue thoroughly
14 researched in order to have meaningful discussion.
15 So it seems to me that it's simply a matter of
16 putting that research on both sides on paper in
17 order to submit it.

18 And so I will respond once the first matter
19 is filed by either counsel. But I can tell you
20 that tentatively I think that June 2 for the reply
21 and June 9 for the sur-reply is a more reasonable
22 schedule than the one that has been suggested to
23 me. So you can anticipate that unless counsel are
24 able to persuade me otherwise, that there -- the
25 schedule that you suggested is going to be

1 shortened.

2 Now, I'll pause so that you can persuade me,
3 if you want to, that I'm in error here.

4 MR. FREDERICK: Mr. Lancaster, I think that
5 it may be appropriate for us to confer again with
6 Mr. Raphael because these dates were set on
7 section 10 of the Case Management Order on when
8 motions to compel would be done. And I think we
9 were attempting to accommodate the various
10 schedules of counsel in coming up with those
11 dates. But if the briefing is to be flipped such
12 that BP has to provide a motion to quash or
13 partially quash the subpoena, then that obviously
14 affects what counsel's plans were in producing
15 those briefs. So if I could suggest that we
16 confer with Mr. Raphael and perhaps communicate
17 with you by e-mail the -- an alternative proposal.

18 SPECIAL MASTER: Sure. Well, that's fine.
19 I'm assuming that when you served your subpoena in
20 compliance with the provisions of section 13, you
21 served a copy of section 10 so that he's fully
22 familiar with that. And as far as the schedule
23 for motions is concerned, that was directed and is
24 directed to events subsequent to the service of
25 interrogatories and requests to produce and not

1 directed to separate motions that would arise out
2 of other discovery matters. But please do talk to
3 Mr. Raphael and address it by e-mail with me. I'm
4 not trying to be difficult here, but I do want to
5 keep things on track.

6 Now, if there is a personal problem, as there
7 was, Mr. Frederick, with your Supreme Court
8 schedule, we can address that; but barring that, I
9 think Hunton & Williams has enough lawyers so that
10 they can probably produce something in fairly
11 short order.

12 But I'll wait to -- I don't want to be
13 draconian here. I'll await your e-mail response
14 after you have had a chance to confer with him.

15 MR. FREDERICK: Thank you. Just so the
16 record is clear, we served the entire Case
17 Management Order on Mr. Raphael so that he would
18 become familiar with all the various procedures
19 contained in it.

20 SPECIAL MASTER: Terrific. Then he ought to
21 be familiar with section 13 as well as section 10.

22 MR. FREDERICK: There is one other matter,
23 Mr. Lancaster, that we would like to raise, which
24 is that in their partial response to our request
25 for documents in the subpoena, they designated a

1 log as confidential that contains descriptions of
2 communications -- very extensive communications,
3 many, many communications on a daily basis over a
4 multi-month period. They have designated the
5 entire log, which contains literally hundreds of
6 communications between BP and New Jersey
7 officials, some of whom are lawyers and some of
8 whom are not, as confidential. And we take issue
9 with that designation.

10 For purposes of our opposition to New
11 Jersey's motion to strike, we will be filing a
12 redacted and an unredacted version that accounts
13 for these confidentiality designations; but we
14 wanted to apprise you of our objection to the
15 designation as this is a public matter, and there
16 is no reason why a log of this nature needs to be
17 designated as confidential and we will be moving
18 appropriately for that designation to be removed.

19 SPECIAL MASTER: And at the time you file the
20 motion, I assume you will file your brief?

21 MR. FREDERICK: I will file -- I don't
22 know -- you know, we will re-examine the Case
23 Management Order. I don't know that this --

24 SPECIAL MASTER: Ms. Mason said she didn't
25 hear. You said I don't know that this -- and then

1 there was a static; and we couldn't pick up that
2 word.

3 MR. FREDERICK: This particular type of
4 motion would be encompassed within our response to
5 a motion to partially quash the subpoena. We will
6 examine the Case Management Order and determine
7 the appropriate means by which to lodge our
8 objection to BP's confidentiality designation for
9 the log.

10 SPECIAL MASTER: All right. That's fine. We
11 look forward to receiving that as well. And we
12 will turn to it promptly.

13 MS. HOROWITZ: Mr. Lancaster, this is Rachel
14 Horowitz. It's likely that whatever motion is
15 filed, that we would be weighing in on it. And
16 obviously that -- at that time it would need to be
17 coordinated with Delaware and BP. But at this
18 point, since it's not clear who is making a motion
19 and so on and so forth, I'm not sure where we
20 would fit into the picture in terms of timing.

21 SPECIAL MASTER: Well, I'm sure that
22 Mr. Frederick will keep you informed of that and
23 copy you on any e-mails which are sent to me. And
24 as the -- as the two matters go forward, that is,
25 the question of the production under the subpoena

1 and the question of the confidentiality issue, I'm
2 assuming that -- and perhaps I'm in error here;
3 but I'm assuming that New Jersey's position will
4 be similar to, if not identical to that of BP and
5 so that the coordination, if that's the case,
6 should -- should result in a timing so that we
7 don't have three separate filings, but that we
8 have one and one; that is, that your filing would
9 be timed to and on the same schedule as BP's. Is
10 that acceptable?

11 MS. HOROWITZ: Yes.

12 MR. FREDERICK: Mr. Lancaster, I would like
13 to object to New Jersey's suggestion that it has
14 an interest in responding to a motion by BP to
15 partially quash the subpoena where we're asking
16 for documents that are entirely within BP's
17 custody and control, and these happen to be
18 communications that may have been made by New
19 Jersey officials. But if the purpose of New
20 Jersey's participation is functionally to double
21 the page limit that their side has for the
22 presentation of these arguments, that works an
23 unfairness to Delaware and is inappropriate.

24 MS. HOROWITZ: Our purpose is to put forth
25 our position on the record. It's not to get a lot

1 more pages out of the situation, Mr. Lancaster.

2 SPECIAL MASTER: Right. Mr. Frederick, I
3 can't resolve that without a record. And so if
4 you believe that whatever Ms. Horowitz submits is
5 duplicative, is simply intended to expand the
6 numbers of pages, you can object to that at the
7 time that she files it. And I will either read it
8 or I will reject it at that time.

9 Have we beaten this particular horse to
10 death? Is there anything else that we can discuss
11 on the question of BP's production?

12 New Jersey?

13 MS. HOROWITZ: Just one point I would like to
14 make. As you're aware, it is our position that
15 the pending projects and so on and so forth are
16 not really relevant to the issues in the case. So
17 to a certain extent we think it makes sense to
18 have the relevancy issue dealt with as a primary
19 matter; and possibly that makes the rest of
20 this -- these motions not necessary. I think that
21 may have been part of the reason that the timing
22 has been set up as it was with respect to the
23 briefing and the various motions.

24 SPECIAL MASTER: I am -- I am not unmindful
25 of that. And I don't want to cause counsel to

1 have to spin their wheels. On the other hand, I
2 anticipate that I will rule fairly promptly, and I
3 think that it makes sense to stay the course here
4 and to keep the schedule even though it may turn
5 out that some of the briefing is unnecessary. I'm
6 sorry for that, but I am concerned about slipping
7 the schedule. So that I thank you, Ms. Horowitz,
8 but I prefer to hold to the schedule.

9 MS. HOROWITZ: Yes. And we appreciate that.

10 Thank you.

11 SPECIAL MASTER: Delaware?

12 MR. FREDERICK: Well, I just would like to
13 point out that their motions aren't really
14 directed in any substantial way to the other
15 projects. We're addressing that in our opposition
16 brief that we will file today. The motion was
17 directed at the BP project. And I would point
18 out, Mr. Lancaster, that there's no small irony in
19 New Jersey using its initial motion to reopen the
20 decree and filing reams of paper in the Supreme
21 Court with affidavits on all the various projects
22 as a justification for initiating this action and
23 now saying it's relevant for them to demonstrate
24 why they should win the lawsuit, but it's not
25 relevant to show -- for us to show why they should

1 lose it. That's a fundamental unfairness inherent
2 in New Jersey's position.

3 SPECIAL MASTER: Well, I'm sure that you will
4 express that in writing at some point; and I will
5 address it at some point.

6 Other than that, is there anything else to be
7 said, Delaware, in regard to the BP side of this
8 equation -- in regard -- the transcript will not
9 reflect that cough -- in response to the BP side
10 of this issue?

11 Delaware?

12 MR. FREDERICK: No, sir.

13 SPECIAL MASTER: Okay. Thank you. We
14 will -- let me just ask before we leave this, are
15 there any other issues that have arisen since the
16 filing of the progress reports that we ought to
17 discuss apart from scheduling the next conference
18 call?

19 New Jersey?

20 MS. HOROWITZ: No. We don't have any other
21 issues.

22 Thank you.

23 SPECIAL MASTER: Delaware?

24 MR. FREDERICK: No.

25 SPECIAL MASTER: Okay. We have progress

1 reports and conference calls scheduled for June 2
2 and June 7, July 7 and July 11, and I propose the
3 dates of August 7 and August 8 for the next
4 progress report and next conference call.

5 New Jersey?

6 MS. HOROWITZ: Those are fine.

7 Thank you.

8 SPECIAL MASTER: Delaware?

9 MR. FREDERICK: Those are fine with us here
10 in Washington. Do you want to --

11 MR. SEITZ: As well with us in Delaware.

12 SPECIAL MASTER: Thank you, counsel.

13 I have one minor housekeeping matter that I
14 am instructed to address by my assistant Elizabeth
15 Umland. Yesterday she got a copy of an e-mail
16 from Mr. Frederick to Ms. Horowitz that read,
17 Rachel, this is what we received from Ms. Umland.
18 It may be that she has the wrong e-mail address
19 for you. Best regards, David.

20 But the e-mail that she had sent did not
21 bounce back from Ms. Horowitz's address. And so
22 she's puzzled. And I guess the question that
23 she's asked me to ask Ms. Horowitz is do we have
24 your right e-mail address, and perhaps you ought
25 to tell me what it is so that we won't have any

1 problem in the future.

2 MS. HOROWITZ: I think you do have it, but I
3 think you have two -- possibly two; and one is not
4 correct. The correct one is rachel.horowitz@
5 dol -- as in division of law -- .lps -- as in law
6 and public safety -- .state.nj.us. And I think
7 sometimes people are using another one, which is
8 at law.dol.lps.state.nj. And that one is
9 incorrect.

10 SPECIAL MASTER: Okay. So if we send it to
11 rachel.horowitz@dol.lps.state.nj.us, we're all
12 right?

13 MS. HOROWITZ: That should be fine.

14 SPECIAL MASTER: Thank you. That makes my
15 life much more comfortable.

16 Is there anything else, counsel, that we
17 ought to address today?

18 New Jersey?

19 MS. HOROWITZ: No, nothing here.

20 Thank you.

21 SPECIAL MASTER: Delaware?

22 MR. FREDERICK: Nothing here.

23 SPECIAL MASTER: All right. Mr. Frederick,
24 we look forward to hearing from you or BP on the
25 BP issues.

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Thank you, counsel. Have a nice weekend.

MS. HOROWITZ: Thank you.

MR. FREDERICK: Thank you.

(The conference was concluded at 10:27 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 11th day of May, 2006.

Claudette G. Mason

Notary Public

My Commission Expires
June 9, 2012.