

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
September 6, 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.

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

Also Present: MARK E. PORADA, ESQ.

PROCEEDINGS

1
2 SPECIAL MASTER: Counsel, Mark Porada and
3 Claudette Mason are with me. And we'll start as
4 we usually do with appearances.

5 New Jersey, would you tell us who is present
6 or on line, even though they're not going to have
7 a speaking role.

8 MS. HOROWITZ: Yes. This is Deputy Attorney
9 General Rachel Horowitz. And also present are
10 Deputy Attorney General Eileen Kelly and Deputy
11 Attorney Dean Jablonski.

12 SPECIAL MASTER: Thank you, New Jersey.
13 Delaware?

14 MR. FREDERICK: David Frederick, Scott
15 Angstreich and Scott Attaway as well as C. J.
16 Seitz.

17 MR. SEITZ: And, Special Master, this is
18 C. J. Seitz. I also have in my office some of the
19 budding historians who have been working on this
20 case, Max Walton, Ryan Newell and Matt Boyer.

21 SPECIAL MASTER: All right. Thank you very
22 much, counsel, and thank you both for your
23 progress reports. Once again, we seem to be on
24 track.

25 I do note Delaware's continuing frustration

1 with New Jersey's production problems. And we'll
2 discuss those in a moment. But, first, putting
3 those items to one side momentarily, let me ask
4 New Jersey, Ms. Horowitz, do you have anything to
5 add or that you wish to discuss in addition to
6 those items and what you have reported?

7 MS. HOROWITZ: Yes. In addition to what we
8 reported, we did also send out yesterday to
9 Delaware some additional documents, a further
10 response clarifying the documents that were sent
11 and addressing the various document production
12 issues that Delaware had raised. We have gone
13 through and compared what was produced in July
14 versus what was produced in August. And I think I
15 wouldn't be too off target by -- in our view
16 there's very, very -- the differences are minute
17 in terms of what was sent out in July versus
18 August. And we think that, with all due respect
19 to Delaware, they are to a certain extent
20 exaggerating the issue.

21 SPECIAL MASTER: Well, parsing for a
22 moment -- I intend to come back to the issues
23 raised in Delaware's progress report; and we'll
24 discuss those in a little more detail. But other
25 than those, do you have anything else to add to

1 your progress report or that you want discussed?

2 MS. HOROWITZ: Well, I think that you also
3 should be aware that we did object to Delaware's
4 production on August 31. We did get a response on
5 September 1. In our view it was not fully
6 responsive to our concerns.

7 SPECIAL MASTER: Okay.

8 MS. HOROWITZ: But we are continuing to try
9 to work on those issues with Delaware.

10 SPECIAL MASTER: Okay. Thank you very much.

11 Mr. Frederick, again, putting aside for a
12 moment the issues raised in your letter, is there
13 anything other than that that you wish discussed
14 or added to your report?

15 MR. FREDERICK: No, I don't think so,
16 Mr. Lancaster.

17 SPECIAL MASTER: All right. Now, let's turn
18 for a moment to the items listed in Delaware's
19 progress report. And I'm not suggesting that we
20 have extensive argument or try to resolve them
21 through this process today; but I note that New
22 Jersey reported that there was a letter sent on
23 August 31. I just heard Ms. Horowitz say that she
24 has sent another letter, which I'm assuming you
25 haven't had an opportunity to review. So we're

1 going to be talking a little bit without a full
2 deck here.

3 But would you, just so we -- we're on the
4 same page, Mr. Frederick, would you list -- just
5 list now, not discuss in detail or not argue or --
6 but just list for me the items which were
7 mentioned in your report and which are still
8 outstanding. Just give me a list of them, if you
9 would, if that's possible, or someone else on your
10 behalf.

11 MR. FREDERICK: Well, I can certainly start
12 the list; and I'll also call on Mr. Seitz to
13 supplement that.

14 I would say the first is that we are
15 concerned about the different productions that New
16 Jersey has made that contain a range of issues and
17 matters. And I have not had a chance to review
18 Ms. Horowitz's letter of yesterday, but have had
19 it summarized. And we have some continuing
20 issues.

21 For instance, New Jersey has said that they
22 will produce a number of additional documents, but
23 they have not said when they will make those
24 productions. And they said that they will
25 produce -- that they are reserving the right to

1 produce more documents; but they're not giving a
2 timetable by which they will do so. And we're a
3 month away from the close of discovery, and we're
4 about to begin the process of taking depositions
5 and we don't have a full set of documents to work
6 with; nor do we have -- and perhaps this has been
7 corrected by CD's that New Jersey sent out
8 yesterday that we have not yet received. But as
9 of yesterday, we didn't have a set of documents
10 that was a sequentially-numbered set of documents
11 from the beginning of this case up to now.

12 SPECIAL MASTER: Right. So you have got
13 timetable and Bates numbers, right?

14 MR. FREDERICK: That's correct.

15 SPECIAL MASTER: Those are two.

16 All I want is a list at this point.

17 MR. FREDERICK: Okay. There are -- there is
18 some confusion about documents from October. And
19 we're studying New Jersey's letter, and we will
20 obviously meet and confer with New Jersey to
21 clarify their meaning; but it appears that New
22 Jersey is taking the position that documents that
23 were made available to Delaware in October are not
24 going to be produced even if they are responsive
25 to requests that we have made. And we are

1 concerned about that because we don't think that
2 it complies with the rules for discovery.

3 I would say those are the three principal
4 issues that we have had. And we have specified in
5 the progress report on page 2, you know, five
6 specific items that we don't know have been
7 corrected by New Jersey's latest production of
8 yesterday.

9 SPECIAL MASTER: All right. Are you saying
10 that you don't know because you haven't seen the
11 production?

12 MR. FREDERICK: That's right. We haven't
13 received it, Mr. Lancaster.

14 SPECIAL MASTER: Right. Okay.

15 MR. FREDERICK: We received from Ms. Horowitz
16 a letter that she e-mailed; but the documents are
17 following separately.

18 SPECIAL MASTER: Right. So is it fair to
19 say, Mr. Frederick, on that score that until you
20 have seen that additional production, you don't
21 know whether it's been satisfied or not?

22 MR. FREDERICK: That's correct.

23 SPECIAL MASTER: So I'm -- I'm -- for
24 purposes of discussion here, I'm scratching that
25 issue at the moment.

1 The Bates numbers and the timetable, Ms.
2 Horowitz, would you comment on those two for me in
3 either order, please?

4 MS. HOROWITZ: Yes. On the additional
5 documents, we're working to get some of them out
6 by the end of this week and the rest next week.
7 They are documents that we do not have. They are
8 coming from third parties. And we have been
9 trying to get them, but it was at the end of
10 August when we were focused on that issue. And
11 obviously there were not -- some people just were
12 not available. So that's what we're talking
13 about. We're not talking about things that we
14 have in-house.

15 SPECIAL MASTER: So on that production then,
16 those documents will be produced either this week
17 or by the end of next week?

18 MS. HOROWITZ: Yes. That's the time frame
19 that we're shooting for and looking at.

20 SPECIAL MASTER: Okay.

21 MS. HOROWITZ: Certainly, whatever we do have
22 in our hands we will get out as quickly as we can.

23 SPECIAL MASTER: All right. On the Bates
24 numbers?

25 MS. HOROWITZ: On the Bates numbers, in our

1 view this is a nonissue. We had sent Delaware in
2 July items that were Bates numbered and then some
3 that were not Bates numbered. We went back in
4 August and Bates numbered everything. There is
5 one -- we sent new CD's out last night with those
6 same Bates numbers in a format that should be
7 easier to retrieve on the computer.

8 But the documents that we're talking about
9 Delaware has had, some of them since last fall,
10 and pretty much all of them since July. What they
11 haven't had are things that we're still in the
12 process of retrieving, as I just mentioned.

13 SPECIAL MASTER: Right. But I take it from
14 Mr. Frederick that the concern here -- limited
15 concern here is the numbering of those documents,
16 the ordering of those documents; and I -- I
17 gathered that -- from something that Mr. Frederick
18 wrote, that there were some problems perhaps with
19 your IT contractor. But do I understand from what
20 you have just said that by one means or another,
21 you believe that the Bates numbering problem has
22 been resolved?

23 MS. HOROWITZ: Yes, we do.

24 SPECIAL MASTER: Okay. And Mr. --

25 MS. HOROWITZ: Yes, we believe it's been

1 resolved.

2 SPECIAL MASTER: And, Mr. Frederick, am I
3 correct that until you see the documents, you
4 won't know the answer to that?

5 MR. FREDERICK: That's correct. Although I
6 would add that we have a continuing question with
7 respect to the documents from October of 2005
8 based on the way Ms. Horowitz referred to that in
9 her letter of yesterday, and there appear to be
10 documents that were made available to us. In that
11 process, Mr. Lancaster, Delaware -- New Jersey
12 made available certain documents. We sent a team
13 up to review and copy those documents.

14 This, of course, was before the full Supreme
15 Court process had fully unfolded before you as
16 Special Master. But there are documents, we
17 believe, from that that are responsive to our
18 requests; and it's unclear whether they have been
19 produced by New Jersey. And it's also unclear
20 what happened to documents that had been numbered
21 in October, but not subsequently produced, and
22 documents that were subsequently produced were
23 given the same Bates numbers as documents that had
24 been produced last October.

25 And that's what we're attempting to clear up.

1 SPECIAL MASTER: Right. Well, let me say,
2 counsel, that I perhaps inadvertently last time
3 used the word ministerial for these sorts of
4 things; but it seems to me that you have made some
5 progress since last we talked. I don't think
6 there's anything that I can resolve today because
7 of the fact that there's -- there are documents --
8 there apparently is a disk in the mail or disks in
9 the mail. And until those are resolved or seen or
10 reviewed, you're not going to be able to address
11 whether the -- the question of whether there
12 continues to be any problems with them.

13 I have been continually impressed by the
14 cooperation between counsel in this process. I
15 told you last time I understand the frustration
16 here, but it seems to me that competent counsel
17 can confer and probably resolve them. If you
18 can't and if there are specific issues as a result
19 of your conferences that remain unresolved, I, of
20 course, am available under the processes set forth
21 in the Case Management Plan. But I urge you to
22 try to resolve them together.

23 And I -- let me -- at the risk of sounding
24 like a broken record here, I do want to commend
25 all counsel on your continuing cooperative

1 approach to getting this matter teed up for
2 resolution.

3 Let me just tell you; I'm currently dealing
4 with another matter in which opposing counsel have
5 lost sight of their respective clients' best
6 interests. They're like bantam cocks, and they
7 can only peck and claw at each other. It's a
8 genuine pleasure to deal with mature men and women
9 who understand that arbitrariness serves no one's
10 purpose and can, in fact, do damage to an
11 otherwise valid position.

12 We're in the final stretch. We're right on
13 schedule. And I'm confident -- I continue to have
14 confidence that you will continue to work together
15 to resolve these differences. We are coming down
16 to the last discovery areas. We're coming down to
17 a period where there will be some time pressures.
18 And I understand why there's some frustration
19 here. But, you know, when we're finished, I would
20 love to be able to report to the Court that we
21 processed this matter to a conclusion without any
22 instances of petty bickering. I just think that
23 that doesn't solve any problems. And when we
24 start using adjectives and adverbs, then we have
25 lost sight of what we're all trying to do.

1 So I urge you, again, to continue to
2 cooperate in this discovery process. If you feel
3 that you have reached a total impasse, call me,
4 and I will solve it for you to someone's
5 unhappiness; I can guarantee that. But I think
6 that these matters can be resolved; and we can,
7 hopefully, get on with the major issues in the
8 case.

9 New Jersey, is there anything else on this
10 matter that you want to raise?

11 MS. HOROWITZ: No, not at this point.

12 Thank you.

13 SPECIAL MASTER: Mr. Frederick?

14 MR. FREDERICK: No, not at this time.

15 SPECIAL MASTER: Okay. We -- we have
16 scheduled progress reports and conference calls
17 for October 2, October 3; for November 8 and
18 November 9 to accommodate election day. And by
19 that time, the deposition discovery will have been
20 completed on November 3, hopefully. And we'll be
21 in order for dispositive motions on November 30.

22 So I am -- I remain very, very pleased with
23 the progress that we have made. I have to tell
24 you that I have done -- as you know, I have done a
25 few of these things before. And from my

1 perspective, the sailing hasn't been as smooth in
2 any of them as this one has. I'm -- I don't want
3 to get overconfident here, and I don't want to --
4 I don't want counsel to -- if I were talking to my
5 children, I would say get a swelled head. I won't
6 say that. But I really am impressed with what you
7 have done thus far, and I'm very comfortable that
8 we're going to come up to the final stages of this
9 matter in good shape.

10 So unless there's something else, counsel, I
11 thank you. I particularly appreciate
12 Mr. Frederick getting up early on the West Coast
13 to be able to accommodate me. And let me hear
14 from you if you have to; but I hope that, as the
15 saying goes, all the rest is silence until October
16 2.

17 MR. FREDERICK: Mr. Lancaster, at the risk of
18 extending this too much further, I wonder if --

19 SPECIAL MASTER: It's your timetable,
20 Mr. Frederick. You're on the West Coast.

21 MR. FREDERICK: Well, we would at some point
22 like to get some guidance from you as to process
23 continuing on after the discovery period closes.
24 It seems to us evident now from the exchange of
25 discovery that there will be disputed issues of

1 fact that may not lend themselves necessarily to
2 dispositive motions. And we wanted to raise this
3 issue with you just for purposes of considering a
4 process in getting guidance from you as to how we
5 might proceed.

6 SPECIAL MASTER: Yes. Where there are
7 disputed issues of fact, those will have to be
8 decided before the matter can be ultimately
9 reported to the Court.

10 My experience in this area leads me to
11 believe that they will be wound into whatever the
12 ultimate resolution is. In other words, while
13 we're talking about dispositive motions here,
14 we're ultimately talking about a report that I'm
15 going to frame and file with the Court. And in
16 the course of that, I will be resolving any
17 disputed issues of fact, as well as ruling on
18 issues of law. Those are then submitted to the
19 Court. And the Court, of course, is the final
20 arbiter as to whether my recommended decision is
21 correct or not.

22 But I don't see that necessarily as a
23 two-step process, although there is a possibility
24 that you may tell me that you can't take a
25 briefing position on legal issues until the

1 factual issues have been decided. If that
2 happens, then we'll do it in a two-step process.
3 But I'm not in a position to decide that at this
4 stage, Mr. Frederick.

5 Is that an answer to your --

6 MR. FREDERICK: Yes.

7 SPECIAL MASTER: It's an answer to your
8 question. Is it a satisfactory answer to your
9 question?

10 MR. FREDERICK: Well, I appreciate that.
11 That does provide guidance. And I think as we
12 continue through the depositions phase of the
13 case, it may become clearer how we can narrow
14 those issues of fact.

15 SPECIAL MASTER: Right. In other words, let
16 me try it this way. In the ordinary summary
17 judgment motion, the first question is is there a
18 genuine issue of material fact. If so, summary
19 motion is not granted. In this context, that's
20 not what we're dealing with. We're dealing with
21 an ultimate decision based on findings of fact and
22 conclusions of law. I have to make those
23 decisions. How they're presented, I think by
24 November we'll have -- we'll all have a better
25 idea of the best posture and the way to present

1 them and the way for me to decide them.

2 Is that helpful?

3 MR. FREDERICK: Yes.

4 SPECIAL MASTER: Anything else, either
5 counsel?

6 New Jersey?

7 MS. HOROWITZ: No, nothing further.

8 Thank you.

9 SPECIAL MASTER: Mr. Frederick?

10 MR. FREDERICK: Nothing further.

11 SPECIAL MASTER: Thank you, all.

12 Good luck, Mr. Frederick; and we'll talk to
13 you on October 3.

14 MR. FREDERICK: Thank you.

15 MR. SEITZ: Thank you.

16 MS. HOROWITZ: Yes.

17 (The conference was concluded at 10:24 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 8th day of September 2006.

Claudette G. Mason

Notary Public

My Commission Expires
June 9, 2012.