

March 1, 2011

Dianne Hill, Clerk  
York County Courthouse  
45 Kennebunk Road  
P. O. Box 160  
Alfred, Maine 04002-0160

RE: Robert F. Almeder, et al. v. Town of Kennebunkport, et al.  
Docket No. RE-09-111

Dear Ms. Hill:

Enclosed for filing in the above referenced case, please find the following:

1. Plaintiffs' Motion To Amend Scheduling Order
2. Proposed Order

A copy of the enclosed was served via U. S. Mail post-prepaid upon all parties identified in the Certificate of Service attached hereto. Thank you for your assistance.

Sincerely,



Sidney St. F. Thaxter

SST/rar  
Enclosure

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2011, I caused to be served by (1) placing a copy of the foregoing document in the U.S. Mail, postage-prepaid, and addressed to the following:

Amy K. Tchao, Esq.

Brian Willing, Esq.

Drummond Woodsum

84 Marginal Way, Suite 600

Portland, ME 04101-2480

Paul Stern, Esq.

Deputy Attorney General

Office of the Attorney General

6 State House Station

Augusta, ME 04333-0006

Neal Weinstein, Esq.

Law Offices of Neal L. Weinstein

32 Saco Ave

P.O. Box 660

Old Orchard Beach, ME 04064

Gregg Frame, Esq.

Taylor McCormack & Frame, LLC

4 Milk Street, Ste. 103

Portland, Maine 04101-4164

André G. Duchette, Esq.

Taylor McCormack & Frame

4 Milk Street, Suite 202

Portland, ME 04101

Christopher E. Pazar, Esq.

Drummond & Drummond

One Monument Way

Portland, ME 04101

Nicholas S. Strater, Esq.

STRATER & STRATER PA

266 York Street

PO Box 69

York, ME 03909

Alan Shepard, Esq.

Shepard & Read

93 Main Street

Kennebunk, ME 04043

Alexander M. and Judith A. Lachiatto, *pro se*

12 Bel Air Avenue

Kennebunkport, ME 04086

Richard J. and Margarete K.M. Driver, *pro se*

6 Marshview Circle

Kennebunkport, ME 04046

Paul J. and Sharon K. Hayes, *pro se*

69 Ballardvale Road

Andover, MA 01810

Alan J. Clark, Trustee of the Allan J. Clark

Revocable Trust, *pro se*

7030 North West Hwy 225A

Ocala, FL 34482-6731

Barbara Young, *pro se*

4440 East Red Range Way

Cave Creek, AZ 85331-5071

Thomas Ramsey, *pro se*

69 Taylor Road

Belmont, MA 02478

Kristen Mulvihill, *pro se*

295 Greenwich St, Apt 5G

New York, NY 10007-1051

Mary Jane and Jason Mulvihill, *pro se*

117 Kings Hwy

Kennebunkport, ME 04046

Kendall and Linda W. Burford, *pro se*  
1 New Biddeford Road  
Kennebunkport, ME 04046

Allison W. Phinney, Jr., C.S.B., *pro se*  
11 Roanoke Avenue  
Jamaica Plain, MA 02130-2828

William Joel, II, *pro se*  
8905 Sierra Road  
Richmond, VA 23229

Peter Wasserman, Trustee  
Peter Wasserman Trust of 1993  
485 Crowell Road  
Hopkinton, NH 03229

Robert M. and Lois W. Baylis, Trustees, *pro se*  
119 Rowayton Avenue  
Rowayton, CT 06853

Barbara Russell, *pro se*  
26 Mynderse Street  
Saugerties, NY 12477

Michael L. and Donna G. Kelly, *pro se*  
9 Phillips Pond Road  
South Natick, MA 01760-5643

Jennifer Wasserman, Trustee  
Jennifer B. Wasserman Trust of 1993  
c/o Richard Wasserman  
Wasserman Grubin & Rogers LLP  
1700 Broadway  
New York, NY 10019

Dated: March 1, 2011



Sidney St. F. Thaxter  
CURTIS THAXTER LLC  
One Canal Plaza, Suite 1000  
P. O. Box 7320  
Portland, Maine 04112-7320  
Telephone: (207) 774-9000

Attorney for plaintiffs

STATE OF MAINE  
YORK, s.s.

SUPERIOR COURT  
CIVIL ACTION  
DOCKET NO. RE-09-111

ROBERT F. ALMEDER et al., )  
)  
)  
Plaintiffs, )  
)  
v. )  
)  
TOWN OF KENNEBUNKPORT et al., )  
)  
Defendants. )  
)  
)  
)

MOTION TO AMEND  
SCHEDULING ORDER

(Title to Real Estate Involved)

**I. INTRODUCTION**

Pursuant to Rule 16(a)(2) of the Maine Rules of Civil Procedure, plaintiffs Robert Almeder, et al. request the court amend the Standard Scheduling Order dated January 31, 2011 in the following manner. First, with respect to expert designation, the court should either require defendants to designate their experts on issues for which they have the burden of proof not later than three months from the date of the issuance of the order or permit plaintiffs to designate rebuttal experts not later than six and a half months from the date of the Standard Scheduling Order with respect to issues for which defendants have the burden of proof. Second, pursuant to Rule 16B(b)(6), since the parties have already participated in a dispute resolution conference with Justice Fritzsche, plaintiffs respectfully request the court exempt the parties from participating in a subsequent ADR conference.

**II. STANDARD OF REVIEW**

Rule 16(a)(1) provides in part: “The Standard Scheduling Order shall not be modified except in accordance with Rule 16(a)(2) . . .” Rule 16(a)(2) states: “On a motion by a party filed

within 30 days of the entry of the Standard Scheduling Order . . . the Standard Scheduling Order may be modified or supplemented to address the requirements of a case not addressed by the Standard Scheduling Order.” The Advisory Committee Notes (2007) states:

The adoption of Rule 16(a)(2) permits the court, on its own or on a motion, filed within 30 days of the scheduling order, to modify the order without having to meet the exacting "good cause" standard. A Rule 16(a)(2) modification of the scheduling order should be the exception, rather than the routine. The new subdivision (a)(2) purposely does not specify the kinds of cases in which a departure from the form order is warranted, but obvious examples include complex or multi-jurisdictional cases, cases with many parties and counsel, and extremely simple cases that do not require the full standard treatment. A motion for modification to the standard scheduling order should specify why the standard order does not meet the requirements of the case and should proffer an alternative order, preferably with the agreement of all counsel. The court is intended to have broad discretion to decide whether to depart from the standard order and, if so, on the schedules and orders made to address the particular requirements of the case.

### **III. REQUIREMENTS OF CASE NOT ADDRESSED BY STANDARD SCHEDULING ORDER**

#### **A. Parties have already participated in ADR.**

At the time the complaint was filed, plaintiffs filed a summary sheet that indicated the action was not exempt from Rule 16B ADR requirement. However, since that time, the parties have engaged in ADR. On February 10, 2010 the parties spent a full day with Justice Fritzsche attempting to resolve the matter. The conference with Justice Fritzsche satisfied the requirements stated in Rule 16B(b)(6). Section 4 of the Standard Scheduling Order should be amended to exempt the parties from participating in any subsequent ADR. If the parties believe that there is a workable solution they, of course, can still agree to ADR or merely negotiate a settlement. At this time, given the Town’s position, mediation a second time would yield no more than it did the first time.

B. Expert Designation Deadlines.

Given the number of parties and claims raised by the parties, it is beyond dispute that this case is an example of the type of case where departure from the provisions of the Standard Scheduling Order is warranted. Plaintiffs have two claims. First, plaintiffs have a count for declaratory judgment that included a request that the court declare that plaintiffs own their property free and clear of all claims of all defendants subject to the public rights of usage. Second, plaintiffs have a statutory quiet title count based on the claim that for over four years, plaintiffs and those under which they claim have been in uninterrupted use of the properties in question.

Defendants have a number of counts including a count seeking a declaration that the Town holds fee title to the property at issue based on the royal grants confirmed in 1663 (Town's Countercl. ¶ 3) by a decree of King Charles II and later re-confirmed by William III and Mary II. According to the Town, since the royal grants predate each of the plaintiffs' sources of title (and presumably cover the entire beach property); the Town has superior title to the property.

Relative to which party has the burden of proof in a declaratory judgment and quiet title action, the Law Court stated in Hodgon v. Campbell, 411 A.2d 667, 669 (Me. 1980):

We believe that both fairness and the nature of declaratory relief dictate that the allocation of the burden of proof in declaratory judgment actions must be determined by reference to the substantive gravamen of the complaint. The party who asserts the affirmative of the controlling issues in the case, whether or not he is the nominal plaintiff in the action, bears the risk of non-persuasion. See Preferred Acc. Ins. Co. v. Grasso, 186 F.2d 987, 991 (2d Cir. 1951); Ross v. American Radiator & Standard Sanitary Corp., 507 S.W.2d 806, 810 (Tex.Civ.App. 1974).

Indeed in the classic quiet title actions, the putative owners like the plaintiffs in this case by bringing an action can ask the court to assign the burden of proof. McGrath v. Hills, 662 A.2d 215 (1995). Indeed expert testimony is not required under 14 M.R.S. § 6651. Id. 218.

Plaintiffs do not intend in the first instance to use an expert but would merely introduce their deeds and chain of title extending back at least 100 years. In addition, the plaintiffs will rely on numerous admissions by the Town and its legal counsel that the Town has no title claim to the beach. The Town's own Comprehensive Plan since 1995 has admitted that Goose Rocks Beach is privately owned and that the Town does not claim any title or prescriptive interest in the beach. So now, for the first time in its history, the Town proffers this highly dubious title claim based either on ancient grants from King Charles II or on a 1684 deed that was discovered well after the lawsuit had been filed.

The Town knows the plaintiffs' title claims; they are based on their deeds and respective chains of title. However, the plaintiffs have no idea what the foundation or basis of the Town's claims are. As the Court knows, the Town's claims have caused a certain amount of uncertainty about the title on Goose Rocks Beach and in that entire section of the town.

The Standard Scheduling Order does not address how expert disclosures should occur when the defendant has filed counterclaims on which it has a burden of proof. In cases without counterclaims or a counterclaim that will not require expert testimony, it makes obvious sense for the plaintiff to designate first, as plaintiff has the burden of proof, and then for the defendant to respond. Based on the information provided, the defendant can decide whether to counter designate an expert. Plaintiffs had not planned to call an expert except in response to claims raised by defendant Town. Defendant Town's claim as stated in their counterclaim is that they have title "by virtue of royal grants of certain English monarchs confirmed in 1663 by the decree of King Charles II and later re-confirmed by William III and Mary II". Town's Countercl. ¶ 3. In response to this claim Plaintiffs interviewed and preliminarily employed an expert historian, but now the Town has shifted its claim to a 1684 conveyance from Governor Danforth of

Massachusetts. Until Plaintiffs know what the Town's claim is and who their experts are they cannot select their own experts. Plaintiffs have deeds and pay taxes and need no expert to show their title. Plaintiffs only need an expert to respond to the Town's title claim, which surprisingly has been shown to change with time. In instances when the defendant has filed counterclaims and intends to support one or more of its claims with expert testimony, the Standard Scheduling Order does not readily fit. Left unchanged, the plaintiffs can designate experts with respect to their claims but until the defendant designates on its claims, plaintiffs are unable to provide as part of the initial disclosure an expert on issues on which the defendant has the burden of proof. The plaintiffs then will need to file a supplemental disclosure on rebuttal experts.

To address this situation, since 1993, under the federal rules, standard scheduling orders provide that the initial expert disclosure be made by any party – whether plaintiff or defendant – that has the burden of proof on an issue at trial. The 1993 Advisory Committee Notes to the Amendments to Rule 26, Federal Rules of Civil Procedure explains the reason for the change:

This paragraph imposes an additional duty to disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses. Normally the court should prescribe a time for these disclosures in a scheduling order under Rule 16(b), and in most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue. In the absence of such a direction, the disclosures are to be made by all parties at least 90 days before the trial date or the date by which the case is to be ready for trial, except that an additional 30 days is allowed (unless the court specifies another time) for disclosure of expert testimony to be used solely to contradict or rebut the testimony that may be presented by another party's expert.

Amending the Standard Scheduling Order here to provide that initial expert disclosures should be made by all parties not more than three months from the date of the order on issues for which the party has a burden of proof and any rebuttal experts be disclosed five months after the date of the order is consistent with the rules admonition that they “shall be construed to secure

the just, speedy and inexpensive determination of every action.” M.R. Civ. P. 1. While there are no reported cases in the state court in Maine, the practice has been followed in instances where a defendant presents counterclaims on which the defendant intends to use experts to support its burden of proof. The practice makes perfect sense.

In the alternative, the Standard Scheduling Order should be amended to address the timing of disclosure of rebuttal experts. The order presently does not address when rebuttal experts shall be disclosed. Experts may be called as rebuttal witnesses and offer expert opinions. State v. Mylon, 462 A.2d 1184, 1187 (Me. 1983). Rebuttal evidence is proper if it “repels or counteracts the effect of evidence which has preceded it.” Field & Murray, Maine Evidence § 611.8, at 335 (6<sup>th</sup> ed. 2007) (citing Emery v. Fisher, 128 Me. 124, 125, 145 A. 747, 747 (1929)).

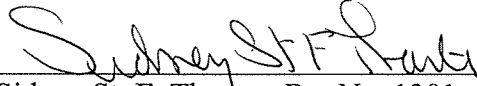
Given that the defendants have their own burden of proof on their counterclaims and apparently intend to offer expert opinion in support of those claims, the court should establish in the scheduling order a deadline of six and a half months from the date of the scheduling order for plaintiffs to designate any rebuttal experts. Such a deadline will avoid disputes later in the process regarding the proper timing of the disclosure of rebuttal experts.

Presently Rule 26(e) requires a party who responded to a discovery response to “duly seasonably” supplement the response with respect to the identity of any person expected to be called as an expert witness at trial. By amending the scheduling order to provide for designation of any rebuttal expert witnesses six weeks after defendants’ disclosure it avoids disputes as to what constitutes duly seasonably and again is fully consistent with securing “the just, speedy and inexpensive determination of every action.”

#### **IV. CONCLUSION**

For the above reasons, plaintiffs request the Standard Scheduling Order be amended as requested.

Dated: March 1, 2011

  
Sidney St. F. Thaxter, Bar No. 1301  
David P. Silk, Bar No. 3136  
CURTIS THAXTER  
One Canal Plaza / P.O. Box 7320  
Portland, Maine 04112-7320  
(207) 774-9000  
Attorneys for plaintiffs

#### **NOTICE**

Pursuant to Rule 7 of the Maine Rules of Civil Procedure, opposition to this Motion must be filed not later than 21 days after the filing of the Motion, unless another time is provided by the Rules of Court. Failure to file a timely objection will be deemed a waiver of all objections to this Motion which may be granted without further notice or hearing.

STATE OF MAINE  
YORK, ss

SUPERIOR COURT  
CIVIL ACTION  
DOCKET NO. RE-09-111

ROBERT F. ALMEDER et al., )  
)  
)  
Plaintiffs, )  
)  
v. )  
)  
TOWN OF KENNEBUNKPORT et al., )  
)  
Defendants. )  
)  
)  
)

**ORDER**

**(Title to Real Estate Involved)**

UPON plaintiffs’ motion to amend this Court’s January 31, 2011 Scheduling Order, paragraphs 2 (expert witness designations) and 4 (alternative dispute resolution conference (ADR)), WITH/WITHOUT HEARING, WITH/WITHOUT OBJECTION, the motion is GRANTED.

IT IS HEREBY ORDERED that the Court’s January 31, 2011 Scheduling Order is amended and modified as follows:

1. Paragraph 2, Expert Witness Designations, is modified as to the timing of disclosures of the parties’ experts:

(A) Each party shall serve on all other parties not later than three months from the date of the issuance of the January 31, 2011 Scheduling Order, a designation of expert(s) on issues/claims for which that party has the burden of proof;

(B) Each party shall serve on all other parties not later than six and a half months from the date of the January 31, 2011 Scheduling Order, any rebuttal expert(s).

2. Paragraph 4, Alternative Dispute Resolution Conference (ADR). The parties satisfied the requirements stated in Rule 16B(b)(6) prior to the issuance of the January 31, 2011 Scheduling Order. The parties, therefore, are exempt from participating in subsequent ADR conference.

The clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a) of the Maine Rules of Civil Procedure.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Justice, Superior Court