For Immediate Release:
October 24, 2017

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Chester County Judge Issues Opinion on SLAPP Suit Dismissal

East Whiteland, Chester County, PA: A Chester County court issued an opinion reaffirming its August 22 decision to dismiss a lawsuit filed by developer Brian O'Neill and his corporate counterparts Constitution Drive Partners and O'Neill Developers against Maya van Rossum and the Delaware Riverkeeper Network (DRN).

The Delaware Riverkeeper Network organization, led by van Rossum, has been challenging a proposal by O'Neill, O'Neill Developers and Constitution Drive Partners to initiate partial clean-up of the highly contaminated Bishop Tube site located in East Whiteland Township in order to construct a more than 200 unit housing development. O'Neill's original suit sought a judgement that would both silence the organization and mandate they pay over $50,000 in damages. The lawsuit also named one citizen and listed up to ten unnamed citizens as current and/or potential targets of the suit.

On August 22, 2017, the Chester County Court of Common Pleas dismissed this lawsuit against DRN stating, "This is what we call constitutionally protected free speech under the First Amendment of the United States Constitution and the Pennsylvania Constitution." O'Neill filed an appeal of the decision that same day.

On October 23, 2017 the court responded to the appeal, issuing an opinion supporting the August 22 decision. In the course of affirming its original decision, Judge Sommers stated that complaints filed against DRN "lack merit." The court also questioned the complaint itself, saying "While we question the 'good faith' of Appellants in bringing the instant lawsuit and subsequent appeal, we will address the complaints,..." The opinion also stated that Mr. O'Neill et al had "commenced this action as a means of intimidation and harassment, not because Appellants believe in the success of their claims."

DRN has been working closely with the East Whiteland Township community on this issue and has written letters, commented at township meetings, and held open public presentations about the site. The court's opinion states that DRN had merely "exercised their right of free speech under the First Amendment of the United States Constitution to petition their government,..." The court also recognized that DRN and community advocates were "concerned about the spreading of contaminated soil and groundwater throughout the community" and that the assertions made in fliers and on the DRN website are true, and as such the activities undertaken are protected under various elements of law.

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"Mr. O'Neill should be ashamed of himself for misusing the law to threaten people into silence and seeking a judgment that would strip them of their First Amendment rights to free speech and to petition their government for appropriate action," said **Maya van Rossum,** the Delaware Riverkeeper and leader of the Delaware Riverkeeper Network.

Ms. van Rossum and the Delaware Riverkeeper Network were represented by attorneys Mark L. Freed and Jordan B. Yeager of Curtin & Heefner LLP. "We're pleased that the Court has vindicated the constitutional rights of residents to speak up and advocate for a healthy environment without fear of retribution," **Freed** said about the original August 22nd dismissal.

The original action was filed by O'Neill and his counterparts on June 27, 2017 and claimed the advocacy activities of DRN resulted in defamation/commercial disparagement, interference with contractual or business relations and amounted to a civil conspiracy.

The Delaware Riverkeeper Network and members of the East Whiteland community held a press conference on Wednesday, July 26, expressing their opposition to the lawsuit. Senators Andy Dinniman and Daylin Leach released statements supporting DRN and the community at that event.

"Pennsylvanians have a Constitutionally protected right to clean air, pure water, and the preservation of the natural environment. Citizens also have a right to voice their opinions, views, and concerns on decisions regarding our public natural resources and to be involved in the processes be they at the local, state or federal levels. The bottom line is Chester County has a long history of standing up for our environmental resources and to stand up, we need to speak out," said state Senator Andy Dinniman in a statement released at the July press event.

"Lawsuits have an important purpose, but when they are wielded as a bludgeon by wealthy interests to silence advocates and communities, they harm the principles that form the foundation of our country," said state Senator Daylin Leach in a statement also issued for the July press event. "Free speech is a right held by all Americans – wealthy or not—and it's our job to protect it."

The Bishop Tube Site is a former metals processing plant located in East Whiteland Township, PA. The site is bordered by Little Valley Creek a stream designated under state law as "Exceptional Value". The Bishop Tube site is listed on the Pennsylvania Priority List of Hazardous Sites for Remedial Response under the Pennsylvania Hazardous Sites Cleanup Act (HSCA). Groundwater, soil and surface water at the Site are contaminated with trichloroethylene (TCE), which is classified as a probable human carcinogen by the EPA and also as causing other significant health problems. TCE and other contaminants of significant concern known to be present at the site continue to migrate into the aquifer, stream and nearby residential area. The DEP has still not published any final remediation plans for the Site.

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Delaware Riverkeeper Network (DRN) is a nonprofit membership organization working throughout the four states of the Delaware River Watershed including Pennsylvania, New Jersey, Delaware and New York. DRN provides effective environmental advocacy, volunteer monitoring programs, stream restoration projects, public education, and legal enforcement of environmental protection laws.

J. BRIAN O'NEILL, O'NEILL PROPERTIES GROUP, L.P. and CONSTITUTION DRIVE PARTNERS, LP	:	IN THE COURT OF COMM
	:	CHESTER COUNTY, PEN
VS.	:	
MAYA van ROSSUM, CARLA ZAMBELLI, DELAWARE RIVERKEEPER NETWORK and JOHN DOES 1 THROUGH 10	:	NO. 2017-03836-MJ
	:	CIVIL ACTION

James C. Sargent, Jr., Esquire, Attorney for Plaintiffs
Jordan B. Yeager, Esquire and Mark L. Freed, Esquire, Attorneys for Defendants Maya van Rossum and Delaware Riverkeeper Network
Samuel C. Stretton, Esquire, Attorney for Defendant Carla Zambelli

OPINION PURSUANT TO Pa.R.A.P. 1925

BY: SOMMER, J. October 23rd, 2017

I. **Procedural Setting**:

This matter comes before this Court as the result of an appeal filed by J. Brian O'Neill, O'Neill Properties Group, L.P. and Constitution Drive Partners, LP (hereinafter "Appellants") from this Court's Order of August 22, 2017, sustaining the preliminary objections of Appellees Maya van Rossum and Delaware Riverkeeper Network (hereinafter "DRN") and dismissing the Complaint. Appellants filed a timely Notice of Appeal on September 21, 2017. I issued an Order for a Concise Statement of Errors Complained Of on Appeal the same day. Appellants' Concise Statement was received in chambers on October 11, 2017. The matter is now ripe for determination.

II. **Facts**:

The underlying facts, as alleged in the Complaint, are set forth as follows. Appellants purchased a property known as the "Bishop Tube" site in 2005. *Complaint at ¶12.* The Bishop Tube site is a former industrial site upon which industrial buildings

and other vacant improvements remain standing. *Id. at ¶14.* The site was formerly a large industrial operation which manufactured stainless steel tubes from the 1950s through 1999. *Id.* The manufacturing process involved the release of significant amounts of chlorinated solvents into the soil and groundwater at the site. *Id.* This contamination remains today in the site's soil and groundwater and has migrated significant distances beyond the boundaries of the site into the surrounding community. *Id. at ¶¶14-15.*

Upon purchasing the Bishop Tube site in 2005, Appellant Constitution Drive Partners, LP ("CDP") entered into an agreement with the Pennsylvania Department of Environmental Protection ("PADEP") pursuant to the Hazardous Sites Cleanup Act whereby CDP agreed to several commitments, including the performance of certain remedial activities. *Id. at ¶18.* Under the agreement, PADEP provided CDP with a covenant not to sue CDP in connection with the contamination at the site and also afforded CDP contribution protection against third party claims relating to same. *Id. at ¶18.* Thus, while Appellants are not responsible for the contamination, they agreed to partially remediate the site, proposing a plan for remediating unsaturated soils. *Id. at ¶17.* In 2010, CDP allegedly satisfied its remedial obligations by installing an air sparging/soil vapor extraction ("AS/SVE") remediation system and operating the system for an unspecified period of time. *Id. at ¶18.*

In 2014, PADEP advised CDP by letter that the covenant not to sue was void as a result of certain damage caused by a salvage contractor to the AS-SVE system, which was no longer in use. *Id. at ¶19.* CDP disputes PADEP's position, but was unsuccessful in its appeal of PADEP's issuance of the letter. *Id.*

Also in 2014, East Whiteland Township rezoned the Bishop Tube site from industrial use to residential use and specifically rezoned the property to a Residential Revitalization District ("RRD"). Prior to the zoning change, CDP had made extensive efforts to market and redevelop the site for commercial purposes, but was unable to do so. *Complaint at* ¶*21*. As a result, CDP sought municipal approvals from the Township for plans to construct a 228 residential townhome community on a portion of the site. *Id. at* ¶*22*. Appellees van Rossum and the Delaware Riverkeeper Network have opposed Appellees' proposed soil clean-up plan as well as remediation and repurposing of the Bishop Tube site by Appellants. *Id. at* ¶*23*. Rather than a new townhome development, Appellees have advocated for the Township and Commonwealth spend public funds to remediate the site and create a park. *Id.*

Appellants allege that Appellees have engaged in a "campaign of misinformation that is designed to mislead, and ha[s] misled, the residents of East Whiteland Township and other surrounding townships, the officials of East Whiteland Township, and the officials of the PADEP into believing any improvements that are proposed by [Appellants] will be dangerous because of the contaminants currently present at the site and that improvement of the Bishop Tube site pursuant to the RDD Zoning puts the surrounding residents in a greater risk of exposure to said contaminants." *Id. at* ¶*24*. Appellants also allege that Appellees have made untrue assertions of fact regarding the risk of the improvements proposed by [Appellants] at public meetings, writings and social media. *Id. at* ¶*25*.

Specifically, Appellees published and distributed a flier to the community which stated as fact that the redevelopment of the site will "expose us to more of the toxins

and put 200+ homes on the contaminated land."[1] *Id. at* ¶26. The flier also stated "if this development happens your community could be on the receiving end of more contamination as the toxins make their way through our local waterways and water table."[2] *Id.* Appellants allege these statements are false. According to Appellants, Appellees desire that the site be fully remediated. *Id. at* ¶26. Appellants also contend that Appellees' single goal is to "prevent the legitimate and lawful business interests of [Appellants] to improve the Bishop Tube site through their clean-up efforts and the development of their 228 townhouse community."[3] *Id. at* ¶27.

Appellants allege that the abovementioned flier also stated that CDP planned to use a "$1 million grant from the DEP (our tax money) to perform a 'PARTIAL CLEAN-UP" of the Bishop Tube site" and that the developer is refusing "to take responsibility

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[1] While Appellants describe this statement as false, it is apparent from the face of the Complaint that it is not. Appellants alleged that the groundwater contamination has migrated significantly offsite, which means that more of the community has been exposed to the contaminants. *Complaint at* ¶¶*14-15*. Appellants further alleged that they proposed a plan to construct 228 new townhomes on a portion of the site. *Id. at* ¶22. The effect of migrating contamination and additional homes being constructed on an already contaminated site is that more of the community will be exposed to such contamination. Therefore, based upon Appellants' own allegations, it appears that the statement of Appellees is actually true.

[2] Appellants have admitted to the fact that groundwater and soil on the site is contaminated. *Complaint at* ¶¶*14-15*. The groundwater contamination has spread significantly offsite as it makes its way through the water table into the nearby creek. *Id.* It is clear, therefore, that nearby communities *could* be on the receiving end of more contamination. Despite Appellants' characterization of the statement as false (which may be ignored for purposes of considering preliminary objections), this statement is not untrue.

[3] Appellants characterize this as Appellees' singular goal; however, throughout the Complaint, Appellants note that Appellees desire the full remediation of the site for purposes of constructing a public park on the land. *Complaint at* ¶¶*23, 26*. Thus, the Complaint contains conflicting allegations.

for full removal of the toxins at the site."[4] *Id. at* ¶*28.* Appellants allege that the public may infer that CDP is obligated to accept such responsibility but is refusing to do so. *Id. at* ¶*28.* However, the Complaint alleges again that Appellants are not responsible for remediation of any contaminated groundwater under the site or downstream from the site and that such responsibility lies with the PRPs identified by the PADEP. *Id. at* ¶¶*17, 28.* Appellants additionally claim that DRN has published false statements on its website saying "that development of the property will increase potential pollution of nearby streams and wetlands and that contamination would continue to affect the surrounding environment and community because of the development." *Id. at* ¶¶*31-32.*[5]

Based upon these statements, Appellants assert three counts against Appellees van Rossum and DRN consisting of (1) Defamation/Commercial Disparagement; (2) Tortious Interference with Contractual or Business Relations; and (3) Civil Conspiracy. Appellees filed Preliminary Objections to the Complaint made up of nine objections ranging from demurrers to challenging the factual insufficiency of the allegations. Rather than respond to the merits of the Preliminary Objections,

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[4] Again, these statements are not false. Appellants allege that they agreed to perform a partial remediation of the site. *Id. at* ¶¶*17-18*. Appellants also pleaded that they have not been deemed a "potentially responsible party" ("PRP") and, therefore, have no liability or responsibility to remediate any contamination at the site. *Id. at* ¶*17.*

[5] As above, these statements are simply not false. Appellants admit that the groundwater has been contaminated and spread significantly offsite. *Id. at* ¶¶*14-15.* The reasonable inference is that contaminated groundwater travels through the water table to nearby waterways, including streams and wetlands, which increases *potential* pollution of those areas. Anything less than full remediation of the site may potentially increase contamination of surrounding areas. This is especially true where construction of townhomes will result in disturbance of the soil through digging and excavating, which will in turn release more toxins present in the soil and groundwater into the surrounding environment.

Appellants filed Preliminary Objections to the Preliminary Objections as they are entitled to do under Pa.R.C.P. 1017 and 1028.

By Order of August 22, 2017, after careful consideration, I overruled Appellants' Preliminary Objections to the Preliminary Objections. At the same time but by separate Order, I ruled on Appellees' Preliminary Objections. I did so after reviewing the extensive argument of Appellees in their Preliminary Objections (filed on July 26, 2017), the Memorandum of Law in support thereof (filed on August 15, 2017), and the Complaint. In so reviewing and after considerable research, I concluded that the *Noerr-Pennington* Doctrine applied to preclude Appellants' claims. See, Order dated August 22, 2017, which is attached hereto and incorporated by reference.

Appellants present sixteen (16) matters complained of on appeal[6] for the appellate court's consideration. The trial court is directed by the Supreme Court of Pennsylvania to address, on the merits, all issues raised in good faith, despite the verboseness of such complaints. *Eiser v. Brown & Williamson Tobacco Corp.*, 595 Pa. 366, 372, 938 A.2d 417, 420 (2007). While we question the "good faith" of Appellants in bringing the instant lawsuit and subsequent appeal, we will address the complaints,

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[6] In considering the burden such an appeal places upon the limited resources of the judicial system, I recall the words of the Honorable Ruggero J. Aldisert, then of the United States Court of Appeals for the Third Circuit.

> When I read an appellant's brief that contains 10 or 12 points, a presumption arises that there is no merit to any of them. I do not say that it is an irrebutable presumption, but is a presumption that reduces the effectiveness of appellate advocacy. Appellate advocacy is measured by effectiveness, not loquaciousness.

United States v. Hart, 693 F.2d 286, 287 n.1 (3d Cir. 1982) (citations omitted). As stated below, although Appellants set forth sixteen alleged errors by the court, we conclude that Appellants essentially state two errors which are summarized and addressed herein.

which are set forth as follows:

1. Appellants were deprived of their right to due process when the trial court disregarded the requirements of the Rules of Civil Procedure and the Chester County Local Rules of Civil Procedure by granting the Preliminary Objections filed by Appellees, without properly considering Appellants' Preliminary Objections to the Preliminary Objections, and without providing an opportunity for, or considering, Appellants' arguments on the merits in opposition to Appellees' Preliminary Objections.

2. Appellants' Complaint set forth a cause of action for defamation. Appellees filed Preliminary Objections to the Complaint, asserting a number of facts outside the Complaint in order to support a claim that Defendants were exercising their First Amendment right to free speech when they defamed Appellants.

3. Appellees' Preliminary Objections were in the nature of a speaking demurrer because they alleged a number of facts outside of the Complaint.

4. Appellants filed timely Preliminary Objections objecting to Appellees' Preliminary Objections on the basis that Appellees' Preliminary Objections were in the form of a speaking demurrer and because Appellees' Preliminary Objections asserted new facts and attached new exhibits that were not part of the record established by and limited to the Complaint, hence were not part of the case.

5. While Appellees have a First Amendment right to voice opposition to a proposed land development project, Appellees have no First Amendment right to defame Appellants, and Appellants would have made this important distinction had the trial court followed correct procedures.

6. The trial court deprived Appellants of the opportunity to vindicate their right to be free from defamation by failing to following Pennsylvania and local procedural rules, and ruling on Appellees' Preliminary Objections prematurely.

7. Appellees did not file a memorandum of law in support of their Preliminary Objections and did not file a praecipe for determination, and accordingly, Appellees' Preliminary Objections were not, and never have been, ripe for determination.

8. Appellants' own Memorandum of Law in support of their Preliminary Objections to Appellees' Preliminary Objections was not due until after the trial court prematurely ruled on Appellees' Preliminary Objections.

9. Appellants were entitled to an opportunity to be heard. Appellants' due process rights encompass the right to notice and the opportunity to be heard on their Preliminary Objections to Appellees' Preliminary Objections, and on the merits of the alleged First Amendment rights and right to be free from Defamation. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993).

10. At the very least, the trial court should have treated Appellees' Preliminary Objections as a petition, and ordered the parties to take depositions, to either request a hearing or submit memoranda of law, and it should have scheduled argument.

11. Under both the Pennsylvania Rules of Civil Procedure and the Chester County Local Rules of Civil Procedure Appellants were entitled to:

a. Submit a memorandum of law in support of their own arguments on Appellants' Preliminary Objections to Appellees' Preliminary Objections;

b. Evaluate whatever law and arguments were made by Appellees in their Preliminary Objections, and respond to Appellees' not yet filed Memorandum of Law in support of those Preliminary Objections;

c. File Appellants' own Memorandum of Law opposing Appellees' arguments in support of Appellees' Preliminary Objections and, as appropriate, arguing the merits of the First Amendment versus defamation theories;

d. Request oral argument on, and argue, the issues raised by both sets of Preliminary Objections and responses thereto (C.C.R.C.P. 206.5, 206.6, 208.3(b), C.C.R.C.P. 211.1).

12. Appellants were not provided the opportunity to exercise their Due Process rights by addressing the issues raised by the two sets of Preliminary Objections.

13. Rather, on August 22, 2017, the trial court, without notice and in disregard of the Pennsylvania Rules of Civil Procedure and Chester County Local Rules, granted Appellees' Preliminary Objections and struck Appellants' Complaint without properly considering Appellants' responsive Preliminary Objections, and disregarded and precluded Appellants' argument that Appellees' speaking demurrer was improper.

14. In fact, contrary to Pennsylvania's standards for review of Preliminary Objections, rather than taking all of the allegations in Appellants' Complaint as true, and affording those allegations all reasonable inferences, the trial court took the

factual allegations in Appellees' Preliminary Objections as true, and ignored the allegations of the Complaint.

15. The trial court's deprivation of a property right (to be free from defamation) by adjudication must be preceded by notice and an opportunity to be heard. Otherwise it is a deprivation of property without due process of law. Notice and an opportunity to be heard are indispensable to due process. The procedures (or absence of procedures) that occurred in the trial court deprived Appellants of their right to due process.

16. The trial court did not even afford Appellants the opportunity to file an amended Complaint.

Upon review of Appellants' allegations of error, we find them to be cumulative and repetitive. For purposes of this opinion and ease of discussion, the basic complaints are summarized as (1) the trial court violated Appellants' due process rights by denying them an opportunity to be heard in opposition to Appellees' Preliminary Objections and (2) the trial court improperly considered Appellees' speaking demurrer and, in doing so, did not adhere to the applicable standard of review in deciding the merits of the Preliminary Objections. The first is largely a procedural issue while the second attacks the substance of this court's ruling.

III. Issues:

A. Whether this court violated Appellants' due process rights by denying them an opportunity to be heard in opposition to Appellees' Preliminary Objections?

B. Whether this court erred as a matter of law in dismissing Appellants' Complaint for failure to state a cognizable claim against Appellees?

IV. Holdings:

A. No, this Court did not violate Appellants' due process rights or deny them an opportunity to be heard in opposition to Appellees' Preliminary Objections.

B. No, this court did not err as a matter of law in dismissing Appellants' Complaint for failure to state a cognizable claim against Appellees.

V. Rationale:

A. Standard and Scope of Review

The question presented in a demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. If doubt exists concerning whether the demurrer should be sustained, then this doubt should be resolved in favor of overruling it. However, any argumentative allegations or expressions of opinion are not accepted as true. *Firing v. Kephart*, 466 Pa. 560, 353 A.2d 833 (1976). The Court is similarly not obliged to accept the legal conclusions or theories underlying the claims. The Superior Court's standard of review of a lower court's decision granting a demurrer is *de novo*. *Bruno v. Erie Ins. Co.*, 630 Pa. 79, 106 A.3d 48 (2014) (internal citations and quotations omitted).

B. Discussion

1. *The Court did not Violate Appellants' Due Process Rights*

Appellants contend that this court violated their due process rights by depriving them of notice and an opportunity to be heard prior to the dismissal of their Complaint. According to Appellants, this overarching abuse contains several subparts. Specifically, Appellants argue that the court ignored the procedural requirements of the Rules of Civil Procedure and local rules by (1) ruling on Appellees' Preliminary Objections before a praecipe for determination was filed, thereby violating C.C.R.C.P. 206.6; (2) by ruling on Appellees' Preliminary Objections prior to Appellees filing a

memorandum of law in support thereof in violation of C.C.R.C.P. 1028(c); (3) by not scheduling oral argument in violation of C.C.R.C.P. 211.1; (4) by not treating Appellees' Preliminary Objections as a petition and ordering the parties to engage in discovery; (5) by failing to allow Appellants the opportunity to file a response to Appellees' Preliminary Objections and brief in support thereof in accordance with C.C.R.C.P. 1028(c); and (6) by failing to provide Appellants the opportunity to file an amended complaint. As a result of the court denying Appellants an opportunity to respond to the merits of Appellees' Preliminary Objections, Appellants allege their due process rights have been violated because they have been deprived of a property right (to be free from defamation). We will address each of these complaints in seriatim.

Appellants contend that Appellees' Preliminary Objections were never ripe for adjudication because Appellees did not file a praecipe for determination or memorandum of law in support thereof. Appellees are mistaken. Both a praecipe for determination and Memorandum of Law were filed by Appellees on August 15, 2017. Thus, the matter was ripe for determination. Appellants also claim that I should have ordered oral argument on the Preliminary Objections and failing to do so was a violation of C.C.R.C.P. 211.1. Again, Appellants are mistaken. To my knowledge, no request for oral argument was made by either party on either set of preliminary objections nor does the docket reflect any such request. Even so, it is within the court's discretion whether to host oral argument. Appellants further argue that I should have treated Appellees' Preliminary Objections as a petition and directed discovery. However, what was before the court was objections to the Complaint based upon the legal and factual sufficiency of the pleadings. No discovery is necessary to resolve these issues. These complaints lack merit.

Next we turn to the overarching complaint which is that Appellants were not provided with the opportunity to respond to Appellees' Preliminary Objections, which Appellants contend, amount to a due process violation. We recognize that Appellees' Preliminary Objections contained a notice to plead pursuant to Pa.R.C.P. 1026(a). However, because we reviewed the legal and factual sufficiency of the Complaint and any applicable law, we determined that no response from Appellants was necessary nor would it aid the Court in its determination. While this may amount to a liberal interpretation of the local and Commonwealth's procedural rules governing the disposition of the preliminary objections, it does not amount to a violation of due process.

Finally, Appellants argue it was an abuse of discretion to deny the opportunity to file an amended pleading following dismissal of the complaint. An amendment is properly refused where it appears amendment is futile. *Lutz v. Springettsbury Twp.*, 667 A.2d 251 (Pa. Cmwlth.1995). Because the speech about which Appellants complained was protected free speech, I concluded that any amendment to the Complaint would have been futile. No amount of pleading would change the fact that Appellees exercised their right of free speech under the First Amendment of the United States Constitution to petition their government, e.g. East Whiteland Township and PADEP, against Appellants' proposed development. I cannot conceive in what respects the present complaint may be amended to make it sufficient in law without alleging facts inconsistent with those contained in the present Complaint. In denying Appellants the opportunity to replead, I denied them the ability to further prolong this abusive action against Appellees. Based upon the foregoing, I respectfully request that the Order of August 22, 2017 be affirmed.

2. *The Complaint Failed to State a Cognizable Claim*

Now we turn to the substantive complaints on appeal. Appellants essentially argue that their Complaint stated a cognizable claim for defamation. Although this Court's Order of August 22, 2017 dismissed all three (3) counts of defamation/commercial disparagement, tortious interference with contractual or business relations, and civil conspiracy, Appellants' Concise Statement only raises issues related to the dismissal of the defamation claim, thereby conceding that the claims for tortious interference and civil conspiracy were properly dismissed. We therefore address the application of the *Noerr-Pennington* Doctrine and the Participation in Environmental Law or Regulation Act, otherwise known as the "Environmental Immunity Act", 27 Pa.C.S. § 8301, et seq. (hereinafter "Act").

a. *Noerr-Pennington* Doctrine

Appellants argue that Appellees' Preliminary Objections set forth facts outside of the Complaint in order to demonstrate to the Court that Appellees were exercising their First Amendment right to free speech, i.e. a speaking demurrer. Thus, it appears that Appellants contend only that dismissal of the claim was premature at the preliminary objection stage based upon facts *de hors* the record, not that the claim ultimately would have been meritorious. This lends to the idea that Appellants commenced this action as a means of intimidation and harassment, not because Appellants believe in the success of their claims.

Pursuant to the *Noerr-Pennington* Doctrine, an individual is immune from liability for exercising his First Amendment right to petition the government. As set forth in great length, the *Noerr-Pennington* Doctrine applies here to bar Appellants' claim for defamation. I will not restate the history and applicability of the *Noerr-Pennington*

Doctrine here, but refer the appellate court to my Order of August 22, 2017. Instead, I will focus on the allegations of the Complaint which led to the conclusion that the Appellees were engaged in exercising their First Amendment rights in petitioning their government.

Specifically, Appellants alleged that "[Appellees] have resisted [Appellants'] proposed soil clean up, remediation and repurposing of the Bishop Tube Site, in a thinly-veiled attempt to coerce the Township and the Commonwealth to impede [Appellants'] efforts and spend many millions of dollars of public revenue to remediate the site and create a park." *Complaint at ¶23.* In evaluating a demurrer, the trial court need only accept as true the well-pleaded allegations of fact, but may disregard conclusions of law, argumentative allegations or expressions of opinion. *Firing*, supra, 466 Pa. 560. Thus, it was within my discretion to discard Appellants' blustery and derogatory characterization of Appellees' conduct and look at the facts as alleged – Appellees were advocating to the Township and PADEP their position that a full remediation of the site and the development of a public park, with public funds, was a better use of the property than the proposed 228 townhome development. These facts were not taken outside the record as Appellants allege; rather, they come straight from paragraph 23 of Appellants' Complaint.

While Appellants clearly disagreed with the position of Appellees, and the opposition of Appellees has allegedly caused delays in Appellants' ability to proceed with its proposed plans, the conduct is not actionable. Appellees petitioned the local and state governments in order to oppose actions which they believe are harmful to the environment and the public. Doing so is an exercise of their First Amendment rights.

As set forth in the Order of August 22, 2017, the sole exception to the *Noerr-Pennington* Doctrine is the "sham exception" under which a defendant will not be protected if he is simply using the petition process as a means of harassment. *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380, 111 S. Ct. 1344, 113 L.Ed.2d 382, (1991). "A 'sham' situation involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all, not one who genuinely seeks to achieve his governmental result, but does so through improper means." *Id.*

Appellants contend that Appellees' single goal is to "prevent the legitimate and lawful business interests of [Appellants] to improve the Bishop Tube site through their clean-up efforts and the development of their 228 townhouse community." *Id. at* ¶27. This allegation might seem to remove Appellees' conduct from immunity under the *Noerr-Pennington* Doctrine; however, when viewing the Complaint as a whole which I am obligated to do, it becomes apparent that this allegation is contradicted by the remaining averments. Throughout the Complaint, Appellants note that Appellees desire the full remediation of the site for purposes of constructing a public park on the land. *Complaint at* ¶¶*23, 26*. Moreover, it is clear from the pleadings that Appellees are concerned about the spreading of contaminated soil and groundwater throughout the community. Thus, Appellants' allegations are undermined by its own admission that Appellees are attempting to procure favorable government action due to genuine concerns. The mere fact that Appellants' business ventures are frustrated by Appellees' opposition does not remove such conduct from the protections of the First Amendment and *Noerr-Pennington* Doctrine.

b. Environmental Immunity Act

Although not discussed in the Order of August 22, 2017, I determined that the Environmental Immunity Act, 27 Pa.C.S. § 8301, et seq., also applies to bar Appellants' claim for defamation. The Environmental Immunity Act provides that,

> a person that, pursuant to Federal or State law, files an action in the courts of this Commonwealth to enforce an environmental law or regulation or that makes an oral or written communication to a government agency relating to enforcement or implementation of an environmental law or regulation shall be immune from civil liability in any resulting legal proceeding for damages where the action or communication is aimed at procuring favorable governmental action. 27 Pa.C.S.A. §8302(a).

The purpose of this Act is to protect those who espouse legitimate environment concerns. It also provides a means to bring a "swift end to retaliatory lawsuits seeking to undermine participation in the establishment of state and local environment policy." *Pennsybury Village Associates, LLC v. Aaron McIntyre*, 11 A.3d 906, 912-13 (Pa.2011)(quoting Preamble to the Act of December 20, 2000, P.L. 980, No. 138). The Act covers both communications to the government and communications to third parties. *Penllyn Greene Assocs., L.P. v. Clouser*, 890 A.2d 424, 433 (Pa. Cmwlth. 2005). Immunity is triggered if, and only if, the communication is aimed at procuring favorable government action, regardless of whether the communication is made directly to the government or to third parties. *Id.* However, a person shall not be immune if the communication is "knowingly false, deliberately misleading or made with malicious and reckless disregard for the truth or falsity." 27 Pa.C.S.A. §8302(b)(1).

Here, as discussed above, it is apparent from the Complaint that Appellees petitioned the local and state governments, and third party residents of East Whiteland Township, against the townhome development and in favor of full remediation of the site and creation of a public park. *Complaint at* ¶¶23-24. In doing so, Appellees

created certain fliers that they distributed to Township officials, residents and the PADEP as well as posting certain documents and information on the DRN website. *Id. at ¶¶24-26, ¶28, and 31.* Appellants contend that the information contained in the fliers and on the website were false. *Id.* However, the characterization of the statements as false is belied by the other allegations of Appellants' Complaint.

First, one flier stated that the redevelopment of the site will "expose us to more of the toxins and put 200+ homes on the contaminated land." *Id. at ¶26.* However, in this same Complaint, Appellants admit that the groundwater contamination has migrated significantly offsite. *Complaint at ¶¶14-15.* The reasonable inference is that, as a result of the migration of groundwater contamination, more of the community has been exposed to the contaminants. Additionally, Appellants acknowledge that they intend to build 228 new townhomes on the site. When you build homes, you intend for people to live in them. By creating more housing for people on a site that is indisputably contaminated, it means that more of the community will be exposed to such contamination. Therefore, these statements are not false.

Next, the flier also stated "if this development happens your community *could be* on the receiving end of more contamination as the toxins make their way through our local waterways and water table." *Id.* (emphasis added). Again, Appellants have admitted to the fact that groundwater and soil on the site is contaminated. *Complaint at ¶¶14-15.* The groundwater contamination has spread significantly offsite as it makes its way through the water table into the nearby creek. *Id.* This court reasonably deduced that nearby communities *could*, in fact, be on the receiving end of more contamination were this development to proceed. As a result, this statement is not untrue.

The flier also stated that CDP planned to use a "$1 million grant from the DEP (our tax money) to perform a 'PARTIAL CLEAN-UP" of the Bishop Tube site" and that the developer is refusing "to take responsibility for full removal of the toxins at the site." *Id. at* ¶28. In the Complaint, Appellants allege that they agreed to perform a partial remediation of the site. *Id. at* ¶¶17-18. Appellants also pleaded that they have not been deemed a "potentially responsible party" ("PRP") and, therefore, have no liability or responsibility to remediate any contamination at the site. *Id. at* ¶17. Thus, the statements simply are not false.

Finally, according to the Complaint, DRN has published statements on its website saying "that development of the property will increase potential pollution of nearby streams and wetlands and that contamination would continue to affect the surrounding environment and community because of the development." *Id. at* ¶¶31-32. Yet Appellants have pleaded that the groundwater is contaminated and has spread significantly offsite. *Id. at* ¶¶14-15. The reasonable inference is that contaminated groundwater travels through the water table to nearby waterways, including streams and wetlands, which increases *potential* pollution of those areas.

In ruling on a demurrer, I am mindful that I must accept all well-pleaded allegations as true. This is not so, however, where the pleadings contain statements that are in conflict with one another. One cannot simply call a statement false in one paragraph and in another admit to its veracity. By definition, such allegations are not well-pleaded. However, this is not merely inartful pleading. It is the result of Appellants straining to state a claim that is categorically lacking in merit. Requiring the court to disregard such inconsistencies in favor of a plaintiff who, by all accounts, is simply

using this lawsuit to chill free speech and harass those who oppose his potentially lucrative development project would be an injustice.

It is clear from the Complaint that Appellees opposed the development of the Bishop Tube Site due to genuine environment concerns – they desired to fully remediate the site, eliminating the risk of the spread of groundwater and soil contamination, for purposes of creating a public park. *Complaint at* ¶23. Because Appellees' actions were aimed at procuring favorable government action, the Act's immunity provision is triggered and Appellees are immune to Appellants' defamation claim under the Environmental Immunity Act.

Based upon the foregoing, I respectfully request that my Order of August 22, 2017 be affirmed.

All of which is respectfully submitted.

BY THE COURT:

Jeffrey R. Sommer J.

BRIAN O'NEILL, O'NEILL PROPERTIES and CONSTITUTION DRIVE PARTNERS, LP Plaintiffs	:	IN THE COURT OF C CHESTER COUNTY,
VS.	:	NO. 2017-03836-MJ
MAYA VON ROSSUM, CARLA ZAMBELLI and DELAWARE RIVERKEEPER NETWORK Defendants	:	CIVIL ACTION - LAW

Filed and Recorded
PROTHONOTARY
Aug 22 2017 01:30
J. Miller

James C. Sargent, Esquire, Attorney for Plaintiffs
Jordan B. Yeager, Esquire and Mark L. Freed, Esquire, Attorneys for Defendants

ORDER OF COURT

AND NOW, this 22 day of August, 2017, upon review and consideration of the Preliminary Objections of Defendants Maya Van Rossum and Delaware Riverkeeper Network to the Complaint, and any response thereto, it is hereby ORDERED said Preliminary Objections are **SUSTAINED**.[1]

Plaintiff's Complaint is hereby DISMISSED with prejudice.

BY THE COURT:

Jeffrey R. Sommer J.

[1] Defendants Maya Van Rossum and Delaware Riverkeeper Network (hereinafter, "DRN") have asserted a total of nine (9) Preliminary Objections to the Complaint. Plaintiff filed Preliminary Objections to the Preliminary Objections on the basis that DRN's objections have alleged facts outside of the Complaint. In the interest of expediency, we overrule the Preliminary Objections of Plaintiff and address DRN's Preliminary Objections under the well-established standard requiring us to accept

Plaintiff's well-pleaded allegations as true. Plaintiff asserts three causes of action against the Defendants: (1) Defamation/Commercial Disparagement; (2) Tortious Interference with Contractual or Business Relations; and (3) Civil Conspiracy.

DRN's first objection is a demurrer to all counts of the Complaint on the basis that the claims are barred by the *Noerr-Pennington* Doctrine. Pursuant to the *Noerr-Pennington* Doctrine, an individual is immune from liability for exercising his First Amendment right to petition the government. Our Commonwealth Court laid out the history of the *Noerr-Pennington* Doctrine in *Penllyn Greene Assocs., L.P. v. Clouser*, as follows:

> The *Noerr-Pennington* Doctrine originated with the United States Supreme Court's decisions in *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657, 669-70, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). In recognition that the "right of petition is one of the freedoms protected by the Bill of Rights," the U.S. Supreme Court held that individuals and organizations are immune from liability under antitrust laws for actions constituting petitions to the government. *Noerr*, 365 U.S. at 138, 81 S.Ct. 523. Over the years, courts have extended this immunity doctrine, referred to as the *Noerr-Pennington* Doctrine, to protect political activity against tort claims. *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) (First Amendment protected against a civil conspiracy claim by white merchants whose businesses were being boycotted); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155 (3d Cir.1988) (defendants were immune from conspiracy liability for damages resulting from inducing official action to decertify a nursing home).
>
> The sole exception to the *Noerr-Pennington* Doctrine is the "sham exception" under which a defendant will not be protected if he is simply using the petition process as a means of harassment. *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380, 111 S.Ct. 1344, 113 L.Ed.2d 382, (1991). "A 'sham' situation involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all, not one who genuinely seeks to achieve his governmental result, but does so through improper means." *Id.* Therefore, under the "sham" exception, an individual will be liable if he

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> "use[s] the governmental process-as opposed to the outcome of that process-as [a] ... weapon." *Id.* See e.g. *Wawa, Inc. v. Litwornia, et al.*, 817 A.2d 543 (Pa. Super. 2003). (dissemination of false information aimed at interfering directly with the business relationships of a competitor triggered "sham" exception to the *Noerr-Pennington* Doctrine).

890 A.2d 424, 430 (Pa. Commw. Ct. 2005). The *Noerr* 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." *Noerr*, 365 U.S. at 139. Thus, "parties may petition the government for official action favorable to their interest 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).

Based upon the allegations of the Complaint, we find that the *Noerr-Pennington* Doctrine applies here to bar Plaintiff's claims. The Complaint basis its claims on DRN's efforts in resisting Plaintiff's proposed soil clean up, remediation, and repurposing of the Bishop Tube site, a former industrial site which has been rezoned "residential" and which Plaintiff intends to develop additional residential housing within the East Whiteland community. See, *Complaint at ¶23-24*. The Complaint described DRN's activities as a conspiracy "to engage in a campaign of misinformation that is designed to mislead, and have misled, the residents of East Whiteland Township and other surrounding townships, the officials of East Whiteland Township, and the officials of the PADEP ("Pennsylvania Department of Environmental Protection") into believing that any improvements that are proposed by Plaintiffs will be dangerous because of the contaminants currently present at the site...." *Id. at ¶24*. Despite the descriptive language attached to the allegations of DRN's conduct, what is clear based upon the Complaint is that DRN is engaged in the petitioning of the government in opposition of Plaintiff's development efforts. DRN has the right to petition its local and state governments as advocates for environmental safety and public health. This is true even if it means that DRN's efforts are adverse to Plaintiff. This is what we call constitutionally protected free speech under the First Amendment of the United States Constitution and the Pennsylvania Constitution. See, U.S. Const. Amend. I, and Article I, Section 7 of the Pennsylvania Constitution, Pa.Const. Art. I, §7.

Because the Complaint makes evident that DRN petitioned the local government in order to influence policy and obtain favorable government action, the sham exception does not apply. See, *Chantilly Farms Inc. v. West Pileland Twp.*, 2001 W.L. 290645 (E.D. Pa. 2001). Moreover, even if we were to consider whether the alleged conduct constituted a "sham", the challenged activities must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. *Trustees of the University of Pennsylvania v. St. Jude*

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Children's Research Hospital, 940 F. Supp.2d 233, 240-41 (E.D. Pa. 2013), quoting *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 380 (1991). From the allegations in the Complaint, we conclude that DRN's concern for the proposed remediation plan and soil clean up is not an objectively baseless concern. Plaintiff has conceded that "chlorinated solvent contamination...remains today in Site soils and groundwater" and that "contamination in groundwater has migrated significant distances beyond the boundaries of the Site" to the surrounding community. See, *Complaint at ¶14-15*. Moreover, Plaintiff has made clear it does not intend to conduct a full clean up of the site, but only a partial one, based upon its belief that it has no legal obligation to do more. See, *Id. at ¶29*. Although Plaintiff avers that it plans to clean up the soils above the water table at the site in accordance with PADEP's standards, it notes that the party who caused the groundwater contamination that bears the responsibility for cleaning it up – and that entity is not Plaintiff. See, *Id. at ¶28*. Given that there is no dispute regarding the fact that groundwater contamination on the site exists and that it has spread beyond the site, DRN's concern cannot be objectively baseless. The dispute remains over who is responsible for cleaning it up and to what degree. That question is not before this Court at this juncture.

In light of the above discussion, we have, therefore, determined that the conduct described in the Complaint is protected by the *Noerr-Pennington* Doctrine and DRN is immune from Plaintiff's tort claims. We need not address the remaining eight preliminary objections as they have been rendered moot by the dismissal of Plaintiff's Complaint against DRN.

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