No. 134, Original

IN THE

Supreme Court of the United States

STATE OF NEW JERSEY,
Plaintiff,

v.

STATE OF DELAWARE,
Defendant.

MOTION OF STATE OF DELAWARE TO STRIKE BP'S DESIGNATION OF ITS PRIVILEGE LOG AND SUPPORTING DECLARATIONS AS CONFIDENTIAL

Defendant, State of Delaware, hereby moves to strike BP's designation of its privilege log and supporting declarations as confidential. In support of this motion, defendant shall rely on the brief filed herewith.

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May 17, 2006

PUBLIC

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INTRODUCTION

Delaware brings this motion to nullify an attempt by BP p.l.c. to designate as "confidential" a "privilege log" with entries **[Begin confidential] [End confidential]** of communications between BP lawyers and New Jersey state officials under the Case Management Plan ("CMP"). Such an effort by BP to cloak from public view its extensive behind-the-scenes efforts would fail to meet the standards for upholding confidentiality in a normal civil lawsuit; it is doubly inappropriate given the matters of grave public importance at issue in this historic suit between sovereign States.

The motion arises in the context of New Jersey's – and BP's – extensive efforts to obtain public support for the construction of BP's massive liquefied natural gas ("LNG") bulk-transfer facility that, if approved, would encroach on Delaware's submerged lands. Although New Jersey and BP have told the Court at great length about the positive aspects of the BP LNG Terminal that BP wishes to place in Delaware's coastal waters in contravention of Delaware's Coastal Zone Act, New Jersey claims in a separate pending Motion to Strike Delaware's Issues of Fact Nos. 1, 2, 6, 8, and 9 that Delaware's attempt to explore the scope of BP's project is irrelevant. Similarly, although BP and New Jersey have liberally disseminated to the media their views on the merits of the case[1] and have claimed a common interest in this case, BP now seeks to shield from public view even the most general privilege log descriptions of its communications with New Jersey about this case. This attempt to shield information from the public appears to be

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[1] *See, e.g.*, Office of the New Jersey Attorney General News Release, *New Jersey Suing Delaware in U.S. Supreme Court* (July 28, 2005), *available at* http://www.state.nj.us/oag/newsreleases05/pr20050728b.html; **[Begin confidential]**

[End confidential]

unprecedented in an original jurisdiction case and is designed to conceal the extent to which litigation ostensibly on behalf of the citizens of New Jersey is being fueled by a private corporation. BP has not articulated, and cannot articulate, a meritorious basis for shielding the privilege log and supporting declarations from public scrutiny. Delaware, its citizens, and perhaps even more so the citizens of New Jersey, have every right to learn how BP has thus far influenced an original jurisdiction action in this Court.

STATEMENT OF FACTS

On March 7, 2006, Delaware served subpoenas on BP America Inc. and five affiliates ("BP") pursuant to the Case Management Plan.[2] On March 21, 2006, BP, through outside counsel at Hunton & Williams, filed an initial written response to the subpoenas. On April 25, 2006, BP provided Delaware with a log identifying **[Begin confidential]** **[End confidential]** communications between BP and New Jersey counsel, **[Begin confidential]** **[End confidential]** which BP contends are privileged because of the supposed "common interest" between New Jersey and BP, along with two declarations in support of its contention.[3]

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[2] The subpoenas sought information relating to, *inter alia*: (1) the scope of BP's proposed LNG terminal project on the Delaware River, particularly with regard to structures that would extend from New Jersey onto Delaware's side of the river within its historic twelve-mile circle and require the dredging of 1.2 *million* cubic yards of Delaware soil; and (2) BP's communications with third parties regarding the 1905 Compact that settled *New Jersey v. Delaware I*, including, for example, New Jersey's revisionist reading of the provision by which Delaware permitted New Jersey to "continue to exercise . . . jurisdiction" on its side of the Delaware River in the absence of a ruling as to where New Jersey's side ended, secure in the knowledge that New Jersey's self-help actions created no legal or equitable jurisdictional rights and that, if the boundary dispute ever resurfaced, Delaware would vindicate its historic rights.

[3] The log lists only documents that BP claims are privileged under the "common interest" rule because Delaware agreed that BP would not have to supply a privilege log for documents exchanged exclusively between BP and its law firms. The log is attached as Exhibit A hereto, **[Begin confidential]** **[End confidential]**

[Begin confidential]

[4] **[Begin confidential]**

End confidential]

[5] **[Begin confidential]**

[End confidential]

[End confidential]

BP has attempted to shield these summary descriptions from public scrutiny by designating every page of the log, including every log entry, every date, and every BP contact with a New Jersey public official, as "CONFIDENTIAL." BP has also designated the two

[6] While the opposition brief is dated January 4, 2006, it was transmitted to Delaware counsel and filed with the Court on January 9, 2006.

declarations that accompany the log as confidential, **[Begin confidential]**

[End confidential] As a consequence of BP's confidentiality designations, Delaware has been forced to file its response to New Jersey's Motion to Strike Delaware's Issues of Fact Nos. 1, 2, 6, 8, and 9 in redacted form, which inhibits public understanding and discussion of the States' contentions.

As addressed below, BP's attempt to shield its privilege log and supporting declarations from public scrutiny is wholly without merit under the law governing confidentiality designations in the most mundane civil litigation, let alone what is potentially a historic controversy between two sovereign States.

ARGUMENT

Under the procedures adopted by the Special Master for this proceeding, the "good cause" standard of Rule 26 of the Federal Rules of Civil Procedure governs the determination of whether BP may cloak from public view its privilege log of communications between BP lawyers and New Jersey state officials. BP has not met, and cannot meet, that standard, because it has no legitimate interest in shielding this material from the public eye. Because BP has no real need to keep "confidential" its privilege log and associated materials, and because there is undoubtedly a strong public interest in the disclosure of this material, the Special Master should strike BP's designation of its privilege log and associated documents as "confidential."

A. BP Must Demonstrate "Good Cause" For Its Confidentiality Designations

"Generally, the public can gain access to litigation documents and information produced during discovery unless the party opposing disclosure shows 'good cause' why a protective order

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[7] **[Begin confidential]**

[End confidential]

is necessary." *Phillips ex rel. Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002). *See also San Jose Mercury News, Inc. v. United States Dist. Ct.*, 187 F.3d 1096, 1103 (9th Cir. 1999) ("It is well-established that the fruits of pretrial discovery are, in the absence of a court order to the contrary, presumptively public."); *In re "Agent Orange" Product Liab. Litig.*, 821 F.2d 139, 145 (2d Cir. 1987) ("[I]f good cause is not shown, the discovery materials in question should not receive judicial protection and therefore would be open to the public for inspection.").

Under the CMP, BP's obligations in responding to Delaware's subpoenas are governed by Rule 45 of the Federal Rules of Civil Procedure. CMP §§ 5.2, 5.2.11. Rule 45 requires that, "[w]hen information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim." Fed. R. Civ. P. 45(d)(2); *see* CMP § 8 ("[i]f a party withholds [discovery] on the ground of privilege . . . it shall provide a privilege log" identifying, *inter alia*, the "general subject matter" of each document withheld).[8] Thus, under Rule 45, BP is required to provide a privilege log that describes the nature of the documents being withheld on grounds of privilege. Neither Rule 45 nor Rule 26(b)(5) states that these required summary descriptions should be hidden from the public as a matter of course.

The CMP does nothing to change that default rule. To the contrary, the CMP states that the "good cause" requirement contained in Rule 26(c) of the Federal Rules of Civil Procedure,

[8] Rule 26(b)(5), which similarly requires that a party withholding documents as privileged "shall describe the nature of the documents . . . not produced . . . in a manner that . . . will enable other parties to assess the applicability of the privilege or protection," does not apply in this proceeding because privilege logs are covered by CMP section 8. *See* CMP § 5.2.3.

which governs protective orders addressing confidentiality, will apply in this proceeding. CMP § 5.2.4.[9] That rule provides, in pertinent part, that

> for good cause shown[] the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including [an order] . . . (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way.

Fed. R. Civ. P. 26(c). Nothing suggests that the CMP intended to depart from this standard, which has governed confidentiality disputes for many decades. *See, e.g., Federal Open Mkt. Comm. of Federal Reserve Sys. v. Merrill*, 443 U.S. 340, 356 (1979) (noting that Rule 26(c)(7), which replaced former Rule 30(b) in 1970, was intended to "reflec[t] existing law") (alteration in original). Accordingly, though BP was permitted in the first instance to designate as confidential those documents that it believes contain a "trade secret" or "other confidential" information, now that Delaware has contested that designation, BP has "the burden of showing that such designation is appropriate" using the "good cause" standard of Rule 26(c). CMP § 9.[10] *See also Phillips*, 307 F.3d at 1210-11 (burden of showing good cause rests on "the party seeking protection").

B. BP Has No Good Cause For Designating Its Log And Declarations As "Confidential"

Good cause exists for an order imposing confidentiality "when a party shows that disclosure will result in a clearly defined, specific and serious injury." *Shingara v. Skiles*, 420

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[9] Section 5.2.4 of the CMP provides, as the only limitation on the applicability of Rule 26(c), that the procedure for resolving discovery disputes set forth in section 10 of the CMP will apply. Because section 9 of the CMP, as described above, specifically addresses how disputes over confidentiality designations should be raised, the CMP states that Rule 26(c) governs the substantive aspects of disputes over confidentiality, while CMP section 9 governs the procedure by which such disputes should be presented to the Special Master.

[10] Under Case Management Order No. 4 ("CMO 4"), section 9 of the CMP applies to documents produced by BP. *See* CMO 4, § 1.

F.3d 301, 306 (3d Cir. 2005); *see also Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981) (to establish good cause for a protective order under Rule 26(c), the "'courts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements'") (quoting *In re Halkin*, 598 F.2d 176, 193 (D.C. Cir. 1979)). "[B]road allegations of harm are not sufficient to establish good cause." *Shingara*, 420 F.3d at 306. Instead, Rule 26(c) requires that a court "balanc[e] the interests of the public and the parties," *id.*, with reference to (at least) the following seven factors:

> 1) whether disclosure will violate any privacy interests;
>
> 2) whether the information is being sought for a legitimate purpose or for an improper purpose;
>
> 3) whether disclosure of the information will cause a party embarrassment;
>
> 4) whether confidentiality is being sought over information important to public health and safety;
>
> 5) whether the sharing of information among litigants will promote fairness and efficiency;
>
> 6) whether a party benefitting from the order of confidentiality is a public entity or official; and
>
> 7) whether the case involves issues important to the public.

Id.; *accord Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995).

The Third Circuit's decision in *Shingara* is particularly illustrative of Rule 26(c)'s application in cases involving issues of public importance. In *Shingara*, a policeman brought a First Amendment retaliation action against employees of the Pennsylvania State Police alleging that the defendants had retaliated against him for speaking out about allegedly faulty radar speed devices. 420 F.3d at 303-04. The district court entered a protective order designating discovery responses and other pre-trial information as confidential, and denied the motion of a newspaper

intervenor to vacate the protective order. *Id.* at 304. Applying the seven facts set forth above, the Third Circuit reversed, holding that the district court's "concern that the disclosure of discovery materials to the media *could* unduly prejudice the public is exactly the type of broad, unsubstantiated allegation of harm that does not support a showing of good cause." *Id.* at 307. The court emphasized that

> by focusing on the issue of media attention, the district court unacceptably downplayed the fact that this case involves public officials and issues important to the public . . . . Similarly, because the district court did not point to any real threat of prejudice to the defendants, we disagree with its reasoning that the likelihood of the discovery documents becoming public in the future is a determinative factor.

Id. The *Shingara* court further noted that the parties had pointed to no "legitimate privacy concerns regarding the requested documents," and that "'privacy interests are diminished when the party seeking protection is a public person subject to legitimate public scrutiny.'" *Id.* (quoting *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787 (3d Cir. 1994)). The court also noted that the nature of the dispute "clearly weigh[ed] against the protective order" because the parties seeking to hide documents from public review were themselves public officials, and because the case certainly involved "issues important to the public." *Id.* at 308. And, importantly, with regard to the embarrassment factor, the Third Circuit stated that "'an applicant for a protective order whose chief concern is embarrassment must demonstrate that the embarrassment will be *particularly serious*,'" *id.* at 307 (quoting *Pansy*, 23 F.3d at 787) (emphasis added), a standard that was not met in *Shingara*, *see id.*, and that the Third Circuit has stated likely cannot be met by a corporation. *See Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986) ("As embarrassment is usually thought of as a nonmonetizable harm to individuals, it may be especially difficult for a business enterprise, whose primary measure of well-being is presumably monetizable, to argue for a protective order on this ground.");

Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1074 (3d Cir. 1984) (general rule favoring disclosure is "not overcome by the proprietary interest of present stockholders in not losing stock value or the interest of upper-level management in escaping embarrassment"). *See also Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982) ("The potential harm asserted by the corporate defendants is in disclosure of poor management in the past. That is hardly a trade secret."); 6 *Moore's Federal Practice* ¶ 26.105[8][a] at 26-278 to 26-279 (3d ed. 2006) ("A risk of revelation of information that might be unpopular or might raise questions unrelated to the litigation is not sufficient to justify a protective order on ground of confidentiality.").

Other courts considering similar questions have refused to depart from the traditional rules requiring the production and public disclosure of privilege logs. In *Estate of Manship v. United States*, 232 F.R.D. 552 (M.D. La. 2005), the court rejected the government's contention that it should not be required to produce a privilege log pertaining to contents of its legal files because of the risk of revealing privileged information. The court noted that, "[e]ven if describing the protected materials in a log may be difficult to do without revealing the confidential nature of the documents, it is nevertheless the obligation of the United States" under the Federal Rules of Civil Procedure. *Id.* at 561. Similarly, in *In re Application for Subpoena to Kroll*, 224 F.R.D. 326 (E.D.N.Y. 2004), the district court required a non-party witness in a patent suit to produce a log of any purportedly privileged materials withheld in response to a Rule 45 subpoena. The district court acknowledged that, by logging this information, parties might be able to discern the date of the witness's conception of an invention based on the dates of the inventor's meetings with attorneys, and noted that, in general, a patent invention record is privileged if provided to an attorney for legal advice. *Id.* at 329. Nevertheless, the court stated that this information should be logged and produced, because "the [attorney-client] privilege

does not extend to the structure and framework of the attorney client relationship," such as dates of meetings, and that "the fact of [an attorney-client] meeting itself is not [privileged] because it does not reveal any confidential communications." *Id.*[11]

BP's attempt to shield even its privilege log from public scrutiny finds no support in the language of Rule 26(c) or the case law applying that Rule. *First*, disclosure will not violate privacy interests or legally recognized interests in secrecy. **[Begin confidential]**

[End confidential] *Second*, the information is being sought for a legitimate purpose, as the information directly relates to this Court's exercise of its original jurisdiction. *Third*, disclosure will not cause embarrassment; BP and New Jersey strenuously assert their "common interest" and therefore are presumably not embarrassed by the communications that they contend reflect that relationship. Moreover, as the Third Circuit has recognized, a corporation like BP has no personal privacy interest, such that a protective order is necessary to ensure the corporation's continued emotional well-being. *See Cipollone*, 785 F.2d at 1121. *Fourth*, the confidentiality of the log itself has no relation to issues

[11] State courts faced with analogous situations have also concluded that pubic disclosure of materials with little to no basis for designation as "confidential" should be the norm. *See Hammock by Hammock v. Hoffmann-LaRoche, Inc.*, 662 A.2d 546, 560 (N.J. 1995) ("Documents that are proprietary must be found compelling in their secrecy interests to overcome the presumption of public access. Rule 4:10-3, relied on by the trial court, does not include a proprietary information category. While a justification for sealing trade secrets may be more readily established, it is more difficult to seal proprietary information."). Similarly, state courts have refused to permit parties to claim that a mere description of privileged materials is, itself, privileged. *See Commissioner of Envtl. Prot. v. Terminix Int'l*, No. X03CV0510942, 2002 WL 172636, at *1-*3 (Conn. Super. Ct. Jan. 3, 2002) (refusing request for confidentiality designation of its privilege log on the grounds that it contained "attorney work product," as the court previously had entered a protective order defining confidential information in terms similar to Rule 26(c)(7) – that is, as "trade secret information," "confidential commercial or financial information," or "personnel or medical information and/or similar information" – and "attorney work product," even if present, did not fall within this definition).

of public health and safety. *Fifth*, a protective order is not necessary to ensure the fairness or efficiency of the case; the sharing of the log is required by the CMP and the Federal Rules of Civil Procedure without any requirement of confidentiality. *Sixth*, one of the parties purporting to benefit from the confidentiality designation is a public entity, which "clearly weigh[s] against" confidential treatment. *E.g.*, *Shingara*, 430 F.3d at 308. *Seventh*, the information involves issues important to the public, as this Court and the citizens of New Jersey and Delaware have a right to know the bases on which this Court's original jurisdiction is based and is being challenged. Thus, because the factors governing confidentiality uniformly weigh in favor of public disclosure, and because the general factual details contained in the privilege log are not themselves privileged, *see*, *e.g.*, *Kroll*, 224 F.R.D. at 329, there is no basis for BP's confidentiality designation.

In purporting to justify that confidentiality designation, BP relies upon the *Restatement (Third) of Law Governing Lawyers* § 59 (2000), which, in addressing a lawyer's duties to a client, defines "confidential client information" as "information relating to representation of a client, other than information that is generally known." *See* Ex. A at 1. But the *Restatement* sets forth this admittedly "expansive definition" of confidential client information (§ 59, reporter's note) in the context of the lawyer's general obligations toward a client, not as a guide to interpreting the term "confidential research, development, or commercial information" under Rule 26(c)(7). Similarly, while Rule 1.6(a) of the ABA Model Rules of Professional Conduct (2004) ("Model Rules") defines confidential client information broadly, the Model Rules do not purport to supplant Rule 26(c)(7); to the contrary, they "presuppose a larger legal context" shaping the lawyer's obligations, including "substantive and procedural law in general." Model Rules, Preamble ¶ 15.

Thus, a lawyer's general duty to protect "confidential client information" under the *Restatement* and Model Rule 1.6(a) is subject to the obligations of litigants under the Federal Rules of Civil Procedure – including the obligation to justify claims to privilege – not the other way around. The *Restatement* does not suggest that its expansive definition of "confidential client information" defines the scope of information subject to a protective order under Rule 26(c)(7); nor do the Model Rules suggest that Rule 1.6(a) defines the scope of information protected by Rule 26(c)(7). Nor is there any indication that the CMP intended to substitute the expansive definition of confidential client information in the *Restatement* for the standard set forth in Rule 26(c)(7). If BP's argument were accepted, and the expansive definition of "confidential client information" determined the scope of Rule 26(c)(7), then every privilege log in every case would always be confidential under Rule 26(c)(7) because it must describe the "nature of the documents . . . not produced." Fed. R. Civ. P. 26(b)(5). But this position is clearly unsustainable. *See, e.g., Estate of Manship*, 232 F.R.D. at 561.

C. The Public Interest Weighs Heavily Against Cloaking BP's Log In Secrecy

BP and New Jersey have repeatedly used the media to disseminate their claims to the public, *see* note 1, *supra*, and have submitted to the Court statements as to the "grave and important" nature of this controversy between two sovereign States. *See* New Jersey's Brief in Support of Motion To Reopen and for a Supplemental Decree at 4, 19 (filed July 28, 2005). BP has also asserted that its interests with New Jersey are so completely aligned that the attorney-client and work product privileges should apply to all communications between them about this matter. Thus, it is with considerable irony that, with respect to the same log and declarations by which BP claims its common interest with New Jersey, BP seeks to prevent the public from understanding the extent of its relationship with New Jersey in this dispute.

It is difficult to overstate the importance of broad discovery and open proceedings in a case of historic dimensions between two sovereign States. "The Court's jurisprudence teaches that, in original jurisdiction cases, full and liberal factual development is important because of the lofty historical, territorial, and financial implications of these cases to the states involved." Report of Special Master, *New Jersey v. New York*, No. 120, Orig., 1997 WL 291594, at *11 (filed Mar. 31, 1997) (citing *United States v. Texas*, 339 U.S. 707, 715 (1950)); *see also Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908) ("[I]t appears to us that few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use.").

Moreover, the citizens of New Jersey have a strong interest in monitoring the activity of their public officials and understanding the factors motivating the decisions of democratic representatives. As the New Jersey Supreme Court stated in *McClain v. College Hospital*, 492 A.2d 991 (N.J. 1985):

> The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to. New Jersey has a strong, expressed public policy in favor of open government, as evidenced by our Open Public Meetings Act, N.J.S.A. 10:4-6 to -21 and our Worker and Community Right to Know Law, N.J.S.A. 34:5A-1 to -31. Our decisional law has reflected this tradition towards openness. In a democracy, the citizens generally have the right to know the truth about all parts of their government, because, without public knowledge of the realities of governmental activities, essential reforms of those activities will be hindered.

Id. at 995-96 (internal quotation marks, brackets, and citations omitted).

Here, the entries on the privilege log are key evidence supporting Delaware's contention that jurisdiction is lacking in this case. In addition, more generally, the log sheds considerable

light on the progress of the dispute so far and the interests of New Jersey going forward. For example, in light of BP's pervasive influence on New Jersey's litigation position in this dispute, New Jersey citizens and the public in general might wish to consider:

(1) why New Jersey was suddenly so willing to abandon a 70-year history of cooperation with Delaware, particularly after this Court had previously rejected New Jersey's attempts to strip Delaware of its historic sovereignty within the twelve-mile circle;

(2) why New Jersey made no meaningful attempt to resolve this matter prior to bringing suit, other than to demand unconditional surrender in an April 2005 letter;

(3) why New Jersey attempted to short-circuit the Court's original jurisdiction procedures by attempting to "reopen" the 1929 boundary case in order to obtain a summary determination of a dispute over the meaning of the 1905 Compact;

(4) why New Jersey's moving papers exhibited so little interest in its own Bill of Complaint and Delaware's Answer in *New Jersey v. Delaware I*, which framed the dispute that the States settled via the 1905 Compact and shed light on the original meaning of its text;

(5) why, after the Court accepted jurisdiction in a dispute of historic dimensions between sovereign States, New Jersey opposed the appointment of a special master and suggested that the case proceed directly to oral argument this Term, without allowing Delaware an opportunity to discover materials that would illuminate the meaning of the century-old Compact, or even to brief the issues fully;

(6) why New Jersey had stated in its briefs that there was no alternative forum in which the 1905 Compact claim could be raised, when, after the Court accepted jurisdiction, BP now admits that it is planning to bring litigation against Delaware on the same issues; and

(7) whether New Jersey has been advised of the adverse consequences to its citizens that may flow from pressing BP's claims in this Court, for example, by testing Delaware's long forbearance in asserting its right to license and tax all structures entering Delaware from New Jersey, and in inviting scrutiny of the States' failure to effectuate the central fishing rights provision of the 1905 Compact, which may render the entire Compact null and void as a matter of law.

Similarly, as the case moves forward, the striking of the confidentiality designation may encourage the public to consider whose interests are really being served by the positions being advanced in New Jersey's submissions to this Court. For, while BP has an apparent desire to influence New Jersey's prosecution of this action **[Begin confidential]**

[End confidential], the public and other interested governmental officials may have their own substantial interest in understanding the true relationship between BP and New Jersey. That understanding, in turn, may result in changes to New Jersey's litigating positions that have substantial effects on the interests of Delaware and its citizens.

CONCLUSION

For the reasons stated, Delaware respectfully requests that the Special Master grant the Motion of State of Delaware to Strike BP's Designation of Its Privilege Log and Supporting Declarations as Confidential.

Respectfully submitted,

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May 17, 2006

EXHIBIT 'A'

FILED SEPARATELY
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