



## State of North Carolina

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ROY COOPER  
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June 16, 2008

*By e-mail and first class mail*

Special Master Kristin L. Myles  
Munger, Tolles & Olson, LLP  
560 Mission Street  
27<sup>th</sup> Floor  
San Francisco, CA 94015

**RE: *South Carolina v. North Carolina*, No. 138, Original; North Carolina's  
Reply Letter Brief re Proposed Case Management Order**

Dear Special Master Myles:

North Carolina submits this letter brief in reply to South Carolina with respect to two aspects of the Case Management Order: 1) who may attend depositions and 2) preparation of privilege logs. North Carolina is filing separately its initial brief with respect to the scope of issues to be resolved in Phase I, the length of time needed for discovery, and the exchange of expert reports.

### Attendance at Depositions

The Special Master should reject South Carolina's request that the Special Master issue a blanket order limiting deposition attendance to the parties, counsel and expert witnesses. Rather, the Special Master should adopt Rule 26(c)(1)(E) of the Federal Rules of Civil Procedure and address this issue, in the event it arises in this litigation, on a case-by-case basis. The case-by-case approach envisioned by the Federal Rules has proven to be an effective approach in federal court for over 70 years.

In its brief to the Special Master, South Carolina argues at length that discovery material in civil litigation is not generally available to the public. (SC's Br. at 6-7) South Carolina, however, conveniently ignores the fact that both States have enacted laws that give the public a right of access to public documents and that preclude state government (even in litigation) from operating behind closed doors. See N.C. GEN. STAT. §§ 132-1 *et seq.*, 143-318.9 *et seq.* (2007); S.C. CODE ANN. § 30-4-15 *et seq.* (2007). Given the openness of government required by law in

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both States, South Carolina's argument is surprising at best. The cases that South Carolina cites with respect to access to discovery materials in litigation between private parties are simply irrelevant.

More importantly, the issue before the Special Master, for all practical purposes, is not about whether the press should be allowed to attend a deposition. In the extraordinary and unlikely scenario that the press seeks to attend a deposition, that request can and should be addressed on a case-by-case basis. Rather, the dispute between North Carolina and South Carolina boils down to whether South Carolina should have veto power in the event that North Carolina's counsel believes it would be helpful to have a non-party present at a deposition. If North Carolina's counsel concludes that it would be helpful to have a non-party (such as a city engineer or city attorney for Concord or Kannapolis) present at a particular deposition, North Carolina should be permitted to do so without having to obtain advance permission from South Carolina or having to obtain an order from the Special Master. In fact, in some circumstances, revealing to South Carolina that a city engineer will be attending a deposition will foreshadow North Carolina's strategy and approach with respect to that deposition.

The Special Master should follow the Rules of Civil Procedure with respect to the attendance at depositions and should reject South Carolina's proposal.

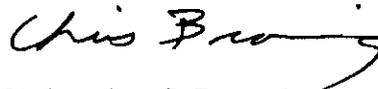
#### Privilege Logs

South Carolina also suggests that the Special Master should reject Rule 26(b)(5)(A)(ii) of the Federal Rules of Civil Procedure and, instead, require that the parties provide a detailed listing of each document withheld on grounds of privilege – regardless of whether some privileged documents could easily be described by category (e.g., “emails and correspondence from North Carolina's Counsel of Record to the Office of the Governor in connection with Bill of Complaint filed by South Carolina in Orig. No. 138”). South Carolina's proposal will not only bog down the process for producing documents in the litigation, it will substantially increase discovery costs for all parties. The inclusion of Rule 26(b) into the Case Management Order will allow parties to describe the nature of privileged documents sufficiently, while recognizing that “rigid insistence on certain logging or indexing procedures” is not efficient with respect to privileged material that can be readily identified by category. 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE § 2016.1, at 234-35 (2d ed. 1994). The rigid proposal advocated by South Carolina should only be imposed if the parties are unable to work through discovery issues cooperatively or if one party were to begin abusing the discovery process.

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The Special Master should incorporate Rule 26(b)(5)(A)(ii) into the Case Management Order and should reject South Carolina's alternative approach.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Browning". The signature is fluid and cursive, with a long horizontal stroke at the end.

Christopher G. Browning, Jr.  
Solicitor General

cc: All Counsel of Record