BROWN & CONNERY, LLP
ATTORNEYS AT LAW
360 HADDON AVENUE
WESTMONT, NEW JERSEY 08108
(856) 854–8900
FAX (856) 858–4967

William M. Tambussi, Esq.
Certified by the Supreme Court of New Jersey as a Civil Trial Attorney
wtambussi@brownconnery.com
Direct Dial: (856) 858–8175

July 22, 2019

VIA: ECF
Honorable Renee Marie Bumb, U.S.D.J.
Mitchell H. Cohen Building
& U.S. Courthouse
4th & Cooper Streets
Camden, New Jersey 08101

Re: Cherry Hill Towne Center Partners, LLC v. GS Park Racing, L.P., et al.
Docket No.: 1:18–cv–12868 (RMB)(KMW)

Dear Judge Bumb:

Our office represents plaintiff Cherry Hill Towne Center Partners, LLC ("Plaintiff" or "CHTC") in the above captioned matter. On July 1, 2019, the Court entered a Letter Order requesting supplemental briefing from the parties. [Dkt. No. 23.] Plaintiff respectfully submits this letter brief in response to the Court's questions.

New Jersey's Sports Wagering Act and its implementing regulations set forth the applicable State licensing requirements. N.J.S.A. § 5:12A–11; *see* N.J.A.C. § 13:69N–1.3. Plaintiff must obtain an "initial sports wagering license" in order to open and operate its sports wagering facility. *Id.* More specifically, the Act authorizes the New Jersey Racing Commission ("Racing Commission") to issue initial licenses to conduct sports wagering to racetracks and certain former racetracks. The Racing Commission's authority is limited to issuance of initial licenses. After the Racing Commission grants an initial license, all regulatory oversight (including renewals of such license) is conducted by the Division of Gaming Enforcement ("NJDGE"). Entities that are granted an initial license with the Racing Commission must submit their renewal application to the NJDGE almost simultaneously upon issuance of the initial license in order for the NJDGE to begin their investigation of the applicant.

Under the Act, Plaintiff is eligible to apply for a sports wagering license from the State. Plaintiff is the owner of real property that was part of the prior site of Garden State Park, a former racetrack located in Cherry Hill, New Jersey (the "Former Racetrack"). Certification of Jack Morris ("Morris Cert."), ¶ 1. The Former Racetrack, which is the proposed site for Plaintiff's sports wagering facility, is located within the oval of the former racecourse and the last horse race at Garden State Park took place in 2001. *Id.* at ¶ 2. Thus, Plaintiff's property falls within the definition of "former racetrack" under N.J.S.A. § 5:12A–10.

Jack Morris, who is one of Plaintiff's controlling members, is also an owner of the Atlantic City casino operating as Hard Rock Atlantic City. *Id.* at ¶ 3. In connection with Hard Rock's casino license issued by the New Jersey Casino Control Commission (the "NJCCC"), Mr. Morris submitted all necessary applications and the NJDGE conducted a complete investigation of his application. *Id.* Ultimately, at the recommendation of the NJDGE, the NJCCC determined that Mr. Morris was suitable for licensure as an owner of Hard Rock Atlantic City. *Id.* Mr. Morris remains in good standing with the NJCCC and NJDGE. *Id.*

Plaintiff is actively pursuing a sports book at Garden State Park. Mr. Morris states that "CHTC has secured local permits, the NJDGE has conducted a preliminary site inspection at the proposed facility and CHTC has commenced the build out of the facility and is prepared to complete the build out of the facility." *Id.* at ¶ 4. "CHTC also is in active discussions with two (2) sports wagering operators, both of which are fully licensed by the NJDGE and currently are operating sports wagering facilities in New Jersey." *Id.* at ¶ 5. Plaintiff expects to select one of the potential sports wagering operators shortly. *Id.*

Plaintiff has not yet applied for a sports wagering license. Mr. Morris explains that Plaintiff is "prepared to file its initial application for a sports wagering license with the New Jersey Racing Commission as soon as possible after the selection of the operator and the renewal application will be submitted to the NJDGE shortly thereafter." *Id.* at ¶ 6. Mr. Morris states that, based on his status as a qualifier with Hard Rock, and because "CHTC will select a sports wagering operator that is licensed with the NJDGE and currently operating sports wagering" in the State, "it is our understanding that the process for CHTC to be fully licensed to operate a sports wagering facility at the Former Racetrack would take approximately ninety (90) to one–hundred and twenty (120) days."[1] *Id.* at ¶ 7.

Furthermore, Plaintiff is unaware of any mechanism by which defendants GS Park Racing, L.P. ("GSPR") and Greenwood Racing, Inc. ("Greenwood Racing") (collectively, "Responding Defendants") could oppose, or be heard on, Plaintiff's application to the Racing Commission. Additionally, even if they could, it is not the role of an administrative licensing

---

[1] Since Plaintiff has not filed its application with the State, Plaintiff is not able to answer the questions sets forth in Footnote 1 of the Court's Letter Order.

body to interpret and adjudicate a restrictive covenant between private parties. *Tobin v. Paparone Const. Co.*, 137 N.J. Super. 518 (Law. Div. 1975); *see Lawrence v. Dep't of Energy & Envtl. Prot.*, 178 Conn. App. 615, 645–47 (2017).

In *Tobin*, Judge Michael Patrick King, a distinguished jurist and one of the longest serving members of the Appellate Division, rejected the plaintiff's argument that "the zoning board had no authority to grant the variance because use of the property was already limited by restrictive covenants more onerous than the zoning ordinance." *Id.* at 527. The court reasoned that the validity of the ordinance should be considered independently of the existence of restrictions upon the land. *Id.* The court concluded that the ordinance "is entirely divorced in concept, creation, enforcement and administration from restrictions arising out of agreement between private parties who may... impose whatever restrictions upon the use of their lands that they desire, such covenants being enforceable only by those in whose favor they run." *Id.* Instead, "[t]he rights and obligations of parties to private covenants are to be determined in appropriate actions to enforce or to be relieved of the burden of, such covenants." *Id.* at 528.

Applying that rationale here, the Racing Commission is not the appropriate entity to interpret and adjudicate the validity of a restrictive covenant. The question of whether Plaintiff satisfies that State's licensing requirements must be considered independently of any alleged restrictions upon the land. Simply put, the rules and regulations governing license eligibility are completely divorced from the restrictive covenant at issue in this case, and should have no bearing on whether Plaintiff is entitled to a sports wagering license. Accordingly, this Court is the appropriate entity to interpret and adjudicate whether the Declaration of Restrictive Covenants, dated January 28, 1999, is enforceable (the "Declaration").[2]

Finally, even though Plaintiff has not filed its application with the State, this case is ripe for adjudication. The Third Circuit has stated that the "ripeness doctrine requires that the challenge grow out of a real, substantial controversy between the parties involving a dispute definite and concrete." *Peachlum v. City of York, Pennsylvania*, 333 F.3d 429, 434 (3d Cir. 2003) (internal quotation marks and citation omitted). To establish a real and substantial controversy, the challenge must be "of sufficient immediacy and reality to justify judicial resolution." *Id.* (internal quotation marks and citation omitted). In determining whether a case is ripe, the Third Circuit generally examines: "(1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration." *Id.* (internal quotation marks and citation omitted). In declaratory judgment cases, the Third Circuit applies a slightly different test for ripeness. *Plains All Am. Pipeline L.P. v. Cook*, 866 F.3d 534, 540 (3d Cir. 2017); *see*

---

[2] The application process requires each applicant to disclose pending civil suits. Accordingly, the existence of the pending litigation will be disclosed on Plaintiff's license application. As noted above, however, the restrictive covenant at issue will have no impact on the licensing decisions of either the Racing Commission or the NJDGE.

Surrick v. Killion, 449 F.3d 520, 527 (3d Cir. 2006). Specifically, the court evaluates: "(1) the adversity of the parties' interests, (2) the conclusiveness of the judgment, and (3) the utility of the judgment." *Cook*, 866 F.3d at 540 (internal quotation marks and citation omitted).

Under the first prong, the parties' interests are adverse where harm will result if declaratory judgment is not entered. *Cook*, 866 F.3d at 541. A party need not have suffered complete harm to establish adversity. *Id.* Rather, "it suffices that there is a substantial threat of real harm and that the threat... remain real and immediate throughout the course of the litigation." *Id.* (alteration in original) (internal quotation marks and citation omitted).

The fact that Plaintiff has not obtained a license to open a sports wagering facility does not affect its ripeness for adjudication. Plaintiff has suffered and will continue to suffer a real and substantial threat of harm. Plaintiff seeks to operate, or allow a tenant to operate, a sports wagering facility on its property. However, Responding Defendants claim that the Declaration, which runs with the land in perpetuity, prohibits sports wagering on Plaintiff's property. Responding Defendants' claim has placed a cloud over Plaintiff's property, resulting in a reduction in the value of Plaintiff's land and business. *Bob's Home Serv., Inc. v. Warren Cty.*, 755 F.2d 625, 627 (8th Cir. 1985) (holding that the case was ripe for adjudication, even though the state had not granted a necessary permit, since "a diminution in value is an immediate injury that presents a presently justiciable question."). The Former Racetrack is one of the few eligible sites for sports wagering in the State. This is undoubtedly a valuable property right. To the extent that a potential purchaser or tenant has an expectation that Plaintiff's property can be used for sports wagering, the property becomes more valuable. However, Responding Defendants' claim that Plaintiff's property is burdened by the Declaration has the effect of eliminating or reducing the validity of such an expectation and, correspondingly, diminishes the value of the property. Accordingly, Plaintiff has adequately established an adversity of interest.

The second prong is also satisfied here. "Cases presenting predominantly legal questions are particularly amenable to a conclusive determination in a preenforcement context, and generally require less factual development." *Surrick*, 449 F.3d at 526 (internal quotation marks and citation omitted). This case presents a straightforward legal issue: whether or not the Declaration is enforceable. The status of Plaintiff's application for a sport wagering license does not affect the Court's ability to render a declaratory judgment in this case. Accordingly, since the instant action focuses on an isolated legal issue, it is particularly amendable to a conclusive determination.

Finally, the third prong is satisfied as well. In determining whether the judgment will be useful to the parties, courts must "consider whether a declaratory judgment will affect the parties' plans of actions by alleviating legal uncertainty." *Id.* at 529. A declaration of rights in this case will alleviate legal uncertainty and could potentially have a significant impact on

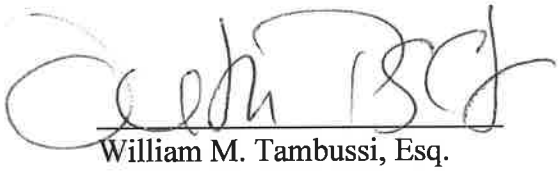
Plaintiff's plan to open and operate a sports wagering facility. For instance, if the Court concludes that the Declaration is enforceable, Plaintiff may be forced to abandon the license application process. On balance, this case is ripe for adjudication. Plaintiff faces a real and substantial threat of harm, this case predominately involves a legal question, and a declaratory judgment will materially affect the actions of the parties.

In conclusion, Plaintiff respectfully requests that the Court exercise its equitable discretion and deny Responding Defendants' motion for preliminary injunction on the merits. The issues and injuries presented to the Court are not merely trifling. Relying on an outdated covenant that was never intended to prohibit sports wagering, Responding Defendants seek to deprive Plaintiff of its rights under the Act by preventing or stalling Plaintiff's entry into the marketplace, thus strengthening their grip on the sports wagering market in the region. Responding Defendants' anticompetitive actions are directly at odds with this State's strong desire to legalize sports wagering at a limited number of locations within its borders, including the Garden State Park.

Accordingly, Plaintiff requests that the Court deny Responding Defendants' motion for extraordinary relief for the following reasons: (i) Responding Defendant cannot succeed on the merits because the covenant at issue is unreasonable and unenforceable; (ii) Responding Defendants have failed to establish by clear and convincing evidence that they will suffer irreparable harm; and (iii) the remaining preliminary injunction factors weigh strongly in favor of denying Responding Defendants' motion. [Dkt. No. 18.]

Respectfully submitted,

BROWN & CONNERY, LLP



William M. Tambussi, Esq.

WMT/asb
cc: Counsel of Record (*via ECF*)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHERRY HILL TOWNE CENTER PARTNERS, LLC, Plaintiff, vs. GS PARK RACING, L.P., GREENWOOD NEW JERSEY, INC., GREENWOOD RACING, INC., Defendants.	Civil Action No.: 1:18–cv–12868 (RMB)(KMW) **CERTIFICATION OF JACK MORRIS**

I, Jack Morris, of full age, certify as follows:

1. I am a controlling member of Cherry Hill Towne Center Partners, LLC ("CHTC"), the owner of real property that was part of the prior site of Garden State Park, a horse racetrack located in Cherry Hill, New Jersey (the "Former Racetrack").
2. Pursuant to the Sports Wagering Act and its regulations, CHTC is permitted to apply for a sports wagering license for the Former Racetrack as the proposed site for the sports wagering facility would be located within the racetrack oval of the former Garden State Park racecourse and the last horse race at Garden State Park took place in 2001, which is within 15 years of the effective date of P.L.2014, c.62.
3. I also am an owner of the Atlantic City casino operating as Hard Rock Atlantic City ("Hard Rock"). In connection with Hard Rock's casino license issued by the New Jersey Casino Control Commission ("NJCCC"), I submitted all necessary applications and the New Jersey Division of Gaming Enforcement ("NJDGE") conducted a complete investigation of my application. Ultimately, at the recommendation of the NJDGE, the

NJCCC determined that I was suitable for licensure as an owner of Hard Rock. I remain in good standing with the NJCCC and NJDGE.

4. CHTC is actively pursuing a sports book at Garden State Park. In furtherance of the same, CHTC has secured local permits, the NJDGE has conducted a preliminary site inspection at the proposed facility and CHTC has commenced the build out of the facility and is prepared to complete the build out of the facility.

5. CHTC also is in active discussions with two (2) sports wagering operators, both of which are fully licensed by the NJDGE and currently are operating sports wagering facilities in New Jersey. We hope to select one of the potential sports wagering operators shortly and that their application to the NJDGE for permission to operate the sports book at the Former Racetrack will be submitted as soon as possible.

6. Accordingly, CHTC is prepared to file its initial application for a sports wagering license with the New Jersey Racing Commission as soon as possible after the selection of the operator and the renewal application will be submitted to the NJDGE shortly thereafter.

7. Given my status as a qualifier with the Hard Rock Atlantic City, which status is in good standing, and that CHTC will select a sports wagering operator that is licensed with the NJDGE and currently operating sports wagering in New Jersey, it is our understanding that the process for CHTC to be fully licensed to operate a sports wagering facility at the Former Racetrack would take approximately ninety (90) to one–hundred and twenty (120) days.

8. Accordingly, we are proceeding forward to be fully licensed to operate the sports wagering facility open to the public at the Former Racetrack as soon as possible.

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

Dated: July 22, 2019

Jack Morris