

THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS

CLAUDE de BOTTON, et al. : TRIAL DIVISION- CIVIL
: VS. :
: OCTOBER TERM 2010
: NO. 1997
MARC B. KAPLIN, ESQ., et al. :
: Superior Court Nos.
: 1635 EDA 2012
: ---- EDA 2012

OPINION

On May 22, 2012, this Court entered an Order and Findings in support thereof, stating in relevant part:

After conducting an in camera review of the submitted documents, the following are found to be discoverable and are **ordered to be produced**. The numbers used to identify the documents are referenced from Defendant's charted submissions:

1(and 2), 8, 15, 16, 17, 18, 19, 21, 23, 24 (and 27), 30, 33, 36 (and 46), 38, 39, 48, 49 (and 54), 53 (and 60), 57, 59, 61, 62, 82, 83 and 88.

The following documents are **not required to be produced**:

3, 4, 5, 6, 7, 11 (and 13), 26 (and 28), 32, 37 (47 and 52), 44 (and 45), 75 (and 78), 81.

Some of the documents on the *need not produce list* are there because they are repetitious of other documents on the *must produce list*. If they are on the *must produce list*, this will control.

Further, the documents in Defendants' chart, numbers 84 through and including 94 were not produced. They appear to be publicly available research documents and if such is accurate, they are equally available to Plaintiff and need not be produced.

Group three, which is a series of Amended Federal Complaints in various non-final draft form, need not be produced.

The unredacted versions of the documents required to be produced must be within ten (10) days.

Following the entry of this Court's Findings and Order, the Kaplin Stewart Defendants¹ appealed on May 30, 2012 and filed their Concise Statement of

¹ Kaplin Stewart Meloff Reiter & Stein, P.C., Marc B. Kaplin, Esquire, Barbara Anisko, Esquire, and

Errors complained of on Appeal on June 22, 2012. (See Docket). The BPG Defendants² appealed on May 31, 2012 and filed their Concise Statement of Errors Complained of on Appeal on June 21, 2012.

The issue to be addressed on appeal is whether the documents ordered to be produced are protected from discovery by an attorney/client privilege existing between the Kaplin Stewart Defendants and the BPG Defendants or by virtue of the work product doctrine.

Generally, the standard of review on appeal of a discovery order is abuse of discretion." *Lockley v. CSX Transp. Inc.*, 2010 Pa. Super. 167, 5 A.3d 383, 388 (2010), quoting *Berkeyheiser v. A-Plus Investigations, Inc.*, 2007 Pa. Super. 336, 936 A.2d 1117, 1125 (2007).

The underlying Action is a Wrongful Use of Civil Process brought by a real estate developer against another real estate developer and its counsel defendants. The Action maintains that Defendants brought Sherman Anti-Trust claims in Federal Court in violation of 42 Pa. C.S. 8371 Pa. Cons. Stat. Ann. §8351 *et seq.* The Federal claims alleged violations of Section 1 of the Sherman Act (Restraint of Trade) and Section 2 of the Act (Attempted Monopolization). Within the body of law particular to the Sherman Act, there are concepts which represent sub-textual matters that define and shape the attendant jurisprudence.

One such concept is known as a “*Twombly*” issue. For purposes of this

Pamela Tobin, Esquire

2 Ellis Acquisition, L.P., Management Partnership Benefit, L.P., Executive Benefit Partnership Campus, L.P., Berwind Property Group, Ltd., Genber/Management Campus, LLC, Cottages at Ellis Owners Association, Inc., Kelly Preserve Owners Association, Inc., Ellis Preserve Owners Association, Inc., Campus Investors Office 2B, L.P., Campus Investors Cottages, L.P, Campus Investors D Building, L.P., Campus Investors H Building, L.P., Campus Investors I Building, L.P., Campus Investors 25, L.P., Campus Investors Office B, L.P., BPG Real Estate Investors-Straw Party 2, L.P., and BPG Real Estate Investors-Straw Party 1, L.P.

decision, the issue is best captured by Headnotes 3 and 5 of the Lawyer's Edition of the *Twombly* opinion. *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544; 127 S.Ct. 1955; 167 L.Ed.2d 929; 2007 U.S. Lexis 5901. (2007).

Because § 1 (15 U.S.C.S. §1) of the Sherman Act does not prohibit all unreasonable restraints of trade, but only restraints effected by a contract, combination, or conspiracy, the crucial question is whether challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express. While a showing of parallel business behavior is admissible circumstantial evidence from which the fact finder may infer agreement, it falls short to conclusively establishing agreement or itself constituting a Sherman Act offense. Even conscious parallelism, a common reaction of firms in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and output decisions is not in itself unlawful. The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.
Id. LEd HN 3.

While a complaint attached by a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss does not need detailed factual allegations, a Plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.
Id. LEd HN5.

Another such concept is known as the *Noerr Pennington Doctrine*. For purposes of this decision, a competent but necessarily limited explanation follows:

Section 1 of the Sherman Act makes it unlawful for persons to engage in a "combination...or conspiracy, in restraint of trade." However, a wide variety of undertakings by persons acting in concert, to seek legislative action, judicial relief, administrative agency activity, or action by the executive branch of government might result in governmental steps which restrain competitors or diminish competition. Indeed, the very act of seeking that

governmental relief even if unsuccessful may have adverse competitive effects. Similarly, “monopolization or attempts to monopolize,” which are proscribed by Section 2 of the Sherman Act, might be advanced by an individual or firm seeking one of these forms of governmental assistance. Additionally, conduct which is regulated by other provisions of the antitrust laws may also involve or be affected by governmental intervention and private requests for such assistance.

Although such conduct may raise competitive concerns which the antitrust laws are generally designed to protect, petitions by individuals or groups of persons for governmental action or intervention implicate other important political, and even constitutional, values. In the seminal decision dealing with the interface of antitrust prohibitions and the right to seek governmental relief, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, the Supreme Court identified various reasons that private requests for such action are generally *immunized* from challenge under the antitrust laws.

First, permitting an antitrust action to be predicated on private requests for governmental action would actually impair the ability of the government to function. Because the government in a representative democracy is acting on behalf of its citizens and must know what they desire and believe would best serve their interests, it is important that these channels of communication be encouraged and kept open. Second, prohibiting such private requests would raise constitutional questions. The *First Amendment* protects freedom of speech and the right to petition governmental officials. Thus, even if Congress in 1890, when enacting the Sherman Act, had sought to limit these constitutional rights, it is doubtful that such a result would be permissible. Third, the *Noerr* Court inferred a contrary legislative intent. The Fifty-first Congress affirmatively chose not to extend the antitrust laws to reach conduct of a distinctly *political* nature.

10-77 Federal Antitrust Law § 77.1.

The exemption from the *Noerr-Pennington* immunity would arise if the “petitioning activities” were not in good faith.

In *Noerr*, the Supreme Court stated that petitioning activities which were a “mere sham” of true attempts to

engage in political conduct, and which were designed simply to exclude competitors or injure competition, would not be protected from antitrust scrutiny. Yet, this was mere dictum; the Court found that the facts there fell far short of the “sham” attempt.

In *California Motor Transport Co. v. Trucking Unlimited*, however, the Supreme Court held that allegations that defendants used the political process solely to deny their competitors “free and unlimited access” to administrative agencies and the courts were sufficient to take the conduct outside the scope of the *Noerr-Pennington* immunity. However, the plaintiffs’ allegations in that case were rather general, and therefore the contours of the “sham exception” were still left unclear.

In *California Transport*, the parties were competing groups of trucking companies subject to regulation by federal and state agencies. The defendants were principally established carriers; the plaintiffs were attempting to enter some of the defendants’ markets. The plaintiffs alleged that the defendants instituted frequent, groundless and harassing actions before administrative agencies and in the courts, in an attempt to frustrate the adjudicative process and with the purpose of denying to the plaintiffs “free and unlimited access” to those tribunals. It was this type of conduct which the Supreme Court concluded might result in the loss of *Noerr* immunity.

10-77 Federal Antitrust Law § 77.4.

The third issue, which dominates the scope of discovery here, was made very much apparent as a result of the Federal Court’s dismissal of the underlying Sherman Act Complaint. This issue is the failure of the Plaintiffs in the Federal Action to prove that a “relevant geographic market” exists. *BPG Real Estate Investors Straw Party 1, L.P., et al. v. Claude de Botton, et al.*, 2:09- CV-01714 SD Doc. 43 (Federal Opinion).

Therefore, the scope of discovery should allow for inquiry into the areas which include acts by the Defendants here which are relevant to:

1. How the relevant geographic market was defined in the underlying Federal Complaint;

2. Issues concerning the level of fact pleading necessary to satisfy the pleading requirement established under *Twombly* and its progeny;
3. Issues concerning the *Noerr-Pennington* Doctrine which involve the Plaintiff's right to petition governmental agencies as part of permitted political conduct and Plaintiff's inherent *First Amendment Rights*;
4. Issues concerning whether the petitioning activities were "mere sham."

Various allegations in Defendant's Federal Complaint implicate the above issues.

B. The Relevant Market

28. The relevant market in this action is the business of developing and operating mixed use town centers located at the intersection of Route 3, an east/west axis, and Route 252, a north/south axis in the Township (the "**Intersection**").

29. The physical location of mixed use town centers is circumscribed by a number of unique factors. Mixed use town centers can only be built where a municipality is pre-disposed to such development and/or use zoning regulations permit flexible or mixed use development. Because mixed use town centers must be substantially sized to accommodate their multiple uses, including pedestrian circulation and parking facilities, they also require significant acreage and therefore can only be located in areas where large tracts of land are available for development. In addition, easy access to highways and the presence of a surrounding population at the appropriate density and per capita and household income levels are essential ingredients of mixed use town center developments, particularly for their retail, office and entertainment components, to be able to thrive.

30. The Ellis Preserve Tract uniquely fulfills the above criteria in that: (a) in or about 2001, the Township designated in its Comprehensive Plan the location of the Ellis Preserve Tract as suited for mixed use town center development; (b) at over 200 acres, the Ellis Preserve Tract contains the requisite amount of acreage for development as a mixed use town center; (c) the Ellis Preserve Tract is located at the cross roads of two major highways, Route 3 and Route 252, giving north/south and

east/west access; and (d) market studies confirm that the Ellis Preserve Tract is surrounded by the requisite population demographics, as to both density and per capita and household income levels, so as to be particularly suited for mixed use town center development.

31. The Ellis Preserve Tract and the Marville Tract are the exclusive sites within the Township which can be developed as mixed use town centers due to their size, access to major highways and proximity to the required population density at the required per capita and household income levels.

32. Because the Ellis Preserve Tract and the Marville Tract are located within a mile and a half of each other, Plaintiffs and the de Botton entities are in direct competition for the same category of high-end retail, commercial and office tenants and for residential tenants/buyers looking to lease space or buy homes in mixed use town centers within the Township.

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38. The approximately five mile area surrounding the cross roads of the two major access and travel roads (Route 3 and 252), with the requisite demographics, make the relevant geographic market a premium destination for mixed use town center development, as recognized in the Township's Comprehensive Plan.

39. Madison/Marquette had defined the relevant geographic market for the Shoppes of Marville as five miles.

40. Claude de Botton has admitted in deposition testimony that the geographic market for the Ellis Preserve MUTC and for the Marville MUTC is five miles.

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64. Public meetings were held on the proposed agreement at which the de Botton Entities, directly or indirectly, through their co-conspirators MadisonMarquette, Franklin, Semeister and IC4NS, continued to oppose the Ellis Preserve MUTC by continuing to make false and misleading statements about the Ellis Preserve MUTC as more fully described in

paragraphs 80 and 81 below.

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F. Defendants' Anti-Competitive Conduct and False Statements

66. Once the de Botton Entities obtained Township approval for development of the Marville MUTC, Defendants orchestrated a scheme and embarked on a course and pattern of anticompetitive conduct to prevent, deter and delay the development of the Ellis Preserve MUTC.

67. Commencing in or around early 2007, Defendants knowingly and intentionally agreed, combined and conspired with MadisonMarquette, Franklin, IC4NS and Semeister to orchestrate and engage in a course of conduct to delay, obstruct and intentionally prevent development of the Ellis Preserve MUTC and to prevent competition for tenants and residential buyers in the mixed use town center market in the Township.

68. Upon information and belief, de Botton and Semeister agreed that Semeister would form IC4NS for the specific purpose of creating and fomenting community opposition aimed at the Ellis Preserve MUTC and not the Marville MUTC in order to delay, protract the public hearing process in an attempt to influence the Township to take action against the Ellis Preserve MUTC or inordinately delay any approval of the Ellis Preserve MUTC until the Marville MUTC was developed and operating.

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71. Upon information and belief, de Botton and Franklin agreed to use MadisonMarquette to influence the Township to take action against the Ellis Preserve MUTC.

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74. de Botton tried to prevent, deter and/or delay the Township from approving the Ellis Preserve MUTC by engaging in a publicity campaign to incite the neighboring business and residential community to oppose the Ellis Preserve MUTC, and by conspiring with and funding,

either directly or indirectly, community opposition and legal proceedings in opposition to the MUTC, including, *inter alia*:

a. On or about June 15, 2007, de Botton funded the widespread distribution of a letter to residents of the Township suggesting that the Ellis Preserve MUTC would harm the Township: “Do we need, and can the area support, two new retail centers called Lifestyle Village or Town Center” and “Which one, do you think, would most affect traffic in the center of town, the LIFESTYLE CENTER one mile away from town, or the TOWN CENTER in the major crossroads of town.” The Defendants attempt to differentiate the Marville MUTC as a “lifestyle center” and the Ellis Preserve MUTC as a “town center” but the terms are interchangeable.

b. Similarly, on or about June 30, 2007, de Botton funded the distribution of a letter to residents of the Township referring to a “new developer” proposing to create a town center on the Ellis Preserve Tract and questioning whether the community could handle this new development.

c. de Botton thereafter funded the distribution of further mailings to residents of the Township promoting false and misleading statements about BPG’s proposed MUTC including disparaging BPG’s reputation as a developer/owner capable of developing the Ellis Preserve MUTC.

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76. In written and verbal communications to individual members of the Board and Planning Commission, de Botton and Franklin threatened to abandon the Marville MUTC plan and construct and lease five box stores instead if the Ellis Preserve MUTC was approved.

77. de Botton has also attempted to prevent, deter and/or delay the Township from approving the Ellis Preserve MUTC by causing representatives of Defendants to speak out at public meetings against the Ellis Preserve MUTC and make false and misleading statements without identifying their affiliation with Defendants so as to give the impression of wide-spread opposition to the Ellis Preserve MUTC.

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80. Upon information and belief, de Botton in combination and conspiracy with Semeister used IC4NS as an artifice and/or instrumentality to disseminate and distribute false and misleading information to the public concerning the Ellis Preserve MUTC including, *inter alia*:

a. On or about August 8, 2007, Semeister, published in the *Delaware County Press* a statement which contained false and misleading information concerning the Ellis Preserve MUTC and which urged all residents of Newtown Township to oppose the Ellis Preserve MUTC;

b. On or about August 29, 2007, Semeister published in the *Delaware County Press* a Letter to the Editor purporting to be on behalf of IC4NS, which contained false and misleading information concerning the Ellis Preserve MUTC and which urged all residents of Newtown Township to oppose the Ellis Preserve MUTC;

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80. f. IC4NS has held informational meetings to which it has invited the public and at which it has disseminated false and misleading information about the Ellis Preserve MUTC including, *inter alia*, falsely conveying that the proposed development will have a negative impact on local traffic, require road improvements at taxpayer's expense, will burden public services, cause taxes to rise significantly, increase crime, threaten the environment and result in property condemnations.

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81. Upon information and belief, de Botton, in combination and conspiracy with Semeister, caused IC4NS to disseminate false and/or misleading statements about the Ellis Preserve MUTC to libel, disparage and defame BPG and to play on the public's fears, concerns and prejudices...

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82. de Botton's and Semeister's intent was to incite the public to attend and oppose the Ellis Preserve MUTC at Township public hearings using the false and misleading information.

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96. Defendants used and continue to use the municipal and judicial process, without probable cause and in

complete disregard of the law, to directly interfere with BPG's ability to proceed with the Ellis Preserve MUTC.

97. The malicious and sham use of governmental and judicial proceedings and the publicity campaign was and continues to be motivated by anticompetitive conduct and monopolistic purposes.

These documents were found, after an in camera review, to be directly discoverable or reasonably contemplated to lead to discoverable evidence which is the touchstone for discoverability (citations omitted).

For the foregoing reasons, this Court respectfully requests that its decision to order the production of certain documents identified in its Order of May 22, 2012 be **AFFIRMED**.

BY THE COURT:

7-3-12

DATE

ALLAN L. TERESHKO, J.

cc:

Pamela Tobin, Esq/ for Appellant Kaplin
Charles Hardy, Esq/Theodore John P. Chylack, Esq for Appellee DeBotton
William Thomas Mandia, Esq/Jeffrey Alan Lutsky, Esq., for Participant BPG