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March 9, 2014

Mark Neary
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Supreme Court of New Jersey
P.O. 970, 25 Market Street
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Re: In re Adoption of Revised Third Round Regulations the New Jersey Council on Affordable Housing N.J.A.C. 5:96 & 5:97
Supreme Court Docket No. 67,126
Supreme Court Docket No. M- , M-
App. Div. Docket No. A-5382-07T3
App. Div. Docket No. M-2899-13

On Emergent Motion for Stay from Order of Appellate Division entered on March 7, 2014

Sat Below: The Hon. Jose Fuentes, P.J.A.D.
The Hon. Marie P. Simonelli, J.A.D.
The Hon. Michael J. Haas, J.A.D.

Brief of Council on Affordable Housing in Support of Emergent Motion for Stay

Dear Mr. Neary:

Please accept this letter brief on behalf of respondent and movant Council on Affordable Housing ("COAH") in support of its emergent motion to stay and vacate in part the

Appellate Division order entered on March 7, 2014 in this matter. Because the Appellate Division order wrongly preempts and renders nugatory this Court's pending consideration of COAH's request for an extension of the timeframe established in In re Adoption of N.J.A.C. 5:96, 215 N.J. 578 (2013), asserts jurisdiction where none exists, and so exceeds the bounds of mandamus by forcing the agency, through the micromanagement of its operations, to ignore relevant statutory provisions, COAH is likely to prevail in its challenge to the order. Likewise, COAH and its members establish irreparable harm, as the order forces them to undertake actions – under threat of contempt, sanctions, and incarceration – under an order that this Court may soon supersede. Additionally, because the relief sought simply will allow this Court to complete its consideration of COAH's present and pending motion for extension, staying the order is entirely consistent with the public interest.

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PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

In 2010, the Appellate Division affirmed in part and reversed in part COAH's regulations that implemented the third round methodology for calculating and addressing fair share need. In re N.J.A.C. 5:96 & 5:97, 416 N.J. Super. 462 (App. Div. 2010), aff'd in part and modified, 215 N.J. 578 (2013). While upholding part of the regulations, the court invalidated the regulations that implemented a "growth share" approach. The court expressed concern whether any such approach would be consistent with this Court's ruling in Southern Burlington County, NAACP v. Twp. of Mt. Laurel, 92 N.J. 158 (1983), noting that it was this Court's role to answer that question. In re N.J.A.C. 5:96 & 5:97, supra, 416 N.J. Super. at 485. The Appellate Division directed COAH to adopt new third round rules for determining municipal obligations "similar to the

[1] The procedural and factual histories have been combined for clarity and brevity.

methodologies used in the first and second round." Id. at 511. The court remanded the matter to COAH to complete within five months. Ibid.

Numerous parties petitioned the Supreme Court for certification. COAH filed a brief in support of the petitions, urging the Court to reverse the Appellate Division's conclusion about the viability of growth share. While the petitions were pending, COAH also sought a stay of the Appellate Division's decision, both from the Appellate Division and, ultimately, this Court. During the pendency of those petitions and COAH's stay request, Fair Share Housing Center (FSHC) filed a motion before the Appellate Division to appoint a special master or, alternatively, to require bi-weekly reporting. In an order entered on January 14, 2011 and filed January 18, 2011, the Appellate Division directed COAH to comply with the 2010 decision and submit bi-weekly reports. (Aa16-17.)

On January 18, 2011, this Court granted COAH's motion for a stay of the Appellate Division decision, "pending further order of this Court." (Aa18.) COAH then sought reconsideration from the Appellate Division of its January 14, 2011 Order.

On March 29, the Court granted numerous petitions for certification. In re Adoption of N.J.A.C. 5:96, 205 N.J. 317

(2011). On April 12, 2011, the Appellate Division stayed implementation of its decision pending "the outcome of the Supreme Court ruling." (Aa19.)

On September 26, 2013, this Court issued In re Adoption of N.J.A.C. 5:96, supra. Rejecting the Appellate Division's doubts, this Court concluded that the Mt. Laurel doctrine did not prohibit alternate approaches to satisfaction of the municipal housing obligations. 215 N.J. at 585. Nonetheless, the Court rejected growth share as inconsistent with the Fair Housing Act. Id. at 618-19. By way of remedy, this Court directed COAH to promulgate regulations similar to those used in the first and second round methodologies in five months, that is, by February 26, 2014. Id. at 620. The Court noted, but did not grant, FSHC's request that it require bi-monthly reporting by COAH, id. at 599, effectively superseding any prior lower court order that required otherwise.

While this Court's five month remand to the agency was pending, FSHC returned to the Appellate Division to seek enforcement of the 2010 decision that this Court modified and affirmed and the April 12, 2011 Order. COAH opposed the motion, informing the Appellate Division that this Court, not the lower

court, was the appropriate forum for FSHC to advance its argument.

On February 26, 2014, COAH filed a motion for extension of time in which to propose and publish revised regulations. (Aa20-26.) That motion remains pending.

On March 7, 2013, after oral argument, the Appellate Division issued the order that is the subject of this motion. (Aa6-10.) The Order charges COAH with "not do[ing] anything to comply" with its 2010 opinion. Although it expresses "serious doubts about [COAH's] good faith" in complying with the 2010 opinion, Aa10, the Order does not otherwise acknowledge or discuss this Court's intervening opinion,[2] or the stay of the opinion that this Court had granted in January 2011.

The Order then proceeds to direct when COAH must meet, what actions the Council must take, and the decisions it must make at each and every meeting, including how to instruct agency staff, and when materials must be posted on the agency's website. (Aa8-9.) Additionally, notwithstanding that the

[2] The Order's citation to the 2010 opinion lists this Court's 2013 opinion in its subsequent history. (Aa7.) The Order also notes that this Court "endorsed" its remedy. (Aa8.) The Order also acknowledges that COAH filed a motion with this Court on February 26, 2014, seeking an extension of time until May 1, 2014, to formally propose and publish regulations governing the third round methodology." Ibid.

timelines established in the Order do not comply with the Administrative Procedures Act ("APA"), it nevertheless requires COAH to adopt the rules "in a manner suitable to comply with the Administrative Procedures Act, including publication in the New Jersey Register." (Aa8.) The Order also informed "each member of the COAH Board" that "fail[ure] to carry out any part of this court's order" will be brought before the court to show cause "why he or she shall not be declared in contempt of this court's authority subject to monetary sanctions, civil detention, and such other sanctions the court may deem suitable to induce compliance with this order." (Aa9.) Among its other requirements, the Order also demands bi-weekly reporting to the court and parties, rewrites the notice requirements established by the Legislature in N.J.S.A. 52:27D-313, and sua sponte and without explanation sanctioned COAH pursuant to Rule 2:9-9. (Aa9.)

When the order issued, COAH applied to the Appellate Division for permission to file an emergent motion for a stay. (Aa2-5.) The court telephonically granted COAH permission to file the emergent stay motion. The court denied relief, relying upon Asbury Park Board of Education v. New Jersey Department of Education, 369 N.J. Super. 481 (App. Div. 2004). (Aa15.) In its

denial, the court said that, to the extent the court's order was inconsistent with the APA, COAH could seek modification "on a showing of extraordinary circumstances." (Aa15.)

COAH files this motion seeking relief from the Appellate Division's March 7, 2014, Order. While acknowledging that the agency has sought from this Court an extension of time, the Appellate Division failed to acknowledge that request remains pending before this Court. Nevertheless, the lower excoriated the agency and sanctioned counsel for not complying with a four-year old lower court opinion that this Court had stayed and, just five months ago, had affirmed in part and modified. In doing so, this Court instructed COAH how to proceed. COAH should not suffer under an inconsistent Appellate Division order while a motion remains pending before this Court seeking modification of that instruction.

ARGUMENT

POINT I

THIS COURT SHOULD STAY THE APPELLATE DIVISION'S ORDER UNTIL THIS COURT RULES UPON COAH'S PENDING MOTION FOR AN EXTENSION OF TIME.

COAH timely returned to this Court for an extension of time for the agency to fulfill the responsibilities assigned to it by this Court's 2013 remand. By issuing an order where it

lacked proper jurisdiction to do so, the Appellate Division's order improperly intrudes upon and preempts this Court's consideration of that motion in a full manner and upon a timeframe of its choosing. Additionally, the Order is deeply flawed. Courts do not run Executive Branch agencies, and the Order transgresses all reasonable bounds of judicial involvement in COAH's operations. It almost entirely ignores the timeframes, processes, and requirements of the Administrative Procedures Act, and in doing so, forces Council members to choose between statutory noncompliance and an explicit threat of contempt. "Extraordinary circumstances" should not be required to comply with the APA. Finally, without basis and explanation, the court relied upon Rule 2:9-9 to sanction COAH and counsel and award FSHC fees.

A stay is "an extraordinary equitable remedy utilized primarily to forbid and prevent irreparable injury, and it must be administered with sound discretion and always upon consideration of justice, equity, and morality in a given case." Zoning Bd. of Adjustment v. Serv. Elec. Cable Television, 198 N.J. Super. 370, 379 (App. Div. 1985) (citing N.J. State Bar Ass'n v. Northern N.J. Mortgage Assocs., 22 N.J. 184, 194

(1956); Citizen's Coach Co. v. Camden Horse R.R. Co., 29 N.J. Eq. 299, 303 (1878)).

This Court established the familiar four-factor test that governs the granting of injunctive relief in Crowe v. DeGioia, 90 N.J. 126 (1982). Because COAH's present request for a stay satisfies all four factors, the Court should stay the Appellate Division's Order.

A. COAH is likely to prevail on the merits because the Appellate Division order seeks to enforce an opinion that has been superseded by this Court's opinion.

Resuscitating an opinion that was stayed for almost four years and that this Court only partially affirmed, the Appellate Division summarily concluded that COAH had failed to comply with its terms. In doing so, the Appellate Division ignored this Court's opinion and the timeframe that this Court established in its remand to the agency.

In In re Adoption of N.J.A.C. 5:96, supra, this Court modified the Appellate Division's 2010 decision in at least two material ways. First, this Court remanded to COAH the responsibility to promulgate a new set of rules within five months. 215 N.J. at 595. In doing so, this Court established a new date binding upon COAH: February 26, 2014. The only plausible reading of this Court's opinion is that the Court

intended that to mean five months from the issuance of its opinion. Although this Court "endorse[d] the remedy imposed by the Appellate Division," id. at 620, the Court did not remand it to that court for any further action or enforcement and, most certainly, ever suggest that this Court's remand was in addition to, secondary to, and duplicative of the Appellate Division's action four years earlier.

Although the Appellate Division Order chastises COAH for "offering any plausible explanation for its failure to carry out this court's order," Aa8, that criticism and conclusion is wrong because the Appellate Division Order ignores this Court's subsequent opinion in the same matter. The agency's submissions to the Appellate Division and counsel's oral argument plainly stated the plausible explanation: COAH thought itself bound by the judgment of this Court, as evidence by the motion for extension filed before this Court. It is internally inconsistent and, perhaps more importantly, deeply unfair to the Council and counsel to acknowledge that the Council had a pending motion before this Court for an extension of time and to so malign the reasonable reliance upon those timeframes as implausible and contemptuous.

In denying COAH's motion for a stay, the Appellate Division relied upon Asbury Park Board of Education v. New Jersey Department of Education, 369 N.J. Super. 481 (App. Div. 2004), for the proposition that "[t]his court has jurisdiction to enforce its own order." (Aa15.) In Asbury Park, the Appellate Division was considering emergency regulations adopted by the Department of Education regarding supplemental funding for Abbott districts against a challenge that the regulations failed to comply with this Court's order in Abbott v. Burke, 177 N.J. 596 (2003).

Asbury Park does not support the Appellate Division's order here. In Asbury Park, the Appellate Division acknowledged that the Supreme Court was likely the better forum to advance those arguments based upon compliance with a Supreme Court order. Asbury Park, supra, 369 N.J. Super. at 486 (noting that "[p]reliminarily, we question whether appellants followed the proper procedural course" in advancing their arguments before the Appellate Division, not the Supreme Court). The court explained that, given the circumstance, appellants could have filed in the Supreme Court, pursuant to R. 1:10-3, Asbury Park, supra, at 486 (observing that claim that party has failed to comply with court order "should be brought before the court that

issued that order, here the Supreme Court, by a motion for relief in aid of litigants' rights under Rule 1:10-3"), or, could have challenged the validity of the regulations immediately after adoption, id. at 486-87. Instead, the districts challenged the validity of the regulations only after proceeding through administrative proceedings conducted consistent with those regulations. Id. at 488. Of note, the lower court was appropriately "mindful of our limited role as an intermediate appellate court called upon to interpret a Supreme Court order." Ibid.

Asbury Park cautions against the order entered below. It recognizes that parties seeking to enforce a Supreme Court order should go to the Supreme Court, not the Appellate Division. Id. at 486. And it does not support the Appellate Division's incorrect assertion of authority here. Nothing in Asbury Park supports the remarkable proposition that the Appellate Division can hold a party in contempt based on a decision that this Court stayed for a long period of time and subsequently modified in a precedential opinion.

By the logic of the panel below, whenever this Court issued an opinion affirming or modifying a lower court decision, a party could return to the lower court on a motion in aid of

litigants' rights as if this Court's intervening opinion never existed. Under that same reasoning, this Court could preclude this sort of end run around its jurisdiction only where it reversed the lower court. By way of example, in its September 2013 opinion, this Court rejected the lower court's doubts that the Mt. Laurel doctrine precluded growth share. After that determination, dissatisfied appellants could not return to the Appellate Division to seek enforcement of the Appellate Division's overruled conclusion to the contrary. The ability of the Appellate Division to ignore this Court's review of their judgments should not depend on whether this Court affirmed, reversed, modified, or endorsed those judgments. Nothing in Asbury Park, nothing in Rule 1:10-3, and nothing in this Court's September 2013 opinion in this matter supports such a convoluted interpretation or outcome. And, certainly, neither the Council nor counsel was contemptuous or derelict for believing otherwise.

B. COAH is likely to prevail on the merits because the order constrains the agency from complying with the Administrative Procedures Act.

In its Order, the Appellate Division has directed COAH to meet on three specific dates, and has further ordered the actions COAH must take at each meeting. At the same time, the

Appellate Division also has required that this process be conducted in a manner that comports with the requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. ("APA"). However, the schedule imposed by the Appellate Division renders compliance with the APA impossible to achieve. Thus, the Order is internally inconsistent, and if enforced, will result, by definition, in a violation of the rule-making requirements of the APA. Finally, the Appellate Division's attempt, in its subsequent Order denying COAH's stay application, to correct the problem it has created, fails to do so in a meaningful manner.

The Order's requirements are several and specific. First, COAH must meet on March 12, 2014, and direct its Executive Director and staff to prepare third round rules for COAH's adoption. (Aa6-10.) Fourteen days later, on March 26, COAH is required to meet and "review and adopt the third round rules …." (Aa8). Finally, 49 days later, on May 14, COAH is required to meet and "review and consider all public comments" on the proposed rules, and then to proceed to adopt the rules. (Ibid.) And, at the same time COAH is ordered to do so in a manner consistent with the APA. (Ibid.)

The standards and timeframes governing the rule-making process for State agencies are spelled out precisely in the APA,

and the regulations supplementing it and adopted by the Office of Administrative Law ("OAL"), N.J.A.C. 1:30-1 et seq. Rules that are not adopted in substantial compliance with the APA are invalid. N.J.S.A. 52:14B-4(d); D.I.A.L. v Dep't of Cmty. Affairs, 254 N.J. Super. 426, 438 (App. Div. 1992). An agency looking to adopt, amend, or repeal a rule must provide notice to the public in the manner set forth in the APA, which includes publication in the New Jersey Register. N.J.S.A. 52:14B-4(a)(1). The notice must include certain detailed information and statements. N.J.S.A. 52:14B-4(a)(2). With regard to the time period for public comment, where (as here) the agency has not published in the New Jersey Register a quarterly calendar of its anticipated rule-making activities, that APA requires 60-day comment period. N.J.S.A. 53:14B-3(4) and (4)(e). Once the comment period has ended, the agency may move to adopt the rules, but must prepare a report summarizing all public submissions and the agency's responses. N.J.S.A. 52:14B-(a)(4).

Additionally, the APA requires that the OAL Director "issue annually a schedule for the filing of documents for publication in the New Jersey Register." Pursuant to N.J.S.A. 52:14B-7(c), the Director of OAL has issued the "2014 New Jersey Register Publication Schedule" ("the Schedule"). (Aa27.) The

Schedule sets forth the dates that OAL will publish the Register throughout the year and the dates by which agencies must provide materials intended for publication to the OAL in order to be included in a particular issue. (Ibid.)

Here, the Appellate Division has ordered COAH to propose its rules for public comment on March 26. Under the Schedule, the next available deadline for publication in the Register is April 3; if the rules are provided to the OAL by that date (and assuming the OAL has no issues with their publication), then the earliest they could be published in the Register would be May 5. In that event, as set forth in the Schedule, the required 60 day comment period would end on July 4. Clearly, this is incompatible with the Appellate Division's Order, which requires COAH to meet and adopt the rules on May 14. Since the earliest the proposed rules can be published in the Register is May 5, this leaves only a nine day "comment period" before the May 14 meeting. A nine day comment period obviously does not satisfy the requirements of the APA, and is also on its face completely impractical.[3]

[3] Even if the OAL would permit publication in an earlier issue of the Register - a decision which is of course outside of COAH's control - publication in the April 7 or April 21 editions would still result in a 60 day comment period that extends

Because the order abbreviates the APA comment period, the regulated public suffers because it is denied a full opportunity to review and comment on the proposed rules. The order also provides essentially no time for COAH to review all of the comments and prepare the required report, which based on past experience, will be substantial.[4] This report is essential, as it forms part of the rule-making record for any future judicial review of the rules, as well as providing guidance to the public as to the agency's interpretation of the rules.

Finally, in its March 7 Order denying COAH's application for a stay, the Appellate Division stated that "[i]n the event COAH cannot meet the deadlines ordered by this court in its … order in aid of litigant's rights consistent with the APA . . . requirements, it may seek relief from this court to modify these deadlines on a showing of extraordinary circumstances." (Aa15). While this recognizes the existence of the problem resulting from the Appellate Division's prior Order, it does not satisfactorily resolve it. It requires COAH to make

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beyond the May 14 meeting day, to June 6 or June 20, respectively.

[4] When COAH adopted an earlier version of the third round rules, it received comments from 612 individuals and entities; the resulting comment and response document constituted 190 pages in the Register. 40 N.J.R. 2690 (June 2, 2008).

a showing of undefined "extraordinary circumstances" merely to conform to the basic mandates of the APA.

Thus, the Appellate Division's Order requires the agency to act inconsistent with the APA, and its subsequent Order does not satisfactorily resolve the issue.

C. COAH is likely to prevail on the merits because separation of powers precludes the Appellate Division from intruding upon discretionary actions of COAH and the Council Members and the order exceeds the scope of mandamus.

Because of separation of powers concerns, N.J. Const. art. III, § 1, ¶ 1, courts are generally reluctant to intrude upon areas within an agency's exclusive jurisdiction. Gilbert v. Gladden, 87 N.J. 275, 281 (1981); In re Failure by Dep't of Banking & Ins. to Transmit Proposed Dental Fee Schedule to OAL, 336 N.J. Super. 253, 261 (App. Div. 2001). Those same concerns underlay limitations on the writ of mandamus.

In In re Failure by Department of Banking and Insurance, supra, appellant contended that the Department of Banking and Insurance (DOBI) had neglected to promulgate a dental fee schedule required by statute. In considering whether to issue a mandamus compelling DOBI to do so, the court reflected on its role under the circumstances:

> We cannot micromanage any administrative agency. How an agency chooses to implement

> legislation is the agency's primary responsibility, not the court's. We give agencies wide discretion in deciding how best to approach legislatively assigned administrative tasks, Dougherty v. Dep't of Human Services, 91 N.J. 1, 6 (1982); Texter v. Dep't of Human Services, 88 N.J. 376, 383 (1982), especially when the task falls within a particular agency's expertise, as does the task in question. See Public Interest Research Group v. State, 152 N.J. Super. 191, 203 (App. Div.), certif. denied, 75 N.J. 538 (1977).
>
> Obviously, deciding how best to approach and accomplish the dental fee schedule revision constitutes an exercise of discretion and is not ministerial. Had the agency not done any work toward revising the schedule, we could issue mandamus compelling the Department to begin its work, Switz, supra, 23 N.J. at 587, but any directive, issued at this time, requiring that the Department complete the task or even directing completion by a specific time has the potential of interfering with the orderly workings of the Department.
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> [Id. at 262-63.]

Additionally, the order far exceeds the permissible scope of mandamus. See In re Livolsi, 85 N.J. 579, 594 n.18 (1981) (describing four pre-1947 writs). This Court has long recognized that when a "'discretionary function'" is involved, a court may "'not seek to interfere with or control the mode and manner of its exercise or to influence or direct a particular result.'" In re Resolution of State Comm'n of Investigation, 108 N.J. 35, 45 n.7 (1987) (quoting Switz v. Middletown Twp., 23

N.J. 580 (1957)); accord N.J. Optometric Assoc. v. Hillman-Kohan Eyeglasses, Inc., 160 N.J. Super. 81, 94 (App. Div. 1978) ("[p]laintiff 'may not use mandamus to compel a decision in a particular way -- its way.'"). For that reason, "mandamus will not lie if the duty to act is a discretionary one and the discretion has been exercised." U.S. Trust Co. of N.Y. v. State, 69 N.J. 253, 259 (1976), rev'd on other grounds, 431 U.S. 1 (1977).

Accordingly, the court's order and its efforts to direct the Council member's exercise of discretion is inappropriate and beyond the proper scope of judicial involvement with the agency's functions.

D. The Court should stay the order because COAH's harm is immediate and irreparable.

The Council and its members are under the immediate threat of irreparable harm. First, the agency has sought a request for extension of time in which to comply with this Court's order. The certification in support of that motion explained that work remains to be done in order to promulgate the regulations. (Aa20-26.) The Appellate Division cannot, simply by its order, shorten that time period from May 1, 2014, to March 21, 2014, without compromising that work. Second, the Order compels the agency and members to undertake tasks – under

threat of fines and incarceration – on a timeframe of the lower court's own making that ignores relevant statutes and this Court's intervening decision and the motion for extension now pending before it.

E. The relative hardships favor a stay during the Court's consideration of COAH's motion for extension.

COAH seeks a stay of the lower court's order to allow this Court to consider its pending motion for extension. The Appellate Division ignored this Court's intervening and superseding instructions in this matter, as well as this Court's consideration of the present motion, and placed COAH and its members at the crosshairs of a contempt order.

The Court is perfectly capable of evaluating COAH's pending motion and ruling accordingly. The numerous parties to this litigation will surely tell this Court their views on that motion. The Appellate Division order undeniably disrupts, curtails, and interferes with a motion pending before this Court on precisely this issue, in precisely this matter. Allowing this Court to consider the pending motion imposes no hardship on anyone.

POINT II

THE COURT SHOULD VACATE THAT PART OF THE ORDER THAT SUA SPONTE AWARDED FEES PURSUANT TO R. 2:9-9.

Without basis and without explanation, the Appellate Division "order[ed] that pursuant to Rule 2:9-9 this court sua sponte directs" FSHC to submit a certification concerning fees. The rule has no applicability here. Neither Council nor counsel failed to comply with the court rules. Neither the Council nor counsel acted in a deficient manner. The proceedings below evidence no failure of the Council or its counsel to abide by the rules of this Court, and the lower court's apparent conclusion otherwise lacks support in the record. The lower court's rejection of the Council's legal argument cannot constitute non-compliance, particularly where the lower court's order facially and utterly fails to acknowledge the long period its opinion was stayed, this Court's subsequent opinion that gave COAH a specific remand for a specific period of time, and the Council's pending application for an extension before this Court.

The Court should vacate that portion of the Order. It is unfounded and wrong.

CONCLUSION

This Court should stay the Appellate Division order pending its consideration of COAH's request for an extension of time.

Respectfully submitted,

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: /s/Robert Lougy
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Assistant Attorney General
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Dated: March 9, 2014

c: Heather Joy Baker (via email)
Supervising Attorney, Supreme Court of New Jersey

All counsel (via email)