IN THE
SUPREME COURT OF THE UNITED STATES

No. 138, Original

STATE OF SOUTH CAROLINA,
Plaintiff,
v.

STATE OF NORTH CAROLINA,
Defendant.

Before the Special Master
Hon. Kristin L. Myles

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

South Carolina respectfully submits its reply to North Carolina's Letter Brief re Proposed Case Management Order filed June 4, 2008 ("NC Br.").

A. Privilege Logs

South Carolina's proposal reasonably specifies the basic information necessary to assess a claim of privilege: the names, employment, and titles of the author(s), addressee(s), and recipient(s) of a document; the subject matter and location of the document; and the nature of the protection claimed. This information is commonly provided in privilege logs, it was used effectively in *New Jersey v. Delaware* to assess claims of privilege and resolve disputes, and it is unlikely to prove either burdensome or unnecessary here. Importantly, moreover, this approach will provide all participants with sufficient information to ensure that

assessments of privilege claims may be made more efficiently and the case thus proceed more efficiently. *See* SC Br. 2-5.

North Carolina objects that providing this information might be burdensome, but its objection is based on a single, inconceivable example. North Carolina anticipates that South Carolina might request "all documents that refer or relate to North Carolina's approval of interbasin transfer permits" and that North Carolina would be compelled to take a "literal[]" reading of that request that would require it "to prepare a privilege log of all emails and memoranda among attorneys at the North Carolina Department of Justice who have been involved in defending this case." NC Br. 3-4. South Carolina would not expect North Carolina to engage in such a literal reading (nor does South Carolina intend to read North Carolina's discovery requests so broadly). Indeed, it is highly unusual, to say the least, to expect a party to log its own attorneys' written communications with each other with respect to the very litigation at issue after a complaint has been filed. North Carolina's concern is therefore without substance.[*]

Although North Carolina relies on the fact that Rule 26 does not require specific categories of information in all cases, it agrees that, even under its proposed standard, it must "'describe the nature of the documents'" listed on its privilege log in order to "'enable other parties to assess the claim'" of privilege. *Id.* at 3 (quoting Fed. R. Civ. P. 26(b)(5)(A)(ii)). But North Carolina continues to refuse to identify

[*] South Carolina notes that, in all events, nothing in North Carolina's proposed language, which simply references Federal Rule of Civil Procedure 26, addresses its purported concern that it could be required to include on its privilege log its attorneys' internal discussions.

what information (short of what South Carolina has proposed) it believes will satisfy that burden. Nonetheless, it can be presumed that North Carolina objects because it intends to provide less information than what South Carolina proposes. That will likely lead to additional, unnecessary disputes when South Carolina finds that it needs additional information to assess North Carolina's privilege claims and to determine whether to dispute those claims. As courts have held, the types of information in South Carolina's proposal are what are required in order to assess a privilege claim. *See* SC Br. 4-5 (citing cases); *see also*, *e.g.*, *SmithKline Beecham Corp. v. Apotex Corp.*, 232 F.R.D. 467, 476-78 (E.D. Pa. 2005) (denying privilege claim where log failed to identify authors or recipients).

It would be better case management here to avoid such disputes over the content of privilege logs. South Carolina's proposal is efficient, reasonable, and not burdensome. It should be adopted.

B. Deposition Attendees

South Carolina proposes to limit deposition attendees, as a general matter, to parties, their representatives, their counsel and experts, and the deponent's counsel. *See* SC Br. 5. As North Carolina apparently agrees, there is no legal justification for permitting the depositions in this case to be presumptively open to the press or public. *See id.* at 6-9. Despite having advocated that position in meet-and-confer discussions, its brief does not defend such a broad position.

Instead, North Carolina advocates a "case-by-case" approach to deciding who should be able to attend depositions, under which the Special Master would need to

adjudicate all proposed exclusions. NC Br. 1-2. In defense of its approach, North Carolina claims that South Carolina's approach gives one party a "veto power over another party's strategic decision to tap an outside resource." *Id.* at 2. To support that claim, North Carolina raises two examples of non-parties that it claims should be permitted to attend depositions: the United States or one of its agencies for case monitoring purposes; and the City Attorneys for Concord or Kannapolis at a deposition of a former employee of one of those cities, for the purpose of assisting North Carolina's deposing attorney.

First, South Carolina's proposal in no way creates a "veto power." Under both States' respective positions, disputes may be submitted to the Special Master and resolved on a case-by-case basis. The question is whether it is a better case management practice to establish, in advance, a defined set of deposition attendees, with the provision for attendance by others upon agreement of the parties or order of the Special Master. Having abandoned its claim of free access to the press and public, North Carolina should not be opposed to some baseline limit. South Carolina believes it will be better for the party States to meet and confer in advance to arrange for non-parties to attend a deposition and try to reach agreement or timely submit a dispute to the Special Master. Otherwise, either State could be surprised by a non-party's attendance at the start of the deposition and potentially have to place an emergency call to the Special Master or adjourn the deposition, which will increase costs and cause unnecessary delay.

Second, South Carolina will not unreasonably withhold agreement to non-party attendance, and it expects the same courtesy from North Carolina. With regard to the specific examples North Carolina raises, however, if United States or City of Concord or Kannapolis attorneys represent the witness or former employee being deposed, then they of course may attend the deposition, as South Carolina's proposal provides. If those attorneys do not represent a party or witness, however, then only in rare cases will there likely be reason to permit their attendance, which would be purely as a spectator. Indeed, absent intervention, the United States' interest in "monitor[ing] the progress of this original action" (NC Br. 2) would in virtually all instances be served just as well by permitting it to review deposition transcripts. Similarly, North Carolina's interest in having City Attorneys who *do not* represent a former city employee present in order "to help the deposing attorney during breaks in the deposition with the formulation of questions" (*id.*) could be just as well served by consulting with those attorneys *before* the deposition as part of North Carolina's preparation, or even simply during the breaks. But increasing the number of attendees at a deposition with non-parties lacking a solid reason to attend (and having no right to ask questions) will only burden the parties with further procedures for dealing with confidential documents, costs for larger facilities, and additional scheduling challenges.

That there may be a few special situations calling for the attendance of non-parties at a deposition is no reason to omit a baseline list of permissible deposition attendees, which may be expanded by agreement or order. North Carolina is not

proposing a limited set of additional entitled parties, however, but apparently advocates that the depositions should be presumptively open to non-parties. Accordingly, North Carolina's approach is likely to cause more disputes needing resolution by the Special Master than South Carolina's proposal. South Carolina's proposal strikes the right balance in covering the normal situations and thus providing certainty.

Finally, North Carolina's quibble (at 2) over whether intervenors should be able to participate in the case beyond the limited scope of their intervention goes not to a dispute with South Carolina but rather to the order permitting intervention for *limited* purposes, as set out by the Special Master, and provides no justification for permitting intervenors to attend any and all depositions as a baseline matter. South Carolina's proposal recognizes that the Special Master's order admits intervenors for limited purposes, but that would not entitle those intervenor-parties to be afforded full party status under the CMP.

Conclusion

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

Respectfully submitted,

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