Superior Court of New Jersey

Appellate Division

Docket No. A-003773-23T1

THE NAR GROUP, INC., *Plaintiff-Appellant,* vs. SAVE LEBANON TOWNSHIP COALITION, a nonprofit corporation; WILLIAM BOHN; RICHARD WEBB, ESQ.; ROBYN DAVIDSON; ABC and XYZ CORPORATIONS 1-10; JOHN and JANE DOES 1-10, jointly, individually and severally, *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM THE ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUNTERDON COUNTY DOCKET NO. HNT-L-343-23 Sat Below: HON. KEVIN M. SHANAHAN, A.J.S.C.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

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Date Submitted: October 21, 2024

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Appellant/Plaintiff The NAR Group, Inc. respectfully submits this Brief in support of its appeal of the June 20, 2024 Decision and Order and the December 1, 2023 Decision and Order which dismissed this action.

PRELIMINARY STATEMENT

This case involves much more than any issue of legitimate public participation – it was an action against a sophisticated attorney for carrying out a vendetta to economically harm the Plaintiff. Plaintiff's initial counsel filed a complaint which was successfully served on all but one of the Defendants. Deciding a pre-Answer motion to dismiss, the Court held that it was a SLAP suit and granted dismissal of those defendants. The Plaintiff appeals this because the decision could not have been reached without the adopting allegations of "fact" asserted by Defendants which were disputed by Plaintiff and should have been a proper subject of discovery.

Then the final Defendant was served, and then filed the same motion to dismiss. As permitted by the Court Rules and the established case-law of New Jersey, Plaintiff amended the Complaint, adding new facts and clarifying the basis and evidence underlying Plaintiff's claims, and then duly opposed the motion based on the Amended Answer.

The Court below recited that the law of New Jersey permitted the amendment, but then did not follow that law, disregarded the Amended Complaint, and then dismissed the action based on the previous complaint as a SLAPP suit, ignoring that the Anti-SLAPP statute N.J.S.A.2A:53-50 et seq. was not even in existence when this action was filed.

Plaintiff respectfully submitted that both of these decisions were reversible error, and respectfully requests that the dismissals be reversed, that the Amended Complaint be reinstated against all defendants, permitting the case to proceed to a conclusion on the merits.

PROCEDURAL HISTORY[1]

The Complaint in this action was filed on September 6, 2023. Pa58.

The Motion Dismissing the Complaint on behalf of all defendants except William Bohn was filed on October 11, 2023. Pa 65. Opposition to the motion was filed on November 20, 2023. A Reply Brief was filed on November 27, 2023. Oral Argument of the motion was heard on December 1, 2023 via videoconference. Pa208-222. On that same day, the Court filed a 22-page Decision and an Order granting the motion to dismiss. Pa1-22.

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1 1T refers to Transcript of Motion, dated December 1, 2023; 2T refers to Transcript of Motion, dated June 20, 2024.

An Appeal was initiated on December 6, 2023 regarding the non-final is decision, but dismissed by the Court and never perfected nor opposed.

On February 7, 2024 William Bohn was successfully served. Pa223. On April 12, 2024, Bohn filed a Motion to Dismiss, essentially copying the previous motion. Pa225.

New counsel joined Plaintiff and an Amended Complaint was duly filed on May 14, 2024. Pa246. The nature of the Amended Complaint was to seek relief from actions Defendants were waging against Plaintiff which were not protected by the Anti-SLAP legislation, such as baselessly attacking non-cannabis farming, which was not legitimately assailable under right to farm laws as set forth below.

Opposition to the new motion to dismiss was filed on May 14, 2024. Pa275-277 (in pertinent part). Defendants filed the Reply Brief on May 20, 2024. Defendants sent an unsolicited Sur-Reply to the Court via email on June 14, 2024. Plaintiffs filed a response on June 19, 2024.

Oral Argument of the motion was heard on June 20, 2023 via videoconference. *See*, Transcript 2T filed herewith. On that same day, the Court filed a Decision and an Order granting the motion to dismiss. Pa23-45. On August 2, 2024 Plaintiff filed the notice of appeal at issue. Pa46.

STATEMENT OF FACTS

On a motion to dismiss, the facts at issue are derived from the Complaint Plaintiff is a farm, currently farming hemp and forest products with indoor and outdoor grow spaces. Pa16. Plaintiff also intends to grow cannabis when it is lawful to do so. Pa211-213. The initial complaint in this case dealt with actions by individuals seeking economic advantage via illegitimate bullying and social media tactics and served several defendants, who moved to dismiss, which was granted on 12/1/2023 Pa1.

At a time when no answer had been filed, Plaintiff amended the complaint to remove all objectionable material which led to the first dismissal, while fully establishing the elements of the claims therein. Pa246. The operative material facts of the action are those alleged in the Amended Complaint as follows:

Plaintiff purchased the property at issue, at 62 Anthony Rd, Glen Gardner, NJ 08826, (the "NAR Property") which had been an abandoned industrial site that was vandalized and robbed, later turned into an illegal dump site. Pa248. After receiving a letter from an attorney who had represented the key town board saying the use of the property for a cannabis farm was not prohibited, Plaintiff invested a tremendous amount of time, money and resources conducting

environmental clean-ups of the Property in reasonable reliance on that letter. Pa248. This benefitted both the Plaintiff and the locals who received the clean-up and reclamation of this illegal dump site.

The State of New Jersey previously awarded Plaintiff NAR Group the right to "cultivate" cannabis in the State on October 15, 2021. Pa248. Cannabis, pursuant to New Jersey law, is any strain of the cannabis plant with sufficient THC production to be regulated as cannabis in the State of New Jersey. Pa248. On or about August 18, 2023, the State of New Jersey Department of Environmental Protection awarded Plaintiff NAR Group its approval of NAR Group's Woodland Management/Forest Stewardship Plan at the NAR Property. Pa248. On or about June 27, 2023, the State of New Jersey awarded Plaintiff NAR Group to grow hemp outdoors for up to 4.4 acres and 24,000 feet of indoor cultivation at 62 Anthony Rd, Glen Gardner, NJ 08826. Pa248. Hemp, pursuant to Federal regulations, is an agricultural crop without sufficient THC production to be regulated in the State of New Jersey. Pa248. Hemp cultivation is legal in New Jersey, see N.J.S.A 4:28-6, and was legalized by the federal government pursuant to the Agriculture Improvement Act of 2018. Pa249. Hemp cultivation is legal in New Jersey is also protected under the New Jersey Right to Farm Act, N.J.S.A. 4:1C-1, et seq. Pa249.

Plaintiff NAR Group has been awarded 2024 Hemp Grower's License number LN:34_00126, which states "This Certifies that the individual or entity listed below is in good standing and an active participant in the New Jersey Hemp Program and complies with all conditions set forth in N.J.S.A. PL 2019, c238, N.J.A.C 2:25-1 et seq. and 7 CFR Part 990." Pa248-249. It is signed by John Kerr, the Hemp Program Manager for the New Jersey Department of Agriculture. Pa249.

Plaintiff NAR Group's woodland management and hemp cultivation activities cover well over 5 acres of land at the NAR Property. Pa249.

The Nar Group has sold its first hemp crop and its 2023 revenue exceeds $2,500 in revenue from the combined proceeds of hemp sales and woodland management. Pa249. Based on the foregoing, the NAR Property at 62 Anthony Rd, Glen Gardner, NJ 08826 should be considered a commercial farm. Pa249. The NAR Property is subject to farmland use pursuant to Township of Lebanon Regulations § 400-14. Pa249.

On or about late Spring of 2022, Defendant Bohn offered to invest a "few hundred thousand dollars" in Plaintiff's business venture and desired to be considered as an investor, with another possible growing building at the Bohn's property. Pa249. Mr. Nitin Manglani, Plaintiff's representative advised Mr.

Bohn, that New Jersey State regulations restricted adding members or shareholders to the company until October 2023. Pa249.

Disappointed in learning about this roadblock, Mr. Bohn turned immediately hostile and focused on attempts to hinder the Plaintiff's economic advantage and "attack" Plaintiff in many ways. Pa249-250. Defendant Bohn has discussed plans for his next collateral attack on Plaintiff. Pa250-251. Similar delay tactics have been used, and called-out by Plaintiff's counsel, such as last minute adjournment demands. Pa250.

Bohn's SLTC set up a website replete with lies to turn the blind followers among the public against the NAR Group, including claims that the modern vertical farm would use more water and electricity than most industrial facilities of comparable size, that it would be operated in "abandoned buildings" by an "absentee corporation", that it generates "dangerous" odors See, Pa250, Pa266-269. The drive to invent unbridled hysteria with such lies is palpable. Pa250.

Unfortunately, racial slurs and prejudice was also an SLTC strategy. Pa250. Though other Caucasian people are farming hemp in Lebanon Township, SLTC opposed Plaintiff's right to grow hemp. Racist posts by SLTC'S followers, including "If you're not white you're not right." Pa250; Complaint Exhibit C at Pa271. Plaintiff's counsel made a record of the racism

in a letter to the Court. *See*, Complaint Exhibit D, at Pa250. This is not legitimate public participation.

Defendants have also harassed Plaintiff by flying drones over the NAR Property and trespassing on the NAR Property, and posting their images, slandered the members of Plaintiff NAR Group, and developed hate, none of which is legitimate of public participation. Pa271; Complaint Exhibit E at Pa247.

To more effectively farm the NAR Property, and realize the greater profits from doing so, Plaintiff NAR Group applied for building permits in or about August 2023. Pa250.

Plaintiff NAR Group has and had a reasonable expectation of economic advantage and benefit, belonging and accruing to Plaintiff NAR Group from the expansion of their farming activities using the building improvements described in the Permits. Pa250.

On or about August 2023, Defendant filed papers which he deemed an "appeal" of the Township of Lebanon taking no action to interfere with Plaintiff NAR Group's Right to Farm, and demanding that the Township of Lebanon stop the Plaintiff NAR Group's building permit applications to interfere with Plaintiff NAR Group's Right to Farm. Pa250.

It was pled that N.J.S.A. 4:1C-10.1(a) sets forth "Any person aggrieved by the operation of a commercial farm, or the operation of a shellfish commercial farm, shall file a complaint with the applicable county agriculture development board or the State Agriculture Development Committee in counties where no county board exists prior to filing an action in court." Pa251.

It was also pled that N.J.S.A. 4:1C-10.1(c) sets forth "In the event the committee has not recommended an agricultural management practice concerning activities addressed by a complaint, the county board shall forward the complaint to the committee for a determination of whether the disputed agricultural operation constitutes a generally accepted agricultural operation or practice. Upon receipt of the complaint, the committee shall hold a public hearing and issue its decision, in writing, to the county board. The county board shall hold a public hearing and issue its findings and recommendations within 60 days of the receipt of the committee's decision." Pa251.

The Complaint further alleged that the exclusive hearing procedures for cases arising from the Right to Farm Act, 4:1C-1 et seq. and the Right to Farm rules set forth at N.J.A.C. 2:76-2, 2A, and 2B are set forth in N.J.A.C. 2:76-2.8, et seq. Pa251.

The Complaint also set forth that N.J.S.A. 4:1C-10.1 and N.J.A.C. 2:76-

2.8, et seq. preempt local government from using conflicting procedures for cases arising from the Right to Farm Act, (the "Exclusive Procedures"). Pa251.

The allegation before the Court was that the Defendants, individually and acting in concert, caused SLTC to file an appeal (the "Appeal") to ask Lebanon Township to circumvent the Exclusive Procedures, and decline to approve all building permit applications. Pa251. The Defendants undertook the Appeal maliciously with the sole purpose to hurt Plaintiff NAR Group and its economic rights. Pa251. By filing the Appeal, Plaintiff NAR Group's economic rights were being unduly interfered with by the Defendants. Pa251-252.

Defendants' crusade to destroy Plaintiff NAR Groups' farm project is the prosecution of a personal vendetta against the NAR Group by each of the Defendants, who seemingly will stop at nothing to see it destroyed. Pa252. The Appeal was objectively baseless, and is not supported by facts, law or even a good faith extension of law. It is merely the venom of a lawyer's hope to use litigation and public participation immunity as a sword, hoping that it will excuse not merely public participation, but Defendants' vengeful and objectively baseless abuse of process, including the Appeal. Pa252.

Defendants were notified of the above law by Nar Group counsel, but responded by writing to the Board of adjustment attorney, the Township

attorney, urging them to suspend all building permits on the NAR property until the unlawful "Appeal" could be heard by a board colluding with SLTC (the "Continuing Campaign"). Pa252.

On May 13, 2024, Defendants demanded that a Lebanon Township committee mandate Plaintiff NAR Group to obtain approval of a site plan to use a building for which Plaintiff NAR group already has a Continued Certificate of Occupancy. Pa252. This means that again, Defendants are seeking harm against Plaintiff NAR Group without any objective basis in law or fact. Pa252. This Continuing Campaign by Defendants as well was without any basis in law, and was instead Defendants' attempt to maliciously leverage their personal relationships in the Township to try to secure governmental behavior in violation of the above cited law and a continued governmental interference in the Nar Group farming at the Nar Property. Pa252-253.

The Continuing Campaign was nothing short of a malicious solicitation of Government misconduct, seeking a hearing without jurisdiction, with no objective legal basis. Pa252-253. The Appeal and Continuing Campaign are objectively baseless shams, no reasonable litigant could conclude that Appeal and Continuing Campaign are reasonably calculated to elicit a favorable outcome; they are simply designed to harm Plaintiff. Pa252-253. That sums the

allegations of the Amended Complaint, Dismissed on June 20, 2024.

However, the Court disregarded the amendment and dismissed upon the original complaint in the June 20, 2024 final Decision and Order. Pa23-45.

LEGAL ARGUMENT

POINT I

THE DISMISSAL SHOULD BE REVERSED BECAUSE IT EXPRESSLY REJECTS THE ESTABLISHED LAW OF NEW JERSEY (Pa23-45)

NJ Rule 4:9-1 clearly states, "[a] party may amend any pleading as a matter of course at any time before a responsive pleading is served . . ." There was, and is no basis for an erroneous belief that N.J. Rule 4:9-1 was suspended in this action.

As the Court below acknowledged in its decision at page 20 of its June 20, 2024 decision, "is true that a motion to dismiss is not a responsive pleading per se, 'the defense of failure to state a claim 'may be raised either by answer or by motion, but, if by motion, then before the party's required responsive pleading.' *Bank Leumi USA v. Kloss*, 243 N.J. 218 (2020) (citing Pressler & Verniero, cmt. 1 on R. 4:6-2)." Pa43.

Thus when no Answer has been served in this case, and a motion to dismiss is not a responsive pleading. Therefore, Plaintiff timely filed its

Amended Complaint with Exhibits before any responsive pleading was filed per N.J. Rule 4:9-1.

In fact this distinction between a motion to dismiss and a responsive pleading is also addressed in NJ Rule 4:6-1(b) which clearly states that "if the motion is denied in whole or part . . . the responsive pleading shall be served within 10 days after notice of the court's action." This rule loses all meaning if the motion to dismiss is the responsive pleading, the two concepts are mutually exclusive. Thus, the Court Rules clearly distinguish a motion to dismiss from a responsive pleading, and the case law set forth above clearly distinguishes a motion to dismiss from a responsive pleading.

If the motion to dismiss is the responsive pleading, it would also need to provide, or lose, all of its affirmative defenses and counterclaims per New Jersey Rules 4:6-1, 4:6-2, and 4:5-4. Further, such a ruling would deprive the Plaintiff of an admission or denial of each paragraph and effectively dissolve New Jersey Rule 4:5-3. Should every litigant need fear this result when filing the motion to dismiss, or can we count on enforcement of the Court Rules?

No litigant should fear that a court will change five New Jersey Court Rules to get the decision they want – litigators need to rely upon the Rules, and need to rely on the Judiciary to be the *vox lex*, and apply the law, especially in

Law Division. This Court has held that absent an ambiguity, Court Rules must be applied as written. "As a general rule of statutory construction, we look first to the language of the statute. If the statute is clear and unambiguous on its face and admits of only one interpretation, we need delve no deeper than the act's literal terms to divine the Legislature's intent." *State v. Thomas*, 166 N.J. 560, 567, 767 A.2d 459 (2001); *Mortg. Grader, Inc. v. Ward & Olivo, L.L.P.*, 438 N.J. Super. 202, 212-13, 102 A.3d 1226, 1231-32 (App. Div. 2014) "The same principles of statutory construction apply to rule construction." *State v. Vigilante*, 194 N.J. Super. 560, 563, 477 A.2d 429 (App.Div.1983); *Douglas v. Harris*, 35 N.J. 270, 278, 173 A.2d 1 (1961). Here, the lower Court found no ambiguity to support re-writing the New Jersey Court Rules 4:5-3, 4:5-4, 4:6-1, 4:6-2, and especially 4:9-1.

However, only one paragraph after the Judge acknowledges that as a matter of law a motion to dismiss is not a responsive pleading, the Judge says that for this case, he will consider the motion to dismiss a responsive pleading, and thus declare the Amended Complaint untimely. This should be held to be a reversible error.

Further, the Judge seems to express outrage that an amended Complaint addresses alleged pleading defects raised by a motion to dismiss. However when

a motion to dismiss is filed, claiming flaws in the original complaint, it is an entirely proper and legitimate use of amendment – this is in part what the *Bank Leumi* decision was examining and responding to.

The Judge tries to distinguish *Bank Leumi* by saying that it was considering a different situation, but that is not an accurate reading of *Bank Leumi*, and fails to address the contradiction to R. 4:6-1(b). Instead, the Court summarily stated at page 21 of its decision that "this Court will decline to consider Plaintiff's amended complaint for the purposes of this motion, and will strike the improperly and untimely filed amended complaint." Pa44. The Court then goes on to discuss only the original complaint that had been superseded. *Id*. Again, this should be held to be reversible error.

POINT II

THE DISMISSAL SHOULD BE REVERSED BECAUSE IT RELIED ON INFERENCES IN FAVOR OF DEFENDANTS (Pa27-28, 32-33, 44)

Even with regard to the original Complaint, the decision of the Court below was in violation of the standards of the law. On a motion under R. 4:6-2(e), including Defendants' motion at issue here, the court must search the complaint in depth and with liberality to determine if a cause of action can be gleaned even from an obscure statement, particularly if further discovery is

taken. *See*, *Printing Mart v. Sharp Electronics*, 116 N.J. 739, 746 (1989). The Court should accept Plaintiff's alleged facts as true for purposes of assessing the viability of Plaintiff's pleading. *See*, *Craig v. Suburban Cablevision, Inc.*, 140 N.J. 623, 625 (1995). The court must also afford the plaintiff every reasonable inference of fact. *Id*. If the complaint states no basis for relief and discovery would not provide one, dismissal of the complaint is appropriate. *See*, *Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 166 (2005). Even if a generous reading of the allegations "merely suggests a cause of action," the complaint will survive the motion. *F.G. v. MacDonell*, 150 N.J. 550, 556 (1997).

The Court acknowledged these rules at page 19 of its June 20, 2024 decision. Pa42.

Applying those standards, the Court below held that "Plaintiff's allegations that Defendants seek to prevent Plaintiff from obtaining land use approval to cultivate a cannabis and hemp, when accepted as true for purposes of this motion, do meet the elements of a claim for Unlawful interference with Prospective Economic Advantage, especially when coupled with the allegation that Defendant was motivated by anti-competitive purposes, i.e. a desire to have his own hemp farm." Thus, for purposes of a motion brought pursuant to R. 4:6-2(e), the Complaint did state a cause of action.

However, the Court then turned its attention to whether relief could be granted, and the *Noerr-Pennington* doctrine.

Several allegations of Defendants' actions were alleged in the original Complaint. Paragraph 23 alleged that Defendants opposed Plaintiff NAR Group's current hemp[2] crop farming and cultivation, with "absolutely no legitimate reasons" why Plaintiff's 'right to farm' can be infringed upon. Pa62.

Paragraph 26 alleges that Defendants attempted to delay and defeat Plaintiffs' efforts to secure land use approvals for cannabis *and hemp* cultivation. Pa247-252. Again, the Complaint alleged that there can be no reasonable objections to hemp farming – there is a right to farm hemp in New Jersey. Pa62. Defendants even acknowledged the separate hemp allegations at page 4 of their October 11, 2023 brief, saying "Plaintiff also alleges that SLTC opposes Plaintiff's current hemp crop cultivation, again without, in Plaintiff's estimation, a valid reason." Said brief does not make a claim regarding the reasonableness of their objections to hemp cultivation (as opposed to the cannabis objections). Thus neither Defendants' moving brief, nor their

2. Hemp is similar to cannabis, but consists of strains lacking in THC, so they don't create any drug effects, so it is not regulated like cannabis. The Amended Complaint focused largely upon the baseless harassment of Plaintiff's hemp farming.

November 27, 2023 Reply Brief give any objectively reasonable cause to oppose fully-legal hemp farming.

In Defendants' second motion to dismiss, paragraph 15 of Defendants' statement of facts in their Brief again acknowledged the separate hemp claims and the separate issue that there is no objectively legitimate ability to oppose it of the Complaint. Defendants do claim that they have a right to an *opinion* regarding hemp at page 12 of their brief. Pa38. However, Defendants' brief never claims any *objective* basis to take action against Plaintiff's hemp farming.

However, Plaintiff's moving brief did establish that Defendants actions against Plaintiff's hemp farming was objectively *un*reasonable. The Plaintiff's brief set forth at pages 3-4: [3]

> "Under the Noerr-Pennington doctrine, participation in judicial and administrative proceedings is not protected when it is "objectively baseless," thereby falling within the "sham" exception to the doctrine. See, Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60- 61 113 S. Ct. 1920, 1928, 123 L. Ed. 2d 611, 624 (1993). To constitute a "sham," "the lawsuit must be objectively baseless in the sense that no reasonable litigant . . . could conclude that the suit is reasonably calculated to elicit a favorable outcome." Id. at 60, 113 S. Ct. at 1928, 123 L. Ed. 2d at 624.
>
> To this end, they filed an Appeal which is entirely outside the jurisdiction of the Township as a matter of law. Moreover, when this was pointed out

3. Whereas the contents of the brief are raised by the Judge, and are therefore in issue, the pertinent part of Plaintiff's brief is made a part of the Record as Pa275-277.

> to them, they redoubled their efforts to push the Appeal through, an objective sham, in which no reasonable litigant could expect to win. The Nar property is subject to farmland use pursuant to Township of Lebanon Regulations § 400-4. Hemp cultivation is legal in New Jersey, see N.J.S.A 4:28-6, and was legalized by the federal government pursuant to the Agriculture Improvement Act of 2018. It is protected under the Right to Farm Act. The NAR Group has alleged, truthfully that it has hemp site approval from the New Jersey Department of Agriculture for 62 Anthony Road, and a 2024 State of New Jersey Hemp Growers License for the NAR Group at 62 Anthony Road.
>
> Any person aggrieved by the operation of a commercial farm shall file a complaint with the applicable [CAB] or the [SADC] in counties where no county board exists prior to filing an action in court. The statute provides for an appropriate hearing to determine, among other things, whether the 10.1(c). See also N.J.A.C. 2:76-2.10 (establishing the hearing procedure for those aggrieved by the operation of a commercial farm). Following an adverse determination, an aggrieved party may then appeal to the SADC, N.J.S.A. 4:1C-10.2, and then to this court for further review, R. 2:2- We conclude that the amendatory language demonstrates specific legislative intent to preempt Township of Franklin v. Hollander, 338 N.J. Super. 373, 390-393 (App.Div. 2001). Id, at 393. The Appeal is thus pre-empted, no hearing should be held in violation of this preemption; and the appeal is a baseless sham."

On May 20, 2024 Defendants also filed a Reply Brief, but again, Defendants' brief never claims any objective, valid basis to take action against Plaintiff's hemp farming.

Defendants use of objectively unreasonable tactics was also raised at oral argument:

> "Count 1 is about them using this illegal and false word "appeal" to stop us from getting our ability to farm hemp on the property, not cannabis. Okay? We're talking about non-THC plants. So the fact is that they're not

> allowed to stop us using a fake procedure that is not permitted under the law. Now, he talks about the Noerr-Pennington doctrine, which was used for the original complaint that has no bearing here. As I cited *Professional Real Estate Investors v. Columbia Pictures* says, when something is a sham . . . legal process that literally has no basis in law, then it's not protected." 2T at 12:14 – 13:1.

Thus, the Court below had a clear basis as to why the hemp opposition was objectively unreasonable, and no over-riding counter-argument from Defendants. Even if there was a dispute, the Court would be required to draw all inferences in favor of the Plaintiffs, as cited above.

Nonetheless, the Court summarily held that "Plaintiff has offered no arguments offering support for the proposition that Defendant's objections are patently unreasonable," and never addressed Plaintiff's extensive argument to support for the proposition that Defendants' objections are patently unreasonable.

Further the Plaintiff objected to the Court's exposure to arguments that could not be considered on a motion to dismiss. The motion was never converted into one for summary judgment, yet the Court permitted Defendants to argue facts outside the record. As Plaintiff objected at oral argument:

> "As to count 2, he says that in 2003, a board said that we had not proved that as of 2023 -- as of 2023, we were not ripe yet for Right to Farm Act protection, and we were not a commercial farm at that time deserving of their protection. Well, that was 2023. Now we're in 2024, has there been any discovery about my client's first farming activities, his first

> woodland preservation activities? There's been no discovery in this. He's taking something that decided that we haven't made a particular hurdle in 2023 trying to project that into the future saying, we can never make that hurdle. Well, that's certainly not motion to dismiss material. That's summary judgment material. He hasn't filed anything like that." T2 at 13:6-19.

The same issue was raised in the first motion. *See*, T1 at 6:13-24. Both of the Defendants' motions included, and were almost exclusively about, matters outside the pleadings. To consider such argument would have required the Court to convert the motions to summary judgment motions and not decide them as motions to dismiss. However, this conversion did not take place, and if it had, then genuine issues of material facts would have been in dispute requiring discovery and a denial of summary judgment. However the lower court utilized the motion to dismiss standard, but then it should not have considered those matters outside both Complaints such as the SLAPP allegations.

So the Court below considered allegations of matters outside the Complaint, adopted an inference supporting Defendants' position, and failed to afford the Plaintiff every reasonable inference of fact, and in fact, based his ruling upon incorrect inferences adverse to the Plaintiff.

Thus, Plaintiff respectfully submits the resulting dismissals should be held to be the result of reversible errors.

POINT III

THE DISMISSAL SHOULD BE REVERSED BECAUSE IT DISMISSED WITH PREJUDICE (Pa1, 42)

In its June 20, 2024 decision, the Court acknowledged that "if the Court decides the complaint should be dismissed, such dismissal should be without prejudice. *Printing Mart-Morristown*, *supra*, 116 N.J. at 772." Pa42. Yet the December 1, 2023 Order expressly dismisses the original complaint against the moving defendants "WITH PREJUDICE" (all caps in original Order). Pa1. No reason is given by the Court for violating the acknowledged case law and standard that the action would be dismissed without prejudice. *Id*. Plaintiff respectfully submits this should be held to be a reversible error.

CONCLUSION

Based on the foregoing, for each of the above reasons and all of them together, Plaintiff respectfully requests that the dismissals be reversed, that the Amended Complaint be reinstated against all defendants, permitting the case to proceed to a conclusion on the merits.

Dated: October 21, 2024

Respectfully Submitted,

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THE NAR GROUP, INC. PLAINTIFF, v. SAVE LEBANON TOWNSHIP COALITION, a nonprofit corporation; WILLIAM BOHN; RICHARD WEBB, ESQ.; ROBYN DAVIDSON; ABC and XYZ CORPORATIONS 1-10; JOHN and JANE DOES 1-10, jointly, individually and severally DEFENDANTS.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003773-23T1 **CIVIL ACTION** Law Division: Hunterdon County Docket No.: HNT-L-343-23 Sat Below: Hon. Kevin M. Shanahan, A.J.S.C. *On Appeal from Orders dated December 1, 2023 and June 20, 2024*

BRIEF OF RESPONDENT WILLIAM BOHN IN OPPOSITION TO APPEAL

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Defendant/Respondent, William Bohn ("Respondent Bohn"), respectfully submits this Brief in opposition to the Plaintiff/Appellant, The NAR Group's ("Appellant"), appeal of the June 20, 2024 Decision and Order of the Court below that dismissed this matter as to Respondent Bohn.[1]

PRELIMINARY STATEMENT

The Complaint dismissed below was nothing more than a "strategic lawsuit against public participation," or "SLAPP," suit intended to discourage Respondents' opposition to Appellant's applications to the Lebanon Township Planning Board ("LTPB") to secure land use approvals for cannabis/hemp cultivation at its property. As the Court below correctly recognized, this SLAPP lawsuit is specifically barred by the Noerr-Pennington Doctrine, which recognizes a citizen's constitutional right to petition the government for redress in an objectively reasonable manner. Respondents' public participation, both before municipal agencies and in the Superior Court, has been validated as objectively reasonable at every stage.

Indeed, Appellant's application to the LTPB is the subject of litigation currently pending in the Superior Court, captioned The NAR Group, Inc. v. Lebanon Township Planning Board, et al, Docket No. HNT-L-454-22 ("Suit #1").

[1] For the reasons set forth in the opposition brief filed by Co-Defendants/Respondents, Save Lebanon Township Coalition ("SLTC"), Richard Webb, Esq. ("Webb"), and Robyn Davidson ("Davidson") (collectively, "Co-Respondents"), the December 1, 2023 Decision and Order of the Court below dismissing the Complaint against the Co-Respondents should also be affirmed.

Respondent Bohn is not a party to that suit, but Co-Respondents, including, SLTC, of which Respondent Bohn is a trustee, is a party to that litigation, and it has intervened and joined in the defense against Appellant's claims against Lebanon Township as a Defendant-Intervenor, moved for summary judgment, and moved for reconsideration of the denial of certain aspects of its summary judgment motion. The Court in Suit #1 granted SLTC's relief at every turn, and, thus, validated the objectively reasonable nature of each of Respondents' actions challenging Appellant's land use applications.

Therefore, in the instant matter, Respondent Bohn (after Co-Respondents) filed a motion to dismiss the Complaint pursuant to the Noerr-Pennington doctrine. Appellant never challenged the application of the Noerr-Pennington below, but instead filed an Amended Complaint without meeting the requirements of R. 4:69-1. The Court below rejected this filing because Respondent Bohn's motion to dismiss is a "response" to the Complaint. As such, because Appellant did not seek leave of court or provide the appropriate analysis to support the filing of the Amended Complaint, the Court below struck the improper pleading, and correctly dismissed the previous Complaint pursuant to the Noerr-Pennington doctrine.

Putting the improper procedure aside, the Amended Complaint also does not change anything, as its allegations still seek to chill public participation, which implicates Noerr-Pennington immunity, and more importantly, Appellant fails to

plead any real damages because Appellant has yet to suffer any real damages. Finally, the Amended Complaint requests a declaration that Appellant's property is a farm subject to the Right to Farm Act, N.J.S.A. 4:1C-3, but primary jurisdiction for that decision rests with an administrative farm board, not the Superior Court yet. Thus, the Court below lacked jurisdiction to decide this issue. Therefore, even if Appellant properly filed its Amended Complaint pursuant to R. 4:9-1, the new allegations were futile, would not survive a subsequent motion to dismiss, and were properly dismissed with prejudice.

Accordingly, as described further below, the decision of the trial court to reject the Amended Complaint and dismiss the previous Complaint with prejudice should be affirmed.

PROCEDURAL HISTORY

The Complaint in this matter was filed on September 6, 2023. Pa58. On October 11, 2023, Co-Respondents filed a motion to dismiss Appellant's Complaint. Pa65. The Court below heard oral argument on December 1, 2023. Pa208-222. On the same day, the Court below issued a Decision and Order granting Co-Respondents' motion to dismiss Appellant's Complaint. Pa1-22.

Respondent Bohn was not served with the Complaint until February 7, 2024. Pa223. On April 12, 2024, Respondent Bohn filed, as his response to the Complaint, his own motion to dismiss Appellant's Complaint pursuant to R. 4:6-2(e). Pa225. On May 14, 2024, Appellant filed an Amended Complaint without the requisite notice of motion for leave to amend in opposition to the motion. Pa246.

On June 20, 2024, the Court below heard oral argument on the motion to dismiss, and, on the same day, issued an Order and Decision rejecting the Amended Complaint, granting Respondent Bohn's motion to dismiss and dismissing the Appellant's Complaint. 2T; Pa23-45.

On August 2, 2024, Appellant filed its Notice of Appeal. Pa46.

STATEMENT OF FACTS

A. *Appellant's Application to the LTPB*

On April 20, 2022, Plaintiff applied to the LTPB seeking site plan approval for an indoor medical cannabis facility. Pa81, ¶33. The LTPB scheduled a hearing on Plaintiff's application for September 30, 2022. Pa85, ¶¶47-50. Webb submitted an opposition brief to the Planning Board that argued that the application was more appropriately heard before the Lebanon Township Board of Adjustment ("BOA"). Pa88, ¶55.The LTPB concurred, declined jurisdiction, and decided that the BOA appropriately held jurisdiction. Pa90-99, ¶¶ 61-63.

B. *Suit #1*[2]

Rather than file an application to the BOA, on November 17, 2022, Appellant filed Suit #1 against the LTPB, the Township Committee and Mayor, which demanded automatic approval of its application and damages for violations of due

[2] In his underlying motion to dismiss, Respondent Bohn relied upon facts alleged in the complaint in The NAR Group, Inc. v. Lebanon Township and certain public records submitted to the Hunterdon County Agricultural Development Board. As the Complaint and records of an administrative agency are a matter of public record, Respondent Bohn did not convert the motion to one for summary judgment or otherwise introduce evidence that should not be considered on motion to dismiss. "In evaluating motions to dismiss, courts consider allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005) (quotation omitted); Krugman v. Mazie Slater Katz & Freeman, 2015 WL 1880073 (App. Div. Apr. 27, 2015) (court may take judicial notice of pleadings in other matters before the court or any other court in New Jersey).

process. Pa70. On January 6, 2023, Respondent moved for summary judgment in Suit #1. Pa105. Prior to the return date of the summary judgment motion, SLTC moved to intervene as a defendant in Suit #1, opposed summary judgment, and cross-moved for summary judgment to dismiss the complaint. Pa108, Pa111. The cross-motion argued, as Webb had previously, that the proper venue for Appellant's application was the BOA, not the LTPB. Pa3.

By order dated March 27, 2023, the Court in Suit #1 denied Appellant's motion for summary judgment, granted SLTC's motion to intervene, and granted in part SLTC's motion for summary judgment, dismissing counts one and two of Appellant's complaint in Suit #1. Pa3, Pa115. Both parties made motions for reconsideration. The Court denied Appellant's motion but granted SLTC's motion as to count four of complaint. Pa3, Pa152. Currently, dueling motions for summary judgment are pending on the three remaining counts in Appellant's complaint.

C. ***The Current Lawsuit***

The allegations of the Appellant's SLAPP lawsuit are bare. Pa58. The Complaint described conversations between Respondent Bohn and Appellant's principal in which Respondent Bohn asked questions about cannabis cultivation and indicated that he would be interested in investing in the project. Pa58, ¶¶9-14. Next, the Complaint alleged, *on information and belief*, that Respondent Bohn intended to obtain a cannabis cultivation license and start his own competing cannabis

cultivation facility on his own Lebanon Township properties. Pa58, ¶¶15-19. Appellant then alleged, on *information and belief*, that Respondent Bohn somehow "enlisted" – without saying how – the help of Webb in opposing Appellant's application to the BOA. Pa, 58 ¶20.

The Complaint further alleged that Webb, Bohn, and Davidson agreed to form SLTC, which had no other purpose than to defeat Appellant's multiple applications and has no valid reason for wanting to do so. Pa58, ¶21-22. The Complaint also alleges that SLTC opposed Appellant's current hemp crop cultivation, again, without, in Plaintiff's estimation, a valid reason, and that SLTC solicits and receives monetary contributions and uses them to file "spurious pleadings." Pa58, ¶24.

Without any substantiation, Appellant alleged that Respondent Bohn conspired with Webb and Davidson to use SLTC to delay Appellant's applications while Defendant Bohn readied his own efforts to cultivate cannabis in Lebanon Township, and that Respondents knew that Appellant would make millions from cultivating cannabis on its property. Pa58, ¶¶26-27.

The Complaint concluded by alleging:

> In this way, by forming SLTC for the express purpose of opposing Plaintiff NAR Group's land use applications for development of the Property for cannabis and/or hemp cultivation, Defendants engaged in a wrongful act that interfered with Plaintiff's ability to sell medical cannabis, and/or hemp, all without justification, causing Plaintiff great damages.
>
> [Pa58, ¶29.]

D. *The Amended Complaint*

The allegations of Appellant's Amended Complaint are also bare without any further elaboration of an unreasonable scheme perpetuated by Respondents. Pa246. The amendment reiterates the previous tortious interference claim set forth in Count I, but jettisons several of the previous allegations and fails to provide any additional detail to support Appellant's claim for tortious inference. Pa246. Instead, the Amended Complaint engages in an analysis of the Right to Farm Act, N.J.S.A. 4:1C-3, and sought a declaration that Appellant's property is a commercial farm. Pa246. Appellant did not obtain leave to amend the Complaint required by R. 4:9-1. Pa43.

Available public record, however, establishes that Appellant had previously filed a Right to Farm application before the Hunterdon County Agriculture Development Board ("HCADB"), which was denied. Pa287, Pa289. According to this administrative agency, Appellant has admitted that it does not meet the eligibility criteria under the Farmland Assessment Act because it has admitted that the property has not been "devoted to agricultural and/or horticultural uses for at least two successive years immediately prior to the tax year …" as required by the Farmland Assessment Act, N.J.S.A. 54:4-23.6(a). Pa287, Pa289. According to Appellant's application this farm board, the property has only been a farm for one year prior to September 25, 2023, so it is not yet eligible as a farm. Pa287, Pa289.

STANDARD OF REVIEW

This Court applies *de novo* review to the trial court's decision to dismiss Appellants' Complaint. Giannakopoulos v. Mid State Mall, 438 N.J. Super. 595, 599 (App. Div. 2014), certif. denied, 221 N.J. 492 (2015).

On a motion to dismiss for failure to state a claim, "the Court is not concerned with the ability of the Plaintiffs to prove the allegation[s]in the Complaint." Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989). The court "must assume the truthfulness of the allegations contained in plaintiffs' complaint, giving plaintiffs the benefit of all reasonable factual inferences that those allegations support." Edwards v. Prudential Prop. & Cas. Co., 357 N.J. Super. 196, 202 (App. Div. 2003).

The test on a motion to dismiss for failure to state a claim requires the court to determine the "adequacy of a pleading" and specifically "whether a cause of action is 'suggested' by the facts." Velantzas v. Colgate–Palmolive Co., Inc., 109 N.J. 189, 192 (1988). The court's analysis of the complaint is "confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim." Rieder v. Department of Transp., 221 N.J. Super. 547, 552 (App. Div.1987) (citation omitted). But the analysis does not end here.

Notwithstanding the foregoing, a motion to dismiss for failure to state a claim should be granted when the complaint fails to articulate a legally sufficient basis

entitling plaintiff to relief. Camden Cty. Energy Recovery Assocs., L.P. v. New Jersey Dept. of Env. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999). Under the New Jersey Rules of Court, for a complaint to survive a motion to dismiss, "the essential facts supporting plaintiffs cause of action must be presented ... conclusory allegations are insufficient in that regard." Scheidt v. DRS Techs., Inc., 424 N.J. Super. 188, 193 (App. Div. 2012). A motion to dismiss for failure to state a claim should be granted when the complaint fails to articulate a legally sufficient basis entitling plaintiff to relief. Camden Cty. Energy Recovery. Assocs, 320 N.J. Super. at 64 (App. Div. 1999). A plaintiff must plead “facts and ... some detail of the cause of action [,]” something more than conclusory allegations to support their complaint. Printing Mart-Morristown, 116 N.J. at 768.

Simply, “A dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted.” Rieder v. State Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987). Although a motion to dismiss pursuant to Rule 4:6-2(e) is ordinarily granted without prejudice to filing an amended complaint, see Printing Mart, 116 N.J. at 772, dismissal with prejudice is appropriate if any effort to amend would be futile. Johnson v. Glassman, 401 N.J. Super. 222. 246-47 (App. Div. 2008).

LEGAL ARGUMENT

I. THE COURT BELOW CORRECTLY REJECTED APPELLANT'S AMENDED COMPLAINT FILED IN VIOLATION OF R. 4:9-1 (Pa23-45)

Pursuant to New Jersey Court Rule 4:9-1

> [a] party may amend any pleading as a matter of course at any time before a responsive pleading is served...Thereafter a party may amend a pleading only by written consent of the adverse party or by leave of court which shall be freely given in the interest of justice.
>
> [R. 4:9-1.]

Any doubt as to whether the filing of a motion to dismiss activates the requirements of this rule is quickly resolved by the very first line of the Comment to Rule 4:9-1, which reads, "The rule is clear that amendments to claims or counterclaims may be filed as of right any time before the filing of a responsive pleading ***including a motion to dismiss***." PRESSLER & VERNIERO, Current N.J. COURT RULES, Comment, R. 4:9-1 (2025) (***emphasis*** added). Appellant argues against the Court Rules and established practice to claims that it can simply file an Amended Complaint after a motion to dismiss without running afoul of R. 4:9-1. Appellant is incorrect, so the Court below properly struck the Amended Complaint.

As noted above, Rule 4:9-1 permits a party to amend a complaint as of right, but only ***before*** a responsive pleading is served. See R. 4:9-l. For example, in Paternoster v. Shuster, 296 N.J. Super. 544 (App. Div. 1997), the defendant filed an

amended counterclaim on March 3, 1995. Four days ***after*** the amendment, on March 7, 1995, the plaintiff filed a motion to dismiss. Id. at 562. The Appellate Division held that the "attempt to file an amended counterclaim ***preceded*** plaintiff's response and was therefore timely filed." Id. (***emphasis*** added). Additionally, courts have regularly held that a motion to dismiss is a responsive pleading and that the filing of such a motion bars the filing of an amended complaint as of right. See Portfolio Recovery Assocs., LLC v. Liwattana, 2017 WL 2458152, at *2 (N.J. Super. Ct. App. Div. June 7, 2017) (holding that a party had appeared by "fil[ing] a responsive pleading in the form of a motion to dismiss."); Town of Harrison Bd. Of Educ. v. Netcher, 439 N.J. Super. 164, 178 (N.J. Super. Law Div. 2014) ("This court concludes ... that plaintiff may not amend its complaint as of right because East Newark's motion to dismiss ... is a responsive pleading."); but see Bank Leumi USA. v. Kloss, 243 N.J. 218, 230 (2020) (finding Rule 4:6-2 treats motions to dismiss as distinct from responsive pleadings but also explaining that "[i]f a motion to dismiss is filed, there is no reason for the moving party to then file additional pleadings until the motion to dismiss is ruled upon").

Appellant cites Bank Leumi as dispositive on the issue of whether the Amended Complaint is properly filed without leave of court, but this case does not so hold. Indeed, the court's focus in Bank Leumi was not the issue at hand, but whether if a Defendant who files a motion to dismiss must also file any additional

pleadings to preserve any counterclaims from the preclusive effect of the entire controversy doctrine. Bank Leumi, 243 N.J. at 230-231. Thus, the court ruled that a motion to dismiss is distinct from a pleading in that "only a pleading triggers the preclusive effects of [the entire controversy doctrine.]" Bank Leumi, 243 N.J. at 230. The court's ruling did not distinguish a motion to dismiss from an answer for R. 4:9-1 purposes.

Additionally, other than a distorted reading of Bank Leumi, Appellant has no support for the proposition that New Jersey Courts consider the filing of a motion to dismiss as anything other than a responsive filing that precludes a plaintiff's ability to amend a complaint as right. The reason Appellant fails to locate any support is because there is none, and New Jersey courts have regularly, for many years, accepted the filing of a motion to dismiss as a responsive pleading the triggers R. 4:9-1's requirements. Numerous reported (and unreported cases) dating back several years in the Superior Court, Appellate Division, and Supreme Court support and acknowledge this procedure. See, e.g., Perez v. Zagami, LLC, 218 N.J. 202, 205 (2014) ("Zagami filed a motion to dismiss the complaint, and Perez filed a cross-motion to amend his complaint …"); Oasis Therapeutic Life Centers, Inc. v. Wade, 457 N.J. Super. 218, 227 (App. Div. 2018) ("Defendants quickly moved pursuant to Rule 4:6-2(e) to dismiss for failure to state a claim upon which relief might be granted, and Oasis cross-moved pursuant to Rule 4:9-1 for leave to file an amended

complaint ….”); Wisniewski v. Murphy, 454 N.J. Super. 508, 517 (App. Div. 2018) (“On May 26, 2017, defendants filed a motion to dismiss … Plaintiff opposed the motion and moved to amend his complaint.”); Pearson v. DMH 2 Ltd. Liab. Co., 449 N.J. Super. 30, 41 (Ch. Div. 2016) (“On November 2, 2015, defendant opposed plaintiffs' motion and cross-moved to amend the counterclaim...”); Delaware River Partners, LLC v. R.R. Constr. Co., Inc., 2022 WL 2286928, at *1 (N.J. Super. Ct. App. Div. June 24, 2022) (“Later that same day, defendant filed a formal motion to dismiss the complaint in the Law Division … Plaintiff opposed the motion and cross-moved to amend its complaint …”); Roseus v. State, 2018 WL 4288653, at *1 (N.J. Super. Ct. App. Div. Sept. 10, 2018) (“Defendants moved to dismiss the complaint under Rule 4:6-2(e) for failure to state a claim … Plaintiff opposed the motion to dismiss and cross-moved to amend his complaint …”); Ianncone v. Borough of Glen Ridge, 2010 WL 4108457, at *1 (N.J. Super. Ct. App. Div. Aug. 6, 2010) (“On April 20, 2009, [Defendants] filed a motion seeking to dismiss plaintiff's complaint for failure to state a claim upon which relief could be granted, pursuant to Rule 4:6-2(e) …On April 22, 2009, plaintiff filed a motion seeking leave to file an amended complaint.”); Bart Commodities v. Hudson Coffee, Inc., 2017 WL 3469331, at *1 (N.J. Super. Ct. App. Div. Aug. 14, 2017) (“After defendants filed motions to dismiss… plaintiffs' filed a cross-motion to amend the complaint …”).

Accordingly, under R. 4:9-1, Appellant needed consent or leave of court before filing the Amended Complaint. Appellant, however, did not contact Respondent to seek consent nor did it file a motion for leave to amend the complaint. In fact, Appellant did not even request the opportunity to amend during oral argument. 2T at 10:21-14:12. Thus, Appellant's Amended Complaint was improper, and the Court below properly refused to consider same as a basis to oppose Defendant's Motion to Dismiss.[3] Accordingly, Respondent Bohn respectfully requests that this Court reject Appellant's interpretation of R. 4:9-1, which ignores years of established practice and procedure, and affirm the Court below.

II. THE COURT BELOW PROPERLY DISMISSED APPELLANT'S COMPLAINT AS BARRED BY NOER-PENNINGTON IMMUNITY (Pa42-PA45)

In granting Respondent Bohn's motion to dismiss Appellant's Complaint, the Court applied the Noer-Pennington doctrine and found that Appellant's Complaint failed to state a claim because it did not establish that Respondent Bohn's (and the Co-Respondents') actions in opposing Appellants' application for land use approvals were objectively baseless. The Court below was correct in its analysis, and Respondent Bohn respectfully requests that this Court affirm the ruling of the Court below.

[3] As set forth in Point III, infra, even if the Amended Complaint was properly filed, the amendment was futile and did not provide a valid basis upon which relief could be granted, so the Court was correct to dismiss the Complaint with prejudice.

A. ***Noer-Pennington, Generally***

The Noerr–Pennington doctrine draws its name from the United States Supreme Court opinions in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and United Mine Workers of America v. Pennington, 381 U.S. 657 (1965), and provides that those who petition the government for redress are generally afforded immunity unless the action is objectively baseless. Noerr-Pennington immunity derives from the First Amendment's guarantee of the right of the people to petition the Government for redress of grievances. *U.S. Const. Amend. I* ("Congress shall make no law ... abridging ... the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."). The doctrine arose out of claims involving anti-trust liability, but over 40 years ago was extended by the United States Supreme Court to protect a citizen's general right to petition administrative agencies and courts. California Motor Transport Co. v. Trucking Limited, 404 U.S. 508, 510 (1972).

Additionally, our New Jersey courts have applied this doctrine in analogous circumstances, including in the context of land-use disputes. For example, in Structure Building Corp. v. Abella, 377 N.J. Super. 467, 469 (App. Div. 2005), the plaintiff developer sought approval from a planning board for a six-lot subdivision. A group of homeowners, one of whom was an attorney, opposed the subdivision plan before the planning board. Id. The group of homeowners even filed a series of

prerogative writ actions to stop the development, but ultimately the planning board approved the project. Id. at 470-71. The developer then sued the unsuccessful homeowners for malicious abuse of process, malicious use of process, and tortious interference with prospective economic advantage. Id. at 469. The defendants moved for summary judgment, and the trial court granted their motion. In dismissing the developer's suit, the trial court stated:

> we don't want to chill resident[s'] rights to object, and they have a right to object, and when they come out and exercise that right, the last thing they want to happen to them was to be hit with a lawsuit. So, if we didn't have Noerr-Pennington Doctrine, the Court would have to create one, because certainly that's unfair to the residents and to persons who wish to object to the actions of developers.
>
> [Id. at 472.]

On appeal, the Appellate Division affirmed the trial court. The Appellate Division put the matter in context as follows:

> The right of homeowners to participate in hearings and oppose zoning applications that affect their property is recognized and encouraged by laws which require they be given notice and an opportunity to be heard - an opportunity to participate actively in the approval process. If dissatisfied with the actions of a zoning board, they have an absolute right to appeal to the courts. Plaintiffs' complaint seeks to punish defendants for the exercise of these rights.
>
> [Id. at 471.]

The only exception to Noerr-Pennington immunity is when the underlying proceeding is a "sham" designed to harm a competitor. However, a lawsuit can only be condemned as a "sham" after a reviewing court has drawn the "difficult line"

separating an objectively reasonable claim from a "pattern of baseless, repetitive claims which leads the fact finder to conclude that the administrative and judicial process have been abused." Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 58 (1993). Importantly, "an objectively reasonable effort to litigate cannot be deemed a sham regardless of subjective intent." Id. New Jersey Courts follow these principles and have noted that parties can forfeit this immunity only if "the conduct at issue is a mere sham to cover ... an attempt to interfere directly with the business relationships of a competitor." Fraser v. Bovino, 317 N.J. Super. 23, 37 (App. Div. 1998). To constitute sham litigation, the Appellate Division explained, "'the lawsuit must be objectively baseless in the sense that no reasonable litigant ... could conclude that the suit is reasonably calculated to elicit a favorable outcome.'" Id. at 39 (quoting Professional Real Estate, 508 U.S. at 60).

Thus, a plaintiff alleging sham proceedings must prove both an objective element and a subjective element to defeat Noerr-Pennington immunity. "First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." Professional Real Estate, 508 U.S. at 60. Second, the baseless lawsuit must conceal an attempt to interfere directly with the business relationships of a competitor, by using the governmental process (as opposed to the outcome of the process) as an anticompetitive weapon. Id. at 60-61.

The objective element requires a plaintiff to prove that the defendant lacked "probable cause" to bring the underlying lawsuit. Id. at 62. That burden is formidable because "[p]robable cause requires no more than a reasonable belief that there is a chance that [a] claim may be held valid upon adjudication." Id. at 63. It is only when the "challenged litigation is objectively meritless may a court examine a litigant's subjective motivation." Id. at 60.

B. ***New Jersey's Application of Noer-Pennington***

New Jersey courts have repeatedly applied Noerr-Pennington to dismiss lawsuits filed by developers (like Appellant) against objectors (like the Respondents) to development projects (like the proposed facility), even where the objections below were eventually rejected. It is well settled in New Jersey that "the same principles which form the basis of the Noerr-Pennington doctrine entitle those who have standing to object to land use applications to immunity from claims for damages based upon their exercise of their right to object. See, e.g., Structure Building, 377 N.J. Super. at 472; Fraser, 317 N.J. Super. at 27 (App. Div. 1998).

For example, in Structure Building, 377 N.J. Super. at 472, the Appellate Division affirmed summary dismissal of a suit against unsuccessful objectors based on Noerr-Pennington immunity because "Defendants' motives are irrelevant to their right to properly seek redress" and their underlying objections, even though unsuccessful were not meritless. Id. In other words, New Jersey courts recognize the

Noerr-Pennington doctrine and apply it to the exact conduct undertaken by the Respondents here. Id. (citing LoBiondo v. Schwartz, 323 N.J. Super. 391 (App. Div. 1999) and Fraser, 317 N.J. Super. at 37). They have done so "without consideration of the [defendant's] underlying motivation, no matter how improper it may be," and regardless of "any anticompetitive purpose [the defendant] may have had." Fraser, 317 N.J. Super. at 38.

In fact, New Jersey courts have condemned developer lawsuits against objectors as improper SLAPP suits which undermine the rights not only of the objecting defendant but also of the public at large which merit claims for malicious abuse of process against the offending plaintiff:

> We point out it is not only the defendant in a SLAPP suit who suffers. The common weal is obviously impaired as well since the consequence of a SLAPP suit is not only to silence the defendant but to deter others who might speak out as well. Suppression of public debate on public issues and the placing of a price – often a high one – on the right to petition for redress is special grievance enough.
>
> [LoBiondo, 323 N.J. Super. at 424.]

See also Baglini v. Lauletta, 338 N.J. Super. 282, 303 (App. Div. 2001) ("The constraint upon the good-faith exercise of the protestors 'bundle of freedoms' afforded by the Constitution caused by a so-called SLAPP suit may indeed constitute special grievance in the context of a malicious use of process claim."). To thwart abusive SLAPP suits, like the one filed by Appellant here, the New Jersey Supreme Court has "approved the use of the frivolous litigation statute and rule, together with

their attorney's fee sanctions, as a means to combat [them]." Maximus Real Est. Fund, LLC v. Marotta, 2009 WL 2461258, at *5 (N.J. Super. Ct. App. Div. Aug. 13, 2009) (citing LoBiondo, 199 N.J. at 97-100).

In a very similar case, Village Supermarkets, Inc. v. Mayfair Supermarkets, Inc., 269 N.J. Super. 224 (Law Div. 1993), Village Supermarkets ("Village") brought tortious interference claims against a competitor who had opposed Village's variance applications in connection with a proposed supermarket development, contending that the competitor's objections to the project were "shams" motivated by anti-competitive interests. Village Supermarkets, Inc., 269 N.J. Super. 224. 228-29 (Law Div. 1993). In Village Supermarkets, the plaintiff wanted to build a supermarket and applied for variances from the local planning board to do so. Id. at 228. The defendant owned an already-existing supermarket in the municipality, and to prevent the new supermarket from coming into the town, both directly opposed the plaintiff's variance application and funded opposition to the application by other taxpayers in town. Id. at 228, 235. The plaintiff sued the defendant for tortious interference with contract and prospective economic advantage. Id. at 228.

The trial court dismissed the claim without prejudice following a R. 4:6-2(e) motion. The court first ruled that the plaintiff brought its claim prematurely. Id. at 229. Noting that the plaintiff's claims were akin to a claim for malicious prosecution in a pending case, the court held that the plaintiff could not bring its claims until the

planning board decided its application for a variance. Id. Only then would it be known whether the defendant's acts had been improper, and, as importantly, whether the plaintiff had suffered any damages because of the defendant's actions. Id.

The trial court also dismissed the claims because the Noerr-Pennington doctrine immunized the defendant's activities. "To impose damages for objecting in a planning board proceeding would chill First Amendment rights (and parallel state constitutional rights) which are protected under the Noerr- Pennington doctrine." Id. at 229-30. The court quoted an opinion of the United States District Court for the District of Northern California that vindicated the rights of a similarly situated defendant:

> For the reasons given by the Supreme Court in [Noerr], this court is persuaded that all persons, regardless of motive, are guaranteed by the First Amendment the right to seek to influence the government or its officials to adopt a new policy, and they cannot be required to compensate another for loss occasioned by a change in policy should they be successful.
>
> [Id. at 231.]

The trial court in Village Supermarkets also defended its decision to dismiss at the pleading stage. "This is not a case where an inadvertent or technical omission in the complaint suggests an amendment that would cure the defect. There is no valid tort theory upon which plaintiff can proceed at this time." Id. at 239 (citing Printing Mart v. Sharp Electronics, 116 N.J. 739, 771-72 (1989)). The court protected the defendants from time-consuming and expensive litigation and did not permit the

plaintiff to harass the defendants with unnecessary discovery to find or bolster a cause of action. "Nor should discovery be permitted .... Where the unknown facts are unknown because they have not yet occurred, and not because of incomplete discovery, it is obvious that plaintiff cannot make the required showing." Id. See also, Seidman v. Spencer Savings Bank, S.L.A., 2022 WL 1487001, at *3 (App. Div. May 11, 2022) (affirming dismissal of breach of fiduciary duty claim pursuant to Noerr-Pennington Doctrine); Tris Pharma, Inc. v. UCB Manufacturing, Inc., 2016 WL 4506129, at *5 (App. Div. Aug. 29, 2016) (affirming dismissal of anti-trust claim on R. 4:6-2(e) motion because of Noerr-Pennington Doctrine).

The same result was reached in Fraser, 317 N.J. Super. 23 (App. Div. 1998). In that case, the Appellate Division affirmed the dismissal of claims against objectors to a condominium project, holding that the defendants exercise of their statutory right to oppose the requested variances could not give rise to a cause of action for damages. Id. at 36-37. The Appellate Court reasoned that a private party's motivations or anti-competitive purpose is irrelevant to the application of Noerr-Pennington immunity. Id. at 38. The Fraser Court further held that “the same principles which form the basis of the Noerr-Pennington doctrine entitle those who have standing to object to land use applications to immunity from claims for damages upon the exercise of their right to object.” Id.

C. *Appellant's Complaint Fails Under Noer-Pennington*

In the light of that precedent and common sense, the Court below properly recognized that Appellant's Complaint failed to state a cognizable cause of action against Respondent Bohn. As an initial matter, Appellant barely alleged any conduct that could be considered wrongful or tortious. Appellant alleged that the Respondents agreed to form SLTC, Pa58, ¶21, but nothing prevents them from doing so. Appellant also alleged that Respondent Bohen, along with Webb and Davidson, formed SLTC to defeat Appellant's application before the Planning Board, Pa58, ¶ 22, but the Constitution and Noerr-Pennington permit them to do that too. Appellant further alleges that Respondent Bohn improperly opposed Appellant's plan to cultivate hemp/cannabis on its property. Pa58, ¶23. Respondent Bohn's opinion as to the location of Appellant's indoor hemp/cannabis facility, however, is not a tortious act, but constitutionally protected activity.

Additionally, Appellant's Complaint claims that the Respondents conspired to delay Appellant's application to allow Respondent Bohn to ready his own competing application. Pa58, ¶26. Even if this allegation was true, the Noerr-Pennington doctrine, however, specifically protects competitive motivations. Like the defendants in Structure Building, Respondent Bohn has a right to object to an application before his local planning board and to participate in judicial proceedings. Moreover, as the Appellate Division observed in Fraser, it does not matter that such

opposition might be motivated by competitive, or even selfish, concerns (here, they were not). The only consideration that matters is whether Respondent Bohn course of action in asserting their objections was objectively reasonable. Appellant's Complaint did not (and could not) make any particularized allegations of objective unreasonable behavior.

Indeed, a review of the record indicates that Respondent Bohn's actions have been objectively reasonable.[4] SLTC moved to intervene in the First Suit, and the Superior Court found that its application had merit and allowed SLTC to intervene. SLTC also made a cross-motion for summary judgment, and the court granted that motion in part. SLTC then moved for reconsideration of the portions of the cross-motion the court had denied, and again it won relief when the court dismissed count four of the complaint. At every turn, therefore, SLTC's (and Respondent Bohn's as a trustee of this entity) legal positions have been either fully or at least partially vindicated.

As the court in Fraser noted, when a party takes a legal position that is vindicated even in part, such action cannot be considered a sham as a matter of law. Fraser, 317 N.J. Super. at 39. And Respondents are even better positioned than the defendant in Fraser: in Fraser, the defendant merely demonstrated that its legal

[4] Importantly, Respondent Bohn has not even appeared in the underlying lawsuit here, *i.e.*, Suit #1.

position merited review by the New Jersey Supreme Court, even if the Supreme Court ultimately rejected the defendant's position. Here, not only have Respondents' legal positions cleared the low bar of advancing non-frivolous arguments, but those arguments have prevailed.

Simply put, Appellant's Complaint is an attack on the right to lodge objections to a proposed development project. The objections asserted are facially meritorious, or at a minimum, objectively reasonable, and Appellant failed to plead otherwise in the Complaint. As the Village Supermarket court rightly observed, permitting Appellant to sue Respondent Bohn would damage him for exercising his First Amendment rights and assert a chilling effect on other who may seek to exercise these essential rights.

Accordingly, Respondent Bohn respectfully requests that this Court affirm the Trial court's dismissal of the Complaint.

D. ***Appellant's Appellate Argument Fails***

Under these circumstances, Appellant cannot plead that Respondent Bohn has engaged in sham litigation, so the Court below properly determined that Respondent Bohn deserved the full immunity offered by the Noerr-Pennington doctrine. Appellant's brief does not challenge the application of Noerr-Pennington or the Court's analysis of the same. Instead, Appellant argues simply that the Court below made improper inferences because it did not consider Appellant's arguments

related to the Respondent's alleged unreasonableness in challenging Appellant's claim that its property is a "farm" under Right to Farm Act, N.J.S.A. 4:1C-3. Appellant also claims that the Court relied upon information outside of the record that should have converted the motion to one for summary judgment. These arguments fail.

As to any alleged inferences drawn, Appellant appears to speculate that the Court did so, but Appellant cannot point to where the Court did so. First, Appellant's "farm" claim not part of its first Complaint, but instead its Amended Complaint, which as noted above, was not properly before the Court because Appellant failed to comply with R. 4:9-1, and the Court struck the same. Second, Appellant fails to note that this claim, *i.e.*, whether Respondents challenge Appellant's claim that that property qualifies as a "farm," was validated by the Superior Court in Suit #1, Pa142, Pa146, PA148-149. So, even if the Court did analyze the declaratory judgment claim, which it did not, Noerr-Pennington would protect Respondents in this regard (but, again, the Court below did not examine this claim).

Second, the Court did not rely on any matters outside of the record. While it is true that Respondent Bohn submitted certain documents in support of his motion, those documents do not convert the motion to one for summary judgment. "In evaluating motions to dismiss, courts consider allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the

basis of a claim." See Footnote 2, supra, citing Banco Popular, 184 N.J. at 183 (2005); Krugman, 2015 WL 1880073. See also Teamsters Local 97 v. State, 434 N.J. Super. 458, 414 (App. Div. 2014) (public records admission on a motion to dismiss); Myska v. New Jersey Mfrs. Ins. Co, 440 N.J. Super. 458, 482 (App. Div. 2015) (documents referenced in Complaint can be referenced on a motion to dismiss).

Here, Respondent Bohn submitted available public records and documents to establish that Appellant did not meet the definition of a "farm" at the relevant time. Specifically, Respondent Bohn submitted documents from the HCADB, establishing that Appellant admitted that it did not meet the eligibility criteria under the Farmland Assessment Act, N.J.S.A. 54:4-23.6(a), because the property has not been "devoted to agricultural and/or horticultural uses for at least two successive years immediately prior to the tax year …". Pa287, Pa289. According to Appellant's application to this board, the property had only been a farm for one year. Pa287, Pa289. These public records establish that, pursuant to the Farmland Assessment Act and the HCADB at the time of the underlying filing, Appellant was not eligible for any declaration that it is a "farm" until at least September 25, 2024 once it satisfies the criteria necessary to be declared a farm.

Initially, the Court's decision does not reveal that these documents were even considered as the Court did not consider the Amended Complaint. Moreover, even

if these documents were considered, these documents are public record and available for court review on a motion to dismiss.

III. THIS COURT SHOULD AFFIRM DISMISSAL OF THE COMPLAINT WITH PREJUDICE BECAUSE THE "AMENDED COMPLAINT" WOULD HAVE BEEN SUBJECT TO DISMISSAL AS FUTILE

Because Appellant failed to meet the requirements of R. 4:9-1, the Appellant forfeited its right to amend the Complaint, the Court below correctly struck the proposed amendment, and this Court need not consider the Amended Complaint further. Nonetheless, even if the amendment was permitted, it was nonetheless futile, so dismissal with prejudice was appropriate.

R. 4:9-1 governs the amendment of a pleading, requiring the leave of court or written consent for any amendment after the filing of an Answer. Although such motions are to be "granted liberally," the determination is "best left to the sound discretion of the trial court in light of the factual situation existing at the time each motion is made." Kernan v. One Washington Park Urban Renewal Assocs., 154 N.J. 437, 456-57 (1998). Although a Rule 4:6-2(e) motion to dismiss is ordinarily granted without prejudice to filing an amended complaint, see Printing Mart, 116 N.J. at 772, dismissal with prejudice is appropriate if amendment would be futile, Johnson, 401 N.J. Super. at 246-47.

An amendment should be denied when it is futile, *i.e.*, when a subsequent motion to dismiss must be granted. Mustilli v. Mustilli, 287 N.J. Super. 605, 607

(Ch. Div. 1995). Amendment also is properly denied where its merits are marginal and allowing the amendment would unduly protract the litigation. See Stuchin v. Kasirer, 237 N.J. Super. 604, 609 (App. Div. 1990). If the proposed cause of action is "not sustainable as a matter of law," the court should refuse leave to amend. Interchange State Bank v. Rinaldi, 303 N.J. Super. 239, 256–57 (App. Div. 1997).

Here, the Appellant filed an Amended Complaint without satisfying R. 4:91. More importantly, although the Court below did not consider the Amended Complaint, the filing of this document revealed what a future amended pleading would look like if this matter was dismissed without prejudice and leave to amend permitted. An analysis of this proposed amendment establishes that even if Appellant met the requirements of R. 4:9-1, the Amended Complaint would have been nonetheless futile.

A cursory review of the Amended Complaint establishes that it continued the Complaint's failure to state a cognizable cause of action against Respondent Bohn. As set forth further below, the Amended Complaint remained an effort to chill public participation, which implicates Noerr-Pennington immunity, and failed to plead any real damages because Plaintiff has yet to suffer any real damages. Moreover, although the Amended Complaint contained new allegations involving the Right to Farm Act, N.J.S.A. 4:1C-3, those allegations required a declaration that can only be made before an administrative farm board, not in the Court below yet. Accordingly,

as the Amended Complaint continued to allege futile claims, dismissal of the matter with prejudice was proper.

A. *The Amended Claims Remain Barred by the Noerr-Pennington Doctrine*

As noted above, Noerr-Pennington immunity barred Appellant's Complaint, and the same principles apply to the amendment. New Jersey law recognizes that Respondent Bohn had a right to oppose Appellant's planned cannabis/hemp project at the local level, and, if those efforts are unsuccessful, in the courts. Structure Building Corp, 377 N.J. Super. 467. As long as Respondent Bohn's grounds for objecting to the project are objectively reasonable, his motivation is irrelevant. Fraser, 317 N.J. Super. at 38. Respondent Bohn's motives can even be anti-competitive, as long as they have a sound basis. Id. Appellant, other the other hand, does not have the right to punish Respondent Bohn with this lawsuit.

Here, the record is clear that a court or a municipal agency has validated each and every step Respondent Bohn and/or Co-Respondents have taken in opposition to Appellant's application. The LTPB adopted Respondents' position in ruling it did not have jurisdiction over the initial application. The Superior Court granted Respondent's application to intervene in the parallel suit brought by Appellant and twice granted Respondent's summary judgment motion in the parallel suit, first on the initial motion, and then on a motion for reconsideration. This objective validation of Respondents' actions provides Respondent Bohn with the protection of the Noerr-

Pennington doctrine.

Most importantly, no allegations in the Amended Complaint would change this result. Instead, the Amended Complaint continued to offer meager, unsubstantiated factual assertions to the effect that Respondent's actions were a "sham" that deprives Respondents of the protections of Noerr-Pennington. The Amended Complaint continued its predecessor's failure to explain why Respondents' actions were objectively unreasonable, which actions were validated by Lebanon Township and the Superior Court.

B. *Appellant's Amended Tortious Interference Claim is Futile Because Appellant Cannot Plead Damages*

Absent from Appellant's pleadings below, amended or otherwise, is a sustainable allegation that Appellant has suffered any damages resulting from Respondents' actions. In other words, even if Appellant was permitted to file its Amended Complaint, that pleading establishes that any damages claim in this regard is premature because there is no existing basis upon which Appellant can claim it has suffered any damages yet. If the challenge to Appellant's cannabis/hemp project succeeds, then Appellant has suffered no harm. On the other hand, if Appellant is correct, and Respondents' actions delayed the enjoyment of certain rights or privileges, then Appellant can bring a claim for abuse of process when the underlying matter is complete. But as of now, Appellant has not suffered any damages, as the Court below correctly recognized.

At best, this matter is akin to the controversy at issue in Village Supermarkets, 269 N.J. Super. 224. There, the court held that in a fight over an ongoing zoning matter, the plaintiff's action was premature and that "[t]here is no valid tort theory upon which plaintiff can proceed at this time." Id. at 239.

> If [defendant] is acting improperly in connection with the current hearings before the municipal planning boards, it will eventually have to answer in damages. The propriety or impropriety of its role in the quasi-judicial proceeding before the municipal boards cannot be evaluated until those proceedings have come to a conclusion. Additionally, there can be no proof of damages at this stage. While exactitude is not required to prove damages, the most significant element is unknown: whether plaintiff will build its supermarket.
>
> [Id. at 229.]

Similarly, here, a significant element of Appellant's claim remains unavailable for pleading at this stage: whether Appellant will build its project. Accordingly, as the Amended Complaint cannot plead a valid claim of damages, Appellant's amended tortious interference claim is futile and should remain dismissed with prejudice.

C. ***Appellant's Amended Declaratory Judgment Claim Fails Because Primary Jurisdiction Rests with an Administrative Agency***

Appellant's Amended Complaint seeks a declaration, pursuant to the Right to Farm Act, N.J.S.A. 4:1C-3, that Appellant's property is a commercial farm, and, as such, Respondents' opposition to the cannabis/hemp project is in the wrong forum, *i.e.*, the Lebanon Planning Board. These amended allegations are futile because the Superior Court does not have primary jurisdiction over Appellant's claim yet.

Instead, primary jurisdiction to regulate agricultural management practices rests with the County Agricultural Board ("CAB") or the State Agricultural Development Committee ("SADC"). Twp. of Franklin v. Hollander, 338 N.J. Super. 373, 391–92 (App. Div. 2001), aff'd, 172 N.J. 147, (2002); Twp. of Franklin v. Hollander, 172 N.J. 147, 151 (2002) ("[t]he CAB and SADC have primary jurisdiction over disputes between municipalities and commercial farms.").

The Farm Act establishes primary jurisdiction with the CAB/SADC, so it does not deprive the court of subject matter jurisdiction. See Boldt v. Correspondence Mgmt., Inc., 320 N.J. Super. 74, 83 (App. Div. 1999). But "primary jurisdiction recognizes that both the administrative agency and the courts have subject matter jurisdiction, ***but for policy reasons, the agency should exercise its jurisdiction first***." Borough of Closter v. Abram Demaree Homestead, Inc., 365 N.J. Super. 338, 348 (App. Div. 2004) (***emphasis*** added), citing, Borough of Haledon v. Borough of N. Haledon, 358 N.J. Super. 289, 301–02 (App. Div. 2003); Muise v. GPU, Inc., 332 N.J. Super. 140, 158–59 (App. Div.2000). Primary jurisdiction "comes into play whenever enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956).

More importantly, this Court has specifically held that the question the Amended Complaints asks, *i.e.*, whether Appellant's property qualifies as a farm,

must be decided first by the CAB or SADC. In dealing with the issue for the first time, the Appellate Division ruled:

> ***In any event, we hold now that when a farming operation arguably meets the definition of a commercial farm under N.J.S.A. 4:1C–3, it is the CAB or SADC that must first decide whether the farm actually meets the definition***. The agency is deprived of jurisdiction only when the operation clearly cannot meet the definition of a commercial farm under the Farm Act.
>
> [Borough of Closter, 365 N.J. Super. at 349-350. (***emphasis*** added).]

Available public record submitted to the Court below establishes that Appellant did not exhaust its available administrative remedy before the relevant CAB or SADC. According to the HCADB, the property has not been "devoted to agricultural and/or horticultural uses for at least two successive years immediately prior to the tax year …" as required by the Farmland Assessment Act, N.J.S.A. 54:4-23.6(a). Pa287, Pa289. Indeed, Appellant's application to the HCADB revealed that the property had only been a farm for one year, so Appellant was not eligible for any declaration from this Board that it is a "farm" until at least September 25, 2024. Pa287, Pa289. Once it satisfies the criteria necessary to be declared a farm, Appellant can again apply. But as primary jurisdiction rests with an administrative agency, Appellant must seek a declaration in that forum first, not the Superior Court.

Based on the foregoing, because any amendment to the Complaint would be futile, Appellant's Complaint properly dismissed with prejudice.

CONCLUSION

Based upon the foregoing, it is respectfully requested that this Court deny Appellants' appeal and affirm the decision of the Court below.

MASON, GRIFFIN & PIERSON, P.C.
Attorney for Defendant-Respondent

/s/ Paul M. Bishop
Date: November 20, 2024 Paul M. Bishop, Esq.

THE NAR GROUP, INC. Plaintiff - Appellant v. SAVE LEBANON TOWNSHIP COALITION, a nonprofit corporation; WILLIAM BOHN; RICHARD WEBB, ESQ.; ROBYN DAVIDSON; ABC and XYZ CORPORATIONS 1-10; JOHN and JANE DOES 1-10, jointly, individuals and severally Defendants - Respondents	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-003773-23T1 Civil Action On Appeal from Superior Court of New Jersey, Law Division, Hunterdon County Sat Below: Hon. Kevin M. Shanahan, A.J.S.C.

BRIEF OF DEFENDANTS/RESPONDENTS SAVE LEBANON TOWNSHIP COALITION, RICHARD WEBB, AND ROBYN DAVIDSON

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Preliminary Statement

Defendants/Respondents Save Lebanon Township Coalition ("SLTC"), Robyn Davidson, and Richard Webb ("Defendants") submit this opposition to the appeal by Plaintiff/Appellant The NAR Group, Inc. ("Plaintiff"). Plaintiff's Complaint against Defendants was a classic "strategic lawsuit against public participation," or "SLAPP" suit intended to discourage Defendants from opposing Plaintiff's applications to the Lebanon Township Planning Board and Board of Adjustment to create a cannabis and hemp cultivation facility. Plaintiff's attempt to chill Defendants' opposition to its plans implicated the Noerr-Pennington Doctrine, which recognizes a citizen's constitutional right to petition the government for redress. Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and United Mine Workers of America v. Pennington, 381 U.S. 657 (1965). It is that doctrine that immunized from civil liability Defendants' lawful exercise of their First Amendment rights to participate in administrative and judicial proceedings.

On December 1, 2023, the trial court properly dismissed with prejudice Plaintiff's Complaint as to Defendants pursuant to R. 4:6-2(e) for having failed to state a claim as to which relief could be granted. The trial court agreed with Defendants' argument that Plaintiff's allegations ran headlong into Noerr-Pennington. Plaintiff took no action to seek reconsideration or relief from that

decision, and because it did not, the trial court's order dismissing the Complaint became final as to Defendants.

Several months after the trial court's dismissal of all claims as to Defendants, a fourth defendant, William Bohn, whom Plaintiff served much later than it served Defendants, moved to dismiss Plaintiff's claims against him on the same grounds as Defendants argued. Facing near-certain dismissal of its Complaint for the same reasons as the trial court dismissed the Complaint against Defendants, and before the trial court could decide Defendant Bohn's motion to dismiss, Plaintiff attempted to amend its Complaint. That attempted amendment and the procedural arguments it engendered became as much a focus of Defendant Bohn's motion to dismiss as the vindication of Defendant Bohn's constitutional rights. The trial court eventually denied Plaintiff's attempt to amend the Complaint and dismissed the Complaint as to Defendant Bohn for the same reasons it dismissed as to Defendants.

Plaintiff now makes the procedural arguments about its attempted amendment to the Complaint the centerpiece of its appeal. But those issues have nothing to do with Defendants, who were not parties to the case by the time Plaintiff attempted to file its Amended Complaint. For Defendants, this appeal is a straightforward review of the trial court's adjudication of their motion to dismiss, and whether Plaintiff could advance its claims as alleged in the original Complaint as against Defendants. Because Defendants' arguments as to why the Complaint failed to state a claim are

unassailable, this Court should affirm the dismissal of the Complaint against Defendants.

Procedural History

Plaintiff filed and served its Complaint on September 6, 2023. Pa58. The Complaint contains one count, Unlawful Interference with Prospective Economic Advantage against Defendants and Defendant Bohn. Id. Defendants moved to dismiss the Complaint pursuant to R. 4:6-2(e) on October 11, 2023. Pa65. The trial court heard oral argument on December 1, 2023, and dismissed with prejudice the Complaint as to Defendants on that day. Pa1. The trial court held that, "the actions by Defendants are entitled to the protections of the Noerr-Pennington Doctrine, and as such, the complaint must be dismissed." Pa22.

On February 7, 2024, Plaintiff finally served the Complaint on Defendant Bohn. Pa223. On April 12, 2024, Defendant Bohn moved to dismiss the Complaint pursuant to R. 4:6-2(e). Pa225. On May 14, 2024, in conjunction with opposition to Defendant Bohn's motion to dismiss, Plaintiff filed an Amended Complaint. Pa246. The trial court heard argument on Defendant Bohn's motion on June 20,

2024, rejected the filing of Plaintiff's Amended Complaint, and dismissed the Complaint with prejudice as to Defendant Bohn.[1] Pa23.

Facts

I. "The First Suit"

Several relevant facts as to Defendants' successful motion actually were found outside the four corners of the Complaint itself, but were nonetheless appropriate for consideration by the trial court without converting Defendants' motion into one for summary judgment.[2] (Importantly, and contrary to Plaintiff's assertion, the relevant facts when it comes to Defendants did not appear in the

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[1] It should be noted that throughout its brief, Plaintiff casually alludes to "Defendants" as having moved to dismiss in April 2024, and having opposed the filing of the proposed Amended Complaint. The use of the plural is inaccurate and misleading. Defendants took no action on this matter after the trial court dismissed the Complaint with prejudice as to them on December 1, 2023.

[2] A court is not limited only to the four corners of a complaint when deciding a R. 4:6-2(e) motion. "In evaluating motions to dismiss, courts consider allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005) (quotation omitted); see also, Teamsters Local 97 v. State, 434 N.J. Super 393, 414 (App. Div. 2014) (finding that court's reference to materials on Division of Pensions and Benefits website were "matters of public record" properly considered on motion to dismiss); Krugman v. Mazie Slater Katz & Freeman, 2015 WL 1880073 (App. Div. Apr. 27, 2015) (court may take judicial notice of pleadings in other matters before the court or any other court in New Jersey). Courts also may consider documents referenced in the complaint, even if not attached to the complaint. Myska v. N.J. Mfrs. Ins. Co., 440 N.J. Super. 458, 482 (App. Div. 2015).

proposed Amended Complaint – that document had no relevance, and indeed did not even exist, when the trial court entered the Order from which Plaintiff appeals as to Defendants.) Plaintiff's Complaint referenced and alluded to a pending matter in the Superior Court, Law Division, The NAR Group, Inc. v. Lebanon Township Planning Board, et al, Docket No. HNT-L-454-22 (the "First Suit"). Pa62 at ¶ 24. That allusion made relevant a handful of pleadings and judicial decisions in that matter that were properly part of the record on this matter.

The relevant alleged facts from the First Suit were as follows. On April 20, 2022, Plaintiff submitted an application to the Lebanon Township Planning Board seeking site plan approval for an indoor medical cannabis facility. Pa81 at ¶ 33. After several delays requested by Plaintiff, the Planning Board scheduled a hearing on Plaintiff's application for September 20, 2022. Pa85-86 at ¶¶ 47-50. Before the September hearing, Defendant Webb submitted a brief to the Planning Board in opposition to Plaintiff's application, arguing that Plaintiff's application should be heard by the Board of Adjustment, and not the Planning Board. Pa88 at ¶ 55. The Planning Board agreed with Defendant Webb's position, adopted a resolution declining jurisdiction over the matter, and found that the Board of Adjustment had jurisdiction over the matter. Pa91-92 at ¶¶ 61-63. Consistent with Defendant Webb's objections and the Planning Board's findings, Plaintiff subsequently filed an application with the Lebanon Township Board of Adjustment. Pa198.

On November 17, 2022, Plaintiff sought to end-run the Planning Board process by filing a six-count complaint against the Lebanon Township Planning Board and the Township Committee and Mayor, which demanded automatic approval of its application and damages for violations of due process (the First Suit). Pa70. Plaintiff moved for summary judgment against the defendants in the First Suit, and that motion was returnable on March 3, 2023. Pa105. Before the return date on that summary judgment motion, Defendant SLTC moved to intervene in the First Suit as a defendant. Pa108. Just a few days later, in anticipation of obtaining Defendant-Intervenor status, Defendant SLTC opposed Plaintiff's summary judgment motion and cross-moved for summary judgment to dismiss the complaint. Pa111. The cross-motion argued, as Defendant Webb had previously, that the proper venue for Plaintiff's application was the Board of Adjustment, not the Planning Board. Da3.

Plaintiff's summary judgment motion failed, but Defendant SLTC's two motions met with success. By order dated March 27, 2023, the trial court denied Plaintiff's motion for summary judgment, granted Defendant SLTC's motion to intervene, and granted in part Defendant SLTC's motion for summary judgment, dismissing counts one and two of Plaintiff's complaint in the First Suit. Pa114. Both parties made motions for reconsideration of the March 27th Order, and Defendant

SLTC once again enjoyed a partial victory – Judge Suh denied Plaintiff's in toto and granted Defendant SLTC's motion as to count four of Plaintiff's complaint. Pa156.

II. The Complaint

Compared with the First Suit, the factual allegations in the Complaint were rather sparse, especially concerning Defendants. After describing a conversation between Defendant Bohn and Plaintiff's principal, Plaintiff alleged that Defendant Bohn somehow "enlisted" – without saying how – the help of Defendant Webb in opposing Plaintiff's Planning Board application. Pa61 at ¶ 20. Plaintiff further alleged that Defendants Webb, Bohn, and Davidson agreed to form Defendant SLTC. Id. at ¶ 21. Plaintiff alleged that Defendant SLTC had no other purpose than to defeat Plaintiff's multiple applications, and had no valid reason for wanting to do so. Pa62 at ¶ 22. Plaintiff also alleged that SLTC opposed Plaintiff's current hemp crop cultivation, again, without, in Plaintiff's estimation, a valid reason. Id. at ¶ 23. Plaintiff alleged that Defendant SLTC solicited and received monetary contributions and used them to file "spurious pleadings" against Plaintiff. Id. at ¶ 24.

Without any substantiation, Plaintiff alleged that Defendants Webb and Davidson conspired with Defendant Bohn to use Defendant SLTC to delay Plaintiff's progress on its applications while Defendant Bohn readied his own efforts to cultivate cannabis in Lebanon Township. Id. at ¶ 26. Plaintiff alleged that

Defendants knew that Plaintiff would make millions from cultivating cannabis on its property. Id. at ¶ 27. Plaintiff concluded by alleging,

> In this way, by forming SLTC for the express purpose of opposing Plaintiff NAR Group's land use applications for development of the Property for cannabis and/or hemp cultivation, Defendants engaged in a wrongful act that interfered with Plaintiff's ability to sell medical cannabis, and/or hemp, all without justification, causing Plaintiff great damages.
> [Pa63 at ¶ 29.]

Legal Argument

I. Motion to Dismiss Standard

"An appellate court reviews de novo the trial court's determination of the motion to dismiss under Rule 4:6-2(e)." Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019). Under the New Jersey Rules of Court, for a complaint to survive a motion to dismiss, "the essential facts supporting plaintiff's cause of action must be presented . . . conclusory allegations are insufficient in that regard." Scheidt v. DRS Techs., Inc., 424 N.J. Super. 188, 193 (App. Div. 2012). When deciding a motion to dismiss brought pursuant to R. 4:6-2(e), a court must "assume that the nonmovant's allegations are true and give that party the benefit of all reasonable inferences." NCP Litigation Trust v. KPMG LLP, 187 N.J. 353, 365 (2006). When considering all of the relevant facts from whichever sources, if "the complaint states no basis for relief and . . . discovery

would not provide one, dismissal of the complaint is appropriate." County of Warren v. State, 409 N.J. Super. 495, 503 (App. Div. 2009).

Dismissal without prejudice so as to give a plaintiff the opportunity to amend a complaint is "ordinarily" the remedy on a successful R. 4:6-2(e) motion. Pressler & Verniero, Current N.J. Court Rules, Comment R. 4:6-2(e) (Gann). Whether to deny a plaintiff that opportunity and therefore dismiss a matter with prejudice remains within the sound discretion of the trial court, however. Johnson v. Glassman, 401 N.J. Super. 222, 247-48 (App. Div. 2008). In Johnson, the plaintiffs brought a shareholder derivative suit. Id. at 227. The defendants brought a R. 4:6-2(e) motion against the plaintiffs' amended complaint, arguing that the plaintiffs had failed to allege "demand futility" adequately.[3] Id. The trial court granted the defendants' motion with prejudice, and the Appellate Division affirmed. Relevant to the case at hand, the Appellate Division noted that the plaintiffs did not counter the defendants' motion with a certification or a proposed amended complaint that would have offered facts sufficient to revive their claim. Id. at 246-47. The Appellate Division concluded that it was reasonable for the trial court to infer from the plaintiffs' silence or inaction that there were no facts that might save the

[3] "Demand futility" describes the concept that shareholder derivative plaintiffs who do not make a pre-suit demand that the board of directors of a corporation act in the best interests of the shareholders must show that any such demand would have been futile. Id. at 228-230.

plaintiffs' claim, and it was therefore not an abuse of the trial court's discretion to have dismissed the claim with prejudice. Id. at 247. As discussed below, that reasoning is relevant in this matter.

II. The Rules of Court Support Defendants

Plaintiff argues that the trial court erred in refusing to recognize Plaintiff's proposed Amended Complaint. Pb at 12-15. The argument is premised on the notion that because a motion to dismiss is not a "responsive pleading," Plaintiff was free to seek a R. 4:9-1 amendment of the Complaint. Id. Because both Defendants and Defendant Bohn made motions to dismiss rather than filed answers, Plaintiff reasons, the trial court should have permitted Plaintiff to freely amend the Complaint as to all of them. But Defendants and Defendant Bohn obviously stand in very different places. Plaintiff cannot direct its R. 4:9-1 argument at Defendants, whom the trial court had dismissed four months before Plaintiff attempted to amend the Complaint.

"A judgment of involuntary dismissal or a dismissal with prejudice constitutes an adjudication on the merits 'as fully and completely as if the order had been entered after trial.'" Velasquez v. Franz, 123 N.J. 498, 507 (1991) (quoting Gambocz v. Yelencsics, 468 F.2d 837 (3d Cir. 1972)). "Such a dismissal 'concludes the rights of the parties as if the suit had been prosecuted to final adjudication adverse to the

plaintiff.'" Alan J. Cornblatt, P.A. v. Barow, 153 N.J. 218, 243 (1998) (quoting Mayflower Indus. v. Thor Corp., 17 N.J. Super. 505, 509 (Ch. Div.), appeal dismissed, 20 N.J. Super. 39 (App. Div.1952)). In this matter, the trial court dismissed the Complaint with prejudice as against Defendants on December 1, 2023. Pa1. The matter was therefore over and complete and there was no active complaint to amend as to Defendants in April 2024.

R. 4:37-2(e) supports that position. That Rule states,

> If a claim is dismissed as to a defendant before final judgment as to all issues and all parties, that defendant shall have notice of and the right to participate in any subsequent proceedings in the case.
> [R. 4:37-2(e).]

The Rule notes that a dismissed party has the right, but not the obligation, to monitor and participate in the case from which it has been dismissed, indicating that, until the complaint is reinstated against that defendant, the defendant is out of the case.

There was a procedural path available to Plaintiff if Plaintiff had wanted to bring revised claims against Defendants after December 1, 2023. Plaintiff could have moved for relief from the December 1, 2023, Order pursuant to R. 4:50-1. A successful motion to vacate the Order under that Rule would have permitted Plaintiff the opportunity to then use R. 4:9-1 to amend the Complaint as to Defendants. Plaintiff did not make a R. 4:50-1 motion, however, and instead tried to amend the Complaint against Defendants after the trial court had dismissed them from the case. That was improper. And with this appeal having been filed and the trial court no

longer having jurisdiction over the matter, a R. 4:50-1 motion is not an option for Plaintiff at this time.

III. Privilege for Litigants Exercising Constitutional Rights

Substantively, the crux of this matter is that Plaintiff alleged that Defendants' constitutionally protected activity in opposition to Plaintiff's business plans amounted to tortious behavior. There is nothing new or novel about a court recognizing that Defendants merit protection from intimidating lawsuits and dismissing claims that would impinge on their rights.

A. State Common Law Privilege

The recognition of a federally protected right to participate in public proceedings paralleled developments in the common law in New Jersey. In the 1960s, as the United States Supreme Court was considering its Noerr and Pennington decisions, the New Jersey Supreme Court also recognized that parties enjoy a privilege or immunity from civil liability when they engage in certain publicly beneficial acts. In Middlesex Concrete Products & Excavating Corp. v. Carteret Industrial Association, 37 N.J. 507 (1962), the court was faced with a claim of tortious interference with contractual rights and economic advantage brought by a contractor against taxpayers in a municipality. The underlying transaction at issue was complicated, and the bench trial it spawned lasted 121 days, but the essence of

the dispute was that a group of taxpayers, some of which were corporations that paid a substantial percentage of the municipality's property taxes, opposed a settlement payment by a municipality to a contractor that would have resulted in a significant increase in municipal taxes. Id. at 518. When the municipality ultimately opted not to enter into the settlement, the contractor sued the municipality and the objecting taxpayers for having petitioned the municipal government to reject the settlement. Id. at 516. The result of the trial was a win for the taxpayers: the contractor recovered far less than what it would have recovered had the municipality entered into the proposed settlement. Id. at 518.

The New Jersey Supreme Court viewed the success of the municipality and the vindication of the taxpayers' objections as evidence that the objections were privileged acts aimed at protecting an important public interest, namely, the public fisc. Id. As such, the plaintiff could not sue the defendants for having urged the municipality to reject the settlement. The court also summarily dismissed the defendant's argument that because the objecting taxpayers had a private or personal interest in the municipality's decision (i.e., lowering their own property tax bills), they had acted with "malice" and therefore had waived the privilege attaching to their petition to the government. In a foreshadowing of decisional law to come, the Supreme Court noted, "[i]t has been held, however, that where defendant has a

proper purpose in view, the addition of ill will does not defeat the privilege."[4] Id. at 519.

B. Noerr-Pennington and Land Use Applications

1. The Doctrine Protects Objectors

Sixty years after Middlesex Concrete, the controversy in Lebanon Township involves similar dynamics and a much more developed body of law emanating from United States Supreme Court precedent in Noerr and Pennington. The facts at issue here retell a familiar story in New Jersey land-use law: developer wants to build on a property for a particular purpose; developer must first get the requisite approvals from the local planning board; a group of citizens appears before the planning board, or even files suit, in an attempt to thwart the planned development; and developer accuses those citizens of tortiously interfering with developer's economic advantage.

The problem for Plaintiff, and plaintiff-developers in similar circumstances, is that New Jersey courts recognize that the First Amendment to the Constitution of the United States affords citizens the right to petition their government for redress in just that way. U.S. Const., Amnd. 1 ("Congress shall make no law . . . abridging

[4] New Jersey's strong public policy of those who actively participate in public matters continues to this day. The most recent example is the Legislature's unanimous enactment of the Uniform Public Expression Protection Act, N.J.S.A. 2A:53A-49 to -61, which creates an expedited process for the dismissal of SLAPP suits such as the one at issue here. Significantly, Plaintiff filed its complaint on September 6, 2023, the day before Governor Murphy signed the new anti-SLAPP bill into law, which went into effect one month later.

. . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.") Because citizens have that right, courts will not permit civil liability to attach to its exercise. In Noerr and Pennington, the United States Supreme Court recognized and protected that core constitutional right in the context of antitrust litigation. Noerr, 365 U.S. 127; Pennington, 381 U.S. 657. Our New Jersey courts have applied the Noerr-Pennington in many analogous circumstances, including in the context of land-use disputes.

For example, in Structure Building Corp. v. Abella, 377 N.J. Super. 467, 469 (App. Div. 2005), the plaintiff developer sought approval from a planning board for a six-lot subdivision. A group of homeowners, one of which was an attorney, opposed the subdivision plan before the planning board. Id. The group of homeowners even filed a series of prerogative writ actions to stop the development, but ultimately the planning board approved the project. Id. at 470-71. The developer then sued the unsuccessful homeowners for malicious abuse of process, malicious use of process, and tortious interference with prospective economic advantage. Id. at 469. The defendants moved for summary judgment, and the trial court granted their motion. In dismissing the developer's suit, the trial court stated:

> we don't want to chill resident[s'] rights to object, and they have a right to object, and when they come out and exercise that right, the last thing they want to happen to them was to be hit with a lawsuit. So, if we didn't have Noerr-Pennington Doctrine, the Court would have to create

> one, because certainly that's unfair to the residents and to persons who wish to object to the actions of developers.
> [Id. at 472.]

On appeal, the Appellate Division affirmed the trial court. The Appellate Division put the matter in context as follows:

> The right of homeowners to participate in hearings and oppose zoning applications that affect their property is recognized and encouraged by laws which require they be given notice and an opportunity to be heard - an opportunity to participate actively in the approval process. If dissatisfied with the actions of a zoning board, they have an absolute right to appeal to the courts. Plaintiff's complaint seeks to punish defendants for the exercise of these rights.
> [Id. at 471.]

2. The "Sham" Litigation Exception - an Objective Test

The privilege afforded objecting parties under the Noerr-Pennington Doctrine is not limitless – a defendant can waive the immunity if it truly abuses the judicial system and engages in "sham" objections plainly designed to obstruct or harm the plaintiff. Importantly, when analyzing whether a party has engaged in sham litigation, the court cannot take into account any subjective motivation by the objecting party. It must focus only on the objective reasonableness or validity of the citizen's objection.

To underscore the objective nature of the sham litigation test, the Appellate Division has made clear that parties do not lose Noerr-Pennington protections just because the motivation behind an objection is anti-competitive in nature. In Fraser v. Bovino, 317 N.J. Super. 23 (App. Div. 1998), the plaintiff was a real estate agent

who lost out on commissions when a condominium development fell through. The local planning board approved the project, but a neighbor, who was also a developer and who himself had wanted to purchase the property through his own corporation, filed a prerogative writ action challenging the planning board's approval. Id. at 23. (Other facts revealed in discovery showed the objector to be aggressive, and even ruthless, in employing legal and extra-legal tactics to stop the condominium development from going forward. Id.) After three years of litigation, the New Jersey Supreme Court eventually granted certification on substantive issues raised by the objector's litigation, but ultimately denied the neighbor's challenge. Id. Nevertheless, the delay caused by the litigation caused the owners of the property to abandon their plans for the condominium development. Id. at 24. The real estate agent who never earned any commissions on the failed project sued multiple parties on various theories of liability, including the objecting neighbor for tortious interference with prospective economic advantage. Id.

The Appellate Division reviewed a complicated tangle of outcomes that were the result of motions and cross-motions for summary judgment. Relevant to the case at hand, the Appellate Division held that Noerr-Pennington immunity applied to the self-interested neighbor who objected to the project. Id. at 37. The court noted that parties can forfeit Noerr-Pennington immunity if "the conduct at issue is a mere sham to cover . . . an attempt to interfere directly with the business relationships of

a competitor." Id. (citation and quotation omitted). To constitute sham litigation, the Appellate Division explained, "'the lawsuit must be objectively baseless in the sense that no reasonable litigant ... could conclude that the suit is reasonably calculated to elicit a favorable outcome.'" Id. at 39 (quoting Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 60 (1993)).

Importantly, the court made clear that in determining whether objecting conduct is a "sham," "[t]he question . . . is answered objectively, without consideration of the actor's underlying motivation, no matter how improper it may be." Id. at 38. In so holding, the court cited two seminal United States Supreme Court opinions on the issue: Professional Real Estate Investors, 508 U.S. at 59 ("[T]he legality of objectively reasonable petitioning 'directed toward obtaining governmental action' is 'not at all affected by any anticompetitive purpose [the actor] may have had.'") (citations omitted) and City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380 (1991) ("That a private party's ... motives are selfish is irrelevant (under Noerr-Pennington).") Id.

In the light of that precedent, the court analyzed the actions of the objecting neighbor in challenging the planning board's decision. The court noted that the mere fact that the New Jersey Supreme Court granted certification on the prerogative writ action meant that the neighbor's legal position was, as a matter of law, not a sham, even if the neighbor did not ultimately prevail. Id. at 39. As a result, the objecting

neighbor's participation in the prerogative writ action enjoyed the immunity granted by Noerr-Pennington, and the court granted summary judgment to the objecting neighbor dismissing the frustrated realtor's claims. Id.

3. Noerr-Pennington and Motions to Dismiss

Courts can invoke, and have invoked, the Noerr-Pennington Doctrine at the motion to dismiss stage. In a thoughtful opinion under circumstances similar to the present matter, the Law Division dismissed without prejudice a claim against multiple defendants in response to a motion pursuant to R. 4:6-2(e). In Village Supermarkets, Inc. v. Mayfair Supermarkets, Inc., 269 N.J. Super. 224 (Law Div. 1993), the plaintiff wanted to build a supermarket and applied for variances from the local planning board to do so. Id. at 228. The defendant owned an already-existing supermarket in the municipality, and to prevent the new supermarket from coming into the town, the defendant both directly opposed the plaintiff's variance application and funded opposition to the application by other taxpayers. Id. at 228, 235. The plaintiff sued the defendant for tortious interference with contract and prospective economic advantage. Id. at 228.

The trial court dismissed the claim without prejudice on a R. 4:6-2(e) motion because the Noerr-Pennington doctrine immunized the defendant's activities. "To impose damages for objecting in a planning board proceeding would chill First Amendment rights (and parallel state constitutional rights) which are protected under

the Noerr- Pennington doctrine." Id. at 229-30. The court quoted an opinion of the United States District Court for the District of Northern California that vindicated the rights of a similarly situated defendant:

> For the reasons given by the Supreme Court in [Noerr], this court is persuaded that all persons, regardless of motive, are guaranteed by the First Amendment the right to seek to influence the government or its officials to adopt a new policy, and they cannot be required to compensate another for loss occasioned by a change in policy should they be successful.
> [Sierra Club v. Butz, 349 F.Supp. 934 (N.D. Cal. 1972).]

The court also ruled that the plaintiff could not plead that the defendant's opposition was a sham until the planning board issues had been decided. Village Supermarkets, 269 N.J. Super. at 231. The court observed:

> It is true that repetitious, baseless activity, including litigation, can be actionable as a sham that is excepted from First Amendment protection. See e.g., California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972). But we cannot know yet whether [the defendant's] activity in the municipal proceeding is baseless. To allow such a premature action would encourage layer upon layer of collateral litigation. This would seriously chill objector participation at the municipal level, especially in cases (although not this one) where the applicant is a substantial commercial entity and the objectors are individuals of modest means.
> [Id. at 237-8.]

The trial court in Village Supermarkets further defended its decision to dismiss at the pleading stage. "This is not a case where an inadvertent or technical omission in the complaint suggests an amendment that would cure the defect. There is no valid tort theory upon which plaintiff can proceed at this time." Id. at 239

(citing Printing Mart v. Sharp Electronics, 116 N.J. 739, 771–72 (1989)). The court protected the defendants from time-consuming and expensive litigation and did not permit the plaintiff to harass the defendants with unnecessary discovery to find or bolster a cause of action. "Nor should discovery be permitted. . . . Where the unknown facts are unknown because they have not yet occurred, and not because of incomplete discovery, it is obvious that plaintiff cannot make the required showing." Id. See also, Seidman v. Spencer Savings Bank, S.L.A., 2022 WL 1487001, *3 (App. Div. May 11, 2022) (affirming dismissal of breach of fiduciary duty claim pursuant to Noerr-Pennington Doctrine) (Pa187); Tris Pharma, Inc. v. UCB Manufacturing, Inc., 2016 WL 4506129, *5 (App. Div. Aug. 29, 2016) (affirming dismissal of anti-trust claim on R. 4:6-2(e) motion because of Noerr-Pennington Doctrine) (Pa191).

C. The Trial Court Properly Dismissed Plaintiff's Complaint

In the light of that precedent and common sense, Plaintiff's Complaint failed to state a cognizable cause of action against Defendants. As an initial matter, Plaintiff barely alleged any conduct that could be considered wrongful or tortious. Plaintiff alleged that Defendants agreed to form SLTC. Pa61 at ¶ 21. The Constitution permits Defendants to do so. Plaintiff also alleged that Defendants Webb and Davidson formed SLTC to defeat Plaintiff's application before the Planning Board. Pa62 at ¶ 22. The Constitution and Noerr-Pennington permit them

to do that too. Plaintiff further alleged that Defendant SLTC opposes Plaintiff's plan to cultivate hemp on Plaintiff's property. Id. at ¶ 23. But to hold an opinion on the location of an indoor hemp facility is not a tortious act; in fact, the ability to hold such an opinion also is Constitutionally protected.

The closest Plaintiff came to alleging tortious behavior is the allegation that Defendants filed "spurious" pleadings against Plaintiff. Id. at ¶ 24. But the Rules of Court have protections for Plaintiff in that regard. If Plaintiff truly believed Defendant SLTC's pleadings in the First Suit lack merit or are vexatious in some way, R. 1:4-8 affords a mechanism for dealing with those allegedly frivolous pleadings.

Plaintiff also hinted at tortious behavior in its allegation that Defendants conspired to delay Plaintiff's application so that Defendant Bohn could ready his own competing application.[5] Id. at ¶ 26. Here is where the full force of the Noerr-Pennington Doctrine comes into play. Like the defendants in Structure Building, Defendants have a right to object to an application before their local planning board and to participate in judicial proceedings. Moreover, as the Appellate Division observed in Fraser, it does not matter that such opposition might be motivated by competitive, or even selfish, concerns. (Here, they were not.) The only

[5] This allegation is preposterous and without any factual basis whatsoever, but Defendants submit it is irrelevant for the reasons that follow.

consideration that matters is whether Defendants' course of action in asserting their objections was objectively reasonable.

A review of the record indicates that Defendant SLTC's actions were indeed objectively reasonable. Defendant Webb himself is a licensed attorney who worked diligently on behalf of Defendant SLTC, and Defendant SLTC eventually retained its own legal counsel. Pa58; Pa110. (As the record indicates, neither Defendant Webb nor Defendant Davidson have made any appearance in the First Suit in an individual capacity.[6]) Each time Defendant SLTC made a substantive argument to the trial court in the First Suit, it was either fully or at least partially vindicated. Defendant SLTC moved to intervene, and the Superior Court found that its application had merit and allowed Defendant SLTC to intervene. Pa115. Defendant SLTC also made a cross-motion for summary judgment, and the court granted that motion in part. Id. Defendant SLTC then moved for reconsideration of the portions of the cross-motion the court had denied, and again it won relief when the court dismissed count four of the complaint. Pa153. At every turn, therefore, Defendant SLTC's legal positions were either fully or at least partially vindicated.

As the court in Fraser noted, when a party takes a legal position that is vindicated even in part, such action is not, as a matter of law, a sham. Fraser, 317

[6] To the extent the Complaint failed to allege that Defendants Webb and Davidson participated in any way in the First Suit, the Complaint's dismissal as to them due to the insufficiency of the pleadings was especially appropriate.

N.J. Super. at 39. And Defendant SLTC is even better positioned than the defendant in Fraser: in Fraser, the defendant merely demonstrated that its legal position merited review by the New Jersey Supreme Court, even if the Supreme Court ultimately rejected the defendant's position. Here, not only did Defendant SLTC's legal positions clear the low bar of advancing non-frivolous arguments, but those arguments also prevailed. Under those circumstances, Plaintiff cannot possibly succeed in arguing that Defendants have engaged in sham litigation, and Defendants merit the full immunity offered by the Noerr-Pennington Doctrine.

Plaintiff rests its argument against the application of the Noerr-Pennington Doctrine on the fact that Plaintiff's facility seeks to grow hemp, a legal and largely noncontroversial agricultural product, in addition to cannabis, the more high-profile and controversial of Plaintiff's products. Pb at 17. Because hemp is unobjectionable in and of itself, Plaintiff argues, Defendants could not reasonably oppose Plaintiff's activities. Id. Plaintiff's argument is misleading. As the Complaint correctly alleges, from the beginning Defendants objected to Plaintiff's production facility, which always has been designed to produce cannabis and hemp. Pa62 at ¶ 23. Those objections are and always have been based on the permissible use on the property under existing zoning laws, not the nature of the product that would be produced, which is why the trial court granted Defendants' actions immunity.

That hemp production might be unobjectionable makes no difference to the exercise of Defendants' constitutional rights. As the foregoing cases make clear, Noerr-Pennington's protections are not reserved for objections to illegal or controversial conduct. Indeed, the construction of houses or condominiums (as in Abella and Fraser, respectively), or supermarkets (as in Village Supermarkets), are entirely legal activities that, in and of themselves, are unobjectionable. But objectors to those activities consistently have received Noerr-Pennington protections, because American citizens have constitutionally protected rights to hold opinions and petition their government about a vast array of topics, controversial or not. So simply because Plaintiff wants to build a facility to produce a legal product (hemp) does not mean that zoning objections to that facility are per se unreasonable.

IV. The Trial Court Properly Dismissed the Complaint with Prejudice

Plaintiff suggests that the trial court erred in dismissing its Complaint with prejudice. But as explained above, the decision to dismiss with or without prejudice resides in the sound discretion of the trial court. Glassman, 401 N.J. Super. at 247-48. When faced with Defendants' motion to dismiss, Plaintiff offered no additional facts by way of certification or a proposed amendment to the Complaint that would have indicated to the trial court that Plaintiff could offer anything in addition to what it already had pled in its Complaint. Indeed, Plaintiff could not – a review of the

proposed Amended Complaint reveals that there were no new facts that occurred between the date Plaintiff filed the Compliant (September 6, 2023) and the date on which the trial court dismissed the Complaint (December 1, 2023). The trial court reasonably inferred from that silence or inaction that it had received all of the pertinent facts and legal theories Plaintiff planned to assert or advance at that time. Concluding that the constitutional bar to bringing Plaintiff's claims was too great to overcome based on the allegations before it, the trial court did not give Plaintiff an opportunity to amend its Complaint because doing so would have been futile – Plaintiff had no more to say about the issues before the court. Id. For that reason, the trial court was well within the bounds of its sound discretion to dismiss Plaintiff's claims against Defendants with prejudice.

Plaintiff's attempt to relate back new and evolving allegations to the filing date of the Complaint, September 6, 2023, is significant. As noted above, New Jersey's anti-SLAPP Uniform Public Expression Protection Act, N.J.S.A. 2A:53A-49 to -61 (the "Act"), applies to all causes of action asserted on or after October 6, 2023. In other words, the protections of that act, including a right to file an order to show cause to dismiss complaints, and shift the burden of attorney's fees and expenses for that procedure to plaintiffs, were not available to Defendants when they moved to dismiss the Complaint. But if the present case remains dismissed and Plaintiff files a subsequent suit for other past or future perceived wrongs, the legal

protections of the Act will attach, which makes the likelihood of Plaintiff coming back to court to harass Defendants in the exercise of their First Amendment rights much less likely.[7]

Conclusion

For the foregoing reasons, Defendants respectfully request that this Court deny Plaintiff's appeal and affirm the dismissal with prejudice of Plaintiff's claims against Defendants.

Webber McGill LLC
Attorneys for Defendants Save Lebanon Township Coalition, Richard Webb, and Robyn Davidson

By: _____
James. K. Webber

Dated: November 20, 2024

[7] There is scant caselaw interpreting the Act, but Defendants take the position that even an attempt to shoehorn new allegations into an old cause of action would trigger the protections of the Act. In other words, Defendants reserve their right to avail themselves of the Act if they must respond to the Amended Complaint.

Superior Court of New Jersey

Appellate Division

Docket No. A-003773-23T1

THE NAR GROUP, INC., *Plaintiff-Appellant,* vs. SAVE LEBANON TOWNSHIP COALITION, a nonprofit corporation; WILLIAM BOHN; RICHARD WEBB, ESQ.; ROBYN DAVIDSON; ABC and XYZ CORPORATIONS 1-10; JOHN and JANE DOES 1-10, jointly, individually and severally, *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM THE ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUNTERDON COUNTY DOCKET NO. HNT-L-343-23 Sat Below: HON. KEVIN M. SHANAHAN, A.J.S.C.

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

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Appellant/Plaintiff The NAR Group, Inc. respectfully submits this Reply Brief in further support of its appeal of the June 20, 2024 Decision and Order and the December 1, 2023 Decision and Order, which, together, dismissed this action.

PRELIMINARY STATEMENT

Defendants filed two briefs in opposition, one by Defendant Bohn and one by the remaining defendants. The opposition to the controlling law that a motion to dismiss is not a responsive pleading relies on inapplicable cases, which should be determinative of the Bohn opposition lead to a reversal of the lower Court's disregarding the duly-filed Amended Complaint and the Bohn dismissal.

Defendants' actions were not only objectively unreasonable, they were textbook sham litigation, some of which was conducted with no reasonable expectation of success. Defendants repeatedly decry in their briefs that their motives should not be examined. The Defendants have taken extensive measures to divert attention from the core issue that drives their actions: initially, Defendant Bohn sought to invest in Plaintiff, but upon being denied (as required by law), Defendants launched a campaign aimed at undermining all of Plaintiff's business operations, even simple farming which there was no legal basis to attack. Defendants are trying to exploit the *Noerr-Pennington* Doctrine to advance a personal vendetta, which we submit is not permitted where sham litigation is clear. The purpose of their activities

is undeniable. Plaintiff respectfully submits that this Honorable Court should decline to apply *Noerr-Pennington* to sham litigation, reverse both decisions, and permit the action to be decided on its merits regarding all defendants.

PROCEDURAL HISTORY

Plaintiff-Appellant relies upon the Procedural History included in our original brief.

STATEMENT OF FACTS

Plaintiff-Appellant relies upon the Statement of Facts included in our original brief.

LEGAL ARGUMENT

POINT I

THE DISMISSAL SHOULD BE REVERSED BECAUSE IT EXPRESSLY REJECTS THE ESTABLISHED LAW OF NEW JERSEY (Pa23-45)

NJ Rule 4:9-1 clearly states, "[a] party may amend any pleading as a matter of course at any time before a responsive pleading is served . . ." There is no basis for an erroneous belief that N.J. Rule 4:9-1 was suspended in this action.

Respondent William Bohn claims that a commentator believes "responsive pleading" should include "***including a motion to dismiss,***" but, of course it does not. If the legislature wanted to make this amendment, it could, but it didn't; the newest amendments have been published, and the amendment does *not* exist. – the rule does *not* include a motion to dismiss as a responsive pleading.

Defendant then claims, incorrectly, that "courts have regularly held that a motion to dismiss is a responsive pleading and that the filing of such a motion bars the filing of an amended complaint as of right." To support this, Defendant cites the unpublished case of *Portfolio Recovery Assocs., LLC v. Liwattana*, 2017 WL 2458152, at *2 (N.J. Super. Ct. App. Div. June 7, 2017). However, the *Portfolio Recovery* actually held that a default should not have been entered, and the Court should have ordered the filing of the answer, and remanded the case for a responsive pleading. Thus, in *Portfolio Recovery,* the motion was expressly <u>not</u> the responsive pleading, it was differentiated from the answer which was still required as a responsive pleading. The motion at issue there merely blocked a clerk-entered default.

Defendant then cites the unique case of *Town of Harrison Bd. Of Educ. v. Netcher*, 439 N.J. Super. 164, 178 (N.J. Super. Law Div. 2014), but in their heavily parsed quote, Defendant leaves out all of the important words. The plaintiff therein took a position that his opponent's motion was a responsive pleading, thus removing the issue from the Court's consideration. Thus the point was never debated nor decided by the *Town of Harrison* Court. Defendants then cites a string of irrelevant, cases[1] where the issue at bar was neither considered nor decided.

1. These include *Perez v. Zagami*, LLC, 218 N.J. 202, 205 (2014); *Oasis Therapeutic Life Centers, Inc. v. Wade*, 457 N.J. Super. 218, 227 (App. Div. 2018); *Wisniewski v. Murphy*, 454 N.J. Super. 508, 517 (App. Div. 2018); *Pearson v. DMH*

Six years after *Town of Harrison Bd. Of Education*, the case of *Bank Leumi USA v. Kloss*, 243 N.J. 218 (2020), met the issue at bar head-on, and stated conclusively that a motion to dismiss is not a responsive pleading. Whereas no Answer has been served in this case, Plaintiff timely filed its Amended Complaint with Exhibits before any responsive pleading was filed per N.J. Rule 4:9-1.

The Remaining Respondents do not address this point at all, arguing instead that their dismissal prior to the Amended Complaint renders them immune from the Amended Complaint. However, that would only be true if the Court fails to reverse the first motion to dismiss, which is addressed below.

Defendants did not oppose that NJ Rule 4:6-1(b) which clearly distinguishes between a motion to dismiss and a responsive pleading, "if the motion is denied in whole or part . . . the responsive pleading shall be served within 10 days after notice of the court's action." This statutory language loses all meaning if the motion to dismiss *is* the responsive pleading. The Legislature clearly intended the responsive pleading to be separate from the motion.

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2 Ltd. Liab. Co., 449 N.J. Super. 30 (Ch.Div. 2016); *Delaware River Partners, LLC v. R.R. Constr. Co., Inc*., 2022 WL 2286928 (N.J. Super. Ct. App. Div. June 24, 2022); and the unreported cases of *Roseus v. State*, 2018 WL 4288653 (N.J. Super. Ct. App. Div. Sept. 10, 2018); *Ianncone v. Borough of Glen Ridge*, 2010 WL 4108457, at *1 (N.J. Super. Ct. App. Div. Aug. 6, 2010); and *Bart Commodities v. Hudson Coffee, Inc*., 2017 WL 3469331, at *1 (N.J. Super. Ct. App. Div. Aug. 14, 2017).

Thus, we need delve no deeper than the Rule's literal terms to divine the Legislature's intent. *See, State v. Vigilante*, 194 N.J. Super. 560, 563, 477 A.2d 429 (App.Div.1983); *Douglas v. Harris*, 35 N.J. 270, 278, 173 A.2d 1 (1961).

Similarly, if the motion to dismiss is the responsive pleading, it would also need to provide, or lose, all of its affirmative defenses and counterclaims per New Jersey Rules 4:6-1, 4:6-2, and 4:5-4. Such a ruling would also terminate the need to admit or deny of each paragraph of the Complaint. (Rule 4:5-3).

In all of their research Defendants, apparently *did not find and discuss a single case* where the Court considered and then decided a motion to dismiss is a responsive pleading, and resolved the issue opposite to *Bank Leumi USA, supra.*

The Judge acknowledged that a motion to dismiss is not a responsive pleading, and the *Bank Leumi USA* case, but then wrote that for this case, "the subject motion to dismiss for failure to state a claim serves as a de facto responsive pleading." (Pa43) The Judge thus declared the Amended Complaint untimely. Plaintiff respectfully submits that this should be held to be a reversible error.

POINT II

THE AMENDEND COMPLAINT IS NOT BARRED BY THE NOERR-PENNINGTON DOCTRINE (Pa27-28, 32-33, 44)

Defendants incorrectly speculate that if the Amended Complaint had been considered, it too would have been dismissed. Defendant Bohn argues that his

assertion that all of his actions were objectively reasonable is based on his claim that "a court or a municipal agency has validated" each and every step. (Bohn Brief at p.31) However, is claim does not withstand scrutiny.

First, we ask if a Court of municipal agency has validated that Bohn could file a municipal appeal in violation of N.J.A.C. 2:76-2.8, *et seq*. which preempts local government from using conflicting procedures for cases arising from the Right to Farm Act. No such decision exists; the use of such his illegal "appeal" proceeding was never vindicated and remains objectively unreasonable.

Defendants' abuse of their sham "appeal" is objectively baseless in the sense that no reasonable litigant, let alone one who is themself a lawyer, could conclude that the "appeal" is reasonably calculated to elicit a favorable outcome – as a matter of law it could not (and did not) succeed. As set forth in paragraphs 33-47 of the Amended Complaint, was filed without any chance of success, is not legitimate litigation, but remains objectively a "sham" intended to deprive the Plaintiff of basic utility permits on their property, and to delay and increase litigation costs, and deprives Defendants of the protections of *Noerr-Pennington*. Similarly, no court or municipal agency has validated that harassment of Plaintiff though drone flights, or that racist social-media posts are objectively reasonable. Defendant's claim to the contrary is simply false.

In a directly related issue, Defendant Bohn also states that his attack on the right to farm is no longer an issue, when he says "Appellant was not eligible for any declaration that it is a "farm" until at least September 25, 2024" (Bohn Brief at p.28). September 25, 2024 has now passed. Despite this, Defendant Bohn argues "Moreover, although the Amended Complaint contained new allegations involving the Right to Farm Act, N.J.S.A. 4:1C-3, those allegations required a declaration that can only be made before an administrative farm board, not in the Court." (Bohn Brief at p.30) However, that is objectively inaccurate. The Hunterdon County Agricultural Board declined to hear Plaintiff's application because Plaintiff's farm was not yet mature enough to meet the N.J.S.A. 4:1C-3 definition of "commercial farm." But Plaintiff is still a local farm, without necessary utilities, unlike any similar property in the Township. Thus, all remedies available before the County and local Agricultural Boards were exhausted. Moreover, nothing cited by Defendants removes jurisdiction from this Court, rather it shows how Defendants continue to cause harm by seeking delay by demanding to argue before a Board that declined jurisdiction already.

Defendant Bohn next argues (Bohn Brief at p.32) that no damages are alleged from Defendants' actions. Amended Complaint paragraphs 50-52 however do allege damages, so again, Defendant Bohn's claims are counter to the Record before this Court. Plaintiff has also been deprived of the use of their buildings, because the sham

"appeal" stopped utility permits, and Defendants have argued against issuing those permits, which has caused the Plaintiff to incur substantial damages.

Defendants all try to compare this action to a law division case *Village Supermarket, Inc. v. Mayfair Supermarkets*, 269 N.J. Super. 224 (L.Div. Union Co. 1993) in which a Plaintiff sued for participation in an *ongoing* municipal hearing so the Court ruled the action was premature. Here, however, Defendants withdrew their illegal "appeal", so it is over and complete, not pending before any hearing.

Bohn also argues that the lower Court does not have jurisdiction, because an agency may also have jurisdiction, citing from *Borough of Closter v. Abram Demaree Homestead, Inc*., 365 N.J. Super. 338, 348 (App. Div. 2004) that "primary jurisdiction recognizes that ***both the administrative agency and the courts have subject matter jurisdiction***." Thus, Bohn nullifies his own assertion. Jurisdiction under N.J.S.A. 2A:15-51, et seq. is also directly cited in the Amended Complaint at paragraph 60.

POINT III

THE PREVIOUSLY DISMISSED DEFENDANTS ARE NOT IMMUNE TO THE AMENDMENT OF THE COMPLAINT (Pa20-22)

The SLTC Brief (from Save Lebanon Township Coalition, Richard Webb and Robyn Davidson) argues that the Defendants who were initially dismissed from this action by the December 1, 2023 Decision and Order should be immune from the Amended Complaint, based on the fact that aforementioned Order was a

dismissal with prejudice. (SLTC Brief, p.10) However, Defendants fail to acknowledge that if that Order and Decision are overturned here, then that dismissal with prejudice is undone, and they would remain a part of this action.

POINT IV

THE DISMISSAL SHOULD BE REVERSED BECAUSE IT DISMISSED WITH PREJUDICE (Pa1, 42)

In its June 20, 2024 decision, the Court acknowledged that "if the Court decides the complaint should be dismissed, such dismissal should be without prejudice. *Printing Mart-Morristown*, *supra*, 116 N.J. at 772." Pa42. Yet the December 1, 2023 Order expressly dismisses the original complaint against the moving defendants "WITH PREJUDICE" (all caps in original Order). Pa1. No reason is given by the Court for violating the acknowledged case law and standard that the action would be dismissed without prejudice. *Id*.

In the SLTC Brief, Defendants point out that a motion to dismiss can result in a dismissal with prejudice upon a holding that any attempt to amend further would be futile. *See*, *Johnson v. Glassman*, 401 N.J. Super. 222, 247 (App. Div. 2008) In contrast to *Johnson*, the Judge below did not examine if amendment would be futile. The Amended Complaint shows that the amendment *is* a proper complaint against the Defendants. Thus, this case does not fall under the *Johnson* exception, and should not have been dismissed with prejudice.

POINT V

THE DISMISSAL SHOULD BE REVERSED BECAUSE IT RELIED ON INFERENCES IN FAVOR OF DEFENDANTS (Pa 18-22, 27-28, 32-33)

The Court below never converted the motion to dismiss into a summary judgment motion, but adopted Defendants' factual assumptions to decide the motion to dismiss. This was reversible error as discussed below.

Defendant STLC agrees that "An appellate court reviews *de novo* the trial court's determination of the motion to dismiss under Rule 4:6-2(e)." *Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C.*, 237 N.J. 91, 108 (2019).

The Court should accept Plaintiff's alleged facts as true for purposes of assessing the viability of Plaintiff's pleading and afford the plaintiff every reasonable inference of fact. *See*, *Craig v. Suburban Cablevision, Inc.*, 140 N.J. 623, 625 (1995). Even if a generous reading of the allegations "merely suggests a cause of action," the complaint will survive the motion. *F.G. v. MacDonell*, 150 N.J. 550, 556 (1997). The Court below acknowledged these rules. Pa42.

Applying those standards, the Court below correctly held that "Plaintiff's allegations…do meet the elements of a claim for Unlawful Interference with Prospective Economic Advantage, especially when coupled with the allegation that Defendant was motivated by anti-competitive purposes, i.e. a desire to have his own hemp farm." Thus, the original Complaint did state a cause of action.

However, the Court then turned its attention to the *Noerr-Pennington* doctrine. Paragraph 23 in the original Complaint. alleged that Defendants opposed Plaintiff NAR Group's hemp crop farming and cultivation, with "absolutely no legitimate reasons" why Plaintiff's 'right to farm' can be infringed. Pa62.Complaint Paragraph 26 also alleged that Defendants attempted block both cannabis *and hemp* cultivation. Pa247-252. No brief yet seen by this Court has provided any objectively reasonable cause to oppose fully-legal hemp farming.

However, Plaintiff's moving brief did establish that Defendants actions against Plaintiff's hemp farming was objectively *un*reasonable. The SLC Brief tries to minimize their improper behavior saying at p.22 of the LSLTC Brief that "to hold an opinion on the location of an indoor hemp facility is not a tortious act." However, the Complaint is not suing for holding an opinion, it is for taking sham legal action against hemp production to weaponize their opinion, which is objectively meritless under the law – that is not protected by the *Noerr-Pennington* doctrine.

Thus, facts were in issue, and the Court had no discovery on whether the Defendants' lawyers had any basis to believe that the right to farm didn't apply, or if their litigation against Plaintiff's farm was a pure sham. Thus, the Court below had a clear basis to rule the hemp opposition was objectively unreasonable,

and no over-riding counter-argument from Defendants, and no objective facts upon which to rule. The Court would be required to draw all inferences in favor of the Plaintiffs, as cited above, but on this issue the Court did not.

In their defense, the SLTC Brief cites *Middlesex Concrete Products & Excavating Corp. v. Carteret Industrial Association*, 37 N.J. 507 (1962), regarding a summary judgment decision, which is decided under a different standard of proof. This that case is not applicable to this issue. The SLTC Brief then cites *Structure Building Corp. v. Abella*, 377 N.J. Super. 467, 469 (App. Div. 2005), which is another case appealed from a summary judgment decision where (unlike this action) no material issue of fact was in dispute.

Then the SLTC Brief asks this Court to believe that "Those objections are and always have been based on the permissible use on the property under existing zoning laws, not the nature of the product that would be produced, which is why the trial court granted Defendants' actions immunity." Considering the nature of this entire action, their social media posts, and all briefs before this Court, it is crystal clear that the SLTC litigation is *entirely* about the products that would be produced, cannabis and hemp, and for STLC to claim otherwise is not credible. Defendants' crusade was mounted in revenge for not being allowed to invest in the project.

Here, however, the Court below summarily, but incorrectly held that "Plaintiff has offered no arguments offering support for the proposition that Defendant's objections are patently unreasonable," However, the Court below never addressed Plaintiff's extensive factual issues and argument to support for the proposition that Defendants' objections are patently unreasonable.

Main St. at Woolwich, LLC v. Ammons Supermarket, 451 N.J. Super. 135, 144, 165 A.3d 821 (App. Div. 2017), *cert. denied,* 231 N.J. 329 (2017) is informative. The defendants in that action argued that their actions of petitioning the local government for zoning changes or other governmental actions were protected under the *Noerr-Pennington* doctrine. They had made certain claims or representations about the plaintiff to government authorities, and the plaintiff sued them for defamation and interference with business relations. The Appellate Division considered whether the *Noerr-Pennington* doctrine applied, recognized that the protection of legitimate petitioning activities from tort liability does not extend to "sham" petitions that are not genuinely aimed at influencing the government but is instead a cover for an attempt to interfere with competition or harm a business for improper motives. That describes Defendants actions perfectly. The sham "appeal" to block Plaintiff from having utilities on the property all winter merely affirms intentional interference with Plaintiff's business. The *Main St. at Woolwich, LLC* court remanded the matter for

the Lower Court to determine if the defendants therein engaged in "sham" litigation.

Further the Plaintiff objected below to the Court's exposure to arguments outside the pleadings, that could not be considered on a motion to dismiss. The motion was never converted into one for summary judgment, yet the Court permitted Defendants to argue facts outside the record over Plaintiff's objection. *See*, T1 at 6:13-24 in the first motion and T2 at 13:6-19 in the second.

Both of Defendants' motions were almost exclusively about, matters outside the pleadings. To consider such argument would have required the Court to convert the motions to summary judgment motions and not decide them as motions to dismiss. However, this conversion did not take place, and if it had, then genuine issues of material fact would have been in dispute requiring discovery and a denial of summary judgment. The lower court utilized the motion to dismiss standard, but then it should not have considered those matters outside both Complaints, such as the SLAPP allegations.

The Court below not only considered allegations of matters outside the Complaint, it adopted an inference supporting Defendants' position, and failed to afford the Plaintiff every reasonable inference of fact, and in fact, based his ruling upon incorrect inferences adverse to the Plaintiff.

Plaintiff further emphasizes the importance for this Honorable court to

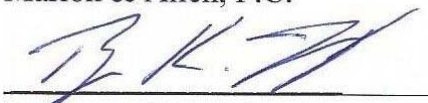
recognize the fundamental principles of due process and fundamental fairness that underpin our judicial system. Plaintiff has acted in good faith throughout this process, seeking to address the harms caused by the Defendants on their merits.

CONCLUSION

Based on the foregoing, for each of the above reasons and all of them together, Plaintiff respectfully requests that the dismissals be reversed, that the Amended Complaint be reinstated against all defendants, permitting the case to proceed to a conclusion on the merits.

Dated: December 4, 2024

Respectfully Submitted,
Marion & Allen, P.C.



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