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By Electronic and First-Class Mail

Ralph I. Lancaster, Jr.
Pierce Atwood, LLP
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Portland, Maine 04101

Re: State of New Jersey v. State of Delaware
No. 134, Original

Dear Mr. Lancaster:

Please accept this letter in reply to Delaware's submission of December 4, 2006 opposing New Jersey's motion to strike as evidence the entire expert report of Joseph Sax, Professor of Law and the legal conclusions contained within the expert report of Carol E. Hoffecker, Professor of History.

Professor Sax's credentials do not transform his legal argument into admissible testimony or diminish the prejudice to New Jersey by allowing Delaware an "auxiliary" 30-page legal brief – which is what the Professor's legal argument would be in brief-format. The 60 page limit on legal briefs is more than a formality. It serves, in part, as a benchmark of equal access to a tribunal. "Striking" the Sax report as evidence will *not* deprive the Supreme Court of the opportunity to review the "background principles" of riparian law offered by Professor Sax. They can easily be inserted

into Delaware's legal brief. It will, however, affirm another important "background principle" – that legal argument is not admissible evidence, even in an original action before the United States Supreme Court.

Delaware itself admits that it offers Professor Sax's report "only to establish the state of water law in 1905." (Db18, fn.7) Unquestionably, that is the purpose of legal briefing, rather than testimony. [1] Moreover, the report is not "testimony" that will assist the Special Master in understanding the intention of the drafters of the 1905 Compact. Instead, Professor Sax's report focuses exclusively upon two words in Article VII: "riparian jurisdiction." Ex.A, ¶9–31. The Professor does not even examine the words in context. The drafters wrote and the parties negotiated "riparian jurisdiction of every kind and nature," not just riparian jurisdiction.

In addition, Professor Sax himself claims that "riparian jurisdiction" is *not* a legal term of art (Ex.A, ¶9). This admission is fatal to Delaware's position that the caselaw, legal treatises and constitutional clauses Professor Sax discusses are relevant *evidence*. Since Delaware argues that admissibility under Rule 702 is primarily determined by relevance (Db12, citing *Daubert v.*

[1] Indeed, Delaware counsel has already authored a 44 page analysis of riparian law and rights. *See, Brief In Opposition to New Jersey's Motion To Reopen,* p.35-78.

Merrell Dow Pharms, Inc. 509 *U.S.* 579 (1993)), this fundamental disconnect between Sax's legal expertise and the "lay" language he purports to explain renders the Professor's report inadmissible as evidence.

Finally, Professor Sax's legal arguments are inherently speculative and unreliable *as evidence* given the absence of any fact showing that the drafter(s) of the Compact -– lawyers or others -- had Sax's cases and treatises in mind, let alone shared his interpretation of that material in drafting the Compact or "selecting" words in it. This deficiency is fatal to Delaware's argument that Sax's material will assist the trier of fact to understand the evidence.[2] For these reasons, the Court should require Professor Sax's examination of "the state of water law in 1905" (Db18, fn.7) to appear in Delaware's legal brief.

Labeling Professor Sax a "consultative expert pursuant to the CMP" (Db10) does not make his report admissible. As used in the federal rules, a "consultative expert" is one who has only been consulted by counsel for an opinion and who is not submitting

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[2] A similar circumstance arose in *Virginia v. Maryland*, when the Special Master rejected legal argument for the purpose of defining the intent of the Compact of 1785, finding that "[t]here is nothing to permit – much less compel - a reasonable inference that use of the word 'navigation' was intended by the drafters and enactors to define 'River Patowmack' by the *legal* definition of navigability..." [emphasis in original]. See Plaintiff's Motion, Ex.C, Page 22.

evidence in litigation.[3] The CMP simply permits the parties to offer evidence from experts "who have been retained...*to testify* as to matters and issues in the case." [§6.6.2b, emphasis supplied]. There is nothing supporting Delaware's claim that reference to "consultative expert" is a CMP codeword for wholesale abandonment of *Fed.R.Evid.* 702 and 704 which restrict expert testimony to facts and reserve legal issues for determination by the Special Master.

Similarly without support is Delaware's assertion that the appointment of a Special Master in 2005 constituted a ruling to accept expert legal testimony in this matter. (Db5; Db22). Whatever Delaware may have had in mind when it proposed to submit "historical evidence" in support of its case in 2005 (*Delaware Brief in Opposition to New Jersey's Motion to Reopen*, p.78), Delaware argued only that a Special Master should be appointed to "hear the evidence and make a recommendation on the resolution of this dispute" if the Supreme Court could not resolve the matter on the papers. Id. In any event, Delaware's prospective intention

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[3] See, e.g., *Sensormatic Elecs. Corp. v. WG Sec. Prods.,* 2006 U.S. Dist. LEXIS 30591 (D. Tex. 2006) at page 7; and *Fed.R.Civ.P.* (b)(4)(B) (allowing depositions of "non-testifying consulting experts" only if there is a showing of exceptional circumstances under which it is impracticable for the party seeking to obtain facts or opinions on the same subject matter by other means.) Alternatively, a "consultative expert" refers to a medical expert who testifies in court concerning a medical issue but who is not the patient's regular treating physician. See, e.g., *McPheron v. Barhardt*, 2003 U.S. Dist. LEXIS 22403 (IL., 2003), 92 Soc.Sec.Rep.Service 893, at page 40-41.

concerning its defense to New Jersey's Complaint in no way precludes or limits plaintiff's right to move to strike inadmissible material, a motion most appropriately filed only after reports are produced and their content known.

Delaware is mistaken in asserting that *Colorado v. New Mexico*, 467 *U.S.* 310 (1984), establishes that legal argument is admissible as evidence (Db12). That case concerned Colorado's request, pursuant to the original jurisdiction of the Supreme Court, for an equitable apportionment of water from an interstate river used by New Mexico. The Supreme Court affirmed the Special Master's decision to accept expert testimony on the ultimate question before him pursuant to *F.R.Evid.* 702 and 704, but that question was *a question of fact* -- specifically, whether New Mexico could reasonably conserve its use of river water sufficient to "cover" or compensate for the larger share sought by Colorado. Id. at 336.

Similarly, *Idaho v. United States,* 533 *U.S.* 262, 266 (2001), presents no precedent adverse to New Jersey's motion (Db14). That case allowed testimony to establish how the Coeur d'Alene Tribe utilized submerged lands so that the Court, not the expert, could interpret congressional enactments and Presidential executive Orders. Id. The expert testified about facts, not the law affecting the statutes or executive orders.

Nor does *New Mexico v. General Electric Co.,* 335 *F.Supp*.2d 1266 (D.N.M.2004), afford a credible basis to oppose New Jersey's motion (Db14). The case concerned an action by the State for damages arising from groundwater pollution where the sole issue for determination was whether and to what extent the presence of contamination in excess of drinking-water standards deprived the State of the opportunity to make Rio Grande water available for appropriation by others. Id. at 1280. This ruling made the State's water allocation policies and the quantity of available water factual issues.

The District Court accepted testimony from engineers concerning water supply and chemical characteristics as well as testimony from a law professor as to how New Mexico allocated water in conformance with the Rio Grande Compact. *Id.* at 1305. The litigation did not concern the meaning of the Compact, only the factual issue of how the State allocated water as a result of the Compact. Thus, *General Electric* does not support substituting legal argument for factual evidence where the meaning of a legal document is the subject of litigation.

While Delaware is certainly correct that the Special Master declined to strike the expert reports offered by Maryland (Db17), the Special Master appropriately disregarded them because they offered only legal and interpretive conclusions unsupported by the

Compact (Db18). New Jersey can divine no difference between those reports and Professor Sax's report which offers his view on the "legal context ...of riparian law" but demonstrates no factual connection whatsoever to the Compact drafters or their alleged "decision" to use one word over any other. *Id*. Professor Sax's suggestions that the Compact drafters must have considered specific laws or cases when they used the term "riparian jurisdiction" – a term the Professor asserts is not even a legal term of art – is precisely the sort of "speculative leap of faith" that the Special Master appropriately rejected in *Virginia v. Maryland*. Moreover, New Jersey asks only that these legal arguments appear in brief form, rather than being stricken from the case altogether.

Delaware's observation that a Compact is a contract that is interpreted by "reference to principles of law" (Db15) does not alter the fundamental premise of the federal rules which allow only testimony helpful to resolving issues of fact. Lawyers do not testify about the law. They brief the law and allow the Special Master to decide the law.

Contrary to Delaware's argument (Db12), *Daubert v. Merrell Dow Pharms. Inc.,* 509 *U.S.* 579 (1993), invented no new principle to support use of legal argument as evidence. *Daubert*, a case brought against a drug company by a mother who used the drug during pregnancy, establishes only that medical expert testimony need not

be based only upon tests conducted according to "generally accepted" scientific techniques. The testimony in *Daubert* concerned the chemical properties of a drug, an issue commonly addressed by experts. The case does not transform the legal interpretation of the Compact of 1905 into a "factual question" upon which testimony is appropriate.

Nor can Delaware credibly claim that testimony on riparian law is required because it is an "arcane" area of law (Db16). Both New Jersey and Delaware administer and interpret "riparian rights and law" on a daily basis. Each state has offices that issue subaqueous licenses and grants and that interpret pre-existing instruments, some of great antiquity. Each state administers regulatory programs which issue permits for activities in riparian areas. These programs are not infrequently required to consider the terms and limitations on riparian grants or licenses. Accordingly, riparian law is not an "arcane" area for either Delaware or New Jersey, and Delaware's unsupported contention to the contrary does not justify admitting a law professor's legal argument as evidence. [4]

[4] Nor does *Smith v. Ingersoll-Rand Co,* 214 *F*.3d 1235, 1246 (10th Cir.2000) cited by Delaware (Db17) illustrate admissible testimony on an "arcane" point. New Mexico law allowed expert testimony concerning the economic value of plaintiff's loss of enjoyment of life (a/k/a "hedonic damages"). Expert testimony concerning plaintiff's damages is commonly accepted as evidence.

Finally, there is nothing in the affidavit of Richard Castagna which renders Professor Sax's legal arguments admissible testimony or justifies admission of legal argument as testimony. (Db22-23). Mr. Castagna, the Manager and Records Custodian for the New Jersey Bureau of Tidelands Management which issues riparian grants and licenses, has only described the maps depicting the Delaware River and the grants, licenses and permits issued by New Jersey in the Twelve Mile Circle. Mr. Castagna is not a lawyer and, accordingly, cannot make legal arguments. Professor Sax's densely-compressed 15 page brief on "the state of water law in 1905" (Db18, fn.7) is in no way comparable in character or purpose to Mr. Castagna's representations.

Similarly, Delaware cannot justify admissibility of Professor Hoffecker's discussion of the meaning and relevance of the 1905 Compact on the ground it offers an "historical explanation" for why, for example, newspapers failed to discuss riparian issues. (Db19). Setting aside the question why newspaper silence here is significant at all, Professor Hoffecker flatly states that riparian issues "presented no problems" because (she opines) Delaware did not regulate or tax structures built into the Delaware River (Ex.B at p.40). This is nothing but "a speculative leap" concerning the meaning and importance of Article VII of the Compact which is inadmissible as evidence.

To the extent that the remaining portions of Professor Hoffecker's opinions identified in New Jersey's motion are offered to establish what the Compact means or what its drafters intended they, also, are inadmissible. Moreover, the overarching theme of the Hoffecker report – that the Compact was only "about" fishing rights – is facially contradicted by the Compact: Articles I and II address criminal and civil process and Article VII addresses riparian rights and grants.

The Special Master rejected an argument quite similar to this in *Virginia v. Maryland*. Maryland argued that the 1785 Compact was intended to apply solely to the tidal portion of the Potomac River because most of its provisions had relevance only to tidewater. The Special Master rejected that argument: "There are provisions that plainly speak to the tidewater portion of the River, see, e.g., Article Ninth (erection of lighthouses ...), but there are several others that unqualifiedly apply to the entire River." (Special Master's Final Report, p.22 (December 9, 2002)). He concluded: "Even accepting as true that the Compact's drafters were principally concerned with tidal waters would not prove *a fortiori* that the Compact was intended to apply exclusively to such waters." (*Id*. at 27.)

Given the clear disconnect between the text of the Compact and Hoffecker's statements concerning the meaning and effect of the

Compact, New Jersey's motion to exclude those statements from the evidentiary record should be granted.

Conclusion

The Special Master should grant New Jersey's motion and issue an order finding the entire expert report of Professor Joseph Sax and the portions of Professor Carol Hoffecker's report identified herein as inadmissible, since they offer legal citations, legal opinions and legal conclusions concerning the meaning and effect of the Compact of 1905, issues that are reserved exclusively for determination by the Special Master. The order is particularly appropriate in the absence of any evidence whatsoever that Delaware counsel are incapable of articulating these legal arguments themselves. Moreover, a level playing field in this case can be preserved only if these extensive legal arguments are restricted to Delaware's 60-page merits brief.

Respectfully submitted,

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