No. 134, Original

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.

BP'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO QUASH, IN PART, SUBPOENAS SERVED BY THE STATE OF DELAWARE, OR, IN THE ALTERNATIVE, FOR A PROTECTIVE ORDER

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I. THE COMMUNICATIONS ARE NOT RELEVANT TO THE ISSUES IDENTIFIED BY DELAWARE.

Delaware offers three reasons for seeking discovery of BP's communications with New Jersey. It wants to see: (1) "whether BP is directing and controlling this litigation;" (2) "whether New Jersey would not have filed suit but for BP's willingness to take that role and bear New Jersey's costs (including by hiring and paying for the counsel that New Jersey preferred);" and (3) "whether New Jersey knew of BP's intention to initiate litigation about the meaning of the 1905 Compact but withheld that information from the Court to strengthen its case for original jurisdiction." (Del. Opp. at 1.)

Delaware's subpoena goes far beyond these issues, seeking every communication between BP and New Jersey concerning the Crown Landing project, the 1905 Compact, this litigation and *Virginia v. Maryland*. (BP Mot. to Quash Ex. B, Del. Subpoena Request Nos. 7, 8.) By Delaware's own proffer of relevance, its requests are overbroad and the subpoena must be narrowed.

Moreover, for the three issues that Delaware claims are relevant, there are simply no responsive documents. As to the first two issues, BP explained in its response to Delaware's Request No. 11 that it had no agreement with New Jersey concerning the Crown Landing project. It further explained that BP and New Jersey had no agreement regarding this litigation, other than an agreement that they share a common legal interest in confirming New Jersey's exclusive riparian jurisdiction under the 1905 Compact, and that they would exchange work product and other privileged information to further that interest. (BP Mot. to Quash, Ex. B at 13.) BP specifically informed Delaware that it had not promised or proposed any payment whatsoever to New Jersey in connection with this common interest. (*Id.*)

Similarly, none of the communications at issue addresses the third question that Delaware says is relevant. BP chose not to appeal the permit decision to Delaware state court for its own

reasons, based on the advice of its own counsel, believing that an appeal to state court would be "futile." (N.J. App. 140a-141a.) BP had no agreement with New Jersey concerning that decision and the documents identified on the privilege log do not reflect otherwise.

Delaware's argument that BP has taken inconsistent positions on whether it would pursue its own litigation against Delaware, though legally irrelevant to the alternative forum question,[1] is misguided for two reasons. First, it incorrectly assumes that BP should have appealed the permit denial to Delaware state court. But BP specifically reserved the Compact argument when it submitted its permit application to Delaware in December 2004. (BP Mot. to Quash Ex. E, Swayze Decl. ¶ 2.) BP was not required to, and consistently chose not to, submit that federal question to the Delaware state permitting agency or to litigate it in a Delaware state court. If it had done so, BP could well have waived its right to seek relief at the appropriate time in federal district court. *See, e.g., Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 644 n.3 (2002) (noting that plaintiff properly filed suit in federal court to challenge decision of state administrative agency); *England v. Louisiana State Bd. of Med. Exam'rs*, 375 U.S. 411, 419-21 (1964) (explaining that a party may waive its right to have a federal court decide its federal claims by submitting those claims to a state court for resolution).

[1] BP's litigation strategy regarding the Compact question has no bearing on the issue of whether New Jersey had an adequate forum to vindicate its own Compact rights. Although the Supreme Court declined jurisdiction in *Arizona v. New Mexico*, 425 U.S. 794 (1976) (per curiam), because there was a "pending state-court action" where the same legal issue was being litigated, the Court explained in *Maryland v. Louisiana*, 451 U.S. 725 (1981), that "one of the three electric companies involved in the state-court action in *New Mexico* was a political subdivision of the State of Arizona. Arizona's interests were thus actually being represented by one of the named parties to the suit." *Id.* at 743. By contrast, BP is not a political subdivision of New Jersey. So even if BP had filed suit against Delaware raising the Compact issue, that private lawsuit would not have been an adequate forum in which New Jersey could protect its own rights, because New Jersey's "interests would not be directly represented." *Wyoming v. Oklahoma*, 502 U.S. 437, 452 (1992).

Second, Delaware's unfair allegation of gamesmanship fails to account for the passage of time and the changing legal obstacles confronting BP between June 2005 and the present. At the time that Ms. Segal made her declaration in June 2005, BP – which continued to face its own legal dispute with Delaware – knew that New Jersey was committed to vindicating its exclusive riparian jurisdiction in this original action proceeding. (BP Mot. to Quash Ex. B at 6; Ex. D, Raphael Decl. ¶ 4.) With that knowledge and the prospect that the original action would be decided in the Court's October 2005 term,[2] Ms. Segal stated that Crown Landing was "awaiting the outcome of this case to resolve whether Delaware has any riparian jurisdiction over the Project." (N.J. App. 142a.)

Since June 2005, however, it became clear that this case would not be concluded in the Court's October 2005 term and that the project would be delayed as a result. It is now uncertain whether the case will be resolved in the October 2006 term. In the meantime, FERC's staff assumed, when preparing a recent Final Environmental Impact Statement ("FEIS"), that both New Jersey and Delaware had jurisdiction over the pier. Hence, the FEIS recommended that Crown Landing pursue a § 401 Water Quality Certification and a federal Coastal Zone Management Act consistency determination from both Delaware and New Jersey, notwithstanding the jurisdictional dispute. (BP Mot. to Quash at 7-8.) Because of the length of time involved before the Supreme Court will resolve the Compact question, and following FERC's final approval of the project (expected shortly), BP will likely need to pursue these parallel permit proceedings to keep the project on track. BP thus explained in its response to Delaware's subpoenas that it "anticipates being a party to future litigation with the State of Delaware (potentially prior to the resolution of this litigation) in which BP will assert that Delaware lacks jurisdiction over the Crown Landing Facility under the Compact of 1905, an issue to be decided in this litigation." (BP Mot. to Quash, Ex. B at 6.)

[2] New Jersey asked the Court to resolve the case during the October 2005 term. (*E.g.,* N.J. Br. in Support of Mot. to Reopen at 34.)

Delaware's insinuations aside, none of the documents on the privilege log concerns deliberations with New Jersey about whether BP would or would not pursue the Compact argument in state or federal court. Since none of the privileged documents is responsive to the three issues Delaware says are relevant, further analysis is unnecessary. The motion to quash should be granted.

II. NEW JERSEY IS THE REAL PARTY IN INTEREST AS A MATTER OF LAW.

Delaware has failed to proffer any basis upon which the Court could conclude that New Jersey is not the real party in interest. (BP Mot. to Quash 10-14). In determining the real party in interest, the Court looks "to the cause of action asserted and to the nature of the State's interest." *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 393 (1938). New Jersey seeks in this case to enforce its interstate compact with Delaware. Such a compact "is, after all, a contract." *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (internal quotation marks, citation omitted). As a party to the 1905 Compact, New Jersey clearly is the real party in interest to enforce that Compact and to assert its regulatory rights under it. *E.g.*, *id.* at 132 n.7 (noting that enforcement of the compact at issue "was of such general public interest that the sovereign State was a proper plaintiff"); *Kansas v. Colorado*, 533 U.S. 1, 8 (2001). Delaware's purported need to determine who is "directing and controlling" this litigation or for what purpose, though factually baseless, is a legal red-herring. New Jersey is the real party in interest as a matter of law, and the discovery Delaware seeks is irrelevant.

III. THE COMMUNICATIONS AT ISSUE ARE PRIVILEGED.

Delaware mistakenly argues that the work product doctrine protects only work protect prepared by an attorney in anticipation of his own client's litigation. Delaware's argument is not supported by relevant case law, ignores the common interest doctrine, and is based on an incomplete reading of Fed. R. Civ. P. 26 and the authorities construing it. Attorney work product prepared by BP's counsel and shared with New Jersey pursuant to a common interest arrangement is protected

from disclosure regardless of whether it was prepared for BP's use in its own litigation against Delaware or for New Jersey's use against Delaware.

A. Delaware Confuses Authorities Construing the "By or For Another Party" Language in Fed. R. Civ. P. 26(b)(3).

Delaware points out two categories of BP work product potentially at issue here: work product prepared by BP for use in its own anticipated litigation against Delaware, and work product prepared by BP for New Jersey's use in this original action against Delaware. Delaware argues at length that most of the entries on the privilege log reflect work product prepared for New Jersey's use in this litigation, not for BP's use. The distinction does not matter.

Rule 26(b)(3), which addresses the work product doctrine, provides in part that:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Fed. R. Civ. P. 26(b)(3) (emphasis added).

The phrase "by or for another party" has occasionally led to confusion. Applied literally, it could mean that an attorney in one case would waive the privilege by sharing work product with another person in a different case, even though both are aligned in a common interest, because the work product shared with the party would not have been prepared "by" him or "for" him. Wright & Miller explain, in the paragraph from which Delaware selectively quotes (Del. Opp. 11-12), that this result would be "intolerable" and they recommend using Rule 26(c) to solve the potential problem:

> A related problem of coverage arises due to the fact that under the rule the protection extends only to documents obtained by "another party" or his representative and in context this rather clearly means another party to the litigation in which discovery is being attempted. Documents prepared for one who is not a party to the present suit are wholly unprotected by Rule 26(b)(3) even though the person may be a party to a closely related lawsuit in which he will be disadvantaged if he must disclose in the

> present suit. Thus suppose A and B are bringing independent antitrust actions against the same defendant based on the same charges. Documents that A has prepared in anticipation of the litigation would be within the qualified immunity in his own suit but would be freely discoverable by defendant on a subpoena duces tecum issued in connection with the suit brought by B. Such a result would be intolerable. Fortunately the courts need not be confined by a literal reading of Rule 26(b)(3) and can continue to arrive at sensible decisions on this narrow point. To the extent that Rule 26(b)(3), literally read, seems to give insufficient protection to material prepared in connection with some other litigation, the court can vindicate the purposes of the work-product rule by the issuance of a protective order under Rule 26(c).

8 Charles Alan Wright, Arthur R. Miller, Richard L. Marcus, *Federal Practice & Procedure* § 2024 at 354-55 (2d ed. 1994) (footnotes omitted, emphasis added) [hereinafter "Wright & Miller"].

Delaware quotes the second sentence from this excerpt without mentioning that Wright & Miller go on to explain that a strict, literal application of Rule 26(b)(3) would provide insufficient work product protection. Following Wright & Miller's analysis, several courts have recognized that any potential gap in work product protection under the literal terms of Rule 26(b)(3) can be filled by reliance on Rule 26(c). *E.g., In re Polypropylene Carpet Antitrust Litig.*, 181 F.R.D. 680, 692 (D. Ga. 1998) ("Here, a large portion of the DOJ Documents would constitute attorney work product as defined by Rule 26(b)(3) if the Division was a party to this litigation. Following the sound advice of Professors Wright, Miller, and Marcus, the Court finds that the confidentiality of these documents is appropriate for protection pursuant to Rule 26(c)"); *California Pub. Util. Comm'n v. Westinghouse Elec. Corp.*, 892 F.2d 778, 781 & n.2 (9th Cir. 1989) (holding that Rule 26(b)(3) did not extend literal protection to work product prepared by non-party for different litigation, but noting that non-party's work product could be protected under Rule 26(c)).

B. Attorney Work Product Prepared by BP's Counsel and Shared With New Jersey Pursuant to Their Common Interest Agreement is Protected From Disclosure Regardless of Whether It Was Prepared for BP's Use In Its Own Litigation Against Delaware or for New Jersey's Use in This Action.

1. Work Product Prepared for New Jersey's Use in This Litigation Is Within the Literal Protection of Rule 26(b)(3).

Although there may be a literal gap in work product coverage under the specific terms of Rule 26(b)(3) when a lawyer shares work product prepared for his client's litigation with another person for use in a different case, no such gap exists (and no resort to Rule 26(c) is needed) when a non-party creates work product for a party to use in litigation against their common adversary. It is therefore ironic and self-defeating that Delaware emphasizes that numerous entries on BP's privilege log reflect work product prepared by BP's counsel for New Jersey's use here.

Such assistance is not uncommon in a common interest arrangement. It is also within the literal protection of Rule 26(b)(3). That Rule specifically limits discovery by one party of "documents . . . prepared in anticipation of litigation or trial by or for another party. . . ." (emphasis added). *Cf. FTC v. Grolier Inc.*, 462 U.S. 19, 25 (1983) ("the literal language of the Rule protects materials prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent litigation"). To the extent that BP's counsel, pursuant to a common interest agreement with New Jersey, provided work product "for" New Jersey to use in this litigation, that work product is expressly protected by Rule 26(b)(3).

2. Work Product Prepared by a Non-Party for a Party Pursuant to a Common Interest Agreement Is Covered by the Work Product Doctrine.

Even apart from the literal protection of Rule 26(b)(3), courts have concluded that the work product doctrine protects work product prepared by a non-party for a party's use in litigation against their common adversary pursuant to a shared interest agreement. In *Transmirra Prods. Corp. v. Monsanto Chem. Co.*, 26 F.R.D. 572 (S.D.N.Y. 1960), the court held that the work product rule and common interest doctrine protected the communications of defendant Monsanto's attorneys who had

previously assisted another company, Sylvania, in obtaining the dismissal of claims brought against Sylvania in separate litigation by the same plaintiff. *Id.* at 579. The court reasoned that "[i]nter-attorney cooperation and pooling of information to prepare an adequate and effective defense for Sylvania would certainly inure as well to the benefit of Monsanto, which in all probability faced similar allegations." *Id.* *Transmirra* has been widely cited, including by the courts in *In re Grand Jury Subpoenas, 89-3 & 89-4, John Doe 89-129*, 902 F.2d 244, 249 (4th Cir. 1990), and *United States v. AT&T Co.*, 642 F.2d 1285, 1298 & n.65 (D.C. Cir. 1980).

Similarly, in *In re Regents of the Univ. of California*, 101 F.3d 1386 (Fed. Cir. 1996), the court held that Eli Lilly & Co. shared a common interest with the University of California in confirming the validity of a patent owned by the University and licensed to Lilly. *Id.* at 1390. The common interest doctrine protected legal advice that Lilly's attorneys gave to the University, even though the attorneys testified that they did not consider the University to be their client. *Id.*

These authorities are consistent with the broad formulation of the common interest doctrine embraced by the Restatement. "Work product, including opinion work product, may generally be disclosed to . . . persons similarly aligned on a matter of common interest." Restatement (Third) Law Governing Lawyers § 91 cmt. b (2000); *see also Lichter v. Mellon-Stuart Co.*, 24 F.R.D. 397, 399 (W.D. Pa. 1959) (holding that work product given to party by lawyer for non-party for use in pending litigation was privileged); *Trans Pacific Ins. Co. v. Trans-Pacific Ins. Co.*, 1991 U.S. Dist. LEXIS 10888 *6-7 (E.D. Pa. July 31, 1998) (holding work product shared with defendant by New Jersey deputy attorney general was protected by common interest and work product privileges); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 43-45 (D. Md. 1974) (collecting cases).

Delaware, by contrast, has failed to cite a single case in which a court denied protection to work product prepared by a non-party for a party's use against a common adversary under a shared interest agreement. Delaware's principal case on point, *In re Grand Jury Subpeona Duces Tecum*,

112 F.3d 910 (8th Cir. 1997), does not support its position. The court there ordered the disclosure of notes taken by attorneys for the White House during meetings with First Lady Hillary Clinton in connection with the "Whitewater" investigation by the Office of Independent Counsel (OIC). The White House attorneys' notes were not prepared in anticipation of litigation because the White House did not anticipate that it would be the subject of any investigation by the OIC. *Id.* at 924. It was in that context that the court said "we know of no authority allowing a client such as the White House to claim work product immunity for materials merely because they were prepared while some other person, such as Mrs. Clinton, was anticipating litigation." *Id.* In a footnote, the court acknowledged that the "common-interest work product doctrine" might have protected the notes, but the doctrine did not apply because the White House shared no common legal interest with Mrs. Clinton in the subject matter of the OIC's investigation. *Id.* at 924 n.16; *see also id.* at 922-23.

Unlike the situation in that case, the work product at issue here was created in anticipation of litigation in which BP, New Jersey, or both would be directly adverse to Delaware. Furthermore, BP and New Jersey specifically agreed at the outset to share their work product to further their common legal interest in confirming New Jersey's exclusive jurisdiction under the 1905 Compact. (*See* Swayze Dec. ¶ 3; Raphael Dec. ¶¶ 4, 6-9; Andersen Dec. ¶ 7; Burke Dec. ¶ 5.)

Delaware's remaining authorities are simply inapposite. Some apply the textual limitation of Rule 26(b)(3) discussed above without addressing Rule 26(c). *E.g., Ramsey v. NYP Holdings, Inc.*, 2002 WL 1402055, *10 n.8 (S.D.N.Y. June 27, 2002). Others state the unremarkable proposition that the work product doctrine requires litigation to be reasonably anticipated, rather then a mere "remote prospect" or "inchoate" possibility. *United States v. Ernstoff*, 183 F.R.D. 148, 155 (D.N.J. 1998). In this case, when DNREC denied the Delaware state permit for the Crown Landing project in February 2005, litigation concerning the Compact was reasonably anticipated.

The other cases cited by Delaware at page 16 of its brief simply state the ordinary proposition that the work product doctrine requires that the materials be prepared in anticipation of litigation rather than for a non-litigation purpose. *E.g., Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 190 F.R.D. 532, 535 (S.D. Ind. 1999) ("[T]he court must determine whether the primary motivating purpose behind the creation of a document … [was] to aid in possible future litigation."); *accord Cooper Hosp./Univ. Med. Ctr. v. Sullivan,* 183 F.R.D. 119, 132 (D.N.J. 1998); *Burton v. R.J. Reynolds Tobacco Co.*, 170 F.R.D. 481, 485 (D. Kan. 1997). The work product exchanged between BP and New Jersey for use in litigation against Delaware easily meets that standard.

3. Delaware's Position Has No Limiting Principle and Would Gut the Work Product and Common Interest Doctrines.

Delaware apparently takes the position that a non-party can never provide work product to a party, regardless of any common interest agreement between them, without waiving the protection of the work product doctrine. Thus, a party aligned with a non-party in litigation against a common adversary could not ask the non-party to comment on drafts or legal strategy without exposing those communications to discovery by their adversary. Delaware's position has no limiting principle and would gut both the work product doctrine and the common interest rule. Its chilling effect would be anathema to both doctrines. As the D.C. Circuit explained:

> [T]he work product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent. The purpose of the work product doctrine is to protect information against opposing parties, rather than against all others outside a particular confidential relationship, in order to encourage effective trial preparation . . . . A disclosure made in the pursuit of such trial preparation, and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the privilege.

AT&T Co., 642 F.2d at 1299. *See also* Christopher B. Mueller, Laird C. Kirkpatrick, *Evidence* § 5.15 at 377 (2d ed. 1999) ("Protecting collaborative efforts by parties with common interests is said to encourage better case preparation and reduce time and expense. The litigation process is

generally not deprived of evidence that would otherwise be available because the collaborative communications are unlikely to be made in the absence of the privilege.") (footnotes omitted); Edward J. Imwinkelried, *The New Wigmore: Evidentiary Privileges* § 6.8.1 at 687 (2002) (same).

At bottom, Delaware advocates the antiquated position that the common interest doctrine applies only when the persons sharing the common interest are both parties to the same litigation. But as set forth in BP's opening brief, that argument has been consistently rejected, both by the Restatement and by the courts. (BP Mot. to Quash at 20.) "Although joint defense of a pending lawsuit is a common situation in which courts have applied the doctrine, its rationale and the Section apply equally to two or more separately represented persons whatever their denomination in pleadings and whether or not involved in litigation. . . ." Restatement § 76 cmt. b Reporter's Note.

C. Delaware's Challenge to BP's Assertion of Attorney-Client Privilege Is Without Merit.

Delaware challenges BP's invocation of attorney-client privilege for all but two documents on the log. As discussed above, because none of the documents on the log pertains to the three issues that Delaware says are relevant, and because the work product privilege has been properly asserted, the Special Master need not determine whether the attorney-client privilege also applies. Even if such a determination were necessary, however, the privilege was properly invoked.

As pointed out in BP's opening brief, once a common interest relationship exists, it protects the exchange, between two separately-represented parties, of information that is otherwise protected by the attorney-client privilege. (BP Mot. to Quash at 17.) "Under the privilege, any member of a client set – a client, the client's agent for communication, the client's lawyer, and the lawyer's agent – can exchange communications with members of a similar client set." Restatement § 76 cmt. d. *See also* Edna Selan Epstein, *The Attorney-Client Privilege and Work-Product Doctrine* 217 (4th ed. 2001) ("Once a common defense privilege exists, its reach is fairly extensive.") In preparing the privilege log, BP asserted the attorney-client privilege in instances where communications between

BP and New Jersey contained information protected by either BP's or New Jersey's attorney-client privilege. That an attorney or a client was not necessarily on the distribution list for each of these communications does not destroy the underlying privilege.

D. Delaware Waived its Challenge to the Specificity of Particular Log Entries By Failing to Invoke the Meet and Confer Process.

Delaware challenges more than a third of BP's privilege log entries as "vague." (Del. Opp. 19 & n.22.) The Special Master should reject this conclusory argument because Delaware violated its basic meet-and-confer obligations under the Case Management Plan.

BP served its privilege log on April 25, 2006. If Delaware objected to the sufficiency of any log entry, it should have told BP in order to "promptly and in good faith exert every reasonable effort to resolve their differences." CMP ¶ 10.1.2. The CMP further specifies a telephonic procedure for resolving any disputes that cannot be resolved informally. *Id.* ¶ 10.1.2. Delaware, despite inquiry from BP, never mentioned any concern about the specificity of BP's log entries until it filed its opposition brief on June 5. This violates the Case Management Plan and prejudices BP, which cannot be expected here to address more than 100 log entries identified by Delaware. The Special Master should rule that Delaware's failure to undertake even the most basic effort to confer with BP justifies "an adverse ruling regardless of the merits." CMP ¶ 10.

IV. DELAWARE HAS NOT DEMONSTRATED SUBSTANTIAL NEED TO OVERCOME THE WORK PRODUCT PROTECTION.

A party seeking to discover ordinary work product must show a "substantial need" for the materials, as well as an inability to obtain substantially equivalent materials by other means. Fed. R. Civ. P. 26(b)(3). The Rule guards "opinion" work product more jealously. "[T]he court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an

attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3). Opinion work product is entitled to "nearly absolute" protection.[3]

As set forth above, none of the documents identified on the privilege log is responsive to what Delaware now says is relevant. A fortiori, Delaware cannot show the "substantial need" for any of these communications. Moreover, many if not most of the privileged communications consist of core opinion work product of counsel, including drafts of pleadings and briefs. "Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney." *Hickman v. Taylor,* 329 U.S. 495, 510 (1947). As the Court in *Hickman* explained:

> [I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests . . . . Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own . . . . The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Id. at 510-11; *see also Grolier*, 462 U.S. at 29 (Brennan, J., concurring).

Delaware does not contest that counsel for both BP and New Jersey reasonably concluded that the common interest doctrine protected their ability to exchange work product without waiving

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[3] *E.g., Chaudhry v. Gallerizzo,* 174 F.3d 394, 403 (4th Cir. 1999) ("nearly absolute immunity"); *In re Ford Motor Co.*, 110 F.3d 954, 962 n.7 (3d Cir. 1997) ("near absolute protection"); *Cox v. Adm'r U.S. Steel & Carnegie,* 17 F.3d 1386, 1422 (11th Cir. 1994) ("nearly absolute immunity"); *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1240 (5th Cir. 1982) ("almost absolute protection"); *In re Sealed Case*, 676 F.2d 793, 812 n.72 (D.C. Cir. 1982) ("as absolute as the attorney-client privilege"); *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977) ("nearly absolute immunity"); *see also Upjohn Co. v. United States,* 449 U.S. 383, 401-2 (1981) ("While we are not prepared at this juncture to say that such material is always protected by the work-product rule, we think a far stronger showing of necessity and unavailability by other means than was made … in this case would be necessary to compel disclosure.").

the underlying privilege. (Swayze Dec. ¶ 3; Raphael Dec. ¶ 8; Andersen Dec. ¶ 7; Burke Dec. ¶ 5.) Delaware's suggestion that it be allowed to rummage through the mental impressions of opposing counsel as long as it promises to limit its use of anything it finds solely to support its jurisdictional claims (Del. Opp. 26), hardly provides the near absolute protection that *Hickman* and its progeny establish for opinion work product, and on which New Jersey and BP's counsel were entitled to rely.

V. DELAWARE HAS FAILED TO SHOW THAT BP AND NEW JERSEY DO NOT SHARE A COMMON INTEREST IN THE COMPACT QUESTION.

Temporarily ignoring its mantra that New Jersey brought this case solely to benefit BP, Delaware then argues that BP and New Jersey lack a common interest sufficient to invoke the common interest doctrine. Delaware posits two reasons why BP and New Jersey do not share a common legal interest. Neither is persuasive.

First, Delaware says that BP's legal interest in the Compact question is limited to avoiding Delaware's regulation of the Crown Landing project, while New Jersey has the broader interest of establishing its exclusive riparian jurisdiction over that project as well as others on the New Jersey shoreline. (Del. Opp. 32.) Simply because New Jersey's interest in the Compact question encompasses more projects than BP's Crown Landing facility does not show that their interests in how the Compact question is resolved diverges in any material respect. Indeed, BP, like New Jersey, has repeatedly asserted New Jersey's exclusive state riparian jurisdiction under the 1905 Compact. (BP Mot. to Quash Ex. B at 7, 11.) Thus, BP certainly cares "why" Delaware is found to lack jurisdiction over the project. Moreover, even if the "identical legal interest" requirement were applicable, it is satisfied here because BP and New Jersey have "demonstrate[d] actual cooperation toward a common legal goal." *E.g., North River Ins. Co. v. Columbia Cas. Co.*, No. 90 Civ. 2518 (MJL), 1995 WL 5792 *4 (S.D.N.Y. Jan. 5, 1995). And, as noted in BP's opening brief, most courts and the Restatement do not even require the common interest to be "identical." (BP Mot. to Quash

at 23-25.) Delaware offers no rationale for discouraging parties from working together to achieve a common legal goal when their legal interests are this closely aligned.

Second, Delaware argues that BP's and New Jersey's interests in the Compact question could conflict depending on how the Court resolves the issue. (Del. Opp. 32.) Delaware does not explain how. In any event, the mere possibility that parties aligned in a common legal cause might later become adverse to one another does not vitiate the protection. In the unlikely event of an adverse proceeding between BP and New Jersey, the common interest protection would be inapplicable only as between them. *E.g.*, Restatement § 76(2) & cmt. f. That remote possibility hardly shows that BP and New Jersey lack a common legal interest now.

Delaware lastly argues that communications between BP and New Jersey prior to the formation of the common interest are not protected. But the declarations clearly establish the common interest as of February 10, 2005. (Swayze Dec. ¶ 3; Andersen Dec. ¶ 7.) It was reaffirmed in May 2005 when New Jersey asked to exchange privileged communications and work product with Mr. Raphael. (Raphael Dec. ¶¶ 3-7; Burke Dec. ¶ 5; *see, e.g.,* Log Entry No. 16.) Delaware's argument that BP's representative William Pascrell was attempting as late as June 23, 2005 to "lobby New Jersey officials and thereby align New Jersey's interest with BP's own" (Del. Opp. 34), simply mischaracterizes the entries. Those entries describe the exchange of attorney work product pursuant to a common interest arrangement that already had been established between New Jersey and BP. (Log Entry Nos. 104-05.)

CONCLUSION

The Special Master should enter an order limiting Delaware's subpoenas to the extent they seek to compel BP to produce its communications with New Jersey.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 12, 2006, the foregoing BP's Reply Brief in Support of its Motion to Quash, in Part, Subpoenas Served by the State of Delaware, or, in the Alternative, for a Protective Order, was served by electronic mail and U.S. Mail, to the offices of:

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