IN THE
SUPREME COURT OF THE UNITED STATES

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No. 138, Original

STATE OF SOUTH CAROLINA,
*Plaintiff*,
v.

STATE OF NORTH CAROLINA,
*Defendant*.

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**Before the Special Master**
**Hon. Kristin L. Myles**

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# BRIEF OF THE STATE OF SOUTH CAROLINA CONCERNING CASE MANAGEMENT PLAN DISPUTES

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At the monthly telephone status conference held May 23, 2008, and in their respective fourth progress reports submitted May 21, 2008, North Carolina and South Carolina informed the Special Master that they had reached agreement on nearly all of the terms and specific language of a proposed Case Management Plan ("CMP") to be jointly submitted for the Special Master's consideration. The Special Master then ordered the parties to submit their proposed CMP, along with simultaneous opening and reply briefs to be filed on June 4 and June 16, 2008, respectively, concerning two procedural disputes over (1) the content of privilege logs and (2) on what terms non-parties, including the press, may attend depositions.

South Carolina respectfully submits its opening brief on those issues.[1]

## A. South Carolina's Proposed Language Concerning The Content Of Privilege Logs Should Be Adopted For Reasons Of Clarity, Efficiency, And Minimization Of Disputes

South Carolina proposes that privilege logs contain the names and titles of the author, addressee(s), and recipient(s) of a document; the subject matter and location of the document; and the nature of the protection claimed. Specifically, South Carolina proposes the following language, which is taken from the CMP issued by Special Master Ralph I. Lancaster in *New Jersey v. Delaware*, No. 134, Orig.:

> If a party withholds on the ground of privilege any written information (in hard copy or electronic form) it shall provide a privilege log to opposing counsel. These privilege logs shall set forth the following information: (a) author's name, place of employment and job title; (b) addressee's name, place of employment and job title; (c) recipient's name, place of employment and job title, if different than that of addressee; (d) general subject matter of document; (e) site of document; and (f) nature of privilege claimed. Thereafter, any privilege log shall be supplemented to include any documents that are subsequently designated privileged by counsel.

Joint Proposed CMP § 7 (South Carolina's Proposal); *see also id.* § 4.3.3 (South Carolina's Proposal) ("Rule 26(b)(5) will not apply because the substance and timing of privilege logs is covered by section 7 of this CMP").[2]

[1] The party States have differing recollections as to when reply briefs are due, and the transcript of the May 23, 2008 status conference is not yet available. To avoid unnecessary conflict, South Carolina has informed North Carolina that it is willing to defer to North Carolina's recollection of a June 16 reply date (rather than South Carolina's recollection of a June 11 reply date), subject to review of the transcript, if available before June 11, or order of the Special Master. The Special Master also ordered the parties to submit simultaneous opening and reply briefs on June 16 and 23, 2008, respectively, concerning the scope and timing of Phase I discovery, and the threshold showing to be made at the end of Phase I. The Special Master further ordered that discovery could begin immediately while these disputed issues are briefed and decided.

North Carolina proposes to rely only on the language of Federal Rule of Civil Procedure 26(b)(5), which requires the withholding party to

> (i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Fed. R. Civ. P. 26(b)(5)(A).

South Carolina's proposed language will add helpful clarity by setting out more specifically than Rule 26(b)(5) what information should be provided in a privilege log. As an initial matter, both the rule and South Carolina's proposal expressly require the withholder to state the privilege claimed, the nature of the document, and the justification for the assertion of privilege. In addition, South Carolina's proposal requires that the names of the persons sending or receiving the document must be disclosed. The case law interpreting Rule 26(b)(5) makes clear that this basic information necessarily must be included in a reasonable privilege log (unless the information itself is privileged), in order to permit the recipient to assess the claim; and courts have used pre-trial or case management orders to spell out more specifically the information that should be provided. *See*, *e.g.*, *Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co.*, 109 F.R.D. 12, 24 (D. Neb. 1983) (pre-trial order required that "any party withholding a document as privileged should identify the document by author, date, recipient, to describe its nature and

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[2] *See* Case Management Plan §§ 5.2.3, 8, *New Jersey v. Delaware*, No. 134, Orig. (Feb. 8, 2006), *available at* www.pierceatwood.com/files/2006-02-08%20Case%20Management%20Plan.pdf.

general content, and to list the specific basis for withholding it from production"); *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 664 (D. Ind. 1991) (similar privilege-log content requirements); *Resolution Trust Corp. v. Diamond*, 137 F.R.D. 634, 641-42 (S.D.N.Y. 1991) (similar privilege-log content requirements); 8 Charles A. Wright et al., *Federal Practice and Procedure* § 2016.1, at 230-31 (2d ed. 1994 & Supp.).

South Carolina submits that having the same types of information in the same format across all privilege logs will increase the clarity and efficiency in assessing a claim of privilege, because all parties will receive the same type of information relevant to the assertion of privilege. That parity of information, moreover, should reduce if not eliminate disputes over what types of information should be provided in the log itself.

North Carolina's proposal requires it, consistent with Rule 26(b)(5), to "describe the nature" of the privileged materials "in a manner that . . . will enable other parties to assess the claim." Plainly, provision of the specific information listed in South Carolina's proposal is necessary for assessment of the privilege, and North Carolina has thus far not explained what different or alternative information it would provide, but its position suggests that it intends to provide substantially less information on its privilege logs, thereby making assessments of privilege claims more problematic and potentially more prone to ancillary litigation. It is common for courts to augment the federal rules by including more specific standards for certain subjects in a case management order. Inclusion of the

privilege-log content language from Special Master Lancaster's CMP would likewise assist the parties and the Special Master here.[3]

### B. Absent Party Agreement Or Order Of The Special Master, Non-Parties Should Not Be Permitted To Attend Depositions

South Carolina proposes the following language (to which North Carolina objects) with respect to who may attend depositions:

> Unless otherwise ordered under Fed. R. Civ. P. 26(c), depositions may be attended by counsel of record, members and employees of their firms, attorneys specially engaged by a party for purposes of the deposition, the parties or the representative of a party (or intervenor-party if the subject of the deposition is within the limited purpose of that entity's intervention in the suit), including counsel from the offices of the respective attorneys general, counsel for the deponent, and expert consultants or witnesses. During examination of a deponent about any document stamped "Confidential – S. Ct. 138" or its confidential contents, persons to whom disclosure is not authorized under section 8 of this CMP shall be excluded.

Joint Proposed CMP App. B, § 4.1 (South Carolina's Proposal).

This proposed language, which also is taken from Special Master Lancaster's CMP in *New Jersey v. Delaware*, will be helpful to the parties and the Special Master by designating in advance who may attend a deposition and also providing for exceptions based on either agreement of the parties or order of the Special Master. As South Carolina understands it, North Carolina seeks a baseline rule of free access for both the press and non-parties.

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[3] The undersigned Special Counsel for South Carolina also represented the State of Delaware in *New Jersey v. Delaware*. Counsel's experience in that case was that Special Master Lancaster's privilege-log content requirements were in no way burdensome, and they substantially assisted the parties in efficiently addressing disputes about assertions of privilege.

North Carolina's position appears erroneously to assume that discovery materials are presumptively public. But the Federal Rules of Civil Procedure indicate that discovery materials, including "depositions, interrogatories, requests for documents . . . and requests for admission," are presumptively *non-public* by providing that they "*must not be filed* until they are used in the proceeding or the court orders filing." Fed. R. Civ. P. 5(d)(1) (emphasis added). The Advisory Committee Notes make clear that this provision, as amended in 2000, "is designed to supersede and invalidate local rules" permitting the filing of such materials, in order to minimize "the costs imposed on parties and courts by required filing of discovery materials that are never used in an action." *Id.*, advisory committee's notes (2000 amendment); *cf.* Fed. R. Civ. P. 30(f)(1) (likewise amended in 2000 to require court reporters to send deposition transcripts to the appropriate attorney, and not the court); *see* Joint Proposed CMP § 3.1 & 3.2 (providing that discovery materials and deposition transcripts "shall not be filed with the Special Master" unless and until used in the case).

As the Second Circuit has held, amended Rule 5(d)(1) makes clear that there is "no presumption of filing all discovery materials, *let alone public access* to them." *SEC v. TheStreet.Com*, 273 F.3d 222, 233 n.11 (2d Cir. 2001) (emphasis added); *see also SmithKline Beecham Corp. v. Synthon Pharms., Ltd.*, 210 F.R.D. 163, 167 (M.D.N.C. 2002) ("Rule 5(d) . . . negates the previous concept that discovery material somehow carried with it a right to public access."). Indeed, "[w]ithout an ability to restrict public dissemination of certain discovery materials that are never

introduced at trial, litigants would be subject to needless annoyance, embarrassment, oppression, or undue burden or expense." *TheStreet.Com*, 273 F.3d at 229 (internal quotation marks omitted).[4]

Moreover, neither the public nor the press has a general First Amendment or common law right to inspect discovery documents, let alone to attend depositions. This Court has held that "pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984) (citation omitted). Moreover, the Court explained, "[m]uch of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information." *Id.* A similar policy is codified in Rule 5(d)(1). *See* Richard L. Marcus, *A Modest Proposal: Recognizing (At Last) That the Federal Rules Do Not Declare That Discovery Is Presumptively Public*, 81 Chicago-Kent L. Rev. 331, 352-53 (2006) (the "proposition that the Rules themselves create a 'presumptive' right of public access to unfiled discovery" "should be discarded"; there is "little or nothing in the Rules to support this view," which "runs counter to recent amendments and the reasoning of the Supreme Court in *Seattle Times*").

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[4] Some cases had held that the pre-2000 version of Rule 5(d), which required the filing of discovery materials unless excepted by local rule, created a statutory public right of access to discovery materials. *See*, *e.g.*, *In re Agent Orange Prod. Liab. Litig.*, 821 F.2d 139, 146-47 (2d Cir. 1987), *superseded by rule as stated in TheStreet.Com*, 273 F.3d at 233 n.11.

It follows that depositions and other discovery materials should not be presumptively open to the press or public. For example, in the federal government's antitrust suit against Microsoft, the court denied press access to the deposition of a Sun Microsystems executive, holding that it "would be annoying, oppressive, and unduly burdensome." *New York v. Microsoft Corp.*, 206 F.R.D. 19, 23 n.4 (D.D.C. 2002). The court noted, moreover, that the protective order entered in the case permitted the parties to conduct depositions "without regard to the disclosure of confidential information, reserving the designation of such information for after the deposition," and explained that "requiring press representatives to leave when a particular question or line of questioning is likely to elicit confidential information" was unduly burdensome and would likely impede the examining attorney's ability to conduct the deposition. *Id.* (emphasis omitted).

In addition, the court rejected the press's request for access to redacted transcripts for all depositions still to be conducted, holding it "unprecedented and without basis in law" given "the changed landscape of the amended version of Rule 5(d)." *Id.* at 24. Thus, the court reasoned, "[h]aving been provided no legitimate reason to authorize such far-reaching access to pretrial discovery materials and, in the absence of precedent which indicates a clearly established right to access to all such materials, the Court declines to create new law by granting the Media's extensive request for transcripts." *Id.*[5]

[5] The court did, however, grant the press's more limited request of access to the redacted transcripts of the depositions of four executives of Microsoft and other computer-industry companies. *See* 206 F.R.D. at 23-24. That holding seems in arguable tension with the court's holding that Rule 5(d) precludes public access to materials not used at trial. Be

These authorities make clear that a presumption of open access by non-parties to the depositions to be taken in this matter is unwarranted and that the depositions should, as a baseline matter, be limited to counsel for the parties and their agents. That approach is solidly grounded in prevailing law, provides certainty during a time when multiple and perhaps numerous depositions will be occurring, and will be much more efficient in taking depositions. Moreover, the parties have agreed to a general seven-hour time limit (12 hours for a cross-noticed deposition) and have agreed to make all depositions confidential for 10 days in order to provide a period for portions of the deposition transcripts (and exhibits) to be designated as confidential. *See* Joint Proposed CMP § 8; *id.*, App. B, §§ 4.2, 5.3. If North Carolina's open-access approach were followed, then those provisions would be difficult, if not impossible, to adhere to when non-parties are present at a deposition.

**Conclusion**

For the foregoing reasons, South Carolina respectfully requests that the Special Master adopt its proposals for CMP §§ 4.3.3 and 7, and App. B, § 4.1.

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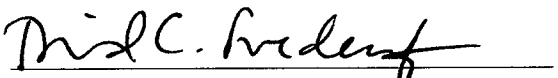
that as it may, to permit the court's permission for media access to particular *redacted transcripts* is no authority for permitting non-party attendance at *live depositions*.

Respectfully submitted,

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