

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
TRIAL DIVISION-CIVIL**

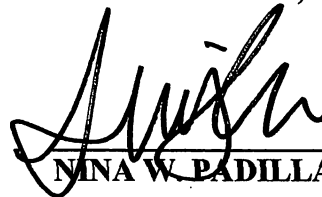
ASIAN AMERICAN LICENSED BEVERAGE	:	July Term 2020
ASSOCIATION OF PHILADELPHIA;	:	
NATIONAL ASSOCIATION OF TABACCO	:	No. 2307
OUTLETS, INC. and REYNOLDS VAPOR	:	
COMPANY,	:	Commerce Program
	:	
Plaintiff,	:	
	:	
v.	:	Control Number 20081701
THE CITY OF PHILADELPHIA,	:	
	:	
Defendant.	:	

**ORDER**

**AND NOW**, this 6<sup>th</sup> day of April, 2021, upon consideration of Plaintiffs' Application for a Preliminary Injunction, Defendant's response in opposition, after oral argument and in accord with the attached Opinion, it hereby is **ORDERED and DECREED** that Plaintiffs' application for a preliminary injunction is **Granted** and enforcement of City of Philadelphia Ordinance § 9-638 entitled "Sale of Electronic Smoking Devices in Youth Accessible Establishments" shall be stayed pending the disposition of this matter and until further order of the court.

This Order will be effective immediately upon presentation to this court of Plaintiffs' Bond in the amount of \$10,000.00.

**BY THE COURT,**

  
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NINA W. PADILLA, J.

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
TRIAL DIVISION-CIVIL**

ASIAN AMERICAN LICENSED BEVERAGE	:	July Term 2020
ASSOCIATION OF PHILADELPHIA;	:	
NATIONAL ASSOCIATION OF TOBACCO	:	No. 2307
OUTLETS, INC. and REYNOLDS VAPOR	:	
COMPANY,	:	Commerce Program
	:	
Plaintiff,	:	
	:	
v.	:	Control Number 20081701
THE CITY OF PHILADELPHIA,	:	
	:	
Defendant.	:	

**OPINION**

Presently before the court is plaintiffs Asian American Licensed Beverage Association of Philadelphia, National Association of Tobacco Outlets, Inc. and Reynolds Vapor Company's (collectively referred to as "Plaintiffs") application for preliminary injunction to enjoin defendant the City of Philadelphia ("City of Philadelphia") from enforcing Ordinance § 9-638, entitled "Sale of Electronic Smoking Devices in Youth – Accessible Establishments" ("Vaping Ordinance"). For the reasons set forth below, the request for preliminary injunction is granted.

**BACKGROUND**

At the center of this dispute is the City of Philadelphia's Vaping Ordinance enacted to restrict sales of flavored and nicotine salt electronic smoking devices to adult only establishments to ensure that young adults and others are not routinely exposed to these products in corner stores and other places they frequent. According to Dr. Thomas Farley, the Philadelphia Commissioner for Public Health, despite legislation restricting the sale of tobacco products to those under 21, minors continue to take up e-cigarettes and vaping, in part because they have access to tobacco products through their young adult friends. <sup>1</sup>

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<sup>1</sup> Farley Affidavit ¶ 23, attached to Defendant's response in opposition to plaintiffs' application for preliminary injunction as Exhibit "A".

National use of e-cigarette and vaping products is at epidemic levels among middle and high school students.<sup>2</sup> Teen vaping is increasing according to the National Institute of Drug Abuse (NIDA).<sup>3</sup> Additionally, the Behavior Risk Factor Surveillance System in 2016 found that among adult users of e-cigarettes, use was highest for young adults aged 18-24, with more than half of adult e-cigarette users under the age of 35. The 2018 National Health Interview Survey also found that adults reporting current e-cigarette use, over half were age 18-24. Currently, vaping and e-cigarette use in Philadelphia is the most prevalent among young adults aged 18-24.<sup>4</sup> Nicotine salts and flavored tobacco products which lessen the harshness of high nicotine levels and taste of tobacco are particularly popular among youth and young adults causing great concern that the trend toward reduced nicotine addiction among our youth is in jeopardy.<sup>5</sup>

The use of e-cigarette and vaping products are addictive and carry many health risks. Long term use can cause severe risk to delicate lung tissue from decades of exposure to multiple unknown chemicals and the likelihood of continued use of these products.<sup>6</sup> EVALI (e-cigarette or vaping product use-associated lung injury) is an illness that may arise from long term e-cigarette and vaping device use.<sup>7</sup> Additionally, e-cigarette and vaping device use may also increase the likelihood of COVID-19 diagnosis,<sup>8</sup> and may cause long-term effects on the

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<sup>2</sup> Farley Affidavit ¶ 6, attached to Defendant's response in opposition to plaintiffs' application for preliminary injunction as Exhibit "A".

<sup>3</sup> Id. ¶ 8.

<sup>4</sup> Id. ¶ 9.

<sup>5</sup> Id. ¶ 25.

<sup>6</sup> Id. ¶ 13.

<sup>7</sup> Id. ¶ 10.

<sup>8</sup> Id. ¶ 14.

developing brains of youth and young adults, including nicotine addiction, mood disorders and a permanent decrease in impulse control.<sup>9</sup>

This court gives great deference to the City of Philadelphia's concern with protecting our youth from exposure to nicotine salted and flavored e-cigarettes and vaping devices which potentially could lead to addiction and varying health concerns. However, despite this deference and concern for the crisis currently gripping our City's youth, this court is constrained and loathed to find that the Vaping Ordinance concerns the subject matter of 18 Pa. C. S. § 6305 and is therefore preempted.<sup>10</sup>

### **Procedural History**

On December 18, 2019, Philadelphia enacted Bill No. 190804 which became effective immediately and is codified at § 9-638 of the Philadelphia Code. (See Ordinance attached to Defendant's response in opposition to plaintiffs' petition for preliminary injunctive relief Exhibit "C"). The Vaping Ordinance prohibits the following:

1. The sale of Electronic Smoking Devices with a Characterizing Flavor, defined as a taste or aroma other than tobacco except at an Adults-Only Establishment. Id. at § 9-638 (2).
2. The sale of Electronic Smoking Devices with Nicotine Salt that contain more than 20 mg/ml of nicotine in any form except at an Adults-Only Establishment. Id. at § 9-638 (3).
3. The sale of any Electronic Smoking Device, unless such Device or category of Devices has been approved by the Department [Public Health] as permitted for sale under this section. Id. at § 9-683 (5).

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<sup>9</sup> Id ¶ 22.

<sup>10</sup> Since this court finds that the Vaping Ordinance concerns the subject matter of 18 Pa. C. S. § 6305 there is no need to consider whether the Vaping Ordinance also concerns the subject matter of § 206-A of the act of April 9, 1929, known as The Fiscal Code. See, 53 Pa. C. S. A. § 301(a).

Prior to enactment of this Vaping Ordinance, plaintiffs who operated non-age restricted convenience stores in Philadelphia sold devices covered by the Vaping Ordinance to consumers age 21 and over. These retailers are no longer permitted to sell these products that are covered by the Vaping Ordinance.

On July 31, 2020, plaintiffs filed a complaint against the City of Philadelphia asking the court to declare the Vaping Ordinance preempted and null and void and to enjoin the City of Philadelphia from enforcement of the Vaping Ordinance. On August 17, 2020, plaintiffs filed a petition for preliminary injunctive relief with the court seeking to enjoin the City of Philadelphia from enforcing the Vaping Ordinance during the pendency of this action. The City of Philadelphia filed a response to plaintiffs' petition and the court heard oral argument on the motion on December 3, 2020 via Zoom. <sup>11</sup>

## **DISCUSSION**

For a preliminary injunction to issue, every one of the following prerequisites must be established; if the petitioner fails to establish any one of them then the request for preliminary injunction is denied.

First, a party seeking a preliminary injunction must show that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages. Second, the party must show that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings. Third, the party must show that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct. Fourth, the party seeking an injunction must show that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits. Fifth, the party must show that the injunction it seeks is reasonably suited to abate the offending activity. Sixth and finally, the party seeking an

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<sup>11</sup> The parties stipulated that while this petition was pending the City of Philadelphia would not enforce the Vaping Ordinance.

injunction must show that a preliminary injunction will not adversely affect the public interest.<sup>12</sup>

In the case *sub judice*, the City of Philadelphia does not dispute prongs 3 (that the requested preliminary injunction would restore the parties to the status quo) and 5 (that the injunction would be reasonably suited to abate the offending activity) of the preliminary injunction test. Additionally, the City of Philadelphia recognizes that under the current state of the law, a violation of an express statutory provision can be considered to constitute irreparable harm under prong 1.<sup>13</sup> However, the City of Philadelphia does dispute the remaining prongs for the issuance of an injunction, the likelihood of success on the merits, that greater injury would result from refusing the injunction than granting the injunction, and harm to other interested parties and the public. These prerequisites for the issuance of an injunction are discussed below.

**1. Plaintiffs will likely succeed on the merits of this action because the Vaping Ordinance is preempted by State Law.**

Plaintiffs argue that they are likely to succeed on the merits because the Vaping Ordinance is preempted by state law. As a city of the first class pursuant to the First Class City Home Rule Act, 53 Pa. C. S. §2961, Philadelphia “may exercise all powers and authority of local self-government and shall have complete powers of legislation and administration in relation to its municipal functions.”<sup>14</sup> Under the concept of home rule, the City of Philadelphia’s ability to

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<sup>12</sup> *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001, 573 Pa. 637, 646–47 (Pa. 2003).

<sup>13</sup> While the City of Philadelphia does not dispute plaintiffs’ claim that violation of an express statutory provision can constitute irreparable harm, the City of Philadelphia argues that the case law was wrongly decided. This argument was not considered by the court.

<sup>14</sup> 53 P.S. § 13131.

exercise municipal functions is limited only by its home rule charter, the Pennsylvania Constitution, and enactments of the General Assembly.<sup>15</sup>

The doctrine of preemption is the mechanism that limits the City of Philadelphia's ability to exercise its municipal functions. There are three closely related forms of state preemption of local lawmaking authority (1) express or explicit preemption, where the statute includes a preemption clause, the language of which specifically bars local authorities from acting on a particular subject matter; (2) conflict preemption, where the local enactment irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the statute; and (3) field preemption, where analysis of the entire statute reveals the General Assembly's implicit intent to occupy the field completely and to permit no local enactments.<sup>16</sup>

The test for preemption is as follows: (1) Does the ordinance conflict with the state law, either because of conflicting policies or operational effect, that is, does the ordinance forbid what the legislature has permitted? (2) Was the state law intended expressly or impliedly to be exclusive in the field? (3) Does the subject matter reflect a need for uniformity? (4) Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation? (5) Does the ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the legislature?<sup>17</sup> If the answer to one of these questions is affirmative, then the local ordinance will be found preempted by the state law.<sup>18</sup> Here, the question of express preemption is before the court.

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<sup>15</sup> *Nutter v. Dougherty*, 938 A2d 401, 411, 595 Pa. 340 (Pa. 2007).

<sup>16</sup> *Holt's Cigar Co. Inc. v. City of Philadelphia*, 10 A3d 902, 907, 608 Pa. 146 (Pa. 2011).

<sup>17</sup> *Duff v. Township of Northampton*, 110 Pa. Cmwlth. 277, 532 A.2d 500, 505 (1987).

<sup>18</sup> *Liverpool Tp. v. Stephens*, 900 A.2d 1030, 1033 (Pa. Cmwlth. 2006).

Title 53 Pa. C. S. A. § 301 entitled Tobacco Product provides in pertinent part as follows:

**(a) General rule.**—Except as set forth in subsection (b), the provisions of 18 Pa. C. S. § 6305 (relating to the sale of tobacco products) shall preempt and supersede any local ordinance or rule concerning the subject matter of 18 Pa. C. S. § 6305 and of section 206-A of the act of April 9, 1929 (P.L. 343, No. 176), [footnote-72 P.S. § 206-A.], known as the Fiscal Code.<sup>19</sup>

In clear language, § 301 expressly preempts “any local ordinance or rule concerning the subject matter of 18 Pa. C. S. § 6305...” Having determined that § 301 contains an express directive of preemption, the questions then become what is the subject matter of § 6305 and does the Vaping Ordinance concern the subject matter of § 6305.<sup>20</sup>

The subject matter of Title 18 Pa. C. S. § 6305 is sale of tobacco products to minors.

Section 6305 provides in part as follows:

(a) Offense defined.—Except as set forth in subsection (f), a person is guilty of a summary offense if the person:

- (1) sells a tobacco product to any minor;
- (2) furnishes, by purchase, gift or other means, a tobacco product to a minor;
- (3) Deleted by 2002, July 10, P.L. 789, No. 112, § 1, effective in 30 days.
- (4) locates or places a vending machine containing a tobacco product in a location accessible to minors;
- (5) displays or offers a cigarette for sale out of a pack of cigarettes; or
- (6) displays or offers for sale tobacco products in any manner which enables an individual other than the retailer or an employee of the retailer to physically handle tobacco products prior to purchase unless the tobacco products are located within the line of sight or under the control of a cashier or other employee during business hours, except

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<sup>19</sup> The exceptions set forth in subsection (b) do not apply to the case herein as they relate to the Fire and Panic Act and exclude any local regulation enacted prior to January 1, 2002 from preemption. See, 53 Pa. C. S. A. § 301 (b)(1) and (2).

<sup>20</sup> Plaintiffs also argue that 72 P.S. § 203-A(a) also preempts the Vaping Ordinance. Section 203-A(a) states in part as follows: “all powers and jurisdiction over dealers licensed under this article, and regarding or affecting the sale of tobacco products by dealers licensed under this article shall reside in the Commonwealth unless any such power or jurisdiction is specifically granted to a political subdivision.” Since § 6305 disposes of the matter, the court need not consider the preemption argument raised by plaintiffs regarding § 203-A(a).



that this paragraph shall not apply to retail stores which derive 75% or more of sales revenues from tobacco products.<sup>21</sup>

Section 6305 “Sale of Tobacco Products” is logistically placed in Chapter 63 of the Crimes and Offenses title of the consolidated statutes related to minors. As set forth above, § 6305 contains five prohibitions relating to the sale of tobacco, of which three of the five directly relate to minors.<sup>22</sup> A minor for purposes of § 6305 is defined as an individual under the age of 21 with nonmilitary service and under the age of 18 with military service.<sup>23</sup> Any minor who violates any of the prohibitions set forth in § 6305 (a)(1),(2) and (5) maybe guilty of a summary offense with a punishment ranging from community service, attending a nicotine prevention and cessation program or a fine.<sup>24</sup>

Section 6305 defines “Tobacco Product” as any electronic device that delivers nicotine or another substance to a person inhaling from the device, including, but not limited to, electronic nicotine delivery systems, an electronic cigarette, a cigar, a pipe and a hookah.<sup>25</sup> The remaining subsections of § 6305 require the notification of a minor’s parent or guardian in the event of a violation (c), provides a defense to the retailer in the event of a violation that the retailer complies with the policy to prevent the sale of cigarettes to minors (f) and permits the Department of Health to conduct compliance checks and allows the participation of minors in these checks (g). Based on § 6305’s title, content, repeated references to minors, prohibitions of

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<sup>21</sup> 18 Pa.C.S.A. § 6305

<sup>22</sup> 18 Pa. C.S. § 6305 (a)(1), (2) and (4).

<sup>23</sup> Id. at (k).

<sup>24</sup> 18 Pa. C. S. § 6305 (b)).

<sup>25</sup> Id.

selling, furnishing, purchasing for, giving and restricting minor's access to tobacco products, it is clear that the subject matter of § 6305 is minor's access to tobacco products.

Having determined that the subject matter of §6305 is minor's access to tobacco products, the next step in the preemption analysis is to determine whether the Vaping Ordinance concerns the subject matter of § 6305. This court finds that it does. Similar to § 6305, the Vaping Ordinance prohibits the selling and offering for sale of certain tobacco products to persons under the age of 21. The title, "Sale of Electronic Smoking Devices in Youth-Accessible Establishments" as well as the content of the ordinance support this conclusion. The Vaping Ordinance requires electronic smoking devices with characterizing flavors and high levels of nicotine salt to be sold only in "adults only establishments". "Adults Only Establishment" is defined by the Vaping Ordinance in part as an establishment that does not allow entry to persons who are under 21<sup>26</sup> years of age.<sup>27</sup> Hence, like § 6305, the Vaping Ordinance concerns the subject matter of minor's access to tobacco products by restricting where the tobacco products at issue could be sold and shows that only persons over the age of 21 may access the products.

The fact that the Vaping Ordinance also restricts adult access to certain smoking devices and imposes different penalties than § 6305 does not shield the ordinance from preemption.

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<sup>26</sup> The Vaping Ordinance attached as Exhibit "C" to defendant's response in opposition to plaintiffs' preliminary injunction refers to "18" as the applicable age for the restriction to apply. Federal legislation enacted on December 20, 2019 and effective immediately raised the federal minimum age of sale of tobacco products from 18 to 21 years. See 21 U.S. C. § 387 f (d)(3)(A)(ii). Effective July 2, 2020, Pennsylvania also raised the legal age to buy tobacco products from 18-21. As such, the applicable age is 21.

<sup>27</sup> Id. § 9-638 (6).

Section 301 does not require the ordinance to be identical to § 6305 for preemption to exist.<sup>28</sup>

On the contrary, the scope of § 301's preemption is broad as evidenced by its use of the phrase "concerning the subject matter". "Subject matter" means "the thing in dispute" and "concerning" means "relating to".<sup>29</sup> Case law is also instructive in that subject matter is also determined by the title of the ordinance/rule/statute and the content of same.<sup>30</sup> Based on the foregoing, this court finds that the subject matter of the Vaping Ordinance is minor's access to tobacco products. As such, since the Vaping Ordinance concerns the subject matter of § 6305, plaintiffs are likely to succeed on the merits as the ordinance is preempted by 53 Pa. C. S. A. § 301.<sup>31</sup>

**2. Greater injury will result from refusing the injunction than granting the injunction as there will be harm to the interested parties and the public.**

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<sup>28</sup> See *United Transportation Union v. Pa. Pub. Util. Comm'n*, 68 A.3d 1026, 1036-1037 (Pa. Commw. Ct. 2013)(it is not necessary for the federal regulation to be identical to the state law or order for preemption to apply where the statute preempted relates to the subject matter of another statute.).

<sup>29</sup> The statute does not define "concerning the subject matter". The Statutory Construction Act of 1972, 1 Pa. C. S. § 1903(a) provides that when words in a statute are undefined, they must be accorded their common and approved usage. "Where a court needs to define an undefined term, it may consult definitions in statutes, regulations or the dictionary for guidance, although such definitions are not controlling." *Roe v. Pennsylvania Game Commission*, 147 A.3d 1244, 1251 (Pa.Cmwlth., 2016) quoting *Adams Outdoor Adver., LP v. Zoning Hearing Bd. of Smithfield Twp.*, 909 A.2d 469, 483 (Pa.Cmwlth.2006). See also, Black's Law Dictionary (11<sup>th</sup> ed. 2019) for definition of "subject matter" and Meriam-Webster.com dictionary, Meriam-Webster, <https://www.meriam-webster.com/dictionary/concerning> for the definition of "concerning".

<sup>30</sup> See, *Mitchell's Bar & Restaurant, Inc. v. Allegheny County*, 924 A.2d 730 (2007)("Section 10.1 of this act was titled 'Clean Indoor Air' and, by its own language, the section's subject matter was the 'regulating and controlling [of] smoking in certain public places...' for 'the purpose of ...protecting the public health and ...providing for the comfort of all parties.'"). See also, *Elias v. Board of School Directors of Windber Area*, 218 A.2d 738, 741, 421 Pa. 260, 264 (Pa. 1966)(Section 554 of the Statutory Construction Act provides that the title of a law may be considered in its construction.).

<sup>31</sup> Recently, in *Cigar Association of America v. City of Philadelphia*, 2020 WL 6703583 (E.D. Pa. 2020), the Honorable Judge Gene Pratter held that a City of Philadelphia Ordinance that prohibits the sale of all flavored tobacco products other than cigarettes is preempted by 53 Pa. C. S. A. § 301 finding that the subject matter of the City's Ordinance concerned the subject matter of § 6305. This court finds Judge Pratter's decision persuasive.

The last two requirements necessary for preliminary injunctive relief are that greater injury will result from refusing the injunction than granting the injunction and that there will be harm to other interested parties and the public. These requirements are related and weigh in favor of granting the injunction. Here, balancing the competing claims of injury and considering the effect on each party of the requested relief, it is clear that the equities weigh in favor of granting the injunction.

The City cannot suffer harm from granting the request for injunctive relief where the court reads the Vaping Ordinance as being preempted by state law thus making the ordinance null and void.<sup>32</sup> Moreover, in conjunction with the current state of the law that a violation of an express statutory provision can be considered irreparable harm, it is clear that the scale tips in favor of plaintiffs.<sup>33</sup> While the subject matter of the Vaping Ordinance is of great concern to the public and this court, no good can come from an ordinance that is invalid.

Enforcing the preempted Vaping Ordinance will only cause greater injury to the parties who will be forced to comply with a null and void ordinance by changing their business practices, training their employees and being subject to punishment if they fail to comply. Additionally, the public will also be subject to greater harm since the court will be giving the City the authority to enforce a law that is contrary to Title 18 Pa. C. S. § 6305 which expressly preempts the ordinance. The court is a gate keeper and is bound to interpret all laws and enforce the laws where requested. In this case, after examining Title 18 Pa. C. S. § 6305, it is clear that the

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<sup>32</sup> See, *Cigar Association of America v. City of Philadelphia*, 2020 WL 6703583 (E.D. Pa. 2020) citing, *Marland v. Trump*, \_\_\_\_ F.Supp. 3d \_\_\_\_, 2020 WL 6381397 at \*13 (E. D. Pa. 2020) (quoting *TikTok Inc. v. Trump*, No. 1:20-CV-02658 (CJN), 2020 WL 5763634, at \*1 (D.D.C. Sept. 27, 2020)) ([T]he government cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required.).

<sup>33</sup> *Id.* See also, *Dillon v. City of Erie*, 83 A.3d 467, 474 (Pa.Cmwlth. 2014).

Vaping Ordinance, while passed to curb this ever present and existing crisis in our City that is griping our youth, our most valuable population, is preempted. This injunction is reasonably suited to abate the offending activity by enjoining its enforcement during the pendency of this action.

### **CONCLUSION**

Based on the foregoing, plaintiffs' motion for preliminary injunctive relief is granted and the Vaping Ordinance shall not be enforced during the pendency of this action with the immediate posting of a \$10,000 bond.<sup>34</sup>

**BY THE COURT,**



NINA W. PADILLA, J.

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<sup>34</sup> See, Pa. R. Civ. P. 1531 (b).