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*By E-Mail and First-Class Mail*

Ralph I. Lancaster, Jr., Esq.  
Pierce Atwood LLP  
One Monument Square  
Portland, ME 04101

**Re: *New Jersey v. Delaware*, No. 134, Original**

Dear Mr. Lancaster:

Delaware does not object to New Jersey's proposed modification to the third of the four issues on the list set forth in paragraph one of Case Management Order #7 ("CMO #7"), as long as Delaware is permitted the opportunity to seek additional discovery with respect to New Jersey's newly asserted claims so that Delaware is not prejudiced by the late introduction by New Jersey of new issues into the case. If such discovery is not permitted, Delaware respectfully requests that the proposed modification be denied.

As New Jersey concedes in its June 20, 2006 letter, the statement of the third issue in CMO #7 closely mirrors the third issue of law in New Jersey's February 10, 2006 list of issues, in which New Jersey "did not . . . frame th[at] issue to refer to Delaware."

CMO #7 Did New Jersey lose any relevant rights conferred by of the Compact of 1905 through the doctrine of prescription and acquiescence?

NJ Did New Jersey lose the rights conferred by Article VII of the Compact through the doctrine of prescription and acquiescence?

Furthermore, New Jersey concedes that, to the extent it "implicitly raised the issue of prescription and acquiescence with respect to Delaware," it did so in pleadings filed *before* it decided how to draft its issue statement, in which it made no claims of prescription or acquiescence with respect to Delaware. In any case, Delaware disputes that New Jersey's statements in those pleadings were sufficient to put Delaware on notice that New Jersey sought to argue that Delaware lost any rights through prescription and acquiescence. To the contrary, those pleadings argued that such theories would be *inapplicable* here, both because the period of

Mr. Ralph I. Lancaster, Jr., Esq.

Page 2

June 26, 2006

time was far too short and because the doctrine does not apply to federally approved compacts. *See* Brief in Opposition to Delaware's Motion for Appointment of a Special Master at 14-15 (Jan. 4, 2006) ("Most cases applying the doctrine have involved periods approaching or exceeding 100 years."); *id.* at 15 n.12 ("[T]he doctrine of prescription and acquiescence is unavailable to divest a state of a federally approved compact right.").

In crafting its discovery requests, therefore, Delaware reasonably did not seek discovery into the basis for any claims of prescription or acquiescence as to Delaware's rights under the 1905 Compact. Delaware should be permitted to take discovery on those claims to avoid being prejudiced.

New Jersey also suggests that its claims of estoppel with respect to Delaware justify modifying the third issue in CMO #7 to address both Delaware and New Jersey. But the question whether Delaware (or New Jersey) is estopped from making certain claims already appears in another issue in paragraph one of CMO #7, so New Jersey's claims of estoppel cannot provide a basis for modifying an issue statement that addresses the different doctrines of prescription and acquiescence.

In the event the Special Master is inclined to deny Delaware's request for discovery on New Jersey's newly added contention, then New Jersey's request to modify should be denied. New Jersey should be found to have waived any arguments it might have that Delaware lost rights through prescription and acquiescence. Indeed, New Jersey could be found to have waived those claims by failing to raise them expressly in its statement of issues or at any time prior to its June 20, 2006 letter. Denial of New Jersey's proposed modification would also prevent any prejudice to Delaware.

Respectfully submitted,



David C. Frederick

cc: Rachel J. Horowitz, Esq. (3 copies)  
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