

**LAMB McERLANE PC**

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*Counsel for Plaintiffs*

J. BRIAN O'NEILL, O'NEILL  
PROPERTIES GROUP, L.P. AND  
CONSTITUTION  
DRIVE PARTNERS, LP

Plaintiff,

v.

MAYA van ROSSUM, CARLA  
ZAMBELLI and DELAWARE  
RIVERKEEPER NETWORK and  
JOHN DOES 1 THROUGH 10

Defendants.

: IN THE COURT OF COMMON PLEAS  
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: OF CHESTER COUNTY, PA  
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: CIVIL ACTION LAW  
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: NO. 2017-03836-MJ  
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**MOTION TO VACATE AND RECONSIDER THE ORDERS DATED AUGUST 22, 2017  
DENYING PLAINTIFF'S PRELIMINARY OBJECTIONS AND SUSTAINING THE  
PRELIMINARY OBJECTIONS OF DEFENDANTS VAN ROSSUM AND THE  
DELAWARE RIVERKEEPER NETWORK**

Plaintiffs, J. Brian O'Neill, O'Neill Properties Group, L.P., and Constitution Drive Partners, LP (hereinafter "Plaintiffs") respectfully submit this Motion to Vacate and Reconsider two Orders: 1) the Order dated August 22, 2017, overruling Plaintiffs' Preliminary Objections to the Preliminary Objections of Defendants Maya Van Rossum and the Delaware Riverkeeper Network (Exhibit A hereto), and; 2) the Order dated August 22, 2017, sustaining the Preliminary Objections of Defendants Maya Van Rossum and the Delaware Riverkeeper Network and dismissing Plaintiffs' Complaint with prejudice (Exhibit B hereto). These Orders were entered without allowing Plaintiffs any opportunity to present their position to the Court on the issues raised by the pleadings and incorrectly found as a matter of law that all defamatory speech is

protected under the First Amendment and the *Noerr-Pennington* Doctrine.

As these Orders are procedurally irregular and incorrect as a matter of law, Plaintiffs request that they be vacated and then reconsidered in compliance with the Pennsylvania and Chester County Rules of Civil Procedure. In support thereof Plaintiffs allege as follows:

**I. STATEMENT OF THE CASE**

1. Plaintiffs instituted this action by writ of summons on April 7, 2017, and Plaintiffs filed their Complaint on June 27, 2017.
2. The Complaint's causes of action all arose out of Defendants' defamatory conduct, and sought compensation for harm caused by intentional misstatement of facts and included three counts: Count I – Defamation/Commercial Disparagement; Count II – Tortious interference with a Contractual or Business Relation, and; Count III – Civil Conspiracy.
3. Defendant Zambelli filed an Answer to the Complaint with New Matter on July 19, 2017, to which Plaintiffs filed a timely Reply on August 3, 2017.
4. Defendants van Rossum and Delaware Riverkeeper filed Preliminary Objections to the Complaint July 26, 2017. Defendants' Preliminary Objections were in the nature of a speaking demurrer because they alleged a number of facts outside the scope of the Complaint. Defendants van Rossum and Delaware Riverkeeper *did not* file a memorandum of law in support of these Preliminary Objections and *did not* file a praecipe for determination, and accordingly, Defendants' Preliminary Objections were not, and have never been, ripe for determination.
5. On August 14, 2017, Plaintiffs filed timely Preliminary Objections objecting to Defendants van Rossum's and Delaware Riverkeeper's Preliminary Objections on

the basis that Defendants' Preliminary Objections were in the form of an improper speaking demurrer and because they contain facts and exhibits which were not part of the record created by the Complaint and contained facts that were not of record in the case.

6. Plaintiffs' Memorandum of Law in support of their Preliminary Objections to Defendants van Rossum's and Delaware Riverkeeper's Preliminary Objections were not due until September 5, 2017 (accounting for the Labor Day holiday).

## **II. LACK OF DUE PROCESS**

7. Plaintiffs were entitled to an opportunity to be heard.<sup>1</sup> Under both the Pennsylvania Rules of Civil Procedure and the Chester County Rules of Civil Procedure Plaintiffs were also entitled to:

- a. Submit a memorandum of law in support of their own arguments on the preliminary objections to Defendants van Rossum's and Delaware Riverkeeper's preliminary objections;
- b. Evaluate whatever law and arguments were made by Defendants van Rossum and Delaware Riverkeeper in their preliminary objections to the Complaint and respond to an as-of-yet unfiled memorandum of law in support of those preliminary objections;
- c. File Plaintiffs' own memorandum of law opposing the arguments of Defendants van Rossum's and Delaware Riverkeeper's preliminary objections, and;
- d. Request oral argument on, and argue if permitted, the issues raised by the

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<sup>1</sup> Traditionally, due process is recognized as encompassing the right to notice and the opportunity to be heard. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993)

preliminary objections and responses thereto (C.C.R.C.P. 206.5, 206.6, 208.3.(b), C.C.R.C.P. 211.1).

8. Plaintiffs were not provided the opportunity to exercise their due process rights in addressing the issues raised by the two sets of preliminary objections discussed herein.
9. Rather, on August 22, 2017, the Court, without notice, allowed Defendants van Rossum's and Delaware Riverkeeper's preliminary objections to proceed without Plaintiff's participation and interrupted Plaintiffs' efforts to argue the merits of its positions.<sup>2</sup> In fact, contrary to Pennsylvania's standards for review of preliminary objections, rather than taking the allegations in Plaintiffs' Complaint as true and affording them all reasonable inferences, the Court took the allegations in Defendants' Preliminary Objections as true and ignored the allegations of the Complaint.

### **III. MIS-APPLICATION OF THE NOERR-PENNINGTON DOCTRINE**

10. The Court failed to address Plaintiffs' defamation or commercial disparagement claim, their tortious interference claim or their conspiracy claim despite allegations of the Complaint which sufficiently pleaded each cause of action.
11. Rather, the Court addressed the Complaint as if its only theory of recovery was based on the Defendants' van Rossum and Delaware Riverkeeper petitioning of the government in opposition to Plaintiffs' development efforts.

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<sup>2</sup> The deprivation of a property right 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. It is the notice which is indispensable to due process. Whatever mechanism is used, it must be reasonably calculated to apprise the interested parties of the pendency of the action and to afford them the opportunity to present their objections. This is why strict compliance with the formal notice requirement is required. *First E. Bank v. The Campstead, Inc.*, 432 Pa. Super. 241, 246, 637 A.2d 1364, 1366 (citations and brackets omitted).

12. In doing so, the Court characterized the Complaint improperly and ignored numerous paragraphs of the Complaint which had to do with Plaintiffs' efforts to seek compensation for the outright lies published by Defendants van Rossum and the Delaware Riverkeeper.
13. The Court failed to accept each allegation of the Complaint as true (as it is required to do),<sup>3</sup> and rather accepted each of the allegations contained in the Defendants van Rossum's and Delaware Riverkeeper's preliminary objections as true, especially as they related to the application of the *Noerr-Pennington* Doctrine.
14. Furthermore, the Court allowed the allegations contained in the Defendants van Rossum's and Delaware Riverkeeper's preliminary objections to remain, even though they violated flagrantly the rule that a trial court may receive evidence by deposition or otherwise, *see* Pa. R.Civ.P. 1028(c)(2), but *not* through averments of facts within a preliminary objection filing. *See Slota v. The Moorings, Ltd.*, 343 Pa. Super. 96, 494 A.2d 1 (1985).

#### **IV. STANDARD FOR VACATION AND RECONSIDERATION**

15. A court has inherent power to reconsider its own rulings. *Moore v. Moore*, 535 Pa. 18, 25, 634 A.2d 163, 167 (1993); *Hutchison v. Luddy*, 417 Pa. Super. 93, 108, 611 A.2d 1280, 1288 (1992). *See* 42 Pa.C.S.A. § 5505 (trial court may reconsider its own order within thirty days of entering the order). The statute limiting the time for reconsideration of orders to thirty (30) days applies only to final, appealable orders. *Hutchison*, 417 Pa. Super. at 108, 611 A.2d at 1; 42

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<sup>3</sup> A Court should consider as true all material facts alleged in the Complaint, together with all inferences that can be reasonably deduced from the material facts pled. *County of Allegheny v. Pennsylvania*, 490 A.2d 402 (Pa. 1985)

Pa.C.S.A. § 5505.” 288.<sup>4</sup>

16. Courts may grant motions for reconsideration where there has been “(1) an intervening change in controlling law, (2) the emergence of new evidence not previously available, or (3) the need to correct a clear error of law or to prevent a manifest injustice.” *General Instrument Corp of Delaware. v. Nu-Tek Elecs. & Mfg., Inc.*, 3 F. Supp. 2d 602, 606 (E.D. Pa. 1998), *aff’d*, 197 F.3d 83 (3d Cir. 1999); see also *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985), *cert. denied*, 476 U.S. 1171 (1986) (“The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence.”).
17. In the instant case, there clearly exists “the need to correct a clear error of law [and] to prevent a manifest injustice”.
18. Plaintiffs must be permitted an opportunity to be heard and to engage in the procedural due process set out in the Rules of Civil Procedure.
19. Plaintiffs must be provided an opportunity to advance the exception to the *Noerr-Pennington* Doctrine that has been carved out for claims of defamation. *Clark Consulting Inc., v. Financial Solutions Partners, LLC*, 2005 U.S. Dist. LEXIS 28642 (S.D.N.Y. 2005)
20. Furthermore, Plaintiffs must be given an opportunity to file an amended complaint, in the event that upon vacation and proper disposition of the two sets of preliminary objections, the Court re-enters an order sustaining Defendants van Rossum’s and Delaware Riverkeeper’s Preliminary Objections.

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<sup>4</sup> This motion is in no way directed towards Defendant Zambelli. Plaintiffs’ submit that the language of the Court’s Order “dismissing the Complaint with prejudice” effectively makes the order final and appealable even though Defendant Zambelli filed an answer with new matter.

WHEREFORE, Plaintiffs, J. Brian O'Neill, O'Neill Properties Group, L.P., and Constitution Drive Partners, LP Motion to vacate and Reconsider the two Orders dated August 22, 2017, be granted.

Respectfully submitted,

**LAMB McERLANE PC**

Dated: September 13, 2017

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James C. Sargent, Jr.  
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# EXHIBIT “A”



BRIAN O'NEILL, O'NEILL  
PROPERTIES and CONSTITUTION  
DRIVE PARTNERS, LP  
Plaintiffs

VS.

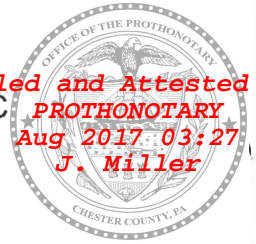
MAYA VON ROSSUM, CARLA  
ZAMBELLI and DELAWARE  
RIVERKEEPER NETWORK  
Defendants

IN THE COURT OF C  
CHESTER COUNTY,

NO. 2017-03836-MJ

CIVIL ACTION - LAW

Filed and Attested by  
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22 Aug 2017 03:27 PM  
J. Miller

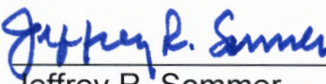


James C. Sargent, Esquire, Attorney for Plaintiffs  
Jordan B. Yeager, Esquire, and Mark L. Freed, Esquire, Attorneys for Defendants

### ORDER OF COURT

AND NOW, this 22 day of August, 2017, upon review and consideration of Plaintiff's Preliminary Objections to the Preliminary Objections of Defendants Maya Van Rossum and Delaware Riverkeeper Network, and any response thereto, it is hereby ORDERED said Preliminary Objections are **OVERRULED**.

BY THE COURT:

  
Jeffrey R. Sommer J.

# EXHIBIT “B”

BRIAN O'NEILL, O'NEILL  
PROPERTIES and CONSTITUTION  
DRIVE PARTNERS, LP  
Plaintiffs

VS.

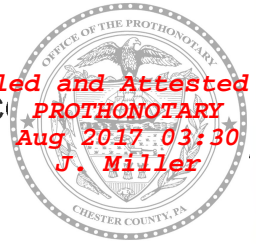
MAYA VON ROSSUM, CARLA  
ZAMBELLI and DELAWARE  
RIVERKEEPER NETWORK  
Defendants

IN THE COURT OF COMMON PLEAS  
CHESTER COUNTY, PA

NO. 2017-03836-MJ

CIVIL ACTION - LAW

Filed and Attested by  
PROTHONOTARY  
22 Aug 2017 03:30 PM  
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**.<sup>1</sup>

Plaintiff's Complaint is hereby DISMISSED with prejudice.

BY THE COURT:

  
Jeffrey R. Sommer J.

<sup>1</sup> 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

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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.