United States Court of Appeals for the Third Circuit

Case 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,

Appellees,

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 Assembly (Intervenors in District Court)

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,

Appellant.

ON APPEAL FROM AN ORDER ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, NO. 3-14-CV-06450, MICHAEL A. SHIPP, U.S. DISTRICT JUDGE

RESPONSE BRIEF FOR PLAINTIFFS-APPELLEES NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NATIONAL BASKETBALL ASSOCIATION, NATIONAL FOOTBALL LEAGUE, NATIONAL HOCKEY LEAGUE, AND OFFICE OF THE COMMISSIONER OF BASEBALL, DOING BUSINESS AS MAJOR LEAGUE BASEBALL

PAUL D. CLEMENT
ERIN E. MURPHY
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 379-5000

JEFFREY A. MISHKIN
ANTHONY J. DREYER
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(212) 735-3000

RICHARD HERNANDEZ
MCCARTER & ENGLISH, LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
(973) 622-4444

Counsel for Plaintiffs-Appellees National Collegiate Athletic Association, National Basketball Association, National Football League, National Hockey League and Office of the Commissioner of Baseball, doing business as Major League Baseball

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Third Circuit L.A.R. 26.1, the National Collegiate Athletic Association 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.

NATIONAL BASKETBALL ASSOCIATION CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Third Circuit L.A.R. 26.1, the National Basketball Association 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.

NATIONAL FOOTBALL LEAGUE CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Third Circuit L.A.R. 26.1, the National Football League 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.

NATIONAL HOCKEY LEAGUE
CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Third Circuit L.A.R. 26.1, the National Hockey League 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.

OFFICE OF THE COMMISSIONER OF BASEBALL DOING BUSINESS AS MAJOR LEAGUE BASEBALL CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Third Circuit L.A.R. 26.1, the Office of the Commissioner of Baseball d/b/a Major League Baseball 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: March 25, 2019

/s/ Jeffrey A. Mishkin
Jeffrey A. Mishkin
(NY Bar No. 1083203)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036-6522
(212) 735-3000

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INTRODUCTION

For twenty-eight days between October 24 and November 21, 2014, a temporary restraining order ("TRO") prevented appellant New Jersey Thoroughbred Horsemen's Association, Inc. ("NJTHA"), from engaging in sports wagering while the district court decided whether recent New Jersey legislation purporting to repeal state prohibitions on sports wagering in casinos and horse racetracks (the "2014 Repealer Law") actually authorized sports wagering in violation of the Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701-3704 ("PASPA"). In connection with that TRO, the district court required appellees National Collegiate Athletic Association, National Basketball Association, National Football League, National Hockey League, and Office of the Commissioner of Baseball doing business as Major League Baseball (collectively the "Leagues") to post a $3.4 million bond, which the court intentionally set "on the high side to avoid any potential loss to defendants," including NJTHA. (A64.) On November 21, 2014, the district court granted summary judgment to the Leagues, holding that the 2014 Repealer Law was invalid as a violation of PASPA, and permanently enjoining New Jersey from "giving operation or effect to the 2014 Law in its entirety." (A80.) On the same day, the TRO expired.

More than three years later, the United States Supreme Court confirmed the conclusion of both the district court and this Court that the 2014 Repealer Law did

authorize sports wagering in violation of PASPA, but held—contrary to this Court's decisions in both *NCAA v. Governor of N.J.*, 730 F.3d 208 (3d Cir. 2013), *cert. denied* 537 U.S. 931 (2014), and *NCAA v. Governor of N.J.*, 799 F.3d 259 (3d Cir. 2015), *aff'd*, 832 F.3d 389 (3d Cir. 2016) (*en banc*), and the position of the United States Department of Justice—that PASPA itself unconstitutionally commandeered the states in violation of the Tenth Amendment. *Murphy v. NCAA*, 138 S. Ct. 1461 (2018). NJTHA then filed a blunderbuss motion to recover nearly $150 million in damages against the Leagues, claiming that the Leagues had prevented NJTHA from engaging in sports wagering during the entire pendency of the lawsuit and arguing that the Leagues had acted in bad faith in pursuing their rights under a statute that was subsequently declared unconstitutional. Specifically, NJTHA demanded immediate remittance of the full amount of the $3.4 million TRO bond and expedited discovery of the Leagues purportedly to look for evidence of the extent to which the Leagues allegedly benefited from unauthorized sports wagering. The district court denied NJTHA's motion in its entirety.

As we show in greater detail below, under Rule 65(c) of the Federal Rules of Civil Procedure, a prevailing party is not entitled to any recovery under an injunction bond if the district court (i) finds that the prevailing party was not "wrongfully enjoined" or (ii), even if it were wrongfully enjoined, determines, in its discretion, that there is good reason to deny recovery under the bond.

In its decision here, the district court correctly concluded that, in light of the binding precedent by this Court that PASPA was constitutional at the time of the TRO, NJTHA had not been "wrongfully enjoined" within the meaning of Rule 65(c). (A18.) In addition, the district court acted well within its discretion to determine that the binding precedent by this Court that PASPA was constitutional constituted good reason to deny NJTHA any recovery on the bond. (A20-21.) Based on those conclusions, the district court found it unnecessary to address the additional issues, fully briefed by the parties, of whether NJTHA must prove the amount of its alleged losses during the pendency of the TRO, and whether NJTHA is entitled to seek damages in excess of the $3.4 million bond for losses allegedly sustained during the entire period of this litigation.

As we now demonstrate, the district court's decision was correct in all respects. Moreover, if this Court were to reach the issues not addressed in the district court's opinion, it should reject NJTHA's contentions that it is automatically entitled to the full $3.4 million bond amount, and that it may obtain damages far in excess of the bond amount for losses it allegedly sustained during the entire 43-month period between the grant of the 28-day TRO in October 2014 and the Supreme Court's decision in May 2018.

STATEMENT OF ISSUES FOR REVIEW

1. Given the binding holding by this Court at the time of the TRO that PASPA was constitutional, and the narrow issue to be decided during the pendency of the TRO—*i.e.*, whether the 2014 Repealer Law actually authorized sports wagering in violation of PASPA—did the district court properly determine that NJTHA was not wrongfully enjoined by the 28-day TRO?

2. Given the binding holding by this Court at the time of the TRO that PASPA was constitutional, and the narrow issue to be decided during the pendency of the TRO, did the district court act within its discretion to hold that good reason existed to deny NJTHA recovery on the bond?

Although the district court did not reach the following three issues, and this Court need not address them if it affirms the district court's decision on the basis of either of the first two issues, NJTHA's appeal raises the following three additional issues:

3. If the district court had found that NJTHA had been wrongfully enjoined and potentially entitled to recover against the bond, is NJTHA entitled to automatically recover the entire $3.4 million bond amount without having to prove any of its actual damages during the 28-day pendency of the TRO?

4. Is NJTHA precluded as a matter of law from seeking damages in this action for putative losses it allegedly sustained after the TRO expired?

5. Having twice litigated and lost the issue of whether the Leagues acted in bad faith when they sought to protect their rights under PASPA, is NJTHA precluded by the doctrines of collateral estoppel and law of the case from relitigating this issue in an attempt to recover more than the $3.4 million bond amount?

STATEMENT OF THE CASE

A. The Initial Litigation ("*Christie I*")

The dispute between the Leagues and NJTHA began in 2012, when the State of New Jersey first enacted a law authorizing sports gambling at New Jersey horse racetracks and Atlantic City casinos, prompting the Leagues to file a lawsuit against New Jersey officials to enjoin the operation of that law as a violation of PASPA. NJTHA intervened as a defendant in the lawsuit, asserting that it intended to offer sports gambling at Monmouth Park racetrack. In their cross-motion for summary judgment—after a period of substantial discovery, including depositions of the four professional League Commissioners and the NCAA President, and of defendants' own expert witness—the defendants argued that (i) the Leagues lacked Article III standing to enforce PASPA because they would not be harmed by the spread of legalized sports gambling to New Jersey, and in fact would benefit from it, and (ii) PASPA was unconstitutional. In support of their lack of injury argument, the defendants asserted that the Leagues (a) invested in and promoted

fantasy sports, (b) held games in jurisdictions where sports gambling is legal, (c) failed to take adequate measures to stop fans from gambling on their games, and/or (d) had financial relationships with casinos. The defendants also argued that sworn statements submitted at the outset of the litigation by the League Commissioners and the NCAA President expressing their views that the spread of state-sponsored sports wagering would irreparably harm the Leagues—the same statements on which NJTHA predicated the motion that is the subject of this appeal—were untrue and evidenced the Leagues' hypocrisy in seeking to enforce PASPA and halt the spread of state-sponsored sports gambling in New Jersey.

On December 21, 2012, the district court denied the defendants' cross-motion for summary judgment, and held that the Leagues had indeed demonstrated injury-in-fact from New Jersey's violation of PASPA. (A146-52 (No. 12-cv-4947, 2012 WL 6698684 (D.N.J. Dec. 21, 2012).) The district court held that this Court's prior decision in *Office of Commissioner of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009), had already established that a violation of PASPA caused injury-in-fact to the Leagues. (A147-48.) Moreover, the district court concluded that the Leagues had established, through congressionally funded studies, several undisputed consumer surveys, and the testimony of the defendants' own expert, that New Jersey's authorization of sports gambling posed a risk of substantial harm to the Leagues. (A149-151.)

Two months later, on February 28, 2013, the district court held that PASPA was constitutional, and permanently enjoined New Jersey from authorizing sports wagering. (A22-45 (926 F. Supp. 2d 551 (D.N.J. 2013), *aff'd sub nom. NCAA v. Governor of N.J.*, 730 F.3d 208 (3d Cir. 2013), *cert. denied*, 537 U.S. 931 (2014) ("*Christie I*")).) In so doing, the district court held that the Leagues had established irreparable injury; indeed, the court wrote, New Jersey's "enactment of the Sports Wagering Law in violation of the Supremacy Clause, alone, likely constitutes an irreparable harm requiring the issuance of a permanent injunction." (A42.)

This Court affirmed the district court's decision, holding that PASPA was constitutional and that the Leagues had shown sufficient threatened harm to entitle them to a permanent injunction. (A153-89 (730 F.3d 208 (3d Cir. 2013), *cert. denied*, 537 U.S. 931 (2014)).) This Court considered—and rejected—the defendants' arguments that the Leagues had not shown irreparable injury because the Leagues have prospered despite pervasive unregulated sports gambling and state-licensed sports wagering in Nevada, and because some of the Leagues (i) purportedly benefit from sports wagering, (ii) hold events in jurisdictions, such as Canada and England, where gambling on sports is licensed, and/or (iii) promote and profit from products that are allegedly "akin to gambling on sports, such as

pay-to-play fantasy leagues." (A167.)[1] This Court concluded: "That the Leagues have standing to enforce a prohibition on state-licensed gambling on their athletic contests seems to us a straightforward conclusion, particularly given the proven stigmatizing effect of having sporting contests associated with gambling, a link that is confirmed by commonsense and Congress' own conclusions." (*Id*.)

The defendants, including NJTHA, separately petitioned the United States Supreme Court for a writ of certiorari to review this Court's *Christie I* decision. On June 23, 2014, the Supreme Court denied those petitions and declined to review this Court's determination that PASPA both was constitutional and barred New Jersey from authorizing sports gambling within the State. (A190 (573 U.S. 931 (2014)).)

B. The Current Litigation ("*Christie II*")

On Friday, October 17, 2014, New Jersey again attempted to legalize sports gambling by enacting the 2014 Repealer Law that purported to repeal certain prohibitions against sports gambling only at New Jersey racetracks and Atlantic City casinos. (A51.) NJTHA immediately announced that it would begin offering sports wagering at Monmouth Park beginning on Sunday, October 26, 2014. (A52.)

[1] This Court noted that, in fact, fantasy leagues are legally distinct from the sports wagering contemplated by the New Jersey Sports Wagering Law. (A186 at n.4 (citing *Humphrey v. Viacom, Inc.*, No. 06-2768 (DMC), 2007 WL 1797648, at *9 (D.N.J. June 20, 2007) (holding that fantasy leagues that require an entry fee are not subject to anti-betting and wagering laws)).)

The Leagues brought suit to enjoin the new statute on Monday, October 20, 2014, and, when NJTHA refused to postpone the beginning of its sports wagering operations to afford the district court a brief opportunity to consider and rule on the validity of the 2014 Repealer Law, the Leagues moved for a TRO and preliminary injunction. (*Id*.)

The defendants, including NJTHA, opposed the TRO, arguing that the 2014 Repealer Law comported with PASPA because the selective repeal did not authorize sports gambling in violation of PASPA. In addition, NJTHA reasserted its contention that the Leagues could not show irreparable harm from sports betting at Monmouth Park because, among other things, the new NBA Commissioner had made public statements supporting legalized sports gambling, the NFL participated in, and failed to enjoin, fantasy football tournaments, the NCAA was unable to prevent March Madness brackets, and the Leagues held games in Las Vegas and London or have teams located in Canada, where sports betting is legal. Bound by this Court's holding in *Christie I* that PASPA was constitutional, NJTHA did not challenge the constitutionality of PASPA in the TRO proceedings.

On October 24, 2014, the district court granted the TRO, holding that the Leagues were likely to prevail on the merits of their argument that the partial repeal of sports wagering laws limited only to casinos and racetracks constituted an authorization of such gambling in violation of PASPA. (A46-66.) The lower court

also held that the Leagues had demonstrated a threat of irreparable injury, notwithstanding NJTHA's arguments about the Leagues' involvement with fantasy leagues and jurisdictions where sports betting is legal, because (i) "[c]onstitutional and statutory violations . . . generally constitute irreparable harm" (A58), and (ii) the well-developed record in *Christie I* was "replete with evidence" demonstrating the potential for harm that would be a "direct result of sports wagering on plaintiffs' games." (A59.)

With the granting of the TRO, the district court ordered the Leagues to post a bond in the amount of $1.7 million, explaining that the amount was a matter of the court's discretion, and that in this instance, the court found it "appropriate to set the bond on the high side to avoid any potential loss to defendants." (A64.) The district court also invited NJTHA to make an application to increase the bond amount if it asserted that enjoining it from offering sports gambling "pose[s] a risk of harm greater than the value of the bond currently set." (*Id.*)

On October 27, 2014, the district court directed that "the 14-day limitation period on the temporary restraining order is extended, for good cause, and by consent of all parties, for an additional 14 days pursuant to Federal Rule of Civil Procedure 65(b)(2) until November 21, 2014." (A10.) In the same order, the court ordered the bond amount increased to $3.4 million. (*Id.*) At no point did the parties litigate—or did the court make any express factual findings—concerning

the actual damages that NJTHA would suffer if it were wrongfully precluded from sports gambling operations during the 28-day pendency of the TRO.

The district court then consolidated the Leagues' application for a preliminary injunction with a decision on the merits of their complaint (A11-12), and on November 21, 2014, granted summary judgment to the Leagues, issuing a permanent injunction in the Leagues' favor. (A67-82 (61 F. Supp. 3d 488 (D.N.J. 2014), *aff'd*, 832 F.3d 389 (3d Cir. 2016) (*en banc*), *rev'd sub nom. Murphy v. NCAA*, 138 S. Ct. 1461 (2018) ("*Christie II*")).) On the same day, the 28-day-old TRO expired by its own terms. On November 24, 2014, NJTHA filed a notice of appeal, but did not request the posting of any post-judgment or appeal bond.

A panel of this Court affirmed the lower court's decision and reconfirmed the constitutionality of PASPA, noting that PASPA had been "criticized as unconstitutional, but we held otherwise in *Christie I* and we cannot and will not revisit that determination here." (A295 (799 F.3d 259, 264 n.5 (3d Cir. 2015)).) Moreover, this Court expressly rejected NJTHA's repeated argument that the Leagues had acted in bad faith when they sought to enforce their rights under PASPA: "It is not 'unconscionable' for the Leagues to support fantasy sports and hold events in Las Vegas or London, nor is doing so 'immediately related' to the 2014 [Repealer] Law. We cannot conclude that the Leagues acted unconscionably, i.e., amorally, abusively, or with extreme unfairness, in relation to the 2014

[Repealer] Law." (A292.) By a 9-3 vote, this Court sitting *en banc* also affirmed the grant of summary judgment, holding that "[t]he 2014 [Repealer] Law violates PASPA because it authorizes by law sports gambling," and "continu[ing] to find PASPA constitutional." (A307 (832 F.3d at 402).)

On May 14, 2018, the Supreme Court concluded that "[w]hen a State completely or partially repeals old laws banning sports gambling, it 'authorize[s]' that activity," thereby expressing its agreement with the Leagues, the district court, and this Court that the 2014 Repealer Law constituted an authorization of sports gambling in violation of PASPA. (A330 (138 S. Ct. at 1474).) The Supreme Court reversed the judgment, however, on the grounds that PASPA impermissibly commandeered the States, and thus was unconstitutional as a violation of the Tenth Amendment. (A331-38.)

Following the Supreme Court's decision, NJTHA was free to offer sports gambling at Monmouth Park. One month later, on June 14, 2018, it opened a sports book at the racetrack.

C. The Current Bond Motion and Decision Below

On May 24, 2018, even before it began operating its sports book, NJTHA filed the motion that is the subject of this appeal. In its motion, NJTHA asserted that it is entitled to recover nearly $150 million in damages allegedly suffered over the 43-month period between the grant of the TRO in October 2014 and the

Supreme Court's decision in May 2018. NJTHA predicated its motion on its renewed argument that the Leagues acted in bad faith in pursuing their rights under a statute that was ultimately declared unconstitutional while simultaneously participating in fantasy sports and/or otherwise coexisting with, and allegedly benefiting from, lawful and unlawful sports wagering.

At a June 20, 2018 conference with the parties regarding bifurcation, the magistrate judge ordered that all discovery—including discovery as to the amount of NJTHA's putative damages—be held in abeyance, and that the parties would brief only the following issues that they agreed could be resolved without any discovery: whether (i) NJTHA was "wrongfully enjoined" by the TRO such that it would be entitled to recover anything on the bond; (ii) NJTHA was entitled to recover the full $3.4 million bond amount as a matter of law without proof of its actual losses; and (iii) NJTHA's asserted right to damages in excess of $3.4 million due to alleged "bad faith" by the Leagues could be decided as a matter of law. A formal order to this effect was entered on July 17, 2018. (A766-769.)

Accordingly, the Leagues did not seek damages discovery and, when opposing NTJHA's motion, briefed only the issues set forth in the magistrate judge's order. (A742-765.) When NJTHA then disingenuously argued that the Leagues had waived any challenge to its damages calculations (A780), the Leagues submitted a proposed sur-reply brief both to highlight the magistrate judge's order

and to point out that, even in the prior proceedings in 2014, the Leagues had never conceded the validity of NJTHA's speculative damages projections. (A787-794.)

On November 15, 2018, the district court denied NJTHA's motion to recover on the bond in its entirety. The court correctly acknowledged that a bond provides security to an enjoined party who is later determined to have been wrongfully enjoined, and that a party "is wrongfully enjoined when it had a right all along to do what it was enjoined from doing." (A18, quoting *Latuszewski v. VALIC Fin. Advisors, Inc.*, 393 F. App'x 962, 966 (3d Cir. 2010).) The court then held that NJTHA had not been wrongfully enjoined because, during the 28-day pendency of the TRO, NJTHA did not have a right "to act pursuant to the 2014 Repealer Law—a law that violated a federal statute that the Third Circuit had already held was constitutional and upon which the Supreme Court declined certiorari when originally provided with the opportunity to consider the statute's constitutionality." (A18.) Indeed, as the district court noted, during the TRO proceedings, the question of PASPA's constitutionality was not even at issue, given this Court's binding decision in *Christie I*. The sole question for which the bond was posted in 2014 was whether the 2014 Repealer Law actually authorized such wagering in violation of PASPA. (A19.) According to the district court, "[t]hat PASPA's constitutionality was introduced on appeal d[id] not convert the

bond, which assured that the 2014 Repealer Law amounted to an authorization, into a bond that assured any and all possibilities." (A19.)

The district court also concluded that good reason existed to deny NJTHA damages arising out of the TRO bond. (A20.) Relying on Judge Posner's decision for the Seventh Circuit in *Coyne-Delany Co. v. Capital Development Board*, 717 F.2d 385, 390-93 (7th Cir. 1983), in which the court held that a district court may consider an intervening change in the law in exercising its discretion as to whether to award damages on an injunction bond, the district court held that, when it issued the TRO, PASPA had been held constitutional and the law favored the Leagues. It would be unreasonable, the district court concluded, "to allow NJTHA to recover under the injunction bond in light of the Leagues' correct interpretation that the 2014 Repealer Law authorized sports betting in violation of the governing law at the time." (A21.)

Because it held that NJTHA was not entitled to recover any damages under the TRO bond, the district court did not address the other, fully briefed issues of whether (i) NJTHA is required to prove the amount of any damages allegedly sustained during the 28-day pendency of the TRO, and (ii) NJTHA is precluded as a matter of law—including collateral estoppel and law of the case—from recovering damages in excess of the bond amount based on the Leagues' enforcement of their rights under PASPA.

On appeal, NJTHA asks this Court to reverse the decision of the district court and remand the case with instructions to the district court to (i) enter an immediate judgment awarding NJTHA damages in the full amount of the $3.4 million bond plus interest, and (ii) conduct an evidentiary hearing, preceded by accelerated discovery, to determine whether and in what amount NJTHA should recover damages in excess of the bond amount. NJTHA's request should be denied, and the opinion and order of the district court should be affirmed.

SUMMARY OF ARGUMENT

The district court's decision should be affirmed in its entirety.

First, the district court properly held that NJTHA was not wrongfully enjoined by the TRO. When the district court issued the TRO in October 2014, the issue of PASPA's constitutionality had been fully litigated in *Christie I*. This Court had determined that PASPA was constitutional, the United States Supreme Court had declined to review that decision, and that decision therefore bound the district court. Under the unambiguous law of this Circuit, as it existed in October 2014, NJTHA did not have the right to operate a sports betting venue at Monmouth Park. That the Supreme Court struck down PASPA as unconstitutional more than three years later, in May 2018, is insufficient to conclude that NJTHA was wrongfully enjoined in October 2014, when the question of PASPA's

constitutionality was not—and could not have been—at issue on the TRO application.

Second, the district court acted well within its broad discretion in finding that good reason existed to deny recovery on the bond. Even where an injunction is erroneously entered, the enjoined party is not automatically entitled to recover its costs and damages on the bond. Rather, the district court must consider and evaluate a full range of factors, including the plaintiff's good faith and any changes in the law since the issuance of the TRO, when determining whether, in the exercise of its discretion, to award the prevailing party costs and damages on an injunction bond. Under the circumstances in this case, which include a change in the law of this Circuit more than three years after the issuance of the TRO, the district court did not abuse its discretion in denying NJTHA any recovery on the bond.

Third, even if NJTHA were entitled to some measure of damages, it would not be automatically entitled to recover the full bond amount. As a matter of law, a TRO bond merely sets the maximum amount of a wrongfully enjoined party's recovery; the party seeking recovery still bears the burden to prove the existence and amount of any actual losses proximately caused by the TRO during the TRO period. Despite its assertion to the contrary, NJTHA has not already established—

and the district court made no factual findings about—the existence and amount of any damages NJTHA allegedly sustained during the pendency of the TRO.

Finally, NJTHA's effort to recover damages far in excess of the $3.4 million bond on the ground that the Leagues acted in bad faith throughout the litigation should be rejected for at least three discrete reasons. First, the law in this Circuit has been clear for decades that any liability of the party that obtained an erroneously granted TRO is limited to provable damages sustained during the pendency of the TRO and not for damages sustained after the expiration of the TRO. Having failed to seek a post-judgment or appeal bond following the entry of the permanent injunction, NJTHA cannot seek damages against the Leagues for losses it allegedly sustained after November 21, 2014, when the TRO expired. Second, having litigated in both *Christie I* and *Christie II* the issue of whether the Leagues acted in bad faith when they sought to protect their rights under PASPA—and having lost that issue at every stage of these litigations—NJTHA is barred by the doctrines of collateral estoppel and law of the case from relitigating the issue once again in its effort to recover more than the face amount of the injunction bond. Third, the Leagues' conduct in seeking to protect their interests under PASPA does not constitute the kind of egregious behavior that might justify an award of damages in excess of the TRO bond amount.

For all of these reasons, as explained in more detail below, the decision of the district court denying NJTHA recovery on the bond should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

A district court's decision regarding recovery under an injunction bond issued pursuant to Rule 65(c) is reviewed for abuse of discretion, and any underlying findings of fact are reviewed for clear error. *See, e.g.*, *Latuszewski*, 393 F. App'x at 966 ("We review the District Court's denial of damages [on a preliminary injunction bond] for abuse of discretion."); *Sprint Commc'ns Co. v. CAT Commc'ns Int'l Inc.*, 335 F.3d 235, 242 n.7 (3d Cir. 2003). To the extent that the district court's decision to permit or deny such recovery is premised on a pure question of law regarding the proper interpretation of Rule 65(c), that particular question of law is subject to plenary review. *See, e.g.*, *Sprint*, 335 F.3d at 239 (exercising plenary review regarding the legal question of whether bond amounts may be retroactively increased).

II. THE DISTRICT COURT PROPERLY HELD THAT NJTHA WAS NOT "WRONGFULLY ENJOINED" BY THE TRO

Rule 65(c) protects an enjoined party from the possibility that a temporary injunction, entered without the benefit of full deliberation, was erroneous in the sense that it would not have been issued if there had been the opportunity for full deliberation. The rule provides, in pertinent part, that 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." Fed. R. Civ. P. 65(c). As this Court explained nearly fifty years ago:

> The requirement of security is rooted in the belief that a defendant deserves protection against a court order granted without the full deliberation a trial offers. That protection consists of a promise that the defendant will be reimbursed for losses suffered if it turns out that the order issued was erroneous in the sense that it would not have been issued if there had been the opportunity for full deliberation.

American Bible Soc'y v. Blount, 446 F.2d 588, 595 n.12 (3d Cir. 1971) (citation omitted).

When the district court entered the TRO in this case, the constitutionality of PASPA was settled law in this Circuit. Congress had enacted PASPA in 1992, and, for more than twenty-five years, every challenge to the constitutionality of PASPA had been rejected. In *Office of Commissioner of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009), for example, some five years before the Leagues relied on PASPA to seek the TRO at issue on this motion, this Court enforced PASPA against the State of Delaware and rejected Delaware's argument that "its sovereign status requires that it be permitted to implement its proposed betting scheme." *Id.* at 303. More than three years later, in *Christie I*, both the district court and this Court concluded that PASPA was constitutional, a position supported by both the Leagues and the United States Department of Justice. (A22-45 (926 F. Supp. 2d

551 (D.N.J. 2013)); A153-89 (730 F.3d 208 (3d Cir. 2013)).) And the United States Supreme Court declined to review that decision or to consider the issue of PASPA's constitutionality, despite NJTHA's urging.[2] (A190.)

In light of the binding holding in *Christie I*, the district court granted the TRO and ordered the TRO bond to assure only the correctness of its conclusion—made without full deliberation because of NJTHA's insistence that it would begin immediate operation of a sports book at Monmouth Park (A52-66)—that the Leagues were likely to establish that the 2014 Repealer Law actually authorized sports wagering in violation of PASPA. (A19.) With fuller deliberation, the district court concluded that the Leagues had established that the 2014 Repealer Law actually authorized sports wagering in violation of PASPA, and granted summary judgment in the League's favor. (A77-80 (61 F. Supp. 3d at 503-08).) The subsequent decisions of this Court and the Supreme Court confirmed that the district court's conclusion on this issue was correct. (A307 (832 F.3d at 402 (*en banc*) ("The 2014 [Repealer] Law violates PASPA because it authorizes by law sports gambling," and "continu[ing] to find PASPA constitutional")); A330 (138 S.

[2] Even after the Leagues relied on PASPA to seek the TRO in this case, the Department of Justice supported the Leagues' position and a panel of this Court reaffirmed that the statute passed constitutional muster. (A286-96 (799 F.3d 259 (3d Cir. 2015)).) So, too, did a 9-3 majority of this Court sitting *en banc*. (A297-315 (832 F.3d 389 (3d Cir. 2016)).)

Ct. at 1474 ("[w]hen a State completely or partially repeals old laws banning sports gambling, it 'authorize[s]' that activity")).)

There is now no basis to conclude that the TRO was "erroneous"—*i.e.*, that "it would not have been issued if there had been the opportunity for full deliberation." *American Bible Soc'y*, 446 F.2d at 595 n.12. No matter how much time the district court had to deliberate on the question before it—whether the 2014 Repealer Law actually authorized sports wagering in violation of PASPA—the district court was required to treat PASPA as constitutional. And the correctness of the district court's decision on the sole issue before it was confirmed upon further and fuller deliberation not only by the district court itself, but by this Court and the Supreme Court as well. That PASPA was eventually struck down in May 2018 as unconstitutional—an argument that was not advanced and could not have been considered during the TRO proceedings—does not mean that NJTHA was wrongfully enjoined in October 2014.[3]

[3] Contrary to NJTHA's repeated assertion that the constitutionality of PASPA was litigated in the district court in *Christie II*, the district court was bound by the holding of this Court in *Christie I* on that issue. Indeed, as NJTHA itself recognizes in its appeal brief, a "lower court has no power to overrule the precedent of its judicial superior." (NJTHA Br. at 28.) *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.*, 825 F.3d 149, 164 (3d Cir. 2016); *United States v. Extreme Assocs., Inc.*, 431 F.3d 150, 156 (3d Cir. 2005). For that reason, NJTHA acknowledges that any effort to relitigate the constitutionality of PASPA in the context of the TRO proceedings "would have

(cont'd)

Combining this Court's statements that "a party is wrongfully enjoined when it had a right all along to do what it was enjoined from doing," *e.g.*, *Latuszewski*, 393 F. App'x at 966, with judicial pronouncements that unconstitutional statutes are "void," *e.g.*, *Marbury v. Madison*, 5 U.S. 137, 177 (1803), NJTHA indulges a legal fiction that PASPA never existed, so that NJTHA had "the right all along" to engage in sports wagering at Monmouth Park. But NJTHA's reliance on that legal fiction reflects a complete misunderstanding of the void *ab initio* doctrine. Contrary to NJTHA's theory, the same treatise on which NJTHA relies explains:

> Though a statute declared unconstitutional is unenforceable, it is not wholly without effect; the existence of the statute prior to that declaration is an operative fact and may have consequences that cannot justly be ignored. . . . Thus, an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified, and courts, depending on the circumstances, have employed other rules that avoid the hard and fast consequences of such a rule.

16A Am. Jur. 2d *Constitutional Law* § 196, Westlaw (database updated Feb. 2019); *see also Chicot Cty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940) ("The actual existence of a statute, prior to [a determination of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration.").

(cont'd from previous page)
been an exercise in futility." (NJTHA Br. at 28; *see also* A74 (61 F. Supp. 3d at 498 (stating that "as much as Defendants would prefer, *Christie II* is not, and cannot be, about the constitutionality of PASPA")).)

None of the cases on which NJTHA relies for the proposition that a statute declared unconstitutional is void involved the question of a wrongful injunction under Rule 65(c). But in other contexts, courts readily look past the legal fiction that the "void *ab initio*" doctrine erases the past to recognize the actual reality of historical facts. *See, e.g.*, *Harris v. Railroad Ret. Bd.*, 3 F.3d 131, 135 (5th Cir. 1993) (where annulment of marriage rendered the marriage "void *ab initio,*" the court "look[ed] through the legal fiction of annulment and recognize[d] that Mrs. Harris's marital status that actually existed before the annulment determines her entitlement to Railroad Retirement benefits during those months"); *Purganan v. Schweiker*, 665 F.2d 269, 270-71 (9th Cir. 1982) (Although annulment of a marriage voids the marriage and operates to "erase the marriage and all its implications from the outset," application of that legal fiction must promote sound policy; in the case of entitlement to social security benefits, "it is the marital status that actually existed during the months in question that determines Appellant's entitlement to social security benefits. During those months Appellant was a married person," despite the annulment.).

Accordingly, the declaration that PASPA is unconstitutional, and thus void, does not mean that PASPA never existed, or that NJTHA had the right all along to operate a sports book at Monmouth Park. Such an assertion is contrary to the actual facts and circumstances of this case, and should be rejected. PASPA

manifestly did exist in October 2014, and had been declared constitutional by this Court. Under the unambiguous law of this Circuit, as it existed in October 2014, NJTHA did not have the right to operate a sports betting venue at Monmouth Park because PASPA prohibited New Jersey from authorizing sports betting. The subsequent change in the law is sufficient to conclude that NJTHA was not wrongfully enjoined by the TRO. *See Chicot*, 308 U.S. at 374; *accord Kansas ex rel. Stephan v. Adams*, 705 F.2d 1267, 1270 (10th Cir. 1983) (where a change in the law occurred after the issuance of the TRO, "the TRO was not dissolved because it was wrongfully issued, but rather because of an intervening event," *i.e.*, the intervening change in the law).

The district court's holding that NJTHA was not wrongfully enjoined was correct, and should be affirmed.

III. THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION TO HOLD THAT GOOD REASON EXISTED TO DENY RECOVERY ON THE BOND

Even where a party was wrongfully enjoined, the district court has the discretion to decide that good reason exists to deny that party recovery on the bond. *See, e.g.*, *Coyne-Delany*, 717 F.2d at 391-92 ("[T]he district court has unquestioned power in an appropriate case not to award costs to the prevailing party and not to award damages on an injunction bond even though the grant of the injunction was reversed."). And this Court has unequivocally held that the district

court's decision to deny damages on a bond for equitable reasons is reviewed for abuse of discretion. *See, e.g.*, *Latuszewski*, 393 F. App'x at 966 ("We review the District Court's denial of damages [on a preliminary injunction bond issued pursuant to Rule 65(c)] for abuse of discretion.").

In *Coyne-Delany*, the Seventh Circuit stated, "we are not prepared to hold that the [enjoined, and ultimately prevailing, party] is entitled as a matter of law to its costs and to its injunction damages up to the limit of the bond." *Coyne-Delany*, 717 F.2d at 392. Rather, the court explained, the district court must exercise its discretion to "consider and evaluate the full range of factors (which might in an appropriate case include, but is not exhausted by, the plaintiff's good faith) that would be relevant under the proper standard" for determining whether to award the prevailing party costs and damages on an injunction bond. *Id.*; *see also H&R Block, Inc. v. McCaslin*, 541 F.2d 1098, 1099 (5th Cir. 1976) (*per curiam*) ("[t]he awarding of damages pursuant to an injunction bond rests in the sound discretion of the court's equity jurisdiction"); *Page Commc'ns Eng'rs, Inc. v. Froehlke*, 475 F.2d 994, 997 (D.C. Cir. 1973) (*per curiam*) (a district court is not bound to award damages on an injunction bond without exercising its discretion to consider the equities of the case); *Zenith Radio Corp. v. United States*, 643 F. Supp. 1133, 1137 (Ct. Int'l Trade 1986) ("the good faith of the party who obtained the injunction is

one of the factors the court may consider" in exercising its discretion as to whether to award such damages).[4]

That "full range of factors" includes, in addition to the good faith of the party that obtained the TRO, a "change in the applicable law after the preliminary injunction [or, in this case, the TRO] was issued." *Coyne-Delany*, 717 F.2d at 392. In *Coyne-Delany*, the federal district court had relied on a state intermediate appellate court decision to grant preliminary injunctive relief. The state intermediate appellate court decision was subsequently reversed by the state's highest appellate court, and the federal district court's preliminary injunction was then vacated. As explained above, the court held that a "change in the law" is a "legitimate consideration" that may counsel against recovery on a bond under Rule 65(c). *Id.* at 391, 392; *accord Zenith Radio Corp.*, 643 F. Supp. at 1138 ("The

[4] Although the Seventh Circuit in *Coyne-Delany* criticized the decisions in *H&R Block* and *Page Communications* for purportedly giving district courts "completely open-ended" discretion to deny damages, *see Coyne-Delany*, 717 F.2d at 391, it agreed that the good faith of the party that sought the injunction and a change in the law after the issuance of the injunction are the kind of good reasons that a district court should consider in exercising its discretion. *Id.* at 392; *see also Zenith Radio Corp.*, 643 F. Supp. at 1136-37 (explaining that the difference between *Page Communications* and *Coyne-Delany* "might not be as great as appears at first blush"). As applied to the instant case, therefore, *H&R Block*, *Page Communications*, and *Coyne-Delany* all lead to the same conclusion: the district court acted well within its discretion in considering a change in the law, as well as the Leagues' good faith, when deciding whether to award damages to NJTHA on the TRO bond.

most significant factor in [the plaintiff's] favor, and the one upon which the court relies in denying assessment of damages, is the change in the law that took place after the preliminary injunction was issued . . . .").

In the instant case, the law relating to state-authorized sports wagering changed more than a quarter century after PASPA was enacted, more than four years after this Court upheld PASPA's constitutionality in a decision—*Christie I*—that the Supreme Court declined to review, and more than three years after the district court issued the TRO. Under these circumstances, and in view of the Leagues' correct interpretation of the 2014 Repealer Law as authorizing sports betting in violation of the governing law of this Circuit at the time, the district court acted well within its discretion in concluding that it would be unreasonable to allow NJTHA to recover damages on the injunction bond. (A21.) That decision was not an abuse of discretion, and should therefore be affirmed.

IV. IN ANY EVENT, NJTHA WOULD NOT BE ENTITLED TO AN IMMEDIATE RECOVERY OF THE $3.4 MILLION BOND, BUT MUST PROVE THE AMOUNT OF ITS ALLEGED DAMAGES DURING THE PENDENCY OF THE TRO

Even if NJTHA were entitled to some measure of damages for having been enjoined from operating a sports book at Monmouth Park during the twenty-eight days between October 24, 2014, and November 21, 2014, it is not automatically entitled to recover the full $3.4 million of the bond. As this Court has held, a "wrongfully enjoined party is only entitled to 'provable damages.'" *Latuszewski*,

393 F. App'x at 966 (quoting *Global NAPs, Inc. v. Verizon New Eng., Inc.*, 489 F.3d 13, 23 (1st Cir. 2007)); *see also Global NAPs, Inc.*, 489 F.3d at 23 (holding that a wrongfully enjoined party may "recover provable damages up to the amount of the security"); 13 James Wm. Moore et al. Moore's Federal Practice § 65.53 (3d ed. 2018) (noting that presumption of recovering against the bond applies only to "provable damages up to the amount of the bond"). As this Court noted in *Latuszewski*, the face amount of an injunction bond does not constitute "an agreement between the parties about the amount of damages that will be caused by an improper injunction." 393 F. App'x at 967 n.8. Rather, the face amount of the bond merely "*limits* the liability of the party seeking the injunction." *Id.* (emphasis in original).

Thus, NJTHA bears the burden to prove its actual damages even if it had been wrongfully enjoined in 2014. Furthermore, "[a]lthough proof of damages on an injunction bond 'need not . . . be to a mathematical certainty[,]' a damages award cannot be speculative." *Id.* at 966 (alterations in original) (citation omitted); *see also* 11A Charles A. Wright et al., *Federal Practice and Procedure* § 2973 (3d ed. Westlaw 2018) ("A wrongfully enjoined defendant must establish what damages were proximately caused by the erroneously issued injunction in order to recover and the alleged damages cannot be speculative.").

NJTHA's contention that the amount of its putative damages during the pendency of the TRO has already been litigated—and that the Leagues have somehow conceded that NJTHA's assertions about the level of profits it likely would have realized in the absence of the TRO—is simply wrong. When the district court ordered the bond in October 2014, it noted that it was "set[ting] the bond on the high side to avoid any potential loss to defendants." (A64.) No discovery was obtained to test NJTHA's alleged predictions as to its likely profits from a sports book at Monmouth Park in the autumn of 2014. And the Leagues made it clear to the district court that, for many reasons, they did not agree with NJTHA's unsupported assessment of Monmouth Park's anticipated sports betting profits. (A536-543.) The Leagues repeated their challenge to NJTHA's putative damages calculations in connection with NJTHA's motion to recover on the bond (A787-794), and the parties agreed to a stipulated order holding in abeyance any discovery concerning NJTHA's alleged damages calculations until the district court ruled on the legal issues governing NJTHA's motion. (A766-769.)

Moreover, subsequent events make the existence of such profits during the 28-day pendency of the TRO suspect. As noted above, a full month elapsed after the Supreme Court's decision in May 2018 before NJTHA began to operate its sports book at Monmouth Park, suggesting that NJTHA would not likely have been

operating its sports book at Monmouth Park for the entire twenty-eight days of the TRO back in October and November 2014.

Accordingly, if this Court were inclined to reverse the district court decision and permit NJTHA to recover its alleged losses during the pendency of the TRO, the Leagues would be entitled to discovery of the factual bases for those claimed losses.

V. NJTHA'S EFFORT TO RECOVER DAMAGES FOR LOSSES ALLEGEDLY SUSTAINED DURING THE ENTIRETY OF THIS LITIGATION SHOULD BE REJECTED

Finally, NJTHA seeks to recover damages far exceeding the $3.4 million bond on the grounds that the Leagues allegedly acted in bad faith in protecting their rights under PASPA during the entirety of this litigation, including the forty-two months between the expiration of the TRO and the Supreme Court's decision. This effort should be rejected as a matter of law for at least three reasons.

First, longstanding Third Circuit precedent establishes that "[t]he liability under a bond given pursuant to a temporary restraining order cannot be carried over to cover possible liability under a preliminary injunction," much less under a final judgment and permanent injunction. *Steinberg v. American Bantam Car Co.*, 173 F.2d 179, 181 (3d Cir. 1949). The purpose of Rule 65(c) in connection with a TRO "is to enable a restrained or enjoined party to secure indemnification for any costs, usually not including attorney's fees, and any damages that are sustained

during the period in which a wrongfully issued [TRO] remains in effect." 11A Charles A. Wright et al., Federal Practice and Procedure § 2954 (3d ed. 2013) (emphasis added). NJTHA does not cite any contrary legal authority. In the instant case, the TRO was in effect for twenty-eight days and expired by its own terms on November 21, 2014. With no post-judgment or appeal bond in place, the Leagues cannot be held liable for any losses that NJTHA claims occurred after the expiration of the TRO. Accordingly, NJTHA's request for damages allegedly suffered after November 21, 2014, should be rejected as a matter of law.

Second, NJTHA has already fully litigated and lost the issue of the Leagues' alleged bad faith both in this case and in *Christie I*. As described above, NJTHA's bad faith argument is predicated—as it has always been—on NJTHA's allegation that the Leagues sought to enjoin New Jersey from authorizing sports betting while simultaneously investing in and promoting fantasy leagues, holding events in jurisdictions that permit legalized sports betting, and/or failing to stop sports betting on events like March Madness. NJTHA has fought this fight before, and has consistently lost it.

In *Christie I*, NJTHA argued that, because some Leagues promoted fantasy sports or held events in locations that permitted legalized sports wagering, League executives were lying to the court when they declared that the Leagues were threatened with injury by the spread of state-sponsored sports gambling. (A146

(No. 12-cv-4947 (MAS) (LHG), 2012 WL 6698684 (D.N.J. Dec. 21, 2012)).) The district court in *Christie I* rejected that argument on the ground that the evidence—including congressionally funded studies, several consumer surveys, and the testimony of the defendants' own expert witness—amply demonstrated the substantial risk that the spread of state-sponsored sports gambling would cause harm to the Leagues. (A146-152.) This Court agreed: "That the Leagues have standing to enforce a prohibition on state-licensed gambling on their athletic contests seems to us a straightforward conclusion, particularly given the proven stigmatizing effect of having sporting contests associated with gambling, a link that is confirmed by commonsense and Congress' own conclusions." (A166-167 (730 F.3d at 223-34).)

NJTHA reignited this fight in *Christie II*, opposing both the TRO and the permanent injunction with arguments that the Leagues' claims of threatened irreparable harm were false and hypocritical, and that the Leagues came to the court with unclean hands because some of the Leagues promoted fantasy sports, held their sporting events in jurisdictions where sports betting is legal, and/or were unable or unwilling to stop fans from betting on events like March Madness. (A481.) Again, the district court rejected NJTHA's assertions, holding that the well-developed record in *Christie I* was "replete with evidence" demonstrating increased risk of irreparable harm that would be a "direct result of sports wagering

on plaintiffs' games." (A59.) And again, this Court affirmed that conclusion and rejected NJTHA's bad faith argument, explaining: "It is not 'unconscionable' for the Leagues to support fantasy sports and hold events in Las Vegas or London, nor is doing so 'immediately related' to the 2014 [Repealer] Law. We cannot conclude that the Leagues acted unconscionably, i.e., amorally, abusively, or with extreme unfairness, in relation to the 2014 [Repealer] Law." (A292 (799 F.3d at 268).)

Having litigated and lost this issue in both *Christie I* and in this case, NJTHA is barred by the doctrines of collateral estoppel and law of the case from relitigating the issue anew. *See, e.g.*, *Henglein v. Colt Indus. Operating Corp.*, 260 F.3d 201, 209 (3d Cir. 2001) (litigant barred from relitigating an issue under doctrine of collateral estoppel where, as here, (1) "the [same] issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action"); *In re Continental Airlines, Inc.*, 279 F.3d 226, 233 (3d Cir. 2002) (precluding relitigation of an issue that was "properly presented and ably and vigorously argued," and explaining that the law of the case doctrine ensures that court decisions on rules of law "continue to govern the same issues in subsequent stages in the same case") (citation omitted).

Finally, even if this Court were inclined to revisit this well-worn argument once again, damages in excess of the bond amount are unavailable except in the

most egregious circumstances. *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 804 (3d Cir. 1989) ("It is generally settled that, with rare exceptions, a defendant wrongfully enjoined has recourse only against the bond.") "A party injured by the issuance of an injunction later determined to be erroneous has no action for damages in the absence of a bond." *Id.* (quoting *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Corp. Linoleum & Plastic Workers*, 461 U.S. 757, 770 n.14 (1983)).

Unlike the Leagues, the plaintiffs in the two cases on which NJTHA relies to support its claim to exceed the bond amount made intentionally and demonstrably false statements of objective fact to secure the injunctive relief they sought. In *Don Post Studios, Inc. v. Cinema Secrets, Inc.*, 148 F. Supp. 2d 572 (E.D. Pa. 2001), for instance, the "plaintiffs filed a frivolous, objectively unreasonable lawsuit and sought an injunction on the basis of a copyright that plaintiffs knew to be invalid." *Id.* at 575. Likewise, in *qad. inc. v. ALN Assocs., Inc.*, 781 F. Supp. 561 (N.D. Ill. 1992), the plaintiff based its request for a preliminary injunction on copyrights that it did not actually own, and engaged in "egregious" copyright misuse and deception of the court. *Id.* at 562.

The egregious behavior of the plaintiffs in *Don Post Studios* and *qad. inc.* bears no resemblance to the Leagues' conduct in seeking to protect their interests under PASPA. As the district court and this Court recognized here,

congressionally funded studies and consumer surveys—as well as the irrefutable fact that even New Jersey's sports wagering law exempted college sporting events that take place in New Jersey or in which any New Jersey college team participates, regardless of where the event takes place (A60)—fully supported the Leagues' concerns that state-authorized and state-sponsored sports gambling would increase the risks to which the Leagues would be exposed.

In sum, NJTHA may not recover damages it allegedly sustained after the expiration of the TRO on November 21, 2014. Moreover, having twice lost the meritless argument that the Leagues acted in bad faith in pursuing their rights under PASPA, NJTHA's effort to resurrect the argument for a third time should be denied under the doctrines of collateral estoppel and law of the case. And finally, on its merits, NJTHA's claim that the Leagues acted in bad faith in seeking to protect their interests is frivolous, and should be rejected.

CONCLUSION

For the foregoing reasons, the district court's decision denying NJTHA's motion to recover damages on the TRO bond should be AFFIRMED.

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Respectfully Submitted,

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: /s/ Jeffrey A. Mishkin
Jeffrey A. Mishkin
Anthony J. Dreyer
Four Times Square
New York, New York 10036-6522
(212) 735-3000

Paul D. Clement
Erin E. Murphy
KIRKLAND & ELLIS LLP
665 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Richard Hernandez
MCCARTER & ENGLISH, LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
(973) 622-4444

Attorneys for Appellees

CERTIFICATE OF BAR MEMBERSHIP

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

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I hereby certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a). Specifically, this Brief contains 8,345 words and is in 14-point Times New Roman font.

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Pursuant to Federal Rule of Appellate Procedure 25(d), I hereby certify that on March 25, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: March 25, 2019

/s/ Jeffrey A. Mishkin
Jeffrey A. Mishkin
(NY Bar No. 1083203)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036-6522
(212) 735-3000