IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. NO. 18-3550

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association; NATIONAL BASKETBALL ASSOCIATION, a joint venture; NATIONAL FOOTBALL LEAGUE, an unincorporated association; NATIONAL HOCKEY LEAGUE, an unincorporated association; OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as MAJOR LEAGUE BASEBALL

v.

GOVERNOR OF THE STATE OF NEW JERSEY; DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; JUDITH A. NASON, Acting Executive Director of the New Jersey Racing Commission; NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.; NEW JERSEY SPORTS & EXPOSITION AUTHORITY

STEPHEN M. SWEENEY, President of the New Jersey Senate;
CRAIG J. COUGHLIN, Speaker of the New Jersey General Assembly
(Intervenors In District Court)

New Jersey Thoroughbred Horsemen's Association, Inc.

Appellant

BRIEF OF APPELLANT NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY AT CIVIL ACTION NO.: 3-14-cv-06450
THE HONORABLE MICHAEL A. SHIPP
ORDER DATED NOVEMBER 16, 2018

McELROY, DEUTSCH, MULVANEY & CARPENTER, LLP
Ronald J. Riccio
One Hovchild Plaza, 4000 Rt. 66, 4th Floor
Tinton Falls, New Jersey 07753

On The Brief:
Ronald J. Riccio, Esq.
Edward A. Hartnett, Esq.
Eliott Berman, Esq.

Attorneys for Appellant
New Jersey Thoroughbred Horsemen's Association, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Third Circuit LAR 26.1, New Jersey Thoroughbred Horsemen's Association, Inc. makes the following disclosure:

1. It has no parent corporations.
2. There are no publicly held companies that hold 10% or more of its stock.

Dated: February 22, 2019

/s/ Ronald J. Riccio
Ronald J. Riccio

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INTRODUCTION

On May 14, 2018, the Supreme Court of the United States rendered a final judgment in this case. Joint Appendix ("A") 319-344 (*Murphy v. National Collegiate Athletic Association*, 139 S. Ct. 1461 (2018)). It held the Professional And Amateur Sports Protection Act, 28 U.S.C. § 3701, *et seq.*, ("PASPA") to be unconstitutional.

For nearly six years prior to the Supreme Court's judgment plaintiffs-appellees, a group of sports leagues ("Leagues"), had repeatedly used the private right of action created by PASPA to block the New Jersey Thoroughbred Horsemen's Association ("NJTHA") from conducting lawful sports gambling at Monmouth Park Racetrack. At every stage of that litigation, NJTHA had argued that PASPA was unconstitutional. Ultimately, the Supreme Court agreed with NJTHA and held PASPA unconstitutional.

Between October 24, 2014 and November 21, 2014, the Leagues procured from the district court a temporary restraining order blocking NJTHA from conducting sports gambling at Monmouth Park ("TRO"). To support their purported imminent threat of irreparable injury the Leagues relied on sworn statements claiming that they needed injunctive relief to protect the integrity of their games from the spread of sports gambling. These sworn statements were false. At the same time as the Leagues were

seeking injunctive relief they were investing in and profiting from the spread of sports gambling. NJTHA provided uncontroverted evidence of the Leagues' double dealing. The district court repeatedly ignored the evidence that the Leagues procured injunctive relief against NJTHA in bad faith.

The district court ordered the Leagues to post a $3.4 million bond at the time the TRO was issued. The purpose of the bond was to guarantee that NJTHA would have a fund available from which it could be compensated for its damages if, under Federal Rule of Civil Procedure 65(c), it was later "found to have been wrongfully enjoined or restrained." NJTHA had every reason to believe that it would be protected by the bond the district court had ordered. But when it came time for the district court to enforce the bond it had previously ordered the Leagues to post, it declined to do so.

Soon after NJTHA's victory in the Supreme Court it moved before the district court for judgment on the bond and for damages in excess of the bond amount (the "Bond Motion"). On November 16, 2018, the district court denied the Bond Motion in its entirety. Despite ultimately prevailing in the Supreme Court and despite being significantly damaged as the result of having been enjoined from conducting lawful sports gambling at Monmouth Park, the district court awarded NJTHA nothing under the bond or otherwise.

The Order of the district court denying the Bond Motion should be reversed and the case remanded with instructions to the district court to: (1) immediately enter judgment awarding NJTHA damages in the full amount of the $3.4 million bond plus interest; and (2) conduct an evidentiary hearing, preceded by accelerated discovery, to determine whether and in what amount NJTHA should receive damages in excess of the bond amount based on the Leagues having filed sworn statements in which they falsely alleged they would suffer irreparable injury unless the spread of sports gambling was enjoined.

STATEMENT OF JURISDICTION

The district court had jurisdiction over the Leagues' claims pursuant to 28 U.S.C. §1331. The district court entered a final Order on November 16, 2018, denying NJTHA's Bond Motion. A3.

NJTHA filed its Notice of Appeal on November 19, 2018, from the district court's November 16, 2018 Order. A1-2. This Court has appellate jurisdiction under 28 U.S.C. §1291.

STATEMENT OF ISSUES FOR REVIEW[1]

1. Did the district court commit reversible error when it decided that NJTHA, despite having won a Supreme Court judgment declaring

[1] These issues were reserved in NJTHA's Brief for Judgment on Injunction Bond and Damages. A348-392.

PASPA to be unconstitutional, had not been "wrongfully enjoined" and thus not entitled to the proceeds on the bond the Leagues had been ordered to post under Federal Rule of Civil Procedure 65(c)?

2. Did the district court commit reversible error when it decided that there was good cause to deny NJTHA the proceeds on the bond it had ordered the Leagues to post under Federal Rule of Civil Procedure 65(c)?

3. Whether NJTHA has established a *prima facie* claim of bad faith against the Leagues based on their having submitted false sworn statements to the court and, if so, whether NJTHA has a right to accelerated discovery and an evidentiary hearing to decide whether and in what amount NJTHA should be awarded damages in excess of the bond amount?

STATEMENT OF RELATED CASES AND PROCEEDINGS

This Court upheld the constitutionality of PAPSA in *National Collegiate Athletic Association v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013) ("*Christie I*") (A153-189) and reaffirmed that holding in *National Collegiate Athletic Association v. Governor of New Jersey*, 832 F.3d 389 (3d Cir. 2016) ("*Christie II*") (A297-315). The United States Supreme Court reversed this Court's judgment in *Christie II* and held PASPA to be unconstitutional. *Murphy v. National Collegiate Athletic Association*, 139 S. Ct. 1461 (2018) (A319-344).

STATEMENT OF THE CASE

A. *Christie I*

In 2011, New Jersey voters approved an amendment to the State Constitution making it lawful for the legislature to authorize sports gambling. N.J. Const. Art. IV, §7, ¶2(D), (F). In 2012, New Jersey enacted a sports wagering Law (the "2012 Law"), N.J. Stat. Ann. §5:12A-1 *et seq.*, authorizing sports gambling at Atlantic City casinos and New Jersey racetracks, including Monmouth Park Racetrack. NJTHA is the licensed operator of Monmouth Park Racetrack. A198 (Complaint) ¶21.

On August 7, 2012, the Leagues filed a complaint (ECF No. 1 in 3:12-cv-4947) ("*Christie I*") in the District Court of New Jersey against the Governor of New Jersey and other state officials (the "State Defendants"). A133-145. Based on the private right of action in PASPA, the complaint sought an injunction restraining the State Defendants from giving operation or effect to the 2012 Law. A142-43 ¶35. To substantiate their claim that they would suffer irreparable injury unless the spread of sports gambling was enjoined, the Leagues relied on what NJTHA alleges were five materially false sworn Declarations from the Commissioners of the NFL, NBA, MLB, NHL, and the President of the NCAA. The Court is respectfully referred to the allegedly false Declarations at A430-458.

On December 11, 2012, the district court granted NJTHA's motion to intervene in *Christie I*.[2] A103 (EFC No. 102 in *Christie I*). On February 28, 2013, the district court issued an Order and Opinion holding that PASPA was constitutional and preempted the 2012 Law. A4-5, A22-45. The district court entered a permanent injunction against the State Defendants. A5.

On September 17, 2013, in a 2-1 decision, this Court affirmed the district court's Order and upheld the constitutionality of PASPA. A153-189 (730 F.3d 208 (3d Cir. 2013)). It did so only after adopting a savings interpretation of PASPA advocated by the Leagues. Under the savings interpretation PASPA was held to be constitutional because it allowed States to repeal sports gambling prohibitions, in whole or in part. On June 23, 2014, the Supreme Court of the United States denied NJTHA's and the State Defendants' Petitions for Certiorari. A190 (573 U.S. 931 (2014)).

[2] On December 11, 2012, the district court also granted a motion by Stephen M. Sweeney, President of the New Jersey Senate, and Sheila Y. Oliver, then-Speaker of the New Jersey General Assembly, to intervene as defendants. A103 (EFC No. 102 in *Christie I*). On January 22, 2013, the United States filed a Notice of Intervention to defend the constitutionality of PASPA (A106 (ECF No. 128 in *Christie I*)) and submitted briefing supporting the constitutionality of PASPA (A106 (ECF No. 136 in *Christie I*)).

B. *Christie II*

On October 17, 2014, New Jersey enacted a law repealing all sports-gambling prohibitions at casinos and racetracks, including Monmouth Park. P.L. 2015 c. 62 ("2014 Repealer") (A468-471). Under the 2014 Repealer, all laws, rules, and regulations concerning sports gambling were repealed to the extent they may apply to Atlantic City casinos, current New Jersey racetracks, and former New Jersey racetrack racecourses. A469. Based on the 2014 Repealer, NJTHA had announced that on October 26, 2014, it would begin accepting sports bets at Monmouth Park. A196 (Complaint) ¶11. The Leagues promptly filed another complaint (3:14-cv-6450) ("*Christie II*") against NJTHA and the State Defendants (A191-215) demanding, *inter alia*, that NJTHA be preliminarily and permanently enjoined from conducting sports gambling at Monmouth Park (A212-14).

To substantiate their claim for injunctive relief the Leagues swore under oath that stopping the spread of sports gambling was "imperative to prevent [] irreparable injury." A196 (Complaint) ¶12; A459-463 (Affidavits verifying Complaint). The Leagues further swore that unless injunctive relief was granted they would suffer the same irreparable injury as "this Court already found sufficient to warrant injunctive relief when the same plaintiffs challenged the 2012 Sports Wagering Law." A210-13 (Complaint)

¶¶61, 65, 69, 74. NJTHA responded that these statements were lies because at the same time as the Leagues claimed they would suffer irreparable injury unless the spread of sports gambling was enjoined they were actively fueling and profiting from the very activity they were seeking to enjoin – the spread of sports gambling not only on their games but on the games of others as well. *See, e.g.*, A548-49 (NJTHA 11/17/14 Letter to Court).

On October 21, 2014, the Leagues applied for an order to show cause ("Order to Show Cause") seeking a TRO against NJTHA and the State Defendants. A472-76. The Leagues argued that "no bond should be required." A478. The Leagues filed their application for an Order to Show Cause on both the *Christie I* docket (ECF No. 174) and *Christie II* docket (ECF No. 12). A472-76. The Leagues filed other identical documents on both the *Christie I* docket and *Christie II* docket. *Compare* A111-113 at ECF Nos. 174, 178, 185, 186, 191, 193 with A122-126 at ECF Nos. 12, 26, 35, 37, 49, 51. The district court filed its orders on both the *Christie I* docket and *Christie II* docket. *Compare* A111-114 at ECF Nos. 175, 179-182, 184, 187-88, 190, 192, 195, 197-200 in *Christie I* with A122-128 at ECF Nos. 13, 27, 31-34, 38, 41, 47, 50, 56, 63-65, 71.

On October 22, 2014, NJTHA responded to the Order to Show Cause. It filed a brief and Certification of Dennis Drazin ("Drazin Cert."). A480-

87. NJTHA argued, *inter alia*, that in the event any injunction was granted a bond was required to be posted by the Leagues pursuant to Fed. R. Civ. P. 65(c). A481-82. The Drazin Certification stated that the lost revenue to Monmouth Park, in the event sports gambling was enjoined from commencing as scheduled on October 26, 2014, would be $1,170,219 per week. A484-87. The Leagues did not dispute anything in the Drazin Certification. A488-510 (Leagues' TRO Reply Brief). They merely argued that any lost revenue that NTJHA would suffer from a TRO was "self-inflicted." A509.

On October 24, 2014, the district court granted a TRO restraining NJTHA from conducting sports gambling at Monmouth Park. A6-8. The scope of the TRO included enjoining sports gambling not only on the Leagues' games but on the games of others with whom the Leagues had no relationship or legal interest, such as soccer, tennis, golf, and boxing. *Id.* In granting the TRO, the district court specifically relied on this Court's holding in *Christie I* that PASPA was constitutional (A55 at lines 6-9; A58 at lines 12-13), a holding ultimately rejected by the Supreme Court. The district court also relied on the Leagues' allegedly false statements made under oath about their claimed irreparable injury if sports gambling was not enjoined. A57-60.

With the issuance of the TRO the district court ordered the Leagues to post a bond in the amount of $1.7 million. A64 at lines 16-17. The district court wrote that "when a risk of financial harm exists for the party to be enjoined, the posting of a security bond is required," citing this Court's decision in *Zambelli Fireworks Manufacturing Co. v. Wood*, 592 F.3d 412 (3d Cir. 2010). A63 at lines 17-20. The district court also cited this Court's decision in *Frank's GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100 (3d Cir. 1988), that the requirement to post a bond "is almost mandatory." *Id.* at lines 20-25 (quoting *Frank's*, 847 F.2d at 103).

On October 27, 2014, the district court extended the TRO for two weeks (through November 21, 2014). A10. It ordered the Leagues to post an additional $1.7 million bond, for a total bond of $3.4 million. *Id.* On November 5, 2014, the Leagues posted a bond in the amount of $3.4 million. A524-29.

On November 19, 2014, the district court, over NJTHA's objection, converted a previously scheduled preliminary injunction hearing into a final summary judgment hearing. A126 at Docket Entry Nos. 50, 56. NJTHA's objection was based, in part, on NJTHA's allegation that the Leagues' false sworn statements about their claimed irreparable injury constituted unclean hands and precluded them from obtaining equitable relief under PASPA.

A548-49 (NJTHA 11/17/14 Letter to Court). On November 21, 2014, the district court issued an Order and Opinion granting the Leagues summary judgment and entering a permanent injunction against the State Defendants. A11-12; A67-82 (61 F. Supp.3d 488 (D.N.J. 2014)).

The district court did not permanently enjoin NJTHA. A12 ¶4. It wrote that "no injunction is being entered against the NJTHA. Therefore, it is unnecessary for the Court to determine the validity of the NJTHA's assertion of unclean hands [of the Leagues]." A81 (61 F. Supp.3d at 497) at n.7.

NJTHA had argued throughout to the district court that because the Leagues had unclean hands, stemming from submitting materially false sworn statements to the court in support of their purported irreparable injury, they were not entitled to the equitable remedy of an injunction. A548-49. By not permanently enjoining NJTHA, the district court was able to brush aside the entire question of the Leagues' bad faith and abuse of judicial processes.

In its Order and Opinion, the district court specifically relied both on its holding and this Court's holding in *Christie I* that PASPA was constitutional. The district court wrote in its *Christie II* Opinion:

> On February 28, after careful consideration of the positions advanced during the course of the litigation, this Court found

> that "Congress acted within its power and [PASPA] does not violate the United States Constitution," and entered a permanent injunction. *Christie I*, 926 F. Supp.2d 551, 554 (D.N.J. 2013). On September 17, 2013, the Third Circuit, in a *de novo* review, affirmed this Court's decision.

A71 (61 F. Supp.3d 488, 493 (D.N.J. 2014)).

On November 24, 2014, the Leagues moved to discharge the $3.4 million bond. A551-52. On December 2, 2014, the district court denied the Leagues' request to discharge the bond. A128 at ECF No. 72.

On August 25, 2015, a panel of this Court by a vote of 2-1 affirmed the district court's November 21, 2014 Order. A286-296 (799 F.3d 259 (3d Cir. 2015)). On October 14, 2015, this Court granted NTJHA's petition for a rehearing *en banc* and vacated this Court's August 25, 2015 Judgment and Opinion. A297, 300 (832 F.3d at 389, 392). On August 9, 2016, this Court, sitting *en banc*, affirmed (9-3) the district court's November 21, 2014 Order. A297-315 (832 F.3d 389 (3d Cir. 2016)). In its Opinion, this Court reaffirmed its holding in *Christie I* that PASPA was constitutional: "we correctly ruled in *Christie I* that PASPA does not commandeer the states in a way that runs afoul of the Constitution." A300 (832 F.3d at 392); *see also* A304-07 (*id.* at 398-402) (explaining why the Court continued to find PASPA constitutional).

C. The Supreme Court's Final Judgment In Favor Of NJTHA

On May 14, 2018, the Supreme Court of the United States reversed this Court's *en banc* Judgment. A319-344 (138 S. Ct. 1461). The Supreme Court held that PASPA was unconstitutional in violation of the Tenth Amendment's anti-commandeering doctrine. A329-335 (138 S. Ct. 1461, 1473-81 (2018)). Not a single Justice voted to uphold the constitutionality of PASPA. The Court also held (6-3) that none of PASPA's provisions were severable.

The Supreme Court explicitly rejected the savings interpretation of PASPA that had been advocated by the Leagues and adopted in *Christie I* and reaffirmed in *Christie II*. A330 (138 S. Ct. at 1474). The Court concluded that even if PASPA was interpreted to allow States to repeal sports gambling prohibitions, in whole or in part, PASPA was still unconstitutional. A331 (*Id.* at 1475). The Court described the distinction adopted in *Christie I* and *II* between State repeals of gambling prohibitions and affirmative State authorizations allowing sports gambling as an "empty" distinction premised on a "misread[ing]" of Supreme Court precedents. A333 (*Id.* at 1478).

D. The Bond Motion

On May 24, 2018, NJTHA filed its Bond Motion. In support of the Bond Motion NTJHA submitted the Certification of Chris Grove, an expert in the sports betting industry. A393-409. Grove concluded that had NJTHA not been restrained from conducting sports gambling at Monmouth Park during the TRO time period (October 24, 2014 – November 21, 2014) its estimated sportsbook win would have been $10,227,331. A396 ¶14. Grove also concluded that during the post-TRO time period (November 22, 2014 – May 14, 2018) had the permanent injunction not been issued, NJTHA's estimated sportsbook win would have been $139,749,842. A399 ¶27.

NJTHA had argued in the Bond Motion that, in addition to damages it sustained during the TRO period, it was entitled to damages for the post-TRO period November 22, 2014 – May 14, 2018. A348-392. The basis for this argument was that the effect of the district court's injunction against the State Defendants *de facto* blocked NJTHA from conducting sports gambling from November 22, 2014 until the Supreme Court's May 14, 2018 final judgment. A364.

The district court's Permanent Injunction had ordered the State Defendants to enforce all New Jersey laws that prohibited sports gambling, including those sports gambling prohibitions that had been repealed at

Monmouth Park. For almost forty-two months (*i.e.*, until the Supreme Court's reversal on May 14, 2018) New Jersey's law enforcement officers were conscripted by a district court injunction to enforce repealed state laws blocking Monmouth Park from conducting sports gambling even though the Leagues were contemporaneously supporting gambling at other venues on their own games and their own players' performances.

In response to the Bond Motion, the Leagues argued that NJTHA had not been "wrongfully enjoined" under Rule 65(c). A742-765. Alternatively, they argued that even if NJTHA had been "wrongfully enjoined," because the law clearly favored the Leagues at the time the TRO was issued, it would be unreasonable to hold them liable for any damages. A762-63. Although given notice of the motion, the surety made no appearance. A116-132 (Docket Sheet).

On November 16, 2018, the district court denied NJTHA's Bond Motion in its entirety. A3, A13-21. The district court concluded that NJTHA had not been "wrongfully enjoined" and even if it had been, under *Coyne-Delany Co. v. Capital Development Board*, 717 F.2d 385 (7th Cir. 1983), "good cause" existed to deny NJTHA any bond damages. A20. The district court ignored NJTHA's allegations that the Leagues had lied under oath about their claimed irreparable injury.

The district court went further than even the Leagues had argued in their opposition to the Bond Motion. In a footnote to its Opinion, the district court, *sua sponte*, "question[ed] the extent to which it could award NJTHA the full amount of damages under the injunction bond considering the Leagues posted the bond for the security of all Defendants, and not solely NJTHA." A21 at n.10. This comment ignored the facts that no other defendant had requested the Leagues to post a bond; no other defendant offered any proof of damages at the time the bond amount was established; no other defendant offered any proof of damages as a result of having been "wrongfully enjoined"; no other defendant joined in the Bond Motion or this appeal (A116-132); and NJTHA was the only private party to challenge the constitutionality of PASPA.

On November 19, 2018, NJTHA filed a Notice of Appeal. A1-2.

SUMMARY OF THE ARGUMENT

The district court's Order denying the Bond Motion should be reversed.

Federal Rule of Civil Procedure 65(c) provides in part as follows:

> The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.

A. A party is "wrongfully enjoined" under Rule 65(c) "when it had a right all along to do what it was enjoined from doing." A18 (Opinion Denying Bond Motion). For three reasons the district court committed reversible error when it concluded NJTHA had not been "wrongfully enjoined."

First, the injunction issued against NJTHA was premised on the holding in *Christie I* that PASPA was a constitutional law. The Supreme Court ultimately ruled for NJTHA and held that PASPA was unconstitutional. An unconstitutional statute, as a matter of law, is void from its inception – void *ab initio*. Because there was no valid federal or state law prohibiting NJTHA from conducting sports gambling at Monmouth Park both at the time the TRO was entered and thereafter, NJTHA "had a right all along to do what it was enjoined from doing."

Second, the district court's exclusive reliance on a snapshot of the state of the extant intermediate appellate law at the time it enjoined NJTHA was the wrong date for deciding whether NJTHA had been "wrongfully enjoined." As a matter of law, the determinative date for deciding whether NJTHA was "wrongfully enjoined" is the state of the law on the date of the Supreme Court's final judgment in favor of NJTHA – May 14, 2018. When the Supreme Court ruled in favor of NJTHA it meant, in

the words of Rule 65(c), that NJTHA had been "found to have been wrongfully enjoined or restrained." The Supreme Court's final judgment establishes that NJTHA "had a right all along to do what it was enjoined from doing."

Third, the Leagues submitted materially false sworn statements to support their claim of irreparable injury needed to procure the injunctive relief against NJTHA. An injunction issued on the basis of lies about irreparable injury is wrongful.

B. For three reasons, the district court committed reversible error when it exercised discretion to conclude that there was good cause to deny NJTHA, a "wrongfully enjoined" party, bond damages.

First, under the plain meaning of Rule 65(c)'s unambiguous text the district court had no discretion to nullify the bond that it had ordered the Leagues to post and which it had declined to discharge. To imply from the text of Rule 65(c) judicial discretion to deny bond damages to a wrongfully enjoined party when that Rule is not only silent on the matter of discretion, but also affirmatively requires that a bond be posted as a precondition to issuance of an injunction, would render the Rule's bond requirement meaningless. Rule 65(c) cannot be interpreted to render meaningless a strict requirement of the Rule.

Second, even if Rule 65(c) were to be judicially re-written to give a court some limited discretion to deny a "wrongfully enjoined" party bond damages, as a matter of Supreme Court precedent there is no discretion to nullify an injunction bond where, as here, a final judgment on the merits leaves no doubt that the enjoined party had the right to engage in the enjoined activity. This is the holding in *Houghton v. Cortelyou*, 208 U.S. 149 (1908). Here, the final judgment of the Supreme Court left no doubt that NJTHA always had the right to engage in the enjoined activity.

Third, the single case relied on by the district court to support its discretion to deny NJTHA bond damages upon a showing of good cause is the Seventh Circuit's decision in *Coyne-Delany Co. v. Capital Development Board*, 717 F.2d 385 (7th Cir. 1983). That case provides no support for the district court's decision.

The Court of Appeals in *Coyne* reversed a district judge who had exercised discretion to deny damages to a wrongfully enjoined party because the then existing law had favored the moving party at the time the injunction was granted. This is the same flawed reasoning the district court judge used here to conclude that "good cause" existed to deny NJTHA damages under the bond. How the district judge could have possibly thought that *Coyne* supported the exercise of discretion to deny NJTHA bond damages when the

district court in *Coyne* had previously been reversed for doing what the district court did here is incomprehensible.

C. This Court should reverse and remand with instructions to the district court to enter a judgment awarding NJTHA damages in the full amount of the $3.4 million bond plus interest. The record is undisputed with respect to NJTHA's bond damages during the TRO period. The issue of the amount of the bond was litigated before the district judge who then set the bond amount. The Leagues offered no evidence in response to NJTHA's Bond Motion to dispute NJTHA's proof of the damages it sustained during the TRO period.

D. The district court's Opinion does not address the issue of NJTHA's entitlement to damages in excess of the bond amount even though the record is undisputed that the Leagues filed materially false sworn statements alleging irreparable injury in order to procure injunctive relief enjoining NJTHA from conducting sports gambling at Monmouth Park. Despite NJTHA putting forth a *prima facie* claim showing that its claim for excess damages is legally cognizable and factually sufficient, without any explanation the district court denied NJTHA any opportunity to prove that claim and, thereby, allowed the Leagues to escape any accountability for their abuse of the Court's judicial processes. On remand, the district court

should be instructed to conduct an evidentiary hearing, preceded by accelerated discovery, to determine whether NJTHA is entitled to damages in excess of the bond amount and, if so, the amount of excess damages.

ARGUMENT

I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY HOLDING THAT NJTHA HAD NOT BEEN WRONGFULLY ENJOINED FROM DOING WHAT IT HAD A RIGHT ALL ALONG TO DO.

Standard of Review: The district court's interpretation of Rule 65(c) is a legal issue subject to *de novo* review. *Garza v. Citigroup Inc.*, 881 F.3d 277, 280 (3d Cir. 2018) ("We review the District Court's interpretation of the Federal Rules of Civil Procedure, which is a legal issue, de novo."); *Giles v. Campbell*, 698 F.3d 153, 155 (3d Cir. 2012) ("this Court exercises plenary review of the District Court's interpretations of the Federal Rules of Civil Procedure and legal conclusions").

A. Meaning Of "Wrongfully Enjoined" Under Rule 65(c)

A party is wrongfully enjoined under Rule 65(c) "when it had a right all along to do what it was enjoined from doing." *Latuszewski v. VALIC Fin. Advisors, Inc.*, 393 F. App'x 962, 966 (3d Cir. 2010) (quoting *Global NAPs, Inc. v. Verizon New Eng., Inc.*, 489 F.3d 13, 22 (1st Cir. 2007)). *See, e.g.*, *Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc.*, 16 F.3d 1032, 1036 (9th Cir. 1994) ("We hold today that a party has been wrongfully enjoined within

the meaning of Rule 65(c) when it turns out the party enjoined had the right all along to do what it was enjoined from doing."); *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1054 (2d Cir. 1990) ("A party has been 'wrongfully enjoined' under Fed. R. Civ. P. 65(c) if it is ultimately found that the enjoined party had at all times the right to do the enjoined act.").

B. NJTHA Had A Right All Along To Do What It Was Enjoined From Doing Because The TRO Prohibiting It From Conducting Otherwise Lawful Sports Gambling At Monmouth Park Was Premised On An Unconstitutional Statute Void From Its Inception.

On May 14, 2018 the Supreme Court held PASPA to be unconstitutional. A319-344 (138 S. Ct. 1461 (2018)). That means that PASPA is not and never was a valid law. Where a statute is, as PASPA was, held to be unconstitutional the statute is void *ab initio*. It's an empty legislative act. It has no force or effect. It's as if the statute had never come into existence. This is the fundamental principle of *Marbury v. Madison*, 5 U.S. 137 (1803).

In *Marbury* Chief Justice Marshall wrote that an unconstitutional statute is "void." *Id.* at 177. A "legislative act contrary to the constitution is not law." *Id.* In *Chicago, Indianapolis, & Louisville Railway Co. v. Hackett*, 228 U.S. 559 (1913), the Supreme Court wrote: "an unconstitutional act is not a law, and can neither confer a right or immunity

nor operate to supersede any existing valid law." *Id.* at 566; *Ex parte Siebold*, 100 U.S. 371, 376 (1879) ("An unconstitutional law is void, and is as no law."); *see also Montgomery v. Louisiana*, 136 S. Ct. 718, 730-31 (2016) (discussing the concept that unconstitutional statutes are "contrary to law and, as a result, void"); 16A Am. Jur. 2d Constitutional Law § 195 (2009) ("Since unconstitutionality dates from the time of its enactment and not merely from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed and never existed; that is, it is void ab initio.").

In denying the Bond Motion the district court ignored the fact that at the time it entered the injunction against NJTHA it did so on the basis of an unconstitutional statute. A party that is compelled by an injunction to obey an unconstitutional statute preventing it from engaging in otherwise lawful activity is wrongfully enjoined from doing what "it had a right all along to do."

C. In Denying The Bond Motion The District Judge Misread The Supreme Court's Opinion.

In denying the Bond Motion the district judge misread the Supreme Court's Opinion and, thereby, reduced the Supreme Court's final judgment to an irrelevancy. It should go without saying that this, alone, is reversible error.

Even though the Supreme Court had unambiguously reversed the final judgment of this Court, the district judge apparently read the Supreme Court's Opinion to mean that the Justices had nonetheless agreed with his conclusion that the 2014 Repealer violated PASPA. The district judge wrote: "This Court, the Third Circuit, *and the Supreme Court all found the 2014 Repealer Law authorized sports betting*." A19 (emphasis added). The Supreme Court did not find that "the 2014 Repealer Law authorized sports betting."

The district court and this Court both held in *Christie II* that the 2014 Repealer violated PASPA because it authorized sports betting. Those holdings were based on the savings interpretation given PASPA in *Christie I* under which PASPA was construed to allow New Jersey the option to enact repeals of sports betting prohibitions.

The Supreme Court's Opinion explicitly rejected *Christie I*'s savings interpretation of PASPA. First, the Court interpreted PASPA to prohibit States from both affirmatively authorizing sports gambling *and* de-regulating sports gambling by repealing sports gambling prohibitions. Second, and most importantly, the Court concluded that even if the savings interpretation given PASPA in *Christie I* was correct, PASPA was nonetheless unconstitutional. The Court wrote: "In our view, petitioners'

[State Defendants and NJTHA's] interpretation [of PASPA] is correct." A330 (138 S. Ct. at 1474). "PASPA … violates the anticommandeering rule. … And this is true under either our interpretation or that advocated by [the Leagues.]" A333 (*Id.* at 1478).

The Supreme Court's holding that PASPA is unconstitutional, with or without the *Christie I* savings interpretation, mooted the issue of whether the 2014 Repealer violated PASPA. Even if the district court had been correct that the 2014 Repealer violated PASPA, which the Supreme Court clearly did not conclude, the Supreme Court left no doubt that NJTHA had been wrongfully enjoined under an unconstitutional statute.

D. "Wrongfully Enjoined" Under Rule 65(c) Does Not Necessarily Mean The District Judge Erred At The Time The Injunction Was Entered.

The district judge compounded his misreading of the Supreme Court's Opinion by then divorcing the Supreme Court's holding that PASPA is unconstitutional from his decision to deny the Bond Motion. He wrote that NJTHA had mistakenly conflated "the issue of whether the 2014 Repealer Law authorized sports betting with the Supreme Court's ultimate holding that PASPA is unconstitutional." A18. Quoting the Leagues' arguments verbatim, the district judge wrote: "As the Leagues assert, PASPA's 'constitutionality was not even at issue in the TRO proceedings. Rather, the issue for which the bond was posted in 2014 was whether New Jersey's

'partial repeal' of its sports wagering prohibitions was an authorization on sports betting' in violation of PASPA." A18-19. The district judge apparently thought that if he was able to *post hoc* validate his decision to enjoin NJTHA as being correct at the moment he entered the TRO, then NJTHA could not have been "wrongfully enjoined." This is wrong on the law and on the facts.

Whether the district judge was right at the moment the TRO was entered is, as a matter of law, irrelevant to whether a party has been "wrongfully enjoined" under Rule 65(c). An "injunction can be proper at the time it was issued, yet become improper after the passage of time." *Global NAPs, Inc. v. Verizon New England, Inc.*, 489 F.3d 13, 22 n.7 (1st Cir. 2007).

The meaning of "wrongfully enjoined" under Rule 65(c) "does not necessarily [mean] that the district court abused its discretion in granting the relief in the first place." *Sprint Commc'ns Co. v. CAT Commc'ns Int'l Inc.*, 335 F.3d 235, 242 n.9 (3d Cir. 2003) (quoting *Blumenthal v. Merrill Lynch Pierce Fenner & Smith Inc.*, 910 F.2d 1049, 1054 (2d Cir. 1990)). An injunction "may be wrongfully issued although the issuance may not have been improvident as an abusive exercise of the trial court's discretion." *Atomic Oil Co. v. Bardahl Oil Co.*, 419 F.2d 1097, 1099 (10th Cir. 1969).

Accord Wainwright Sec. Inc. v. Wall St. Transcript Corp., 80 F.R.D. 103, 107 (S.D.N.Y. 1979). In *Nintendo of America, Inc. v. Lewis Galoob Toys, Inc.*, 16 F.3d 1032 (9th Cir. 1994), the Ninth Circuit acknowledged that the district court properly issued a preliminary injunction but later concluded that, having prevailed on the merits, the defendant was "wrongfully enjoined." *Id.* at 1036 n.4.

In addition to misreading and then ignoring the Supreme Court's Opinion the district judge attempted to further validate his issuance of the TRO by saying that the constitutionality of PASPA was not "at issue in the TRO proceedings." A19. Even if this strained attempt by the district judge to validate the correctness of his decision to issue the TRO in the first instance was somehow relevant under the law, which it is not, the district judge was wrong to say that PASPA's constitutionality was not "at issue in the TRO proceedings."

As a practical matter, the overarching issue in the *Christie I* and *II* litigation was always the constitutionality of PASPA. As a conceptual matter, the constitutionality of PASPA had to be an issue in the TRO proceedings because the TRO was premised on the holding in *Christie* I that PASPA was constitutional by virtue of a savings interpretation. And, as a factual matter, PASPA's constitutionality was at issue not only in the TRO

proceedings but throughout every stage of the district court, Circuit Court, and Supreme Court proceedings in *Christie II*.

In the TRO proceedings both NJTHA and the State Defendants argued that "Plaintiffs cannot have it both ways; either PASPA permits States to repeal their prohibitions against sports wagering in whole or in part, as does the 2014 Act, or PASPA unconstitutionally commandeers states authority by forcing States to maintain unwanted prohibitions." A240-41 (State Defendants' Mem. in Opposition to Plaintiffs' Application for a TRO). It was made clear to the district court in the briefing in the TRO proceedings and thereafter that if the district court construed the 2014 Repealer to violate PASPA, then under *Christie I*'s holding PASPA had to be unconstitutional. A230-31; A253-54; A266-68. The district judge rejected those arguments and held that PASPA was constitutional and the 2014 Repealer violated it.

Furthermore, at the time the TRO was granted it would have been an exercise in futility for NJTHA to attempt to re-litigate before the district court the decision by this Court in *Christie I* holding PASPA to be constitutional. A lower court has no power to overrule the precedent of its judicial superior. *See, e.g.*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *Hutto v. Davis*, 454 U.S. 370, 375 (1982); *Free Speech Coal., Inc. v. Attorney Gen. United States*, 825 F.3d 149, 164

(3d Cir. 2016); *United States v. Extreme Assocs., Inc.*, 431 F.3d 150, 156 (3d Cir. 2005).

When NJTHA appealed the Order of the district court to this Court in *Christie II*, NJTHA raised the issue of PASPA's constitutionality just as it had done in the district court. *See* A283 n.2. When this Court decided *Christie II* it reaffirmed the holding in *Christie I* that PASPA was constitutional and concluded that the 2014 Repealer violated it. A300 (832 F.3d at 392).

Before the Supreme Court PASPA's constitutionality was the single question presented: "Does a federal statute that prohibits adjustment or repeal of state-law prohibitions on private conduct impermissibly commandeer the regulatory power of States in contravention of *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997)?" A317. When the Supreme Court ruled in favor of NJTHA it squarely held that PASPA was unconstitutional whether it permitted repeals of sports gambling prohibitions or not.

E. Whether A Party Has Been "Wrongfully Enjoined" Is Determined As Of The Date Of The Final Judgment On The Merits.

The district judge used the wrong time period for deciding whether NJTHA had been "wrongfully enjoined." The time for deciding whether a defendant has been "wrongfully enjoined" under Rule 65(c) is "whether, in

hindsight in light of the ultimate decision on the merits after a full hearing, the injunction should not have issued in the first instance." *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1054 (2d Cir. 1990). As the plain language of Rule 65 directs, the inquiry focuses on whether the successful party was subsequently found to be wrongfully enjoined. *Blumenthal* has been followed by this Court in *Sprint Communications Co. v. CAT Communications International, Inc.*, 335 F.3d 235, 242 n.9 (3d Cir. 2003).

In *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797 (3d Cir. 1989), this Court wrote that whether a party has been injured by a wrongful injunction depends on whether the injunction is "*later determined* to be erroneous" and the enjoined party wins "on the merits." *Id.* at 804 (emphasis added) (internal quotation marks omitted). In *Sprint*, this Court reiterated that the enjoined party can recover on a bond if it is "*later determined*" that the party was "wrongfully enjoined." *Id.*, 335 F.3d at 240 (emphasis added); *see also Clark v. K-Mart Corp.*, 979 F.2d 965, 969 (3d Cir. 1992) ("It is settled that one can recover on an injunction bond only after a trial and final judgment on the merits."); *American Bible Soc'y v. Blount*, 446 F.2d 588, 595 n.12 (3d Cir. 1971) (adopting the rule that a final judgment is a prerequisite to recovery on a bond). *Accord Global NAPs*,

Inc. v. Verizon New England, Inc., 489 F.3d 13, 22 (1st Cir. 2007) (rejecting plaintiff's argument that "under Rule 65(c), an injunction cannot be wrongful unless it is shown that issuance of the injunction was an abuse of discretion at the time it was issued").

Using, as the district court did, the state of the intermediate appellate law on the date the TRO was issued, rather than the date of the final judgment of the Supreme Court, to determine whether NTJHA was "wrongfully enjoined" undermines the dual purposes of Rule 65(c)'s bond requirement. First, posting the bond puts the moving party on notice "of the price they can expect to pay if the injunction was wrongfully issued." *Instant Air Freight*, 882 F.2d at 804-05. "[I]t assures the enjoined party that it may readily collect damages from the funds posted." *Sprint*, 335 F.3d at 240 n.5 (internal citation omitted). Second, the bond is a contract between the court and the plaintiff seeking the injunction. *Instant Air Freight*, 882 F.2d at 804 n.9 ("The bond can thus be seen as a contract in which the court and plaintiff 'agree' to the bond amount as the 'price' of a wrongful injunction.") (quoting Note, *Recovery for Wrongful Interlocutory Injunctions Under Rule 65(c)*, 99 Harv. L. Rev. 828, 833 (1986)).

The Leagues lost in the Supreme Court. When it came time, however, for the Leagues to honor their contract and pay up for the risk they willingly,

knowingly, and confidently assumed when they chose to seek an injunction against NJTHA, they welched. And when the district court allowed the Leagues to walk away from their obligation, despite the fact the Supreme Court held that the Leagues were always wrong about PASPA's constitutionality, it committed reversible error.

II. THE DISTRICT COURT AS A MATTER OF LAW HAD NO DISCRETION TO DENY NJTHA BOND DAMAGES.

Standard of Review: The district court's interpretation of Rule 65(c) is a legal issue subject to *de novo* review. *Garza v. Citigroup Inc.*, 881 F.3d 277, 280 (3d Cir. 2018) ("We review the District Court's interpretation of the Federal Rules of Civil Procedure, which is a legal issue, de novo."); *Giles v. Campbell*, 698 F.3d 153, 155 (3d Cir. 2012) ("this Court exercises plenary review of the District Court's interpretations of the Federal Rules of Civil Procedure and legal conclusions").

The district court thought it had equitable discretion to deny NJTHA bond damages even if NJTHA had been "wrongfully enjoined" under Rule 65(c). It did not.

A. Under The Plain Meaning Of Rule 65(c), If A Defendant Has Been Found To Have Been "Wrongfully Enjoined," A Court Has No Discretion To Deny Bond Damages.

The idea that a court may have some discretion to deny bond damages to a "wrongfully enjoined" defendant is rooted in the Supreme

Court's decision in *Russell v. Farley*, 105 U.S. 433 (1881). *Russell* held that because "no Act of Congress or rule of this court had ever been passed" mandating that a court order a bond to be posted as a precondition upon the issuance of an injunction, a court had equitable discretion to deny bond damages. *Id.* at 441. *Russell* predicated its holding on the fact that up to and including 1881 there was no rule or statute either mandating the posting of an injunction bond or precluding discretion to deny recovery on an injunction bond. *Id.* at 441-42. Absent such a rule or statute, *Russell* reasoned, there was no basis for depriving a court of its inherent equitable power to deny bond damages to a wrongfully enjoined party. *Id.*

"Reliance on the *Russell* decision today is unwarranted because its reasoning is explicitly based on the absence of a rule such as rule 65(c)." Note, *Recovery for Wrongful Interlocutory Injunctions Under Rule 65(c)*, 99 Harv. L. Rev. 828, 843 (1986). Rule 65(c) was adopted in 1937. This Rule negated the holding in *Russell*.

The plain meaning of Rule 65(c)'s unambiguous text shows that there is no express or implied discretion to deny bond damages to a wrongfully enjoined party. The Court of Appeals for the Tenth Circuit in *Atomic Oil Company v. Bardahl Oil Co.*, 419 F.2d 1097 (10th Cir. 1970), has suggested that Rule 65(c) does not contemplate discretion to nullify an injunction bond

especially where, as here, the judge nullifying the bond is the same judge who ordered the bond to be posted and declined to discharge it:

> Rule 65(c) states in mandatory language that the giving of security is an absolute condition precedent to the issuance of a preliminary injunction. It imports no discretion to the trial court to mitigate or nullify that undertaking after the injunction has issued. It is obvious that to superimpose such a caveat on the rule would inevitably dilute the otherwise imperative application of the conditions set out in Rule 65(c), and would counteract against the interests meant to be protected by the rule.

Atomic, 419 F.2d at 1100-1101.

The plain meaning of the text of a Federal Rule controls. "We give the Federal Rules of Civil Procedure their plain meaning." *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 123 (1989). "As with a statute, our inquiry is complete if we find the text of the Rule to be clear and unambiguous." *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 540–41 (1991). "The Supreme Court and this Court have repeatedly held that the Federal Rules of Civil Procedure, like any other statute, should be given their plain meaning." *Elliott v. Archdiocese of New York*, 682 F.3d 213, 225 (3d Cir. 2012) (internal quotation marks and citations omitted).

This Court should interpret Rule 65(c) as it is written and hold that the Rule does not give courts discretion to nullify injunction bonds. This view

has been endorsed in Note: *Recovery for Wrongful Interlocutory Injunctions Under Rule 65(c),* 99 Harv. L. Rev. 828 (1986). The Note states: "Courts should not be free to deny, in their discretion, the recovery of damages otherwise available under Rule 65(c). Courts should deny recovery only when damages are not recoverable under the general law of damages or under a just interpretation of the conditions of the bond." *Id.* at 842-43. "But relieving the plaintiff of all liability on the bond violates the principles of notice and contract that underlie the bond requirement." *Id.* at 843.

This Court has steadfastly insisted on the importance of the bond requirement of Rule 65(c). *E. g., Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 426 (3d Cir. 2010) ("We have never excused a District Court from requiring a bond where an injunction prevents commercial, money-making activities."). Having taken such care to bar the front door by mandating a bond when an injunction is issued, it should not open the back door to the same result by allowing discretion to nullify the bond.

B. There Is No Discretion To Deny Bond Damages Where A Final Judgment In That Case Leaves No Doubt As To The Right Of the Enjoined Party To Engage In The Enjoined Activity.

Even before Rule 65(c) was promulgated, the Supreme Court held in *Houghton v. Cortelyou,* 208 U.S. 149 (1908), that there is no discretion to

deny bond damages where "[t]he result of th[e] litigation leaves no doubt as to the rights of the parties." *Id.* at 160.

After ultimately winning on the merits, the defendant in *Houghton* moved before the trial court for bond damages. *Houghton*, 208 U.S. at 154. The trial court denied the defendant any bond damages. *Id.* That decision was reversed on appeal and judgment was entered for the defendant in the amount the defendant lost due to the wrongful injunction "with interest." *Id.* The plaintiff appealed to the Supreme Court. *Id.* at 155.

The Supreme Court affirmed and explained that *Russell v. Farley*, 105 U.S. 433 (1881), provided no support for the exercise of discretion to deny bond damages plus interest. *Houghton*, 208 U.S. at 159. The Court noted that in *Russell* the injunction had been properly issued with respect to "more than one half of the claim." *Houghton*, 208 U.S. at 158. In *Houghton*, as here, the injunction was wrong with respect to the entire claim. *Id.* at 158-59.

The Supreme Court wrote that "[w]e do not perceive, in this condition of affairs, *any room* for the application of the doctrine laid down in *Russell v. Farley*, which permits a court to relieve from liability on an injunction bond. The result of the litigation leaves no doubt as to the rights of the parties … ." *Houghton*, 208 U.S. at 160 (emphasis added).

Houghton stands for the proposition that, as a matter of law, the final judgment of the Supreme Court against the Leagues and in favor of NJTHA means there wasn't "any room" for the district court to exercise discretion to deny NJTHA bond damages.

III. THE DISTRICT COURT ERRED IN CONCLUDING THERE WAS GOOD CAUSE TO DENY NJTHA DAMAGES UNDER THE INJUNCTION BOND.

Standard of Review: Even if a district court has some discretion to deny bond damages for "good cause," there is, at a minimum, a presumption in favor of recovery under the bond. Therefore, the standard of review on appeal of a district court's "decision to deny costs and injunction damages" is not a broad one on the sliding scale of abuse of discretion, but rather is more akin to "the standard of simple error used in reviewing decisions of questions of law." *Coyne-Delany Co. v. Capital Dev. Bd.*, 717 F.2d 385, 392 (7th Cir. 1983). *See also Global NAPs, Inc. v. Verizon New Eng., Inc.*, 489 F.3d 13, 23 (1st Cir. 2007) (adopting "stricter review along sliding scale of abuse standard").

A. There Is A Presumption In Favor Of Recovery Under The Injunction Bond.

Even if a district court has some discretion to deny bond damages for "good cause," there is, at a minimum, an implicit *presumption* in Rule 65(c) *in favor of awarding injunction damages*. *Coyne-Delany Co. v. Capital*

Dev. Bd., 717 F.2d 385, 392 (7th Cir. 1983). *See, e.g.*, *Nokia Corp. v. Interdigital, Inc.*, 645 F.3d 553, 557 (2d Cir. 2011). Consequently, "a prevailing defendant is entitled to damages on the injunction bond unless there is a good reason for not requiring the plaintiff to pay in the particular case." *Coyne*, 717 F. 2d at 391. *See, e.g., Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc.*, 16 F.3d 1032, 1037 (9th Cir. 1994) (it is "rare" for a party to lose on merits and not suffer the execution of preliminary injunction bond); *Atomic Oil Co. v. Bardahl Oil Co.*, 419 F.2d 1097, 1100-03 (10th Cir. 1969).

Courts that have interpreted Rule 65(c) to grant discretion to deny bond damages have for good reason adopted this presumption in favor of awarding the "wrongfully enjoined" party damages under the bond. First, if bond damages are not to be automatically awarded to a defendant that has been "wrongfully enjoined," a presumption in favor of damages is at least fairly implied by the text of Rule 65(c). *Coyne*, 717 F.3d at 392. Second, the presumption "discourages the seeking of preliminary injunctions on flimsy (though not necessarily frivolous) grounds." *Id.* Third, the presumption makes the law more predictable. *Id.* Fourth, the presumption allows an enjoined party to readily collect damages from the funds posted in

the event that it was wrongfully enjoined, without further litigation. *Id.* at 391.

B. The Seventh Circuit's Decision in *Coyne* Does Not Support The District Court's Exercise of Discretion To Deny NJTHA Damages Under The Injunction Bond.

The district court relied on *Coyne* to support its conclusion that "it would be unreasonable for the Court to allow NJTHA to recover under the injunction bond" because "the law as it existed in 2014 clearly favored the Leagues." A21. Ironically, that's the same flawed reasoning that resulted in the reversal of the district court's decision in *Coyne* to deny bond damages.

The district court initially erred by equating the Supreme Court's final judgment to the "change in the law" that occurred in *Coyne*. A20. No laws got changed in this case. To the contrary, legal arguments advocated for by the Leagues, and that had been adopted for years in *Christie I* and *Christie II*, were rejected by the Supreme Court. This resulted in a reversal of the judgment entered in the *same* case in which the injunction had been issued. That's not a "change in the law." That's a reversal by a Supreme Court final judgment of prior judgments entered by lower courts. The Supreme Court certainly did not see itself as changing the law; instead it saw itself as rejecting arguments that "misread" their existing precedents. A333 (138 S. Ct. at 1478).

Coyne, unlike here, did involve a true "change in the law." In *Coyne* the Seventh Circuit had reversed the district court's injunction because, while the federal appeal was pending, the state's highest court in a different and unrelated case had changed the governing state law on which the district court relied in granting the injunction.[3] *Coyne*, 717 F.2d at 389. Following the reversal by the Circuit Court mandated by the state's highest court having changed state law in an unrelated case, the defendant moved before the district court to recover damages on the injunction bond and costs. *Id.* The district judge denied the motion in its entirety, writing: "The law as it existed at the time the case was filed clearly favored the plaintiffs. It would be unreasonable to require a party to anticipate a change in the law and would be unconscionable to label a suit filed in good faith as frivolous where there is such a subsequent change." *Id.* at 390.

Even though there was a true change in the governing law pending appeal, the district court's denial of bond damages in *Coyne* was nonetheless reversed. The appellate court wrote that the district judge had applied "an

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[3] In the underlying lawsuit in *Coyne*, the "premise of [the plaintiff's] civil rights suit against [the defendant] was under Illinois law as expounded by the Illinois Appellate Court in *Polyvend, Inc. v. Puckorius*, 61 Ill. App.3d 163 (1978)." *Coyne*, 717 F.2d at 389. After *Polyvend* was reversed by the Illinois Supreme Court, 77 Ill.2d 287, the preliminary injunction issued in *Coyne* that had been based on the later reversed Illinois Appellate Court decision was reversed by the Seventh Circuit, 616 F.2d 341 (1980).

incorrect standard," ignored "the principle of preference" in favor of awarding damages to a wrongfully enjoined party, and "fail[ed] to consider and evaluate the full range of factors … that would be relevant under the proper standard." *Id.* at 392.

The Court's reasons for reversing the district court in *Coyne* apply with even more force here. Not only did the district judge in this case mistakenly equate a true change in the governing law pending appeal in an unrelated case with a reversal in the same case by the Supreme Court, but the district judge inexplicably chose to follow the same flawed reasoning of the district judge in *Coyne* that resulted in a reversal. Rather than supporting the denial of bond damages to NJTHA, *Coyne* strongly supports reversal of the district court's Order.

Coyne does set forth guidelines for a court to follow in deciding whether it should exercise discretion to deny damages to a "wrongfully enjoined" party. *Coyne*'s guidelines strictly limit the amount of a court's discretion to deny bond damages. They provide:

1. "Normally" a wrongfully enjoined party should receive "damages, at least up to the limit of the bond." *Id.* at 391. A district court does not have "carte blanche to excuse the plaintiff from paying any damages on the bond." *Id.* There must be a "good reason for not requiring the plaintiff to pay in the

particular case." *Id.* One case following *Coyne* said that denying damages to a wrongfully enjoined party is "rare." *Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc.*, 16 F.3d 1032, 1037 (9th Cir. 1994).

2. There is a "presumption" "in favor of awarding costs and damages on the bond to the prevailing party," as opposed to the issue of "attorney's fees under the American rule, which in the absence of bad faith leaves each party to bear his own attorney's fees." *Coyne*, 717 F.2d at 392. *Accord Nokia Corp. v. Interdigital Inc.*, 645 F.3d 553, 558 (2d Cir. 2011); *Global NAPs, Inc. v. Verizon New Eng., Inc.*, 489 F.3d 13, 23 (1st Cir. 2007); *National Kidney Patients Ass'n v. Sullivan*, 958 F.2d 1127, 1134-35 (D.C. Cir. 1992).

3. A good reason to award damages would be if the bond amount is less than the wrongfully enjoined party's actual damages. *Coyne*, 717 F.2d at 392.

4. A good reason to award damages would be if the party who obtained the wrongful injunction is a "substantial corporation." *Id.*

5. "In deciding whether to withhold costs or injunction damages … the outcome of the underlying suit" should be considered. *Id.*

6. A factor that may be a legitimate consideration, though not always, for denying bond damages could be a change in the law. *Id.* at 392-93.

Had the district court properly applied the *Coyne* guidelines, NJTHA could not possibly have been denied bond damages. In addition to the

Leagues' failure to rebut the presumption in favor of granting NJTHA recovery under the bond, the district court ignored the fact that the bond amount of $3.4 million is well below the unrefuted $10,227,337 amount of damages opined by NJTHA's expert. Further, the district court gave no consideration to the "substantial" resources of the Leagues as compared to the strained resources of NJTHA. Nor did the district court consider the significant unrefuted damages sustained by Monmouth Park and its workers while the Leagues were fueling and profiting from the spread of sports gambling.[4] Conspicuously omitted from the district court's decision is the fact that the arguments by the Leagues, which had been accepted in *Christie I* and *II*, were ultimately rejected, *in toto*, by the Supreme Court. And, most glaringly, the district court allowed the Leagues to escape any accountability for lying under oath about their purported irreparable injury that supported their claim for an injunction.

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[4] The Court is respectfully referred to the Certification of William Anderson in Support of the Bond Motion (A414-16) setting forth the damages sustained by Monmouth Park Racetrack's employees as a result of having been prevented from conducting sports betting during the period October 26, 2014 – May 14, 2018. The Court is also respectfully referred to the Certification of James Jemas in Support of the Bond Motion (A410-13) setting forth the damages, over and above the lost sports betting profits, sustained by Monmouth Park Racetrack as a result of having been prevented from conducting sports betting during the period October 26, 2014 – May 14, 2018. The Leagues did not file any affidavits, declarations, or certifications in opposition to the Bond Motion. A131 at ECF No. 91.

C. On Remand The District Court Should Be Instructed To Immediately Enter Judgment In Favor Of NJTHA For The Full Amount Of The $3.4 Million Bond Plus Interest.

The amount of damages recoverable under a bond need not be proven with mathematical certainty. *Nokia Corp. v. Interdigital Inc.*, 645 F.3d 553, 559 (2d Cir. 2011) (a "party's proof of damages d[oes] not need to be to a mathematical certainty"); *Global NAPs, Inc. v. Verizon New Eng., Inc.*, 489 F.3d 13, 24 (1st Cir. 2007) ("proof did not need to be to a mathematical certainty").

There is no reason for a remand to the district court to decide the amount of bond damages sustained by NJTHA as the result of having been "wrongfully enjoined" during the TRO period. The record is clear that NJTHA sustained damages of at least as much as the bond amount during the TRO period. On remand the district court should be instructed to immediately enter judgment in favor of NJTHA for the full amount of the $3.4 million bond plus interest.

While NJTHA submitted an expert certification demonstrating that it suffered damages during the TRO period that are more than three times the $3.4 million bond amount, the Leagues submitted no evidence disputing this fact. A393-409. Moreover, at the time the TRO was issued NJTHA submitted the Drazin Certification in support of establishing the amount of

the bond. A484-87. The Drazin Certification stated that the lost revenue to Monmouth Park, in the event sports gambling was enjoined from commencing as scheduled on October 26, 2014, would be $1,170,219 per week. *Id.* *See Global NAPs, Inc. v. Verizon New Eng., Inc.*, 489 F.3d 13, 24-25 (1st Cir. 2007) (noting that the court would "not relieve GNAPs of its tactical choice" not to file its opposition to the damages affidavit submitted to the district court by the wrongfully enjoined defendant).

With the Drazin and Grove sworn submissions, the factual record establishes with far greater certainty than the law requires that NJTHA sustained damages of at least $3.4 million as the result of having been "wrongfully enjoined." *See Global NAPs*, 489 F.3d at 24-25 (1st Cir. 2007) (noting that proof of bond damages is sufficient where the amount of the bond was actually litigated and the plaintiff failed to present evidence to the contrary).

NJTHA is also entitled to receive interest on the bond amount. *Houghton v. Cortelyou*, 208 U.S. 149, 154-55 (1908). *See also Ambromovage v. United Mine Workers*, 726 F.2d 972, 982 (3d Cir. 1984) ("in the absence of a Congressional directive to the contrary, the district court has broad discretion in determining whether to allow pre-judgment interest").

IV. ON REMAND THE DISTRICT COURT SHOULD BE INSTRUCTED TO CONDUCT AN EVIDENTIARY HEARING TO DETERMINE WHETHER, BASED ON THE LEAGUES' BAD FAITH, NJTHA IS ENTITLED TO DAMAGES IN EXCESS OF THE BOND AMOUNT, AND, IF SO, THE AMOUNT OF DAMAGES.

Standard of Review: The district court's summary dismissal of NJTHA's *prima facie* claim for excess bond damages based on the Leagues' bad faith is akin to the grant of a motion to dismiss and, as such, is a question of law subject to plenary review. *See Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 177 (3d Cir. 1997) (applying plenary review to district court's grant of defendant's motion to dismiss and/or partial summary judgment).

The district court's Order summarily dismissed, without explanation, that part of the Bond Motion relating to NJTHA's damages in excess of the bond amount during both the TRO period (October 24, 2014 – November 21, 2014) and post-TRO period (November 22, 2014 – May 14, 2018). The summary dismissal of NJTHA's bad faith claim for excess bond damages denied NJTHA any opportunity to prove its claim and is, therefore, reversible error.

"[G]enerally" a wrongfully enjoined party's recovery "cannot exceed the amount posted." *Sprint Commc'ns Co. v. CAT Commc'ns Int'l Inc.*, 335 F.3d 235, 240 (3d Cir. 2003). Nevertheless, this Court has recognized that a

claim seeking recovery of damages in excess of the amount of an injunction bond is a legally cognizable independent claim where a plaintiff did not act in good faith when procuring an injunction. *See Sprint*, 335 F.3d at 240 n.5; *see also Coyne-Delany Co. v. Capital Dev. Bd.*, 717 F.2d 385, 393 (7th Cir. 1983) ("the bond is the limit of the damages the defendant can obtain for a wrongful injunction, even from the plaintiff, *provided the plaintiff was acting in good faith*" (emphasis added)); *Diginet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388, 1394 (7th Cir. 1992); *International Ass'n of Machinists v. Eastern Airlines, Inc.*, 925 F.2d 6, 10 (1st Cir. 1991).

In responding to the Bond Motion the Leagues conceded that "an enjoined party may recover provable damages in excess of the amount of the bond securing temporary injunctive relief. A760 (citing *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 804 (3d Cir. 1989)). *See also Don Post Studios, Inc. v. Cinema Secrets, Inc.*, 148 F. Supp.2d 572, 576 n.5 (E.D. Pa. 2001) (district court ordered hearing to consider the amount of excess damages suffered by a "wrongfully enjoined" defendant, including as damages the amounts by which plaintiffs have been unjustly enriched);[5] *qad.*

[5] NJTHA's damages in excess of the bond amount include both lost profits and the amount by which the Leagues were unjustly enriched. If a "plaintiff gains something of value by reason of the erroneous provisional relief, the defendant has a restitutionary claim based on the amount the plaintiff gained." 1 Dan B. Dobbs, *Law of Remedies*

inc. v. ALN Assocs., Inc., 781 F. Supp. 561 (N.D. Ill. 1992) (holding that the right to recover damages in excess of the bond was properly within the scope of Rule 65 where plaintiff pursued and obtained an injunction by abusing the judicial system).

Not only is NJTHA's excess bond damages claim cognizable under the law, the claim is also supported by a plethora of undisputed facts. To support their claim that they would suffer irreparable injury unless NJTHA was enjoined, the Leagues submitted materially false affidavits from in-house counsel swearing that the "factual information" in the *Christie II* complaint is "true and correct" based on their "personal knowledge." A459-463. In paragraph 12 of the Complaint, the Leagues' in-house counsel falsely swore to the fact that to protect the Leagues from suffering irreparable injury it was "imperative" that the spread of sports gambling to Monmouth Park and "any[where] else" be immediately halted. A196 ¶12. None of this was true.

Further, in *Christie I* the four Commissioners of the NFL, NBA, MLB, and NHL, and the President of the NCAA, each filed materially false

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§2.11(3) at 266 (2d ed. 1993). This claim is "not dependent on an injunction bond," and "applies to permanent injunctions later reversed as well as to provisional orders." Dan B. Dobbs, *Should Security Be Required As a Pre-Condition to Provisional Injunctive Relief,* 52 N. Carolina L. Rev. 1091, 1136 (1974).

sworn Declarations. A430-458. Those statements were also relied upon by the Leagues to procure the injunction against NJTHA in *Christie II*. *See*, *e.g.*, A196 ¶12.[6] Those false statements described a parade of horribles the Leagues swore would cause irreparable injury unless the spread of sports gambling was enjoined. A430-458. None of this was true.

The district court, by both summarily dismissing and failing to address NJTHA's bad faith claim, appears to have conflated and/or confused inquiries as to irreparable harm and unclean hands with the separate issue presented in the Bond Motion: whether the Leagues failed to act in good

[6] All of these statements made by the Commissioners in *Christie I* form the predicate for the Leagues' assertion of irreparable injury in *Christie II*. In *Christie I* the Commissioners submitted to the Court Declarations, under penalty of perjury, regarding how each League would suffer irreparable injury from the spread of sports betting. Limited expedited document and deposition discovery was also taken in 2012. On December 21, 2012, the Court in *Christie I* denied the State Defendants' motion to dismiss and cross-motion for summary judgment insofar as it sought a finding that the Leagues lacked standing. A146-152 (2012 WL 6698684). In the *Christie II* litigation, the Leagues' Complaint was verified by affidavits submitted by representatives of each of the five Leagues certifying to the truth of the facts set forth in the Complaint with respect to each League. A459-463. The Complaint in *Christie II* asserts the Leagues will suffer irreparable harm from the spread of sports betting to New Jersey racetracks, Atlantic City casinos, and anywhere else, and that such "harm will be precisely the same as the harm this Court already found sufficient to warrant injunctive relief when the same plaintiffs challenged the 2012 Sports Wagering Law." A210-13 ¶¶61, 65, 69, 74.

faith when they sought injunctive relief against NJTHA.[7] Every time the district court issued injunctive relief it turned a blind eye to the Leagues' materially false statements because, in the court's view, the Leagues had shown "the 2014 Law was enacted in violation of and is preempted by PASPA." A80 (61 F. Supp. 3d at 507). But, even if the district court was right to exclude the Leagues' falsehoods as part of its irreparable harm analysis—and NJTHA does not agree that it was—those facts are pivotal to NJTHA's independent claim that the Leagues did not procure injunctive relief against NJTHA in good faith.

On remand the district court should be directed to conduct an evidentiary hearing, preceded by accelerated discovery, to determine whether NJTHA is entitled to damages in excess of the bond amount and, if so, in what amount. NJTHA seeks its day in court to prove that the Leagues failed to act in good faith when they claimed that they would be irreparably injured unless NJTHA was enjoined. The district court erred by summarily denying NJTHA the opportunity to prove its case. The undisputed facts in

[7] In granting summary judgment and issuing the permanent injunction, the district court declined to consider this evidence in its consideration of irreparable harm on the grounds that because "the 2014 Law was enacted in violation of and is preempted by PASPA," there were "no factual issues that need to be decided." A80 (61 F. Supp. 3d at 507). It also did not review the evidence when assessing unclean hands on the grounds that no permanent injunction was entered against NJTHA. A81 (61 F. Supp. 3d at 497 n.7).

the record show that NJTHA has the right to pursue its legally cognizable bad faith claim.

Factually, the record shows the Leagues did not come close to acting in good faith. At the very same time as the Leagues were relying on their sworn statements to establish the irreparable injury essential to obtain injunctive relief against NJTHA, the undisputed record shows that they were aggressively fueling and profiting from the rapid expansion of sports gambling throughout the United States and internationally. On the one hand, in paragraph 12 of the Complaint, the Leagues swore that, to protect the Leagues from suffering irreparable injury, it was "imperative" that the spread of sports gambling to Monmouth Park and "any[where] else" be immediately halted. A196 ¶12. On the other hand, the Leagues themselves were spreading sports gambling elsewhere *and* establishing their own gambling enterprises.

In *Christie I* the commissioners of the NFL, NBA, MLB, and NHL, and the President of the NCAA, each filed materially false sworn Declarations. A430-458. The Leagues relied on those sworn statements to procure an injunction against NJTHA in *Christie II*. *See, e.g.*, A196 ¶12;[8] A459-463. The Leagues swore they would suffer the following irreparable

[8] *See supra* n.6.

injuries unless the spread of sports gambling was immediately halted: (1) the promotion of match-fixing or the appearance thereof; (2) the integrity of the Leagues' games would be undermined; (3) the Leagues' reputation would be irreparably damaged; (4) public confidence in the Leagues' games would be eroded; (5) their fan base would shrink; and (6) fan loyalty would be harmed. None of this was true.[9]

For example, MLB Commissioner Bud Selig swore that the spread of sports betting would "threaten to damage irreparably the integrity of, and public confidence in, MLB." A445 ¶6. And that "[t]he more pervasive the sports gambling culture" the more "cynicism" for the sport and fans suspecting "that the 'fix is in'" thereby making it more likely fans would "disengage from what they perceive to be a tainted sport." A445-46 ¶6. NFL Commissioner Goodell swore that gambling on NFL games "will fuel speculation, distrust and accusations of point-shaving or game-fixing." A432 ¶5. Former NBA Commissioner David Stern swore that with gambling on NBA games "[f]ans' interest – once unified toward the common goal of winning the game – will become fragmented, with spectators rooting for varied outcomes such as merely 'covering the spread' or scoring enough points to beat an 'over/under' bet." A439-440 ¶4. And

[9] A detailed description of the sworn false statements appear in the record at A367-384; A417-429.

NHL Commissioner Gary Bettman falsely swore that sports gambling "threatens to compromise the NHL's reputation and integrity, and undermines fans' trust and confidence in honest competition." A451 ¶6.

What the Leagues did not disclose in their complaint and sworn statements submitted to the court was that, contemporaneously with the Leagues seeking to enjoin NJTHA from sports betting, the Leagues themselves were spreading and making money from sports gambling. Specifically, their complaint and sworn statements omit material facts regarding their own financial interests in sports gambling.

Significantly, the Leagues omitted to disclose to the court that most of the Leagues have a financial stake in fantasy sports betting. The record shows the Leagues not only affirmatively endorse fantasy sports betting, but they also *invest* in fantasy sports betting franchises.[10] A580-82, 583-88, 589-592, 629-630, 631-33, 664-66, 685-86. Notably, the NBA has invested in FanDuel, *and* the NHL and MLB have invested in DraftKings. A583-88, 629-630. Two NFL team owners, Jerry Jones of the Dallas Cowboys and

[10] Fantasy gambling is nothing more than gambling on the performances of the Leagues' players in the Leagues' games as opposed to the outcome of the games. Fantasy gambling is a huge business. A562; A548-49.

Robert Kraft of the New England Patriots, own equity stakes in DraftKings. A598-99.

Fantasy sports betting is gambling. Some of the Leagues' owners and commissioners admitted there is no difference between the two. Contrary to his own sworn statement, former NBA Commissioner Stern has publicly admitted that daily fantasy sports betting is the equivalent of "gambling" on games. A634 (Stern stating "[o]nce daily fantasy became an acceptable exception to the law against gambling, I think that's gambling."). Former Commissioner Stern left no doubt about his view of fantasy gambling when he testified, under oath, at his deposition in *Christie I* as follows:

> Q: "Commissioner, does the NBA endorse fantasy basketball?"
> A: "Yes. Yes, we do."

A637 at 35:23-25. Mark Cuban, the owner of the NBA's Dallas Mavericks team admitted that the Leagues' anti-betting stance was "hypocritical" given their embrace of fantasy gambling. A652.

Under PASPA, betting on the performances of the players in the Leagues' games was prohibited. 28 U.S.C. §3702. The Leagues, however, chose to selectively exploit their private right of action under PASPA to enjoin NJTHA from conducting gambling on the outcomes of their games, while they contemporaneously invested in facilitating betting on the performances of the Leagues' players in their games. The reason for the

Leagues' selective enforcement of PASPA is clear: the Leagues and their owners themselves were profiting from fantasy sports businesses.

The Leagues and their owners not only profit from investing in fantasy gambling businesses but also from fantasy sports betting sponsorship dollars. Nearly every NFL, NBA, and MLB team (and most NHL teams) has entered into a sponsorship deal with either FanDuel or DraftKings. A583-88.

The record further shows that at the same time as the Leagues sought to stop sports gambling at Monmouth Park, they actively supported betting on the outcome of their games. Rather than limiting the impact of gambling, as the Leagues claimed to the court in their sworn statements, the Leagues took advantage of it.

For example, NFL owners approved relocating the Oakland Raiders football team to Las Vegas, the gambling capital of the world. A595. In addition, the NFL plays games in London, where gambling is legal, and where bookies are allowed to take bets right outside the stadium while the game is being played. A604 ¶2; A608 ¶46; A611-13; A614-621; A622-23. Likewise, the NHL has a Las Vegas franchise. A687. MLB has a franchise in Canada where gambling on MLB games is legal. A672-75. The NFL issues injury reports which serve no purpose other than to assist oddsmakers

in establishing point spreads for gambling purposes. A625-28. The NCAA does nothing to stop the spread of March Madness gambling, a national pastime engaged in by Presidents of the United States and millions of others. A733-35, 736-39.

In their brief opposing the Bond Motion, the Leagues' explanation for swearing they would suffer irreparable injury unless the spread of sports gambling was enjoined was that the Leagues' statements "bear no resemblance" to the "outright factual falsehoods" cited in *Don Post Studios, Inc. v. Cinema Secrets, Inc.*, 148 F. Supp.2d 572 (E.D. Pa. 2001) and *qad Inc. v. ALN Assocs., Inc.*, 781 F. Supp. 561 (N.D. Ill. 1992). A760-61. The Leagues did not protest that their sworn statements were true, only that they were not outrageously false. NJTHA is entitled to a judicial determination on whether the Leagues' false sworn statements are or are not outrageous, and not to have the Leagues' determination merely accepted without comment by the very courts that relied on those statements to enjoin NJTHA.

If there truly was, as the Leagues repeatedly swore, an "imperative" need to enjoin the spread of sports gambling to protect the Leagues from suffering irreparable injury, the Leagues would never have contemporaneously engaged in any conduct facilitating and profiting from

the spread of sports gambling. It's obvious that what the Leagues did was to choose the pursuit of profits over the requirement of candor before the tribunal. They fabricated a story to support their claim of irreparable injury when there was no irreparable injury. And they did so with a callous disregard for the fact that they knew blocking NJTHA from conducting sports gambling at Monmouth Park seriously jeopardized the economic survival of Monmouth Park and the livelihood of its workers. The Leagues' lack of candor is the epitome of bad faith and should not continue to be overlooked by the Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the district court's order denying NJTHA's motion should be reversed and the case remanded with instructions to the district court to (1) immediately enter judgment awarding NJTHA damages in the full amount of the $3.4 million bond plus interest; and (2) conduct an evidentiary hearing, preceded by accelerated discovery, to decide if NJTHA should be awarded damages in excess of the bond amount and, if so, in what amount, for losses sustained by NJTHA during the October 24, 2014 – November 21, 2014 TRO period and post-TRO period from November 22, 2014 – May 14, 2018.

Dated: Tinton Falls, New Jersey
February 22, 2019

McELROY, DEUTSCH, MULVANEY & CARPENTER, LLP

By: /s/ Ronald J. Riccio
Ronald J. Riccio
One Hovchild Plaza, 4000 Rt. 66
Tinton Falls, New Jersey 07753
Tel: (732) 733-6200
Fax: (732) 922-2702
Attorneys for New Jersey Thoroughbred Horsemen's Association, Inc.

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am admitted to practice before the United States Court of Appeals for the Third Circuit.

/s/ Ronald J. Riccio
Ronald J. Riccio

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/s/ Ronald J. Riccio
Ronald J. Riccio

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Pursuant to Federal Rule of Appellate Procedure 25(d), I hereby certify that on this 22nd day of February, 2019, the foregoing Brief was electronically filed with the Clerk of Court for the United States Court of Appeals for the Third Circuit using the CM/ECF system. I also hereby certify that I caused 7 paper copies to be delivered by Federal Express to the Clerk's Office.

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Jeffrey A. Mishkin
jeffrey.mishkin@skadden.com
Anthony J. Dreyer
anthony.dreyer@skadden.com
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
4 Times Square
New York, NY 10036

William J. O'Shaughnessy
woshaughnessy@mccarter.com
Richard Hernandez
rhernandez@mccarter.com
McCARTER & ENGLISH LLP
100 Mulberry Street
Four Gateway Center, 14th Fl.
Newark, NJ 07102

Dated: February 22, 2019

/s/ Ronald J. Riccio
Ronald J. Riccio