

<p>CHARLES P. KUHAR, SR., <i>et al.</i>,</p> <p style="padding-left: 40px;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>CITY OF PHILADELPHIA, <i>et al.</i>,</p> <p style="padding-left: 40px;">Defendants.</p>	<p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p>	<p>COURT OF COMMON PLEAS</p> <p>PHILADELPHIA COUNTY</p> <p>August Term 2022</p> <p>No. 220801916</p>
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**ORDER**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2023, upon consideration of the Motion for Sanctions filed by Defendant Abortion Liberation Fund of Pennsylvania (“ALF”), and any response thereto, it is hereby ORDERED that Defendant ALF’s Motion for Sanctions is GRANTED.

It is further ORDERED that, within 30 days of this Order, Defendant ALF shall submit a bill of costs and statement of attorneys’ fees to be awarded as sanctions against Plaintiffs.

BY THE COURT:

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CHARLES P. KUHAR, SR., <i>et al.</i> ,	:	COURT OF COMMON PLEAS
	:	PHILADELPHIA COUNTY
Plaintiffs,	:	
	:	August Term 2022
v.	:	
	:	No. 220801916
CITY OF PHILADELPHIA, <i>et al.</i> ,	:	
	:	
Defendants.	:	

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**DEFENDANT ABORTION LIBERATION FUND OF PENNSYLVANIA’S  
MOTION FOR SANCTIONS AGAINST PLAINTIFFS**

Defendant Abortion Liberation Fund of Pennsylvania (“ALF”), by and through its undersigned counsel, files this Motion for Sanctions against Plaintiffs Charles P. Kuhar, Sr., and Theresa Kuhar (together, “the Kuhars”) and the Pro-Life Coalition of PA, Inc. (the “Pro-Life Coalition”) (collectively, “Plaintiffs”) for dilatory, vexatious and bad faith litigation tactics, which unnecessarily multiplied the burdens and expenses of litigation in this matter. In support of its Motion, ALF submits and incorporates the attached Brief, and states as follows:

**Background and Procedural History**

1. On or about July 1, 2022, Defendant City of Philadelphia (the “City”) contributed \$500,000 to ALF, a private non-profit organization, out of the City’s general fund, which primarily consists of municipal tax revenue. (Third Am. Compl. at ¶¶ 30–32.) Consistent with its mission, ALF intends to spend the funds contributed by the City to expand access to abortions for individuals experiencing poverty, which will include providing financial assistance for individuals to pay, in whole or in part, for lawful abortions in Pennsylvania.

2. The Kuhars are City residents and taxpayers who purportedly support the Pro-Life Coalition, a non-profit corporation whose stated mission is to “protect the sanctity of human life.” (*Id.* at ¶¶ 9–11.) Plaintiffs filed this suit because they disagree with ALF’s mission and the City’s decision to contribute funds to ALF.

3. On August 16, 2022, the Kuhars filed a Complaint and an Emergency Motion for Special and Preliminary Injunction in the Philadelphia Court of Common Pleas against the City of Philadelphia, Mayor James Kenney, City Treasurer Jacqueline Dunn, and City Controller Rebecca Rhynhart in their official capacities (the “City Defendants”), attempting to challenge the legality of the City’s contribution to ALF. (October 19, 2022 Memorandum Opinion Denying Plaintiffs’ Third Amended Motion for Preliminary Injunction (the “Oct. 19 Op.”) at 1.)

4. On August 23, 2022, Plaintiffs filed an Amended Complaint adding ALF as a Defendant. (*Id.*)

5. ALF and the City Defendants filed preliminary objections to the Kuhars’ Amended Complaint on September 15, 2022, and September 16, 2022, respectively. (*Id.* at 1–2.) ALF’s preliminary objections raised, among other defects in the Amended Complaint, the Kuhars’ failure to state a viable cause of action and their inability to do so because, as a matter of law, no right of action is available to private parties under the statutes cited in the Amended Complaint—namely,

the Pennsylvania Welfare Code, the Pennsylvania Abortion Control Act, and the federal Hyde Amendment.

6. On September 16, 2022, Defendants also filed responses to the Kuhars' Motion for Preliminary Injunction. ALF argued in its opposition that the Kuhars could not meet any of the essential elements of Pennsylvania's injunction standard, primarily because they could not possibly prevail on the merits of claims that do not exist as a matter of law.

7. In lieu of a response to the Defendants' preliminary objections, the Kuhars filed a "Second Amended Complaint for Injunctive and Declaratory Relief" on October 1, 2022, adding references to Pennsylvania Constitutional provisions, and reciting elements of taxpayer standing, while also dropping their unsupportable claims for surcharge, mandamus and violations of the Sunshine Act. This iteration of Plaintiffs' complaint contained only one Count—for "Declaratory Judgment"—but contained the same underlying grounds as the prior pleadings, alleging violations of the Pennsylvania Constitution, the Pennsylvania Human Services Code, the Pennsylvania Abortion Control Act and the Federal Hyde Amendment. (*E.g.*, Second Am. Compl. at ¶ 20.) This iteration also continued to expressly "seek injunctive relief enjoining [ALF] from using any of the \$500,000 and directing its immediate return to [the City]." (*Id.* at ¶ 61.)

8. On October 3, 2022, the Kuhars filed a Second Amended Motion for Special and Preliminary Injunction. As with their prior injunction motions, they sought a preliminary and special injunction to prevent supposed violations of the Pennsylvania Human Services Code, the Pennsylvania Abortion Control Act and the Federal Hyde Amendment, and added purported violations of the Pennsylvania Constitution. (*See* 10/3/2022 Mem. of Law in Support of 2d Am. Mot. for Special and Preliminary Injunction at 2.)

9. On October 12, 2022, before ALF or the City Defendants had a chance to respond to the Second Amended Complaint, Plaintiffs sought leave to and filed a *Third* Amended Complaint for Injunctive and Declaratory Relief (the “Third Amended Complaint”) to add the Pro-Life Coalition as a party. Like the prior iterations of Plaintiffs’ Complaints, the Third Amended Complaint asserted the same alleged violations of the Pennsylvania Constitution, the Pennsylvania Human Services Code, the Pennsylvania Abortion Control Act and the Federal Hyde Amendment. (*E.g.*, Third Am. Compl. at ¶ 22.)

10. Plaintiffs also filed their *Third* Amended Motion for Preliminary Injunction (the “Third PI Motion”) on October 10, 2022. The Third PI Motion contained the exact same arguments as the Second PI Motion, seeking a preliminary and special injunction to prevent supposed violations of the Pennsylvania Human Services Code, the Pennsylvania Abortion Control Act, the Federal Hyde Amendment, and the Pennsylvania Constitution. (*See* 10/10/2022 Mem. of Law in Support of 3d Am. Mot. for Special and Preliminary Injunction at 2.)

11. Both ALF and the City Defendants filed Preliminary Objections to the Third Amended Complaint and Responses in Opposition to Plaintiff’s Third PI Motion on October 13, 2022. ALF’s arguments in opposition to the preliminary injunction and in support of the preliminary objections were primarily based on the same substantive grounds: Plaintiffs’ failure and inability after *four* bites at the apple to state a viable cause of action against ALF. Crucially, ALF argued again that Plaintiffs cannot prevail on the merits of claims that ALF violated the Pennsylvania Constitution, any Pennsylvania statute or the federal Hyde Amendment because no private litigant has any legal right to sue a private party like ALF under any such law. (*See* 10/13/2022 Br. in Opp. to Pls.’ 3d Am. Mot. for Special and Preliminary Injunction at 5-10.)

12. On October 14, 2022, the Court held a hearing on Plaintiffs' Third PI Motion, where Plaintiffs had yet another opportunity to articulate a viable cause of action and respond to ALF's arguments about their failure to state a claim. (Oct. 19 Op. at 2.) At no point in that hearing, or in any of their pleadings or briefing up to that point, did Plaintiffs argue that they did not need to articulate a cause of action against ALF in order to obtain the extraordinary relief they seek.<sup>1</sup>

13. On October 19, 2022, the Court issued the Oct. 19 Opinion and accompanying order denying Plaintiffs' Third PI Motion. Specifically, the Court held Plaintiffs were not "entitled to the extraordinary remedy of a preliminary injunction because... (ii) Plaintiffs have no standing with respect to either the City or ALF; and, (iii) Plaintiffs have not demonstrated a likelihood of success on the merits on the substantive claims as to either the City or ALF." (*Id.* at 10.) With respect to the merits of Plaintiffs' claims, the Court specifically concluded after full briefing and argument that Plaintiffs "have offered no argument, citation, evidence of legislative intent, or any other authority whatsoever" that they have any right of action against ALF under any of the statutes that form the basis of their complaint. (*Id.* at 7.)

14. Later on October 19, 2022, Plaintiffs appealed the Oct. 19 Opinion and accompanying order to the Commonwealth Court.

15. The next day, on October 20, 2022, Plaintiffs filed an Emergency Application for Stay and Injunction Pending Appeal (the "CCP Application") in this Court.

16. On October 25, 2022, before briefing on the CCP Application was complete in this Court, Plaintiffs also filed an Emergency Application for Stay and Injunction Pending Appeal Pursuant to Pa. R.A.P. 1732 in the Commonwealth Court.

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<sup>1</sup> A true and correct copy of the Transcript from the October 14, 2022 hearing on Plaintiffs' Third Amended Motion for Preliminary Injunction is attached hereto as Exhibit A.

17. Pursuant to an Order dated October 20, 2022, ALF filed an opposition to the CCP Application in this Court on October 27, 2022.

18. On October 31, 2022, this Court denied the CCP Application (“Oct. 31 Order”), confirming that this case would proceed in this Court despite the pendency of Plaintiffs’ collateral appeal of the Oct. 19 order denying preliminary relief.

19. On November 2, 2022, pursuant to an Order issued by the Commonwealth Court on October 26, 2022, ALF filed an opposition to the Plaintiffs’ Emergency Application for Stay and Injunction Pending Appeal in the Commonwealth Court.

20. Despite their prolific filings and the Oct. 31 Order denying their first request for a stay, Plaintiffs did not oppose ALF’s Preliminary Objections by the 20-day deadline. Neither did they seek an extension of time within which to file. (Nov. 4 Order at ¶ 2). Instead, on the November 2, 2022 preliminary objection response deadline under Pa.R.C.P. 1026(a), Plaintiffs tried again to stay the proceedings before this Court by filing a Motion to Defer proceedings pending their collateral appeal of the October 19 order. (*Id.* at ¶ 3.)

21. On November 4, 2022, the Court sustained ALF’s Preliminary Objections and dismissed the Third Amended Complaint. (*Id.* at p.3.) In addition to Plaintiffs’ failure to file a responsive pleading, this Court sustained ALF’s preliminary objections for the same substantive reasons as previously set forth in the Oct. 19 Opinion denying Plaintiffs’ motion for preliminary injunction—namely, Plaintiffs’ lack of standing and inability to identify any legally cognizable private right of action against ALF. (*Id.*)

22. Later on November 4, 2022, Plaintiffs attempted to cure their omission by filing a motion for leave to file their preliminary objection responses *nunc pro tunc*, and for

reconsideration of the Nov. 4 Order (“the Nov. 4 Motion”). The Nov. 4 Motion attached Plaintiffs’ proposed late responses to Defendants’ preliminary objections. (Nov. 4 Mot., Ex. A & B.)

23. In the proposed Response to ALF’s Preliminary Objections attached to Plaintiffs’ *nunc pro tunc* application, Plaintiffs repeated a remarkable position that was previously unstated and is entirely inconsistent with their dogged pursuit of an injunction against ALF: “***Plaintiffs are not seeking to sustain a private right of action against Defendant Abortion Liberation Fund.*** Rather, Plaintiffs’ Count I seeks a declaration that expenditure of public funds by Defendant City of Philadelphia to Defendant [ALF] for abortions violates Pennsylvania Law.” (Nov. 4 Mot., Ex. B at ¶¶ 15-24 (emphasis added).) Plaintiffs thus—for the first time in a late response to a second set of preliminary objections—suggested that they seek nothing more than a declaration, despite having filed three iterations of an emergency motion for injunctive relief against ALF and continuing to frame their amended pleadings as “Complaint[s] for *Injunctive and Declaratory Relief.*”

24. At the same time, Plaintiffs continue to pursue injunctive relief against ALF via a still-pending appeal of the Oct. 19 Order, and they stubbornly pursued parallel emergency requests for interim injunctive relief both in this Court and in the Commonwealth Court,<sup>2</sup> despite their November 4<sup>th</sup> revelation that they do not seek to maintain any private right of action against ALF.

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<sup>2</sup> When Plaintiffs’ proposed pleading attached to the Nov. 4 Motion appeared to limit the scope of Plaintiffs’ proposed claims and abandon any claim for injunctive relief, undersigned counsel for ALF asked Plaintiffs’ counsel to withdraw the Application for Stay and Injunction Pending Appeal that was then pending in the Commonwealth Court, as their newly-minted position before this Court could not be reconciled with the ongoing effort to obtain an injunction against ALF pending appeal. Plaintiffs refused and insist on pursuing inconsistent positions before this Court and the Commonwealth Court. A true and correct copy of counsel’s e-mail correspondence between November 18 and 22, 2022 is attached hereto as Exhibit B.



25. On November 10, 2022, Plaintiffs filed Concise Statements of Errors Complained of on Appeal pursuant to Pa.R.A.P. 1925(b).<sup>3</sup> In these filings, Plaintiffs doubled down on the position that they do not need a private right of action against ALF, stating that the “trial court erred in holding that the Plaintiffs’ Third Amended Complaint and Third Amended Motion for Special and Preliminary Injunction seeks a private right of action.” (11/10/22 Concise Stmt. of Errors at ¶7.)

26. On November 23, 2022, pursuant an Order of this Court dated November 9, 2022, ALF filed responses in opposition to Plaintiffs’ Motion to Defer and the Nov. 4 Motion.

27. On December 2, 2022, this Court denied Plaintiffs’ motions to defer proceedings, for *nunc pro tunc* relief, and for reconsideration.

28. On December 20, 2022, the Commonwealth Court denied Plaintiffs’ Emergency Application for Stay and Injunction Pending Appeal Pursuant to Pa.R.A.P. 1732.<sup>4</sup>

### **Plaintiffs’ Tactics Warrant Sanctions**

29. With this litigation concluded, Plaintiffs’ vexatious tactics have been brought into greater focus. ALF is “entitled to a reasonable counsel fee as part of the taxable costs” as sanctions for “dilatatory, obdurate [and] vexatious conduct during the pendency of [this] matter,” 42 Pa.C.S.A. § 2503(7), and because Plaintiffs’ conduct in pursuing an injunction that they knew could not possibly succeed without a private right of action against ALF was “arbitrary, vexatious [and] in bad faith.” *Id.*, § 2503(9).

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<sup>3</sup> Plaintiffs’ seriatim injunction filings before this Court generated four motion control numbers, and Plaintiffs filed appeals in relation to the denial of each one. Accordingly, they filed four identical Concise Statements of Errors Complained of on Appeal on November 10, 2022.

<sup>4</sup> A true and correct copy of the Commonwealth Court’s December 20, 2022 Memorandum Opinion denying Plaintiffs’ Emergency Application is attached hereto as Exhibit C.

30. Plaintiffs' barrage of filings after this Court denied their preliminary injunction motions—specifically, their motions of November 2 (to defer trial court proceedings) and November 4, 2022 (for reconsideration and *nunc pro tunc* relief) and their ongoing pursuit of injunctive relief from the Commonwealth Court—reveal at least two sanctionable elements of Plaintiffs' approach throughout this litigation:

a) First, the proposed pleadings attached to the Nov. 4 Motion confirmed that Plaintiffs intended to pursue vexatious (and baseless) motions for preliminary injunctive relief against ALF, causing great burden and expense, while taking the entirely inconsistent (and equally baseless<sup>5</sup>) position—which they avoided explaining until faced with dismissal for failure to state a claim—that Plaintiffs merely seek declaratory relief and do not need a private right of action against ALF to obtain such limited relief.

b) Second, Plaintiffs pursued a frivolous motion for reconsideration and for *nunc pro tunc* relief, multiplying the burdens and expenses for ALF, under the guise that they did not understand this case would proceed in the Court of Common Pleas, even though they had unsuccessfully sought emergency stays of these proceedings both in this Court and in the Commonwealth Court, reflecting a tactical decision to feign ignorance of the deadline and take their chances with a Motion to Defer instead of timely responding to the preliminary objections.

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<sup>5</sup> Of course, Plaintiffs must at least articulate a right to relief against the defendants to obtain any declaratory judgment. *See, e.g., Graziano v. Wetzel*, 268 A.3d 1129 (Pa. Cmwlth. 2021) (sustaining preliminary objection against inmate seeking declaratory judgment about a sanction procedure because inmate did not have a private cause of action to file a challenge under the relevant state law); *see also Stilp v. Commonwealth*, 910 A.2d 775, 782 (Pa. Cmwlth. 2006) (“plaintiff must demonstrate an ‘actual controversy’ indicating imminent and inevitable litigation, and a direct, substantial and present interest” to obtain a declaratory judgment).

31. Particularly egregious is Plaintiffs’ knowing pursuit of a sham injunction and corresponding preliminary injunction proceedings. Plaintiffs admit never having a viable right of action against ALF, but waited months—during which they forced the parties to litigate seriatim amended injunction motions, conduct a full preliminary injunction hearing and brief an application for stay of the injunction ruling—to come clean. The real theory of Plaintiffs’ case, such as it is, cannot square with a demand for injunctive relief.

32. Having now conceded that Plaintiffs never intended to pursue a private right of action against ALF, it is obvious that they pursued illegitimate preliminary injunction motions in bad faith. Plaintiffs engaged in dilatory and vexatious litigation tactics under § 2503(7) and (9) by trying to stop a legitimate non-profit from spending its money on its lawful mission through bogus filings that multiplied expensive proceedings in a futile attempt to obtain an injunction that could never issue absent a viable cause of action against ALF.<sup>6</sup>

33. By November 4, 2022, when Plaintiffs revealed they merely intend to seek a declaration and “are not seeking to sustain a private right of action against Defendant Abortion Liberation Fund,” Plaintiffs had already forced ALF to expend significant time and resources in this Court: (a) responding to multiple preliminary injunction motions on an expedited basis, (b) preparing for and conducting a full preliminary injunction hearing, (c) responding to the CCP Application, which sought an interim injunction pending appeal, and (d) responding to a motion to defer proceedings in this court pending the outcome of Plaintiffs’ attempts to obtain injunctive

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<sup>6</sup> See, e.g., *Ash v. Cort*, 350 F. Supp. 227, 232 (E.D. Pa. 1972), *aff’d*, 471 F.2d 811 (3d Cir. 1973) (“Plaintiff has failed to prove that there is a likelihood of success on the merits, in that . . . plaintiff has no private right of action”); see also Ex. C at 23 (“without establishing a private right of action under the state and federal statutes at issue, Appellants apparently cannot maintain their challenge to the City’s contribution to the ALF or, concomitantly, prove they have a likelihood of success on the merits of their claim”)

relief from the Commonwealth Court. The Court should therefore impose sanctions in the amount of ALF's attorneys' fees and costs incurred in connection with these injunction proceedings and post-ruling motions for interim injunctive relief from this Court.<sup>7</sup>

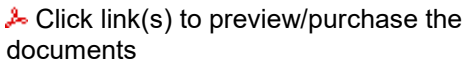
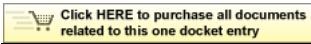
34. In addition, this Court should sanction Plaintiffs in the amount of attorneys' costs and fees incurred responding to the Nov. 4 Motion for the independent reason that Plaintiffs' requests for reconsideration and *nunc pro tunc* relief were frivolous. The Nov. 4 Motion provided no legal basis for any of the relief requested, and it served only to multiply the proceedings in pursuit of relief that had already been denied in the Court's Oct. 31 Order. While the Nov. 4 Motion includes a fleeting reference to Pa.R.A.P. 1701, that rule expressly authorizes the trial court to continue presiding over a matter where, as here, the pending appeal concerns "only a particular item, claim, or assessment adjudged in the matter." Pa.R.A.P. 1701(c). In other words, "[t]o the extent the matters remaining in the trial court are not dependent on resolution of the issue on appeal, the trial court may continue to address them." *Commonwealth v. McClure*, 172 A.3d 668, 699 (Pa. Super. 2017)); *see also Rosen v. Rosen*, 549 A.2d 561, 564 (Pa. 1988) ("The purpose of Rule 1701(c) is to prevent appeals of ancillary issues from delaying the resolution of basic issues while the matter may proceed without prejudicing the rights of the party seeking interim review.")

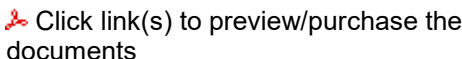
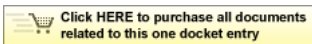
35. To the extent that the request for leave to file late pleadings *nunc pro tunc* was premised on the notion that Plaintiffs could not have expected the Court to act on unopposed objections while they appealed the preliminary injunction ruling, the entire premise is absurd in light of (a) the Court's October 31 Order expressly denying a stay, and (b) Plaintiffs' concurrent

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<sup>7</sup> While this Motion relates only to fees and costs expended in proceedings before this Court, ALF reserves the right to file, in due course, a motion with the Commonwealth Court pursuant to Pa.R.A.P. 2744 seeking attorneys' fees and costs for responding to Plaintiffs' appeal of this Court's preliminary injunction ruling.

filing asking the Court to “defer” trial court proceedings. The November 2, 2022 Motion to Defer evidences that Plaintiff knew proceedings—and the deadline by which they were required to respond to preliminary objections—had not been stayed. And any notion that Plaintiffs were caught unawares by the Court’s decision to act on pending preliminary objections is further belied by the fact that Plaintiffs were ready with fulsome answers to both the City’s and ALF’s Preliminary Objections (totaling over 70 pages) as attachments to a motion for *nunc pro tunc* relief just 95 minutes after the Court docketed the Order sustaining preliminary objections. The timing is confirmed on the civil docket sheet for this matter:

04-NOV-2022 03:21 PM	ORDER ENTERED/236 NOTICE GIVEN	ROBERTS, JOSHUA
<b>Documents:</b>	 <a href="#">ORDER_118.pdf</a> 	
<b>Docket Entry:</b>	<p>07-22102107 UPON CONSIDERATION OF THE PRELIMINARY OBJECTION TO THE THIRD AMENDED COMPLAINT FILED BY THE CITY OF PHILADELPHIA AND THE ABORTION LIBERATION FUND OF PENNSYLVANIA, AND PLAINTIFFS HAVING FAILED TO FILE A RESPONSIVE PLEADING WITHIN THE TIME ALLOWED PURSUANT TO RULE 1026(A), THE COURT STATES AS FOLLOWS. SEE TERMS 1 THROUGH 9. THEREFORE, FOR THE REASONS SET FORTH ABOVE, AND AS SUPPLEMENTED BY THE COURT'S MEMORANDUM OPINION, IT IS ORDERED THAT THE (I) THE CITY OF PHILADELPHIA'S PRELIMINARY OBJECTIONS TO COUNT I OF THE THIRD AMENDED COMPLAINT ARE SUSTAINED; (II) THE ABORTAION LIBERATION FUND OF PENNSYLVANIA'S PRELIMINARY OBJECTION TO COUNT I OF THE THIRD AMENDED COMPLAIN ARE SUSTAINED; AND (III) THE THIRD AMENDED COMPLAINT IS DISMISSED. ... BY THE COURT: ROBERTS, J.: 11/4/22</p>	
04-NOV-2022 03:21 PM	NOTICE GIVEN UNDER RULE 236	
<b>Docket Entry:</b>	<p>NOTICE GIVEN ON 07-NOV-2022 OF ORDER ENTERED/236 NOTICE GIVEN ENTERED ON 04-NOV-2022.</p>	

04-NOV-2022 04:55 PM	MOTION TO FILE NUNC PRO TUNC	KING III, THOMAS W	
<b>Documents:</b>	  <a href="#">Motion to File Response Nunc Pro Tunc.pdf</a> <a href="#">Motion CoverSheet Form</a>		
<b>Docket Entry:</b>	61-22111161 RESPONSE DATE 11/28/2022. (FILED ON BEHALF OF THERESA M KUCHAR AND CHARLES P KUCHAR)		

The Oct. 31 Order had clearly placed Plaintiffs on notice that this Court would not stay proceedings pending their collateral appeal, and when their response to the preliminary objections came due, they made a tactical decision to risk filing another motion to “defer” proceedings instead of filing the preliminary objection response papers they had prepared. When that decision backfired, they were ready with responses to the preliminary objections that they could have filed when due. The net result is that they forced ALF to respond to two more baseless motions.

36. Plaintiffs’ deliberate gamesmanship between November 2 and 4, 2022, is consistent with their history of peppering this Court and Defendants with vague filings chock full of irreconcilable positions, and further evidences a bad faith intent to play fast and loose with the courts. Plaintiffs’ filings have perplexed both this Court and the Commonwealth Court. *See, e.g.*, Ex. A at 30:18-20 (“I’m having a hard time following the bouncing ball as well here.”); Ex. C at 20 (noting the confusing nature of Plaintiffs’ Emergency Application for Stay and Injunction Pending Appeal).

37. The confusion sown by Plaintiffs’ tactics is undoubtedly intentional. Through serial amendments, Plaintiffs avoided responding to Defendants’ preliminary objections before fully litigating their preliminary injunction request. Faced with arguments that they could not obtain an injunction against ALF without a private right of action under any of the relevant statutes, Plaintiffs knew that filing their preliminary objection response would mean clearly conceding they do not, indeed, have a right of action against ALF. By putting off the preliminary objection

response, Plaintiffs were able to keep the theory of their case against ALF vague, sidestepping questions in the preliminary injunction proceedings about whether they had any viable claim against ALF. It is now plain that Plaintiffs set out to pursue legally irreconcilable positions before this Court, and the sequence they followed in rolling out these arguments suggests that they did so in bad faith to keep alive a vexatious and dilatory request for injunctive relief that they knew to be unsupported by a valid cause of action against ALF.

WHEREFORE, ALF respectfully requests that this Honorable Court issue an order sanctioning Plaintiffs pursuant to 42 Pa.C.S.A. §§ 2503(7) and (9), and requiring Plaintiffs to pay an amount, to be established through separate submission by ALF of a bill of costs, representing ALF's costs and attorneys' fees incurred (a) responding to Plaintiffs' motions for injunctive relief, (b) preparing for and conducting the October 14, 2022 preliminary injunction hearing, (c) responding to the CCP Application, (d) responding to Plaintiffs' November 2, 2022 Motion to Defer, (e) responding to the Nov. 4 Motion, and (f) preparing this Motion for Sanctions.

Respectfully submitted,

Dated: January 3, 2023

By: /s/ Aliza R. Karetnick

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	:	PHILADELPHIA COUNTY
Plaintiffs,	:	
	:	August Term 2022
vs.	:	
	:	No. 220801916
CITY OF PHILADELPHIA, <i>et al.</i> ,	:	
	:	
Defendants.	:	

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**BRIEF IN SUPPORT OF DEFENDANT  
ABORTION LIBERATION FUND OF PENNSYLVANIA'S  
MOTION FOR SANCTIONS AGAINST PLAINTIFS**

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Defendant Abortion Liberation Fund of Pennsylvania (“ALF”) respectfully submits this Brief in support of the accompanying Motion for Sanctions against Plaintiffs Charles P. Kuhar, Sr., and Theresa Kuhar (together, “the Kuhars”) and the Pro-Life Coalition of PA, Inc. (the “Pro-Life Coalition”) (collectively, “Plaintiffs”) for dilatory, vexatious and bad faith litigation tactics, which unnecessarily multiplied the burdens and expenses of litigation in this matter.

## **I. INTRODUCTION**

Plaintiffs have engaged in a pattern throughout this case of peppering the Court with seriatim baseless motions containing intentionally vague and internally inconsistent arguments. Now, at the conclusion of proceedings before this Court, Plaintiffs’ vexatious tactics have been brought into greater focus. While the parties’ arguments throughout this case have largely centered on Plaintiffs’ failure to articulate a viable right of action against ALF, Plaintiffs only recently clarified that they “are not seeking to sustain a private right of action against Defendant Abortion Liberation Fund.” They offered this concession in a last-ditch effort to avoid dismissal of their complaint for failure to state a claim against ALF, apparently taking the position that because Plaintiffs’ complaint merely “seeks a declaration that expenditure of public funds by Defendant City of Philadelphia to Defendant [ALF] for abortions violates Pennsylvania Law”, they do not need to have a cause of action against ALF to seek a declaration.

Chief among the problems with this novel theory on the merits is that it cannot be reconciled with Plaintiffs’ months-long expensive effort to obtain a preliminary injunction against ALF that would restrict this non-profit organization’s ability to spend its own money. As ALF has argued throughout this case, no party can obtain a preliminary injunction against another party against whom it has no cause of action. Plaintiffs knew this but charged forward with wasteful preliminary injunction motions against ALF. Had Plaintiffs been clear from the outset about the purportedly limited nature of this declaratory judgment action, rather than being coy about the

basis for their case against ALF, the parties and the Court could have shortcut arguments about Plaintiffs' right of action and dispensed with the futile preliminary injunction proceedings. Instead, by putting off their response to the preliminary objections, Plaintiffs obscured the true nature of their case and forced ALF to spend significant time and resources fighting a preliminary injunction that Plaintiffs knew could never be granted.

Plaintiffs cannot have it both ways—arguing when it suits them that their claims provide a sufficient basis to enjoin ALF from spending its money, and then attempting to avoid dismissal based on the entirely inconsistent (and baseless) theory that this isn't the kind of case that requires a right of action against the defendant. The Court should not tolerate parties playing fast and loose with the courts in this way and should impose sanctions on Plaintiffs under 42 Pa.C.S.A. § 2503. Specifically, ALF is “entitled to a reasonable counsel fee as part of the taxable costs” as sanctions for “dilatory, obdurate [and] vexatious conduct during the pendency of [this] matter,” 42 Pa.C.S.A. § 2503(7), and because Plaintiffs' conduct in pursuing an injunction that they knew could not possibly succeed without a private right of action against ALF was “arbitrary, vexatious [and] in bad faith.” *Id.*, § 2503(9).

## **II. MATTER BEFORE THE COURT**

Defendant ALF's Motion for Sanctions against Plaintiffs pursuant to 42 Pa.C.S.A. §§ 2503 (7) and (9).

## **III. STATEMENT OF QUESTIONS INVOLVED**

1. Whether, pursuant to 42 Pa.C.S.A. §§ 2503(7) and (9), Plaintiffs' pursuit of futile preliminary injunction motions without a valid right of action against ALF entitles ALF to reasonable counsel fees and costs incurred in connection with sham injunction proceedings?

*Suggested Answer: Yes*

2. Whether Plaintiffs' filing of a frivolous motion for reconsideration and for leave to file late preliminary objection responses *nunc pro tunc* entitles ALF to reasonable counsel fees and costs incurred responding to that motion pursuant to 42 Pa.C.S.A. §§ 2503(7) and (9)?

*Suggested Answer: Yes*

#### **IV. BACKGROUND AND PROCEDURAL HISTORY**

Plaintiffs filed this suit because they disagree with ALF's mission and the City's decision to contribute funds to support that mission. On or about July 1, 2022, the City contributed \$500,000 to ALF, a private non-profit organization, out of the City's general fund, which primarily consists of municipal tax revenue. (Third Am. Compl. at ¶¶ 30–32.) On August 16, 2022, the Kuhars filed a Complaint and an Emergency Motion for Special and Preliminary Injunction in this Court, attempting to challenge the legality of the City's contribution to ALF. (October 19, 2022 Memorandum Opinion Denying Plaintiffs' Third Amended Motion for Preliminary Injunction (the "Oct. 19 Op.") at 1.) On August 23, 2022, Plaintiffs filed an Amended Complaint adding ALF as a Defendant. (*Id.*)

ALF filed preliminary objections to the Kuhars' Amended Complaint on September 15, 2022, which raised, among other defects, the Kuhars' failure to state a viable cause of action and their inability to do so because, as a matter of law, no right of action is available to private parties under the statutes cited in the Amended Complaint. On September 16, 2022, ALF filed responses to the Kuhars' Motion for Preliminary Injunction. ALF argued in its opposition that the Kuhars could not meet any of the essential elements of Pennsylvania's injunction standard, primarily because they could not possibly prevail on the merits of claims that do not exist as a matter of law.

In lieu of a response to the Defendants' preliminary objections, the Kuhars filed a "Second Amended Complaint for Injunctive and Declaratory Relief" on October 1, 2022, adding references to Pennsylvania Constitutional provisions, and reciting elements of taxpayer standing, while also

dropping their unsupportable claims for surcharge, mandamus and violations of the Sunshine Act. This iteration of Plaintiffs’ complaint contained only one Count—for “Declaratory Judgment”—but contained the same underlying grounds as the prior pleadings, alleging violations of the Pennsylvania Constitution, the Pennsylvania Human Services Code, the Pennsylvania Abortion Control Act and the Federal Hyde Amendment. (*E.g.*, Second Am. Compl. at ¶ 20.) This iteration also continued to expressly “seek injunctive relief enjoining [ALF] from using any of the \$500,000 and directing its immediate return to [the City].” (*Id.* at ¶ 61.) On October 3, 2022, the Kuhars filed a Second Amended Motion for Special and Preliminary Injunction. As with their prior injunction motions, they sought a preliminary and special injunction to prevent supposed violations of the Pennsylvania Human Services Code, the Pennsylvania Abortion Control Act and the Federal Hyde Amendment, and added purported violations of the Pennsylvania Constitution. (*See* 10/3/2022 Mem. of Law in Support of 2d Am. Mot. for Special and Preliminary Injunction at 2.)

On October 12, 2022, before ALF or the City Defendants had a chance to respond to the Second Amended Complaint, Plaintiffs sought leave to and filed a *Third* Amended Complaint for Injunctive and Declaratory Relief (the “Third Amended Complaint”) to add the Pro-Life Coalition as a party. Like the prior iterations of Plaintiffs’ Complaints, the Third Amended Complaint asserted the same alleged violations of the Pennsylvania Constitution, the Pennsylvania Human Services Code, the Pennsylvania Abortion Control Act and the Federal Hyde Amendment. (*E.g.*, Third Am. Compl. at ¶ 22.) Plaintiffs also filed a *Third* Amended Motion for Preliminary Injunction (the “Third PI Motion”) making the exact same arguments as the Second PI Motion and seeking a preliminary injunction to prevent supposed violations of the Pennsylvania Human Services Code, the Pennsylvania Abortion Control Act, the Federal Hyde Amendment, and the



Pennsylvania Constitution. (*See* 10/10/2022 Mem. of Law in Support of 3d Am. Mot. for Special and Preliminary Injunction at 2.)

Both ALF and the City Defendants filed Preliminary Objections to the Third Amended Complaint and Responses in Opposition to Plaintiff's Third PI Motion on October 13, 2022. ALF's arguments in opposition to the preliminary injunction and in support of the preliminary objections were primarily based on the same substantive grounds: Plaintiffs' failure and inability after *four* bites at the apple to state a viable cause of action against ALF. Crucially, ALF argued again that Plaintiffs cannot prevail on the merits of claims that ALF violated the Pennsylvania Constitution, any Pennsylvania statute or the federal Hyde Amendment because no private litigant has any legal right to sue a private party like ALF under any such law. (*See* 10/13/2022 Br. in Opp. to Pls.' 3d Am. Mot. for Special and Preliminary Injunction at 5-10.)

On October 14, 2022, the Court held a hearing on Plaintiffs' Third PI Motion, where Plaintiffs had yet another opportunity to articulate a viable cause of action and respond to ALF's arguments about their failure to state a claim. (Oct. 19 Op. at 2.) At no point in that hearing, or in any of their pleadings or briefing up to that point, did Plaintiffs argue that they did not need to articulate a cause of action against ALF in order to obtain the relief they seek.

Shortly thereafter, on October 19, 2022, the Court issued the Oct. 19 Opinion and accompanying order denying Plaintiffs' Third PI Motion. Specifically, the Court held Plaintiffs were not "entitled to the extraordinary remedy of a preliminary injunction because... (ii) Plaintiffs have no standing with respect to either the City or ALF; and, (iii) Plaintiffs have not demonstrated a likelihood of success on the merits on the substantive claims as to either the City or ALF." (*Id.* at 10.) With respect to the merits of Plaintiffs' claims, the Court specifically concluded after full briefing and argument that Plaintiffs "have offered no argument, citation, evidence of legislative

intent, or any other authority whatsoever” that they have any right of action against ALF under any of the statutes that form the basis of their complaint. (*Id.* at 7.) Plaintiffs immediately filed an appeal of that decision in the Commonwealth Court on October 19, 2022.

The next day, Plaintiffs filed an Emergency Application for Stay and Injunction Pending Appeal (the “CCP Application”) in this Court. On October 25, 2022, before briefing on the CCP Application was complete in this Court, Plaintiffs also filed an Emergency Application for Stay and Injunction Pending Appeal Pursuant to Pa. R.A.P. 1732 in the Commonwealth Court. Pursuant to an Order dated October 20, 2022, ALF filed an opposition to the CCP Application in this Court on October 27, 2022.

On October 31, 2022, this Court denied the CCP Application (“Oct. 31 Order”), confirming that this case would proceed in this Court despite the pendency of Plaintiffs’ collateral appeal of the Oct. 19 order denying preliminary relief. On November 2, 2022, pursuant to an Order issued by the Commonwealth Court on October 26, 2022, ALF filed an opposition to the Plaintiffs’ Emergency Application for Stay and Injunction Pending Appeal in the Commonwealth Court.

Despite their prolific filings and the Oct. 31 Order denying their first request for a stay, Plaintiffs did not oppose ALF’s Preliminary Objections by the 20-day deadline. Neither did they seek an extension of time within which to file. (Nov. 4 Order at ¶ 2). Instead, on the preliminary objection response deadline under Pa.R.C.P. 1026(a), Plaintiffs tried again to stay the proceedings before this Court by filing a Motion to Defer proceedings pending their collateral appeal of the October 19 order. (*Id.* at ¶ 3.)

On November 4, 2022, the Court sustained ALF’s Preliminary Objections and dismissed the Third Amended Complaint. (*Id.* at p.3.) In addition to Plaintiffs’ failure to file a responsive pleading, this Court sustained ALF’s preliminary objections for the same substantive reasons as

previously set forth in the Oct. 19 Opinion denying Plaintiffs’ motion for preliminary injunction—namely, Plaintiffs’ lack of standing and inability to identify any legally cognizable private right of action against ALF. (*Id.*) Later on November 4, 2022, Plaintiffs attempted to cure their omission by filing a motion for leave to file their preliminary objection responses *nunc pro tunc*, and for reconsideration of the Nov. 4 Order (“the Nov. 4 Motion”). The Nov. 4 Motion attached Plaintiffs’ proposed late responses to Defendants’ preliminary objections. (Nov. 4 Mot., Ex. A & B.)

In their proposed Response to ALF’s Preliminary Objections, Plaintiffs repeated a remarkable position that it had not previously articulated and is entirely inconsistent with their dogged pursuit of an injunction against ALF: “***Plaintiffs are not seeking to sustain a private right of action against Defendant Abortion Liberation Fund.*** Rather, Plaintiffs’ Count I seeks a declaration that expenditure of public funds by Defendant City of Philadelphia to Defendant [ALF] for abortions violates Pennsylvania Law.” (Nov. 4 Mot., Ex. B at ¶¶ 15-24 (emphasis added).) Plaintiffs thus—for the first time in a late response to a second set of preliminary objections—suggested that they seek nothing more than a declaration, despite having filed three iterations of an emergency motion for injunctive relief against ALF and continuing to frame their amended pleadings as “Complaint[s] for *Injunctive and Declaratory Relief.*” On November 10, 2022, Plaintiffs doubled down on this position, stating in their Concise Statements of Errors Complained of on Appeal pursuant to Pa.R.A.P. 1925(b)<sup>1</sup> that the “trial court erred in holding that the Plaintiffs’ Third Amended Complaint and Third Amended Motion for Special and Preliminary Injunction seeks a private right of action.” (11/10/22 Concise Stmt. of Errors at ¶7.)

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<sup>1</sup> Plaintiffs’ seriatim injunction filings before this Court generated four motion control numbers, and Plaintiffs filed appeals in relation to the denial of each one. Accordingly, they filed four identical Concise Statements of Errors Complained of on Appeal on November 10, 2022.

At the same time, Plaintiffs continue to pursue injunctive relief against ALF via a still-pending appeal of the Oct. 19 Order, and they stubbornly pursued parallel emergency requests for interim injunctive relief both in this Court and in the Commonwealth Court, despite their November 4<sup>th</sup> revelation that they do not seek to maintain any private right of action against ALF.

On November 23, 2022, pursuant an Order of this Court dated November 9, 2022, ALF filed responses in opposition to Plaintiffs' Motion to Defer and the Nov. 4 Motion. On December 2, 2022, this Court denied Plaintiffs' motions to defer proceedings, for *nunc pro tunc* relief, and for reconsideration. On December 20, 2022, the Commonwealth Court denied Plaintiffs' Emergency Application for Stay and Injunction Pending Appeal. (Ex. C.)

## V. ARGUMENT

### A. Applicable Legal Standard.

Pursuant to 42 Pa.C.S.A. § 2503, “[t]he trial court may, upon motion, require a party to pay another participant’s counsel fees if the party’s conduct in commencing the action was arbitrary, vexatious or in bad faith.” *Dooley v. Rubin*, 618 A.2d 1014, 1018 (Pa. Super. 1993) (citing *Santillo v. Robinson*, 557 A.2d 416 (Pa. Super. 1989); *Brenckle v. Arblaster*, 466 A.2d 1075 (Pa. Super. 1983)). The sanction for “a reasonable counsel fee as part of the taxable costs” is particularly warranted under § 2503(7) based on “dilatory, obdurate [and] vexatious conduct during the pendency of [this] matter,” and under § 2503(9) because Plaintiffs’ conduct in pursuing an injunction that they knew could not possibly succeed without a private right of action against ALF was “arbitrary, vexatious [and] in bad faith.” Claims are considered “vexatious if brought without legal or factual grounds and if the action served the sole purpose of causing annoyance.” *Miller v. Nelson*, 768 A.2d 858, 862 (Pa. Super. 2001), *appeal denied*, 782 A.2d 547 (Pa. 2001) (citation omitted)

The rule is intended “to sanction those who knowingly raise, in bad faith, frivolous claims which have no reasonable possibility of success, for the purpose of harassing, obstructing or delaying the opposing party.” *Dooley*, 618 A.2d at 1018. Thus, “relentless pursuit of a claim which plainly lacks legal merit warrants an award of counsel fees.” *Miller*, 768 A.2d at 862 (citation omitted); *see also Thunberg v. Strause*, 682 A.2d 295, 301 (Pa. 1996) (upholding fee award sanction where plaintiff pursued claims that had “no reasonable basis” in light of the plaintiff’s own admissions); *In re Est. of Liscio*, 638 A.2d 1019, 1022 (Pa. Super. 1994), *appeal denied*, 652 A.2d 1324 (Pa. 1994) (affirming fee award sanction for pursuing a claim that “had no reasonable possibility of success, coupled with [] prolonging litigation and unnecessarily delaying” resolution).

**B. Plaintiffs’ Dilatory, Vexatious and Bad Faith Litigation Tactics Warrant Sanctions.**

Plaintiffs’ barrage of filings after this Court denied their preliminary injunction motions—specifically, their motions of November 2 (to defer trial court proceedings) and November 4, 2022 (for reconsideration and *nunc pro tunc* relief) and their ongoing pursuit of injunctive relief from the Commonwealth Court—reveal at least two sanctionable elements of Plaintiffs’ approach throughout this litigation. *First*, the proposed pleadings attached to the Nov. 4 Motion confirmed that Plaintiffs intended to pursue vexatious preliminary injunction motions against ALF, knowing such motions were futile in a case where Plaintiffs merely seek declaratory relief without any private right of action against ALF. Because Plaintiffs concede they “are not seeking to sustain a private right of action against [ALF],” obtaining injunctive relief against ALF is a legal impossibility. But Plaintiffs nevertheless forced ALF into extensive litigation of their futile preliminary injunctive motions before revealing the true theory of this case, thus entitling ALF to sanctions for their dilatory and vexatious litigation tactics under §§ 2503(7) and (9).

*Second*, Plaintiffs’ November 4 Motion for reconsideration and for *nunc pro tunc* relief was frivolous in its own right and needlessly multiplied the burdens and expenses for ALF to oppose this baseless filing. Plaintiffs stubbornly filed this motion under the guise that they did not understand this case would proceed in the Court of Common Pleas, even though they had unsuccessfully sought emergency stays of these proceedings both in this Court and in the Commonwealth Court, reflecting a tactical decision to feign ignorance of the deadline and take their chances with a Motion to Defer instead of timely responding to preliminary objections.

**1. *Plaintiffs forced ALF to litigate a sham preliminary injunction that they knew is incompatible with their entire theory of the case.***

Plaintiffs admit never having a viable right of action against ALF. But Plaintiffs intentionally waited months to clearly concede that they “are not seeking to sustain a private right of action against [ALF].” By doing so, Plaintiffs multiplied the proceedings in this case, forcing ALF to incur significant burdens and expenses responding to sham preliminary injunction motions that Plaintiffs knew were not supported by any valid claim against ALF.

The true theory of Plaintiffs’ case is baseless in its own right and only bolsters the Court’s decision to sustain ALF’s preliminary objections. Of course, Plaintiffs must at least articulate a right to relief against the defendants to obtain any declaratory judgment. *See, e.g., Graziano v. Wetzel*, 268 A.3d 1129 (Pa. Cmwlth. 2021) (sustaining preliminary objection against inmate seeking declaratory judgment about a sanction procedure because inmate did not have a private cause of action to file a challenge under the relevant state law); *see also Stilp v. Commonwealth*, 910 A.2d 775, 782 (Pa. Cmwlth. 2006) (“plaintiff must demonstrate an ‘actual controversy’ indicating imminent and inevitable litigation, and a direct, substantial and present interest” to obtain a declaratory judgment). But the central issue for current purposes is that Plaintiffs’ theory, such as it is, cannot be squared with demands for injunctive relief that Plaintiffs forced the Court

and Defendants to litigate for several months. *See, e.g., Ash v. Cort*, 350 F. Supp. 227, 232 (E.D. Pa. 1972), *aff'd*, 471 F.2d 811 (3d Cir. 1973) (“Plaintiff has failed to prove that there is a likelihood of success on the merits, in that . . . plaintiff has no private right of action”); *see also* Ex. C at 23 (“without establishing a private right of action under the state and federal statutes at issue, Appellants apparently cannot maintain their challenge to the City’s contribution to the ALF or, concomitantly, prove they have a likelihood of success on the merits of their claim”).

While waiting months to come clean about their lack of viable claim against ALF, Plaintiffs set in motion months of expensive litigation over motions that had “no reasonable possibility of success, for the purpose of harassing, obstructing or delaying the opposing party.” *Dooley*, 618 A.2d at 1018 (citing *Santillo*, 557 A.2d 416); *see also Thunberg*, 682 A.2d at 301.<sup>2</sup> Even after the Court tried to get Plaintiffs to clarify their basis for seeking an injunction against ALF, (*see* Ex. A at 30-32), Plaintiffs continued to insist that they had a basis for seeking relief from ALF and persisted in their “relentless pursuit of a claim which plainly lacks legal merit.” *Miller*, 768 A.2d at 862 (citing *In re Estate of Liscio*, 638 A.2d 1019). And by waiting until after those extensive preliminary injunction proceedings to clarify the true nature of their claims, Plaintiffs’ tactics temporarily succeeded in tying up ALF in litigation over its ability to use its own money. Thus, as was the case in *Est. of Liscio*, Plaintiffs’ pursuit of motions that “had no reasonable possibility of success, coupled with [their] prolonging litigation and unnecessarily delaying distribution of the [funds], as well as costing [ALF] thousands of dollars in attorney fees” places their conduct

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<sup>2</sup> The Pennsylvania Supreme Court’s analysis in *Thunberg* is particularly instructive, as the plaintiff in that case was sanctioned under § 2503 for continuing to pursue claims that had no reasonable basis in light of the plaintiff’s own admissions. 682 A.2d at 301. Such is the case here, as Plaintiffs’ own admission that they do not have a right of action against ALF completely undermines the claim for injunctive relief that they insisted on pursuing against this defendant.

squarely within “the conduct envisioned by...§ 2503 permitting an award of attorney fees.” 638 A.2d at 1022.

By November 4, 2022, when Plaintiffs revealed they merely intend to seek a declaration and “are not seeking to sustain a private right of action against Defendant [ALF],” Plaintiffs had already forced ALF into: (a) responding to multiple preliminary injunction motions on an expedited basis, (b) preparing for and conducting a full preliminary injunction hearing, (c) responding to the CCP Application, which sought an interim injunction pending appeal, and (d) responding to a motion to defer proceedings in this court pending the outcome of Plaintiffs’ attempts to obtain injunctive relief from the Commonwealth Court. The Court should therefore impose sanctions in the amount of ALF’s attorneys’ fees and costs incurred in connection with these injunction proceedings and post-ruling motions for interim injunctive relief from this Court.

**2. *Plaintiffs multiplied the burdens on ALF with a frivolous motion for reconsideration and for leave to file late pleadings nunc pro tunc.***

This Court should also sanction Plaintiffs in the amount of attorneys’ costs and fees incurred responding to the Nov. 4 Motion for the independent reason that Plaintiffs’ requests for reconsideration and *nunc pro tunc* relief were frivolous. The Nov. 4 Motion provided no legal basis for any of the relief requested, and it served only to multiply the proceedings in pursuit of relief that had already been denied in the Court’s Oct. 31 Order. While the Nov. 4 Motion includes a fleeting reference to Pa.R.A.P. 1701,<sup>3</sup> that rule actually authorizes the trial court to continue

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<sup>3</sup> Plaintiffs also cited *Mumma v. Boswell*, 937 A.2d 459, 465 (Pa. Super. 2007), without analysis. But *Mumma* is easily distinguishable on first glance, as it involved a notice to appeal a *final disposition*, not a collateral order governed by Rule 1701(c). *Id.* (“The trial court, therefore, did not have authority to enter its dispositional order, since it dismissed Mumma’s professional negligence claims after he filed a notice of appeal seeking appellate review related to those claims.”). The Nov. 4 Motion itself confirms the plainly collateral issue appealed on October 19—the denial of Plaintiff’s Third PI Motion—is different than the subject matter addressed by the Nov. 4 Order. (Nov. 4 Mot. at 4; *see also* Nov. 4 Order at 6 (“The standards for the granting or denying of a Preliminary Injunction, and the sustaining or overruling of Preliminary Objections



presiding over a matter where, as here, the pending appeal concerns “only a particular item, claim, or assessment adjudged in the matter.” Pa.R.A.P. 1701(c). In other words, “[t]o the extent the matters remaining in the trial court are not dependent on resolution of the issue on appeal, the trial court may continue to address them.” *Commonwealth v. McClure*, 172 A.3d 668, 699 (Pa. Super. 2017)); *see also Rosen v. Rosen*, 549 A.2d 561, 564 (Pa. 1988) (“The purpose of Rule 1701(c) is to prevent appeals of ancillary issues from delaying the resolution of basic issues while the matter may proceed without prejudicing the rights of the party seeking interim review.”).

To the extent that the request for leave to file late pleadings *nunc pro tunc* was premised on the notion that Plaintiffs could not have expected the Court to act on unopposed objections while they appealed the preliminary injunction ruling, the entire premise is absurd in light of (a) the Court’s October 31 Order expressly denying a stay, and (b) Plaintiffs’ concurrent filing asking the Court to “defer” trial court proceedings. The November 2, 2022 Motion to Defer evidences that Plaintiff knew proceedings—and the deadline by which they were required to respond to preliminary objections—had not been stayed. And any notion that Plaintiffs were caught unawares by the Court’s decision to act on pending preliminary objections is further belied by the fact that Plaintiffs were ready with fulsome answers to both the City’s and ALF’s Preliminary Objections (totaling over 70 pages) as attachments to a motion for *nunc pro tunc* relief just 95 minutes after the Court docketed the Order sustaining preliminary objections. The Oct. 31 Order had clearly

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are distinct, with different procedures and substantive burdens.”); Ex. C at 22-23 (“the trial court clearly considered those [threshold] issues in its October 19, 2022 orders and memorandum opinion, not in the context of disposing of the POs but in the context of determining whether Appellants were likely to succeed on the merits”). The collateral nature of Plaintiffs’ October 19 appeal is further confirmed by their separate appeal of the Court’s preliminary objection ruling on November 15, 2022. In any event, Plaintiffs made no effort in the Nov. 4 Motion to identify any error of law or manifest abuse of discretion in the Nov. 4 Order to support a request for reconsideration. *See Dahl v. Ameriquest Mortg. Co.*, 954 A.2d 588, 593 (Pa. Super. 2008).

placed Plaintiffs on notice that this Court would not stay proceedings pending their collateral appeal, and when their response to the preliminary objections came due, they made a tactical decision to risk filing another motion to “defer” proceedings instead of filing the preliminary objection response papers they had prepared. When that decision backfired, they were ready with responses to the preliminary objections that they could have filed when due. The net result is that they forced ALF to respond to two more baseless motions.

**3. *Plaintiffs engaged in these litigation tactics in bad faith.***

Plaintiffs’ deliberate gamesmanship between November 2 and 4, 2022, is consistent with their history of peppering this Court and Defendants with vague filings chock full of irreconcilable positions, and further evidences a bad faith intent to play fast and loose with the courts. Plaintiffs’ filings have perplexed both this Court and the Commonwealth Court. *See, e.g.*, Ex. A at 30:18-20 (“I’m having a hard time following the bouncing ball as well here.”); Ex. C at 20 (noting the confusing nature of Plaintiffs’ Emergency Application for Stay and Injunction Pending Appeal).

The confusion sown by Plaintiffs’ tactics is undoubtedly intentional. Having now conceded that Plaintiffs never intended to pursue a private right of action against ALF, it is obvious that they pursued illegitimate preliminary injunction motions in bad faith. Plaintiffs engaged in dilatory and vexatious litigation tactics under § 2503(7) and (9) by trying to stop a legitimate non-profit from spending its money on its lawful mission through bogus filings that multiplied expensive proceedings in a futile attempt to obtain an injunction that could never issue absent a viable cause of action against ALF.

Through serial amendments, Plaintiffs avoided responding to Defendants’ preliminary objections before fully litigating their preliminary injunction request. Faced with arguments that they could not obtain an injunction against ALF without a private right of action under any of the relevant statutes, Plaintiffs knew that filing their preliminary objection response would mean

clearly conceding they do not, indeed, have a right of action against ALF. By putting off the preliminary objection response, Plaintiffs were able to keep the theory of their case against ALF vague, sidestepping questions in the preliminary injunction proceedings about whether they had any viable claim against ALF. This is precisely the kind of bad faith litigation conduct that § 2503 was passed to address, with the “aim to sanction those who knowingly raise, in bad faith, frivolous claims which have no reasonable possibility of success, for the purpose of harassing, obstructing or delaying the opposing party.” *Dooley*, 618 A.2d at 1018 (citing *Santillo*, 557 A.2d 416). It is now plain that Plaintiffs set out to pursue legally irreconcilable positions before this Court, and the sequence they followed in rolling out these arguments confirms that they did so in bad faith to keep alive a vexatious and dilatory request for injunctive relief that they knew to be unsupported by a valid cause of action against ALF.

## **VI. RELIEF**

For the foregoing reasons, ALF respectfully requests that this Honorable Court issue an order sanctioning Plaintiffs pursuant to 42 Pa.C.S.A. §§ 2503(7) and (9), and requiring Plaintiffs to pay an amount, to be established through separate submission by ALF of a bill of costs, representing ALF’s costs and attorneys’ fees incurred (a) responding to Plaintiffs’ motions for injunctive relief, (b) preparing for and conducting the October 14, 2022 preliminary injunction hearing, (c) responding to the CCP Application, (d) responding to Plaintiffs’ November 2, 2022 Motion to Defer, (e) responding to the Nov. 4 Motion, and (f) preparing this Motion for Sanctions.

Respectfully submitted,

Dated: January 3, 2023

By: /s/ Aliza R. Karetnick

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**CERTIFICATE OF SERVICE**

I hereby certify that on the date set forth below, I caused the foregoing Motion for Sanctions, together with the supporting Brief and all documents in support thereof, to be served upon the following parties via electronic filing:

*Attorney for Plaintiffs*

*Attorneys for Defendant City of Philadelphia*

Dated: January 3, 2023

By:

/s/ Aliza R. Karetnick

Aliza R. Karetnick , No. 82395