NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

CLAUDE DE BOTTON, NEWTOWN SQUARE EAST, L.P., NATIONAL DEVELOPERS, INC. AND NEWTOWN G.P., LLC,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
KAPLIN STEWART REITER & STEIN, P.C., MARC B. KAPLIN, ESQUIRE, BARBARA ANISKO, ESQUIRE AND PAMELA M. TOBIN, ESQUIRE (COLLECTIVELY "KSMRS"),	:	
Appellants	:	No. 1635 EDA 2012

Appeal from the Order Dated May 22, 2012
In the Court of Common Pleas of Philadelphia County
Civil Division No(s).: 001997, October Term, 2010

CLAUDE DE BOTTON, NEWTOWN SQUARE EAST, L.P., NATIONAL DEVELOPERS, INC. AND NEWTOWN G.P., LLC,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
BPG REAL ESTATE INVESTORS, CAMPUS INVESTORS OFFICE B, L.P., CAMPUS INVESTORS 25, L.P., CAMPUS INVESTORS I BUILDING, L.P., CAMPUS INVESTORS H BUILDING, L.P., CAMPUS INVESTORS D BUILDING, L.P., CAMPUS INVESTORS COTTAGES, L.P., CAMPUS INVESTORS OFFICE 2B, L.P., ELLIS PRESERVE OWNERS ASSOCIATION, KELLY PRESERVE OWNERS ASSOCIATION, COTTAGES AT ELLIS OWNERS ASSOCIATION, GENBER/ MANAGEMENT CAMPUS, LLC, BERWIND	:	

PROPERTY GROUP, LTD., EXECUTIVE BENEFIT PARTNERSHIP CAMPUS, MANAGEMENT PARTNERSHIP BENEFIT, L.P. AND ELLIS ACQUISTION, L.P., KAPLIN STEWART MELOFF REITER & STEIN, P.C., MARC B. KAPLIN, ESQUIRE, BARBARA ANISKO, ESQUIRE, AND PAMELA M. TOBIN	:	
	:	No. 1734 EDA 2012
APPEAL OF: BPG DEFENDANTS	:	

Appeal from the Order Dated May 22, 2012
In the Court of Common Pleas of Philadelphia County
Civil Division No(s).: 001997, October Term, 2010

BEFORE: FORD ELLIOTT, P.J.E., MUNDY, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED SEPTEMBER 25, 2013**

Appellants, Kaplin Stewart Reiter & Stein, P.C., Marc B. Kaplin, Esq., Barbara Anisko, Esq., Pamela M. Tobin, Esq. (collectively, "Kaplin"), BPG Real Estate Investors, Campus Investors Office B, L.P., Campus Investors 25, L.P., Campus Investors I Building, L.P., Campus Investors H Building, L.P., Campus Investors D Building, L.P., Campus Investors Cottages, L.P., Campus Investors Office 2B, L.P., Ellis Preserve Owners Association, Kelly Preserve Owners Association, Cottages at Ellis Owners Association, Genber/Management Campus, LLC, Berwind Property Group, Ltd., Executive Benefit Partnership Campus, Management Partnership Benefit, L.P., and Ellis

* Former Justice specially assigned to the Superior Court.

Acquisition, L.P. (collectively, but excluding Kaplin, "BPG"),[1] appeal from the order entered in the Philadelphia County Court of Common Pleas ordering the production of privileged documents to Appellees, Claude de Botton, Newtown Square East, L.P., National Developers, Inc., and Newtown G.P., LLC (collectively, "de Botton").[2] Kaplin and BPG contend that the trial court erred by ordering the production of privileged information. As set forth in further detail below, this case—which has been litigated in the United States District Court for the Eastern District of Pennsylvania, the Court of Common Pleas of Delaware County, and the Court of Common Pleas of Philadelphia County—has consumed significant judicial resources. We vacate the order below and remand with instructions to stay the action until the underlying case, ***BPG Real Estate Investors-Straw Party 1, L.P., et al. v. Claude de Botton, et al.***, 10-7352 (C.C.P. Delaware filed June 15, 2010), is complete. The parties may appeal, without prejudice to any future appeals, any subsequent disposition of the underlying motion.

[1] BPG contends that BPG Real Estate Investors-Straw Party 1, L.P. and BPG Real Estate Investors-Straw Party 2, L.P., are also parties to the appeal but they are not named in the caption. ***See*** BPG's Brief at 4 n.1.

[2] Kaplin and BPG each filed a notice of appeal and an appellate brief. For ease of disposition, we resolve both appeals together.

We quote the findings of facts and conclusions of law as set forth in a prior decision by the United States District Court for the Eastern District of Pennsylvania:[3]

> [BPG] sue the defendants[4] for, *inter alia*, federal antitrust violations[.] According to the Amended Complaint, BPG and the de Botton Defendants own parcels of land in Newtown Township, on which each of them would like to develop a "mixed use town center" ("MUTC")[.] The plaintiffs describe an MUTC as a "planned integration of mutually supportive commercial, retail, residential, entertainment and community uses in a pedestrian friendly environment on one parcel of land," Am. Compl. at ¶ 2[.] Simply stated, BPG alleges that the defendants have done a variety of illegal things to slow down or prevent BPG's development of an MUTC on its parcel of land[.] The defendants have purportedly taken these actions to eliminate competition with their own MUTC in Newtown Township[.]

BPG Real Estate Investors—Straw Party 1, L.P. v. de Botton, 09-1714 (E.D. Pa. Apr. 29, 2010) (order), at 2-3 (footnotes omitted) ("Federal Order"). For example, in support of their antitrust allegations, BPG alleged that de Botton, *inter alia*, disparaged BPG, deterred potential MUTC tenants from signing leases with BPG, and abused the judicial process. Fed. First Amended Compl., 6/15/09, at 20, 29. BPG also claimed that de Botton

[3] For clarity, we reformatted the federal court's decision and excluded docket numbers and parentheticals.

[4] In the federal lawsuit, there were numerous defendants not involved in the instant, underlying Philadelphia County lawsuit. The federal court labeled Claude de Botton, National Developers, Inc., and Newtown G.P., LLC, as the "de Botton Defendants."

bought a specific piece of property in order to have legal standing to object to BPG's development. ***Id.*** at 16.

We continue quoting from the federal district court's decision:

> BPG sues the de Botton Defendants in Count I for attempted monopolization in violation of § 2 of the Sherman [Antitrust] Act, and BPG brings claims in Count II against all defendants for antitrust conspiracy pursuant to § 1 of the Sherman Act[.] The de Botton Defendants move to dismiss Count I, and all defendants move to dismiss Count II[.] The defendants raise many arguments in favor of dismissal, but we will address only their contention that BPG fails to allege a relevant geographic market, as BPG must do to maintain its antitrust claims[.]
>
> BPG has the burden of proving the relevant geographic market, and at this stage BPG must therefore allege facts in the Amended Complaint that could plausibly support its proposed relevant geographic market[.] The relevant geographic market is "the area in which a potential buyer may rationally look for the goods or services he or she seeks," ***Tunis Brothers Co. v. Ford Motor Co.***, 952 F.2d 715, 726 (3d Cir. 1991) (internal quotations omitted), *quoted* in ***U.S. Horticultural Supply v. Scotts Co.***, 2010 WL 729498 *4 (3d Cir. Mar. 4, 2010)[.] "[T]he geographic market is not comprised of the region in which the seller attempts to sell its product, but, rather, is comprised of the area where customers would look to buy such a product," ***U.S. Horticultural Supply***, 2010 WL 729498 at *4[.]
>
> The plaintiffs allege that "[t]he relevant market in this action is the business of developing and operating mixed use town centers located at the intersection of Route 3, an east/west axis, and Route 252, a north/south axis in [Newtown] Township," Am. Compl. at ¶ 28[.] BPG also claims that the relevant geographic market is "[t]he approximately five mile area surrounding the cross roads of the two major access and travel roads (Routes 3 and 252)," ***Id.*** at ¶ 38[.] In BPG's response to the de Botton Defendants' motion to dismiss, they then puzzlingly argue

> that the relevant geographic market is Newtown Township, BPG Resp. to de Botton Mot. Dismiss at 22-23[.]
>
> We could dismiss the antitrust claims due to the plaintiffs' failure to clearly and consistently allege a relevant geographic market[.] But BPG does not allege facts that could support a conclusion that **any** of its proposed geographic boundaries—the intersection, a five-mile radius around the intersection, or the Township as a whole—meets the requirements for a relevant geographic market[.] BPG does not, for example, allege any facts that could support a conclusion that the intersection or a five-mile radius of it—as opposed to a four-mile or ten-mile radius—is the boundary of the area in which a customer would rationally seek look to buy or use any of the goods or services that BPG hopes to offer at its MUTC[.] The same is true with respect to the entirety of Newtown Township[.] "The mere delineation of a geographical area, without reference to a market as perceived by consumers and suppliers, fails to meet the legal standard necessary for the relevant geographic market," ***Tunis Brothers***, 952 F.2d at 727[.]
>
> BPG argues that the defendants target similar geographic areas for marketing their MUTC, but this is unavailing because (1) the defendants' marketing plans do not determine the relevant geographic market for antitrust purposes and (2) the relevant geographic market is defined from the buyer's perspective, not the seller's[.] BPG states that "there are relatively few areas within the Philadelphia area where a mixed use town center can realistically be developed," but this does not address the relevant inquiry[.] BPG also contends that "consumer convenience" is a factor in defining the relevant geographic market and that it is possible to have a relatively small geographic market, Pl. Resp. Madison Marquette Mot. Dismiss at 21[.] This may be true, but BPG fails to allege any facts regarding "consumer convenience" that could support—much less plausibly support—a conclusion that its customers would not take advantage of MUTC offerings outside the small areas that BPG proposes as relevant geographic markets[.]

> We may take judicial notice of geography, and we therefore note that Newtown Township is a suburb of Philadelphia that is surrounded by other suburban towns and cities[.] Any of the potential customers of BPG's MUTC—*e.g.*, residential renters and buyers, upscale retailers, shoppers, and those seeking office space—could easily get those services from an MUTC at a different intersection, outside the five-mile radius, or outside of Newtown Township[.] BPG does not allege any facts to suggest that a potential customer of its MUTC would not seek goods or services from an MUTC that is, for example, five-and-a-half miles away from the intersection or in a neighboring suburb[.] We thus conclude that BPG has failed to allege a relevant geographic market, and we will dismiss its antitrust claims in Counts I and II, which are the only federal law claims in the Amended Complaint[.]

Federal Order, at 3-9 (footnotes omitted). Accordingly, the district court dismissed the two federal antitrust claims. It also declined to exercise supplemental jurisdiction over BPG's remaining state claims of business disparagement, tortious interference, abuse of process, and civil conspiracy, and transferred the case to the Delaware County Court of Common Pleas. ***Id.*** at 12; ***see also*** Fed. First Amended Compl., 6/15/09, at 33-37.

The Delaware County Court of Common Pleas received the federal case on June 15, 2010. On November 22, 2010, BPG filed a second amended complaint in that court raising four claims: abuse of process, business disparagement, tortious interference with contractual rights and prospective economic advantage, and civil conspiracy. BPG's Second Amended Compl., 10-7352, 11/10/10, at 25-30 (Delaware Co.).

Similar to the federal action, BPG alleged in the Delaware County action that de Botton engaged in "a variety of illegal things to slow down or

prevent BPG's development of an MUTC." ***See*** Federal Order at 3. For example, for its abuse of process claim, BPG alleged that de Botton purchased a particular parcel of land in order to establish legal standing to oppose BPG's development. BPG's Second Amended Compl. at 17, 25 (Delaware Co.). De Botton, BPG claimed, subsequently abused legal process to interfere with BPG's development. ***Id.*** Another example is BPG's allegation that de Botton's illegal acts interfered with BPG's prospective contractual relations with potential MUTC tenants. ***Id.*** at 29.

Meanwhile, on October 15, 2010, de Botton filed the instant suit in Philadelphia County against Kaplin and BPG. De Botton's Compl., 101001997, 10/15/10 (Phila. Co.). De Botton alleged claims of wrongful use of civil proceedings and abuse of process. ***Id.*** at 25, 28. The complaint referenced de Botton's ownership of the parcel of land set forth above, ***id.*** at 10, and that the parties were competing for prospective MUTC tenants. ***Id.*** at 9.

In response, BPG, in Delaware County, filed a motion to stay the Philadelphia County lawsuit and transfer it to Delaware County for coordination. BPG's Mot. for Immediate Stay, Transfer and Coordinate de Botton's Later Filed Phila. Action., 11/22/10 (Delaware Co.). De Botton opposed, and the Delaware County trial court denied BPG's motion without prejudice. Order, 2/2/11 (Delaware Co.). In denying the motion, the court relied on the representations of de Botton's counsel that discovery for the

Philadelphia County action would "be conducted with 'laser-like precision' and limited solely to the issues" of whether Kaplin and BPG "acted without probable cause and for an improper purpose in filing [federal antitrust] claims against" de Botton. ***Id.*** at 1. The court permitted BPG to renew its request if discovery exceeded the "laser-like precision." ***Id.*** at 2.

Discovery thus continued in the Philadelphia County lawsuit. On April 13, 2011, de Botton served interrogatories and requests for documents on Kaplin and BPG. BPG and Kaplin objected on grounds of, *inter alia*, attorney-client privilege and work product doctrine. The parties then executed, and the Philadelphia court approved, a clawback agreement.[5]

> 1. In response to [de Botton's] requests for production and interrogatories served on April 13, 2011, [Kaplin] and BPG shall produce documents that constitute work product which was [sic] collected or created in connection with defining the relevant market for purposes of bringing the Federal Antitrust Claims in the Federal Court Action (herein referred to as the "Defendants' Designated Work Product Documents"). The production of the Defendants' Designated Work Product Documents shall not constitute a waiver of the Work Product Protection in the Philadelphia Action for all other documents which constitute work product in the Federal Action. Nor shall production of the Defendants' Designated Work Product Documents constitute a waiver by Defendants of Work Product Protection or any other privilege for the Philadelphia Action, Delaware County Action, or any other action previously brought or hereafter brought. Defendants' Designated Work Product Documents shall be protected

[5] A clawback agreement permits the production of documents without an intent to waive privilege and requires the return of mistakenly produced documents. ***See*** cmt. to Fed. R. Civ. P. 26.

> from disclosure in the Delaware County Action, the Philadelphia Action, and any other action to the same degree as if BPG and [Kaplin] did not produce Defendants' Designated Work Product Documents in the Philadelphia Action pursuant to this agreement. [De Botton] may use, in the Philadelphia Action only, the Defendants' designated Work Product Documents.
>
> 2. This Agreement does not constitute a waiver, or an agreement to waive, attorney-client privilege by any party.
>
> 3. [De Botton] agree[s] that they will not utilize in the Delaware County Action or any other pending or subsequent litigation any documents designated as Defendants' Designated Work Product Documents and produced in the Philadelphia Action. Nothing contained in this Agreement shall prohibit the use of any documents in the Delaware County Action properly obtained during the course of discovery in the Delaware County Action.
>
> 4. [De Botton] agree[s] that they will not use or rely on the production of the Defendants' Designated Work Product Documents to advance or support any argument in the Philadelphia Action or in any other pending or subsequent litigation between the parties that BPG or [Kaplin] have waived the Attorney-Client Privilege, Work Product Protection (except, in the Philadelphia Action, to the extent set forth above in paragraph 1 and subject to paragraph 5 below), or any other applicable privilege recognized at law.

Stipulated Non-Waiver and Clawback Agreement and Order, 10/26/11, at 4-5 (Phila Co.). Kaplin subsequently produced 290 pages of work product and a privilege log identifying withheld documents.

The parties, however, disputed the adequacy of the production.[6] On February 7, 2012, de Botton filed a motion to compel Kaplin to produce selected documents for the court's *in camera* review. Kaplin opposed and the court granted de Botton's motion, reasoning as follows:

> At the heart of this wrongful use of civil process action are the very communications which [Kaplin] seek[s] protection for under the attorney-client privilege or the attorney work product doctrine. Therefore, they are relevant and discoverable and ostensibly not covered by the cited privileges. As an added layer of protection, this Court will conduct an in camera inspection of the un-redacted communications identified in [Kaplin's] Redaction Log attached to their Answer. . . .

Order, 4/18/12 (Phila. Co.).

Meanwhile, Kaplin and BPG filed a motion to stay the Philadelphia lawsuit in Philadelphia County on February 10, 2012. The Philadelphia trial court denied the motion on March 21, 2012, and adopted the rationale of the Delaware County trial court. Order, 3/21/12, at 9-10 (Phila. Co.).

Kaplin complied and submitted the disputed documents to the Philadelphia County trial court for *in camera* review. The court, focusing only on the documents' purported relevance to the underlying claims, granted in part de Botton's motion to compel. Order, 5/22/12 (Phila Co.).

[6] In the meantime, on December 12, 2011, this Court issued the decision of ***Betts Indus., Inc. v. Heelan***, 33 A.3d 1262 (Pa. Super. 2011), which is discussed below.

Kaplin and BPG each filed a timely notice of appeal[7] and a court-ordered Pa.R.A.P. 1925(b) statement.

Kaplin raises the following issues:

> Did the lower court err by ordering [Kaplin] to produce attorney client privileged communications in this wrongful use of civil proceedings action where (a) reliance on counsel has not been asserted as a defense; (b) de Botton acknowledged the privilege was preserved pursuant to a stipulation previously approved by the lower court and (c) the privileged communications relate to claims asserted by [BPG] against [de Botton] in the Court of Common Pleas of Delaware County ("Delaware County Action").
>
> Did the lower court err by ordering [Kaplin] to produce attorney work product that (a) exceeded the scope of the parties' agreement set forth in the Stipulated Non-Waiver and Clawback Agreement and Order approved by the lower court and (b) pertains to [BPG's] state law claims pending in the underlying case against [de Botton] in the Delaware County Action.
>
> Because the discovery the court ordered in the wrongful use action infringes on the attorney client privilege and work product protection in the Delaware County Action, should the Court exercise its supervisory powers to stay the wrongful action in accordance with this Court's directive in ***Betts Industries, Inc. v. Heelan***, 33 A.3d 1262 (Pa. Super. Ct. 2011).

Kaplin's Brief at 5.

BPG raises the following issues:

[7] An order compelling the disclosure of privileged information is appealable under the collateral order doctrine. ***Ben v. Schwartz***, 729 A.2d 547, 552 (Pa. 1999); ***accord Commonwealth v. Harris***, 32 A.3d 243, 249 (Pa. 2011) (reaffirming holding of ***Ben***, ***supra***, and disagreeing with contrary holding of ***Mohawk Indus., Inc. v. Carpenter***, 558 U.S. 100 (2009)).

> Did the trial court err in its Order of May 22, 2012 by directing [Kaplin] to produce documents protected from discovery and disclosure by the attorney-client privilege that exists between [Kaplin] and [BPG]?
>
> Where [BPG has] not asserted advice of counsel as a defense in this litigation or otherwise waived their attorney-client privilege with respect to confidential communications with [Kaplin], did the trial court err in its Order of May 22, 2012 by directing [Kaplin] to produce documents protected by the attorney-client privilege that exists between [Kaplin] and [BPG]?
>
> Where there has been no argument or finding that the attorney-client privilege was waived by [Kaplin] or [BPG], did the trial court err in its Order of May 22, 2012 by directing [Kaplin] to produce documents protected by the attorney-client privilege that exists between [Kaplin] and [BPG]?
>
> Where there has been no argument or finding that a recognized exception to the attorney-client privilege applies, did the trial court err in its Order of May 22, 2012 by directing [Kaplin] to produce documents protected by the attorney-client privilege that exists between [Kaplin] and [BPG]?

BPG's Brief at 4-5.

We summarize the argument for Kaplin's third issue, which disposes of this appeal.[8] Kaplin contends that on March 21, 2012, in denying the motion to stay, the Philadelphia County trial court opined that the instant lawsuit's claims "did not implicate the state law claims pending in the Delaware County Court." Kaplin's Brief at 36. Kaplin argues that on May 22, 2012,

[8] We do not opine on the merits of any other of BPG's and Kaplin's arguments on appeal. BPG and Kaplin retain the right to appeal, without prejudice to any future appeals, any order resolving the underlying motion.

the Philadelphia County court, however, insisted that "the documents could relate to the ***Noerr Pennington***[9] defense and the state law allegations" before the Delaware County court. ***Id.*** Kaplin asserts that the Philadelphia County court's inability to distinguish the claims before it and the Delaware County court justify invoking this Court's supervisory power to stay the instant action. We hold Kaplin and BPG are entitled to limited relief.

The standard of review for an order compelling the disclosure of privileged information is *de novo*. ***Nationwide Mut. Ins. Co. v. Fleming***, 924 A.2d 1259, 1263 (Pa. Super. 2007).

As set forth above, in the federal lawsuit, BPG raised claims of attempted monopolization under § 2 of the Sherman Act and antitrust conspiracy under § 1 of the Sherman Act. "Liability under § 2 requires '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" ***Broadcom Corp. v. Qualcomm Inc.***, 501 F.3d 297, 306-07 (3d Cir. 2007) (quoting ***United States v. Grinnell Corp.***, 384 U.S. 563, 570-71 (1966)). The second element—willful acquisition or

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[9] The ***Noerr-Pennington*** antitrust immunity doctrine immunizes an individual "from liability for[, *inter alia*,] exercising his First Amendment right to petition the government" unless the individual is using the petition process to harass. ***Penllyn Green Assocs., L.P. v. Clouser***, 890 A.2d 424, 429 n.5 (Pa. Cmwlth. 2005).

maintenance—requires proof of "[c]onduct that impairs the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way may be deemed anticompetitive." ***Id.*** at 308 (citations omitted).

Liability under § 1 of the Sherman Act requires proof of the following elements: "(1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted actions were illegal; and (4) that it was injured as a proximate result of the concerted action." ***Gordon v. Lewistown Hosp.***, 423 F.3d 184, 207 (3d Cir. 2005) (citations omitted).

BPG also raised, in the Delaware County action, state claims of abuse of process, business disparagement, tortious interference with contractual rights and prospective economic advantage, and civil conspiracy.

We note:

> "Abuse of process" is defined as "the use of legal process against another primarily to accomplish a purpose for which it is not designed."
>
> To establish a claim for abuse of process it must be shown that the defendant (1) used a legal process against the plaintiff, (2) primarily to accomplish a purpose for which the process was not designed; and (3) harm has been caused to the plaintiff.
>
> Abuse of process is, in essence, the use of legal process as a tactical weapon to coerce a desired result that is not the legitimate object of the process. Thus, the gravamen of this tort is the perversion of legal process to benefit someone in achieving a purpose which is not an authorized goal of the procedure in question.

> Abuse of process is a state common law claim.

Werner, 799 A.2d at 785 (citations omitted). Unlike a wrongful use claim, an abuse of process claim does not require establishing gross negligence or absence of probable cause. ***See Cruz v. Princeton Ins. Co.***, 972 A.2d 14, 19 n.5 (Pa. Super. 2009) (*en banc*).

Business disparagement, *i.e.*, trade libel or injurious falsehood, requires proof of the following elements:

> (1) the statement is false; (2) the publisher either intends the publication to cause pecuniary loss or reasonably should recognize that publication will result in pecuniary loss; (3) pecuniary loss does in fact result; and (4) the publisher either knows that the publication is false or acts in reckless disregard of its truth or falsity.

Maverick Steel Co., L.L.C. v. Dick Corporation/Barton Malow, 54 A.3d 352, 354 (Pa. Super. 2012) (citation omitted), *appeal denied*, 65 A.3d 415 (Pa. 2013).

The following elements are required to establish a claim for tortious interference with contractual rights:

> (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party;
>
> (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring;
>
> (3) the absence of privilege or justification on the part of the defendant; and

> (4) the occasioning of actual legal damage as a result of the defendant's conduct.
>
> In determining whether a particular course of conduct is improper for purposes of setting forth a cause of action for intentional interference with contractual relationships, or, for that matter, potential contractual relationships, the court must look to section 767 of the Restatement (Second) of Torts. This section provides the following factors for consideration: 1) the nature of the actor's conduct; 2) the actor's motive; 3) the interests of the other with which the actor's conduct interferes; 4) the interests sought to be advanced by the actor; 5) the proximity or remoteness of the actor's conduct to interference, and 6) the relationship between the parties.

Id. at 355 (citation omitted).

The elements of a civil conspiracy claim are set forth below:

> In order to state a civil action for conspiracy, a complaint must allege: 1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; 2) an overt act done in pursuance of the common purpose; and 3) actual legal damage. Additionally, absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy to commit that act. Proof of malice is an essential part of a cause of action for conspiracy. The mere fact that two or more persons, each with the right to do a thing, happen to do that thing at the same time is not by itself an actionable conspiracy.

Goldstein v. Phillip Morris, Inc., 854 A.2d 585, 590 (Pa. Super. 2004) (citations and quotation marks omitted).

As discussed above, in the Philadelphia lawsuit, de Botton raised claims of wrongful use of civil proceedings and abuse of process with respect

to the two federal antitrust claims. The elements for a claim of wrongful use of civil proceedings are set forth by statute:

> **(a) Elements of action.—**A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings:
>
> (1) He acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and
>
> (2) The proceedings have terminated in favor of the person against whom they are brought.

42 Pa.C.S. § 8351(a)(1)-(2). "Thus, in an action for wrongful use of civil proceedings, the plaintiff first must demonstrate that the person taking part in the initiation, procurement or continuation of civil proceedings either acted in a grossly negligent manner, or that he lacked probable cause." ***Werner***, 799 A.2d at 786 (citation omitted). The elements for de Botton's abuse of process claim were set forth above.

In ***Betts***, Allegheny Valve and Coupling Inc. sued Betts in federal court for violating federal trademark law and state law for "theft of product, unjust enrichment, misappropriation of trade secrets, and breach of confidential relationship." ***Betts***, 33 A.3d at 1263-64. The federal court granted Betts' summary judgment motion regarding the federal trademark claim and dismissed the remaining state claims without prejudice. ***Id.*** Allegheny filed suit in state court raising the state law claims. ***Id.*** at 1264. Betts filed "a

counterclaim for wrongful use of civil proceedings, commonly known as a ***Dragonetti*** Act violation, against the corporate entity, and a separate cause of action against [Raymond V. Heelan, Jr. and Cairn L. Bishop, the president and vice-president of Allegheny Valve and Coupling Inc.,] pursuant to the ***Dragonetti*** Act." ***Id.*** Mr. Heelan and Mr. Bishop filed, and the court granted, preliminary objections in the nature of a *demurrer* to Betts' separate ***Dragonetti*** cause of action against them. ***Id.*** at 1263. Betts appealed. ***Id.*** After reversing the trial court's order, the Superior Court stayed the case:

> Nonetheless, it appears that the salient facts and legal issues from the federal trademark claim and the related state claims are sufficiently similar that it would be wasteful to litigate two separate ***Dragonetti*** actions if Betts were to prevail in state court. Therefore, we find that in the interests of judicial economy and to avoid piecemeal litigation, the proper procedure in this matter is to stay this action until completion of the outstanding case involving the related state claims. ***See e.g. PNC Bank v. Bluestream***, 14 A.3d 831 (Pa. Super. 2010) (ordering stay of one proceeding in the interests of judicial economy).

Id. at 1268 (footnote omitted).

Here, BPG, through its counsel Kaplin, alleged numerous facts underpinning both their federal antitrust claims and Pennsylvania tort claims. For example, both the federal and Delaware County complaints contend that de Botton manufactured standing by purchasing a particular property and engaged in acts that interfered with the prospective contractual relations between BPG and MUTC tenants. ***Compare*** Fed. First Amended

Compl. at 16, 20, 29, ***with*** Second Amended Compl. at 17, 25, 29 (Delaware Co.). De Botton relies on these alleged facts to support its abuse of civil process and wrongful use of civil proceeding claims in the Philadelphia County lawsuit. ***See*** Compl. (Phila. Co.), at 9, 10, 25, 28. All parties' legal claims in Delaware and Philadelphia County are based on a common, factual nucleus: allegations of anti-competitive behavior.

Given such congruent alleged facts among all three actions, and recognizing, similar to the Court's rationale in ***Betts***, "that it would be wasteful to litigate two separate ***Dragonetti*** actions if [de Botton] were to prevail" in the Delaware County action, we hold that it is in the interest of judicial economy that the Philadelphia lawsuit be stayed pending completion of the Delaware County lawsuit. ***See Betts***, 33 A.3d at 1268. Additionally, we discern minimal merit to having the Philadelphia County lawsuit proceed without a trier of fact resolving the underlying factual allegations, some of which are common to both the federal, Delaware, and Philadelphia County claims.[10] ***Cf. id.*** We do not opine on the merits of de Botton's Philadelphia claims, the underlying motion to compel, or any other appellate argument. Accordingly, we vacate the order,[11] remand with instructions to stay the

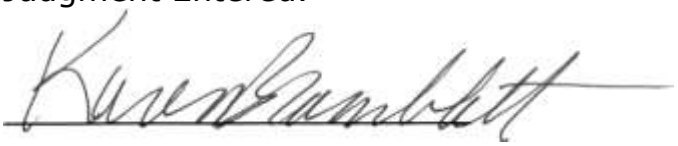
[10] The parties may, of course, move for summary judgment or other relief at the appropriate juncture.

[11] As previously noted, upon expiration of the stay, the Philadelphia County trial court may resolve the underlying motion and the parties may appeal as permitted by law. We note the trial court cited ***Bell Atlantic Corp. v.***

Philadelphia County action until the completion of the Delaware County action, and relinquish appellate jurisdiction.

Order vacated. Case remanded with instructions to stay. Jurisdiction relinquished.

Judgment Entered.



Prothonotary

Date: 9/25/2013

Twombly, 550 U.S. 544 (2007), and discussed the ***Noerr-Pennington*** doctrine, in justifying disclosure of privileged documents. ***See*** Trial Ct. Op. at 2-3. The trial court cited ***Twombly*** for, *inter alia*, the proposition that a complaint requires a minimal level of factual allegations. ***Id.*** at 2. We trust the trial court, at an appropriate time, will identify and discuss the factors for disclosing or not disclosing privileged documents within the context of a ***Dragonetti*** action and a court-approved clawback agreement.