

TOWN OF DOVER,

Plaintiff/Respondent,

v.

RICHARD GONZALEZ,

Defendant/Appellant.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO.: A-000047-25 T02

On Appeal From:

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: MORRIS COUNTY  
DOCKET NO.: MRS-L-330-25

Sat Below:

Hon. Noah Franzblau, J.S.C.

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**DEFENDANT'S/APPELLANT'S BRIEF IN SUPPORT OF APPEAL**

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## **PRELIMINARY STATEMENT**

Defendant Richard Gonzalez ("Defendant" or "Defendant Gonzalez") respectfully submits this Brief in support of his Appeal of the Order entered by the Honorable Noah Franzblau, J.S.C. on July 18, 2025 dismissing his Counterclaim. The trial court improperly made credibility determinations and acted as a fact-finder in connection with considering a Rule 4:6-2(e) Motion to Dismiss. The court ignored the underlying basis for the counterclaim in ruling that The New Jersey Uniform Public Expression Protection Act ("UPEPA") did not apply. Additionally, the court refused to recognize that Defendant's Counterclaim sought to demonstrate that Plaintiff Dover's ("Plaintiff" or "Dover") action was and is an effort to stamp out protected speech rather than simply trying to enforce an unenforceable settlement agreement. Additionally, Plaintiff The Town of Dover unlawfully conditioned receipt of a benefit (the settlement agreement) on waiver of the a constitutionally protected right (political speech). Also, the trial court misapplied the "content, form, and context" test when determining whether speech is a matter of public concern under the New Jersey Uniform Public Expression Protection Act. The trial court's order therefore must be reversed. The transcript of the July 18, 2025 motion hearing (T1-T17) sets forth the colloquy incorrectly. Most if not all of the references to Mr. Cohen are actually references to the Court and counsel for

Gonzalez engaging in colloquy beginning on page 6 and continuing through page 15 line 17.

### **PROCEDURAL HISTORY AND STATEMENT OF FACTS<sup>1</sup>**

On August 15, 2014, Richard Gonzalez initiated legal proceedings by filing a complaint in the United States District Court for the District of New Jersey. (Da18) The complaint alleged violations of the Conscientious Employee Protection Act (CEPA), the New Jersey Civil Rights Act, and the New Jersey Law Against Discrimination, as well as asserting claims that the Town of Dover's actions contravened the public policy of the State of New Jersey. (Da18 – Da43) All allegations within the complaint pertained to Mr. Gonzalez's employment as a police officer for the Town of Dover. (Da18 – Da43)

Subsequently, the case proceeded through motion until a settlement was reached in the fall of 2015, culminating in an order dismissing the case. (Da62) The Settlement Agreement was effectuated on December 10, 2015. (Da65 – Da72) The executed Settlement Agreement stipulated, in pertinent part, that in exchange for the gross settlement amount, Mr. Gonzalez released all claims against Dover. (Da66 – Da67) The Settlement Agreement incorporated a non-disparagement clause. (Da69) See also (Da135, ¶ 3 of Affidavit of Richard Gonzalez dated March

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<sup>1</sup> The Procedural History and Statement of Facts are interrelated and have been combined to avoid repetition for the convenience of the Court.

21, 2025, Exhibit A attached to the Certification of Richard P. Flaum, Esq. (Da132) (hereinafter, “RPF Cert.).

Over the years, Mr. Gonzalez published numerous comments relevant to the Town of Dover on the Facebook group “Dover Forum – Morris County, NJ”. (Da137 at ¶ 14). In approximately December 2019, he established the Facebook group “Dover expression forum. Morris county” due to perceived censorship on the aforementioned “Dover Forum – Morris County, NJ” group, and thereafter began posting on both pages. Id. For a considerable time period, Gonzalez disseminated various comments, news articles, videos, and general information highlighting matters of public interest within the Town of Dover, including allegations of excessive use of force by police officers, misuse of public funds, and misconduct by public officials. See (Da134 – Da385) Exhibit A, generally. In his capacity as a concerned citizen and former police officer, Mr. Gonzalez also submitted Open Public Records Act (“OPRA”) requests seeking information, such as payments made on behalf of the administration to attorneys or police reports regarding council members, and subsequently published the acquired information. See (Da140 and Da328 – Da385) Exhibit A attached to RPF Cert. Gonzalez also had exchanges with public officials, including the current Mayor James Dodd. (Da138 at ¶ 22-24, Da164-Da196, Da348-Da353).



On February 15, 2024, Mr. Gonzalez received an initial cease and desist letter from the Town of Dover.(Da93) Mr. Gonzalez did not respond to this letter and continued to post matters of public concern on social media, asserting his First Amendment rights. (Da140 at ¶ 41). Plaintiff did not take other legal action against him.

Almost a year later, on January 16, 2025, Dover filed a motion to enforce the underlying Settlement Agreement in the United States District Court for the District of New Jersey, which was subsequently deemed frivolous. Prior to Mr. Gonzalez having the opportunity to file an opposition, the Court advised Dover that the matter was subject to immediate dismissal due to the absence of a retention of jurisdiction clause within the Settlement Agreement. Dover voluntarily withdrew the motion and subsequently initiated an Order to Show Cause (Da113) in the trial court the day following the withdrawal.

On February 5, 2025, the Plaintiff filed a Verified Complaint against Mr. Gonzalez and an Order to Show Cause. (Da8 and Da113) Plaintiff's Verified Complaint seeks damages for Defendant's alleged breach of contract, specifically the non-disparagement provision within the Settlement Agreement. (Da8-Da96) Plaintiff's Order to Show Cause requests emergent relief and restraints, specifically: (1) an order enjoining Defendant from further non-disparagement; and

(2) the return of the consideration paid by Plaintiff to Defendant under the Settlement Agreement. (Da113 – Da131)

By Order dated February 6, 2025, the Court granted Plaintiff's Order to Show Cause without imposing any temporary restraints and scheduled a return date for April 4, 2025. In accordance with the schedule outlined in the February 6, 2025 Order, on March 21, 2025, Defendant filed an Answer, a Counterclaim, (Da97 – Da104) and a Brief in opposition to Plaintiff's Order to Show Cause. Defendant also filed an Order to Show Cause to dismiss Plaintiff's Verified Complaint pursuant to the Uniform Public Expression Protection Act ("UPEPA"). On March 28, 2025, Plaintiff filed a reply.

In his court filing, the Defendant submitted at least 64 relevant Facebook posts documenting key events such as public officials' arrests, videos of the current Mayor explicitly berating another public official, and shared articles alleging public corruption. See Exhibit A attached to RPF Cert. (Da138 ¶ 19-26, Da152-Da205, Da340-Da385) A review of the Defendant's posts also shows he was engaging in direct discourse with public officials. (Da138 at ¶ 22-24, Da164-Da197, Da348-Da385). In contrast, the Plaintiff's Complaint identified a minimal number of posts Plaintiff considered disparaging, several of which included opinions or addressed matters of public concern rather than factual allegations.

Nonetheless, this served as substantive evidence supporting the Defendant's claims that his posts are predominantly protected political speech.

On April 4, 2025, the Court held oral argument on the parties' Orders to Show Cause and granted Plaintiff's request to enforce the non-disparagement clause of the parties' settlement agreement and entered temporary restraints enjoining Defendant from posting negative or derogatory social media posts or make other disparaging comments against the Town of Dover, its officials or employees. (Da119-Da131) In its statement of reasons, the Court identified five posts it considered disparaging and stated, "Despite Defendant's contention that he cannot be prevented from engaging in political discourse, the court does not conclude that many of Defendant's comments can be reasonably interpreted as political discourse. Rather, certain posts are clearly disparaging." See Da126 and Da397 pg. 6 of the court's April 4, 2025 Statements of Reasons.

On May 5, 2025 Defendant Gonzalez filed a Motion for Reconsideration of the April 4, 2025 Orders pursuant to New Jersey Rules of Court, Rule 4:49-2. On May 7, 2025 the Plaintiff filed a Motion to Dismiss Defendant's Counterclaim (Da105 – Da131). An answer was never filed to Defendant's Counterclaim. Thereafter, on May 29, 2025 Defendant filed an opposition to Plaintiff's Motion to Dismiss Defendant's Counterclaim. (Da132a – 403a). The Hon. Noah Franzblau, J.S.C. held oral argument on the Plaintiff's Motion to Dismiss on July 18, 2025.

(T3-16)<sup>2</sup> On July 18, 2025 the trial court entered an Order granting Plaintiff's motion to dismiss Defendant's Counterclaim. (Da1-Da7)

On August 5, 2025, Defendant/Appellant filed his Motion for Leave to Appeal from the July 18, 2025 Order dismissing his Counterclaim. (Da404) On September 8, 2025, the Court granted the motion by Appellant. (Da405)

### **STANDARD OF REVIEW**

A trial court's determination of a Rule 4:6-2(e) motion to dismiss is reviewed *de novo*. Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019). (citing Stop & Shop Supermarket Co., LLC v. County of Bergen, 450 N.J. Super. 286, 290, 162 A.3d 291 (App. Div. 2017). A reviewing court "owe[s] no deference to the trial court's conclusions." Id., at 108 (citing Rezem Family Assocs., 423 N.J. Super. 103, 114 (App. Div. 2011).

### **LEGAL ARGUMENT**

#### **POINT I**

#### **The court acted as a fact-finder when considering a Rule 4:6-2(e) motion.** **(Where raised: T6:4-19 -T11:6-14, Da7, Da401-Da402)**

It is well settled that under Rule 4:6-2(e), "the test for determining the adequacy of a pleading is whether a cause of action is "suggested by the facts." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). Before

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<sup>2</sup> T = Transcript of July 18, 2025 motion hearing.

discovery, the trial court must not discern the ability of the pleading party to "prove the allegation contained in the complaint." Id. Instead, the complaint is entitled to "every reasonable inference of fact" and must be construed liberally with a "generous and hospitable approach" Id. The court may not weigh evidence or resolve factual disputes at this stage. Id. Dismissal is only appropriate when the "factual allegations are palpably insufficient to support a claim." Mac Prop. Grp. LLC & The Cake Boutique LLC v. Selective Fire & Cas. Ins. Co., 473 N.J. Super. 1, 16 (App. Div. 2022) (quoting Frederick v. Smith, 416 N.J. Super 594, 597 (App. Div. 2010)).

The factual issues raised by the Counterclaim (Da102-Da104) (as set forth in Defendant's Affidavit, Da134-Da385) are whether Defendant Gonzalez's speech was of public concern in order to be protected by UPEPA. Defendant Gonzalez pled:

8. Gonzalez's activity constitutes First Amendment political speech which is given the greatest level of protection under the Constitution.

9. Uniform Public Expression Protection Act ("UPEPA") is designed to prevent plaintiffs from using strategic lawsuits to suppress and intimidate critics.

10. Plaintiff's attempt to silence and punish Defendant, a vocal critic of the current administration, constitutes a clear violation of the UPEPA.

Plaintiff's Affidavit and Answer and Counterclaim, No. MRS-L-330-25, at 6 (Morris Cnty. Super. Ct. Mar. 21, 2025)(Da134-Da385; Da97-Da104). (Gonzalez's

Affidavit was part of the Answer to the Complaint and the Counterclaim in this matter)

Instead of evaluating whether Defendant's constitutionally protected political speech was protected by UPEPA, the court made factual and credibility findings determining that Gonzalez's online posts were disparaging as a matter of law and therefore UPEPA did not apply. See generally Order Granting Plaintiff's Motion to Dismiss, No. MRS-L-330-25, (Morris Cnty. Super. Ct., Jul. 18, 2025), Da1-Da7.

The trial court's opinion cited only to a few specific social media posts created by Defendant, rather than considering Defendant's other posts that numbered in the dozens. The court also refused to consider the fact that "Dover" is the Plaintiff in this action, not the Mayor or members of the administration, yet the court ignored those facts opining that Gonzalez disparaged the Mayor and Clerk. See generally Order Granting Plaintiff's Motion to Dismiss, Da1-Da7.

Defendant submitted a detailed Affidavit outlining the extensive history between Plaintiff and Defendant. See generally Plaintiff's Affidavit and Answer and Counterclaim, Da134-Da385; Da97-Da104. Defendant also included multiple posts to demonstrate that his comments addressed matters of genuine public concern. See id. Defendant also provided a concise summary of these comments, which is sufficient to meet the requirements of a pleading. See id. The court refused to consider these relevant materials and also failed to consider Defendant's

Counterclaim argument that Dover cannot prove any damages. See generally Order Granting Plaintiff's Motion to Dismiss, Da1-Da7. Therefore, the real explanation for their actions was to silence Defendant's legitimate First Amendment activity—a violation of UPEPA. Under New Jersey law, pleadings are to be construed liberally to ensure that litigants are not precluded from pursuing their claims.

This is exactly the kind of speech protected under UPEPA. The Act applies generally to the exercise of the right of free speech, guaranteed by the United States Constitution or the New Jersey Constitution, on a matter of public concern. N.J.S.A. 2A:53A-60(3). The Act requires that it shall be broadly construed and applied to protect the exercise of the right of freedom of speech, freedom of the press, the right to assembly and petition, and the right of association, guaranteed by the United States Constitution or the New Jersey Constitution. See id. The purpose of UPEPA is to protect individuals from meritless lawsuits aimed at chilling free speech. Defendant's statements were made within the context of political discourse and public criticism, quintessential examples of the speech the UPEPA was enacted to defend. Defendant further asserts that Plaintiff's current lawsuit improperly implicates his First Amendment right to free speech, which cannot be overridden by the limited or insubstantial arguments advanced by Plaintiff.

"Every reasonable inference of fact" in favor of the Defendant would have viewed his submitted exhibits in the aggregate. See Printing Mart, 116 N.J. at 746.

A liberal interpretation of the pleadings would have determined that his comments, news articles, videos, or allegations of excessive force use by police officers addressed genuine public concern. See id. Instead of affording Defendant with a "generous and hospitable approach," the trial court determined that contracting away defamatory language was a waiver of Defendant's First Amendment right to political speech. See id.

If the trial court assumed the Defendant Gonzalez's facts to be true, and did not resolve factual disputes and/or make a credibility determination that a few selected posts were "disparaging" pursuant to Rule 4:6-2(e), the factual allegations would have been sufficient to support Defendant Gonzalez's UPEPA Counterclaim. Instead, the trial court acted as a fact-finder and dismissed the Counterclaim.

## **POINT II**

### **The government cannot condition receipt of a benefit on waiver of the First Amendment. (Where raised: T6:24-25, T7:1-25, T8:1-25, T9:1-20, T10:23-25, T11:1-5, T15:3-13, Da6, Da130-Da131)**

New Jersey Courts have consistently held that the government cannot condition the receipt of a benefit on the waiver of constitutionally protected rights. In Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ., the New Jersey Supreme Court considered whether a public high school could condition receipt of extracurricular activities contingent on forfeiting constitutional protections against



unreasonable searches and seizures. 176 N.J. 568, 644 (2003). The Court held that "the government is forbidden from making the receipt of a benefit...contingent on the infringement of a constitutionally protected right." Id. The Court reasoned:

The school district cannot require "voluntary" waiver of the right to be free from searches any more than the county commissioners of Wabaunsee County, Kansas could require municipal contractors to "voluntarily" waive their *First Amendment right to criticize the local government in order to receive government contracts.* Joye, 176 N.J. at 644 (emphasis added).

The court further added that this rule is well settled within United States Supreme Court precedent. Joye, 176 N.J. at 644 (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972)).

The trial court contends "Plaintiff's claims against Defendant are based in contract and Plaintiff seeks only to enforce contractual terms to which Defendant agreed and for which he received material compensation." Order Granting Plaintiff's Motion to Dismiss at 5, Da6. However Plaintiff's interpretation of the non-disparagement clause cited below is so expansive that it effectively silences the Defendant from *ever* saying anything negative about the town or its officials, past, present or future, regardless of the context or public interest involved.

The agreement which included mutual obligations, including a broad and unambiguous non-disparagement provision (Section 10), which prohibits both parties from making negative comments or disparaging remarks, in writing, orally or electronically about each other and related parties, including officers and employees of the

Town of Dover.

Plaintiff's Opposition to Motion for Reconsideration Brief, p. 6, Da425.

Assuming *arguendo* the settlement agreement between Defendant Gonzalez and The Town of Dover is as expansive as the Plaintiff and the trial court suggest, the clause is void for illegality. In other words, the Township of Dover is attempting to withhold Defendant Gonzalez's First Amendment right to political speech due their interpretation of the non-disparagement provision in the settlement agreement.

Therefore, the nondisparagement clause as the Plaintiff and the trial court interpret it should be stricken and severed from the agreement. As the settlement agreement contemplates, a clause is severable if "determined to be legally invalid or unenforceable by a court ...it shall be stricken from this agreement." See Settlement Agreement, Gonzalez v. Town of Dover and Town of Dover Police Department, No. 2:14-cv-05132-KM-LDW, at 6 (D.N.J. Dec. 8, 2015), Da70, ¶14.

The Plaintiff previously asserted in their opposition to Defendant's Motion for Reconsideration of the trial court's April 4, 2024 orders that Defendant's reliance on Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, 490-91 (2012) has no bearing here. Plaintiff previously argued that in this case Defendant voluntarily entered into a legally binding settlement agreement with the Town of Dover in 2015 while the speech restriction in Mazdabrook was imposed

unilaterally by the association, not mutually agreed upon. However, Mazdabrook Commons "is a *private*, residential community whose residents have **contractually agreed** to abide by the common rules and regulations of the Association." Mazdabrook Commons Homeowners' Ass'n v. Wasim Khan, No. A-6106-08T3, 2010 N.J. Super. Unpub. LEXIS 2170, at \*40-41 (Super. Ct. App. Div. Sep. 1, 2010) (emphasis added)(Da407). In that case, the homeowners association was a private entity, whereas The Town of Dover and the board of education in Joye are public entities. Compare Joye, 176 N.J. 568 with Mazdabrook, 2010 N.J. Super. Unpub. LEXIS 2170, at \*40-41 (Da417). Even though the homeowner's association was a private entity with whom the residents had willfully entered into a contract, the Court nonetheless held that the homeowner's association could not restrict an individual's right to free speech under the New Jersey Constitution.

Therefore, the trial court's order should be reversed. The trial court's assertion that Gonzalez engaged in disparaging speech constituted an improper "bootstrapping" maneuver. This facilitated the court's bypassing a full consideration of the UPEPA argument, which protects legitimate First Amendment activity from strategic lawsuits. The trial court improperly relied on the nondisparagement clause and failed to consider the fact that Plaintiff Dover's real motive is to silence the Defendant, when in fact Dover cannot demonstrate they were harmed by any of the posts. The trial court's determination as a trier of fact

on a motion to dismiss is a reversible error. Consequently the order must be reversed to provide Gonzalez the opportunity to prove that the Plaintiff was not disparaged and has no damages.

### **POINT III**

#### **The trial court erred when failing to review Gonzalez's statements in the aggregate. (Where raised: T7:25, T8:1-25, T9:1-20, T10:3-18, T13:1-25, T14:3-20, Da2-Da3, Da126-Da127, Da397)**

New Jersey Courts have consistently emphasized the importance of considering the "content, form, and context" of the speech to determine whether it involves a matter of public concern. The New Jersey Supreme Court determined the heightened "actual-malice" standard is appropriate when assessing protected speech critical of the government and discourse on political subjects—speech "at the core of First Amendment values." Senna v. Florimont, 196 N.J. 469, 493 (2008) (citing Buckley v. Valeo, 424 U.S. 1, 24 (1976); State v. Miller, 83 N.J. 402, 411-12 (1980)). Although New Jersey jurisprudence related to the nascent New Jersey UPEPA is limited, sister courts have applied the "content, form, and context" test when assessing whether speech regarding public concern is protected under UPEPA. M.G. v. Bainbridge Island Sch. Dist. #303, 566 P.3d 132, 146 (Wash. Ct. App. 2025) (stating "the legal **test** in determining whether speech is a matter of public concern...is a question of law, which courts must determine 'by the content, form, and **context** of a given statement, as revealed by the **whole**

record."') (quoting Billings v. Town of Steilacoom, 408 P.3d 1123, 1131 (Wash. Ct. App. 2017); see also Connick v. Myers, 461 U.S. 138, 147-148 (1983).

The legislature specifically used the term of art, "public concern" contemplated throughout New Jersey First Amendment jurisprudence when drafting the UPEPA. See e.g., Durando v. Nutley Sun, 209 N.J. 235 (2012); Senna v. Florimont, 196 N.J. 469 (2008). The relevant section of UPEPA reads:

Except as otherwise provided in subsection c., this act applies to a cause of action asserted in a civil action against a person based on the person's:

...

(3) exercise of the right of freedom of speech or of the press, the right to assembly or petition, or the right of association, guaranteed by the United States Constitution or the New Jersey Constitution, on a matter of *public concern*.

2A:53A-60(3) (emphasis added). Thus, since the plain text of the statute aligns with the New Jersey First Amendment Jurisprudence, the legislature likely intended to integrate the two, as sister courts have done in protecting speech of public concern under UPEPA.

Here, the trial court erred when viewing specific speech in isolation. Despite the trial court's use of the catch all phrase "among Defendant's posts," it decisively only cited posts that the Court as the trier of fact decided were disparaging. See Order Granting Plaintiff's Motion to Dismiss at 2, Da3. This improper action by the trial court must be reversed. The court did not refer to all of the comments, news

articles, videos, or allegations of excessive force use by police officers that addressed genuine public concern and were attached to pleadings. See generally id. (Da1-Da7) Defendant also included multiple posts to demonstrate that his comments addressed matters of genuine public concern. See generally Defendant Gonzalez's Affidavit and Answer and Counterclaim, Da134-Da385; Da97-Da104. Under New Jersey law, pleadings are to be construed liberally to ensure that litigants are not precluded from pursuing their claims. Rule 4:6-2(e).

If the trial court assumed the Defendant Gonzalez's facts to be true, and did not resolve factual disputes for their determination pursuant to Rule 4:6-2(e), the factual allegations would have been sufficient to support Defendant Gonzalez's UPEPA Counterclaim.

Therefore, the trial court's order should be reversed.

### **CONCLUSION**

For all of the foregoing reasons Defendant Gonzalez respectfully submits that the trial court's order to dismiss his Counterclaim should be reversed.

Respectfully submitted,

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TOWN OF DOVER,

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RICHARD GONZALEZ,

Defendant/Appellant.

NEW JERSEY SUPERIOR COURT,  
APPELLATE DIVISION  
Docket No. A-000047-25 (AM-000629-24)

Civil Action

ON APPEAL FROM MORRIS COUNTY  
SUPERIOR COURT, LAW DIVISION  
DOCKET NO.: MRS-L-330-25

*Sat below:*

*Hon. Noah Franzblau, J.S.C*

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**PLAINTIFF/RESPONDENT'S AMENDED BRIEF IN OPPOSITION  
OF APPEAL**

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## **PRELIMINARY STATEMENT**

This appeal arises from a simple and familiar circumstance: two parties resolved federal litigation through a written settlement agreement, and one party later disregarded a material term of that agreement. The sole issue is whether the Plaintiff/Respondent Town of Dover (“Town”) may enforce the non-disparagement clause that Defendant/Appellant Richard Gonzalez (“Appellant”) voluntarily accepted, with counsel, in exchange for substantial consideration. Appellant now asks this Court to view that contract-based enforcement effort through the lens of the Uniform Public Expression Protection Act (“UPEPA”) and the First Amendment. But nothing in UPEPA—or in constitutional doctrine—transforms a bargained-for promise into a protected right to ignore the promise. The Town’s claim arises from Appellant’s contractual undertaking, not from the content or viewpoint of his speech. This appeal therefore presents a straightforward question of contract enforceability, not a speech case.

Appellant voluntarily entered into a settlement agreement in 2015, received substantial monetary consideration, and agreed, without hesitation or coercion, to refrain from disparaging the Town, its officials and employees (“Releasees” as defined in the 2015 settlement agreement). (Da124, n1) (“Da” denotes Appellant’s Amended Appendix). Nearly a decade later, after repeatedly violating that agreement, he now seeks to recast the Town’s ordinary enforcement of that contract

as a constitutional infringement and a supposed Strategic Lawsuit Against Public Participation (“SLAPP”) action. That characterization is neither accurate nor supported by law.

The structure and purpose of UPEPA confirm that the Act has no role in this appeal. The Town’s claim does not depend on the viewpoint or subject matter of Appellant’s speech; it rests on a voluntary promise Appellant made when he resolved prior litigation, accepted substantial consideration, and agreed not to engage in defined disparaging conduct. (Da69). That contractual obligation—not the content of any online comment—is the source of this lawsuit. UPEPA does not dissolve bargained-for settlement terms or convert a breach of those terms into protected expression. The Town would have the same claim regardless of whether the disputed statements concerned public officials or wholly unrelated topics, because the duty arises from a promise Appellant chose to make. The Town acted because Appellant’s posts fell within the specific type of conduct—disparaging and personally attacking municipal officials—that he expressly agreed to forbear from in the Settlement Agreement. (Da74–Da94). The Town’s application did not depend on whether the posts were political, rude, humorous, or critical; it depended on whether they met the contractual definition of “disparaging.” (Da69).

This case arises from a settlement agreement that both parties deliberately negotiated to bring prior litigation to a final close. (Da62-65). Appellant accepted

substantial consideration in exchange for several commitments, including an agreement not to engage in defined disparaging conduct toward the Town and its officials. The Town's present action seeks to enforce that voluntary agreement. Nothing about this appeal requires the Court to revisit the wisdom of the bargain the parties struck or the motivations that led Appellant to accept its terms. The dispute centers on a straightforward question: having accepted the benefits of the agreement, may Appellant now avoid the obligations he assumed under it?

The trial court dismissed Appellant's counterclaim at the pleading stage after determining that the theory he advanced did not align with the nature of the dispute presented. Even accepting Appellant's allegations as he framed them, the court understood the matter to turn on the parties' settlement agreement rather than on any statutory protections he sought to invoke. The appeal now asks this Court to consider that determination in the context of the agreement Appellant voluntarily executed and the limited scope of the issues that remain.

The trial court appropriately viewed the dispute through that contractual lens and resolved the counterclaim at the pleading stage on that basis. The issues on appeal therefore concern the scope of the commitments Appellant voluntarily undertook and whether his counterclaim, as framed, stated any basis for relief under the statute he invoked. The appeal narrowly concerns the scope of the parties' agreement and what role UPEPA plays in a matter grounded in contract.

## **STATEMENT OF FACTS AND PROCEDURAL HISTORY**<sup>1</sup>

The Town of Dover is a municipal entity organized under the laws of the State of New Jersey. Appellant Gonzalez had worked for the Town as a Dover police officer. (Da108 ¶3).<sup>2</sup> On August 15, 2014, Gonzalez commenced a federal civil action against the Town alleging various employment-related claims. (Da18–Da43). The matter ultimately resolved in the fall of 2015, and the federal court entered an order dismissing the action. (Da62). Thereafter, on December 10, 2015, the parties executed a written “Settlement Agreement and General Release” (“Agreement”). (Da64–Da72). As part of that Agreement, Gonzalez expressly agreed to a mutual non-disparagement clause, set forth in Paragraph 10, under which he “will not make any negative comments or disparaging remarks, in writing, orally, or electronically, about the employer or any releasee including their respective Officers, Directors and Employees.” (Da69).

On or about February 5, 2025, the Town filed an Order to Show Cause seeking to enforce the non-disparagement provision of the Settlement Agreement based on Defendant’s repeated violations. The Town asserted that Gonzalez had made ongoing negative and disparaging statements about the Town and its officials, including the Mayor, James Dodd, and the Town Clerk, Tara Pettoni. These statements consisted of numerous posts and comments published by Gonzalez in a

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<sup>1</sup> The Town combined the Statement of Fact and Procedural history for efficiency purposes and to avoid duplication.

<sup>2</sup> “Da” refers to Defendant Gonzalez’s Appendix in Support of Defendant’s/Appellant’s Appeal.

Facebook group titled “Dover Forum – Morris County, New Jersey.” (Da9 at ¶10).

The posts identified by the Town were not political commentary but plainly personal attacks. As reflected in the Appendix (Da74–Da94), Appellant published posts depicting municipal officials as “clowns,” mocked their physical appearance and clothing, and used vulgar epithets directed at specific individuals. He also accused officials of engaging in improper romantic relationships and “stealing taxpayer money,” and circulated sexualized jokes targeting municipal employees. The Town’s application thus identified a series of online comments that, in its view, fell within the conduct Appellant agreed to avoid under the non-disparagement clause. These comments included accusations directed at specific municipal officials, personal criticisms, and insinuations about misconduct. The Town submitted these examples not to assess their political value, but to demonstrate the type of statements it believed violated the terms of the settlement agreement. Whether the comments touched on broader issues or were framed in personal terms, the Town’s position was that they constituted the kind of disparaging conduct Appellant expressly agreed he would not engage in when he accepted the benefits of the settlement.

On March 21, 2025, Gonzalez filed his own Order to Show Cause and Motion to Dismiss the Town’s application, along with an Answer and a Counterclaim asserting an alleged violation of the UPEPA. (Da97–Da104). Following oral

argument on April 4, 2025, the Honorable Judge Franzblau issued an Order granting Plaintiff's Order to Show Cause, denying Defendant's cross-application, and providing a written Statement of Reasons. (Da388-402). The Court concluded that UPEPA did not apply to this matter because Defendant had accepted material consideration as part of the settlement agreement and had "explicitly agreed to forbear from engaging in defined activity." (Da402).

On May 5, 2025, Defendant Gonzalez filed a Motion for Reconsideration of the April 4, 2025, Orders pursuant to Rule 4:49-2. Subsequently, on May 7, 2025, the Town filed a Motion to Dismiss Defendant's Counterclaim. The trial court denied Defendant's Motion for Reconsideration on June 6, 2025. Thereafter, on July 18, 2025, Judge Franzblau granted the Town's Motion to Dismiss Gonzalez's UPEPA/anti-SLAPP Counterclaim in its entirety. (Da1–Da7).

On August 5, 2025, Appellant Gonzalez filed a Motion for Leave to Appeal from the July 18, 2025 Order dismissing his Counterclaim. (Da404). The Appellate Division granted the motion on September 8, 2025. (Da405).

### **STANDARD OF REVIEW**

A trial court's ruling on a motion to dismiss under Rule 4:6-2(e) is subject to de novo review. Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019) (citing Stop & Shop Supermarket Co., LLC v. County of Bergen, 450 N.J. Super. 286, 290 (App. Div. 2017)). On appeal, the

reviewing court “owes no deference to the trial court’s conclusions,” and instead applies the same standard independently. *Id.*, at 108 (citing Rezem Family Assocs. V. Boro of Millstone, 423 N.J. Super. 103, 114 (App. Div. 2011)).

## **LEGAL ARGUMENT**

### **POINT I**

#### **RULE 4:6-2(E) REQUIRED DISMISSAL BECAUSE THE COUNTERCLAIM FAILED TO STATE ANY COGNIZABLE CAUSE OF ACTION (Da5-6).**

UPEPA, N.J.S.A. 2A:15-59.1 to -59.6, provides an expedited mechanism for dismissing claims that are brought because of a defendant’s expressive activity. The statute does not apply where, as here, the underlying duty arises from a voluntary contractual commitment rather than from the content or viewpoint of any expression.

Appellant’s primary contention that the trial court improperly engaged in fact-finding when dismissing his Counterclaim is unsupported by the record and misstates the nature of Rule 4:6-2(e) review. Under Rule 4:6-2(e) a motion to dismiss “should be granted if even a generous reading of the allegations does not reveal a legal basis for recovery.” Edwards v. Prudential Prop. & Cas. Co., 357 N.J. Super. 196, 202 (App. Div. 2003), citing Camden County Energy Recovery Assocs. v. N.J. Dep’t of Env’tl. Prot., 320 N.J. Super. 59, 64-65 (App.Div.1999), *aff’d o.b.*, 170 N.J. 246 (2001). Accordingly, “[t]he motion may not be denied based on the possibility



that discovery may establish the requisite claim; rather, the legal requisites for plaintiffs' claim must be apparent from the complaint itself.” Id. The court was not required to, and did not, resolve factual disputes or weigh evidence. Instead, it accepted Appellant’s allegations as true and correctly concluded that, even under the most generous reading, the Counterclaim failed to articulate any legally cognizable cause of action under UPEPA or any other statute. This is precisely the role of the court at the pleading stage. Appellant’s attempt to characterize the court’s application of that pleading standard as “fact-finding” does not reflect the nature of the ruling.

The trial court’s reasoning did not depend on evaluating the truth, accuracy, or character of any particular statement made by Appellant. Instead, the court focused on the legal framework governing the counterclaim and concluded that, even accepting Appellant’s allegations as pled, the counterclaim did not describe a theory that would bring this contract-based dispute within UPEPA’s scope. The court therefore did not need to resolve factual disputes about the nature or purpose of individual posts; its analysis rested on the more fundamental point that the Town’s claim arose from a negotiated agreement rather than from the substance of Appellant’s online expression.

The UPEPA statutory scheme does not contemplate situations where a party has accepted consideration in connection with a settlement agreement (a contract) and

has explicitly agreed to forbear from engaging in defined activity—specifically not to disparage those protected under the settlement agreement. See *Friedman v. Tappan Development Corp.*, 22 N.J. 523, 538 (1956) (discussing forbearance as a valid legal detriment in contract). Defendant has provided no case law to confirm that UPEPA vitiates the terms of the parties’ settlement agreement and Defendant’s obligations thereunder.

(Da401).

Appellant misapplies the standards established in Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739 (1989), and subsequent case law. Those cases require that a complaint be given every reasonable inference, but do not require courts to invent a cause of action where none exists. Accepting Appellant’s allegations as true does not transform his Counterclaim into a valid UPEPA claim.

Appellant’s position rests on the assumption that the trial court was required to analyze the subject matter or value of his posts. The court did not need to do so. The obligation enforced here stemmed from a voluntary settlement commitment, not from any governmental restriction or evaluation of expression. Because the duty arises from the parties’ agreement, the court appropriately resolved the counterclaim without undertaking a First Amendment public-concern inquiry.

The Town acted because Appellant’s posts fell within the specific type of conduct—disparaging and personally attacking municipal officials—that he expressly agreed to forbear from in the Settlement Agreement. (Da74–Da94). The Town’s application did not depend on whether the posts were political, rude,

humorous, or critical; it depended on whether they met the contractual definition of “disparaging.”

Ultimately, Appellant’s argument seeks to collapse the distinction between an adjudication of facts and an evaluation of legal sufficiency. The trial court resolved the counterclaim at the pleading stage by applying the Rule 4:6-2(e) standard and concluding that the theory Appellant advanced did not fit the contractual framework governing the dispute. The court treated the allegations as pled and determined that, even accepting them as true, the counterclaim did not state a statutory basis for relief under UPEPA.

## **POINT II**

### **THE SETTLEMENT WAS A NEGOTIATED RESOLUTION OF LITIGATION, NOT A GOVERNMENT-IMPOSED RESTRICTION TRIGGERING UPEPA. (Da6, Da401-402)**

Appellant’s position overlooks the fact that the obligation at issue arises from a voluntary settlement of prior litigation. The parties resolved that matter through reciprocal commitments, one of which was Appellant’s agreement to refrain from a defined category of disparaging conduct toward specified individuals. The Town’s application sought to enforce that negotiated term, not to regulate Appellant’s participation in public discourse or to condition governmental benefits on the restriction of protected activity.

Gonzalez contends that the settlement funds were “conditioned” upon his agreement to waive his First Amendment rights, but that framing is both inaccurate and legally irrelevant. The non-disparagement clause was a mutually agreed-upon component of a private settlement contract, signed with the advice of counsel, in which both sides exchanged promises to secure finality. The Town’s payment discharged potential legal exposure in the pending federal case while Gonzalez’s promises, including the non-disparagement obligation, were the reciprocal commitments necessary to achieve that closure. Nothing about this structure resembles the unconstitutional-conditions cases Appellant invokes.

The settlement agreement does not restrict Appellant’s ability to participate in public discourse. It reflects a voluntary commitment to refrain from a defined category of disparaging conduct toward specified individuals as part of resolving prior litigation. The Town’s enforcement application relied on that contractual framework, not on any assessment of whether Appellant’s posts addressed public issues or private matters. The nature or subject matter of the posts was not the basis for the claim; the focus was whether the conduct fell within the agreed-upon prohibition.

Although this matter is not a First Amendment issue, but a contractual dispute, even if the agreement is viewed as involving a waiver of speech rights, such constitutional waivers are fully permissible where, as here, they are knowing,

voluntary, and supported by consideration. See Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, 486 (2012) (“A waiver of constitutional rights in any context must, at the very least, be clear.”). Courts routinely enforce settlement provisions that limit or waive constitutional rights. Gonzalez’s attempt to recast a standard contractual term as an unconstitutional condition ignores both the nature of the bargain he struck and the well-settled law allowing parties to voluntarily agree to such limitations.

It is well established that a waiver of constitutional rights requires the “intentional relinquishment or abandonment of a known right or privilege.” State v. Rose, 458 N.J. Super. 610, 630 (App. Div. 2019), quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Courts “indulge every reasonable presumption against waiver” of fundamental rights and “do not presume acquiescence in the loss of fundamental rights.” Zerbst, 304 U.S. at 464. Even under the demanding standard governing constitutional waivers, the non-disparagement clause remains fully enforceable. Here, there is no need for presumption as the record demonstrates a clear, knowing, and voluntary waiver. Gonzalez was represented by counsel, fully aware of the terms, and accepted substantial monetary consideration in exchange for resolving his lawsuit and agreeing not to disparage the Town. His intentional, counseled decision to enter the settlement agreement satisfies the Zerbst standard, and the waiver he executed cannot now be undone because he regrets the bargain he made.

Ultimately, Appellant seeks to convert a voluntary contractual limitation into a constitutional right he never bargained for. The law does not permit such an outcome. The settlement agreement reflects a deliberate and mutually beneficial resolution of longstanding litigation, and the non-disparagement clause was a material term of that agreement. Appellant accepted the benefits, violated his obligations, and now asks this Court to relieve him from the consequences of his own choice. The trial court correctly rejected that invitation, and its ruling should be affirmed.

### **POINT III**

#### **THE TRIAL COURT CORRECTLY DECLINED TO CONDUCT A FIRST AMENDMENT INQUIRY BECAUSE THE ONLY ISSUE WAS WHETHER GONZALEZ BREACHED THE CONTRACT (Da7).**

Appellant's contention that the trial court was required to assess his posts under a First Amendment "public concern" framework does not fit the nature of the claim before the court. The Town did not seek to restrict Appellant's ability to speak on public matters; it sought to enforce a term of a settlement agreement that Appellant voluntarily accepted as part of resolving prior litigation. The trial court therefore focused on whether the parties' contractual commitments governed the dispute, not on whether any individual comment could be classified as political speech. The issue was the existence of a bargained-for obligation, not the viewpoint or subject matter of Appellant's remarks.

The character of the posts—whether abrasive, crude, political, or otherwise—is irrelevant to the analysis. What matters is that the parties themselves defined the conduct Appellant agreed to avoid, and the Town sought only to enforce that voluntary term. Courts do not rewrite settlement agreements after the fact, and they do not convert contractual duties into constitutional claims simply because the underlying conduct involves speech. Were Appellant’s approach accepted, any party could revive a settled dispute by characterizing the contractually prohibited conduct as expressive. That outcome would destabilize settlement practice and distort UPEPA far beyond its intended scope.

UPEPA likewise does not convert this contractual dispute into a First Amendment case. Anti-SLAPP statutes protect defendants from lawsuits filed because of their speech, not lawsuits filed because they broke a contract they freely signed. The Town’s claim derives exclusively from a written agreement; the cause of action would exist regardless of the content, form, or context of the posts. The statute simply does not apply where the underlying duty is contractual rather than constitutional. Accordingly, the trial court properly focused on whether Gonzalez had a contractual obligation not to disparage the Town, not on whether his comments could, in some abstract sense, be characterized as political or of public concern. In fact, the trial court upheld Appellant’s “ability to engage in political discourse,” provided he does not “disparage Plaintiff and the ‘Releasees.’” (Da7). Because the

First Amendment was not implicated, no public-concern or balancing test was required.

Nothing in the Town's enforcement application required the court to evaluate the content, viewpoint, or subject matter of Appellant's posts. The application sought to enforce a negotiated settlement term that existed independently of any expressive value of the comments at issue. The trial court appropriately treated the matter as a contractual dispute and applied the pleading standard accordingly.

### **CONCLUSION**

For all of these reasons, the trial court correctly dismissed Gonzalez's Counterclaim and properly enforced the parties' settlement agreement according to its plain terms. This case presents a straightforward breach-of-contract dispute, not a First Amendment controversy, and nothing in UPEPA alters the enforceability of the non-disparagement clause Gonzalez knowingly accepted in exchange for monetary consideration. Because the court applied the correct legal standards and reached the only outcome supported by the record, the Order below should be affirmed in its entirety.

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Veronica A. Acevedo

Dated: November 17, 2025