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June 6, 2023

Hon. Renée Marie Bumb, Chief Judge  
United States District Court, District of New Jersey Camden  
Mitchell H. Cohen Building & U.S. Cthse.  
Room 1050  
4th & Cooper Sts.  
Camden, NJ 08101

Re: Charles Foulke, Jr., Lenny Corporation vs. Cherry Hill Township  
Our File No. 2708-53531  
Docket No. 23-cv-02343 (RMB/SAK)

Dear Judge Bumb:

This office represents the Plaintiffs in the above-referenced matter. I am writing in response to Defendant's counsel's letter of May 30, 2023 requesting leave to file a Motion to Dismiss under 12(b)(1) and 12(b)(6) and the scheduling of a pre-motion conference to discuss same. At the outset, Defendants have been properly served with both the Complaint and the Order to Show Cause. (ECF Doc. #6 and #7) after Mr. Riso refused to accept service.<sup>1</sup>

Defendants have deprived Plaintiff of their Constitutional rights and now the Defendants want to deprive Plaintiffs of the ability to have their claims heard in this Court. Defendant's proposed Motion to Dismiss is without legal basis. Indeed, as discussed below, Defendants appear to seek to bring a motion for summary judgment disguised as a motion to dismiss. Not only have Plaintiffs sufficiently pled a claim for violation of their due process rights and violations of 42 U.S.C. §1983, but Plaintiffs' have also pled in the Complaint that exhausting the allegedly required administrative process would be futile.

Defendants' arguments ignore the standard upon which this Court must review a motion under 12(b)(1) or 12(b)(6). A court must grant a motion to dismiss if it lacks subject matter jurisdiction to hear a claim. Fed. R. Civ. P. 12(b)(1). Defendants seek leave to file a Rule 12(b)(1) motion presented by the movant as a facial challenge to the court's subject matter jurisdiction. Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). In reviewing a facial attack, "the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." Gould Elecs. Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000). The pleadings allege violations of 42 U.S.C. §1983 and Due Process violations. Defendants' argument that the court should ignore the Plaintiffs' allegations to determine that it lacks subject matter jurisdiction is simply not consistent with the appropriate standard of review.

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<sup>1</sup> There is nothing curious about service. I understood that Mr. Riso would be representing the Defendants and thus included his name in the order expecting he would as professional courtesy agree to accept service. After the pleadings were filed, I wrote to Mr. Riso on May 10, 2023 requesting he accept service and he refused. Based on his refusal to accept service, it is not clear why he would expect a courtesy copy of pleadings that I was required to serve on his clients.

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When reviewing motions pursuant to 12(b)(6), the court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." [Eid v. Thompson, 740 F.3d 118, 122 \(3d Cir. 2014\)](#) (quoting [Phillips v. Cty. of Allegheny, 515 F.3d 224, 233 \(3d Cir. 2008\)](#)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" [Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#) (quoting [Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#)). The Supreme Court clarified that this plausibility standard should not be conflated with a higher probability standard. [Iqbal, 556 U.S. at 678](#). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." [Iqbal, 556 U.S. at 678](#) (citing [Twombly, 550 U.S. at 556](#)); "Factual allegations of a complaint must be enough to raise a right to relief above the speculative level." [Twombly, 550 U.S. at 555](#). A pleading party need not establish the elements of a prima facie case at this stage; the party must only "put forth allegations that 'raise a reasonable expectation that discovery will reveal evidence of the necessary element[s].'" [Fowler v. UPMC Shadyside, 578 F.3d 203, 213 \(3d Cir. 2009\)](#) (quoting [Graff v. Subbiah Cardiology Assocs., Ltd., 2008 U.S. Dist. LEXIS 44192, 2008 WL 2312671 \(W.D. Pa. June 4, 2008\)](#)); see also [Connelly v. Lane Constr. Corp., 809 F.3d 780, 790 \(3d Cir. 2016\)](#). The primary question in deciding a motion to dismiss is not whether the plaintiff will ultimately prevail, but rather whether he or she is entitled to offer evidence to establish the facts alleged in the complaint. [Maio v. Aetna, 221 F.3d 472, 482 \(3d Cir. 2000\)](#). The purpose of a motion to dismiss is to "streamline[] litigation by dispensing with needless discovery and factfinding." [Neitzke v. Williams, 490 U.S. 319, 326-27, 109 S. Ct. 1827, 104 L. Ed. 2d 338 \(1989\)](#).

Based on the allegations and the legal claims, Plaintiffs' complaint is sufficiently pled to survive both a motion under 12(b)(1) and 12(b)(6). Indeed, all of Defendants' argument ignore the pleadings and essentially ask the court to determine summary judgement as who is wrong or right as to the legal claims pled.

Defendants first argue that the complaint should be dismissed because Plaintiffs have not exhausted their administrative remedies under N.J.S.A. 40:55D-1 et. seq. The New Jersey statute does not prohibit Plaintiffs from filing a lawsuit to vindicate their rights under Federal law. Indeed, the Zoning Board of Appeals has no jurisdiction over the Federal claims raised in Plaintiffs' Complaint.<sup>2</sup> Moreover, Plaintiffs have adequately pled in paragraph 61 of the Complaint that "it would be futile for Plaintiffs to expect to have their property rights honored in any administrative proceeding under these circumstances and therefore, Plaintiff should not be required to exhaust any further available administrative review." Because Plaintiff has pled that exhausting administrative remedies based on the facts will be futile and the court must accept that allegation as true, there is no basis to dismiss the complaint under 12(b)(6). [Daley v. Warden, No. 4:05-CV-01955, 2005 U.S. Dist. LEXIS 60043 \(M.D. Pa. Nov. 4, 2005\)](#). When access to procedure is absolutely blocked or there is evidence that the procedures are a sham, the plaintiff need not pursue them to state a due process claim. [Alvin v. Suzuki, 227 F.3d 107, 110 \(3d Cir. 2000\)](#). Plaintiffs' pleading meets the legal requirements.

<sup>2</sup> Plaintiff's anticipated Defendants arguments and filed the administrative appeal to protect their rights in an abundance of caution. It is expected that the appeal will be heard on July 8, 2023 and denied, rendering this argument moot.

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Defendants next argue that the right to operate a business or the property right in a license to operate a business are not protected by due process. The complaint filed by Plaintiffs has nothing to do with a business license or the right to operate a business. On the contrary, the Complaint clearly alleges that it has to do with real property rights. In paragraph 54 of the complaint Plaintiffs alleged that the “Defendants actions in rescinding the permits and destroying the ability of Plaintiffs to utilize the properties for a lawfully permitted use amount to an unlawful taking of Plaintiffs’ property.” The Fourteenth Amendment of the United States Constitution forbids a state from depriving persons of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1 Id.

Defendants then argue that the alleged conduct in the complaint does not “shock the conscience”. Defendants’ argument asks the court to decide as a legal matter whether their argument is correct. That argument is one for summary judgment, not a motion to dismiss a complaint. It is undisputed that Plaintiff’s pled in paragraph 58 that Defendants conduct “shocks the conscience”. That is all Plaintiffs need to do to survive a motion to dismiss under 12(b)(6). [Maio v. Aetna, 221 F.3d 472, 482 \(3d Cir. 2000\)](#). Plaintiff does not have to prove as a matter law any claims at this stage. Notably, all of the cases cited by Defendants in support of this argument are summary judgment opinions, not opinions on motions to dismiss.

Finally, as a last ditch attempt, Defendants argue that the Court should abstain from hearing Plaintiff’s complaint. Abstention from the exercise of federal jurisdiction is the exception, not the rule. The doctrine of abstention, under which a district court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under that doctrine only in the exceptional circumstances where the order to the parties to repair to the state court clearly serves an important countervailing interest. [Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 96 S. Ct. 1236, 47 L.Ed.2d 483 \(1976\)](#). The Doctrine of Abstention is not applicable in this case.

Accordingly, the Court should deny Defendants request to file a motion to dismiss and set Plaintiffs’ Order to Show Cause for a hearing.

Respectfully submitted,

CAPEHART & SCATCHARD, P.A.

*Laura D. Ruccolo*  
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cc: Eric Riso, Esq.