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May 2, 2008

VIA HAND DELIVERY

Hon. Travis L. Francis, A.J.S.C.
Middlesex County Courthouse
Chambers 307
56 Patterson Street
P.O. Box 964
New Brunswick, NJ 08903-0964

Re: *Sussex Commons Associates, LLC v. Rutgers, The State University, et al.*
Docket No. MID-L-8465-06

Dear Judge Francis:

This firm represents *amici curiae* CPG Holdings, LLC (as successor to the dissolved Chelsea Property Group, Inc.) and CPG Partners, L.P. (collectively, "Chelsea"). Please accept this letter brief, in lieu of a more formal brief, in connection with the Court's consideration of Document Request No. 13 of plaintiff Sussex Commons Associates, LLC pursuant to New Jersey's Open Public Records Act, N.J.S.A. 47:1A-1, *et seq.* ("OPRA"). Request No. 13 seeks: "All documents received by Rutgers Environmental Law Clinic from Pitney Hardin, LLP."

These documents have previously been determined by Special Discovery Master Nicholas H. Politan and Judge James A. Farber to constitute protected attorney work product in a lawsuit brought by Sussex Commons Outlets, LLC, an entity related to Sussex Commons Associates, LLC (the Sussex Commons entities are collectively referred to herein as "Sussex"), instituted in the Superior Court of New Jersey, Law Division - Sussex County entitled *Sussex*

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Commons Outlets, LLC v. Chelsea Property Group, Inc., et al., Docket No. SSX-L-554-03 (the “*Chelsea/Sussex* lawsuit”).¹ Therefore, Chelsea respectfully requests that the Court sustain the objection of Rutgers, The State University (“Rutgers”), to Sussex’s OPRA Request No. 13 on the grounds that these documents have already been determined by a court to be protected by the attorney work product doctrine and thus are exempt from production under OPRA.

STATEMENT OF FACTS

The Pertinent Parties.

Plaintiff Sussex Commons Associates, LLC is attempting to build a 90-store, 350,000 square foot outlet mall at Ross’ Corner, Frankford Township, New Jersey. (Certification of Julia LeMense Huff, dated October 17, 2006 (“Huff Cert.”), ¶ 17). Chelsea is a defendant in the *Chelsea/Sussex* lawsuit. (Huff Cert., ¶ 31). The Rutgers Environmental Law Clinic (“RELC”) is one of eight clinical legal educational programs at Rutgers Law School-Newark. (Huff Cert., ¶ 7). Citizens For Responsible Development At Ross’ Corner (“CRDRC”) is a non-profit corporation whose mission is to promote responsible development at Ross’ Corner and to oppose the building of Sussex’s mall. (Huff Cert., ¶¶ 19). The RELC served as counsel for CRDRC during the relevant time period. (See Huff Cert., ¶ 21). We understand from a

¹ By Order dated February 25, 2008, the Honorable Thomas J. Critchley, Jr., J.S.C. granted Chelsea’s motion for summary judgment dismissing the Second Amended Complaint of plaintiff Sussex Commons Outlets, LLC. (Certification of Donald A. Soutar (“Soutar Cert.”), Exhibit A). That Order is currently being appealed by Sussex. (Soutar Cert., Exhibit B).

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March 25, 2008 letter to the Court from Richard Webster, Esq. that CRDRC is now represented by the Eastern Environmental Law Center.

The Pertinent Background.

The following procedural history from the *Chelsea/Sussex* lawsuit is relevant to the issues raised in this lawsuit. Chelsea and CRDRC shared a common adversary in various lawsuits initiated by Sussex and a common interest in opposing Sussex. Chelsea provided limited financial assistance to CRDRC (\$16,500) and certain traffic information, both of which were used by CRDRC to help fund and support a traffic study of the Ross' Corner area. (Soutar Cert., Exhibit C at 5 (Items A-62 & A-63)). Chelsea's limited assistance to CRDRC was fully addressed in the *Chelsea/Sussex* lawsuit and all of the related documents were produced to Sussex in the *Chelsea/Sussex* litigation. Significantly, the Court found that CRDRC and Chelsea had a First Amendment right to express their opinions with respect to Sussex's site plan application and, as a matter of law, there was no "wrongdoing" by Chelsea or CRDRC in opposing the Ross' Corner Project. (Soutar Cert., Exhibit D at Tr. 33:23 – 34:2). Their conduct is fully protected under basic protections guaranteed by Federal and New Jersey constitutional and case law. See, e.g., *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136-39 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); *Village Supermarket, Inc. v. Mayfair Supermarkets, Inc.*, 269 N.J. Super. 224, 230-31 (Law Div. 1993).

During the course of the *Chelsea/Sussex* lawsuit, and the several related lawsuits to which Chelsea, CRDRC, and Sussex were parties, Day Pitney, LLP (formerly known as

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Pitney Hardin, LLP) communicated with the RELC, counsel for CRDRC. Those communications (the “Pitney-RELC Communications”) included the mental impressions, opinions, and legal strategies of counsel with respect to their common adversary, Sussex. Sussex sought to obtain those communications in the *Chelsea/Sussex* lawsuit.

By Order dated May 18, 2006 in the *Chelsea/Sussex* lawsuit, Special Discovery Master Nicholas H. Politan denied Sussex’s motion to compel production of the Pitney-RELC Communications, Ordering:

1. Sussex’s application to compel the discovery of communications between Chelsea’s counsel and counsel for Citizens for Responsible Development at Ross’ Corner is hereby denied

(Soutar Cert., Exhibit E). Thereafter, on May 30, 2006, Sussex filed a “Notice Of Motion For Appeal Of Paragraph 1 Of Discovery Master’s May 18, 2006 Order” to the Superior Court-Law Division. (Soutar Cert., Exhibit F). On June 23, 2006, the Honorable James A. Farber, J.S.C. heard oral argument on Sussex’s appeal and issued an Order in which he held that:

Plaintiff’s motion be and hereby is denied in its entirety for the reasons stated on the record on June 23, 2006.²

(Soutar Cert., Exhibit G). The reasons set forth on the record emphasized that the Pitney-RELC Communications sought by Sussex were protected by the attorney work product doctrine. (Soutar Cert., Exhibit H at *Tr.* 17:6-9).

² A transcript of the June 23, 2006 Hearing before the Honorable James A. Farber, J.S.C. is attached as Exhibit H to the Soutar Certification.

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Meanwhile, on May 11, 2006, Sussex and Sussex principal, Howard Buerkle, submitted an OPRA Request to Rutgers in which Sussex sought the same documents. Specifically, Sussex's OPRA Request No. 13 sought: "All documents received by Rutgers Environmental Law Clinic from Pitney Hardin, LLP."³ (Verified Complaint, Exhibit A). On May 13, 2006, Rutgers objected to providing documents in response to Sussex's OPRA Request, including Document Request No. 13. (Verified Complaint, ¶ 13).

In short, having failed to obtain the protected attorney work product from the Superior Court in Sussex County, Sussex now seeks to obtain these documents in a second forum. For the public policy reasons set forth below, Sussex's request should be denied and the objection of Rutgers should be sustained.

I. CHELSEA IS AN APPROPRIATE PARTY TO SERVE AS AN *AMICUS CURIAE* WITH RESPECT TO THE COURT'S CONSIDERATION OF DOCUMENTS SOUGHT UNDER OPRA THAT ARE PROTECTED BY THE ATTORNEY WORK PRODUCT DOCTRINE.

The role of an *amicus curiae* is to "assist in the resolution of an issue of public importance," R. 1:13-9, "[by] provid[ing] the court with information pertaining to matters of law about which the court may be in doubt," *Keenan v. Bd. Of Chosen Freeholders*, 106 N.J. Super. 312, 316 (App. Div. 1969), or by advising the court "of certain facts or circumstances relating to a matter pending for determination." *Case v. Male*, 63 N.J. Super. 255, 258 (Essex Co. Ct. 1960). The participation of *amicus curiae* is particularly appropriate in cases with "broad

³ Pitney Hardin LLP is now known as Day Pitney LLP.

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implications,” *Taxpayers Ass’n of Weymouth Township v. Weymouth Township*, 80 N.J. 6, 17 (1976), or of “general public interest.” *Case, supra*, 63 N.J. Super. at 259; *see also InfoComp Corp. v. Somerset Trust Co.*, 165 N.J. Super. 382 (App. Div. 1979) (court requested an amicus brief due to important question of public policy and statutory interpretation); *State v. Maguire*, 84 N.J. 508 (1980) (granting amicus curiae status due to public importance of the issues involved).

By Order dated April 22, 2008, the Honorable Travis L. Francis, A.J.S.C, granted leave to several parties, including Chelsea, to appear in this action as *amici curiae*. Consistent with R. 1:13-9 and the authorities cited above, the Court requested that each *amicus curiae* “state with specificity: (1) the identity of the *amicus curiae*; (2) the issue being addressed; (3) the nature of the public interest therein; and (4) the nature of the *amicus curiae*’s special interest, involvement or expertise in respect to that interest.” (Order at 2).

Chelsea provides the information requested as follows:

1. The identity of the *amicus curiae*: Chelsea is a citizen of the State of New Jersey, with its principal place of business at 105 Eisenhower Parkway, Roseland, New Jersey.
2. The issue being addressed: Whether a party should be permitted to obtain through an OPRA Request, or pursuant to the common law right to know, documents that have been adjudicated to be protected from disclosure by the attorney work product doctrine.
3. The nature of the public interest: The public has a strong interest in the consistency of decisions among the various branches of government and, by the very nature of the attorney work product doctrine, in the protection of the “system underlying the orderly prosecution and defense of legal claims.” *Hickman v. Taylor*, 329 U.S. 495, 510 (1947); *LaPorta v.*

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Gloucester Cty Bd Of Chosen Freeholders, 340 N.J. Super. 254, 260 (App. Div. 2001).

4. Chelsea's special interest, involvement or expertise in respect to the public interest: Chelsea is well-suited to address the public interest in this context because the documents sought by Request No. 13 constitute the work product of Chelsea's attorneys and their protection under the attorney work product doctrine has been confirmed by the Court in the *Chelsea/Sussex* lawsuit.

II. THE PITNEY-RELC COMMUNICATIONS ARE NOT SUBJECT TO OPRA.

A. The Pitney-RELC Communications Are Not "Government Records."

Pursuant to N.J.S.A. 47:1A-1, the legislature declared that "government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest." Pursuant to N.J.S.A. 47:1A-1.1, a "government record" is "any paper . . . that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State." Significantly, N.J.S.A. 47:1A-1.1 specifically excludes from the scope of "government records" "information which is to be kept confidential pursuant to court order." Here, the Honorable James A. Farber has already determined that the Pitney-RELC Communications should be kept confidential and protected as attorney work product. Thus, as a threshold matter, the Pitney-RELC Communications are not "government records" and are therefore beyond the reach of an OPRA Request.

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**B. The Pitney-RELC Communications Have Already Been
Determined TO Be Protected Attorney Work Product And Are
Therefore Exempt From OPRA.**

N.J.S.A. 47:1A-9(b) states: “The provisions of this act . . . shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.” The work product doctrine, first recognized by the Supreme Court of the United States in *Hickman v. Taylor*, 329 U.S. 495 (1947), is codified in the New Jersey Court Rules at R. 4:10-(2)(c). The New Jersey Rule, like its federal counterpart, protects from disclosure “documents and other tangible things” prepared “in anticipation of litigation or for trial” either “by or for” a party or “by or for” that party’s “representative.” R. 4:10-(2)(c); *LaPorta*, 340 N.J. Super. at 260. Rule 4:10-2(c) further provides that “the 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.” The documents that Sussex seeks are the very essence of attorney work product. They are communications directly between counsel for two parties who are each involved in adversarial proceedings against the same adversary, Sussex. (*See Soutar Cert.*, Exhibit F at *Tr.* 17:6-9).

Significantly, and in sharp contrast to the attorney-client privilege, disclosure of work product to a third party does not necessarily result in waiver of the protection of the attorney work product:

[T]he work product privilege does not exist to protect a

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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.'**

United States v. Gulf Oil Corp. 760 F.2d 292, 295 (Temp. Emer. Ct. App. 1985) (emphasis in original); *Matter of Grand Jury Subpoena, Etc.*, Nov. 16 1974, 406 F. Supp. 381, 386-87 (S.D.N.Y. 1985).⁴ See also *LaPorta*, 340 N.J. Super. at 262 ("persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims"). In short, the purpose of the attorney work product doctrine is to protect an attorney's own trial preparation materials from disclosure to counsel for the opposing party.

Here, Sussex sought Pitney Hardin's trial preparation materials and work product that were communicated to the RELC in the *Chelsea/Sussex* lawsuit. This attorney work product was communicated consistently with maintaining confidentiality from the common adversary -- Sussex. Moreover, since Chelsea's and CRDRC's attorneys shared the same goals of defending the litigation and objecting to the proposed Ross' Corner project (as currently configured),

⁴ Where New Jersey rules are patterned after Federal Rules, Federal case law is used in aid of interpretation. See, e.g., *Delgozzo v. Kenny*, 266 N.J. Super. 169, 188 (App. Div. 1993) ("our courts have consistently looked to the interpretations given the federal counterpart for guidance") (citations omitted).

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communicating attorney work product and trial preparation materials did not substantially increase the opportunity for potential adversaries to obtain the information. As found by Judge Farber, as a matter of well-settled law, the disclosure of those materials to a non-adverse third party did not waive the attorney work product protection for those materials. (Soutar Cert., Exhibit F at *Tr.* 17:11-16 (6/23/06 Opinion)).

Applying N.J.S.A. 47:1A-9(b) and the work product protection set forth in *R.* 4:10-2(c), the Appellate Division in *Gannett New Jersey Partners, L.P. v. Middlesex*, 379 N.J. Super. 205, 218 (App. Div. 2005), held that “if a document is protected work product under *Rule* 4:10-2(c), it is also protected from disclosure under OPRA.” That same ruling should apply here: the Superior Court of New Jersey - Law Division, Sussex County determined that the Pitney-RELC Communications were protected by the attorney work product doctrine, therefore the Pitney-RELC Communications should be protected from disclosure under OPRA. This Court should therefore sustain Rutgers’ objection to Document Request No. 13.

III. SUSSEX SHOULD BE COLLATERALLY ESTOPPED FROM SEEKING REVIEW OR RECONSIDERATION OF JUDGE FARBER’S DETERMINATION OF ATTORNEY WORK PRODUCT PROTECTION.

“A party is precluded by collateral estoppel from relitigating matters or facts which the party actually litigated and which were determined in a prior action, involving a different claim or cause of action, and which were directly in issue between the parties.” *Zoneraich v. Overlook Hospital*, 212 N.J. Super. 83, 93 (App. Div. 1986). Here, Sussex was denied access to the very same Pitney-RELC Communications in the *Chelsea/Sussex* lawsuit that

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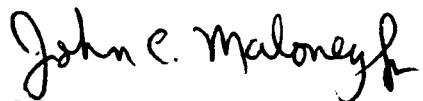
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it seeks here. The issue of attorney work product protection was extensively litigated through a motion to compel before Special Discovery Master Politan, followed by an appeal of the Special Discovery Master's decision to Judge Farber. Sussex litigated, lost, and chose not to press this issue further in the *Chelsea/Sussex* action.⁵ Sussex's current pursuit of the Pitney-RELC Communications in another forum is a text-book illustration of why collateral estoppel should be invoked. Therefore, contrary to Sussex's request, this Court should not conduct an *in camera* inspection of documents that Judge Farber has already determined are protected by the attorney work product doctrine. There is no basis in law or fact for this Court to second guess the decision of Judge Farber.

For the foregoing reasons, Chelsea respectfully requests that Your Honor sustain the objection of Rutgers University to Request No. 13 of Sussex's OPRA Requests.

Thank you for Your Honor's courtesies and consideration.

Respectfully submitted,



John C. Maloney, Jr.

cc: Kevin D. Kelly, Esq. (via Hand Delivery w/ enclosures)
James P. Lidon, Esq. (via Electronic and Regular Mail w/ enclosures)
Julia LeMense, Esq. (via Electronic and Regular Mail w/ enclosures)
Steven P. Weissman, Esq. (via Electronic and Regular Mail w/ enclosures)
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Edward Lloyd, Esq. (via Electronic and Regular Mail w/ enclosures)

⁵ Sussex did not raise this issue in connection with its current appeal of the Court's Order granting summary judgment in favor of Chelsea. (Soutar Cert., Exhibit B).