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October 21, 2010

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VIA HAND DELIVERY

Office of the Clerk
Superior Court of New Jersey
Cumberland County Law Division
60 West Broad Street
Bridgeton, NJ 08302

**Re: TrackRacket, et al v. New Jersey Motorsports Park and City of Millville
NJ Superior Court, Cumberland County Law Division
Docket No.: L-1230-09**

Dear Sir/Madam:

I am enclosing herewith for filing in connection with the above matter, the original and two copies of Plaintiffs' Memorandum of Law in Opposition to Defendant City of Millville's Motion to Quash Subpoenas. Please file the original and return a time/date stamped copy to the courier.

Thank you for your assistance. Should you have any questions or require additional information, please do not hesitate to contact me.

Very truly yours,



RICHARD D. GALLUCCI, JR

RDG/rn
Enclosures

cc: The Honorable Ann McDonnell (via first class mail)
Katharine M. Morris, Esquire (via email and first class mail)
Jeffrey A. DiLazzerro, Esquire, (via email and first class mail)
Michael L. Testa, Jr., Esquire (via email)

I. INTRODUCTION.

Non-party City of Millville seeks an order of this Court quashing the valid subpoenas served on various officials and representatives in connection with Plaintiffs' lawsuit related to noise emanating from the race track operated by remaining defendant New Jersey Motor Sports Park (NJMP). True and correct copies of the subpoenas are attached as Exhibit B to the Certification of Katherine Morris, Esquire ("Morris Cert.") in support of Millville's motion to quash the subpoenas. The crux of Millville's argument is that the officials and representatives of Millville are surrounded by a cloak of legislative immunity in connection with their thoughts and the mental processes they employed at the time of the passage of the noise ordinance, Ordinance 23-2004.

Once again, Millville's argument misses the mark and seeks to quash an area of questioning that neither Plaintiffs, nor their counsel, have any intention of pursuing. Again, this suit is a public and private nuisance suit related to the noise emanating from the race track operated by remaining defendant NJMP. Plaintiffs do not seek to repeal and have never challenged Millville's noise ordinance or the process of the passage of the ordinance. To state otherwise is to ignore Plaintiffs' complaint. Accordingly, as Plaintiffs have no intention of invading the mental process of the local legislature in passing the noise ordinance, Millville's arguments are moot and the motion should be denied.

II. STATEMENT OF FACTS.

On December 23, 2009, plaintiffs filed this action against defendants New Jersey Motorsports Park and the City of Millville. In the Complaint, plaintiffs asserted an action in lieu of prerogative writs pursuant to Rule 4:69 against defendant City of Millville for Millville's failure to enforce its own ordinance related to public nuisances.

On April 26, 2010, following oral argument on Millville's motion to dismiss, the Court dismissed plaintiff's claim seeking to enforce Millville's public nuisance ordinance via action in lieu of prerogative writs. The Court further issued a written opinion citing the grounds for the dismissal. Specifically, the Court determined as follows:

The writ of mandamus is subject to important well-defined qualifications. A plaintiff's right and the defendants' duty must legally be clear. Here, plaintiff's right to have the nuisance ordinance enforced against NJMP is not clear. Although Millville's ordinance defines public nuisance broadly, Millville cannot be compelled to enforce a general public nuisance ordinance against NJMP when it specifically and legislatively exempted NJMP from the noise ordinance. Under the common approach to statutory construction, specific language takes precedence over more general language."

See Court's opinion at 3-4, Exhibit A to Morris Cert.

Following dismissal of Millville as a defendant, on September 20, 2010, Plaintiffs issued subpoenas to various Millville City officials and representatives. The subpoenas were directed to and/or copied current counsel for Millville. Millville now seeks to quash the subpoenas in their entirety or, in the alternative, to have the Court issue a protective order delineating the precise areas of questions as opposed to carving out any specific subject matter.

III. ARGUMENT.

A. **The Court Should Deny Millville's Motion to Quash the Subpoenas as Legislative Immunity is Inapplicable to the Current Case.**

In support of its current motion, Millville argues that “it can only be assumed, based upon the assertions in the Complaint, that the questions of the Council and representatives concern the passage of both the ordinance and resolution, or quite possibly, the City representatives personal ‘thoughts’ or ‘opinions’ concerning the ordinance . . .”. See Millville’s Memo of Law in Support of Motion to Quash at 3. Millville then cites to N.J. Turnpike Authority v. Sisselman, 106 N.J. Super. 358 (App. Div.), certif. denied 54 N.J. 565 (1969), claiming that the mental processes of government officials as to how they made decisions is protected by immunity.

Once again, Millville attempts to re-plead Plaintiffs’ Complaint to include claims that are nowhere to be found in the four corners of the Complaint, and then moves to quash the subpoenas based on such non-existent claims. The Complaint has never challenged the passage of the noise ordinance, an issue previously addressed by the Court when it dismissed Plaintiffs’ action in lieu of prerogative writ against Millville where the Court opined “The court does not address the timeliness argument as plaintiffs are not challenging the validity of the ordinances passed by Millville.” See August 26, 2010, Opinion at 4, attached to Morris Cert.

Plaintiffs do not dispute that a limited immunity exists as to the thoughts and opinions of the Millville officials and/or representatives in connection with their votes to pass the noise ordinance “in the absence of allegations of improper behavior on their part.” See N.J. Turnpike Authority v. Sisselman, 106 N.J. Super. at 367. Accepting that limited exception that is an area Plaintiffs do not seek information on by way of the subpoenas at issue, Plaintiffs have a right to seek discovery from witnesses that is likely to lead to admissible evidence. By way of example, Plaintiffs have every right to seek discovery from Millville on topics including, but not limited

to, actions by Millville to investigate the noise emanating from the racetrack since passage of the noise ordinance; investigations into the complaints of residents, the relationships between and among officers, directors and representatives of the NJMP and the officials and representatives of Millville; and the benefits that have or have not materialized for Millville as a result of the racetrack vis-à-vis any tax abatements or tax amnesty. None of these areas concern the “thoughts” or “opinions” of the Millville officials when they voted on passage of the noise ordinance.

Accordingly, as Plaintiffs have no intention of inquiring into the thought process of the Millville officials in connection with their votes to pass the noise ordinance and can agree to this restriction, the current motion is moot and should be denied.

B. The Proposed Protective Order Submitted By Millville In the Alternative is Overbroad and Impossible for the Court to Police.

In the alternative to quashing the subpoenas at issue, Millville seeks entry of a protective order that seeks to codify the specific areas of questioning during the depositions of the Millville officials rather than simply stating the areas that may not be explored and which form the basis of their motion to quash, namely, the thoughts and mental processes of the officials in passing the noise ordinance. See Proposed Protective Order of Millville.

First, other than the limited legislative immunity as cited by Millville in its briefing on this issue, Millville cites to no authority that would limit Plaintiffs’ discovery in the manner suggested. Indeed, such a limitation is contrary to Rule 4:10-2(a) which expressly provides for broad discovery that “is relevant to the subject matter involved in the pending action.” Second, the proposed protective order by Millville invites future discovery disputes that will require the Court to resolve as it will be impossible to delineate each area of questioning, especially when questioning at a deposition often depends on the answers of the deponent to certain questions.

For these reasons, Plaintiffs can consent to a protective order that prohibits questioning on the thoughts and mental processes of the Millville officials in deciding to pass the noise ordinance. The current proposed protective order is far too overreaching and will inhibit Plaintiffs from seeking legitimate discovery necessary to sustain their burden of proof. As such, Plaintiffs submit it should be rejected by the Court.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs' respectfully request that the Court deny the City of Millville's motion to quash the subpoenas and require the parties to whom the subpoenas are issued to appear for their depositions.

Respectfully submitted,

SPECTOR GADON & ROSEN, P.C.

BY: 

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Richard D. Gallucci, Jr., Esquire

Peter N. Kessler, Esquire

Attorneys for Plaintiffs

TrackRacket, Inc. Michelle Post, David Carrow,
Elizabeth Milne and Byron Robbins.

Dated: October 21, 2010.

SPECTOR GADON & ROSEN, P.C.

By: Oliver D. Griffin, Esquire
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Attorneys for Plaintiffs

TRACKRACKET, INC., a domestic nonprofit
organization, MICHELLE POST, DAVID
CARROW, ELIZABETH MILNE and
BYRON ROBBINS,

Plaintiffs,

v.

NEW JERSEY MOTORSPORTS PARK
and CITY OF MILLVILLE,

Defendants.

:
: SUPERIOR COURT OF NEW JERSEY
: LAW DIVISION
: CUMBERLAND COUNTY
:
: DOCKET NO.: L-1230-09
:
:
: CERTIFICATION OF
: FILING AND SERVICE
:
:
:

I hereby certify that on the 221st day of October, 2010, the original of the within Memorandum of Law in Opposition to Defendant City of Millville’s Motion to Quash the Subpoenas of City of Millville Officials and Representatives and supporting papers was hand delivered for filing to the Clerk of the Superior Court of Cumberland County, 60 West Broad Street, Bridgeton, NJ, and copies were served upon the following interested person(s):

Name and Address

Method

Jeffrey A. DiLazzero, Esquire
Kavanagh Kavanagh & DiLazzero
219 North High Street
Millville, NJ 08332
Attorney for Defendant,
New Jersey Motorsports Park

Email and First Class Mail

Katherine M. Morris, Esquire
Cooper Levinson
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Attorneys for Defendant
City of Millville

Email and First Class Mail

I certify that the foregoing statements made by me are true. I understand that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



RICHARD D. GALLUCCI, JR.

Dated: October 23, 2010