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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RAMAPOUGH MOUNTAIN INDIANS, INC., and RAMAPOUGH LENAPE NATION Plaintiffs, -against- RAMAPO HUNT & POLO CLUB ASSOCIATION, INC. Defendant.	Civ. No. 2:18-cv-09228 Hon. Claire C. Cecchi

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO RAMAPO HUNT & POLO CLUB ASSOCIATION, INC.'S MOTION FOR SUMMARY JUDGMENT TO DISMISS PLAINTIFFS' COMPLAINT OR IN THE ALTERNATIVE TO DISMISS RAMAPOUGH LENAPE NATION FROM THIS ACTION

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Plaintiffs Ramapough Mountain Indians, Inc. and the Ramapough Lenape Nation, (collectively, "Plaintiffs" or the "Ramapough") respectfully submit this Brief in Opposition to Ramapo Hunt & Polo Club Association, Inc.'s Motion to Dismiss, stylized as a *Motion for Summary Judgment to Dismiss Plaintiffs' Complaint or in the Alternative to Dismiss Ramapough Lenape Nation from this Action* (the "Motion," or "Motion to Dismiss").

PRELIMINARY STATEMENT

Plaintiffs filed this lawsuit to challenge a conspiracy by the Ramapo Hunt & Polo Club Association, Inc. ("Defendant" or "Polo Club") and the Township of Mahwah ("Mahwah" or "the Township") to deprive Plaintiff of its civil rights. As described below, a central component of that conspiracy involved Defendant and the Township's patently frivolous position that Mahwah zoning law prohibits two Ramapough from gathering on their own privately-owned property, and that religious observance—even a silent open-air prayer—is prohibited in conservation-zoned land. The Township has since abandoned this obviously unconstitutional position and it has been emphatically denounced by the New Jersey courts. Despite these losses, Defendant now takes the even more outrageous position that its repetitive and unconstitutional attempts to misuse Mahwah zoning law to chill Plaintiffs from practicing their religion and gathering on their own land somehow precludes Plaintiffs from suing to enforce its constitutional and statutory rights in federal court. This position must be roundly rejected. Defendant's Motion should be denied (i) because the Polo Club fails to meet the requirements of Local Rule 56.1, (ii) because the Polo Club makes no showing that the Plaintiffs' First Amended Complaint ("FAC") is barred by the entire controversy doctrine or res judicata, (iii) because the FAC more than adequately alleges that the Polo Club conspired with the Township to violate Plaintiffs' civil rights under § 1985(3), *see* ECF No. 107, and (iv) because the Polo Club's weak attempt to cloak its collusive activity to violate Plaintiffs' rights in First Amendment immunity is baseless.

Lastly, Defendant's request "in the alternative" to dismiss Ramapough Lenape Nation as a party for lack of Executive Branch Recognition should be denied as the status of Ramapough Lenape Nation's sovereignty is not relevant to whether it may sue in this Court.

FACTUAL BACKGROUND[1]

This action arises from the actions of the Polo Club, Mahwah, their respective members or agents, Geraldine Entrup, and Thomas Mulvey (Mahwah, Entrup, and Mulvey each a "Former Defendant"), which intentionally deprived Plaintiffs of rights and liberty secured under the First and Fourteenth Amendments to the United States Constitution and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc ("RLUIPA"). *See* FAC ¶ 1.

Plaintiff Ramapough Lenape Nation is a state-recognized sovereign entity whose members descend from the original Munsee people of Lenapehoking and whose ancestral territory includes parts of present-day New York and New Jersey. Plaintiff Ramapough Mountain Indians, Inc. is a 501(c)(3) nonprofit organization owned, operated, and managed on behalf of the Ramapough. *See id.* ¶ 2.

The Ramapough have lived in and practiced religion on their ancestral land since the pre-contact period. *See id.* ¶ 3. A central tenet of their faith is a strong and sacred link between human beings and nature. *Id.* ¶ 6. One of the Ramapough's most sacred lands within their ancestral territory is known as the "Split Rock Sweetwater Prayer Camp," or simply, "Sweet Water," the meaning of the Lenape word "Ramapough," located on a parcel of property at 95 Halifax Road in Mahwah, New Jersey. *Id.* ¶¶ 7, 26. Although the Ramapough acquired private

[1] The following facts relevant to this action are set forth in Plaintiffs' FAC. Additional facts supporting Plaintiffs' claim against the Polo Club have developed since the Plaintiffs initially proposed their FAC, as previously noted in Plaintiffs' Renewed Motion to Amend the Complaint. *See* ECF No. 104-1, at 1-2 (recognizing Court's potential preference for a revised proposed FAC incorporating facts developed since Plaintiffs' initial FAC). No such additional facts are needed, however, to deny the Polo Club's Motion.

ownership of Sweet Water in 1995, the Ramapough have used Sweet Water for religious ceremonies and gatherings since before the Township's establishment. *Id.* ¶¶ 3, 7-8, 26, 28, 29. The Ramapough use the land and water at Sweet Water extensively to practice their faith. *Id.* ¶¶ 6-8, 26-41, 60. Sweet Water – the site of an historical Ramapough burial ground – is very sacred to the Ramapough as one of the few ceremonial sites left after years of dispossession, discrimination, and marginalization that still haunt the Ramapough. *Id.* ¶¶ 33-34. Ramapough members sincerely hold the religious belief that without the ability to pray on their sacred land, they would be unable to carry out their spiritual and religious responsibilities. *Id.* ¶¶ 49, 87.

Several sacred items can be found at Sweet Water, including a stone altar and a prayer circle, made from natural materials found on the land, and essential for the Ramapough's religious observances. *Id.* ¶¶ 6, 7, 43, 45.

Since at least November 2016, the Polo Club and the Township have conspired to chill the Ramapough from assembling and exercising their religion at Sweet Water by interpreting Mahwah zoning code unconstitutionally and unreasonably to prohibit open-air prayer and gatherings on the Ramapough's land. *See id.* ¶¶ 9, 13. In support of this endeavor, Defendant induced the Township to unilaterally revoke a permit that explicitly recognized the Ramapough's rights to use Sweet Water for religious purposes and cultural assembly and to impose crippling fines on the Ramapough, totaling thousands of dollars a day. *See id.* ¶¶ 9-12, 53-64, 70-71.

During the same period, the Ramapough faced constant racist and xenophobic harassment by Defendant. *See id.* ¶¶ 4, 9, 13, 46, 73-74, 76-82. The Ramapough's prayer circle was defaced with a swastika, *id.* ¶ 46, logs were stolen, *id.* ¶ 47, Defendant's members publicly shouted disturbing racist language to interrupt Plaintiffs' religious ceremonies, *id.* ¶ 74, Defendant trespassed on Plaintiffs' land, *id.* ¶¶ 13, 76, green bags of dog feces were tossed onto the Sweet

Water driveway, *id.* ¶ 75, Defendant threatened and used Mahwah's "private warrant" process to bring malicious unfounded criminal charges against Ramapough members, *id.* ¶¶ 47, 73, 81, Defendant's members publicly demanded that Mahwah jail and fine Ramapough members, *id.* ¶ 76, Defendant's President attempted to entrap Ramapough members, *id.* ¶ 77, Mahwah's order to show cause demanded demolition of the Ramapough's sacred altar and prayer circle, *id.* ¶¶ 13, 79, 82, in court Mahwah's counsel threatened the Township would resort to "self-help" if denied judicial cooperation, *id.* ¶ 78, 82, and the Town Council President and Defendant publicly suggested "self-help" to tear down Plaintiffs' stone altar, *id.* ¶¶ 13, 80,

"As a direct result of Defendants' continued—and harassing—efforts to stop the Ramapough from using their land for religious purposes, as well as Defendants' demands the Ramapough take down sacred sites like the sacred altar and prayer circle, Plaintiffs are sustaining ongoing, irreparable injuries." *Id.* ¶ 14. These actions not only interfere with, but also substantially prevent Ramapough members from the practice of their religion. *Id.* The curtailment of the Ramapough's use of the Sweet Water religious sanctuary by these actions is causing the Ramapough "great ongoing trauma and distress." *Id.* ¶ 14.

PROCEDURAL HISTORY IN THIS ACTION

In urgent response to an April 24, 2018 demand by Former Defendant Geraldine Entrup (a Township Administrative Officer) that Plaintiffs cease to pray on – or even to enter – their land, and remove the sacred stone altar and prayer circle, Plaintiffs filed the instant action on May 14, 2018. *See* ECF No. 1. The Polo Club and Former Defendants filed motions to dismiss on July 18, 2018. *See* ECF Nos. 28, 29. On August 6, 2018, Plaintiffs sought to extend the deadline to amend as of right and to oppose Defendants' motions to dismiss until September 21, 2018. *See* ECF No. 32. On August 7, 2018, this Court granted Plaintiffs' request. ECF No. 38.

Plaintiffs sought leave to file the FAC on September 21, 2018. Plaintiffs added a claim against the Polo Club and Mahwah for conspiracy to violate civil rights under § 1985(3).

On January 23, 2019, the Polo Club filed an Opposition to Plaintiffs' Motion for Leave to Amend the Complaint. *See* ECF No. 72. On February 13, 2019, Plaintiffs filed a reply in support of leave to amend. *See* ECF No. 75.

Meanwhile, on March 18, 2019, the U.S. Attorney's Office for the District of New Jersey, Civil Rights Division, filed a Statement of Interest on behalf of the United States contending that Plaintiffs' FAC sufficiently states RLUIPA equal terms and substantial burden claims, and that the RLUIPA claims were ripe for adjudication. *See* ECF No. 82.

On June 28, 2019, while the Motion for Leave to Amend remained pending, Plaintiffs and Mahwah reached a settlement agreement (the "Settlement") to resolve several disputes (including this litigation as to Mahwah) concerning Plaintiffs' use of their land. ECF No. 104-3.

The Settlement ensures Plaintiffs' ability to use Sweet Water for cultural and religious gatherings, without the need to apply for a zoning variance, and without the further issuance of summonses and fines by Mahwah, while simultaneously requiring that Plaintiffs provide the Township with advance notice of certain gatherings on the land, limit gatherings of more than 35 people, and not hold large gatherings (over 150 people) on the property. *Id.* ¶ 2(a), (b) & (c). Importantly, the Settlement recognizes that the Ramapough's prayer circle and stone altar may remain on the property, *id.* ¶ 1(a), and requires the Township to vacate all fines and convictions previously assessed and obtained against Plaintiffs, *id.* ¶ 5. Per the Settlement's terms, on July 3, 2019, the Ramapough and Mahwah filed a stipulation dismissing Mahwah, Entrup, and Mulvey with prejudice, which this Court so-ordered on July 10, 2019. *See* ECF Nos. 100, 102.

On July 8, 2019, in light of the stipulation, Judge Clark administratively terminated the

pending Motion for Leave to File First Amended Complaint, ECF No. 42, permitting Plaintiffs to file a renewed motion to amend and clarify its claims against the remaining defendant, the Polo Club, *see* ECF No. 101. Accordingly, on August 9, 2019, Plaintiffs filed their Renewed Motion for Leave to File First Amended Complaint ("Renewed Motion") seeking to move forward with its § 1985(3) claim against the Polo Club for conspiracy to violate Plaintiffs' civil rights. *See* ECF No. 104-1; *see also* ECF No. 42-2. In their Renewed Motion, Plaintiffs noted their readiness to proceed on the § 1985(3) claim against the Polo Club as alleged in the initially proposed FAC – and a lack of necessity to revise the FAC – but further indicated that, should the Court prefer, Plaintiffs would supplement the proposed pleading "as contemplated by Rule 15(d), to include relevant factual allegations that postdate the filing of the [then-]current [p]roposed [FAC]." *See* ECF No. 104-1 at 11. Plaintiffs also provided various examples of the supplemental allegations that would be included. *See* ECF No. 104-1 at 11-12.

The Polo Club did not file an opposition to Plaintiffs' Renewed Motion. On September 13, 2019, Judge Clark granted Plaintiffs leave to amend without expressing preference for any supplement or revision to the proposed FAC. *See* ECF No. 106. On September 17, 2019, Plaintiffs filed their FAC. *See* ECF No. 107. As contemplated in Plaintiffs' Renewed Motion, the FAC names the Polo Club as sole defendant and retains portions as to Former Defendants.

On November 7, 2019, Defendant sought leave to file an over-length motion to dismiss that the Court granted the next day. ECF Nos. 112, 113. On November 14, 2019, Defendant filed the Motion, styled as a *Motion for Summary Judgment to Dismiss Plaintiffs' Complaint or In the Alternative to Dismiss Ramapough Lenape Nation from this Action*. ECF No. 114.

MUNICIPAL AND STATE COURT HISTORY

Also relevant to Defendant's Motion to Dismiss are no less than 9 cases initiated by Defendant, Former Defendants, and their members and agents in State, Municipal, and Tax

courts. These cases were brought before and during this action and are summarized below.

1. ***State v. Ramapough Mountain Indians, Inc.*, Summons Nos. 0233-SC-08491, et seq. (Mahwah Mun. Ct.); *State v. Ramapough Mountain Indians, Inc.*, Summons Nos. 0233-SC-008525, et seq. (Mahwah Mun. Ct.) (collectively, "Quasi-Criminal Cases")**

Since at least November 2016, the Polo Club and the Township sought to impose on the Ramapough, through excessive summonses, crippling zoning fines in an effort to stop the Ramapough from assembling and exercising their religion at Sweet Water, giving rise to these Quasi-Criminal Cases. *See* FAC ¶¶ 9-10. The Quasi-Criminal Cases comprised trial and appeal-level quasi-criminal prosecutions of the Ramapough for zoning violations, including for, e.g., "Failure to Obtain Zoning Permit for Use – Religious Use." *See* FAC ¶ 12.

In April 2018, at the Polo Club's urging, the Township stepped up these efforts and began to improperly issue summonses daily on the Ramapough for gathering in the open air on their own land to pray, and for their use of a stone altar and prayer circle—seeking to impose coercive fines of up to $12,500 *per day*. *See id.* ¶¶ 11-13. The Township issued daily fines for purportedly improper use, even on days when no one used the land at all. The Polo Club's participation in this scheme was open and apparent, as its President attested publicly, the Polo Club sought "to help and assist the Prosecutor, in a back-seat role, and . . . argu[e] legal issues or motions." Ex. A to Minga Decl. ¶¶ 86-88.[2] By September 21, 2018, the ongoing fines totaled $1,452,500, from over 1,200 individual summonses. *See* FAC ¶ 11.

Of the over 1,200 summonses, the municipal court action for Nos. 0233-SC-08491 et seq. concerned just 44 paper summonses. *See* ECF No. 114-7 at 5. (The remainder of the 1,200-plus

[2] *See* Ex. B to Minga Decl. at 13 (arguing for the Polo Club "to participate in this enforcement action as amicus curiae and/or intervenor for purposes of participating in motion practice and legal issues, and to exercise rights under the New Jersey Crime Victim's Bill of Rights"). The Court need not but may take judicial notice of filings in related actions to deny the Motion. *S. Cross Overseas Ag's, Inc. v. Wah Kwong Shp'g Grp. Ltd.*, 181 F.3d 410, 426 (3d Cir. 1999).

summonses were vacated by the Settlement while as yet unadjudicated. *See* ECF No. 104-3 at 6 ¶ 5.) Judge Roy F. McGeady remarked that just these 44 were "a lot of summonses, a lot of charges, a lot of dates, [and] a lot of issues." *See* ECF No. 114-5 at 6 (Tr. 5:6-7).

After initially dismissing one summons that "cited a violation of an ordinance that is *not a regulatory ordinance*," *see* ECF No. 114-7 at 5 (emphasis added), the Court conducted a trial with respect to the other "43 summonses, covering 103 days between them," *see* ECF No. 114-5 at 6 (Tr. 5:20-21), and acquitted the Ramapough of many, *see, e.g.*, *id.* at 12 (Tr. 11:6-7) ("as to the three soil complaints, . . . Not Guilty"), 14 (Tr. 13:5-16) ("the Court finds that the Township agents . . . induced the [Ramapough] not to obtain a permit [for the renewable energy system]"). Concerning the "September 15, 2017 letter from [the Township Zoning Officer] rescinding the January 25, 2012 original zoning permit," Judge McGeady "emphasize[d] the need to have had a hearing to rescind that original zoning permit. The Tribe was not given an opportunity to be heard, present its arguments, and therefore, nothing was preserved for any appeal, which the Township argues should have been done." ECF No. 114-6 at 3-4 (Tr. 23:3-5, 23:16-24:6).

On the remaining summonses, Judge McGeady considered the Ramapough's RLUIPA defense, and without citation "conclude[d] that RLUIPA is . . . available to the Tribe in the US District Court, but not in a State Court." *Id.* at 8 (Tr. 28:21-24). Judge McGeady thus "found [the Ramapough] guilty on all the summonses alleging structures without a permit, except . . . the renewable energy system summons." *Id.* at 10 (Tr. 30:11-13). The Township sought "the *mandatory maximum penalty*." *Id.* (Tr. 30:15-19) (emphasis added). Judge McGeady disagreed and "impose[d] the minimum . . . totaling $13,699.00." *Id.* at 12 (Tr. 32:11-15).

2. *State v. Ramapough Mountain Indians, Inc.*, Case No. BMA 001-18-02 (Super. Ct. N.J. Law Div.: Bergen Cnty.) (decided Jan. 10, 2018)

This action presented an appeal and a trial *de novo* of Judge McGeady's decision before

Judge Keith A. Bachmann. In a Judgment After Trial *de novo*, Judge Bachmann observed that Judge McGeady had acquitted Plaintiffs of numerous summonses. *See* ECF No. 114-7 at 5. Judge Bachmann then upheld 102 of the 103 violations Judge McGeady imposed, finding that all 102 arose from a single tent on 95 Halifax for 102 days without a license. *See id.* at 12-13. This holding turned on finding that the tent's dimensions exceeded the size not requiring a permit under the municipal code, as well as having been pitched from October 2016 through October 17, 2017. *See id.* at 6 ¶¶ 5-6. Reviewing Judge McGeady's judgment of $13,699.00, Judge Bachmann found that half the fine, i.e., "$50 per day[,] would be sufficient." *Id.* at 14. Judge Bachmann further held that court costs should be assessed per violation, not per summons. *See id.* at 15. In lieu of $13,699.00, Judge Bachmann imposed fines and costs totaling $7,210 after a mathematical amendment. *See* Ex. C to Minga Decl. Significantly, as to an RLUIPA defense, Judge Bachmann held that "[t]his [was] not the proper forum." *See* ECF No. 114-7 at 11.

The Ramapough filed a Motion for Emergent Relief to Stay the Judgement. *See* Ex. D to Minga Decl. The Ramapough indicated that the tent's dimensions and duration findings were clear mistakes from the face of the record so no license should have been required or violations found. *See id.* at 14-16. The Appellate Division considered the Ramapough's likelihood of success on the merits and granted the stay. *See* Ex. E to Minga Decl. at 1. Before fully briefing the appeal, Mahwah and Plaintiffs reached the Settlement that vacated the 102 violations and fines and expunged the conviction. *See* ECF No. 104-3 at 6 ¶ 5.[3]

3. *State v. Dwayne Perry*, Case No. S-2017-00031909233 (Bergen Cnty. Super. Ct. Crim.) (dismissed July 23, 2018)

The Chief of the Ramapough Lenape Nation, Dwayne Perry, was charged with criminal

[3] The Polo Club omits this subsequent history that no fines were proper and no convictions exist.

mischief by the Bergen County Prosecutor's Office based on a complaint by a Polo Club Trustee that Chief Perry had tampered with surveillance cameras trained on Sweet Water by the Polo Club. *See* FAC ¶ 73; Mot. at 33. The charge was dismissed July 23, 2018 under the *de minimis* statute. *See* FAC ¶ 73 ("Surveillance footage showed no such occurrence, and the Bergen County Superior Court later found that Chief Perry 'did not touch, let alone tamper' with the Polo Club's cameras."); Ex. F to Minga Decl.

4. ***State v. Steven D. Smith*, Case No. 18-02-003-18-01 (Super. Ct. N.J. Law Div., Bergen Cnty.) (decided Aug. 10, 2018)**

Steven D. Smith, known by his Ramapough name of "Owl," was charged in connection with the same purported tampering with surveillance cameras that the dismissed charges against Chief Perry concerned after a complaint by the same Polo Club Trustee. *See* FAC ¶ 73; Mot. at 33. Owl was found not guilty by the Superior Court. *See* Ex. G to Minga Decl.

5. ***Mahwah v. Ramapough Mountain Indians, Inc.*, Case No. BER-L-3189-17 (Super. Ct. N.J. Law Div.: Bergen Cnty.) (filed May 9, 2017)**

On May 9, 2017, in response to complaints by the Polo Club, *see* ECF No. 114-8 at 3 ¶ 4, the Township brought an action before Judge Charles E. Powers to permanently enjoin the Ramapough from "all use of [95 Halifax] that is in violation of Mahwah's current zoning ordinance," *see id.* at 6 ¶ 1, including alleged "use of the property as a campground with some individuals using the site on a permanent basis as living quarters, soil movement and illegal construction in the flood plain," without "the necessary zoning approval from the Township," *see id.* at 3 ¶ 4. Mahwah filed an Order to Show Cause with Interim Restraints with its complaint. *See* Ex. H to Minga Decl. Mahwah alleged that the Ramapough were violating the Township Zoning Ordinance and the New Jersey Flood Hazard Area Control Act. *See* ECF No. 114-8 at 5-6 ¶¶ 15-20. Mahwah's Township Engineer later testified that more than two people praying in

the open air on 95 Halifax regardless of structures would violate the ordinance. *See* FAC ¶ 59. The Township also admitted in its complaint that "[o]n April 12, 2017, the [Ramapough's engineer] submitted a Site Layout Plan rather than the Site Plan and application as required by the Township" and the next day the "Zoning Application was reviewed and denied. It was recommended that the summonses previously issued by the Township be reinstated." *See* ECF No. 114-8 at 5 ¶¶ 11- 12. On May 10, 2017, Judge Powers granted the Order to Show Cause with Interim Restraints.

On May 31, 2017, the Ramapough filed a Motion to Vacate Temporary Restraints, to stay the summonses, and to allow the Ramapough to resume religious activities at Sweet Water. *See* Ex. I to Minga Decl. at 21. The Ramapough argued *inter alia* that: Mahwah failed to show irreparable harm; all material facts underlying Mahwah's claims were controverted; the injunction harms the Ramapough more than it benefits Mahwah; and Mahwah was harassing the Ramapough with identical allegations in multiple forums. *See id.* at 8-20.

On June 15, 2017, the Ramapough filed their Answer, in which the Ramapough asserted affirmative defenses based on: (1) the entire controversy doctrine; (2) equitable doctrines of estoppel, waiver, and unclean hands; (3) laches; (4) RLUIPA; and (5) the Municipal Land Use Law, Flood Hazard Control Act, and other laws. *See* ECF No. 114-8 at 16-18.

Also on June 15, 2017, Judge Powers vacated the temporary restraints imposed on May 10, 2017, dismissed both allegations, and dismissed the hearing on the Order to Show Cause. *See* Ex. J to Minga Decl. at 6-8. Judge Powers held that the flood hazard allegations were unfounded, but that the Municipal Court was the proper forum for the Ramapough's RLUIPA and First Amendment arguments and the Zoning Ordinance allegations. *See id.*

On or about August 21, 2017, the Ramapough filed a motion to dismiss Mahwah's

complaint, noting the court had indicated in its June 15, 2017 Order that the Zoning Ordinance allegations should be resolved in the Municipal Court. *See* Ex. K to Minga Decl. at 1, 7-8.

On September 21, 2017, the Township filed a Notice of Cross-Motion for Injunctive Relief Against the Ramapough. *See* Ex. L to Minga Decl. The Township noted that Mahwah Construction Code officials, around August 11, 2017, "received numerous phone calls from concerned residents [i.e., the Polo Club] respecting a renewable energy system [allegedly] constructed" without a zoning permit, a building permit, site plan approval and permits from the New Jersey Department of Environmental Protection ("NJ DEP"). *See id.* at 7. The Township also represented vaguely that on or about August 25, 2017, a Mahwah Construction Code Official, "in response to safety concerns (inclusive of electrocution and death) arising from the placement of the energy resource system in the floodway, issued Notices of Violation and Order to Terminate." *Id.* Mahwah also stated that on September 15, 2017, Michael Kelly rescinded the July 2012 Zoning Permit issued by former Mahwah Zoning Officer Gary Montroy. *See id* at 8.

On September 22, 2017, the Polo Club President and Trustee, Paul Scian, filed "on behalf of the . . . Township of Mahwah," a certification supplementing Mahwah's submission the prior day. *See* Ex. M to Minga Decl. at 30. Scian attested to a June 30, 2017 Town Council meeting in which a "Ramsey NJ resident spoke of the lack of Indian lineage in the group purporting to be Ramapough Indians." *Id.* at 18 ¶ 78. Scian also stated that the Polo Club's members "see, hear, *smell* and observe everything that happens" at Sweet Water. *Id.* at 20 ¶ 86 (emphasis added).

On October 23, 2017, the Ramapough filed a reply to Mahwah's response and Cross-Motion. *See* Ex. N to Minga Decl. The Ramapough noted that Mahwah persisted with simultaneous actions against the Ramapough on identical Zoning Ordinance claims in multiple forums. *See id.* The Ramapough also pointed out that Mahwah's Cross-Motion sought "almost

exactly the same relief [Judge Powers] already denied on June 15th" and that Mahwah's "brief in support [was] a near-verbatim copy of the [rejected] May 8th brief." *See id.* at 4-5.

On January 5, 2018, Judge Powers denied Mahwah's Cross-Motion for an injunction. *See* Ex. O to Minga Decl. at 1. Judge Powers also denied the Ramapough's motion to dismiss, reasoning Mahwah "has a right to enforce its zoning ordinances and thus, the [Ramapough] motion . . . must be denied. . . ." *See* Ex. P to Minga Decl. at 5.

On February 23, 2018, Mahwah filed a response to a settlement proposed by the Ramapough, deemed the Ramapough's proposal "unacceptable," and enclosed a markup. *See* Ex. Q to Minga Decl.; Ex. R to Minga Decl. Mahwah demanded language such as:

> The RMI allege that the pile of rocks constitute an 'altar,' which implies religious connotation, as does reference to the poles and logs as a 'prayer' circle. However, the parties do not agree that the prayer circle and/or altar have any religious connotations or uses unless reviewed and approved by the Zoning Board of Adjustment.

See Ex. R to Minga Decl. at 3 *See also* FAC ¶¶ 44, 80, 87, 89.

On or around February 28, 2018, the Ramapough and Mahwah reached a tentative settlement agreement, subject to ratification by the Town Council and Ramapough Council, and Judge Lisa Perez Friscia dismissed the complaint. *See* Ex. S to Minga Decl.

On March 13, 2018, the *Polo Club* submitted a letter to Judge Perez Friscia concerning the Ramapough Council's failure to ratify the settlement agreement and reflecting that the Polo Club's counsel had simply walked into chambers to conduct settlement negotiations although not a named party in the litigation. *See* Ex T to Minga Decl. at 3-4.

On October 5, 2018, Mahwah submitted a letter to Judge Polifroni in which Mahwah noted: *Ramapo Hunt & Polo Club Association Inc. v. Ramapough Mountain Indians, Inc.*, Case No. BER-L-6409-17 (Super. Ct. of N.J. Law Div.: Bergen Cnt.) (the "Polo Club injunctive action"), was set for trial on November 13, 2018; a settlement was placed on the record on

February 28, 2018, but the Ramapough had not obtained approval; and Mahwah was requesting restoration of the matter to the trial calendar. *See* Ex. T to Minga Decl. Despite referring to the Polo Club's injunctive action as a related case set for trial the following month, Mahwah *failed to mention the existence of the federal litigation or the ongoing mediation ordered by Judge Cecchi since June 20, 2018*. *See* ECF No. 24.

On October 22, 2018, Mahwah submitted a Motion to Restore the Case to Active Status, *see* Ex. U to Minga Decl., despite this Court's October 16, 2018 stay of "[d]iscovery and motion practice" to allow for "meaningful mediation." *See* ECF No. 62.

On November 8, 2018, the Ramapough responded to Mahwah's Motion to Restore the Case to Active Status before Judge Powers indicating that while they "[did] not oppose the restoration of the case for the purpose of entering into the record a settlement as negotiated in a federal mediation that is nearing completion," Mahwah had "agreed to . . . adjournments and/or stays of all federal and state matters currently pending." *See* Ex. V to Minga Decl. ¶¶ 3-4.

On November 9, 2018, Judge Powers restored the case to active status. *See* Ex. W to Minga Decl. On November 19, 2018, Judge Polifroni scheduled trial for January 30, 2019. *See* Ex. X to Minga Decl.

On November 21, 2018, Mahwah filed a Motion to Consolidate the Township injunctive action with the Polo Club injunctive action that was identical – copy-pasted verbatim without acknowledgment – to the motion to consolidate submitted by the Polo Club on January 30, 2018, in the Polo Club injunctive action. *See* Ex. Y to Minga Decl.; Ex. Z to Minga Decl.

On December 7, 2018, Judge Polifroni consolidated the injunctive actions and set the consolidated action for trial. *See* Ex. AA to Minga Decl.

6. *Polo Club v. Ramapough Mountain Indians, Inc.*, Case No. BER-L-6409-17 (Super. Ct. of N.J. Law Div.: Bergen Cnty.) (filed May 9, 2017)

The Polo Club injunctive action commenced on September 22, 2017 with a Verified Complaint seeking relief "[d]eclaring that the [Ramapough's] use of the Property for religious use, a house of worship, and/or as a prayer camp or prayer facility violates the Township of Mahwah Zoning Ordinance" and "[e]njoining the [Ramapough] from using the Property for religious use, house of worship, and/or as a prayer facility." ECF No. 114-10 at 3. The Ramapough answered the Polo Club complaint on November 28, 2017. *See* ECF No. 114-15.

The Polo Club's complaint was accompanied by an Order to Show Cause With Temporary Restraints including primarily a restraint on "[e]ngaging or allowing any religious, house of worship, or prayer camp or other activity on the Property," *see* Ex. AB to Minga Decl., which was denied on Dec. 15, 2017, *see* ECF No. 107-6.

On January 30, 2018, the Polo Club submitted its motion to consolidate the injunctive actions that Mahwah would later copy verbatim. Ex. Z to Minga Decl.

7. *Mahwah v. Ramapough Mountain Indians, Inc. & Polo Club v. Ramapough Mountain Indians, Inc.*, Consolidated Case No. BER-L-3189-17 (Super. Ct. of N.J. Law Div.: Bergen Cnty.) (decided May 3, 2019)

On April 22, 2019, the day trial was scheduled to begin, Bergen County Judge Robert C. Wilson instead began an extended settlement conference. During that conference, the Ramapough and the Township reached a settlement of all claims against one another in the various actions between the Ramapough and various New Jersey governmental entities, resulting in the dismissal of the Township's injunctive action and others. *See* ECF No. 104-3; Ex. AC to Minga Decl.

The Polo Club, however, declined to join the settlement and insisted on trying their claims to enjoin any religious activity by the Ramapough on their own land. *See* Ex. AD to Minga Decl. at 15-16 (arguing "Religious uses are not permitted. Public Assembly uses are not

permitted."). The Polo Club presented their full case-in-chief, after which the Ramapough made a trial motion to dismiss. Judge Wilson granted the motion, finding that the Ramapough were not violating any zoning ordinances, that the Polo Club failed to show a *prima facie* case for injunctive relief, and rejected their attempt to restrain the Ramapough's prayer and gathering:

> It appear[s] that there is a request to enjoin the Ramapough Mountain Indians from gathering on the land and praying, and that public assembly is prohibited by the zoning laws per the claim of the plaintiffs . . . the relief being requested today is not fathomable. . . .
> To now say that this court should enjoin people from freely assembling on property and praying goes against [the First Amendment]. That would be inappropriate court action and authority. Certainly this court would never do that. It would be a prior restraint on the liberty of a free people to assemble and gather on their property and to do that which they say they're allowed to do and which the law recognizes that they are allowed to do.
>
> The Court also does not see any violations of law currently occurring. Assemblage on property that they own and praying is no more violative of the law than me having a party over at my own home. . . . [T]here's no showing that the laws currently are being violated. The [Ramapough have] settled and agreed upon the lawful use of the property. There is no showing that Mahwah's not enforcing the law as of today and, as such, being that there is no current violation, or one even being contemplated, the Court is devoid of any evidence and finds that the plaintiffs have failed to show a prima facie case to give a restraint as a matter of law.

ECF No. 114-21 at 20-22 (Tr. 7:23-10:8).

On May 3, 2019, pursuant to this decision, Judge Wilson entered an Order dismissing all claims brought by the Polo Club, *see* Ex. AE to Minga Decl., and also an Order dismissing all claims by Mahwah as mooted by the settlement, *see* Ex. AC to Minga Decl. On June 17, 2019, the Polo Club's time to appeal the decision expired without any appeal.

8. *Ramapough Mountain Indians, Inc. v. Michael Kelly and Township of Mahwah*, Docket No. BER-L7345-17 (Bergen Cnty. Super. Ct.) (filed Oct. 17, 2017)

On October 27, 2017, the Ramapough filed this suit to try to reinstate the 2012 permit that was rescinded in September 2017. *See* ECF No. 114-16 at 10; *see also* FAC ¶¶ 56-57.

9. *Ramapo Hunt & Polo Club v. Ramapough Mountain Indians, Inc.*, Case No. 00814502019 (Tax Ct. of N.J.) and related matters (filed April 1, 2019)

On April 1, 2019, the Polo Club filed a complaint with the Tax Court of New Jersey seeking cancellation of the tax-exempt status of the Ramapough's property. *See* Ex. AF to Minga Decl. On May 20, 2019, the Ramapough filed a motion to dismiss, *see* Ex. AG to Minga Decl., which the parties then thoroughly briefed, including a sur-reply and supplemental briefing. *See* Exs. AH, AI, AJ, AK, AL to Minga Decl. On June 28, 2019, the tax court dismissed the complaint, for which decision the time to appeal has now run. *See* Ex. AM to Minga Decl.

10. *Thomas Powers v. Township of Mahwah & Ramapough Mountain Indians, Inc.*, Case No. BER-L-6223-19 (Super. Ct. N.J. Law Div.: Bergen Cnty.) (filed August 16, 2019)

Polo Club member Tom Powers filed a *pro se* complaint on August 16, 2019, amended on September 6, 2019, challenging the Settlement. *See* Exs. AN, AO to Minga Decl. On December 13, 2019, the Ramapough filed a still-pending motion to dismiss based on, *inter alia*, Powers failing to state any claim for relief. *See* Ex. AP to Minga Decl.

As the above summary makes clear, Defendant and the Township's voluminous and redundant litigation has been completely unsuccessful. Not a single court has endorsed Defendant's outrageous position that open-air prayer is banned from conservation-zoned land.

DISCUSSION

I. DEFENDANT'S FAILURE TO COMPLY WITH RULE 56.1 IS FATAL TO THEIR "MOTION FOR SUMMARY JUDGMENT TO DISMISS PLAINTIFFS' COMPLAINT"

Defendants confusingly style their filing as *both* a Motion to Dismiss and a Motion for Summary Judgement. Their explanation for this unorthodox approach is that "this Court may not believe that the entire controversy bar is apparent on the face of the Amended Complaint." Mot. at 24. Plaintiffs disagree that a Motion for Summary Judgement is necessary or appropriate here; the Court may take judicial notice of other court proceedings, and may thus consider the

applicability of the entire controversy doctrine as a matter of law, discussed below. "The [C]ourt is not limited to the four corners of the complaint." 5B Wright & Miller, Fed. Prac. & Proc. Civ. § 1357 (3d ed.). "To resolve a 12(b)(6) motion, a court may properly look at public records, including judicial proceedings, in addition to the allegations in the complaint." *S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd.*, 181 F.3d 410, 426 (3d Cir. 1999). However, should the Court disagree, and determine that a Motion for Summary Judgment *is* necessary to adjudicate Defendant's entire controversy defense, Defendant's half-hearted attempt to bring that motion in combination with its Motion to Dismiss must be denied for failure to comply with the Local Rules of Civil Procedure.

The Motion should be dismissed because Defendant failed to comply with the requirements of submitting a Rule 56.1 statement. *See* Mot. at 9-19. "[T]he Rule 56.1 statement is viewed by the Court as a vital procedural step." *Davis v. Camden Cty. Bd. of Soc. Servs.*, No. CV 12-2481 (RBK/AMD), 2014 WL 12613194, at *2 (D.N.J. Mar. 17, 2014). "The purpose of [the 56.1 statement] is to prevent the court 'from having to drudge through deposition transcripts, expert reports, and lengthy contracts to determine the facts.'" *Decree v. UPS*, No. CIV 07-3674 RBK/AMD, 2009 WL 3055382, at *5 (D.N.J. Sept. 18, 2009) (quoting *Comose v. N.J. Transit Rail Op's, Inc.*, No. 98–2345, 2000 WL 33258658, at *1 (D.N.J. Oct. 6, 2000)). Accordingly, "[t]he failure to comply with Rule 56.1(a) can be severe." *Masci v. Six Flags Theme Park, Inc.*, No. CIV.A. 12-6585, 2014 WL 7409952, at *7 (D.N.J. Dec. 31, 2014). Local Rule 56.1 specifically mandates dismissal and Courts in this district routinely hold that "[a] moving party's failure to comply with Rule 56.1 is itself sufficient to deny its motion." *See Kee v. Camden County*, No. 04–0842, 2007 WL 1038828, at * 4 (D.N.J. Mar. 30, 2007); *accord Bowers v. NCAA*, 9 F. Supp. 2d 460, 476 (D.N.J.1998); *Langan Eng'g & Envtl. Servs., Inc. v. Greenwich*

Ins. Co., No. 07–2983, 2008 WL 5146538, at * 1 n.3 (D.N.J. Dec. 8, 2008).

Under Local Rule 56.1, the movant for summary judgment must submit a statement of undisputed material facts that is "a separate document (not part of a brief) and shall not contain legal argument or conclusions of law." Moreover, the movant is required to set forth material facts in the 56.1 statement "in separately numbered paragraphs citing to the affidavits and other documents submitted in support of the motion." "[T]he assertions . . . must be set out in separately numbered paragraphs, and *each fact alleged must be supported by a specific citation to an affidavit*." *Masci v. Six Flags Theme Park, Inc.*, No. CIV.A. 12-6585, 2014 WL 7409952, at *7 (D.N.J. Dec. 31, 2014) (citing L. Civ. R. 56.1 cmt.) (emphasis added).

Here, "Defendant's Motion for Summary Judgment is subject to dismissal for failure to comply with L. Civ. R. 56.1." *Estate of Dasaro v. County of Monmouth*, No. CV 14-7773 (PGS), 2015 WL 5771606, at *4 n.2 (D.N.J. Sept. 30, 2015). First, most obviously, "Defendant failed to submit its Statement of Material Facts as a separate document." *Id.* Courts routinely dismiss motions purporting to move for summary judgment on this basis alone. *See, e.g.*, *id.*

Second, Defendant has failed to set forth facts in separately numbered paragraphs. *See Ajmeri v. Bank of Am. Health & Welfare Plan*, No. CIV.A. 12-02394 JAP, 2013 WL 4597047, at *5 (D.N.J. Aug. 29, 2013) (denying summary judgment motion where "Plaintiff includes a statement of facts in her Memorandum of Law [and] the facts are not set forth in separately numbered paragraphs, as required by Rule 56.1(a).").

Third, Defendant has not cited to documentary evidence to support virtually any, let alone "each material fact." See *Agbottah v. Orange Lake Country Club*, No. CV 12-1019, 2012 WL 12894827, at *1 (D.N.J. Mar. 27, 2012) (denying summary judgment). Unacceptably instead, Defendant largely provides lengthy paragraphs of facts followed by blanket citations to

lengthier documents. *See United States v. Claxton*, 766 F.3d 280, 307 (3d Cir. 2014); *Rouse v. Hudson Cty. DOFS*, No. CV 15-1511 (JLL), 2019 WL 2083301, at *3 (D.N.J. May 13, 2019).

Fourth, Rule 56.1(a) forbids a movant from including "legal argument or conclusions of law." *See Decree*, 2009 WL 3055382, at *5. However, the Polo Club argumentatively mischaracterizes the allegations in the FAC under the guise of "summariz[ing]." *See* Mot. at 18-19. Plaintiffs dispute these mischaracterizations, which are numerous and must be read against the FAC. Defendant also "note[s]" various legal arguments and conclusions raised in prior filings before, and decisions by, other courts with apparently similar intent. *See* Mot. at 9-17.

Ultimately, Defendant's failure to abide by the requirements of Local Rule 56.1 frustrates its express purpose to enable the opponent of summary judgment to furnish a responsive statement addressing each material fact. Given Defendant's lack of a compliant Local Rule 56.1 statement, Plaintiffs do not respond to each unnumbered paragraph missing citation. Rather, Plaintiffs point to just a few of the many egregious disputed fact issues.[4] *Braintree Labs., Inc. v. Novel Labs., Inc.*, No. CIV.A. 11-1341 PGS, 2013 WL 211252, at *17 (D.N.J. Jan. 18, 2013) ("a party may refrain from admitting" "'uncontested' facts [that] contain vague, ambiguous and imprecise language."), *vacated and remanded on other grounds*, 749 F.3d 1349 (Fed. Cir. 2014).

For instance, Plaintiffs dispute the Polo Club's purportedly "undisputed material fact" that "Mahwah issued a number of summons to [Plaintiffs] for violating various zoning ordinances." Mot. at 9. As support for Plaintiffs' alleged "various zoning" violations, Defendant misleadingly points to Judge Bachmann having upheld 102 of 103 violations, but fails to mention that Judge Bachmann noted Judge McGeady's acquittal of Plaintiffs of numerous other

[4] If the Court would disagree with Plaintiffs and find that it should treat Defendant's motion as one for summary judgment, Plaintiffs respectfully request that the Court order Defendant to file a compliant 56.1 statement and permit Plaintiffs an opportunity to supplement their submission.

summonses and that all 102 violations resulted from just a single tent on the property at 95 Halifax for 102 days. *See* ECF No. 114-7 at 5-6, 12-13. Moreover, Judge Bachmann clearly affirmed based on finding the tent's size required a license, *see id.* at 6, 10-13, and the Ramapough's successful Motion for Emergent Relief to Stay his judgment pending appeal showed that his determinations of tent size and duration were clear errors from the face of the record and thus no license should have been required and no violations found whatsoever. *See* Ex. D to Minga Decl. at 14-16; Ex. E to Minga Decl. at 1. Defendant's "undisputed fact" also omits that the Settlement expunged the conviction for the 102 violations and vacated the fines. *See* ECF No. 104-3 at 6 ¶ 5.[5]

Given the Polo Club's numerous and blatant violations of Local Rule 56.1(a), the Court should dismiss its motion for summary judgment outright. In the alternative, the Court could wholly decline to treat any portion of the Polo Club's motion as one for summary judgment and proceed to deny the Motion as one under Rule 12(b)(6) as no basis exists to convert even in part – i.e., as to the entire controversy doctrine – what is effectively a motion to dismiss. *See Shepherd v. Fed. Bureau of Prisons*, No. CIV. 14-2992 NLH, 2015 WL 5692872, at *3-4 (D.N.J. Sept. 28, 2015) (declining to treat motion as for summary judgment and denying as a motion to dismiss). As shown below, Defendant's entire controversy doctrine also fails as a matter of law.

II. DEFENDANT'S INVOCATIONS OF THE ENTIRE CONTROVERSY DOCTRINE AND RES JUDICATA ARE INAPPOSITE

Whether a state court decision should have a preclusive effect in a subsequent federal action depends on the law of the state that adjudicated the original action. *Forcellati v. PHH*

[5] Other examples abound: Harold Molt is not a Ramapough member, and the Polo Club fails to note the acquittals of Chief Perry and Steven D. Smith in the face of the Polo Club's harassment by bringing criminal charges. *See* Exs. F, G to Minga Decl.

Mortg. Corp., No. 18-1118 (CCC), 2018 U.S. Dist. LEXIS 199931, at *11 (D.N.J. Nov. 26, 2018) (Cecchi, J.). The Polo Club invokes two principles of preclusion: (1) claim preclusion (also known as *res judicata*); and (2) New Jersey's closely-related entire controversy doctrine.

For *res judicata* to apply, the Polo Club bears the burden of showing that there has been "(1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same cause of action." *U.S. v. Athlone Indus., Inc.*, 746 F.2d 977, 983 (3d Cir. 1984). In considering whether causes of action are distinct, the Third Circuit assesses whether there is "an essential similarity of the underlying events giving rise to the various legal claims." *Id*. at 984. Factors that the Court consider include "(1) whether the acts complained of and the demand for relief are the same (that is, whether the wrong for which redress is sought is the same in both actions); (2) whether the theory of recovery is the same; (3) whether the witnesses and documents necessary at trial are the same (that is, whether the same evidence necessary to maintain the second action would have been sufficient to support the first); and (4) whether the material facts alleged are the same." *Id*. (internal citations omitted).

New Jersey's entire controversy doctrine—set forth in New Jersey Rule of Court 4:30A—similarly "requires that a person assert in one action all related claims against a particular adversary or be precluded from bringing a second action based on the omitted claims against that party." *Tadros v. City of Union City*, No. 10-CV-2535 (DMC)(JAD), 2011 U.S. Dist. LEXIS 35714, at *16 (D.N.J. Mar. 31, 2011) (quoting *Melikian v. Corradetti*, 791 F.2d 274, 279 (3d Cir. 1986)). The doctrine is "essentially New Jersey's specific, and idiosyncratic, application of traditional res judicata principles." *Rycoline Prod., Inc. v. C & W Unlimited*, 109 F.3d 883, 886 (3d Cir. 1997). Like *res judicata*, the entire controversy doctrine requires that a prior state judgment be adjudicated on the merits. *Id*. at 889. Because *res judicata* does not bar

Plaintiffs' complaint, as explained *infra*, nor can the entire controversy doctrine bar these claims. *Cafferata v. Peyser*, 251 N.J. Super. 256, 262 (N.J. App. Div. 1991) (holding that where *res judicata* is inapplicable, "the entire controversy doctrine, predicated on litigation which could have, but did not take place, is inapplicable"). Further, the entire controversy doctrine is inapplicable where claims are "separate and discrete" from those in the initial proceeding. *Hillsborough Twp. Bd. of Educ. v. Faridy Thorne Frayta, P.C.*, 321 N.J.Super. 275, 285 (N.J. App. Div. 1999) (holding that mandatory joinder of claims does not bar a subsequent action where claims are "separate and discrete" from those in the first proceeding). As set forth below, Plaintiffs allege new facts that occurred after Defendant and Mahwah brought the state actions.

"[D]evelopment of new material facts can mean that a new case and an otherwise similar previous case do not present the same claim" and that res judicata is therefore inapplicable. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2305 (2016) (citing Restatement (Second) of Judgments § 24, Comment f (1980)). "Factual developments may show that constitutional harm, which seemed too remote or speculative to afford relief at the time of an earlier suit, was in fact indisputable . . . [and] such changed circumstances will give rise to a new constitutional claim." *Id*. at 2305-06 (ruling that constitutional claims based on post-enforcement consequences of a state abortion law were not barred by a judgment in an earlier case challenging the same law, given that the later case "rest[ed] in significant part upon later, concrete factual developments"). *Accord Morgan v. Covington Twp.*, 648 F.3d 172, 178 (3d Cir. 2011) (reversing dismissal where second action brought claims based on conduct that occurred after filing of first action, holding that *res judicata* does not bar claims that are predicated on events that postdate the filing of the initial complaint," even if the claims "relate to . . . [the] earlier-filed lawsuit."). And where "important human values . . . are at stake, even a slight

change of circumstances may afford a sufficient basis for concluding that a second action may be brought." *Id*. at 2305. Similarly, "[t]he New Jersey entire controversy does not require plaintiffs to assert claims that are premature or speculative." *Yerkes v. Weiss*, No. 17-2493(JBS/AMD), 2018 U.S. Dist. LEXIS 53864, at *41 (D.N.J. Mar. 29, 2018) (denying dismissal where Plaintiff was unaware of a key fact at the time the first complaint was filed); *cf. Mateen v. Am. President Lines*, No. 12-6849 (CCC), 2013 U.S. Dist. LEXIS 107549, at *24 (D.N.J. July 31, 2013) (Cecchi, J.) (dismissing claims where plaintiff unsuccessfully challenged discriminatory actions that occurred through December 2011 in a state court proceeding, and then attempted to challenge the same actions—from November 2011, before the original action was filed—in a second action). Courts have likewise found that an issue was not "actually litigated" for purposes of issue preclusion when "it was not decided in prior litigation, arose out of separate transactions and facts, or was not necessary to the judgment." *Prospect Funding Holdings, LLC v. Breen*, No. 2:17-cv-3328-KM-MAH, 2018 U.S. Dist. LEXIS 19373, at *15 (D.N.J. Feb. 5, 2018) (citing 18 Wright & Miller, Fed. Practice & Pro. § 4419 (3d ed. 2016)), *aff'd* 757 F. App'x 130 (3d Cir. 2018).

A. No State Court Action Resolved The Civil Conspiracy Claims Or The Predicate Constitutional And RLUIPA Violations Raised In The FAC

Here, Defendant argues *pro forma* that because Plaintiffs "had the opportunity and obligation to raise its civil conspiracy claim in the state court actions," and because "New Jersey's Superior Court had jurisdiction to hear the civil conspiracy claims," that the claims are now barred by *res judicata* and the entire controversy doctrine. But none of the state court actions included a fully-litigated decision on the issues of civil conspiracy and affirmative First Amendment and RLUIPA claims. Moreover, these issues arose out of separate transactions and facts, and were not necessary to the state court judgments.

In the state proceedings, Defendant and the Township brought affirmative claims against Plaintiffs, seeking findings that Plaintiffs were in violation of Mahwah municipal zoning ordinances and illegal activity occurring on 95 Halifax Road. *See Twp. of Mahwah v. Ramapough Mountain Indians, Inc.*, Docket No. BER-L-003189-17; *Ramapo Hunt & Polo Club Assoc., Inc., v. Ramapough Mountain Indians, Inc. et al.*, Docket No. BER-L-006409-17.

As Defendant notes, Mahwah filed a verified complaint as well as an order to show cause on May 9, 2017 against Plaintiffs for violations of Township zoning ordinances beginning in 2016, including "the use of the property as a campground with some individuals using the site as a permanent basis as living quarters, soil movement and illegal construction in the flood plain," all of which was allegedly performed without "the necessary zoning approval from the Township." *See* Mot. at 9-10; ECF No. 114-8; Ex. H to Minga Decl.

Similarly, in September 2017, Defendant sought declaratory and injunctive relief for Plaintiffs' alleged violations of Mahwah's building and construction codes, as well as Mahwah municipal ordinance C-200, including alleged health and safety violations, flood zone hazards, public assembly and religious use on Plaintiffs' privately-owned land, construction of structures without a permit, and failure to provide off-street parking. *See* ECF No. 114-10 ¶¶ 113-213. The matters were consolidated and set for trial in April 2019. *See* Ex. AA to Minga Decl.

While Plaintiffs and the Township reached a settlement, the Polo Club proceeded to trial against the Ramapough. The Court found that the Ramapough were not in violation of Mahwah zoning ordinances and did not find "any violations of law currently occurring" on 95 Halifax Road, and dismissed Defendant's complaint against Plaintiffs, finding that the Polo Club failed to prove a *prima facie* case for injunctive relief. *See* ECF No. 114-21 at 20-22 (Tr. 7:23-10:14).

The state actions concerned Plaintiffs' conduct. Here, the wrongs for which Plaintiffs

seek redress in this action are *Defendant's* conduct in furthering a civil conspiracy—premised on First Amendment and RLUIPA violations—to deprive the Ramapough of their civil rights. Defendant's *pro forma* assertion that "the claims in the state court actions are identical to this Federal action and arose out of the same transaction or occurrence" is undermined by Defendant's own description of the state court claims, which sound entirely in alleged municipal zoning violations. Mot. at 25-26. The Ramapough's alleged zoning violations are entirely distinct occurrences from the Polo Club's racially- and religiously-motivated campaign of harassment against Plaintiffs or the conspiracy to violate the Ramapough's civil rights.

Further, there was never a final judgment on the merits with respect to the predicate acts underlying Plaintiffs' claim of civil conspiracy. Defendant's argument that Plaintiffs sought to offer the First Amendment and RLUIPA as defenses in the state trial is of no moment, because the state court did not need to reach the merits or require the Ramapough to offer any evidence in defense, and in any event, an RLUIPA defense is distinct from an affirmative claim. *Id*. In dismissing the Polo Club's complaint against Plaintiffs, the court stated that it was "devoid of any evidence," finding that the Ramapough were not violating any zoning ordinances and that the Polo Club "failed to show a prima facie case to give a restraint as a matter of law against [the Ramapough]." ECF No. 114-21 at 22 (Tr. 10:6-13). Because the Polo Club did not establish any legal violations by the Ramapough, the court did not need to reach the Ramapough's defenses, and the RLUIPA and First Amendment issues were *a fortiori* not "necessary" to the judgment. Accordingly, neither *res judicata* nor the entire controversy doctrine bar the FAC.

B. The FAC Is Based On Recent Factual Developments Giving Rise To New Constitutional And Civil Conspiracy Claims

In support of Defendant's preclusion arguments, the Polo Club references state court actions involving the Ramapough, all of which predate key factual allegations in the FAC. *See*

Mot. at 17-19. As noted above, the Polo Club relies primarily on Bergen County Superior Court Case No. BER-L-3189-17, filed by Mahwah on May 8, 2017, in which Mahwah sought to enjoin the Ramapough's use of Sweet Water for religious purposes allegedly in violation of local zoning ordinances, and which was consolidated with Bergen County Superior Court Case No. BER-L-6409-17, filed by the Polo Club on September 22, 2017. *See id*.

The FAC asserts claims based on conduct that occurred after the filing of the referenced state and municipal court proceedings (including the Ramapough's responsive pleadings in those actions), and which therefore could not have been raised in those earlier proceedings. For example, in a January 2018 letter, Mahwah ordered the Ramapough to stop using their land for religious purposes. *See* FAC ¶ 48. This action came less than two months after Mahwah's Township Engineer stated under oath that more than two people engaging in open-air prayer on the Land would violate the Township's municipal code, despite the absence of any such provision in the zoning code. *Id*. ¶ 59. Thereafter, the Township began daily imposing coercive summonses against Plaintiffs for religious use of their land, including for open-air prayer, starting in April 2018. *Id*. ¶¶ 11-13. Similarly, many of the key facts demonstrating that Mahwah's actions were driven by religious animus and that they were motivated by a conspiracy with the Polo Club—such as comments by Town Council Members and Polo Club members at February and March 2018 Town Council Meetings, *see id.* ¶¶ 13, 80—occurred after the three actions referenced by Mahwah were filed and had been litigated. Consequently, while the referenced state-court actions shared some background context with the FAC, they did not hinge on the same material facts. Rather, the fact of the prior cases forms a significant part of Plaintiffs' present claims. Because changed circumstances give rise to new claims, preclusion principles do not bar the Plaintiffs' claim. *See Hellerstedt*, 136 S. Ct. at 2305.

III. PLAINTIFFS HAVE STATED A CAUSE OF ACTION FOR CONSPIRACY IN VIOLATION OF 42 U.S.C 1985(3)

The Polo Club also seeks to dismiss the Ramapough's § 1985(3) claim for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *See* Mot. at 27-34. "Under Fed.R.Civ.P. 12(b)(6), a 'defendant bears the burden of showing that no claim has been presented.'" *Halimi v. Pike Run Master Ass'n*, No. CIV. 11-4195, 2011 WL 5926670, at *3 (D.N.J. Nov. 28, 2011) (quoting *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005)). The Third Circuit is "particularly vigilant in reviewing orders dismissing claims alleging civil rights violations; [it] will 'not affirm a dismissal at the pleading stage, unless it is readily discerned that the facts cannot support entitlement to relief.'" *Lake v. Arnold*, 112 F.3d 682, 684–85 (3d Cir. 1997), *as amended* (May 15, 1997) (quoting *Carter v. City of Philadelphia*, 989 F.2d 117, 118 (3d Cir. 1993)). Courts in the Third Circuit thus assess motions to dismiss a § 1985(3) claim "[w]ith this liberal standard in mind." *Lake*, 112 F.3d at 684-85 (citing *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971)).

As discussed below, the Polo Club contends in error that Plaintiffs' § 1985(3) claim fails as a matter of law because (i) Plaintiffs purportedly have alleged "no facts concerning a 'conspiracy'" and (ii) Plaintiffs purportedly have made "no colorable allegation that Mahwah's zoning ordinance or any other laws have been applied 'unequally.'" *See* Mot. at 28, 32. Neither argument holds up. As an initial matter, however, much of the Polo Club's arguments hinge on caselaw determined under a summary judgment standard that underscores the need for discovery here. Rather, under the Third Circuit's "liberal standard" on motions to dismiss, *see Lake*, 112 F.3d at 684-85, Plaintiffs have alleged facts more than sufficient to form a plausible claim that the Polo Club conspired with Mahwah to violate the Ramapough's civil rights. Moreover, the Polo Club's unequal-enforcement argument is the wrong legal standard and entirely irrelevant, and in any case, the Ramapough plead sufficient facts to show the Polo Club's invidious intent.

A. Plaintiffs Have Adequately Pleaded Facts Alleging The Conspiracy Element Of A 1985(3) Claim.

The Polo Club argues that Plaintiffs have not plausibly alleged that the Polo Club had a meeting of the minds with Mahwah by misconstruing the FAC as having only alleged that the Polo Club reported inaccurate information to the Mahwah police department in connection with criminal prosecutions brought against Ramapough members. Mot. at 31. This completely ignores the substance of Plaintiffs' allegations.

Indeed, the facts supporting Plaintiffs' § 1985(3) claim are not limited to paragraphs 70-82 of the FAC as the Polo Club asserts they "undisputedly" are. *See* Mot. at 18. Even a cursory review of the FAC reveals instances of the Polo Club colluding with the Township. *See, e.g.*, FAC ¶¶ 13 (alleging "Defendants' actions are driven by religious animus and pressure from members of the Polo Club" and quoting Polo Club member Kathy Murray pressuring the Town Council over "lost property value" resulting from Plaintiffs' use of their land), 57 (Mahwah issued a letter purporting to revoke the 2012 permit without notice, proper cause, or a hearing on September 15, 2017), 58 (only days after the Township revoked the 2012 permit, the Polo Club filed an Order to Show Cause with Temporary Restraints prohibiting gathering of five or more persons on 95 Halifax), 59 (one-upping the Polo Club's zoning interpretation, Township Engineer Michael Kelly testified on October 31, 2017 that more than *two* people praying on the Ramapough's land regardless of structures would violate the municipal code), and 68 (Polo Club's religious and nonreligious structures have tacit approval from the Township).

Moreover, contrary to Defendant's "summarizing," Mot. at 18, the actual face of the FAC sufficiently states a claim for conspiracy. The Third Circuit has instructed that "[t]o plead conspiracy adequately, a plaintiff must set forth allegations that address [1] the period of the conspiracy, [2] the object of the conspiracy, and [3] the certain actions of the alleged

conspirators taken to achieve that purpose." *Shearin v. E.F. Hutton Grp., Inc*., 885 F.2d 1162, 1166 (3d Cir. 1989) (citing *Kalmanovitz v. G. Heileman Brewing Co.,* 595 F. Supp. 1385, 1400-01 (D. Del. 1984), *aff'd*, 769 F.2d 152 (3d Cir. 1985)) (reversing to find conspiracy sufficiently pleaded), *abrogated on other grounds by Beck v. Prupis*, 529 U.S. 494, 499 (2000); *accord James Julian, Inc. v. Raytheon Co.*, 499 F. Supp. 949, 955 (D.Del. 1980)).

Plaintiffs here have adequately alleged conspiracy. First, Plaintiffs sufficiently allege that, since at least 2016, Mahwah and the Polo Club has repeatedly and intentionally attempted to stop the Ramapough from assembling and praying on their land. FAC ¶¶ 9-12. Plaintiffs further allege that the actions of the Polo Club have continued through present. *Id.* ¶ 14.

Further, the FAC alleges specific facts that, if proven true, demonstrate a conspiratorial objective shared between Mahwah and the Polo Club, to target the Ramapough. These facts include, *inter alia*: (i) "from December 2016 through May 2017 representatives of the Mahwah Council, including the Mayor, regularly visited and conferred with the Polo Club regarding action to take against Ramapough's use of Sweet Water"; (ii) "agents of the Polo Club communicate with agents of Mahwah as frequently as once per day, collaborating to prevent Ramapough prayer and assembly"; and (iii) at a March 22, 2018 Town Council meeting, Mahwah Town Council president Robert Hermansen said, "[i]t's time to move forward one way or the other." Later, Mr. Hermansen suggested, "[d]o we go in and take the rocks [—referring to the Ramapough's sacred Stone Altar—] down oursel[ves]?" At that same Council meeting, Polo Club member Charles Brammer said, "[w]e need something done. Not a year from now. Not six months from now. It better be done now. We're tired of it." FAC ¶¶ 71, 80, 82.

Additionally, the FAC sets forth abundant and specific facts showing the Polo Club and Mahwah acted in furtherance of the conspiracy, including, among other things, allegations that

members of the Polo Club lodged unfounded and malicious complaints to the Mahwah Police Department and Mahwah instituted litigation against Ramapough, in which Polo Club attorneys assisted and participated. FAC ¶¶ 73, 78, 82. For instance, the FAC specifically alleges that the Polo Club employed the municipal "private warrant" process to bring baseless criminal charges against Chief Perry. *Id.* ¶ 73. The FAC also alleges that in October 2016 the President of the Polo Club tried to entrap Ramapough members by offering use of a Polo Club electrical box and then filing a police report for theft of electricity. *Id.* ¶ 77. The FAC relays public exchanges between the Polo Club and the Township Council in which Polo Club members publicly demanded that Mahwah jail and fine Ramapough members, *id.* ¶ 76, and in which the Polo Club and the Town Council President publicly suggested "self-help" to tear down Plaintiffs' stone altar, *id.* ¶¶ 13, 80. Likewise, the FAC reports the January 5, 2018, Township attorney Brian Chewcaskie's threat in court that the Township would resort to "self-help." *Id.* ¶ 78. Further, the FAC specifically alleges that the Polo Club's attorneys "have sought to directly intervene" and "actually assisted and participated in the Township's lawsuits in which they had no official role." *Id.* ¶ 82.[6] The Polo Club also is alleged to have regularly met and conferred with the Township's Mayor from December 2016 through May 2017 concerning "action to take against the Ramapough's use of Sweet Water." *Id.* ¶ 71. These allegations show that the conspirators acted in furtherance of preventing the Ramapough's religious use of Sweet Water.

Nor can the Polo Club legitimately rely on either of the mere two authorities that it cites. *Redwood v. Dobson,* 476 F.3d 462 (7th Cir. 2007), stands for the proposition that mere contact between the Polo Club and Mahwah cannot be deemed a "conspiracy." *Id.* But here there is

[6] *See, e.g.*, Ex. B to Minga Decl.; *see also* Ex. B to Minga Decl. ¶¶ 86-88 (Polo Club President and Trustee attesting to the Polo Club's efforts "to help and assist [Mahwah's prosecution of the Ramapough], in a back-seat role, and . . . argu[e] legal issues or motions.").

more than mere contact, *see* FAC ¶¶ 13, 57-59, 68, 73-82, and the *Redwood* court analyzed a motion for summary judgment, assessing ""if there is enough *evidence* for a jury to reasonably find for the nonmoving party." *Minarsky v. Susquehanna County*, 895 F.3d 303, 309 (3d Cir. 2018) (emphasis added). That standard is inappropriate here as discovery has hardly begun.[7].

Neither does *Suber v. Guinta*, 902 F.Supp.2d 591 (E.D. Pa. 2012), support the weight the Polo Club places on it. The Polo Club quotes the decision for the inapposite truism that "it is not enough to use the term 'conspiracy' without setting forth supporting facts that tend to show an unlawful agreement." *Id*. at 608. Plaintiffs allege facts; unlike *Suber*, they do not merely repeat the word "conspiracy" in the FAC.

Lastly, "[a] conspiracy, for [the] purposes [of a § 1985(3) claim], need not be shown by proof of an explicit agreement but can be established by showing that the 'parties have a tacit understanding to carry out the prohibited conduct.'" *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 427 (2d Cir. 1995); *see also Snell v. Tunnell*, 920 F.2d 673, 702 (10th Cir. 1990) (a conspiracy may be established by showing that "participants in the conspiracy . . . share the general conspiratorial objective"), *cert. denied*, 499 U.S. 976 (1991). The FAC more than adequately alleges a tacit agreement between Mahwah and the Polo Club as their alleged public and private communications, and coordinated enforcement and litigation reflects. FAC ¶¶ 13, 57-59, 68, 70-73, 77-82. Plaintiffs also have abundantly pleaded: that the Polo Club met regularly with Mahwah, threats of prosecution and bad acts in furtherance of the conspiracy attributable to the Polo Club, and actions taken by Mahwah at the behest of the Polo Club, thereby meeting the standard laid out by the *Suber* court. *See* FAC ¶¶13, 57-59, 68, 71-80. As a result, Plaintiffs'

[7] In fact, as of the filing of this brief, the Polo Club's initial written discovery—due December 30—still has not been received, and no extension has been sought.

FAC has more than met its burden to allege facts tending to show an unlawful agreement between the Polo Club and Mahwah.

B. The FAC Alleges Facts Showing That Mahwah—As Urged By the Polo Club—Has Selectively Enforced Zoning Ordinances

The Polo Club claims that the FAC is deficient because it has "no colorable allegation that Mahwah's zoning ordinances have been applied unequally." Mot. at 28. Under § 1985(3), Plaintiffs are not required to show that Mahwah's ordinances have been applied "unequally" against Plaintiffs. Rather, Plaintiffs must and did allege that the Polo Club conspired to violate their constitutional rights to use Sweet Water out of religious and racial animus.

The FAC sufficiently alleges that, even if Mahwah's zoning ordinances are facially neutral, Mahwah's invocation of them to chill Plaintiffs' religious practice out of animus triggers strict scrutiny. "Official action that targets religious conduct for distinctive treatment cannot be shielded [from constitutional attack] by mere compliance with the requirement of facial neutrality." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 545-46 (1993). Thus, when government officials "exercise discretion in applying a facially neutral law, so that whether they enforce the law depends on their evaluation of the reasons underlying a violator's conduct, they contravene the neutrality requirement if they exempt some secularly motivated conduct but not comparable religiously motivated conduct." *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 165-66 (3d Cir. 2002). Indeed, discretionary targeting of religious use was Congress's concern behind RLUIPA. H.R. Rep. No. 106-219, (1999), at 17-18 (RLUIPA designed to prohibit zoning against religious activities that forbids uses "because they are religious"), 23-24 ("Land use regulation has a disparate impact . . . on small faiths.").

Plaintiffs have adequately alleged conduct implicating bias by Defendants against a religious group, and interference with constitutionally protected activity on their property, two

grounds the Third Circuit has explicitly found independently constitute "conscience-shocking" behavior. *See Eichenlaub v. Township of Indiana,* 385 F.3d 274, 285 (3d Cir. 2004) ("shocks the conscience" analysis proper for zoning controversies involving "hostility to constitutionally-protected activity on the premises."); *see also Chainey v. Street,* 523 F.3d 200, 220 (3d Cir. 2008) (allegations of "bias against an ethnic group" shocks the conscience). Plaintiffs' allegations involve more than mere disagreements about the general applicability of zoning laws and improper motives – they constitute interference with a constitutionally protected activity in a manner wholly unrelated to a rational governmental goal. *See* FAC ¶¶ 46-69; *Dotzel v. Ashbridge*, 306 F. App'x 798, 801 (3d Cir. 2009). Plaintiffs are not required to prove selective enforcement at this stage, but plead facts to plausibly state a claim. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Plaintiffs plausibly plead selective enforcement.

Such selective enforcement triggers strict scrutiny, which can only be overcome if the government "advance[s] interests of the highest order" to justify its selective enforcement, and the selective enforcement is "narrowly tailored [to] those interests." *Lukumi*, 508 U.S. at 546. As described above in Section III.A, Plaintiffs have adequately pleaded facts sufficient to support a conspiracy claim against the Polo Club for coordinating discriminatory efforts with Mahwah. Mahwah has sought thousands of fines against Plaintiffs, pursued an injunction, and tried to compel removal of religious artifacts from 95 Halifax with the aim of prohibiting the Ramapough's religious practice. *See* FAC ¶¶ 11-12, 14, 58-59, 61, 65. So has the Polo Club. *See id.* ¶¶ 9, 13, 58, 70-71, 73, 76-77, 80-82. Moreover, "Polo Club members have put up religious and non-religious structures including a statue of a brass horse, menorahs, Christmas trees, and wreaths, and have hosted large events with as many as twenty-five cars parked on the road." *Id.* ¶ 68. As alleged in the FAC, the Polo Club has and continues to further the objective

of a conspiracy with Mahwah to selectively target the Ramapough's use of its own land. The repeated summonses against the Ramapough for the Ramapough's religious use of the land and assembly evidence a pattern of discrimination against the Ramapough when compared to the treatment afforded to other churches and other, non-religious users in the conservation zone. *See id.* ¶¶ 60, 66-69. The many other actions brought by the Polo Club only buttress that assessment.

Lastly, as Plaintiffs have noted, while Plaintiffs do not believe it necessary to further amend, many new facts have developed to support the Ramapough's claim against the Polo Club since the initial filing of the FAC. *See* ECF No. 114-1 at 11-12 (listing examples). Plaintiffs stand prepared to amend if the Court wishes to have such facts added to the FAC or if the Court deems such facts material to the resolution of this issue.

IV. DEFENDANTS' CONDUCT IS NOT PROTECTED BY THE FIRST AMENDMENT

A. The First Amendment Does Not Bar Plaintiffs' Claims Against Defendant

The Polo Club summarily states that Plaintiffs' FAC "seeks to hold the [Polo Club] liable for engaging in protected speech and petitioning activities that are immunized under the First Amendment's Free Speech and Petition clauses." Mot. at 36. It is well-established that not all speech and petitioning activities are protected by the First Amendment. Rather, courts routinely find that civil liability is properly grounded in improper speech and petitioning activity under appropriate circumstances such as here. *See Prof'l Real Estate Inv'rs, Inc. v. Columbia Picts. Indust., Inc.,* 508 U.S. 49, 56 (1993) (antitrust liability can be based on the filing of a "sham" lawsuit); *Bill Johnson's Rests., Inc. v. NLRB,* 461 U.S. 731, 743 (1983) ("Just as false statements are not immunized by the First Amendment right to freedom of speech, baseless litigation is not immunized by the First Amendment right to petition." (citations omitted)); *We, Inc. v. City of Philadelphia*, 174 F.3d 322, 327 (3d Cir. 1999) ("[T]he Petition Clause is on a par with the

freedoms to speak, publish, and assemble. It follows that the protection afforded by *Noerr–Pennington* is no more absolute or extensive than that provided by other First Amendment guarantees"); *In re IBP Confidential Bus. Documents Litig*., 755 F.2d 1300, 1313 (8th Cir. 1985), *on reh'g*, 797 F.2d 632 (8th Cir. 1986) (explaining that *Noerr-Pennington* doctrine does not apply to activities "'ostensibly directed toward influencing governmental action,' [that] are actually nothing more than an attempt to harm another,").

Plaintiffs do not seek to hold the Polo Club liable for engaging in protected activity. Rather, the Amended Complaint alleges in *specific* terms, among other things, that: the Polo Club has sought to entrap the Ramapough, as in October 2016 when Polo Club President Paul Scian invited Ramapough members to use an electrical box and then filed a police complaint for theft of electricity, *see* FAC ¶ 77; lodged "numerous and unfounded malicious complaints to the Township's police department using the New Jersey municipal 'private warrant' process," including a criminal complaint against Chief Perry for allegedly tampering with surveillance cameras, which the Bergen County Superior Court found to be utterly baseless, *see id.* ¶ 73; the Polo Club has harassed Plaintiffs by hiring Jeanine Genauer of the JPR Group, a public relations firm, to publish on *northjersey.com* on June 1, 2017, the false accusation that the Ramapough were violating New Jersey state regulations, *see id.* ¶ 72; the Polo Club has harassed the Ramapough and invaded the privacy of their sacred ceremonies by "maintain[ing] surveillance cameras on the property 24 hours a day, and [trespassing] on Ramapough land to threaten, photograph, and record Tribe members," [8] *see id* ¶ 76; *id.*Charles Brammer, a Polo Club member – on March 22, 2018, in a Town Council meeting where the Town Council president suggested

[8] The apparent existence of such tapes and evidence – or its willful destruction despite a duty to preserve for litigation – is all the more reason to deny the Polo Club's motion to dismiss and allow discovery to proceed.

that those in attendance "go in and take the rocks [of the sacred Stone Altar] down oursel[ves]," – demanded that "[w]e need something done. Not a year from now. Not six months from now. It better be done now." *see* FAC ¶ 80; and the Polo Club has brought numerous litigations against the Ramapough in state courts, *id*. ¶ 81, *see supra Municipal and State Court History*. In other words, Plaintiffs seek to hold the Polo Club liable for their unprotected and unlawful actions. With the benefit of discovery, Plaintiffs expect to further show that the Polo Club's speech and petitioning activities have constituted unprotected activity and sham litigations.

Plaintiffs are entitled to plead protected activity – and have done so in specific terms – as a basis to demonstrate the Polo Club's discriminatory intent and agreement, two necessary elements of a § 1985(3) claim. *See Wisconsin v. Mitchell*, 508 U.S. 476, 489-90 (1993) ("First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent"); *Zhang Jingrong v. Chinese Anti-Cult World All.*, 287 F. Supp. 3d 290, 305 (E.D.N.Y. 2018) (holding that plaintiffs had permissibly cited defendants' speech in Complaint as "evidence of Defendants' racial animus" where the "subject speech [was] not the independent basis for Plaintiffs' § 1985(3) claims"). Moreover, the allegations set out in the FAC support Plaintiffs' claims to the extent they show Mahwah and the Polo Club's coordination to target the Ramapough. Frequent racist, hostile and disturbing public declarations by the Polo Club, FAC ¶ 74, declarations made by Brian Chewcaskie at the January 5th trial, *id.* ¶ 78, and declarations made at the March 22, 2018 Town Council meeting, *id.* ¶ 80, underline the fact that members of the Polo Club, very similar to the members of the public quoted in *Church of Lukumi Babalu Aye, Inc*, have disparaged or called for an end to Ramapough religious practice, and for the Ramapough's expulsion from their sacred land. *See id.* ¶¶ 11-13, 48, 59, 79. *See also* Ex. AQ to Minga Decl. ("Would any homeowner in any community want to have this

mini-Lenape Indian village by their home in a residential community . . . ? We think not.").

The Polo Club contests Plaintiffs' allegations that the Polo Club conspired with Mahwah, and reject the allegations that the Mahwah and Polo Club speak regularly, and that Mahwah has taken legal actions, which benefit Polo Club interests. These facts alleged in the FAC demonstrate that the Polo Club's Motion must be denied. As established by the *Church of Lukumi Babalu Aye, Inc*., statements made by Polo Club members or members of the general public are highly relevant here. Moreover, Mahwah's actions under pressure from the Polo Club are similar to the actions of the Village of Mamaroneck in *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007), where the Second Circuit Court held that political pressure from a group of influential neighbors opposed to the plaintiff's variance did not give the Village a "compelling government interest" to act.

B. The *Noerr-Pennington* Defense Does Not Immunize The Polo Club

The Polo Club's final First Amendment argument is that Plaintiffs' claims are barred by the *Noerr-Pennington* doctrine. *See* Mot. at 39. This argument lacks merit. The *Noerr-Pennington* doctrine is an antitrust principle that immunizes from certain tort liability private actors who act in concert to legitimately influence the legislative process. *See E.R.R. Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 159 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 671 (1965) ("The conduct of [the private actors] did not violate the Act, the action taken to [raise prices] was the act of a public official who is not claimed to be a co-conspirator"). Defendant avers that this doctrine should be extended to bar Plaintiffs' conspiracy claims because the doctrine "has been applied as a defense in civil litigation generally." Mot. at 39. However, *Noerr-Pennington* does not shield Defendant's actions.

Defendant's conduct extended beyond the doctrine's petitioning purview by seeking to

privately enforce zoning laws and assert criminal charges through sham lawsuits. *See* FAC ¶¶ 73, 76, 77, 80, 82; *We, Inc. v. City of Phil. Dep't of Lics. & Inspects.*, 983 F. Supp. 637, 639–40 (E.D. Pa. 1997) ("defendants' conduct in the present case can be distinguished from [protected conduct]," such as "complaining, albeit vigorously, to the proper authorities and then leaving it to those authorities to take the appropriate measures"); *City of Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 380 (1991). The *Noerr-Pennington* doctrine does not apply to activities that "are actually nothing more than an attempt to harm one another." *In re IBP Confidential Bus. Documents Lit.*, 755 F.2d at 1313.

The Polo Club brought and continues to bring sham lawsuits in Municipal, State, and Tax courts, including criminal actions, seeking to deprive the Ramapough's right to open-air prayer and religious gatherings guaranteed by the First Amendment; not a single conviction exists, leaving no question that the Polo Club's Motion must be denied. *See* FAC ¶¶ 58, 81-82, Ex. F; ECF No. 114-21 at 20-22 (Tr. 7:23-10:14); Ex. A to Minga Decl. ¶¶ 86-88; *supra Municipal and State Court History*; *see also Hanover 3201 Realty, LLC v. Village Supermkts.*, Inc. 806 F.3d 162, 180 (3rd Cir. 2015) (reversing grant of motion to dismiss as complaint raised at least a sham petitioning question of fact); *FTC v. Shire ViroPharma Inc.*, No. 17-131-RGA, 2018 WL 1401329, at *7 (D. Del. Mar. 20, 2018), *aff'd*, 917 F.3d 147 (3d Cir. 2019); *Fox News Network, LLC v. Time Warner Inc*., 962 F. Supp. 339 (E.D.N.Y. 1997) (citing *P.&B. Marina L.P. v. Logrande*, 136 F.R.D. 50, 61 n.9 (E.D.N.Y. 1991)).

V. POLO CLUB'S ARGUMENT THAT THE RAMAPOUGH LENAPE NATION CANNOT AVAIL ITSELF OF FEDERAL COURT IS UNAVAILING

Defendant argues that a "sovereign entity" must be federally recognized to "sue in Federal Court," and because the Ramapough Lenape Nation is an "unrecognized 'sovereign[],'" it may not bring suit. Mot. at 45-46. This argument reflects a fundamental misunderstanding of

Article III of the Constitution. Native American tribal governments are distinct from "foreign" nations for Article III standing—they are considered "domestic dependent nations." *Cherokee Nation v. State of Georgia*, 30 U.S. 1, 13-14 (1831) ("[Article III] does not comprehend Indian tribes in the general term 'foreign nations;' . . . [they are] not foreign to the United States.").

Notably, Defendant relies only on cases concerning the rights of foreign governments, and cite no caselaw supporting the assertion that Native Americans—federally recognized or not—do not enjoy constitutional rights. *See* Mot. at 45-47. Defendant's argument that Native American tribes must be federally recognized to sue in federal court is similarly unsupported by the Ninth Circuit case it cites. While the *Kahawaiolaa v. Norton*[9] decision discusses the benefits of federal recognition, it expressly states: "This is not to say, obviously, that non-federally recognized tribes do not exist, or do not possess rights." 386 F.3d 1271, 1273 n.1 (9th Cir. 2004).

Indeed, this Court has permitted a Native American tribal nation—lacking federal *and* state recognition—to proceed with constitutional claims. *See Lenni-Lenape Tribal Nation v. Lougy*, No. 15-5645 (RMB/JS), 2016 WL 6393802 (D.N.J. Oct. 27, 2016) (denying motion to dismiss in part and finding plaintiffs stated claims for equal protection and procedural due process). Accordingly, the Ramapough Lenape Nation is a proper plaintiff, and Defendant's motion should be denied.

CONCLUSION

For all the foregoing reasons, the Court should deny the Polo Club's Motion with prejudice.

[9] Plaintiffs in *Kahawaiolaa* were native Hawaiians that sued the Department of Interior, alleging that regulations excluding them from Indian tribal recognition violated equal protection.

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s/ Diane P. Sullivan

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