AMERICAN CIVIL LIBERTIES UNION of PENNSYLVANIA

Eastern Region Office
PO Box 40008
Philadelphia, PA 19106
215.592.1513 T
215.592.1343 F

Central Region Office
PO Box 11761
Harrisburg, PA 17108
717.238.2258 T
717.236.6895 F

Western Region Office
313 Atwood Street
Pittsburgh, PA 15213
412.681.7736 T
412.681.8707 F

June 29, 2015

VIA E-MAIL AND REGULAR MAIL

Richard B. Sandow, Esquire
Ronald D. Amrhein, Jr., Esquire
Jones, Gregg, Creehan & Gerace LLP
411 Seventh Avenue, Suite 1200
Pittsburgh, PA 15219-1905

Re: **Notice Pursuant to Pa. R. Civ. P. 1023.1 and 1023.2**
Dewey Homes & Investment Properties, LLC, et al. v. Delaware Riverkeeper Network, et al., Docket No. 15-10393 (Butler Co. C.C.P.)

Dear Messrs. Sandow and Amrhein:

We represent Delaware Riverkeeper Network ("DRN"), Clean Air Council ("CAC"), David Denk, Jennifer Chomicki, Anthony Lapina and Joann Groman (collectively, the "Defendants"). On or about May 22, 2015, you filed a Complaint on behalf of the plaintiffs in the above-referenced case against the defendants in the Court of Common Pleas of Butler County, Pennsylvania (the "Complaint"). We are writing to put you and your clients on notice that the claims and other legal contentions set forth in the Complaint are completely baseless and unwarranted by existing law, and have been improperly filed to harass and inflict expense upon the defendants. We request that you withdraw the Complaint immediately. If you fail to do so, we will seek appropriate sanctions pursuant to Pa. R. Civ. P. 1023.1 and 1023.2. We further reserve the right, in the future, to seek additional relief for Wrongful Use of Civil Proceedings pursuant to 42 Pa. C.S.A. §8351, *et seq.*

A. The Complaint Does Not – And Cannot – State A Claim Against The Defendants

1. The *Noerr-Pennington* Doctrine immunizes the Defendants against any potential liability in connection with the claims asserted in the Complaint.

All of plaintiffs' alleged causes of action – tortious interference with contracts (Count I), tortious interference with prospective contractual relations (Count II) and civil conspiracy (Count III) – share the same fatal flaw. Defendants' actions in this matter all involve core expressive and petitioning-of-government-for-redress-of-grievances activities, which are safeguarded by the First Amendment to the U.S. Constitution. Consequently, the claims brought by your clients directly challenging defendants' constitutionally protected activities are barred as a matter of law by the *Noerr-Pennington* Doctrine.

Plaintiffs' claims focus upon the defendants' alleged actions in response to the enactment of Ordinance 127 by Middlesex Township and the approval of a permit for the Geyer wellsite. Ordinance 127, if allowed to stand, will permit unconventional natural gas development in 90.2% of Middlesex Township. As you know or should know, the defendants include individuals who are residents of Middlesex Township and who live in close proximity to the Geyer wellsite. The defendants include parents of young children who would be exposed to air emissions and other risks from the Geyer wellsite and related industrial infrastructure both at school and at home. Residents rely on clean groundwater for drinking and other household purposes. Two of the defendants are non-profit organizations dedicated to the protection of clean air, clean water and a healthy environment.

As we trust you are aware, under the well-established *Noerr-Pennington* Doctrine, an individual is immune from liability for exercising his or her First Amendment right to petition the government. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-138 (1961) ("*Noerr*"), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) ("*Pennington*"). In *Noerr* and *Pennington,* the United States Supreme Court held such immunity existed "regardless of the defendants' motivations" in waging their campaigns, as it recognized that the right of individuals to petition the government "cannot properly be made to depend on their intent in doing so." 365 U.S. at 139. "[*Noerr-Pennington*] immunity extends to persons who petition all types of government entities – legislatures, administrative agencies and courts." *Trustees of University of Pennsylvania v St. Jude Children's Research Hospital*, 940 F. Supp. 2d 233, 240-41 (E.D. Pa. 2013) (quoting *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 122 (3d Cir. 1999)).

It also is immaterial that plaintiffs may have suffered "direct injury as an incidental effect" of the petitioning speech. *See e.g., N.A.A.C.P. v, Claiborne Hardware, Co.*, 458 U.S. 886, 914 (1982) (finding N.A.A.C.P. immune even though store owners suffered direct injury as a result of group's boycott activity). "[P]arties may petition the government for official action favorable to their interests without fear of suit, even if the result of the petition, if granted, might harm the interests of others." *Tarpley v. Keistler*, 188 F.3d 788, 794 (7th Cir. 1999) (citations omitted).

The sole exception to the *Noerr-Pennington* Doctrine is the "sham exception," under which a defendant will not be protected if he or she is simply using the petition process as a means of harassment. *Chantilly Farms Inc. v. West Pileland Twp.*, No. Civ.A. 00-3903, 2001 WL 290645 (E.D. Pa., March 23, 2001). That appears to be what plaintiffs insinuate in a conclusory manner in the Complaint. *See, e.g.,* Complaint at ¶77. Under well-settled U.S. Supreme Court precedent, however, in order for a suit to constitute a "sham" it must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. *Trustees of the University of Pennsylvania,* 940 F. Supp. 2d. at 244 (quoting *Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 381 (1991)). If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr-Pennington. Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 56-57 (1993). Indeed, a court cannot even consider a litigant's subjective motivation in filing suit unless the suit is objectively without merit. *Id.*, 508 U.S. at 60-61; *Firetree, Ltd. v. Fairchild*, 920 A.2d 913, 919 (Pa. Commw. Ct. 2007) (the doctrine provides "an absolute right that does not depend on whether the speaker has a proper motive or intent").

The *Noerr-Pennington* Doctrine has been applied in both Pennsylvania federal and state courts to shield people using legal and political channels to challenge commercial interests, precisely as defendants have done here. The U.S. Court of Appeals for the Third Circuit has found, as "a matter of law," that when individuals "call[] ... attention" to a business's violations of law by petitioning government authorities and "eliciting public interest," their actions "cannot serve as a basis for tort liability." *Brownsville Golden Age Nursing Home, Inc., v. Wells*, 839 F.2d 155, 160 (3d Cir. 1988). *Brownsville* involved citizen complaints about the conditions of a local nursing home, which resulted in the eventual loss of the home's operating license. Similarly, a court dismissed state tort claims against private hotel owners who engaged in political and petitioning activity to oppose the construction of a new hotel. *VIM, Inc. v. Somerset Hotel, Ass'n*, 19 F.Supp.2d 422, 426-28 (W.D.Pa. 1998). The court held that, "[i]t is well-settled ... that claims for civil conspiracy, tortious interference and malicious use of process are subject to *Noerr-Pennington* immunity." *Id.* at 430, citing *Brownsville, supra.*

In state court, the Philadelphia Court of Common Pleas sustained preliminary objections on *Noerr-Pennington* grounds where a civic association and neighbors campaigned against a developer's plans to build houses in forested land abutting a

Philadelphia park. "Here, plaintiffs seek to recover damages against these defendants for actions they have taken to influence public bodies concerning their opposition to Bethany Builders' development plans, conduct which clearly is protected under both the First Amendment and Noerr-Pennington." *Bethany Bldg., Inc. v. Dungan Civic Ass'n*, March Term 2001, No. 2043, 2003 WL 1847603 (Phila. C.P. Mar. 13, 2003).

Plaintiffs cannot credibly argue here that the defendants' actions were "objectively baseless." The arguments advanced by defendants were virtually identical to those that were expressly accepted by the Pennsylvania Commonwealth Court and the Pennsylvania Supreme Court in *Robinson Township, Delaware Riverkeeper Network, et al. v. Commonwealth*, 52 A.3d 463, 484-85 (Pa. Commw. Ct. 2012), aff'd in part, rev'd in part by *Robinson Twp., Delaware Riverkeeper Network, et al. v. Com.*, 83 A.3d 901, 980 (Pa. 2013). Thus, the melodramatic references in the Complaint to alleged "scorched earth campaign(s)," "purposefully inflammatory language" and "incendiary actions" on the part of defendants are not only false but also irrelevant. *See, e.g.*, Complaint at ¶79(a),(c),(f). The Complaint fails to state a claim upon which relief may be granted as a matter of law, and must be withdrawn immediately. As the U.S. Court of Appeals for the Third Circuit made plain in ruling on the misuse of civil process to stifle constitutionally protected petitioning activity, "...in land use cases in which a developer seeks to eliminate community opposition to its plans [by suing opponents for petitioning activities] ... it will do so at its own peril." *The Barnes Foundation v. The Township of Lower Merion*, 242 F.3d 151, 162 (3d Cir. 2001).

2. The Pennsylvania Anti-SLAPP Act further immunizes the defendants against plaintiffs' claims.

The Complaint you have filed on behalf of the plaintiffs is not only legally groundless, but also represents precisely the type of suit that the Environmental Immunity Act, 27 Pa.C.S. §§8301-8305 (the "Act"), was enacted to prevent. The Act's stated purpose is to "protect those persons targeted by frivolous lawsuits based on their constitutionally protected government petitioning activitie[s]" and "encourage and open the lines of communication to those government bodies clothed with the authority to correct or enforce our environmental laws and regulations." *Pennsbury Village Associates, LLC v. Aaron McIntyre*, 608 Pa. 309, 320, 11 A.3d 906, 913 (Pa. 2011).

The defendants are immune from suit under the Act. They have petitioned government bodies of the Commonwealth of Pennsylvania to challenge the enactment by Middlesex Township of Ordinance 127 and the approval of a permit for the Geyer wellsite. These filings, in accordance with procedures under the Municipalities Planning Code, have the unambiguous and stated purpose of vindicating environmental rights that are enshrined in our Commonwealth's Constitution. Pa. Const. Art. I., Sec. 27. No exception to immunity under the Act is applicable. The Complaint must be dismissed immediately.

3. Plaintiffs cannot establish an "absence of privilege or justification" or that the "sole purpose" of the defendants' actions was to cause harm to the plaintiffs when the defendants articulated their positions in defense of human health, safety and property values.

The Complaint you have filed is astonishingly vague concerning your clients' allegations about precisely which of defendants' activities could even conceivably be considered actionable. Even viewed through the most forgiving lens, all claims against the defendants must fail for yet another basic reason: the Complaint has not and cannot identify specific facts capable of supporting the requisite elements of those claims.

A cause of action for tortious interference with existing or prospective contractual relations requires, among other elements: "purposeful action by the defendant, specifically intended to harm an existing relationship or intended to prevent a prospective relation from occurring" and "the absence of privilege or justification on the part of the defendant." *Acumed LLC v Advanced Surgical Servs., Inc.* 561 F.3d. 199. 212 (3d Cir. 2009). "[W]here an individual acts legally to advance his own legitimate business interests and did not act solely to intentionally injure the interests of another, a claim for tortious interference with a prospective business relationship must fail." *Yurcho v. Hazelton Area School Distr.*, 2012 WL 8683308 (Commw. Ct. 2012) (citing *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 412 A.2d 466 (1979)).

Similarly, with respect to a civil conspiracy claim, "[p]roof of malice, i.e., an intent to injure, is essential in proof of a conspiracy." *Thompson Coal Co. v Pike Coal Co.*, 488 Pa. 198, 412 A.2d. 466, 472 (Pa. 1979). The element of malice requires a showing that "the sole purpose of the conspiracy is to cause harm to the party who has been injured." *Becker v. Chicago Title Ins. Co.,* 2004 WL 228672 at *13 (E.D. Pa. 12004) (citing *Thompson Coal Co., supra*, 412 A.2d at 472). Where the facts show that a person acted to advance his own business interests, those facts constitute justification and negate any alleged intent to injure. *Thompson Coal Co., supra,* 412 A.2d at 472; *WM High Yield Fund v. O'Hanlon*, 2005 WL 6788446 (E.D. Pa. 2005) (granting motion to dismiss civil conspiracy claim).

Here, the defendants' alleged actions were not only immunized from liability by the *Noerr-Pennington* doctrine and the Anti-SLAPP Act, they also constituted actions undertaken in furtherance of defendants' own interests as property owners, as parents and as advocates for public health, safety and a clean environment. You and your clients have not even attempted to establish, nor is there any basis upon which to establish, that the defendants acted with the "sole purpose" of harming the plaintiffs as opposed to furthering their own commercial and personal interests. Thus, the defendants' alleged actions are justified as a matter of law and cannot be actionable as a tortious interference with contract or a civil conspiracy.

B. <u>Unless the Complaint, which is completely devoid of legal merit and has been filed for improper purposes, is withdrawn within 28 days of the date of this letter, defendants will seek sanctions under Pa. R. Civ. P. 1023.1 *et seq.*</u>

Pennsylvania Rule of Civil Procedure 1023.1 requires that at least one attorney of record sign every pleading that is filed. Both of you have signed the Complaint in the above-referenced case. Your signatures constitute certifications that you have read the Complaint and that, to the best of your knowledge, information and belief, formed after an inquiry that is reasonable under the circumstances:

> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; [and]
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law...

Pa. R. Civ. P. 1023.1(c).

Even a cursory review of the Complaint reveals that the claims contained within it are completely without legal merit. Equally apparent from the circumstances surrounding the commencement of this case is that the Complaint has been filed with the purpose of harassing the defendants and dissuading them from exercising their rights to petition and free speech, which are guaranteed to them under the Pennsylvania and United States constitutions. The filing of the Complaint constitutes an egregious violation of Rule 1023.1(c), which can only be remedied by an immediate withdrawal of the pleading.

If the Complaint is not withdrawn within 28 days of the date of this letter, defendants will file a motion for sanctions against both of you for having signed and filed a frivolous and improperly-motivated Complaint against the defendants. Requested sanctions will include, at a minimum, in addition to the striking of the offensive pleading itself, all attorneys' fees and expenses incurred by the defendants in connection with the motion for sanctions and any "show cause" hearings that may be ordered by the Court. *See* Pa. R. Civ. P. 1023.2(b), 1023.4(a)(2). The law firm of Jones, Gregg, Creehan & Gerace LLP will be named in the motion for sanctions as being jointly responsible for violations of Rule 1023.1 you both committed. Pa. R. Civ. P. 1023.4(a)(3).

This letter further serves as notice that defendants may institute a claim against you and your clients for Wrongful Use of Civil Proceedings pursuant to the Dragonetti Act, 42 Pa.C.S.A. §8351 *et seq.*, once the case is resolved favorably to the defendants. *See, e.g., Bannar v. Miller*, 701 A.2d 242 (Pa. Super. 1997); *Hart v. O'Malley,* 436

Pa.Super. 151, 160-61, 647 A.2d 542, 547 (1994), *aff'd*, 544 Pa. 315, 676 A.2d 222 (1996) (citing *Kelly-Springfield Tire Co. v. D'Ambro*, 408 Pa.Super. 301, 596 A.2d 867 (1991)).

C. Conclusion

All three counts of the Complaint are completely without legal or factual merit. Those claims are barred by the *Noerr-Pennington* doctrine and by the Anti-SLAPP Act. Defendants demand that plaintiffs withdraw the Complaint immediately, or risk sanctions now and through a Wrongful Use of Civil Proceedings claim in the future. Please contact us no later than July 6, 2015, to confirm that you are withdrawing the Complaint with prejudice. If we do not hear from you by the appointed date we will construe your silence as a refusal of this request and we will proceed accordingly. Thank you.

Respectfully,

Michael Healey, Esq.
Healey & Hornack, P.C.
247 Ft. Pitt Blvd., 4th Fl.
Pittsburgh, PA 15222
(412) 391-7711

Witold J. Walczak, Esq.,
Legal Director
Sara Rose
Staff Attorney
American Civil Liberties Union of Pennsylvania
247 Ft. Pitt. Blvd., 2d Fl.
Pittsburgh, PA 15222
(412) 681-7864

Joseph Otis Minot, Esq.
Aaron Jacobs-Smith, Esq.
Alex Bomstein, Esq.
Clean Air Council
135 South 19th Street, Suite 300
Philadelphia, PA 19103
(215) 567-4004

Craig F. Turet, Esq.
Curtin & Heefner LLP
2005 South Easton Road, Suite 100
Doylestown, Pennsylvania 18901
(267) 898-0570

James A. McGovern, Esq.
Marshall, Dennehey, Warner, Coleman & Goggin
600 Grant Street, Suite 2900
Pittsburgh, PA 15219
(412) 803-1140