



State of New Jersey

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO BOX 093
TRENTON, NJ 08625-0112

JON S. CORZINE
Governor

STUART RABNER
Attorney General

ROBERT J. GILSON
Director

November 27, 2006

By Electronic and First-Class Mail

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

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

Dear Mr. Lancaster:

Please accept this letter-brief on behalf of Plaintiff in support of its motion for an order striking 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. Both reports have been made at the request of defendant, State of Delaware, in support of Delaware's claims and defenses in this case.

TABLE OF CONTENTS

Table with 2 columns: Section Name and Page. Rows include PRELIMINARY STATEMENT (2), STATEMENT OF FACTS (3), LEGAL ARGUMENT (6), and CONCLUSION (11).

Preliminary Statement

The role of an expert is to assist the Special Master in interpreting issues of fact, not to provide legal opinion or argument regarding interpretation of legal documents. The report authored by Professor Joseph Sax on defendant's behalf (Exhibit A) is comprised wholly of legal argument in support of Delaware's interpretation of Article VII of the Compact of 1905, in particular, the meaning of the phrase "riparian jurisdiction." Legal argument and opinion concerning the meaning of the Compact, without any supporting facts, will not assist the Special Master in determining the intention of the drafters of the Compact and is, thus, inadmissible as evidence under Fed.R. Evid. 702 and 704. Moreover, the Professor's legal argument is so heavily annotated and lengthy that fair play alone mandates its publication be restricted to Delaware's legal brief, which is subject to a 60 page limit.

The foregoing rules and principles also support plaintiff's motion to strike the portions of Professor Carol Hoffecker's report that speculate on the purpose and legal effect of the Compact (Exhibit B, Pgs.32-33,40,46,51) and, in particular, the intended effect of the U.S. Supreme Court's 1934 ruling making the boundary between the two states "subject to the Compact of 1905." (Pg.51-52). Professor Hoffecker's legal conclusions are so interwoven with her

political narrative that excision of this legal material is necessary to prevent its inadvertent inclusion in the factual record.

Alternatively, plaintiff asks the court to disregard the legal citations, legal argument and legal conclusions in both reports.

#### Statement of Facts

The question presented in this case is whether the Compact of 1905 grants New Jersey exclusive State riparian jurisdiction over improvements appurtenant to the New Jersey side of the Delaware River within the Twelve Mile Circle, free from regulation by Delaware. *New Jersey's July 28, 2005 Motion to Reopen No. 11 Original and For A Supplemental Decree*. This Court refined the issue further in Case Management Orders 7 and 8, identifying four issues for resolution:

- (a) Is the 1905 Compact enforceable?
- (b) Which state was...given regulatory authority by the Compact of 1905 over projects ...constructed on the New Jersey shore but extending beyond the low water line within the 12-Mile Circle?
- (c) Did New Jersey or Delaware lose any relevant rights conferred by the Compact of 1905 through the doctrine of prescription or acquiescence?
- (d) Is either state estopped from claiming exclusive jurisdiction over projects physically constructed on the New Jersey shore but including improvements or modifications beyond the low water line within the 12-Mile Circle?

The Special Master rejected Delaware's request to frame the issues solely in light of Article VII of the Compact which provides that "[e]ach State may on its own side of the river continue to exercise riparian jurisdiction of every kind and nature and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective states." Specifically, the Special Master rejected Delaware's proposal to restrict Issue (b), above, to identification of the extent of riparian jurisdiction under Article VII "in light of the 1934 boundary determination and Article VIII of the Compact." (CM07; June 20, 2006 Letter, Frederick to Lancaster). Similarly, the Special Master rejected Delaware's attempt to restrict Issue (c) to rights conferred by Article VII (as opposed to rights conferred by the Compact itself.) Id.

Turning to the motion at hand, an examination of the expert reports submitted on Delaware's behalf readily demonstrates the need for a ruling in advance of final briefing in this case. Instead of interpreting facts, Professor Sax's report purports to address the "meaning and scope" of Article VII of the Compact of 1905 (Ex. A, ¶9) by using legal principles to interpret the meaning of the phrase "riparian jurisdiction." <sup>1</sup> Introductory text aside

---

<sup>1</sup> References are to numbered paragraphs within Professor Sax's report, attached as Exhibit A.

(Ex. A, ¶1-9), the report is composed exclusively of Professor Sax's discussion and analysis of riparian and regulatory law and legal treatises (Ex.A, ¶11-16, 23-30) and the law of "wharfing out" (Ex.A, ¶17-22). The report contains over 65 citations to statutes, cases, legal treatises and constitutions.

From these legal sources, Professor Sax concludes that (a) the Compact drafters "intended" to reserve certain powers to Delaware concerning wharves built out from the New Jersey shoreline (Ex.A, ¶31) and (b) that the drafters deliberately chose the term "riparian jurisdiction" with a specific understanding of law in mind (see, e.g., Ex.A, ¶10,17,20, 26). However, Professor Sax does not deduce the drafters' "intent" and "choice of words" from facts such as prior drafts of the Compact or statements by the drafters. Instead, Professor Sax relies exclusively upon his interpretation of riparian and regulatory law ( Ex.A, ¶11-16, 23-30) and the law of "wharfing out" (Ex.A, ¶17-22; summarized in ¶10 and ¶31) to define "riparian jurisdiction" and divine the intention of the Compact's drafters as articulated in Article VII of the Compact. Professor Sax's report is, in essence, a legal brief rather than an admissible expert report.

The other expert report by Professor Carol Hoffecker, a Delaware historian, purports to provide the "historical background

and context of the Compact of 1905" (Ex.B, p.2).<sup>2</sup> After surveying selected quotes, legislation and political material, Professor Hoffecker concludes that the Compact addressed only fishing rights and "resolved nothing else." (Ex.B, p.51). The Professor also opines as to the issues the Compact of 1905 was "designed" to "resolve" (Ex.B, p.32); the meaning and relative importance of the individual clauses in the Compact ("riparian issues presented no problems" Ex.B, p.40; clauses unrelated to fishing only "preserved the status quo" Ex.B, p.51); which issues in the Compact were "transcendent" (Ex.B, p.42); the Compact's "mandates" (Ex.B, p.47); and the meaning of the 1934 U.S. Supreme Court holding making the New Jersey-Delaware boundary "subject to the Compact of 1905." (Ex.B, p.50). These conclusions concerning the meaning and purpose of the 1905 Compact and the relative weight to be assigned its text, are flatly inadmissible as evidence and should be properly restricted to Delaware's legal brief, as legal argument.

#### Legal Argument

Expert testimony is admissible under Fed.R.Evid. 702 if it concerns (1) scientific, technical, or other specialized knowledge that (2) will aid the trier of fact to understand or resolve a fact

---

<sup>2</sup> Because Professor Hoffecker's report, attached as Exhibit B, does not contain numbered paragraphs, reference is by page number.

at issue. Furthermore, Fed.R.Evid. 704 permits ultimate issue testimony, only if it will be helpful in accordance with Rule 702. (Fed.R.Evid. 704, Commentary). However, as the Special Master recognized in *Virginia v. Maryland*, both rules allow expert opinions "only in matters for the trier of fact, i.e., issues of fact." <sup>3</sup> Professor Sax is a professor of law and his report discusses legal principles he believes relevant to construing the Compact of 1905. His legal experience, however, does not qualify him to construe the Compact of 1905 for its legal effect, a function that is reserved for the Special Master in this matter. *Cryovac Inc. v. Pechiney Plastic Packaging, Inc.*, 430 F.Supp. 346, 364 (D.Del. 2006); *Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 367 (4<sup>th</sup> Cir.,1986). Similarly, Professor Hoffecker's experience as a historian specializing in Delaware politics does not qualify her to testify concerning the purpose and effect of the Compact of 1905 or the relative importance of its provisions.

Professor Sax's report purports to address the "meaning and scope" of Article VII of the Compact of 1905 (Ex.A, ¶9) by using legal principles to interpret the meaning of the phrase "riparian jurisdiction." The report is composed exclusively of Professor Sax's discussion and analysis of riparian and regulatory law and

---

<sup>3</sup> Exhibit C, *Virginia v. Maryland*, No. 129, Original (Special Master's Memorandum of Decision No. 4, July 10, 2001 at pp.15-16, fn.20).

legal treatises ( Ex.A, ¶11-16, 23-30) and the law of "wharfing out" (Ex.A, ¶17-22). From these legal sources, Professor Sax concludes that (a) the Compact drafters "intended" to reserve certain powers to Delaware concerning wharves built out from the New Jersey shoreline (Ex.A, ¶31) and (b) that the drafters deliberately chose the term "riparian jurisdiction" with a specific understanding of law in mind (see, e.g., Ex.A, ¶10,17,20, 26).

However, Professor Sax does not deduce the drafters' "intent" and their "choice" of words from facts such as prior drafts of the Compact or statements by the drafters. Instead, the Professor relies exclusively upon his interpretation of riparian and regulatory law ( Ex.A, ¶11-16, 23-30) and the law of "wharfing out" (Ex.A, ¶17-22; summarized in ¶10 and ¶31) to define "riparian jurisdiction" and to divine the intention of the Compact's drafters as articulated in Article VII of the Compact.

Professor Sax characterizes his report as "historical analysis" (¶8), but the report is a legal brief and not an "interpretation of fact" admissible as evidence. Any legal brief can be described as an "historical analysis" if it sets forth the evolution of caselaw; it can be described as "factual" if it recites caselaw or legal treatises. However, as the Special Master acknowledged in *Virginia v. Maryland*, the opinions of "historian experts" concerning the legal scope of a Compact between states are



not facts that either establish the intent of the Compact's negotiators or override the language in the Compact from which its meaning is determined. Id. A Monday-morning 'battle of the experts' over the possible technical meanings of terms in the Compact will not illuminate the contemporaneous purpose of the Compact drafters. See, *Edwards v. Aguillard*, 482 U.S. 578, 595-6 (1987).

Professor Sax's goal of addressing "the Compact drafters' understanding of riparian law" does not make his report interpretation of fact and, *ergo*, admissible evidence. Professor Sax provides no facts that the Compact drafters chose the phrase "riparian jurisdiction" over any other. Professor Sax cites no previous drafts of the Compact or statements by drafters explaining their "intent" in using the phrase. Instead, Professor Sax asserts that the Compact drafters' "choice" of the phrase is best understood in light of "the law concerning wharfing out" (Ex.A, ¶17). Since there are no facts connecting Professor Sax's legal analysis of "wharfing out" to the drafters of the Compact or to their selection of the phrase "riparian jurisdiction," Professor Sax's legal and interpretive conclusions are "speculative leaps of faith" which should be excluded as evidence.<sup>4</sup> Legal argument

---

<sup>4</sup> For quotation, see, Exhibit C, Virginia v. Maryland, No. 129, Original (Special Master's Memorandum of Decision No. 4, July 10, 2001 at pp.15-16, fn.20).

concerning "wharfing out" and riparian uses should be confined to the parties' merits brief.

Finally, Professor Sax's report is not admissible simply because it discusses a phrase ("riparian jurisdiction") which the Professor asserts is not a legal "term of art" (Ex.A, ¶11). While it is true that some legal authorities opine that an expert's testimony might be admissible if it uses words that do not have specialized legal meaning (See, 4-704 Weinstein's Federal Evidence §704.04[1]), such testimony commonly characterizes acts or omissions by parties that juries must decide conform with a legal standard. See, e.g., *United States v. Duncan*, 42 F.3d 97, 101-102 (2d Cir. 1994) (admitting expert testimony opining whether defendant's action falsifying tax IRS filings "obstruct" and "defraud" the tax process) and *United States v. Mohr*, 318 F.3d 613, 624 (4th Cir. 2003) (admitting expert testimony whether use of police dog was "unreasonable" and "violated accepted police practices"). In comparison, Professor Sax's report establishes no particular act or omission by the Compact drafters but, instead, provides legal argument to interpret the Compact of 1905. It remains the province of the Special Master, not Professor Sax, to determine the meaning of Compact and all its words.

Similarly, while Professor Carol Hoffecker's report discusses the historical background and alleged "context" of the Compact of

1905 (Ex.B, p.2), the Professor frequently strays into areas reserved for the Special Master, such as the relative importance of the Articles of the Compact of 1905 and the legal effect of Article VII. The Special Master should strike the portions of Professor Hoffecker's report

- (A) that conclude that the Compact addressed only fishing rights and "resolved nothing else" (Ex.B, p.51);
- (B) that identify issues the Compact of 1905 was allegedly "designed to resolve" (Ex.B, p.32);
- (C) that discuss the meaning and relative importance of the individual Articles of the Compact ("riparian issues presented no problems" Ex.B, p. 40; clauses unrelated to fishing only "preserved the status quo" Ex.B, p.51);
- (D) that select which "issues" in the Compact were "transcendent" (Ex.B, p.42);
- (E) that characterize portions of the Compact as a "mandate" (Ex.B, p.47); and
- (F) that purport to explain or comment upon the meaning of the 1934 U.S. Supreme Court holding making the New Jersey-Delaware boundary "subject to the Compact of 1905." (Ex.B, p.50-1),

since federal courts have ruled expert testimony inappropriate except to interpret facts of record.

---

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 is 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,

STUART RABNER  
ATTORNEY GENERAL OF NEW JERSEY

By: /s/ Barbara L. Conklin  
Barbara L. Conklin  
Deputy Attorney General

c: David Frederick, Esq.  
Collins J. Seitz, Esq.  
Rachel Horowitz, D.A.G.