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June 12, 2006

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Re: New Jersey v. Delaware, No. 134, Original
Motion to Quash, or in the Alternative for
a Protective Order, of BP America Inc.
and five Affiliates

Dear Mr. Lancaster:

New Jersey respectfully submits this letter in reply to Delaware's brief in opposition to the Motion of BP America Inc. and its affiliates, ("BP"), for a Protective Order, filed in response to subpoenas issued by Delaware.

Delaware argues that it is entitled to have BP produce communications between it and New Jersey so Delaware can explore whether New Jersey is the real party in interest, or whether New Jersey's interests were somehow rendered irrelevant as a result of a "collusive" effort with BP to create a forum for New Jersey's claims. Delaware further argues that these communications are not



protected by privilege, or, in the alternative, that any privilege was waived when New Jersey and BP shared them. Finally, Delaware contends that it is entitled to discover these materials even if they are privileged, because it has shown a "substantial need" that outweighs any work product protections.

Delaware has failed to show that it has a "substantial need" for the documents, and in any event must demonstrate more than a "substantial need," since the documents generally contain counsel's mental impressions, opinions, and legal theories. See *Fed. R. Civ. P. 26(b)(3); Upjohn v. United States*, 449 U.S. 383, 401-02 (1981). Moreover, Delaware's arguments reveal that the documents it seeks are not even marginally relevant to the matters Delaware claims are at issue. Tellingly, in opposing BP's and New Jersey's claim that the shared documents remain protected by application of the common interest doctrine, Delaware has conceded that, while a grant of full relief to New Jersey will advance BP's interests, the claims raised in New Jersey's pleadings seek relief that extends beyond that which is necessary to advance BP's interest in this litigation.

In light of Delaware's concession that New Jersey's pleadings raise claims which only New Jersey can assert, it is difficult to simultaneously credit Delaware's assertion that New Jersey is acting merely as a proxy for BP. Thus, Delaware's subpoena seeks discovery on matters irrelevant to this proceeding.

At the same time, requiring the production of privileged correspondence concerning New Jersey's legal evaluations and work product would be extremely burdensome and harassing, since it would open New Jersey's case evaluation and litigation strategy to Delaware's scrutiny, and necessarily require intrusive inquiry into New Jersey's decision making process. Therefore, BP's motion to quash and for a protective order should be granted.

As New Jersey argued in its Motion to Strike Delaware's Issue of Fact # 2, in granting New Jersey's Motion for Leave to File a Complaint, the Supreme Court asserted its original jurisdiction over this matter and implicitly recognized that New Jersey is the real party in interest with respect to its Compact claims. Such a ruling ordinarily will not be disturbed in the absence of some new issues of fact or law that call for a different result. *Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992)(quoting *Arizona v. California*, 460 U.S. 605, 619 (1983)("prior rulings in such cases 'should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated.'"). Delaware has failed to identify any legal arguments or factual circumstances that were not within the contemplation of the Court when it allowed New Jersey to file its original action. Rather, Delaware relies on cumulative information pertaining to the same arguments it previously raised before the Court. This is not sufficient to reopen the Court's ruling,

because when the Court rejected Delaware's jurisdictional challenge to New Jersey's original motion, the Court was fully informed that BP stood to benefit from New Jersey's action and that Delaware claimed New Jersey was acting for BP.

Delaware persists in its argument that New Jersey is not the real party in interest despite the fact that its own arguments, made in opposition to BP's Motion to Quash, recognize that New Jersey's claims are peculiarly its own, and are not simply passed-through claims asserted on behalf of BP. In opposition to New Jersey's and BP's assertion that there was no waiver of the work product privilege because the documents remain protected by the common interest doctrine, Delaware now contends as follows:

BP's interest in this case is extremely narrow: it is interested only in Delaware losing the ability to block BP's construction of its proposed LNG facility (footnote omitted). BP has not identified any interest in *why* Delaware loses this case or *whether* New Jersey obtains all the relief sought in its initial pleading. New Jersey, in contrast, apparently cares a great deal about those issues; indeed, New Jersey has represented that there is only "some commonality between the [] interests" of BP and New Jersey. NJ Mot. to Strike 19 (emphasis added)[Delaware Bf. at 31-32].

Further, Delaware points out that "New Jersey's prayer for relief requested declaratory and injunctive relief that would prevent Delaware from regulating 'any improvement appurtenant to the New Jersey shore of the Delaware River within the Twelve-Mile Circle,'

whether by requiring permits in the future or enforcing previously issued permits. NJ Pet. 17 (Prayer for Relief)(emphasis added).” Delaware goes on to say that “BP can not credibly claim any interest in New Jersey’s expansive claims for relief, *which go well beyond BP’s narrow commercial interests.*”(emphasis added).

Thus, Delaware’s own opposition clearly acknowledges that New Jersey’s pleadings assert a claim as to which New Jersey is the real, and the only, party in interest. Delaware does not need discovery to identify the claims clearly asserted on the face of New Jersey’s pleadings, and now explicitly recognized by Delaware.

Delaware also argues that it needs discovery of communications between New Jersey and BP in light of the recent declaration from counsel for BP, indicating that BP is considering filing litigation that would challenge Delaware’s jurisdiction. Delaware contends that it should be permitted to explore whether BP contemplated this future litigation at the time New Jersey filed its action, and whether BP “colluded” with New Jersey to keep this information from the Court. This assertion similarly does not present a relevant issue for discovery. When New Jersey asked the Court to assert original jurisdiction over its Compact claims, New Jersey relied on the settled law that, where there is a real controversy under an interstate compact, a local forum will not be adequate. See N.J. Motion to Reopen, Reply Bf. at 10, citing *Texas v. New Mexico*, 462 U.S. 554, 569 (1983); *Wyoming v. Oklahoma*, 502

U.S. 437, 451-52 (1992). New Jersey has a right to have its claims to enforce an interstate compact, approved by Congress, heard in the forum provided by the Constitution and 28 U.S.C. § 1251(a).

Whether BP is now contemplating an action thus simply is not relevant, and cannot be relied on to divest jurisdiction. New Jersey's ability to enforce its Compact rights never was, and cannot be, dependent on whether BP decides to bring an action in Delaware State court or elsewhere. *West Virginia ex rel Dyer v. Sims*, 341 U.S. 22, 28-29 (1951) ("It requires no elaborate argument to reject the suggestion that an agreement solemnly entered between states... can be unilaterally nullified, or given final meaning by an organ of one of the contracting states."). The Court does not require a compacting state to first seek redress in the courts of the other states, and then seek review on certiorari. Although it is well established that the Supreme Court exercises its original jurisdiction sparingly, the Court has nevertheless recognized the special importance of deciding real controversies arising under an interstate compact. *Texas v. New Mexico*, *supra*, 462 U.S. at 569; *West Virginia ex rel. Dyer v. Sims*, *supra*, 341 U.S. at 28-29. There was no need for New Jersey to "collude" with BP to file its original action, and the entire question is irrelevant to the proper exercise of jurisdiction.

In addition to seeking discovery that is not relevant, Delaware's demands would also impose severe burdens on New Jersey.

Delaware's efforts to "discover" New Jersey's reasons for filing suit, or the degree to which New Jersey was influenced by BP, would necessarily involve inquiries into the thought processes of New Jersey's Governor and Attorney General, who authorized this action. Delaware's offer to agree that it will not to introduce the information it receives as evidence on matters other than its jurisdictional argument cannot possibly address the prejudice that these disclosures would cause to New Jersey. This prejudice flows not only from the possibility that these documents will be introduced into evidence, but from the fact that it is not possible for Delaware to separate its knowledge of New Jersey's litigation strategy from the development of its own strategy. To the contrary, Delaware will have the benefit of knowing New Jersey's evaluative and thought processes regarding its approach to this litigation.

Moreover, the production of the documents subpoenaed by Delaware represents the tip of the iceberg that is Delaware's inquiry. This inquiry may ultimately call for New Jersey to reveal its evaluation not only of the opinions or communications provided by BP, but of other, internally generated opinions, analyses and legal theories, which comprise the entire picture available to New Jersey's decision-makers. Disclosure of these materials is prejudicial whether requested by Delaware directly, or necessitated in order to place into context the materials produced. The

protection of work product documents of this nature is at the heart of the work product privilege. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947)(If an attorney's thoughts must be shared with opposing counsel, "(t)he effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.").

The discovery process is not to be used by a party as a fishing expedition to seek factual support for speculative claims. See *Zuk v. Eastern Pa. Psychiatric Inst. of Med. College of Pa.*, 103 F.3d 294, 299 (3d Cir. 1996); see also *Micro Motion, Inc. v. Kane Steel Co.*, 894 F.2d 1318, 1327 (Fed. Cir. 1990) ("The discovery rules are designed to assist a party to prove a claim it reasonably believes to be viable without discovery, not to find out if it has any basis for a claim. That the discovery might uncover evidence showing that a plaintiff has a legitimate claim does not justify the discovery request.") Yet this is what Delaware seeks to do, through its most recent claims that New Jersey and BP "colluded" to "create" a forum for New Jersey's Compact claims.

To justify these inquiries, Delaware ignores settled law, the implications of its proposed areas of inquiry, and the inherent contradictions in its arguments. For example, Delaware argues that it is entitled to probe the mental processes and motives of New Jersey's decision-makers, even though the Court has recognized this is not an appropriate area of inquiry. See *South Dakota v. North*

Carolina, 192 U.S. 286, 311 (1904) ("If the law concerned itself with the motives of parties new complications would be introduced into suits which might seriously obscure their real merits.") (quoting *Dickerman v. Northern Trust Co.*, 176 U.S. 181, 190 (1900) and citing *McDonald v. Smalley*, 26 U.S. (1 Pet.) 620, 624 (1828) (Marshall, C.J.)).

Delaware presses these arguments, even though they inappropriately question, and would seemingly require examination of, the decision by the New Jersey Governor and Attorney General to authorize this suit. See *Louisiana v. Texas*, 176 U.S. 1, 18 (1900) ("Public policy forbids the imputation to authorized official action of any other than legitimate motives."). At the same time, Delaware ignores the clear contradiction between its theory that BP is the real party in interest in this suit, which it advances to justify this discovery, and its recognition that, in addition to their common interest that New Jersey have exclusive riparian jurisdiction within the Twelve-Mile Circle, New Jersey has interests in addition to those it shares with BP.

It is not appropriate for Delaware to use the discovery process to relitigate issues previously decided by the Court, or to distract from the bona fide matters at issue. Put simply, Delaware's attempt to probe into irrelevant and privileged areas, based on speculation and innuendo, is an abuse of the discovery process and should not be permitted. Therefore, BP's Motion to

Quash, or for a Protective Order, should be granted.

Respectfully submitted,

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In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF DELAWARE,

Defendant.

**Before the Special Master
the Hon. Ralph I. Lancaster, Jr.**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 12th day of June, 2006, counsel for the State of New Jersey caused New Jersey's Letter Reply on the Motion of BP America, Inc. to Quash, in part, Subpoenas Served by the State of Delaware, or for a Protective Order, to be served upon counsel for the State of Delaware and counsel for BP America, Inc. in the manner indicated below:

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