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JOSH VADELL, EDWARD RIEGEL, ANDY PRONOVOST, JERRY STRING, EUGENE MAIER, DAVID MADAMBA, LONELL JONES, JOSEPH IACOVONE, CONSTANT HACKNEY, MICHAEL GAVIN and JAMES ARMSTRONG,	**SUPERIOR COURT OF NEW JERSEY** **APPELLATE DIVISION** **DOCKET NO.: A-002112-23** **DOCKET NO. ATL-L-2900-18**
Plaintiffs,	***On appeal from the Order of the Superior Court of New Jersey: Law Division***
vs.	***Atlantic County***
	Sat Below:
	Hon. John C. Porto, P.J. Cv.
ATLANTIC CITY, STATE OF NEW JERSEY, DEPARTMENT OF COMMUNITY AFFAIRS	
Defendants.	

PLAINTIFFS-APPELLANTS APPELLATE BRIEF

Of Counsel & On the Brief:
Matthew R. Curran, Esq. (#024172005)

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[1] In opposition to Plaintiffs' Motion for Leave to Amend the Complaint, Defendants submitted a letter brief with attached exhibits but did not file a certification.

PRELIMINARY STATEMENT

Plaintiffs Josh Vadell, Edward Riegel, Andy Provonost, Jerry String, Eugene Maier, David Madamba, Lonell Jones, Joseph Iacovone, Constant Hackney, Michael Gavin, and James Armstrong appeal the Trial Court's Order granting Defendants Atlantic City's and the State of New Jersey's cross-motion for reconsideration of the June 8, 2021 Order partially granting their motion to dismiss for failure to state a claim upon which relief may be granted pursuant to R. 4:6-2. Plaintiffs also appeal the Trial Court's Order denying their motion for leave to amend their Complaint to amend their New Jersey Civil Rights Act ("CRA"), N.J.S.A. 10:6-1, *et seq*., Count to add a citation to Article IV, Section VII, paragraph 3 of the New Jersey Constitution (New Jersey's Contract Clause) and to add direct constitutional law claims.

Plaintiffs are retired Atlantic City law enforcement officers. They allege that they are owed accrued deferred compensation in the form of lump sum payments for accumulated sick time when they retired from their employment. They accrued this deferred compensation benefit over the course of their decades-long careers and based upon the plain terms of several Collective Negotiations Agreements ("CNAs"). Although the most recent Collective Negotiations Agreement expired before their retirements, our Supreme Court has held that contractual benefits continue to exist beyond the expiration date of the contract if there is clear and

unambiguous contractual language that the CNA would remain in effect. In Matter of County of Atlantic, 230 N.J. 237, 255-56 (2017). The expired CNA, in this matter, had clear language that the contract continued in full force. Plaintiffs Reigel, Armstrong, and Iacovone also assert that they were unlawfully denied compensation for performing the duties of a sergeant following their promotions in 2016.

Defendants contend that the Municipal Stabilization & Recovery Act ("MSRA"), N.J.S.A. 52:27BBBB-1, *et. seq.*, permitted them to revoke the deferred compensation that Plaintiffs accrued over the course of their careers. However, by the plain language of the statute, the Legislature only authorized Defendants to prospectively nullify contractual terms and benefits. Stated differently, the MSRA permits the State to terminate contractual rights going forward. It does not allow Defendants to retroactively alter the terms and conditions of Plaintiffs' employment where this compensation has already been accrued by Plaintiffs. This concept is critical to both Plaintiffs' contractual and constitutional claims.

The Court should be guided by Caponegro v. State Operated School District of the City of Newark, Essex County, 330 N.J. Super. 148, 151 (App. Div. 2000), which is directly on point. In this case, pursuant to a state statute, the State took over control of the Newark Public School system and terminated the employment of school administrators. While the Caponegro Court found that the State could unilaterally terminate the plaintiffs' rights to continued employment, the plaintiffs

were still entitled to their accrued deferred compensation such as sick days. 330 N.J. Super. at 155.

Plaintiffs also allege that Defendants' deprivation of their previously vested deferred compensation also violates the CRA. In their initial Complaint, Plaintiffs pled a CRA Count based upon Defendants' violation of several provisions of the New Jersey Constitution. Notwithstanding the foregoing, in reaching its conclusion to dismiss Plaintiff's Complaint with prejudice, the Trial Court decided that there was **no** reason to consider whether the Defendants acted unconstitutionally.

For the foregoing reasons and the arguments set forth at greater length below, this Court should grant Plaintiffs' appeal and remand this matter to the Trial Court.

STATEMENT OF FACTS & PROCEDURAL HISTORY[1]

a. The Plaintiffs

The ten Plaintiffs are all retried Atlantic City police officers. (28a ¶91, 23a ¶54, 27a ¶83, 19a ¶21, 26a ¶77, 22a ¶46, 21a ¶31, 21a ¶38, 25a ¶62 & 25a ¶67). The Plaintiffs had long and distinguished careers with the Atlantic City Police Department ("ACPD") where many of them received commendations and promotions. (19a-29a ¶15-94). As Atlantic City Police officers, Plaintiffs also made sacrifices that are distinct from what is often required of other public and private

[1] Plaintiffs' Statement of Facts and Procedural History are combined for the Court's convenience because they are intertwined.

sector employees. For instance, Plaintiff Josh Vadell almost made the ultimate sacrifice on September 2, 2016 when he was shot in the head in the line of duty. (19a ¶16). During the incident which resulted in his gunshot wound, Plaintiff Vadell saved three juveniles who were being robbed at gunpoint near the parking garage at Caesar's Casino. (19a ¶17). Just 16 days later, Plaintiff Vadell became the father to his third daughter. (19a ¶18). Thereafter, Plaintiff Vadell endured months of intense rehabilitation and multiple surgeries to repair the damage to his brain and skull. (19a ¶19). As another example, Plaintiff Maier was shot at, stabbed, and had numerous broken bones through his career. (23a ¶53). While not every Plaintiff has suffered these degrees of sacrifice, every Plaintiff retired in good standing with Atlantic City.

b. The Collective Negotiation Agreements

The terms and conditions of Plaintiffs' employment were dictated by collective negotiation agreements ("CNA"), the most recent of which expired on December 31, 2015. (29a ¶95); (56a-95a). This CNA between Atlantic City and the Policemen's Benevolent Association ("PBA") Local No. 24 had a term of January 1, 2013 to December 31, 2015. (56a). The CAN was approved as to form and execution by the City Solicitor on December 18, 2013. (92a).

Article XIX of the CNA is titled "Terminal Leave With Pay." (74a). As per this term, "upon retirement the employee shall be entitled to terminal leave up to one and one-half (1 1/2) year with full pay. Ibid. The terminal leave shall be based upon

accumulated sick leave. Ibid. Plaintiffs elected, pursuant to Article XIX (B)(B), for the lump sum payment of accumulated sick time. (29a ¶98). The contract provides in pertinent part: "Accumulated sick leave lump sum payment. Lump sum shall be compensated at the full rate of pay in effect at the time of employee's retirement. It shall be paid upon retirement, or, at the exclusive option of the employee, over a four (4) year period beginning in the year of retirement…" (74a).

The accrual of terminal leave with pay is in the prior CNAs. (29a ¶96). The 1990-1992 CNA (111a-112a), the 1993-1995 CNA (151a-152a), and the 2008-2012 CNA (194a-195a) all demonstrate this initiative to reduce employee sick time usage, which Plaintiffs relied on. (74a ¶96). The union and Atlantic City did not reach a successor agreement covering the time between December 31, 2015 and Plaintiffs' retirements. (29a ¶97).

Notably, the most recent CNA has a section titled "Duration." (91a). This section, Article XLIV, provides as follows: "This Contract shall be in full force and effect from January 1, 2013 until midnight, December 31, 2015. The parties agree that negotiations for a successor Agreement modifying, amending or altering the terms and provisions of this Agreement shall commence the first week of September 2015. In the event no successor Agreement is completed before December 31, 2015, the present Contract will continue in full force." (91a-92a).

The CNAs already phased out the sick time sellback by capping the benefit for those hired after January 1, 2013 at $15,000. (34a ¶120). The CNA also decreased the amount of time that could be accumulated. Employees hired in 1984 could accumulate sixteen (16) months of time. (34a ¶121). Employees hired in 1985 could accumulate fourteen (14) months of time. (34a ¶121). Further, employees hired after 1986 could accumulate twelve (12) months of time. Employees hired after October 16, 2006 could only accumulate six (6) months of time. (34a ¶122).

c. Benefits to Atlantic City arising out of Article XIX of the collective bargaining agreement, "Terminal Leave with Pay"

The average Plaintiff in this litigation who worked 25 years completed 96% of their service under the promise that if they did not use their sick time, they would be compensated for that unused time at retirement. (33a ¶116). Defendants reaped the benefits of Plaintiffs coming into work every day and not requiring the payment of sick time and overtime to cover Plaintiffs if they called out. (33a ¶117). Plaintiffs satisfied their end of this negotiated contract. (33a ¶118).

d. Plaintiffs' retirement dates

Plaintiffs' dates of retirement are set forth as follows: Gavin (February 1, 2017); (28a), Maier (March 14, 2017); (23a), Hackney (April 1, 2017); (27a); Armstrong (April 12, 2017); (838a), Vadell (May 1, 2017); (19a), Iacovone (June 1, 2017); (26a), String (July 1, 2017); (22a), Riegel (November 1, 2017); (21a),

Pronovost (November 1, 2017); (21a), Madamba (November 1, 2017); (25a), Jones (November 1, 2017); (25a).

e. The State's history of supervision of Atlantic City

Pursuant to N.J.S.A. 52:27BB-54, *et seq*., the Local Finance Board ("LFB") and the Director of the Division of Community Affairs may, subject to the approval, assume and exercise supervision over the financial affairs of a municipality in unsound financial condition under specific conditions set forth in N.J.S.A. 52:27BB-55 and in accordance with the procedures set forth in N.J.S.A. 52:27BB-56. In February 2011, the State assumed supervisory responsibilities over Atlantic City by installing a Monitor during the pendency of the 2008-2012 collective negotiations agreement which contained the accrued sick leave/terminal leave with pay contractual term. (414a-417a). Thereafter, under the supervision of the State, Atlantic City and PBA Local No. 24 engaged in contractual negotiations, which were ultimately approved by the City on December 18, 2013. Ibid. As set forth above, this most recent CNA provided for police officers to both accrue and be paid a lump sum terminal leave based upon accrued, unused sick days.

f. The MRSA

Effective May 27, 2016 the Legislature passed the MRSA, N.J.S.A. 52:27BBBB-1, *et. seq*. (30a ¶100). The MRSA gave the State or their designee the ability to: (a) Unilaterally modify CNAs; (b) Supersede the jurisdiction of the Public

Employees Relations Commission; (c) Refuse to abide by conventional arbitration decisions; and (d) Refuse to abide by interest arbitration decisions. (30a ¶101).

On June 6, 2016, pursuant to the MRSA, the Director of the Division of Local Government Services ("DLGS"), in conjunction with the Commissioner of the Department of Community Affairs, deemed Atlantic City a "municipality in need of stabilization and recovery." Atlantic City was given 150 days to submit a five-year stabilization plan to the State. (30a-31a ¶102). On November 9, 2016, the Plan was rejected, and the City was placed under the supervision of the Department of Community Affairs. (30a ¶101). From December 2016 to March 13, 2017, the DCA, Atlantic City, and PBA Local 24 attempted to negotiate an agreement regarding contractual terms. (217a). Ultimately, those talks broke down. Ibid.

On March 13, 2017, DLGS State Designee Jeffrey Chiesa, Esq. issued a Notice of Implementation attempting to invoke his authority under the MSRA by stating he was changing the terms and conditions of employment for members of PBA Local 124 including Plaintiffs. (31a ¶103); (212a). In this March 13, 2017 notice, Chiesa proclaimed that several contractual modifications would be implemented on **March 15, 2017**. (212a). Most significant to this litigation, Chiesa stated that "[e]ffective **March 15, 2017**, all pending and prospective Terminal Leave payments shall be eliminated for all employees." Ibid. (emphasis added). Notably, both Plaintiff Gavin (retirement date February 1, 2017) and Plaintiff Maier

(retirement date March 14, 2017) retired before Chiesa's proposed Notice of Changes in the Terms and Conditions of Employment was planned to go into effect and before PBA Local 24's lawsuit. (28a ¶91 & 23a ¶54).

Before Chiesa's Notice Implementation could go into effect, attorneys on behalf of PBA Local 24 filed a Superior Court lawsuit on March 15, 2017 (the "First Police Matter"). (768a). PBA Local 24 sought to prevent the unilateral imposition of the modifications to the CNA. Ibid. On March 17, 2017, the Honorable Julio L. Mendez, A.J.S.C. executed an Order to Show Cause why an emergent temporary injunction restraining the continued violation of the plaintiffs' constitutional rights should not be barred. (864a-871a).

On May 23, 2017, Judge Mendez granted in part and denied in part PBA Local 24's petition for a temporary injunction. (262a-263a). The Trial Court denied the plaintiffs' petition for a temporary injunction regarding changes to the salary scale, overtime calculus, health insurance coverage, longevity, and education incentive pay, workers' compensation benefits, and terminal leave pay over $15,000. (263a). The Court granted the plaintiffs' petition for a temporary injunction regarding the reduction of the police force, changes to the work schedule, and the elimination of terminal leave under $15,000. Pursuant to the Court's Order, **all** temporary restraints remained in place until the close of business June 6, 2017. (263a).

On June 7, 2017, Chiesa issued another "Notice of Implementation." (220a). Therein, he asserted that he would implement changes to the terms and conditions of employment that would take effect from June 7, 2017 through December 31, 2021. (31a ¶104); (217a). Among the changes he articulated that he was going to implement, Chiesa stated as follows: "**[e]ffective June 7, 2017**, all pending and prospective Terminal Leave payments over $15,000 shall be eliminated for all employees." (31a ¶105); (220a) (emphasis added). Additionally, DLGS Designee Chiesa provided, "[t]he State reserves the right to modify or entirely eliminate the payment of terminal leave payments in accordance with future rulings or interpretations by the Court." (220a).

Before June 7, 2017, six of the eleven Plaintiffs in this litigation had already retired from the ACPD. They are Gavin (2/1/17, 28a ¶91), Maier (3/14/17, 23a ¶54), Hackney (4/1/17, 27a ¶83), Armstrong (4/12/17, 383a), Vadell (5/1/17, 19a ¶21), and Iacovone (6/1/17, 26a ¶77). Further, two of the Plaintiffs, Gavin, and Maier, retired before Defendants' initial attempt to eliminate terminal leave payments.

On December 14, 2017, the members of PBA Local No. 24 (not retirees) voted to approve the settlement of the First Police Matter. (625a-626a). All Plaintiffs retired before the union voted on whether to approve the settlement of the First Police Matter.

As part of the settlement agreement of the First Police Matter, the parties agreed to modifications of the June 7, 2017 Implementation Memorandum. *Compare* (217a-219a) & (230a-234a). Many of which terms were inured to the benefit of the police unions and their membership. Ibid. For instance, the Defendants negotiated a provision awarding each police officer 110 hours of Kelly time per calendar year. (230a ¶2).

Further, the parties agreed that there would be an anticipated savings to the municipal budget of $2.261 million dollars due to police officer retirements. (230a ¶3). **The parties agreed to allocate this anticipated $2.261 million dollars to the 252 currently employed law enforcement officers actively employed as of the date of this agreement**. Ibid. The agreement further provided that the unions will provide a proposed distribution of these additional monies to each of the actively employed law enforcement officers which is subject to review and approval by both Defendants, which approval shall not be unreasonably withheld. Ibid. This additional money was included in each officer's base salary and is pensionable. Ibid. Further, sergeants also benefited the settlement agreement. While the June 7, 2017 Implementation Memorandum directed that the current rank differential upon promotion from police officer to sergeant was eliminated (222a), the settlement agreement increased their base salaries to $100,000 per year. (231a ¶3).

In addition to the foregoing, Defendants also agreed to review the amount of overtime for any significant savings and take same into account when making determinations regarding salary increases the following year. (232a ¶8). Defendants also withdrew a directive from the June 7, 2017 Implementation Memorandum that reduced police officers' workers compensation payments. (231a ¶5). On June 7, 2017, Chiesa directed that police officers would receive only 70% of their weekly wages while on workers' compensation. (218a) In the settlement agreement, "[t]he parties agree that employees will receive one hundred percent (100%) of his/her pay when absent due to approved workers' compensation leave." (231a ¶5).

On October 18, 2018, Melanie Walter, Acting Director of the DLGS, issued a directive to Atlantic City. (32a ¶111); (238a-240a). Therein, Walter opined as follows:

> The administration of good government requires decisive action when certain circumstances arise. Such circumstances confront the City today. Promotion of sustainable budgetary practices and implementation of sound fiscal strategies is essential to the City's budgetary health. Immoderate terminal leave obligations hinder the City's budgetary flexibility and cash flow, forcing the City to sacrifice current hiring and employee compensation to support outsized legacy costs generated through unsustainable leave time policies and practices. These obligations thus compromise the City's short term operational and budgetary solvency and its long term fiscal health. However, reasonable, consistent terminal leave practices are sustainable within the City's existing and projected budgetary constraints. (238a).

Walter went on to explain, "[f]ollowing exhaustive consideration of the City's budgetary needs, contractual obligations, and long-term financial projections, I have

concluded that the City's recovery has progressed sufficiently to support certain previously suspended terminal leave payouts for pre- and post- MSRA employee retirements. To this end, the City may now initiate terminal leave payments for both pre and post-MSRA employees." (239a). Pursuant to this new position, pre-November 9, 2016 retirees, referred to as "Pre-MSRA," would receive their full scheduled terminal leave amount. Ibid. Those who retired on November 9, 2016 or thereafter would be subject to a terminal leave cap of $15,000. Ibid. Further, Walter instructed the City that any retiree receiving terminal leave payments would be required to sign a release. Ibid. Prior payments of accumulated sick leave did not require the execution of a release agreement. (33a, ¶114).

Officers who retired from the ACPD received their full sick time payouts through 2016. (31a, ¶106). Further, documents produced by Atlantic City in response to an OPRA request reveal that after Atlantic City was placed under the supervision of the State pursuant to the MRSA on November 9, 2016 retiring police officers received deferred compensation payouts well in excess of $15,000, including payments of **$150,000.00**, **$150,000.00**, **$57,716.54**, and **$93,286.32**. (418a-421a).

Further, Defendants made several payments to retired Atlantic City police officers in excess of $15,000 who cashed out accrued vacation time **after** November 9, 2016. (422a-427a). Some of the examples with the dates of payment in parenthesis

are as follows: $46,016.46 (6/16/17), $16,896.51 (6/16/17), $20,829.08 (6/16/17), $28,724.28 (6/16/17), $25,159.26 (6/2/17), $17,654.62 (6/30/17), $17,682.72 (6/2/17), $19,392.94 (6/16/17), $20,404.06 (6/16/17), $21,430.87 (6/16/17), $19,587.92 (6/16/17), $45,494.34 (6/16/17), $18,941.67 (6/2/17), $23,645.64 (6/2/17), $16,388.82 (6/16/17), $17,692.32 (6/16/17), $18,598.87 (6/16/17) and $15,964.65 (11/18/16). (422a-427a).

On October 24, 2018, the City passed Resolution 591. (33a ¶115);(428a-434a). Therein, the City adopted the October 18, 2018 memo and capped Plaintiffs' lump sum terminal leave payments at $15,000 each. (33a ¶115). The City escrowed the funds to pay all accumulated sick leave liabilities and has set aside $7,619,182.11 as of February 28, 2018. (31a-32a. ¶107); (220a). Defendants have deprived Plaintiffs of $750,928.99 in deferred compensation, a fraction of what is held in escrow. (35a ¶131).

On December 3, 2018, Plaintiffs filed their Complaint in Lieu of Prerogative Writs. In their pleading, Plaintiffs alleged breach of contract (Count One), prerogative writ (Count Two), violations of the New Jersey Constitution and the CRA, N.J.S.A. 10:6-1, *et seq*. (Count Three), unjust enrichment (Count Four), and quantum meruit (County Five). (34a-39a).

On January 11, 2019, Defendants filed a notice of motion to dismiss the Complaint with prejudice pursuant to R. 4:6-2(e). (254a). In their motion papers,

Defendants attached and relied upon the unpublished decision of the Atlantic County Superior Court in the prior litigation, *The Atlantic City Policemen's Benevolent Association Local 24, et al. v. Christopher J. Christie, et al.*, docket no. ATL-L-554-17. (261a)

While the motion to dismiss was pending, Defendants moved to consolidate the *Vadell* litigation with other lawsuits involving similar issues. (387a); (572a). On March 26, 2019, the Court granted this motion. (572a). In *Richard Andrews, et als. v. City of Atlantic City, et als*., ATL-01-19, the plaintiffs, members of the ACPD, were all currently employed at the time the motion to dismiss was decided. (585a). Another case that was ultimately consolidated with these matters on July 22, 2020 was *Angelo DeMaio, et als. v. City of Atlantic City, et als.*, ATL-L-981-19. (581a); (583a). The *Demaio* plaintiffs are retired Atlantic City Fire Department ("ACFD") employees who retired before a settlement was reached between the Defendants and that union in 2019.

On May 23, 2019, the Court entered an Order staying these matters pending the New Jersey Supreme Court's decision in Barila v. Board of Educ., 199 A. 3d 295. (576a-577a). This case before our Supreme Court potentially impacted whether the plaintiffs in the various consolidated litigations could pursue their claims if they were members of the police unions who voted for a settlement of the First Police Matter.

On September 21, 2020, the Court granted a Consent Order in *James Armstrong v. City of Atlantic City*, Docket No. ATL-L-1490-18. (578a) Pursuant to the Consent Order, the *Armstrong* Plaintiff's litigation was consolidated with the *Vadell* Plaintiffs. Ibid. Further, Armstrong was permitted to pursue all claims raised in the *Vadell* litigation, in exchange for his dismissing with prejudice claims brought under the Law Against Discrimination. (579a).

Following our Supreme Court's decision in Barila, on June 8, 2021, the Honorable Julio L. Mendez, A.J.S.C. issued an Order and written opinion regarding Defendants' motion to dismiss. (581a-622a). In this decision, Judge Mendez granted Defendants' motion to dismiss with prejudice as to Plaintiffs Reigal, Pronovost, String, Madamba, and Jones. (581a-582a). In reaching this holding, the Trial Court inaccurately believed that these Plaintiffs were still members of the union who participated in the ratification of the settlement agreement to the First Police Matter on December 14, 2017. (617a-618). The Trial Court reached this conclusion because it inaccurately wrote that the settlement occurred on June 7, 2017. Ibid. The Trial Court denied Defendants' motion to dismiss with respect to the *Vadell* Plaintiffs because they retired before the settlement agreement was ratified. Ibid.

On June 27, 2021, Plaintiffs filed a motion to reconsider the Court's June 8, 2021 Order. (623a). In support of this motion, Plaintiffs attached a certification from Juliann Schwenger, an Atlantic City police officer, and as of June 27, 2021, the

President of PBA Local 24. (625a). Schwenger certified that on December 14, 2017 the union members voted via email on whether to ratify the settlement agreement of the First Police Matter. (626a). Further, she certified that only active employees (not retirees) were allowed to participate. Ibid. Schwenger further certified that all of the Vadell Plaintiffs had retired before the ratification vote. Ibid. On July 15, 2021, Defendants filed a cross-motion for reconsideration of the Court's June 8, 2021 Order partially granting their motion to dismiss. (627a).

On October 25, 2021, the Trial Court granted Plaintiffs' motion and permitted Plaintiffs Armstrong, Reigal, Pronovost, String, Madamba, and Jones's claims to proceed to discovery. (629a-630a). In its written memorandum, the Trial Court acknowledged that it based its June 8, 2021 decision on there being a settlement of the First Police Matter on June 7, 2017. (745a). However, ratification of the agreement took place on December 14, 2017. Ibid. Further, the Trial Court denied Defendants' motion for reconsideration without prejudice. (630a).

Following motion practice, the parties engaged in discovery, including responding to document demands, interrogatories, and admissions. (769a-863a); (872a-986a). On February 23, 2022, the Honorable John C. Porto, J.S.C. entered a case management order outlining due dates for various aspects of discovery. (649a). Judge Porto entered additional case management orders extending the discovery end date on April 28, 2023 (652a), October 5, 2023 (655a), and October 5, 2023 (655a).

Since the case moved into discovery, the parties have exchanged thousands of pages of written discovery. (990a).

On November 15, 2023, Plaintiffs filed a motion for leave to amend their Complaint. (658a). Plaintiffs sought to add citations to the New Jersey State Constitution of 1947. Specifically, Plaintiffs sought to add a citation to Article IV, Section VII, paragraph 3 of the New Jersey Constitution (New Jersey's Contract Clause) to the CRA Count. (699a). Further, Plaintiffs sought to add a Count Six, which asserts direct violations of the New Jersey Constitution without reference to the CRA.[2] (702a). On December 15, 2023, after the motion had been fully briefed, the Law Clerk to the Judge Porto wrote to the parties and requested the following:

> Regarding the above captioned matter, the Court requests defense counsel provide additional briefing on "futility." Specifically, the Court requests further briefing on R. 1:36-3 and whether it applies to this matter. If so, provide why or why not based on the parties and issues previously addressed. Please also brief the overarching goal of the M.S.R.A. Finally, please provide additionally briefing on the application or non-application of res, judicata, collateral estoppel, and the single controversy doctrine." (738a).

Instead of filing a sur-reply to Plaintiff's motion as directed by the Court, on December 29, 2023, Defendants filed a motion for reconsideration of their motion to dismiss for failure to state a claim, which was initially filed almost four years

[2] In their motion to dismiss for failure to state a claim upon which relief may be granted, Defendants had argued sovereign immunity as a defense to Plaintiffs' CRA claims. Plaintiffs sought to add direct constitutional claims to counter that argument.

earlier on January 11, 2019. (739a). This was Defendants' second motion to reconsider the Court's decision to deny their motion to dismiss.

On February 8, 2024, during oral argument, Plaintiffs' counsel repeatedly brought up that Plaintiffs have constitutional arguments to support their claims. (1T13:3-21; 1T14:7-15:2; 1T20:6-22; 1T21:3-15; 1T22:1-24; 1T22:25-23:10).[3] Plaintiffs also made constitutional arguments in opposition to the initial motion to dismiss for failure to state a claim upon which relief can be granted. (592a-593a).

On February 16, 2024, the Trial Court filed an Order denying Plaintiffs' motion to amend their complaint, granting Defendants' motion for reconsideration, and dismissing Plaintiffs' Complaint with prejudice. (1001a). On the same date, the Trial Court filed its Written Decision. (1002a-1031a). The Court held that the MSRA permitted Defendants to cap terminal leave at $15,000. (1029a). The Court also based its decision in part upon the fact that Governor Murphy amended and extended the MSRA in June 2021. Ibid. Further, the Court found that "a reasonableness analysis is not required." Ibid. The Trial Court also expressly stated that there was *no* "reason to consider the Plaintiffs' attorney's arguments that the Defendants act[ed] unconstitutionally." Ibid.

[3] Plaintiffs refer to this transcript as "1T."

With respect to Plaintiffs' motion to amend the Complaint, the Court asserted Plaintiffs sought to add a "contract theory," which it concluded was denied based upon a futility argument. Ibid. However, Plaintiffs' already pled contract and quasi-contract theories in their initial Complaint. (34a-35a & 38a-39a). Further, the Court denied Plaintiffs' motion to amend regarding the direct constitutional claims, in part, because they were supposedly duplicative of the CRA claims. (1030a). The Court further mischaracterized Plaintiffs' constitutional claims as only arising out of an alleged violation of their rights to collectively bargain. Ibid.

On February 22, 2024, the Trial Court denied Plaintiffs' motion to extend the discovery end date. (1039a). On March 18, 2024, Plaintiffs filed their Notice of Appeal. (1a).

LEGAL ARGUMENT

I. THE TRIAL COURT MISAPPLIED THE MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM STANDARD AND, AS SUCH, THE COURT SHOULD REMAND THIS MATTER FOR THE COMPLETION OF DISCOVERY AND TRIAL (1025a-1031a).

This Court applies a *de novo* standard of review to a Trial Court order dismissing a complaint under R. 4:6-2. Arsenis v. Borough of Bernardsville, 476 N.J. Super. 195, 205 (App. Div. 2023). The appellate decision is governed by the same standards as applied by the Trial Court. Donato v. Moldow, 374 N.J. Super. 475, 483 (App. Div. 2005).

In determining the adequacy of a pleading under R. 4:6-2(e), the Court must only determine if a cause of action is "suggested" by the facts. Printing Mart v. Sharp Electronics, 116 N.J. 739, 746 (1989) *quoting* Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988). The Court "searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Id., *quoting* DiCristofaro v. Laurel Grove Memorial Park, 43 N.J. Super. 244, 252 (App. Div. 1957). A motion to dismiss brought under R. 4:6-2(e) at the onset of litigation has "extraordinarily limited range" and "is granted only in the rarest instances." Geyer v. Faiella, 279 N.J. Super. 386, 389 (App. Div. 1995), *certif. denied*, 141 N.J. 95 (1995). Additionally, if such a motion is granted, it should be without prejudice. Ibid.

"At this preliminary stage of the litigation the Court is not concerned with the ability of [Plaintiff] to prove the allegation[s] contained in the complaint." Ibid. All allegations pled in the Complaint here are assumed true, and Plaintiff is entitled to "all reasonable factual inferences that those allegations support." F.G. v. MacDonell, 150 N.J. 550, 556 (1997). "If a generous reading of the allegations merely suggests a cause of action, the complaint will withstand the motion." Ibid.

Under this standard, the Court's examination of the allegations contained in Plaintiff's Complaint is "at once painstaking and undertaken with a generous and

hospitable approach." Printing Mart, 116 N.J. at 746. The Court's test at this preliminary stage of the litigation is simply "whether a cause of action is suggested by the facts." Green v. Morgan Props., 215 N.J. 431, 451-52 (2013).

Under this extraordinarily strict standard, the Trial Court erred when it dismissed with prejudice Plaintiffs' Complaint and denied their motion for leave to amend their Complaint. For the reasons set forth below, this Court should grant Plaintiffs' appeal and remand this matter for the completion of discovery and trial.

II. PLAINTIFFS SUFFICIENTLY PLED CONSTITUTIONAL LAW CLAIMS AGAINST DEFENDANTS, AND THE TRIAL COURT ERRED WHEN IT DISMISSED THESE CLAIMS WITHOUT ANALYSIS. (1029a-1031a); (1T13:3-21; 1T14:7-15:2; 1T20:6-22; 1T21:3-15; 1T22:1-24; 1T22:25-23:10).

As set forth above, the Trial Court granted Defendants' motion for reconsideration without considering Plaintiffs' constitutional claims. (1029a). No analysis was provided by the Trial Court regarding whether the facts Plaintiffs pled in their Complaint "suggested" causes of action under the CRA or direct constitutional violations. Printing Mart, 116 N.J. at 746. Based upon the Trial Court's failure to conduct this analysis, this Court should grant Plaintiffs' appeal. However, as set forth at greater length below, even if this Court decides to analyze the merits of these claims, this appeal should be granted because the Plaintiffs have pled "the fundament of a cause of action" as required by the motion to dismiss standard. Ibid.

Our Supreme Court has recognized the CRA's "broad remedial purpose." Owens v. Feigh, 194 N.J. 607, 614 (2008).[4] In this manner, the CRA is analogous to the Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1, *et seq*., and the Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1, *et seq*. *See* Donelson v. DuPont Chambers Works, 206 N.J. 243, 257 (2011). "In 2004, the Legislature adopted the CRA for the broad purpose of assuring a state law cause of action for violations of state and federal constitutional rights and to fill gaps in statutory anti-discrimination." Owens, 194 N.J. at 614.

The CRA provides in subsections a, b, c, and e of N.J.S.A. 10:6-2 for protections of rights, privileges, and immunities secured by the New Jersey Constitution and specifically provides for a cause of action for any deprivation, interference, or other violation of those rights. Additionally, subsection d of N.J.S.A. 10:6-2 specifically provides that an action brought pursuant to the Act may be filed in New Jersey Superior Court.

The Courts have recognized two types of claims under the CRA: a claim for when one is "deprived of a right" and a claim for when one's "rights are interfered with by threats, intimidation, coercion, or force." Felicioni v. Admin. Office of Courts, 404 N.J. Super. 382, 400 (App. Div. 2008). In this matter, Plaintiffs alleged

[4] The Third Circuit has held that the New Jersey Constitution offers broader protections than the Federal Constitution. Monteiro v. City of Elizabeth, 436 F. 3d 397, 404 (3d Cir. 2006).

that they were deprived of their rights in violation of the CRA based upon several theories under the New Jersey Constitution as set forth below.

A. Defendants violated the Takings Clause of the New Jersey Constitution by depriving Plaintiffs of their previously vested property rights. (1029a-1031a); (1T13:3-21; 1T14:7-15:2; 1T20:6-22; 1T21:3-15; 1T22:1-24; 1T22:25-23:10).

"Under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, paragraph 20 of the New Jersey Constitution, property owners must be paid just compensation for government takings." Mansoldo v. State, 187 N.J. 50, 58 (2006). Further, Article I, paragraph 20 of the New Jersey Constitution provides that "private property shall not be taken for public use without just compensation." N.J. Const., Art. I, ¶20. Under our State Constitution, the government is prohibited "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Greenway Development Co. v. Borough of Paramus, 163 N.J. 546, 553 (2000).

Significantly, the United States Supreme Court has ruled that the Takings Clause applies to personal property. Horne v. Dept. of Agriculture, 135 S. Ct. 2419, 2425-2426 (2015). In rejecting the Government's argument that this constitutional protection only applied to real property, such as in the context of eminent domain, Justice Roberts, writing for the Court, explained, "[t]he Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home." Horne, 135 S. Ct. at 2426.

As set forth above, the Trial Court did not engage in any constitutional analysis of Plaintiffs' claims either with respect to Plaintiffs' motion to amend their Complaint or Defendants' cross-motion for reconsideration. Presumably, in their opposition brief, Defendants will first argue that this was not a governmental taking by disputing Plaintiffs' assertion that they have property rights in their terminal leave pay. However, as demonstrated by the case law below, as retirees, Plaintiffs had vested property interests. This contrasts with the Atlantic City law enforcement officers who continued to work for the city. Those employees did not have vested property interests in terminal leave because of their ongoing employment.

In In Matter of County of Atlantic, 230 N.J. at 255-56, our Supreme Court held that public employees were contractually entitled to scheduled salary increases even after the CNAs at issue had expired where there was clear and unambiguous contractual language that the CNA would continue to remain in effect after the expiration of the contract. One of the CNAs at issue in In Matter of County of Atlantic contained language that "[t]his agreement shall remain in full force and effect during the collective negotiations between the parties beyond the date of expiration set forth herein until the parties have mutually agreed on a new agreement." 230 N.J. at 255. Our Supreme Court ruled that the public employers were bound by the terms of the expired CNAs. Id. at 257.

Likewise, in this matter, the most recent expired CNA has a section titled "Duration." (91a). This section, Article XLIV, provides as follows:

> This Contract shall be in full force and effect from January 1, 2013 until midnight, December 31, 2015.
>
> The parties agree that negotiations for a successor Agreement modifying, amending or altering the terms and provisions of this Agreement shall commence the first week of September 2015. In the event no successor Agreement is completed before December 31, 2015, the present Contract will continue in full force. (91a-92a).

Defendants cannot legitimately argue that Plaintiffs lack contractual rights based upon the expiration of the CAN. This issue has been squarely decided in Plaintiffs' favor by our Supreme Court.

Presumably, Defendants will next argue in their opposition brief that the MSRA and the State's takeover of Atlantic City somehow authorized Defendants to revoke Plaintiffs' vested deferred compensation. However, this Court is bound by Appellate Division precedent to reject Defendants' argument.

In binding case law, the Court has held that a State takeover statute cannot deprive public employees of previously vested deferred compensation. In Caponegro, 330 N.J. Super. at 151, the plaintiffs were former senior staff members of the Newark Board of Education. On July 12, 1995, the State took over the Newark public school system pursuant to N.J.S.A. 18A:7A-34 to -52.[5] Caponegro, 330 N.J.

[5] This statute is titled "Creation of school district under full State intervention upon determination of failure of local school district." Pursuant to this statute, the

Super. at 150. Due to the State takeover, the plaintiffs' employment was terminated. 330 N.J. Super. at 151. In addition to contractual claims of continued employment, the plaintiffs sought deferred compensation, including accumulated vacation and sick days. Id. at 155.

Some of the Caponegro plaintiffs' positions were abolished pursuant to N.J.S.A. 18:7A-44a (Abolishment of central administrative and supervisory staff; reorganization and evaluation). This section of the statute provided in pertinent part:

> Notwithstanding any other provision of law or contract, the positions of the district's chief school administrator and those executive administrators responsible for curriculum, business and finance, and personnel may be abolished upon create of the school district under full State intervention. The affected individuals shall be given 60 days' notice of termination or 60 days' pay. The notice of payment shall be in lieu of any other claim or recourse against the employing board of the school district based on law or contract.

The Appellate Division found that even if the plaintiffs had a contractual right to further employment, the takeover statute substantially impaired those rights, and the Legislature had a significant and legitimate public purpose and was based upon reasonable conditions related to an appropriate governmental objective. Caponegro, 330 N.J. Super. at 154-55. This, however, did not end the Court's inquiry.

Legislature authorized the Commissioner of Education, after a determination that a local school district has failed to assure a thorough and efficient system of education, to create a school district under full State intervention.

There remained the issue of whether the plaintiffs were entitled to accrued deferred compensation. The Caponegro Court then went on to explain the difference between this remaining issue before the Court and its finding that the Legislature could impair the plaintiffs' contract rights to continued employment as follows:

> [a]lthough we are therefore persuaded that there was no constitutional prohibition against the abolition of petitioners' positions and their immediate termination, whether or not they had contracts, we are also satisfied that this holding does not resolve the issue of the conditions necessarily attendant upon their termination. **There is indeed a distinction that must be drawn between a prospectively effective contract nullification on the one hand and, on the other, the abrogation of previously vested property rights. We are of the view that petitioners were entitled to the same deferred compensation – that is, their accumulated vacation and sick days – that they would have received had they terminated their employment voluntarily**. This compensation, we conclude, could neither be constitutionally withheld nor was intended by the takeover statute to be withheld. Id. at 155 (emphasis added).

The Appellate Division held that N.J.S.A. 18:7A-44a did not abrogate the plaintiffs' contractual right to payment on termination for accumulated vacation and sick days. 330 N.J. Super. at 151. The Caponegro Court expounded on its holding as follows: "to the extent that the pre-takeover contracts of employment … require payment of this deferred compensation upon termination of employment, petitioners are entitled to receive it in the same manner as if their employment had been voluntarily terminated." Id. at 157. Further, the Court ruled that a "contractual right to compensable accumulated leave is typically characterized as deferred compensation since it constitutes remuneration for services already rendered and, to

the extent already earned, is not subject to unilateral divestment by the employer." Id. at 156.[6]

Further, in Matter of School Bd. Of Morris, 310 N.J. Super. 332, 345-47 (App. Div. 1998), cited approvingly by Caponegro, the Appellate Division held that a retroactive cap on vested or accumulated sick leave compensation could not be upheld absent a knowing and intentional waiver by the persons adversely affected. 310 N.J. Super. 332, 347-48 (App. Div. 1998). In reaching this ruling, the Court observed that sick leave pay is a form of deferred compensation that has "long been considered 'additional compensation upon retirement' subject to mandatory negotiation." 310 N.J. Super. at 340 (*quoting* Maywood Educ. Ass'n Inc. v. Maywood Bd. Of Educ., 131 N.J. Super. 551, 555 (Ch. Civ. 1974)).

Finally, in Owens v. Press Publishing Co., 20 N.J. 537 (1956), our Supreme Court found that the right to severance pay survived the expiration of a collective bargaining agreement. Specifically, the Owens Court held:

> Deferred compensation 'was not conditioned upon the employee's discharge from service within the term of the collective bargaining agreement.' The Court reasoned that 'once the right came into being it … survive[d] the termination of the agreement.' In contrast, the Court concluded that the plaintiffs' claims for severance pay allegedly earned in the intervening period between expiration of the collective

[6] *See also* NJ Ass'n of School Business Officials v. Davy, 409 N.J. Super. 467 (App. Div. 2009) (distinguishing Caponegro from statutorily authorized regulation at bar which had no impact on any contractual right to payments for unused leave accumulated under prior contracts).

bargaining agreement and their respective discharge was 'ill-founded.'" 20 N.J. at 348-49.

The above cases stand for the proposition that Defendants cannot unilaterally revoke vested deferred compensation in the form of accumulated sick days. Additionally, by the plain language of the CNAs, the parties intended for employees to accrue "terminal leave" by way of accumulating unused sick time, which the employees would be entitled to upon retirement as a lump sum. (74a). Defendants' revocation of Plaintiffs' previously vested property rights was a constitutional violation of the Takings Clause.[7]

i. Plaintiffs Gavin and Maier both retired before Defendants' initial effective date of March 15, 2017. (1029a-1031a); (1T13:3-21; 1T14:7-15:2; 1T20:6-22; 1T21:3-15; 1T22:1-24; 1T22:25-23:10).

With respect to Plaintiffs Gavin and Maier, these Plaintiffs retired before the initial effective date for the State's change to the terms and conditions of their employment. On March 13, 2017, Chiesa issued a letter providing members of the ACPD with notice that the terms and conditions of their employment, including their entitlement to terminal leave, would be altered on March 15, 2017. (31a ¶103); (212a). Both Plaintiff Gavin (retirement date February 1, 2017) and Plaintiff Maier (retirement date March 14, 2017) retired before Chiesa's proposed Notice of

[7] Using the same reasoning, Plaintiffs Reigel, Armstrong, and Iacovone were unlawfully denied compensation for performing the duties of a sergeant following their promotions in 2016 up to the dates of their respective retirements.

Changes in the Terms and Conditions of Employment was planned to go into effect and before PBA Local 24's lawsuit (i.e. the First Police Matter).[8] (28a ¶91 & 23a ¶54).

At the time of their retirements, Plaintiff Gavin and Plaintiff Maier had vested property rights to their terminal leave. Consistent with the reasoning in Caponegro, 330 N.J. Super. at 155 involving a similar state takeover statute, these Plaintiffs are entitled to deferred compensation notwithstanding the State's authority pursuant to the MRSA to prospectively nullify contractual terms. Based upon the foregoing, the Trial Court erred when it reconsidered Defendants' R. 4:6-2e motion.

ii. Plaintiffs Hackney, Armstrong, Vadell, and Iacovone retired before the Trial Court lifted its temporary restraints against Defendants on June 7, 2017, which was Defendants' second implementation date. (1029a-1031a); (1T13:3-21; 1T14:7-15:2; 1T20:6-22; 1T21:3-15; 1T22:1-24; 1T22:25-23:10).

Defendants' initial plan had been to implement the powers of the MRSA to alter the terms and conditions of Atlantic City police officers' employment on March 15, 2017. (31a ¶103); (212a). That did not happen. Instead, attorneys on behalf of PBA Local 24 filed a Superior Court lawsuit on March 15, 2017. (768a). Therein, PBA Local 24 sought to prevent the unilateral imposition of the modifications to the collective bargaining agreement. Ibid. Pursuant to Judge Mendez's Order, all

[8] Gavin, who retired on February 1, 2017 (28a), was separated from Atlantic City for more than a month before Chiesa issued his Notice of Implementation memorandum on March 13, 2017 to be effective March 15, 2017. (31a ¶103); (212a).

temporary restraints issued on March 15, 2017 remained in effect until the close of business June 6, 2017. (263a). On June 7, 2017, the State issued a new notice of implementation date of June 7, 2017. (31a ¶105); (217a).

While the Trial Court's temporary restraints remained in effect, four additional Plaintiffs retired from their employment with the city: Hackney (4/1/17, 27a ¶83), Armstrong (4/12/17, 838a), Vadell (5/1/17, 19a ¶21), and Iacovone (6/1/17, 26a ¶77). All four of these Plaintiffs had vested property rights to their terminal leave before the Defendants' new June 7, 2017 implementation date. As such, it was a constitutional violation when they were denied their terminal leave. Based upon the foregoing, the Trial Court erred when it reconsidered Defendants' R. 4:6-2e motion.

iii. Plaintiffs String, Riegel, Pronovost, Madamba, and Jones retired while the parties to the First Police Matter negotiated a settlement of that lawsuit, which was ultimately settled on December 14, 2017. (1029a-1031a); (1T13:3-21; 1T14:7-15:2; 1T20:6-22; 1T21:3-15; 1T22:1-24; 1T22:25-23:10).

While Defendants announced that they were implementing changes to the collective negotiations agreements between the police unions and the city as of June 7, 2017, many of the supposed changes stated in Chiesa's June 7, 2017 Implementation Memorandum were ultimately not enacted. *Compare* (217a-219a) & (230a-234a). Instead of Defendants unilaterally dictating what changes were going to be made, the parties to the First Police Matter engaged in settlement discussions with retired Superior Court Judge Williams on October 10, 2017 and

November 17, 2017 which resulted in an amicable resolution of the litigation. (230a).

As part of the settlement agreement of the First Police Matter, the parties agreed to modifications of the June 7, 2017 Implementation Memorandum, many of which terms were inured to the benefit of the police unions and their membership. *Compare* (217a-219a) & (230a-234a). For instance, the Defendants negotiated a provision granting PBA Local 24's membership 110 hours of Kelly time per calendar year. (230a ¶2). The settlement agreement defined Kelly time as "the contractual hourly increment of time off for actual hours worked not to exceed one hundred ten (110) hours per calendar year." Ibid.

Even more notably, the parties to the settlement agreement agreed that there would be an anticipated savings to the municipal budget of $2.261 million dollars due to police officer retirements. (230a ¶3). Consequently, *the parties agreed to allocate this anticipated $2.261 million dollars to the 252 currently employed law enforcement officers actively employed as of the date of this agreement*. Ibid. The agreement further provided, "PBA Local 24 and SOA will provide a proposed distribution of these additional monies to each of the actively employed law enforcement officers which is subject to review and approval by both the City and the State Designee, which approval shall not be unreasonably withheld." Ibid.

Further, this additional money was agreed to be added to each police officer's base salary and is pensionable. Ibid.

The rank-and-file officers were not the only ones who benefited from this anticipated $2.261 million budget savings. While the June 7, 2017 Implementation Memorandum directed that effective June 7, 2017 the current rank differential upon promotion from police officer to sergeant was eliminated (222a), the settlement agreement awarded all currently employed sergeants with an increase in their base salaries to $100,000 per year. (231a ¶3).

In addition to the foregoing benefits bestowed to actively employed law enforcement officers, the State and Atlantic City conceded a directive from the June 7, 2017 Implementation Memorandum that reduced police officers' workers' compensation payments. (231a ¶5). On June 7, 2017, DLGS State Designee Chiesa directed that effective that day Atlantic City police officers would receive only 70% of their weekly wages while on workers' compensation. (218a) Thereafter, in the settlement agreement, "[t]he parties agree that employees will receive one hundred percent (100%) of his/her pay when absent due to approved workers' compensation leave." (231a ¶5).

In another provision of the settlement agreement, Defendants agreed to review the amount of overtime for any significant savings and take any such significant savings into account when making determinations regarding salary increases the

following year. (232a ¶8). Finally, Defendants agreed to indemnify and hold harmless PBA Local 24 and the SOA in the event of legal actions by retired police officers seeking terminal leave above $15,000. (232a ¶9).

In its opinion, the Trial Court repeatedly cited to Defendants' decision to cap terminal leave at $15,000. (1029a-1030a). Plaintiffs agree that Defendants' decision to cap terminal leave at $15,000 should be the trigger date for when their property rights were vested. However, Defendants did not agree to this $15,000 cap until the parties to the First Police Matter settled that litigation. This was after all of Plaintiffs retired from their employment with Atlantic City.[9] As such, Plaintiffs String, Riegel, Pronovost, Madamba, and Jones had vested property rights to their terminal leave, and it was a constitutional violation to deny them this property.

Based upon the foregoing, the Trial Court erred when it reconsidered Defendants' R. 4:6-2e motion.

B. Defendants violated the Contracts Clause of the New Jersey Constitution by depriving Plaintiffs of their previously vested property rights. (1029a-1031a); (1T13:3-21; 1T14:7-15:2; 1T20:6-22; 1T21:3-15; 1T22:1-24; 1T22:25-23:10).

Both the New Jersey and Federal Constitutions prohibit the passage of laws impairing the obligations of contracts. Burgos v. State, 222 N.J. 175, 193 (2015).

[9] Plaintiffs concede that if they were employees of Atlantic City and active union members at the time that the First Police Matter was settled (they were not), they would be bound by the $15,000 cap that the parties to that lawsuit negotiated pursuant to Barila v. Board of Educ. of Cliffside Park, 241 N.J. 595 (2020).

The Federal Constitution's Contract Clause, Article I, Section 10, Clause 1, provides that "[n]o State shall … pass any … Law impairing the Obligation of Contracts." U.S. Const., art. I, §10, cl. 1. Likewise, the New Jersey Constitution, Article 4, Section 7, Paragraph 3, holds that "[t]he Legislature shall not pass any … law impairing the obligation of contractors, or depriving a party of any remedy for enforcing a contract which existed when the contract was made." These constitutional protections provide "parallel guarantees." Burgos, 222 N.J. at 193.

When determining whether there was a violation of the Federal or State Contract Clauses, a court must undertake a three-part analysis: (1) whether the law has operated as a substantial impairment of a contractual relationship; (2) whether the government entity, in justification, had a significant and legitimate public purpose behind the regulation; and (3) whether the impairment is reasonable and necessary to serve this important public purpose. United Steel Paper v. Gov't of Virgin Islands, 842 F. 3d 201, 205 (3d Cir. 2016) (*citing* Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411-13 (1983)); Nieves v. Hess Oil V.I. Corp., 819 F. 2d 1237, 1243 (3d Cir. 1987).

To determine whether there was a "substantial impairment of a contractual relationship," courts analyze three threshold inquiries: (1) whether there is a contractual relationship; (2) whether a change in law has impaired that contractual relationship; and (3) whether the impairment is substantial. Transport Workers

Union of Am., Local 290 v. S.E. Pa. Transp. Auth., 145 F. 3d 619, 621 (3d Cir. 1998); *see also* Burgos, 222 N.J. at 193.

Further, the Court will examine whether the law at issue has a legitimate and important public purpose. Transport Workers Union of Am., Local 290, 145 F. 3d at 621. A legitimate public purpose is one aimed at remedying a broad and general social or economic problem. United Steel Paper, 842 F. 3d at 211. Finally, the Court must determine whether the impairment was necessary. Ibid. The Court determines whether the State "consinder[ed] impairing the obligations of its contracts on a par with other policy alternatives" and "imposed a drastic impairment when an 'evident and more moderate course would serve its purposes equally well.'" Ibid. (internal quotations omitted).

In United Steel Paper, 842 F. 3d at 204-05, in response to a severe budget crisis, the Virgin Islands enacted the Virgin Islands Economic Stability Act of 2011 ("VIESA"), which reduced the salaries of most government employees by 8%. This reduction occurred despite the fact many government employees were covered by a collective bargaining agreement that established their salary and benefits. Ibid. In reversing the District Court's ruling, the Third Circuit found that the enactment of VIESA violated the Contract Clause of the United States Constitution. Ibid.

In reaching its holding, the United Steel Paper Court found that the collective negotiations agreement established a contractual relationship, and the union

employees had a reasonable expectation that they would benefit from their bargain in the absence of mutual assent. Id. at 211. Further, the Court found that since the State was a contracting party, "its legislative judgment is subject to stricter scrutiny than when the legislation affects only private contracts." Id. at 212 (*quoting* Nieves, 819 F. 2d at 1249).

At this stage of its inquiry, the Court set forth a two-part test to determine whether the statute was necessary: (1) the Court "must ensure that the Government did not consider impairing the obligations of its contracts on a par with other policy alternatives;" and (2) "whether the Government imposed a drastic impairment when an evident and more moderate course would serve its purposes equally well." Id. at 212. If either prong is satisfied, the legislation is unconstitutional.

Further, an act of legislation may be declared in violation of the Contract Clause if it is unreasonable. An impairment "is not a reasonable one if the problem sought to be resolved by any impairment of the contract existed at the time the contractual obligation was incurred." Id. at 213 (*quoting* Univ. of Haw. Prof'l Assembly v. Cayetano, 183 F. 3d 1096, 1107 (9th Cir. 1999)).

In this matter, the government is a contracting party, and as such, the Legislature's judgment is subject to stricter scrutiny than when the legislation only affects private contracts. Nieves, 819 F. 2d at 1249. Further, the MSRA operates as an impairment of a contractual relationship between Atlantic City and Plaintiffs

based upon the arguments set forth in *Point II, A* above. This impairment was substantial as Plaintiffs have been deprived of $750,928.99 in accrued deferred compensation. (35a ¶131).

Defendants had the opportunity to take steps in assisting Atlantic City's financial stabilization by obtaining more savings for the City through the diminishment of the prospective contractual terms and conditions of acting police officers that remained employed with Atlantic City. As active police officers, those employees could either recoup their diminished earnings over time through efforts such as overtime, or they could mitigate any diminishment in pay by seeking employment with another municipality that offered higher wages. Instead, Defendants took $2.261 million in savings due to police officer retirements and agreed to distribute it to active officers. This is an instance where a few Atlantic City police officers (Plaintiffs), were required to bear the public burden which in all fairness and justice should have been borne by the public as a whole.

Further, the contractual impairment is unreasonable because the problem sought to be resolved by the impairment of Plaintiffs' contract rights existed at the time the contractual obligation was incurred. United Steel Paper, 842 F. 3d at 213. The State installed a monitor to supervise Atlantic City prior to the negotiation of the most recent CNA which contained provisions for terminal leave with pay. (92a); (416a-417a).

There are facts that directly contradict Defendants' assertions that the elimination of Plaintiffs' terminal leave pay was a reasonable use of State power to stabilize the finances of Atlantic City. First, in November 2018, Defendants paid out sick leave over $15,000 to several Atlantic City non-law enforcement officer employees who retired and **did not even have any contractual rights to sick leave payments**. For instance, n June 1, 2016, Irving Jacoby, who worked for Administration, retired from Atlantic City. (886a, Rogs., #44-45). On November 2, 2018, Irving Jacoby received a retiree sick time payout of $33,469.47. (866a, Rogs., #46-47). Irving did not have a written contractual agreement with Atlantic City to receive a retiree sick time payout. (886a-887a, Rog., #48).

Second, in November 2018, Defendants paid Joanne Jiacopello's sick time over $15,000. Joanne Jiacopello was Principal Account Clerk. (887a-888a, Rogs., #52-53). Jiacopello retired from Atlantic City on July 1, 2016. (888a, Rogs., #54). On November 2, 2018, Jiacopello received a retiree sick time payout of $95,164.92. (888a, Rogs., #55-56). Jiacopello did not have a written contractual agreement with Atlantic City to receive a retiree sick time payout. (888a-889a, Rogs., #57).

Third, in November 2018, Defendants paid Eleanor Derry over $15,000 in sick time payouts. On October 1, 2016, human resources employee Eleanor Derry retired. (889a-890a, Rogs., #62-63). Derry likewise did not have a written

contractual agreement but she received a sick time payout of $26,655.73. (890a, Rogs., #64 & #65).

Fourth, in an interrogatory, Plaintiffs asked Defendants to identify any Atlantic City employees who received payments over $15,000 for sick time terminal leave pay who retired between the date of the enactment of the MSRA and December 31, 2017. (898a-899a, Rogs., #2). In response, Defendants stated the following: "A.D., with a date of hire of August 20, 1979, and a retirement date of December 2016 received a terminal leave payout of $44,950.18." Ibid.

In addition to A.D., Defendants also paid Douglas Brown, who retired from the ACPD on April 1, 2016, a retiree sick time payout of $76,095.13 on November 2, 2018. (883a-884a, Rogs., #33, #34 & #35). Further, Robert Berg, who retired from the ACPD on April 1, 2016, received a retiree sick time payout of $98,451.86 on November 2, 2018. (884a-885a, Rogs., #37, #38 & #39). ACFD employee Jonas Haws, who retired from Atlantic City on March 1, 2016, received a retiree sick time payout of $27,818.38 on November 2, 20218. (885a, Rogs., #40-41). Further, on, Kevin Klepadio, who retired from the ACFD on June 1, 2016, received a sick time payout of $21,181.20. (887a, Rogs., #49, #50 & #51). Finally, the Court should consider the eye-popping sick leave payout Defendants bestowed upon Charles

Labarra. ACFD retiree Labarra received a retiree sick time payout of $143,093.28 on November 16, 2018. (889a, Rogs., #58, #60, & #61).[10]

The above-referenced facts directly rebut Defendants' assertions that Atlantic City could no longer sustain terminal leave (i.e., sick leave) payments over $15,000. These facts demonstrate that Defendants' decision to impair Plaintiffs' contractual rights was not reasonable or necessary. Based upon the foregoing, the Trial Court erred when it reconsidered Defendants' R. 4:6-2e motion.

C. Defendants violated the Equal Protection Clause of the New Jersey Constitution by depriving Plaintiffs of their previously vested property rights, allowing pre-November 9, 2016 retirees to receive uncapped benefits, and awarding other post-November 9, 2016 retirees deferred compensation well in excess of the $15,000 cap. (1029a-1031a); (1T13:3-21; 1T14:7-15:2; 1T20:6-22; 1T21:3-15; 1T22:1-24; 1T22:25-23:10).

The Fourteenth Amendment's Equal Protection Clause prohibits a state from denying "any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. 14, §1. "The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.'" Plyler v. Doe, 457 U.S. 202, 216 (1982) (*quoting* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). However, the "legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate

[10] Labarra's retirement date is an issue that Plaintiffs seek to clarify as part of the remaining discovery to be conducted before dispositive motion practice.

competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill." Plyler, 457 U.S. at 216. As such, "[i]f a statutory distinction has some reasonable basis, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." Whitaker v. DeVilla, 147 N.J. 341, 358 (1997).

New Jersey Courts have found that the concept of equal protection is implicit in Article I, Paragraph 1. McKenney v. Byrne, 82 N.J. 304, 316 (1980); Guaman v. Velez (Guaman I), 421 N.J. Super. 239, 267 (App. Div. 2011). The analysis under a New Jersey equal protection challenge differs from the federal analysis, but "the tests weigh the same factors and often produce the same result." Sojourner A. v. N.J. Dep't of Human Servs., 177 N.J. 318, 333 (2003). Under the New Jersey Constitution, Courts apply "a more flexible balancing test that considers three factors: '(1) the nature of the right asserted; (2) the extent to which the statute intrudes upon that right; and (3) the public need for the intrusion.'" Guaman I, 421 N.J. Super. at 267.

The MSRA violates Plaintiffs' equal protection rights under the New Jersey Constitution. Defendants have taken the arbitrary position that post-November 9, 2016 retirees are subject to a terminal leave cap of $15,000. (231a-232a); (238a-239a). However, pre-November 9, 2016 retirees are entitled to uncapped terminal leave. Ibid. Some post-November 9, 2016 retirees received deferred compensation

payments either well in excess of (i.e., $150,000) or comparable to (i.e., $93,286.32 & $57,716.54) what Plaintiffs seek as part of this lawsuit. (418a-421a). Further, **after** November 9, 2016, Defendants made approximately 18 payments to sworn law enforcement of accrued vacation leave that were in excess of $15,000, with some payments in excess of $45,000. (422a-427a). Based upon the foregoing, the Trial Court erred when it reconsidered Defendants' R. 4:6-2e motion.

D. Defendants have violated Plaintiffs' rights to Substantive and Procedural Due Process under the New Jersey Constitution by depriving Plaintiffs of their previously vested property rights. (1029a-1031a); (1T13:3-21; 1T14:7-15:2; 1T20:6-22; 1T21:3-15; 1T22:1-24; 1T22:25-23:10).

The Fourteenth Amendment to the Federal Constitution provides: "No State shall make or enforce any law which shall … deprive any person of life, liberty or property, without due process of law." The New Jersey Constitution Article I, par. 1 also protects a person's right to acquire, possess, and protect property. Retroactive legislation that impairs or destroys a "vested right" may violate the due process clauses of the federal, U.S. Constitution amendment XIV, section 1, or state, N.J. Constitution Art. 1, ¶1, constitutions. Twiss v. State, 124 N.J. 461, 469 (1991).

In this matter, Plaintiffs have a contractual property right in the form of deferred compensation as set forth at length in *Point III, A*, (pages 29-24 above). Defendants have destroyed Plaintiffs' vested rights by way of retroactively capping

their deferred terminal pay to $15,000. Based upon the foregoing, the Trial Court erred when it reconsidered Defendants' R. 4:6-2e motion.

III. UNDER CONTRACT AND QUASICONTRACTUAL PRINCIPLES, DEFENDANTS CANNOT UNILATERALLY DIVEST PLAINTIFFS OF THEIR ACCRUED TERMINAL LEAVE. (1028a-1030a).

A. The Trial Court erred when it dismissed Plaintiffs' contract claims. (1028a-1031a).

In their Complaint, Plaintiffs assert that Defendants violated their contractual rights. (34a-35a). Plaintiffs refer the Court to *Point II, A* in which they set forth the important contractual principles set forth in In Matter of County of Atlantic, 230 N.J. 237, Caponegro, 330 N.J. Super. 148, Matter of School Bd. Of Morris, and Owens, 20 N.J. 537 that demonstrate that they are entitled to their vested deferred compensation. Based upon the holdings of those cases, the Trial Court erred when it reconsidered Defendants' R. 4:6-2e motion.

B. The Trial Court erred when it dismissed Plaintiffs' quasi-contractual claims. (1028a-1031a).

Assuming *arguendo* that the Court accepts Defendants' argument regarding the lack of formal contractual rights, then Plaintiffs are entitled to recovery under the theories of unjust enrichment and quantum meruit. Under the motion to dismiss standard pursuant to R. 4:62e, the quasi-contractual claims should be remanded to the Trial Court to finish discovery.

The elements of an unjust enrichment claim are: (1) the plaintiff expected remuneration from the defendant at the time she or he performed or conferred a

benefit on the defendant; and (2) the failure of remuneration enriched the defendant beyond its contractual rights. VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994). Quantum meruit applies when "one party has conferred a benefit on another, and the circumstances are such that to deny recovery would be unjust." Kas Oriental Rugs, Inc. v. Ellman, 394 N.J. Super. 278, 286 (App. Div. 2007). To prevail with a theory of quantum meruit, a party must establish the following: "(1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services." Starkey, Kelly, Blaney & White v. Estate of Nicolaysen, 172 N.J. 60, 68 (2000) (internal quotations omitted).

In the present matter, Plaintiffs conferred a benefit on Atlantic City by extensively limiting their use of sick time. The average Plaintiff in this litigation who worked 25 years used 4% of sick leave under the promise that if they did not use their sick time, they would be compensated for that unused time at retirement. (33a ¶116). Defendants reaped the benefits of Plaintiffs coming into work every day as well as avoiding the payment of sick time and overtime to cover Plaintiffs if they called out. (33a ¶117). Plaintiffs satisfied their end of this agreement throughout the entirety of their careers. (33a ¶118). They had a reasonable expectation of payment in lieu of using their sick time.

This same analysis is applicable to Plaintiffs Riegel's, Armstrong's, and Iacovone's claims that they were unlawfully denied compensation for performing the duties of a sergeant following their promotions in 2016 up to the dates of their retirements. In July 2016, Plaintiff Riegel was promoted to the rank of sergeant. (20a ¶29). Defendant Atlantic City owes Plaintiff Riegel compensation for performing the duties of a sergeant from June 2016 through his November 1, 2017 retirement. (20a ¶30). Plaintiff Armstrong also asserts that Defendants owe him compensation for performing the duties of a sergeant before his retirement, which includes both backpay and the loss of pension benefits. Finally, Plaintiff Iacovone was promoted to sergeant on July 5, 2016. (26a ¶74). Plaintiff Iacovone's salary was never adjusted by Defendant Atlantic City and Plaintiff is owed a retroactive salary adjustment for the work completed as a sergeant to which he was not compensated. (26a ¶75).

For the foregoing reasons, the Trial Court erred in granting the Defendants' motion for reconsideration regarding their motion to dismiss pursuant to R. 4:6-2e.

IV. THE TRIAL COURT WHEN IT DISMISSED WITH PREJUDICE PLAINTIFFS' PREROGATIVE WRIT CHALLENGE. (1030a-1031a).

Plaintiffs' Second Count of the Complaint challenges the adoption of Resolution 591 of the City of Atlantic City, which was approved on October 24, 2019 (35a-36a, ¶127-132). Challenges to municipal action are generally brought by actions in lieu of prerogative writs. *See R.* 4:69–1 to –7. A Court will overturn municipal action if it is arbitrary, capricious, or unreasonable. Charlie Brown of

Chatham v. Board of Adjustment of Chatham, 202 N.J. Super. 312, 321 (App.Div.1985); Bryant v. City of Atl. City, 309 N.J. Super. 596, 610, (App. Div. 1998).

Here, Resolution 591 (242a) is arbitrary and capricious as it violates established and vested contractual rights, the New Jersey Constitution, and the CRA. Further, Defendants' application of the MSRA was arbitrary and capricious because they engaged in conduct not authorized by the statute. In interpreting a statute, "the overriding goal is to determine as best [the court] can the intent of the Legislature, and to give effect to that intent." State v. Hudson, 209 N.J. 513, 529 (2012). The best indicator of legislative intent is "the plain language chosen by the Legislature." State v. Gandhi, 201 N.J. 161, 176 (2010). In interpreting a statute, Courts are to give the relevant language its ordinary meaning and construe it "in a common-sense manner." State in Interest of K.O., 217 N.J. 83, 91 (2014).

Further, the Court may utilize the doctrine of "expressio unis est exclusion alterius," which suggests that when items are specifically listed, those excluded were excluded purposefully. Evans v. Atlantic City Bd. Of Educ., 404 N.J. Super. 87, 91 (App. Div. 2008). Finally, Courts should "avoid interpreting a legislative enactment in a way that would render it unconstitutional." State v. Fortin, 198 N.J. 619, 630 (2009).

In this matter, by the plain language of the statute, the MSRA provides authority to prospectively nullify CNAs as well as prospectively modify wages, hours, or other terms and conditions of employment regarding employee rights arising out of expired CNAs. Absent from the statutory language of the MSRA is any explicit language that the Legislature intended to abrogate previously vested property rights, such as the deferred compensation at issue in this litigation. If it were the Legislature's intention to discharge the debts of municipalities in need of stabilization and recovery, it would have plainly stated that the MSRA "discharges," "forgives," or "absolves" debts.[11] Based upon the foregoing, the Court should grant Plaintiffs' appeal and remand this matter back to the Trial Court.

V. THE TRIAL COURT ERRED WHEN IT DENIED PLAINTIFFS' MOTION FOR LEAVE TO AMEND THEIR COMPLAINT. (1023a-1030a).

R. 4:9-1 provides that leave to file an amended pleading "shall be freely given in the interests of justice." It is well established that under the rule, leave is to be liberally granted and without consideration of the ultimate merits of the amendment. *See, e.g.,* Kernan v. One Washington Park, 154 N.J. 437, 456-57 (1998). Notably, pursuant to R. 4:9-2, the parties may even amend the pleadings to conform to

[11] The MSRA authorizes the "restructure of debts" which refers to the renegotiation of debt. N.J.S.A. 52:27BBBB-5(a)(3). In this matter, PBA Local 24 and Defendants engaged in negotiations resulting in a settlement agreement wherein the union agreed to a $15,000 cap on terminal leave in exchange for other consideration from Atlantic City and the State.

evidence at trial. The Trial Court erred in denying Plaintiffs' motion to amend as it should have been liberally granted without consideration of the ultimate merits of the amendment.

CONCLUSION

For the foregoing reasons, the Trial Court's decision to grant Defendants' cross-motion reconsideration and reverse the denial of the initial order regarding their motion to dismiss for failure to state a claim upon which relief may be granted should be reversed.

Respectfully submitted,
Sciarra & Catrambone, LLC
By: Matthew R. Curran /s/ (# 024172005)
Matthew R. Curran, Esq.

Dated: August 19, 2024

----------X

JOSH VADELL, EDWARD RIEGEL, ANDY PRONOVOST, JERRY STRING, EUGENE MAIER, DAVID MADAMBA, LONELL JONES, JOSEPH IACOVONE, CONSTANT HACKNEY, MICHAEL GAVIN, and JAMES ARMSTRONG,

Appellants/Plaintiffs,

vs.

ATLANTIC CITY, STATE OF NEW JERSEY, DEPARTMENT OF COMMUNITY AFFAIRS,

Respondents/Defendants.

----------X

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-002112-23

Civil Action

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ATLANTIC COUNTY, ORDER ENTERED FEBRUARY 15, 2024

Docket No. in The Court Below:
ATL-L-002900-18

Sat Below:
Hon. John C. Porto, P.J.Cv.

RESPONDENTS' BRIEF ON APPEAL

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PRELIMINARY STATEMENT

Defendants/Respondents City of Atlantic City (the "City"), State of New Jersey, and New Jersey Division of Local Government Services in the Department of Community Affairs (collectively, "Defendants") respectfully submit this brief in response to Plaintiffs/Appellants Josh Vadell, Edward Riegel, Andy Pronovost, Jerry String, Eugene Maier, David Madamba, Lonell Jones, Joseph Iacovone, Constant Hackney, Michael Gavin, and James Armstrong (collectively, "Plaintiffs") appeal of the Superior Court's February 15, 2024 Order: (1) denying Plaintiffs' motion for leave to amend their Complaint, (2) granting Defendants' motion for reconsideration of the June 8, 2021 Order denying, in part, Defendants' motion to dismiss the Complaint for failure to state a claim, and (3) dismissing the Complaint in this matter, with prejudice.

Plaintiffs are ten former members of the Atlantic City Police Department ("ACPD") and former members of the Policemen's Benevolent Association, Local No. 24 ("PBA"). Collectively, they are seeking over $900,000.00 in accumulated sick leave, also known as "terminal leave," payments through this litigation. On appeal, Plaintiffs would have the Court believe that this is an ordinary action to confirm terminal leave payments pursuant to a collectively negotiated agreement ("CNA") between the PBA and the City. It is not.

The entirety of Plaintiffs' Complaint, and proposed Amended Complaint, flows from Plaintiffs' challenge to Defendants' reduction of terminal leave payments to $15,000 pursuant to the Municipal Stabilization and Recovery Act ("MSRA"), N.J.S.A. 52:27BBBB-1 to -19. Plaintiffs' challenge was considered, and rejected, by the Superior Court, because this case is not about the enforcement of a CNA, but statutory interpretation.

In 2016, Atlantic City was designated a municipality in need of "stabilization and recovery" under the MSRA, and the Director of the Division of Local Government Services within the New Jersey Department of Community Affairs (the "Director") was given broad authority to facilitate the City's financial recovery. Among the powers bestowed upon the Director pursuant to the MSRA, was the authority to unilaterally modify or amend expired collectively negotiated agreements in recognition of Atlantic City's dire financial position.

To date, only one appellate court has interpreted the MSRA in an unpublished decision, but its holding is clear and well-supported. In Atl. City Superior Officers' Ass'n v. City of Atl. City, No. A-3117-20, 2022 WL 2352376 (N.J. Super. Ct. App. Div. June 30, 2022), the Appellate Division recognized that the "Legislature instructed the courts to liberally construe the MSRA 'to give effect to its intent that severe fiscal distress in municipalities in need of stabilization and recovery shall be addressed and corrected.'" Id. at *6. The Appellate Division explained that alleged

"vesting" of employee rights under expired CNAs is "inconsequential" following the enactment of the MSRA, as the MSRA permits Defendants to unilaterally modify the terms of expired CNAs. But the Appellate Division went further, stating that elimination of lump sum accumulated sick leave payments does not "infringe on . . . vested contractual rights[.]" Id. at *9. In so ruling, the Appellate Division explicitly rejected constitutional claims similar to those raised by Plaintiffs here.

As recognized by the Superior Court, this changes the entire context of Plaintiffs' case, which is primarily predicated on constitutional challenges that have already been rejected, and mandates that the Superior Court's decision be affirmed. It is also for this reason that each and every case cited by Plaintiffs, arising outside of the MSRA, is inapposite. None of the cases relied on by Plaintiffs involve a takeover statute like the MSRA, which was intended to ensure the financial recovery of the City. On appeal Plaintiffs cannot rehabilitate their claims by arguing that they are immune from the MSRA based on their retirement dates. Each of the Plaintiffs retired months after the City was designated a municipality in need of stabilization and recovery, and the MSRA was enacted to avoid precisely the sort of expense Plaintiffs seek to impose.

The Superior Court properly dismissed Plaintiffs' Complaint and denied Plaintiffs' motion for leave to amend as futile, where, as here, the entirety of Plaintiffs' claims relates to action permitted under the MSRA.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

A. Atlantic City's Financial Crisis and Designation Under the MSRA.

In the Complaint, Plaintiffs recognize the extraordinary financial crisis that Atlantic City has faced over the past decade. The City submitted to state monitorship pursuant to N.J.S.A. 52:27BB in February 2011 in response to tax appeals filed by various casinos which, among other economic conditions, triggered an unprecedented financial crisis. (Pa000325).[2] Despite the monitorship, the City continued to struggle financially, and "experienced a $14,000,000[] reduction in its real property tax base, a substantial decline in tax revenue, drastic property tax increases, and suffocating tax appeals. The economic downturn resulted in the closure of 5 casinos, more than 11,000 people have lost their jobs, and Atlantic County has one of the highest foreclosure rates in the nation." (Pa000265).

On May 27, 2016, then-Governor Christopher Christie signed S-1711/A-2569 into law, the MSRA, with bipartisan support. (Pa000227).

In adopting the MSRA, the Legislature found and declared that:

> a. The short and long-term fiscal stability of local government units is essential to the interests of the citizens of this State to assure the efficient and effective provision of necessary governmental services

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[1] Because of overlapping factual matters, and for the convenience of the Court, the Statement of Facts and Procedural History are combined.

[2] As referenced herein, "Pa" refers to Plaintiffs' Appendix. "Da" refers to Defendants' Appendix.

> vital to public health, safety, and welfare, including the fiscal health of our State's municipalities.
>
> b. In certain extreme cases, local governments that experience severe fiscal distress become incapable of addressing the circumstances that led to that extraordinary distress or of developing a comprehensive plan for financial rehabilitation and recovery.
>
> c. It is necessary and appropriate for the State to take action to assist local governments experiencing severe budget imbalances and other conditions of severe fiscal distress or emergency by requiring prudent fiscal management and operational efficiencies in the provision of public services.
>
> d. As the State entity primarily responsible for the financial integrity and stability of all local government units, the Local Finance Board should be authorized, under certain limited circumstances, to develop a comprehensive rehabilitation plan for local governments that are experiencing severe fiscal distress, and to act on behalf of local government units to remedy the distress.

N.J.S.A. 52:27BBBB-2.

The MSRA provides that the Director "may ascertain whether a municipality should be deemed a municipality in need of stabilization and recovery." N.J.S.A. 52:27BBBB-4a. If so ascertained, the MSRA requires that the Director recommend to the Commissioner of the Department of Community Affairs (the "Commissioner") that the Commissioner designate the municipality to be in need of stabilization and recovery ("Final Determination"). Id. If the Commissioner makes such a Final Determination, the Director is required to notify the municipality's clerk or other municipal official of the Final Determination in writing. Id.

Within 150 days of the Final Determination, the MSRA requires that the municipality prepare and adopt a resolution containing a five-year recovery plan which must be submitted to the Commissioner for review ("Recovery Plan"). N.J.S.A. 52:27BBBB-4b. The MSRA provides in detail various items that must be included in the Recovery Plan, including a proposed balanced budget for the upcoming fiscal year. N.J.S.A. 52:27BBBB-4b. Upon receipt of the Recovery Plan, the Commissioner has five business days to determine in his "sole and exclusive discretion, whether the [R]ecovery [P]lan is likely or is not likely to achieve financial stability for the municipality." N.J.S.A. 52:27BBBB-4c. If the Commissioner determines that the Recovery Plan "is not likely to achieve financial stability[,]" or if the "municipality fails to submit a plan," the Local Finance Board may "assume and reallocate to, and vest exclusively in the [D]irector any of the functions, powers, privileges, and immunities of the governing body of that municipality[.]" N.J.S.A. 52:27BBBB-5a(1). In those circumstances, the MSRA authorizes the Director "to take any steps to stabilize the finances, restructure the debts, or assist in the financial rehabilitation and recovery of the municipality in need of stabilization and recovery[.]" Id.

On November 9, 2016, pursuant to the MSRA, the Local Finance Board voted 5-0 to assume, reallocate, and vest the powers of the governing body of Atlantic City exclusively with then-Director of the Division of Local Government Services in the

Department of Community Affairs, Timothy Cunningham. (Pa000227–228). On November 14, 2016, former United States Senator and Attorney General of New Jersey, Jeffrey Chiesa, was named the Director's designee (the "Designee") and was authorized to exercise any powers granted to the Director under the MSRA, including taking steps to stabilize the finances, restructure the debts, and assist in the financial rehabilitation and recovery of the City. (Pa000273). Each and every Plaintiff was a member of the PBA at the time the MSRA was enacted, and thus knew or should have known that the Director had broad powers, including unilaterally modifying contract terms such as terminal leave.

B. The MSRA Conferred the Director with Broad Powers to Stabilize Atlantic City and Facilitate Its Recovery.

The MSRA provides the Director with broad powers in taking employment actions in municipalities "in need of stabilization and recovery," and specifically authorizes the Director and/or his Designee to:

> [T]ake any steps to stabilize the finances, restructure the debts, or assist in the financial rehabilitation and recovery of the municipality in need of stabilization and recovery, including, but not limited to:
>
> ***
>
> (f) amending or terminating any existing contracts or agreements, which shall not include bonds, notes, indentures, or other similar financing instruments and documents to which the municipality is a party, in accordance with the terms thereof; or unilaterally amending or terminating any contracts or agreements which shall not include bonds, notes, indentures, or other similar financing instruments and documents to which the municipality is a party, provided that the director determines that the unilateral termination or amendment is reasonable

> and directly related to stabilizing the finances or assisting with the fiscal rehabilitation and recovery of the municipality in need of stabilization and recovery;
>
> (g) unilaterally modifying, amending, or terminating any collective negotiations agreements, except those related to school districts, to which the municipality is a party, or unilaterally modifying, amending, or terminating the terms and conditions of employment during the term of any applicable collective negotiations agreement, or both, provided that the director determines that the modifications, amendments, or terminations are reasonable and directly related to stabilizing the finances or assisting with the fiscal rehabilitation and recovery of the municipality in need of stabilization and recovery;
>
> ***
>
> (i) with respect to any expired collective negotiations agreement to which the municipality in need of stabilization and recovery is a party, unilaterally modifying wages, hours, or any other terms and conditions of employment[.]

N.J.S.A. 52:27BBBB-5a(3).

New Jersey courts, including the Appellate Division, have consistently recognized the broad authority conferred to the Director under the MSRA.

C. Courts Have Consistently Confirmed the Constitutionality of the MSRA.

In early 2017, the then-Director and Designee announced reforms to the ACPD to promote stabilization and recovery under the MSRA. Specifically, on March 13, 2017, the Designee issued a Notice of Implementation—PBA Local 24, changing the terms and conditions of employment for the PBA's members. (Pa000212–219). Each of the Plaintiffs here, except for Plaintiff Gavin, was a member of the ACPD and PBA at the time the Notice of Implementation was issued.

(Compl. ¶¶ 21, 30, 38, 46, 54, 62, 67, 77, 83, 91, Pa000016–28). Among the changes to be implemented was the elimination of "all pending and prospective Terminal Leave payments." (Pa000218).

Following the Notice of Implementation, the PBA, together with the Superior Officers' Association ("SOA") challenged the Notice. On March 17, 2017, the PBA and SOA (collectively, the "Unions") commenced an action by way of Order to Show Cause challenging the constitutionality of the MSRA, and the reforms implemented by the then-Director and Designee (the "First Police Matter"). (Pa000864–871). Each of the Plaintiffs (except Plaintiff Gavin and Plaintiff Maier, who retired a day earlier) were members of the ACPD, and represented by the PBA, at the time the Unions commenced the First Police Matter. (Compl. ¶¶ 21, 30, 38, 46, 54, 62, 67, 77, 83, 91, Pa000016–28).

By Order dated May 23, 2017, in a 57-page opinion by the Honorable Julio L. Mendez, A.J.S.C. (the "First Police Decision"), the Superior Court upheld the constitutionality of the MSRA, as well as the Director's right to implement the majority of the collective bargaining agreement modifications at issue. (Pa000262–320). In doing so, the Superior Court recognized that the MSRA reflected the State Legislature's intent to provide the Director and Designee with broad and extensive powers to execute a comprehensive plan to assist the City in achieving economic stability. (Pa000272).

Judge Mendez explained that "Atlantic City's severe fiscal crisis stem[med] from two main reasons. First, the well documented economic downturn and devaluation of real estate that led to the substantial reduction in tax revenue. Second, the inability of the City to reduce spending to reflect the reduction in revenue." (Pa000287). In considering the constitutionality of the MSRA, the Superior Court found:

> Regarding the enactment of the [MSRA], the law is settled. The State has an inherent police power to issue legislation regarding the regulation and administration of municipalities when it is necessary for the protection of the public welfare, health, and safety. See Rodriguez v. Raymours Furniture Co., 225 N.J. 343, 355 (2016); Hudson Cnty. News Co. v. Sills, 41 N.J. 220, 227 (1963). The power granted to municipalities originates in the State's police power. See Inganamort v. Ft. Lee, 62 N.J. 521, 528 (1973) citing Bergen County v. Port of New York Authority, 32 N.J. 303, 312-314 (1960). Also, "[t]he grant of an express power by the Legislature is always attended by such incidental authority as is fairly and reasonably necessary or appropriate to make it effective, and the authority granted to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent." Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 581, 622 A.2d 237, 241 (1993) quoting Mulligan v. Wilson, 110 N.J. Super. 167, 171, 264 A.2d 745 (App. Div.1970). Courts will uphold an exercise of police power when "statutes exercising those police powers serve a legitimate public purpose and the adjustment of the private parties' duties and obligations is on reasonable terms and conditions." Fidelity Union Trust Co. & N.J. Highway Auth., 85 N.J. 277, 287 (1981); see also Schmidt v. Bd. of Adjustment of City of Newark, 9 N.J. 405, 413-16 (1952).
>
> The State of New Jersey duly enacted the [MSRA] to address the extraordinary financial distress of municipalities like Atlantic City. Despite the City's severe economic collapse over the last 8 years, the City has continued to enter into contracts and has agreed to payments and benefits it simply can no longer afford. The court acknowledges

> that over the last few years the current administration has made efforts to confront these issues. Plaintiffs have also made significant concessions, but it simply is not enough. The State Legislature has determined that Atlantic City requires "prudent fiscal management and operational efficiencies in the provision of public services" in order to recover. N.J.S.A. 52:27BBBB-2.
>
> Having carefully reviewed the [MSRA], the case law, and arguments submitted by both sides, the court concludes that plaintiffs are unable to establish a reasonable probability of success on the merits on their challenges to the [MSRA]. The enactment of the [MSRA] is a proper exercise of the State's inherent police power to pass legislation when necessary for the public health, safety, and welfare. Courts are reluctant to disturb legislation, such as the [MSRA], enacted to serve a legitimate public purpose.

(Pa000290–292).

The Superior Court also considered the Unions' challenges relating to the abrogation or impairment of contracts. Specifically, the Unions argued that the MSRA constituted a "substantial impairment" of the expired CNAs. (Pa000304). In response, the Superior Court held that: (a) the MSRA "provides the Designee with authority that impairs the contract rights of the plaintiffs[;]" (b) "Courts have . . . recognized that at times based on extraordinary circumstances contracts of public employment are subject to modification or early termination[;]" and (c) "Plaintiffs were well aware of the financial state of Atlantic City when entering into their respective CNAs and MOAs, it was even included in the language of the agreements." (Pa000305–306).

With respect to terminal leave, the Superior Court held that "plaintiffs cannot

establish that they have a property right to terminal leave lump sum payouts. . . . Eliminating lump sum payments based on the terminal leave payout at the time of retirement does not violate the . . . New Jersey Constitution." (Pa000297). The Superior Court further found that:

> The part of the Designee's proposal dealing with eliminating terminal leave lump sum payments for accumulated sick leave in excess of $15,000 is reasonable and consistent with the Recovery Act. This part of the proposal is consistent with the objectives of the Recovery Act to establish financial stability for Atlantic City. The City can no longer sustain terminal leave lump payments amounting to an overall liability of $10,000,000.

(Pa000319).

Following the First Police Decision, the Designee issued a Notice of Implementation—PBA Local 24 dated June 7, 2017, consistent with the Decision. (Pa000220–225). Among the changes placed into effect was a change in the terminal leave policy, capping payments at $15,000. (Pa000221). The Notice of Implementation also made clear that the "State reserves the right to modify or entirely eliminate the payment of terminal leave payments in accordance with future rulings or interpretations by the Court." (Pa000221).

Thereafter, on January 18, 2018, the parties to the First Police Matter filed a settlement agreement resolving that matter. (Pa000230–234). As part of the settlement agreement, the parties agreed that "the terminal leave payouts for all

police officers and superior officers will be a maximum of $15,000 at the time of retirement." (Pa000231–232).

Following the settlement, Melanie Walter, then-Acting Director of the New Jersey Department of Community Affairs, Division of Local Government Services, issued a memorandum dated October 18, 2018, advising the City to issue terminal leave payouts capped at $15,000 for those who retired from the ACPD on November 9, 2016, or thereafter (i.e. after the City's governance was designated to the State), upon receipt of a release from that retiree. (Pa000239). On October 22, 2018, the City passed Resolution 591 in furtherance of the October 18, 2018 memorandum, authorizing terminal leave payments in accordance with the DCA's directive and the Superior Court's prior orders. (Pa000242–243). Accordingly, each of the Plaintiffs here are only entitled to terminal leave capped at $15,000 pursuant to the October 18, 2018 memorandum and Resolution 591.

D. The *Superior Officers* Decision.

Following the settlement of the First Police Matter, the Appellate Division had its first opportunity to consider the MSRA and confirmed that the "Legislature instructed the courts to liberally construe the MSRA 'to give effect to its intent that severe fiscal distress in municipalities in need of stabilization and recovery shall be addressed and corrected.'" Atl. City Superior Officers' Ass'n v. City of Atl. City, (*Superior Officers)* No. A-3117-20, 2022 WL 2352376, *6 (N.J. Super. Ct. App.

Div. June 30, 2022) (quoting N.J.S.A. 52:27BBBB-13); (Pa000675). While the *Superior Officers* decision relates to the Director's ability to reject an arbitration decision under the initial MSRA, the Appellate Division also considered the CNA at issue in this matter, and the question of whether the Director could reject a decision concerning accumulated sick leave compensation benefits allegedly vested prior to when Atlantic City was designated as in need of stabilization and recovery. See id. at *9; (Pa000677).

In *Superior Officers*, the Appellate Division found that the "MSRA's findings and declarations undeniably supply the justifications for granting the State the authority to unilaterally modify the expired-but-effective CNA" at issue. Ibid. (citing N.J.S.A. 52:27BBBB-2). The Appellate Division further explained that alleged "vesting" of employee rights under expired CNAs is "inconsequential" following the enactment of the MSRA, finding that the "MSRA permits the Director to unilaterally modify this contract term." Id. at *8; (Pa000676). As the Appellate Division explained:

> The Legislature's enactment of N.J.S.A. 52:27BBBB-5(3)(i) contemplated precisely the circumstance here where the State may unilaterally modify the terms and conditions of employment in connection with an expired CNA.
>
> Applying the principles of statutory interpretation, the Legislature's intent by the plain language of this provision is apparent. The State may "unilaterally modify" any term or condition of employment where the CNA with a municipality in need of stabilization and recovery is expired. This "clear and unambiguous result" concludes our

> interpretative process. Richardson, 192 N.J. at 195. Thus, MSRA permits the Director to unliterally modify the contract term for accumulated sick leave upon from Lieutenant to Captain as that CNA expired.

Ibid. The Appellate Division has thus recognized the State's ability to limit accumulated sick leave compensation under the MSRA.

Although unpublished, the Appellate Division's decision in *Superior Officers* has been found persuasive by a number of courts below. On March 4, 2024, the Honorable Michael J. Blee, A.J.S.C. issued an Order and Decision in Atl. City Policemen's Benevolent Ass'n Loc. 24 v. City of Atl. City, ATL-L-2790-23, favorably citing the *Superior Officers* decision and recognizing that the "MSRA delineates substantial authority to the State's ability to terminate and modify existing agreements involving municipalities in need of stabilization and recovery." (Da00011).[3]

E. Plaintiffs' Complaint.

Plaintiffs filed their claims by Complaint dated December 3, 2018, alleging causes of action for breach of the CNA for failure to pay out accumulated sick leave and for passing Resolution 591, prerogative writ purportedly seeking to void Resolution 591, violations of the New Jersey Civil Rights Act and the New Jersey

[3] The Police Unions have appealed Judge Blee's decision, which is pending under Appellate Docket A-002112-23.

State Constitution, unjust enrichment, and quantum meruit. (*See generally* Compl., Pa000016–41).[4]

Plaintiffs are all retired members of the ACPD, alleged to have retired between February 1, 2017 and November 1, 2017. (Id. ¶¶ 2–11, Pa000017-18). Each of the Plaintiffs in this action were members of the ACPD at the time the MSRA was enacted, and Atlantic City was designated as a municipality in need of stabilization and recovery. (Id. ¶¶ 21, 30, 38, 46, 54, 62, 67, 77, 83, 91, Pa000016-28).

Plaintiffs allege that prior to the MSRA, the terms and conditions of Plaintiffs' employment with the City were governed by a collectively negotiated agreement between the City and the PBA. (Id. ¶ 95, Pa000029). Plaintiffs acknowledge that the operative CNA expired on December 31, 2015 (Ibid.), and that a successor agreement was not reached. (Id. ¶ 97, Pa000029).

Despite the fact that each and every Plaintiff was a member of the ACPD at the time the MSRA was implemented, and every Plaintiff with the exception of Plaintiff Gavin (who retired February 1, 2017) was employed by the ACPD at the time the Designee issued the Notice of Implementation reducing terminal leave

[4] In or around the time Plaintiffs commenced this action, approximately thirty-nine (39) other members of the Atlantic City Police and Fire Unions filed similar claims regarding the Director's authority to limit terminal leave under the MSRA in actions captioned Richard Andrews v. City of Atl. City, ATL-01-19 and Angelo DeMaio v. City of Atl. City, ATL-L-891-19. Both Andrews and DeMaio have been dismissed with prejudice and without appeal.

payments, Plaintiffs seek the full amount of terminal leave benefits they would have been entitled to under the expired CNA—prior to the implementation of the MSRA. Although the Superior Court previously found that capping terminal leave at $15,000 was reasonable and consistent with the MSRA, and the Appellate Division has since recognized the State's ability to limit accumulated sick leave compensation, Plaintiffs seek terminal leave payments many times over the $15,000 to which they are entitled. (Plaintiff Vadell alleges that under the CNA he would have been entitled to a payout of $65,470.37 (Id. ¶¶ 23, 25, Pa000020); Plaintiff Riegel alleges under the CNA he would have been entitled to a payout of $129,085.20 (Id. ¶¶ 33, 35, Pa000021); Plaintiff Pronovost alleges that under the CNA he would have been entitled to a payout of $95,008.22 (Id. ¶¶ 40, 42, Pa000022); Plaintiff String alleges that under the CNA he would have been entitled to a payout of $90,086.40 (Id. ¶¶ 48–49, Pa000023); Plaintiff Maier alleges that under the CNA he would have been entitled to a payout of $129,778.88 (Id. ¶¶ 56–57, Pa000024); Plaintiff Madamba Maier alleges that under the CNA he would have been entitled to a payout of $108,234.24 (Id. ¶¶ 64–65, Pa000025); Plaintiff Jones alleges that under the CNA he would have been entitled to a payout of $112,804.88 (Id. ¶¶ 69–70, Pa000025–26); Plaintiff Iacovone alleges that under the CNA he would have been entitled to a payout of $65,433.76 (Id. ¶¶ 79–80, Pa000027); Plaintiff Hackney alleges that under the CNA he would have been entitled to a payout of $58,791.56 (Id. ¶¶ 86–87,

Pa000028); Plaintiff Gavin alleges that under the CNA he would have been entitled to a payout of $46,235.48 (Id. ¶¶ 93–94, Pa000028–29)).

On January 11, 2019, Defendants filed a motion to dismiss Plaintiffs' Complaint, which was pending before Judge Mendez, highlighting the applicability of the First Police Decision and the estoppel impact of Plaintiffs' representation by the PBA in the First Police Matter. (Pa000254–261). On May 23, 2019, Judge Mendez entered an Order staying the motion to dismiss pending the New Jersey Supreme Court's decision in Barila v. Bd. of Educ., 241 N.J. 595 (2020), which implicated terminal leave rights more broadly in New Jersey. (Pa000993–994). Barila was decided on April 20, 2020, with the New Jersey Supreme Court expressly disagreeing with the Appellate Division that there was a "vested right" in accumulated sick leave compensation. Barila, 241 N.J. at 600.

Thereafter, on June 8, 2021, Judge Mendez entered a decision and order, granting Defendants' initial motion to dismiss in part. (Pa000581–622). In ruling on the motion to dismiss, Judge Mendez largely based his decision on *res judicata*, dismissing only those plaintiffs who retired after the settlement of the First Police Matter, and declining to dismiss the claims of Plaintiffs who retired prior to the settlement of the First Police Matter. Judge Mendez indicated that the Superior Court would address the "constitutional challenges and the potential impact of the MSRA on the [New Jersey Supreme Court decision in] Barila[,]" concerning terminal leave.

(Pa000622). Thereafter, on October 25, 2021, Judge Mendez entered an order granting Plaintiffs' motion for reconsideration and reinstating claims by plaintiffs Edward Reigal, Andy Pronovost, Jerry String, David Madamba and Lyonell Jones, and granting Plaintiffs ninety (90) days for discovery, recognizing the legal nature of the question presented. (Pa000629–630).

On November 15, 2023, Plaintiffs filed a motion for leave to amend their Complaint in two ways. (Pa000658–666). First, Plaintiffs sought to add a contract clause theory to their claim that the MSRA violates the New Jersey Civil Rights Act. Second, Plaintiffs sought to add a standalone claim for alleged breach of the New Jersey Constitution, based on the same theories underpinning their claim for purported violation of the Civil Rights Act. (Ibid.). Defendants opposed Plaintiffs' motion based on futility, citing among other things, the *Superior Officers* decision, which was decided after the initial motion to dismiss briefing in this matter.

On December 15, 2023, the parties received correspondence from the Superior Court requesting additional briefing. Specifically, the Court wrote:

> Regarding the above captioned matter, the Court requests defense counsel provide additional briefing on "futility." Specifically, the Court requests further briefing on R. 1:36-3 and whether it applies to this matter. If so, provide why or why not based on the parties and issues previously addressed. Please also brief the overarching goal of the M.S.R.A. Finally, please provide additionally briefing on the application or non-application of res judicata, collateral estoppel, and the single controversy doctrine.

(Pa000738). Based on the Superior Court's request, and in light of the Appellate Division's decision in *Superior Officers*, Defendants filed a cross-motion for reconsideration of the Superior Court's initial decision denying Defendants' motion to dismiss. (Pa000739–744).

F. The Superior Court's Well-Reasoned Decision Dismissing the Complaint with Prejudice.

On February 8, 2024, the Superior Court heard oral argument in connection with both Plaintiffs' motion for leave to amend and Defendants' cross-motion for reconsideration of the motion to dismiss.

On February 15, 2024, the Superior Court issued a thirty-page Order and Decision denying Plaintiffs' motion for leave to amend and granting Defendants' cross-motion, dismissing the Complaint with prejudice. (Pa001001–1031). In its decision, the Superior Court considered the essential question of "whether the MSRA allow[s] the Defendants to vacate any prior anticipated terminal leave payments purportedly owed to these Plaintiffs who retired in 2017 from a police force in a 'municipality in need of stabilization and recovery?'" (Pa001027).

The Superior Court unequivocally found that "the answer is yes, the MSRA specifically allows the Defendants to do so." (Ibid.). Specifically, the Superior Court found that:

> [T]he Legislature clearly granted the State broad authority, and intended the MSRA to supersede any collective bargaining agreement or CNA. Furthermore, the Court finds the Legislature also instructed

> the courts to construe the MSRA liberally in light of the State's interest in addressing the City's severe fiscal distress. The Defendants can cap the terminal as they did here.

(Ibid.).

In reaching this decision, the Superior Court considered the "futility" of Plaintiffs' Complaint:

> The Legislature instructed the courts to liberally construe the MSRA "to give effect to its intent that severe fiscal distress in municipalities in need of stabilization and recovery shall be addressed and corrected." N.J.S.A. 52:27BBBB-13. When construing a statute, this court's "paramount goal" is to discern the Legislature's intent. DiProspero v. Penrt, 183 N.J. 477, 492 (2005). Courts must "look first to the statute's actual language and ascribe to its words their ordinary meaning." Kean Fed'n of Teachers v. Morell, 233 N.J. 566, 583 (2018). "[T]he best indicator of that intent is the statutory language, ..." Richardson v. Bd. of Trs., PFRS, 192 N.J. 189, 195 (2007) (quoting DiProspero, 183 N.J. at 492). "If the plain language leads to a clear and unambiguous result, then our interpretive process is over." Ibid.

(Pa001028). The Superior Court further observed that the MSRA directly speaks to situations, such as here, where there is an expired CNA. Under these circumstances, the MSRA provides:

> Notwithstanding the provisions of any other law, rule, regulation, or contract to the contrary, the director shall have the authority to take any steps to stabilize the finances, restructure the debts, or assist in the financial rehabilitation and recovery of the municipality in need of stabilization and recovery, including, but not limited to: . . . (i) with respect to any expired collective negotiations agreement to which the municipality in need of stabilization and recovery is a party, unilaterally modifying wages, hours, or any other terms and conditions of employment. . . . N.J.S.A. 52:27BBBB-5(3)(i) (2016) as amended (2021).

(Pa001029).

Judge Porto recognized that:

> [T]here was no CNA in place covering the time between December 31, 2015 and Plaintiffs retirements in 2017. The MSRA was effective on May 27, 2016 and a determination was made to cap terminal leave at $15,000.00. The intent of the MSRA is clear and unambiguous and it permits the Defendants to exercise their authority over the ACPD's retirees and can "unilaterally modify[] wages, hours, or any other terms and conditions of employment" to take "any steps" to stabilize the City's finances.

(Ibid.). Accordingly, Judge Porto found that a "reasonableness analysis is not required[.]" (Ibid.).

The Superior Court considered each of Plaintiff's causes of action and found that none are sufficient to state a claim, where, as here, the complained of action all stems from "Defendants' act of capping Plaintiffs' terminal leave pursuant to the MSRA in an effort to stabilize the City's finances." (Pa001030). Ultimately, the Superior Court held that Defendants' actions are consistent with the MSRA.

The Superior Court's February 15, 2024 Order and Decision should be affirmed on appeal.

LEGAL ARGUMENT

POINT I

THE SUPERIOR COURT APPLIED THE PROPER STANDARD BELOW (Pa001024–1031).

Plaintiffs generally contend that in dismissing Plaintiffs' Complaint, the Superior Court misapplied the motion to dismiss standard under Rule 4:6-2(e). (Pb20–22). In issuing the February 15 Order, the Superior Court considered the

"futility" of Plaintiffs' Complaint and proposed Amended Complaint. A motion for leave to amend is governed under the same standard as a motion to dismiss. Pressler & Verniero, Current N.J. Court Rules, cmt. 2.2.1 on R. 4:9-1 (2024); Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501–02 (2006) (explaining "there is no point to permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted" (quoting Interchange State Bank v. Rinaldi, 303 N.J. Super. 239, 256–57 (App. Div. 1997)); Webb v. Witt, 379 N.J. Super. 18, 28 (App. Div. 2005) ("A motion for leave should be decided pursuant to the same standard as a motion to dismiss for failure to state a claim." (citation omitted)).

Rule 4:6-2(e) provides that a defendant may move to dismiss a complaint for "failure to state a claim upon which relief can be granted[.]" R. 4:6-2(e). On appeal, this Court may conduct a plenary review from the lower court's decision to grant Defendants' motion to dismiss pursuant to Rule 4:6-2(e). Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div.), certif. denied, 185 N.J. 297 (2005). However, it is well settled that a motion to dismiss for failure to state a claim under Rule 4:6-2(e) must be granted if 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.) (citation omitted), certif. denied, 176 N.J. 278 (2003). A court must dismiss a plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief. Camden Cnty. Energy Recovery Assocs. v. N.J. Dep't of Env't.

Prot., 320 N.J. Super. 59, 64 (App. Div. 1999), aff'd, 170 N.J. 246 (2001); see Printing Mart-Morristown v. Sharp Elecs Corp., 116 N.J. 739, 771–72 (1989) (setting forth standard for motions to dismiss); Sickles, 379 N.J. Super. at 105–06 (discussing that a motion to dismiss "must be evaluated in light of the legal sufficiency of the facts alleged in the complaint" (quoting Donato v. Moldow, 374 N.J. Super. 475, 482 (App. Div. 2005))).

"If the complaint states no basis for relief and discovery would not provide [the claimant with a basis for relief], dismissal is the appropriate remedy." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005) (citation omitted). Because Plaintiffs cannot assert a claim against Defendants as a matter of law, this Court should affirm both the Superior Court's denial of Plaintiffs' motion for leave to amend, and dismissal of the Complaint, with prejudice.

POINT II

THE MSRA EXPLICITLY AUTHORIZES THE UNILATERAL MODIFICATION OF CONTRACTS AND THE SUPERIOR COURT PROPERLY FOUND THAT PLAINTIFFS FAIL TO ALLEGE ANY ACTIONABLE CONDUCT (Pa1024–1031).

In denying Plaintiffs' motion for leave to amend and granting Defendants' cross-motion to dismiss, the Superior Court considered the plain language of the MSRA, and properly applied that language to dismiss Plaintiffs' Complaint. Plaintiffs' response on appeal is to ignore the plain language of the MSRA, or

alternatively argue that the Superior Court's interpretation was somehow improper. Plaintiffs' position is contrary to basic tenants of statutory interpretation and should be rejected by this Court. The Superior Court properly dismissed the Complaint, because it does nothing more than complain of a permissible and authorized action under the MSRA. Indeed, the Superior Court found that "[a]ll causes of action arise from the Defendants' act of capping Plaintiffs' terminal leave pursuant to the MSRA in an effort to stabilize the City's finances." (Pa001030).

Relevant here, the MSRA specifically grants Defendants with the authority to:

> [T]ake any steps to stabilize the finances, restructure the debts, or assist in the financial rehabilitation and recovery of the municipality in need of stabilization and recovery, including, but not limited to:
>
> ***
>
> (f) amending or terminating any existing contracts or agreements, which shall not include bonds, notes, indentures, or other similar financing instruments and documents to which the municipality is a party, in accordance with the terms thereof; or unilaterally amending or terminating any contracts or agreements which shall not include bonds, notes, indentures, or other similar financing instruments and documents to which the municipality is a party, provided that the director determines that the unilateral termination or amendment is reasonable and directly related to stabilizing the finances or assisting with the fiscal rehabilitation and recovery of the municipality in need of stabilization and recovery;
>
> (g) unilaterally modifying, amending, or terminating any collective negotiations agreements, except those related to school districts, to which the municipality is a party, or unilaterally modifying, amending, or terminating the terms and conditions of employment during the term of any applicable collective negotiations agreement, or both, provided

> that the director determines that the modifications, amendments, or terminations are reasonable and directly related to stabilizing the finances or assisting with the fiscal rehabilitation and recovery of the municipality in need of stabilization and recovery;
>
> ***
>
> (i) with respect to any expired collective negotiations agreement to which the municipality in need of stabilization and recovery is a party, unilaterally modifying wages, hours, or any other terms and conditions of employment.

N.J.S.A. 52:27BBBB-5a(3).

In dismissing Plaintiffs' Complaint, the Superior Court considered the statutory language and found that:

> The Legislature instructed the courts to liberally construe the MSRA "to give effect to its intent that severe fiscal distress in municipalities in need of stabilization and recovery shall be addressed and corrected." N.J.S.A. 52:27BBBB-13.

(Pa001028). The Superior Court further held:

> This Court finds the Legislature clearly granted the State broad authority, and intended the MSRA to supersede any collective bargaining agreement or CNA. Furthermore, the Court finds the Legislature also instructed the courts to construe the MSRA liberally in light of the State's interest in addressing the City's severe fiscal distress. The Defendants can cap the terminal as they did here.

(Pa001027).

The Superior Court's Order and Decision is consistent with both this Court's prior decisions concerning the MSRA and basic jurisprudence regarding statutory interpretation. The New Jersey Supreme Court has held that the basic rule of statutory construction is to ascribe to plain language its ordinary meaning. See

Bridgewater-Raritan Educ. Ass'n v. Bd. of Educ., 221 N.J. 349, 361 (2015). The Court first looks to the plain language of the statute and then ascribes to the statutory language its ordinary meaning. See D'Annunzio v. Prudential Ins. Co., 192 N.J. 110, 119–20 (2007). Under New Jersey law, words in statutes shall be given their "generally accepted meaning, according to the approved usage of the language[,]" unless that reading is inconsistent with "the manifest intent of the legislature" or a "different meaning is expressly indicated[.]" N.J.S.A. 1:1-1. The "overriding goal has consistently been the Legislature's intent." Hardwicke v. Am. Boychoir Sch., 188 N.J. 69, 95 (2006) (quoting O'Connell v. State, 171 N.J. 484, 488 (2002)).

In the *Superior Officers* matter, this Court had occasion to construe the MSRA and explained:

> The Legislature's enactment of N.J.S.A. 52:27BBBB-5(3)(i) contemplated precisely the circumstance here where the State may unilaterally modify the terms and conditions of employment in connection with an expired CNA.
>
> Applying the principles of statutory interpretation, the Legislature's intent by the plain language of this provision is apparent. The State may "unilaterally modify" any term or condition of employment where the CNA with a municipality in need of stabilization and recovery is expired. This "clear and unambiguous result" concludes our interpretative process. Richardson, 192 N.J. at 195. Thus, MSRA permits the Director to unliterally modify the contract term for accumulated sick leave upon from Lieutenant to Captain as that CNA expired.

Superior Officers, 2022 WL 2352376, at *8; (Pa000676).

While not precedential, the *Superior Officers* decision is instructive. See

Sauter v. Colts Neck Volunteer Fire Co. No. 2, 451 N.J. Super 581, 600 (App. Div. 2017) (explaining that a court may find "the logic of the opinion persuasive and adopt[]" the unpublished, nonbinding opinion). As in the *Superior Officers* case, the only alleged improper conduct by Defendants here is action that is expressly permitted by the MSRA, which was granted by the Legislature to ensure the economic recovery of the City. Plaintiffs' Complaint does nothing more than complain of conduct that is expressly permitted under the MSRA.

Recognizing the fatal flaw in Plaintiffs' Complaint, the Superior Court properly concluded that "[t]here is no basis under the MSRA that provides the Plaintiffs with any basis for relief for any of their asserted causes of action in their Complaint." (Pa001031). Here, the complained of conduct was expressly permitted under the MSRA and therefore cannot be the basis of Plaintiffs' claims. See *Superior Officers*, 2022 WL 2352376, at *8–9 (affirming dismissal); (Pa000676–677).

POINT III

THE SUPERIOR COURT PROPERLY DISMISSED PLAINTIFFS' CONSTITUTIONAL CLAIMS AFTER FINDING THE MSRA PRECLUDES THE RELIEF SOUGHT (Pa001028–1031).

This Court should affirm the Superior Court's dismissal of Plaintiffs' constitutional claims. In dismissing Plaintiffs' Complaint, the Superior Court aptly noted that each of Plaintiffs' causes of action, including Plaintiffs' claims for

violation of the State Constitution, "find their genesis in the capped payment of terminal leave." (Pa001030).[5]

Every court to consider the MSRA has found that it is constitutional, as has every court that has ruled on challenges to the MSRA arising under the Takings and Contract Clauses of the State Constitution.[6] The Appellate Division is no exception, and in *Superior Officers* explained:

> However, "[t]he prohibition against impairment of contracts under the federal and state constitutions is not absolute. It 'must be accommodated to the inherent police power of the states to safeguard the vital interests of their residents.'" In re Pub. Serv. Elec. & Gas Co.'s Rate Unbundling, Stranded Costs & Restructuring Filings, 330 N.J. Super. 65, 93 (App. Div. 2000) (citation omitted).
>
> MSRA's findings and declarations undeniably supply the justifications for granting the State the authority to unilaterally modify the expired-but-effective CNA. See N.J.S.A. 52:27BBBB-2.

Superior Officers, 2022 WL 2352376, at *9; (Pa000677). The Appellate Division further favorably cited Judge Mendez's decision in the First Police Matter, in which Judge Mendez noted that:

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[5] We note that Plaintiffs did not brief their constitutional claims below in connection with Defendants' cross-motion to dismiss and any such argument are waived on appeal. State v. Walker, 385 N.J. Super. 388, 410 (App. Div.) ("Generally, issues not raised below, even constitutional issues, will not ordinarily be considered on appeal unless they are jurisdictional in nature or substantially implicate public interest." (citing cases)), certif. denied, 187 N.J. 83 (2006).

[6] In the June 8, 2021 Order in this matter, Judge Mendez declined to consider the constitutional question, basing his decision on *res judicata*.

> [P]laintiffs cannot establish that they have a property right to terminal leave lump sum payouts. Plaintiffs present no cases to support their argument that the Takings Clause of the New Jersey Constitution applies to terminal leave payouts or even other rights generated by CNAs.

Id. at *3; (Pa000671).

While rejecting constitutional challenges to the MSRA, the Appellate Division explained that the MSRA is to be "liberally construe[d]" in accordance with its plain terms. Id. at *7; (Pa000676). That is precisely what the Superior Court did, and each of Plaintiffs' constitutional claims fail, almost all of which have been previously addressed and rejected in prior court decisions.

POINT II

PLAINTIFFS FAIL TO PLEAD A VIOLATION OF THE TAKINGS CLAUSE UNDER THE NEW JERSEY STATE CONSTITUTION (Pa001028–1031).

In Point II.A of their appellate brief, Plaintiffs argue that they have adequately pled a constitutional violation of the Takings Clause under the New Jersey State Constitution by alleging that Defendants deprived them of their previously vested property rights by eliminating terminal leave payments over $15,000. (Pb24-30). This exact argument was expressly rejected in the First Police Matter, which decision the Appellate Division relied upon in the *Superior Officers* matter.

In the First Police Matter, Judge Mendez unequivocally held that in the context of the MSA, "[e]liminating lump sum payments based on the terminal leave payout at the time of retirement does not violate the Takings Clause of the New

Jersey State Constitution." (First Police Decision at 34, Pa000297). First, Judge Mendez found that the "[t]he Takings Clause typically applies to eminent domain, which is not the case here," and Plaintiffs do not have a vested property right in terminal leave payments. (Ibid.). Judge Mendez further explained "that plaintiffs cannot establish that they have a property right to terminal leave lump sum payouts. Plaintiffs present no cases to support their argument that the Takings Clause of the New Jersey Constitution applies to terminal leave payouts or even other rights generated by CNAs." (Ibid.). In *Superior Officers*, the Appellate Division cited Judge Mendez's decision approvingly and made clear that the "MSRA's findings and declarations undeniably supply the justifications for granting the State the authority to unilaterally modify the expired-but-effective CNA" at issue. *Superior Officers*, 2022 WL 2352376, at *9 (citing N.J.S.A. 52:27BBBB-2); (Pa000677). The Appellate Division further explained that alleged "vesting" of employee rights under expired CNAs is "inconsequential" following the enactment of the MSRA, finding that the "MSRA permits the Director to unilaterally modify this contract term." Id. at *8; (Pa000676). Additionally, the Appellate Division acknowledged that the "MSRA permits the Director to unliterally modify the contract term for accumulated sick leave upon from Lieutenant to Captain as that CNA expired." Ibid.

In an effort to revive their Takings Clause claim, Plaintiffs cite inapposite case law on appeal, ignoring both Supreme Court precedent and the prevailing cases

regarding the MSRA. First, Plaintiffs all but ignore the New Jersey Supreme Court precedent in Barila, 241 N.J. 595.

In Barila, the New Jersey Supreme Court considered the alleged "vesting" of terminal leave and held that:

> Nothing in the [applicable] 2012 Agreement suggests—let alone creates—a vested right to apply that Agreement's compensation formula upon retirement[.]
>
> ***
>
> The 2012 Agreement's limiting language is unsurprising, given the nature of the employment benefit at issue. A teacher in the Cliffside Park School District who had more than one hundred days of unused sick leave while the 2012 Agreement was in effect, and who continued to work into the term of a successor agreement, faced the prospect that an illness or injury would require the use of some or all of that sick leave. By the time of his or her retirement, that teacher might accumulate more sick leave, might use some of his or her accumulated sick leave, or might have no sick leave remaining. It would make little sense to confer on a teacher a vested right to be compensated under an expired Agreement's formula for accumulated sick leave, given that uncertainty.

Id. at 618–19. The Supreme Court expressly "disagree[d]" with the Appellate Division's finding that there was a "vested right" in accumulated sick leave compensation. Id. at 622.

Shockingly, Plaintiffs only reference to Barila, outside of their procedural history, is in a footnote conceding that "if they were employees of Atlantic City and active union members at the time that the First Police Matter was settled . . . they would be bound by the $15,000 cap that the parties to that lawsuit negotiated

pursuant to Barila v. Board of Educ. of Cliffside Park, 241 N.J. 595 (2020)." (Pb35 n.9).

Governing law does not allow Plaintiffs to parse so finely. Here, each of the Plaintiffs was employed by the ACPD at the time the MSRA was implemented, and expressly permitted the Director to unilaterally modify the expired CNA. Moreover, each of the Plaintiffs, with the exception of Plaintiff Gavin, were employed by the ACPD at the time of the March 13, 2017 Notice of Implementation, in which Defendants made clear their intent to limit terminal leave. Thereafter, Plaintiffs retired, knowing Defendants' intention to modify terminal leave and their unilateral ability to do so.

None of the cases cited by Plaintiffs support their Takings Claim. First, while Plaintiffs cite case law supporting the continued application of an expired CNA, none of the cases arise under the MSRA, which specifically allows the State to unilaterally modify expired CNAs. Compare Matter of County of Atlantic, 230 N.J. 237, 255–56 (2017) (finding contractual language in specific CNAs at issue required the CNA to remain in effect after expiration), with *Superior Officers*, 2022 WL 2352376, at *8 ("MSRA permits the Director to unilaterally modify this contract term. N.J.S.A. 52:27BBBB-5(3)(i) applies squarely to the facts of this case. That provision provides . . . with respect to any expired collective negotiations agreement to which the municipality in need of stabilization and recovery is a party, unilaterally

modifying wages, hours, or any other terms and conditions of employment[.]").

The remaining cases cited by Plaintiffs are similarly unpersuasive. Citing to the Appellate Division decision in Caponegro v. State Operated Sch. Dist., 330 N.J. Super. 148 (App. Div. 2000), Plaintiffs grossly misstate that this case is somehow dispositive. Not only is this case and the statute at issue therein readily distinguishable from the present matter, but implementation of a $15,000 cap on Plaintiffs' accrued terminal leave is in no way contrary to the findings in Caponegro.

In Caponegro, the State took over the Newark public school system pursuant to statute—not the MSRA—after a determination was made that the local school district had failed to assure a thorough and efficient system of education. 330 N.J. Super. at 151. As a result of the takeover, and pursuant to statute, employment contracts were extinguished, and senior staff members of the Newark public school system were removed from their positions. Id. These senior staff members filed the lawsuit seeking payment on termination for accumulated vacation days, sick days and personal days, which entitlement was not abrogated by the statute.

As an initial matter, the objective of the statute in Caponegro was the recovery of the local school district and assuring a thorough and efficient education. Id. at 154. It had nothing to do with the financial welfare or stability of Newark or its public school system. Therefore, although the statute provided for the termination of employment contracts, the Court held that withholding payment of the benefits at

issue upon termination was not expressly provided for in, or intended by, the legislation and, under those particular circumstances, would not have been related to the governmental objective to be constitutional. As the Appellate Division in Caponegro expressly stated, withholding these payments "is hardly necessary as a predicate for the essential restructuring of the school staff." Id. at 157. Here, to the contrary, the MSRA is extraordinary legislation enacted by the State of New Jersey to address the extraordinary financial crisis in Atlantic City. (First Police Decision at 3, Pa000266). Unlike Caponegro, capping terminal leave here is in direct furtherance of the MSRA's objective of stabilizing the City's finances, particularly where the City's liability for terminal leave for the ACPD alone was over $10 million, and Plaintiffs presently seek approximately $900,000 in terminal leave. If anything, allowing Plaintiffs' claims to proceed and obligating the City to pay Plaintiffs terminal leave in the hundreds of thousands of dollars would undercut the MSRA's objectives of immediately addressing the City's precarious financial state.

Moreover, the statute in Caponegro expressly provided for the payout of these vested benefits for employees not rehired for the upcoming school year, with the only question being whether the statute intended to also provide these benefits to the petitioners who were terminated under separate provisions of the statute. With these considerations in mind the Court decided that "petitioners are entitled to receive [deferred compensation] in the same manner as if their employment had been

voluntarily terminated." Caponegro, 330 N.J. Super. at 157. Here, not only does the MSRA not provide for the payment of terminal leave, but multiple courts have already found to the contrary and that capping terminal leave is provided for under the MSRA's broad power to "unilaterally modify[], amend[], or terminate[] any collective negotiations agreements," which Plaintiffs have done for all post-MSRA retirees without exception. N.J.S.A. 52:27BBBB-5a(3)(g).

Finally, the employees in Caponegro were terminated upon the State's takeover with the implementation of the statute, and therefore the deferred benefits had vested with their termination. 330 N.J. at 151. However, as of the adoption of the MSRA, contrary to the plaintiffs in Caponegro, Plaintiffs were all still employed by the ACPD, and, therefore, had no vested right to terminal leave payments.

Plaintiffs' reliance on Matter of Morris Sch. Dist. Bd. of Educ., 310 N.J. Super. 332 (App. Div. 1998), is equally unavailing. In Matter of Morris School District, a teachers union agreed to accept the findings of a neutral factfinder appointed by the Commissioner of Education when they could not agree on terms to a renewed collective bargaining agreement with the Board of Education. The factfinder proposed a retroactive cap on paid leave that had not been previously raised by either party, and the Court found that the union members could not be forced to accept the cap absent a knowing waiver. Id. at 343. In that case, there was no MSRA or statute that provided the Board of Education with the right to modify

or terminate the collective bargaining agreement, rendering the decision irrelevant to the present matter.

Finally, the question in Owens v. Press Publ'g Co., 20 N.J. 537 (1956), the remaining case cited by Plaintiffs, was whether the plaintiffs' right to severance pay survived the expiration of a collective bargaining agreement, which, again, is irrelevant here given the MSRA.

Plaintiffs do not, because they cannot, cite an analogous case supporting their Takings Clause claim and the Superior Court's Order should be affirmed on appeal. See Barila, 241 N.J. at 618 (reversing Appellate Division finding regarding vested right to terminal leave); *Superior Officers*, 2022 WL 2352376, at *8 (finding that "'vesting' of . . . accumulated sick leave lump sum payments is inconsequential. MSRA permits the Director to unilaterally modify this contract term."); (Pa000676).

POINT V

THE COMPLAINT FAILS TO PLEAD A VIOLATION UNDER THE CONTRACTS CLAUSE OF THE NEW JERSEY STATE CONSTITUTION (Pa001028–1031).

Next, Plaintiffs generally contend, without any substantive analysis, that Defendants violated their constitutional rights under the Contracts Clause to the New Jersey State Constitution by depriving Plaintiffs of their terminal leave payments upon retirement. (Pb35–42). Like Plaintiffs' Takings Clause argument, this issue has already been considered and expressly rejected in *Superior Officers* and the First

Police Matter. *Superior Officers*, 2022 WL 2352376, at *9; (First Police Decision at 40–43, Pa000303–306). Those same findings apply equally here.

> In the First Police Decision, Judge Mendez specifically found:
>
> > The [MSRA] has a significant and legitimate public purpose, which is to restore financial stability to near-bankrupt municipalities. Additionally, the [MSRA] is based upon reasonable conditions related to appropriate governmental objectives, because it is a proper delegation of the State's police power. … This court has determined that the Recovery Act has a significant and legitimate public purpose, and is based upon reasonable conditions related to appropriate governmental objectives.

(First Police Decision at 42, Pa000305). Moreover, the court in *Superior Officers* directly considered a purported Contract Clause violation in the context of the MSRA:

> We reject plaintiff's contention that the broad grant of authority to the State under the statutory framework violates New Jersey's Contract Clause, N.J. Const., Art, IV, § VII, ¶ 3. Under that Clause, the Legislature cannot pass "any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made." N.J. Const., Art. IV, § VII, ¶ 3. However, "[t]he prohibition against impairment of contracts under the federal and state constitutions is not absolute. It 'must be accommodated to the inherent police power of the states to safeguard the vital interests of their residents.'" In re Pub. Serv. Elec. & Gas Co.'s Rate Unbundling, Stranded Costs & Restructuring Filings, 330 N.J. Super. 65, 93 (App. Div. 2000) (citation omitted).
>
> MSRA's findings and declarations undeniably supply the justifications for granting the State the authority to unilaterally modify the expired-but-effective CNA. See N.J.S.A. 52:27BBBB-2.

Superior Officers, 2022 WL 2352376, at *9; (Pa000677).

Applying these findings here, and because the MSRA does not run afoul to the Contracts Clause as a matter of law, the Superior Court properly dismissed Plaintiffs' constitutional claim predicated on the Contract Clause. (Pa001027).

Legislation is held to unconstitutionally impair a contract when it "(1) substantially impair[s] a contractual relationship, (2) lack[s] a significant and legitimate public purpose, and (3) is based upon unreasonable conditions and . . . unrelated to appropriate governmental objectives." Farmers Mut. Fire Ins. Co. of Salem v. N.J. Prop.-Liab. Ins. Guar. Ass'n, 215 N.J. 522, 546–47 (2013) (alterations in original) (internal citations and quotations omitted). Plaintiffs cite to this approach, but then misapply the law.

Specifically, Plaintiffs focus on whether the MSRA was enacted for a legitimate public purpose and Defendants' actions are reasonably related to appropriate governmental objectives. (Pb35–42). There may be no dispute that such a purpose exists here, as the MSRA "has a significant and legitimate public purpose, which is to restore financial stability to near-bankrupt municipalities." (First Police Decision at 42, Pa000305).

Plaintiffs' reliance upon the Third Circuit's Decision in United Steel Paper v. Gov't of V.I., 842 F.3d 201 (3d Cir. 2016) to try to argue otherwise is misplaced. The critical issue in United Steel Paper was that the problem or "impairment" that caused the government to abrogate its contract existed at the time the government

entity entered into the contract at issue. That is not true here. In United Steel Paper, the Virgin Islands government enacted a law that reduced the salaries of its own employees shortly after entering into collective bargaining agreements, which was the basis for the Third Circuit's holding that an "impairment" is not reasonable if the conditions existed at the time of the negotiations. Id. at 213. Unlike the Virgin Islands, the New Jersey Legislature did not adopt the MSRA to reduce salaries of its own employees, but rather to address the dire financial circumstances of the City, which for years had failed to resolve its mounting budget deficits. In United Steel, the Third Circuit held the contract modification was unreasonable because the government was aware of its falling revenues at the time it agreed to grant a salary increase to the public employees in the first place and had already authorized $500 million in debt to cover expenses. Id. at 214. Here, the State of New Jersey was not a party to the CNA that Plaintiffs claim has been impaired. Unlike the circumstances of United Steel Paper, the MSRA was not a legislative reversal of the State's own contractual obligations, but rather an intervention in the affairs of a municipality that was in need of State assistance to escape financial ruin. As such, United Steel Paper has no application here.

The MSRA does not violate the Contracts Clause because the MSRA was adopted by the Legislature with a legitimate public purpose (preventing the City from financial ruin) and is reasonably related to that appropriate governmental

objective. The Appellate Division has already found that capping terminal leave benefits does not infringe the Contracts Clause, and the Superior Court's February 15 Order should therefore be affirmed. *Superior Officers*, 2022 WL 2352376, at *9 ("We reject plaintiff's contention that the broad grant of authority to the State under the statutory framework violates New Jersey's Contract Clause[.]"); (Pa000677).

POINT VI

THE COMPLAINT AND PROPOSED AMENDED COMPLAINT FAIL TO ALLEGE VIOLATIONS OF PLAINTIFFS' EQUAL PROTECTION, SUBSTANTIVE DUE PROCESS, AND PROCEDURAL DUE PROCESS RIGHTS (Pa001028–1031).

In Point II.C, Plaintiffs contend that Defendants violated their constitutional rights under the Equal Protection Clause of the New Jersey State Constitution by allowing pre-November 9, 2016 retirees to receive uncapped terminal leave benefits, while capping their terminal leave at $15,000.00. (Pb42–44). Plaintiffs further argue in Point II.D that Defendants have violated their substantive and procedural due process rights "by way of retroactively capping their deferred terminal pay to $15,000." (Pb44–45). Both arguments lack merit and Plaintiffs have not, and cannot, assert a claim under either theory.

Under New Jersey law, state Due Process and Equal Protection claims are afforded similar analyses. Barone v. Dep't of Hum. Servs., 107 N.J. 355, 368 (1997).

Indeed, New Jersey courts have long rejected "mechanical" tests under either the equal protection or due process clauses in favor of a balancing process whereby:

> [A] court must weigh the nature of the restraint or the denial against the apparent public justification, and decide whether the State action is arbitrary. In that process, if the circumstances sensibly so require, the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or the denial.

Sojourner A. v. N.J. Dep't of Hum. Servs., 177 N.J. 318, 332–33 (2003) (quoting Robinson v. Cahill, 62 N.J. 473, 492 (1973)) (denying Equal Protection challenge to cap on welfare benefits). As a result, in analyzing a state equal protection claim, New Jersey courts apply a flexible balancing test, which considers three factors: (1) "the nature of the right affected," (2) "the extent to which the government action interferes with that right," and (3) "the public need for such interference." Trautmann ex rel. Trautmann v. Christie, 211 N.J. 300, 305 (2012) (quoting Doe v. Poritz, 142 N.J. 1, 94 (1995)). Due Process similarly ensures "that 'a law shall not be unreasonable, arbitrary or capricious, and that the means selected shall bear a rational relation to the legislative object sought to be obtained.'" (First Police Decision at 36 (quoting Robson v. Rodriguez, 26 N.J. 517, 522 (1958)), Pa000299).

In the context of the MSRA, courts have already considered and rejected Plaintiffs' claim that the MSRA grants "exclusions arbitrarily and irrationally target[s] [P]laintiffs' contractual and statutory rights constituting differential treatment, and therefore, violate [P]laintiffs' Due Process and Equal Protection

rights under the New Jersey Constitution." (Ibid.). In the First Police Decision, Judge Mendez explained that the fact that the MSRA was "enacted to satisfy the important public purpose of stabilizing Atlantic City . . . weighs heavily against any constitutional challenge to the [MSRA]" under Article 1, Paragraph 1 of the State Constitution. (Id. at 38, Pa000301). Judge Mendez recognized that "Atlantic City is in a very difficult financial position and has been for many years. The State Legislature's passage of the [MSRA] was to protect the public interest. As this court has previously stated, the [MSRA] was enacted to satisfy the important public purpose of stabilizing Atlantic City." (Ibid.).

While the financial stability of Atlantic City is an important public purpose, Plaintiffs do not allege that have been singled out for special treatment based upon the exercise of a right, and are not a protected class, which is essential for finding such a violation. See Cnty. of Warren v. State, 409 N.J. Super. 495, 512 (App. Div. 2009) (dismissing equal protection and due process claims), certif. denied, 201 N.J. 153, cert. denied, 561 U.S. 1026 (2010). Instead, Plaintiffs' claim relates to the distinction in terminal leave pay for those that retired before November 9, 2016 (pre-MSRA retirees) versus those that retired after the implementation of MSRA in Atlantic City on November 9, 2016. This distinction is not arbitrary but reflects the reality of the passage of the MSRA. It was only after the governing authority of the City vested with the State that the Director was given the authority to unilaterally

modify the terms of the PBA's expired CNA. Employees who retired prior to the City's designation under MSRA received their full terminal leave. Employees that retired after were capped at $15,000.

Plaintiffs' suggestion that "[s]ome post-November 9, 2016 retirees received deferred compensation . . . in excess of (i.e., $150,000) or comparable to . . . what Plaintiffs seek as part of this lawsuit" is knowingly misleading. (Pb43–44). In this regard, the individuals identified by Plaintiffs as receiving payments in excess of $15,000 post-November 9, 2016 did ***not*** retire post-MSRA; rather, these former police officers retired pre-MSRA, but only received payouts post-MSRA, two of whom had executed settlement agreements with the City prior to the adoption of the MRSA relating to terminal leave.

Where, as here, the MSRA is not arbitrary, but rather "satisf[ies] the important public purpose of stabilizing Atlantic City" (First Police Decision at 38, Pa000301), Plaintiffs fail to state a claim for due process and equal protection claims. See J.D. ex rel. Scipio-Derrick v. Davy, 415 N.J. Super. 375, 397 (App. Div. 2010) (affirming dismissal with prejudice of equal protection claim in accordance with R. 4:6-2 and noting that "when an equal protection challenge fails to state a claim, our courts have not hesitated to dismiss the complaint with prejudice").

POINT VII

THE COMPLAINT FAILS TO SUFFICIENTLY PLEAD CONTRACTUAL AND QUASI-CONTRACTUAL CLAIMS (Pa001027–1031).

Recognizing that the MSRA specifically permits Defendants to unilaterally modify the expired CNA at issue here, the Superior Court also properly dismissed Plaintiffs' contractual and quasi-contractual claims. Here, Plaintiffs' breach of contract claim rests solely on their allegations that (a) the CNA "is clear that Plaintiffs are entitled to a payout from the Defendant Atlantic City for accumulated sick leave[,]" and (b) the City "has breached the contract by not paying the benefits to Plaintiff and adopting Resolution 591." (Compl. ¶¶ 124–25, Pa000034). However, Plaintiffs themselves recognize that the MSRA gives the Director the ability to "[u]nilaterally modify collective bargaining agreements[.]" (Id. ¶ 101, Pa000030).

As recognized by the Superior Court, Plaintiffs cannot state a claim based on these allegations because (a) Defendants are entitled to amend and modify contracts pursuant to the MSRA and (b) Defendants' changes to terminal leave were lawful under the MSRA. See *Superior Officers*, 2022 WL 2352376, at *9 (finding that the "MSRA's findings and declarations undeniably supply the justifications for granting the State the authority to unilaterally modify the expired-but-effective CNA" (citing N.J.S.A. 52:27BBBB-2)); (Pa000677).

The same applies to Plaintiffs' quasi-contractual claims and the legal authority relied upon by Plaintiffs is simply inapposite. (Pb45–47). Plaintiffs argue that their claims of unjust enrichment and quantum meruit are warranted because "Plaintiffs conferred a benefit on Atlantic City by extensively limiting their use of sick time" and as a result, "Defendants reaped the benefits of Plaintiffs coming into work every day as well as avoiding the payment of sick time and overtime to cover Plaintiffs if they called out." (Pb46). However, Plaintiffs provide no caselaw whatsoever to support their apparent theory that common law quasi-contract principles should supersede the authority granted to Defendants under the MSRA.

Indeed, the only cases cited by Plaintiffs merely identify the basic elements necessary to plead a cause of action for unjust enrichment and quantum meruit. (Pb46 (citing VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994) (discussing the elements of an unjust enrichment claim in the context of a lien placed on a property to remedy inequitable rental income commissions); Kas Oriental Rugs, Inc. v. Ellman, 394 N.J. Super. 278, 286 (App. Div. 2007) (setting forth the elements necessary to state a quantum meruit claim in the context of post-termination commissions); Starkey, Kelly, Blaney & White v. Est. of Nicolaysen, 172 N.J. 60, 68 (2002) (discussing elements of a quantum meruit cause of action as applied to attorneys fees)). None of these cases consider issues of quasi-contractual claims and their preemption by statute. Moreover, while Plaintiffs may have limited their use

of sick time during their careers, the Appellate Division has acknowledged that "[t]he purpose of sick leave is to give an employee the opportunity to continue to receive a salary while they are out on disability[,]" not lump sum payments. *Superior Officers*, 2022 WL 2352376, at *3; (Pa000672). Plaintiffs chose to retire after implementation of MSRA, and Plaintiffs' failure to utilize their sick leave prior to retirement does not give rise to a cause of action against Defendants.

POINT VIII

THE SUPERIOR COURT PROPERLY DISMISSED PLAINTIFFS' PREROGATIVE WRIT CHALLENGE (Pa001030–1031).

In dismissing Plaintiffs' Complaint in its entirety, the Superior Court also properly disposed of Plaintiffs' prerogative writ claim. In Point IV, Plaintiffs argue that the Superior Court erred when it dismissed their prerogative writ challenge to "the adoption of Resolution 591 of the City of Atlantic City, which was approved on October 24, 2019." (Pb47–49). Plaintiffs, however, fail to state a prerogative writ claim as a matter of law, and fail to mount a challenge to Resolution 591.

In considering a prerogative writ action brought in connection with the MSRA, the Superior Court has previously explained:

> "When a reviewing court considers an appeal from an action taken by a governing body, the standard by which it is guided is whether the action was arbitrary, capricious or unreasonable." Fay v. Medford Tp. Council, 423 N.J. Super 81, 87-88 (Ch. Div. 2011) (citing Cell S. of N.J. v. Zoning Bd. Of Adjustment, 172 N.J. 75, 81-82 (2002)); Burbridge v. Mine Hill Twp., 117 N.J. 376, 385 (1990)). "The factual

> determinations made by the board are presumed to be valid as well as the exercise of its decision making, based upon such determinations, will not be overturned unless they are arbitrary, capricious, or unreasonable, and the burden of proof is upon the plaintiff." Fay v. Medford Tp. Council, 423 N.J. Super 81, 87-88 (Ch. Div. 2011) (citing Cell S. of N.J. v. Zoning Bd. Of Adjustment, 172 N.J. 75, 82 (2002))."

Bader Field Sports, LLC v. State, ATL-L-1427-17 (N.J. Super. Ct. Law Div. Aug. 28, 2018) (J. Mendez, A.J.S.C.) (holding State actions were "not arbitrary, capricious or unreasonable"); (Pa000384).

Here, the Complaint (and Plaintiffs' appeal) contain nothing more than bare and conclusory allegations of bad faith which do not satisfy the "arbitrary and capricious" standard. See Mitchell v. City of Somers Point, 281 N.J. Super. 492, 500 (App. Div. 1994) (explaining that "insubstantial" and speculative allegations of bad faith cannot support a prerogative writ). Indeed, the adoption of Resolution 591 did not occur in a vacuum. As Plaintiffs' own Complaint identifies, Resolution 591 was adopted after Judge Mendez issued the First Police Decision, and the parties, including the PBA, in the First Police Action engaged in settlement discussions which resulted in capping terminal leave payments at $15,000.

Indeed, in the First Police Decision, Judge Mendez held that:

> The part of the Designee's proposal dealing with eliminating terminal leave lump sum payments for accumulated sick leave in excess of $15,000 is reasonable and consistent with the Recovery Act. This part of the proposal is consistent with the objectives of the Recovery Act to establish financial stability for Atlantic City.

(First Police Decision at 56, Pa000319).

The decision to limit terminal leave to $15,000 was vetted by the Superior Court, and ultimately approved by the PBA and the City's elected officials after months of consideration and review. Plaintiffs fail to allege that Resolution 591, which authorizes the payment of approved terminal leave, is arbitrary and capricious, and their claim therefore fails as a matter of law.

POINT IX

THE SUPERIOR COURT PROPERLY DENIED PLAINTIFF'S MOTION FOR LEAVE TO AMEND AS FUTILE (Pa001023–1031).

The Superior Court properly denied Plaintiffs' motion for leave to amend their Complaint as futile. In the February 15 Order and Decision, the Superior Court noted that in analyzing a motion for leave to amend:

> [T]the motion judge must engage in a two-step evaluation, weighing "whether the non-moving party will be prejudiced, and whether granting the amendment would nonetheless be futile." Notte, 185 N.J. at 501. Where "the amendment is so meritless that a motion to dismiss ... would have to be granted," a judge may deny the motion to amend under "the so-called futility prong of the analysis." Pressler & Verniero, Current N.J. Court Rules, Comment 2.2.1, R. 4:9-1 (2024).

(Pa001024).

As set forth herein, the crux of both Plaintiffs' original Complaint and the proposed Amended Complaint is Plaintiffs' challenge to Defendants' elimination of terminal leave over $15,000 under the MSRA. As the Superior Court found, because "Defendants can cap the terminal [leave] as they did here" (Pa001027), amendment

is futile and the Superior Court properly denied Plaintiffs' motion for leave to amend.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court affirm the Superior Court's February 15, 2024 Order and Decision in its entirety.

Dated: November 18, 2024

Respectfully submitted,

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Plaintiffs,	***On appeal from the Order of the Superior Court of New Jersey: Law Division***
vs.	***Atlantic County***
	Sat Below:
	Hon. John C. Porto, P.J. Cv.
ATLANTIC CITY, STATE OF NEW JERSEY, DEPARTMENT OF COMMUNITY AFFAIRS	
Defendants.	

PLAINTIFFS-APPELLANTS' REPLY BRIEF

Of Counsel & On the Brief:
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[1] Pursuant to R. 2:6-1(a)(2), Plaintiffs have submitted a supplemental appendix with briefs the parties filed with the Trial Court because Defendants raised the question of whether an issue was raised in the Trial Court.

PRELIMINARY STATEMENT

Plaintiffs Josh Vadell, Edward Riegel, Andy Provonost, Jerry String, Eugene Maier, David Madamba, Lonell Jones, Joseph Iacovone, Constant Hackney, Michael Gavin, and James Armstrong respectfully submit the within Reply Brief in further support of their appeal.

Defendants' opposition brief ignores the difference between prospectively modifying employment terms and retroactively stripping employees of already vested rights. The Municipal Stabilization and Recovery Act ("MSRA"), N.J.S.A. 52:27BBBB-1, *et seq*., does not grant Defendants the authority to retroactively eliminate vested terminal leave benefits.

Further, in their opposition brief, Defendants heavily rely upon the unpublished decision Atl. City Superior Officers Ass'n v. City of Atl. City, (*Superior Officers*) No. A-3117-20, 2022 WL 2352376 (N.J. Super. Ct. App. Div. June 30, 2023). However, there are crucial factual distinctions between this case and the *Superior Officers* decision. In *Superior Officers*, the plaintiffs were still employed and they could use their sick time as part of their ongoing employment with Atlantic City. Here, the *Vadell* plaintiffs are retired and they seek compensation for already accrued benefits.

Further, in their opposition brief, Defendants ignore the events that show that the implementation of the MSRA was not straightforward and the actual details of

how the MSRA would be implemented on Atlantic City employees was in flux until the settlement of the First Police Matter. The first instance where a distinction was made between pre- and post-November 9, 2016 retirees was in an October 18, 2018 correspondence from the State. Further, Defendants did not consistently apply their own designated timeline, paying out uncapped terminal leave to at least one Atlantic City Police Officer who retired after November 9, 2016. In this October 18, 2018 correspondence, Defendants also permitted Atlantic City to pay out uncapped terminal leave to several civilian employees who retired prior to November 9, 2016 notwithstanding the fact that they did not have a written contractual agreement with the City to receive retiree sick time payouts.

Finally, Plaintiffs address Defendants' waiver argument. Specifically, Defendants assert that Plaintiff's constitutional claims were not raised in opposition to their motion for reconsideration. The Court should reject this argument as Plaintiffs extensively briefed their constitutional claims before the Trial Court in opposition to Defendants' motion to dismiss for failure to state a claim upon which relief may be granted. Further, Plaintiffs specifically raised their Takings Clause argument in response to Defendants' motion for reconsideration. Thus, there was no waiver of the Plaintiffs' constitutional claims.

For the foregoing reasons and based upon the arguments set forth below, the Court should reverse the Trial Court's decision and remand the case for further proceedings.

LEGAL ARGUMENT

I. THE MSRA DOES NOT PROVIDE AUTHORITY FOR DEFENDANTS TO RETROACTIVELY ELIMINATE VESTED TERMINAL LEAVE BENEFITS.

Contrary to the arguments by Defendants' in their opposition brief, the Municipal Stabilization and Recovery Act ("MSRA"), N.J.S.A. 52:27BBBB-1, *et seq*., does not explicitly grant Defendants the power to retroactively strip employees of rights that have already vested. Defendants' opposition brief overlooks the crucial distinction between prospective modification of employment terms and the retroactive elimination of already accrued benefits. In Caponegro v. State Operated School District of the City of Newark, Essex County, 330 N.J. Super. 148, 151 (App. Div. 2000), the plaintiffs were separated from their employment with their employer by way of an involuntary separation. Because the employment relationship ended, the plaintiffs-employees' right to accrued vacation and sick time had vested. Caponegro, 330 N.J. Super. at 151.

The principle in Caponegro that terminal leave benefits vest upon retirement applies regardless of whether a state takeover statute is involved. Further, the noble public policy objectives of saving a municipality in financial distress does not vitiate

this fundamental property right. It is respectfully submitted that the Court does not have to reach the issue of whether the Legislature has the power to retroactively eliminate a vested property right. This is because there is no language in the MSRA that clearly and unambiguously authorizes the State to terminate vested property rights.

Similarly, Barila v. Board of Ed. of Cliffside Park, 241 N.J. 595 (2020) supports Plaintiffs' position in this appeal. Therein, our Supreme Court defined a vested right to be "a present fixed interest which … should be protected against arbitrary state action." Barila, 241 N.J. at 617-18, *quoting* Phillips v. Curiale, 128 N.J. 608, 620 (1992). "[T]o become vested, a right 'must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another …." Barila, 241 N.J. at 618, *quoting* Phillips, 128 N.J. at 621.

Based upon this legal guidance, the Barila Court sought to answer the following question, "whether the parties to that Agreement intended to confer on teachers such as plaintiffs, *who remained in the Board's employ during the entire term of the 2012 Agreement*, a vested right to compensation for accumulated unused sick leave up to a maximum of $25,000[?]" Id. at 615. Again, one of the significant distinctions for the Barila plaintiffs as compared to the Plaintiffs in this litigation was the Barila plaintiffs' continued employment.

The Barila Court noted that the nature of the employment benefit at issue tethers the right to compensation, in part, upon the employee's retirement or other separation from service. Id. at 618-19. The Court observed the uncertainty of an active employee's right to this benefit as follows:

> A teacher in Cliffside Park School District who had more than one hundred days of unused sick leave while the 2012 Agreement was in effect, and who continued to work into the term of a successor agreement, faced the prospect that an illness or injury would require the use of some or all of that sick leave. By the time of his or her retirement, that teacher might accumulate more sick leave, might use some of his or her accumulated sick leave, or might have no sick leave remaining. Id. at 619.

Similarly, Atl. City Superior Officers Ass'n v. City of Atl. City, (*Superior Officers*) No. A-3117-20, 2022 WL 2352376 (N.J. Super. Ct. App. Div. June 30, 2023), an unpublished case which Defendants heavily rely on in their opposition brief, does not support Defendants' argument that the MSRA empowered Defendants to strip Atlantic City employees of their vested property rights. While the *Superior Officers* unpublished decision addresses similar issues involving the MSRA, there are crucial factual differences that distinguish it from the present case.

In *Superior Officers*, the plaintiffs continued their employment with Atlantic City. The *Superior Officers* plaintiffs sought lump sum payouts of sick time due to their promotions to captain. Id. at *8. However, based upon the authority of the MSRA, the Director modified the contract term for a lump sum payment. Ibid.

Specifically, he directed that the plaintiffs would not receive a lump sum payout but they would be able to use their accumulated sick leave days. Ibid.

Ultimately, the *Superior Officers* Court did not rule on the issue of whether lump sum payments upon promotion for accumulated sick leave constitute a vested right. Id. at 9. The Court sidestepped this issue by finding that the Director permitted the plaintiffs to keep and use their accumulated sick leave during the remaining course of employment. Ibid. Specifically, the Court explained its reasoning as follows:

> In the end, although no case law directly addresses whether lump sum payments upon promotion for accumulated sick leave constitute a vested right, Judge Mendez's reasoning that the vested right was the sick leave days, not the dollar amount, is also persuasive. The Director disapproved the arbitration award granting Barnhart and Sarkos lump sum payments for accumulated sick leave when they were promoted. But the Director permitted them to use the accumulated leave during their tenure. Thus, because plaintiffs retain their sick leave benefit, the arbitration award does not infringe on their vested contractual rights, if any. Ibid.

In this appeal, there is no opportunity to sidestep the issue of whether Plaintiffs had vested rights because of their retirements. They did not have the opportunity to use their accumulated sick days on an ongoing basis.[1] While the MSRA allows for

[1] With respect to Plaintiff Vadell, for the approximately eight months before his forced retirement, he could not use his banked sick time. On September 2, 2016, Vadell was shot in the head while he attempted to break up a robbery. (Pa961).

the prospective modification of contracts, it does not explicitly grant Defendants the authority to eliminate vested benefits.

For the foregoing reasons, the Court should grant Plaintiffs' appeal and remand this matter to the Trial Court to finish discovery and for trial.

II. PLAINTIFFS' RETIREMENT DATES ARE CRUCIAL TO DETERMINING THEIR VESTED RIGHTS.

As set forth in *Point I* above, terminal leave benefits vest upon the employee's separation from his or her employment. As such, Plaintiffs' retirement dates and the dates of Defendants' actions in implementing the authority they received from the MSRA are crucial to resolving this matter.

In their opposition brief, Defendants attempt to argue that Plaintiffs' retirement dates are irrelevant because they all retired after November 9, 2016. This was the date that the Local Finance Board voted 5-0 to assume, reallocate, and vest the powers of the governing body of Atlantic City exclusively with then-Director of Local Government Services in the Department of Community Affairs, Timothy Cunningham. (Pa227-Pa228). However, November 9, 2016 is an arbitrary date picked by Defendants years after this event.

November 9, 2016 is approximately four months **before** DLGS State Designee Jeffrey Chiesa, Esq. issued a March 13, 2017 Notice of Implementation attempting to invoke his authority under the MSRA by stating that he was changing the terms and conditions of employment for Atlantic City Police Officers. (Pa31

¶103); (Pa212). In his March 13, 2017 Notice of Implementation, Chiesa stated that "[e]ffective **March 15, 2017**, all pending and prospective Terminal Leave payments shall be eliminated for all employees." Ibid. (emphasis added). It is undisputed that before the March 15, 2017 effective date, both Plaintiffs Gavin and Maier retired.[2] (Pa28 ¶91 & Pa23 ¶54).

Defendants do not explain why November 9, 2016 should be the trigger date instead of March 15, 2017, the date that Chiesa announced that terminal leave payments would be eliminated. Presumably, it is because the revocation of terminal leave benefits did not go forward on March 15, 2017 because the Honorable Julio L. Mendez, A.J.S.C. executed an Order to Show Cause why an emergent temporary injunction restraining the continued violation of the plaintiffs' constitutional rights should not be barred. (Pa864-Pa871).

In fact, while Defendants initially sought to completely eliminate terminal leave payments, that never happened. On May 23, 2017, Judge Mendez granted in part and denied in part PBA Local 24's petition for a temporary injunction. (Pa262-63). The Court granted the plaintiffs' petition for a temporary injunction regarding the reduction of the police force, changes to the work schedule, and the elimination

[2] Plaintiffs Gavin and Maier also retired before PBA Local 24's Superior Court lawsuit (the "First Police Matter") which was filed on March 15, 2017. (768a).

of terminal leave under $15,000. (Pa263). Further, **all** temporary restraints remained in place until the close of business on **June 6, 2017**. (Pa263).

Before June 6, 2017, six of the eleven Plaintiffs in this litigation had already retired. They are Gavin (2/1/17, Pa28 ¶91), Maier (3/14/17, Pa23 ¶54), Hackney (4/1/17, Pa27 ¶77), Armstrong (4/12/17, Pa383), Vadell (5/1/17, Pa19 ¶21), and Iacovone (6/1/17, Pa26 ¶77). Based upon the analysis set forth in *Point I* above, these six Plaintiffs' right to terminal leave vested at the time of their retirement dates.

The remaining Plaintiffs all retired prior to the December 14, 2017 vote by PBA Local No. 24's union membership to approve the settlement of the First Police Matter. The day the union voted in favor of the settlement should be the trigger date because the parties to the First Police Matter agreed to modifications of the June 7, 2017 Implementation Memorandum as part of the settlement. *Compare* (Pa217-219) & (Pa230-234). Stated differently, how the Defendants were going to implement the MSRA was in a state of flux until the First Police Matter was resolved through settlement.

The first time that Defendants made a distinction between employees who retired prior to November 9, 2016 and after this date is in the October 18, 2018 correspondence from Melanie Walter, Acting Director of the DLGS, to Atlantic City. (Pa32 ¶111); (Pa238-240). In this correspondence, Walter acknowledged that Defendants had suspended terminal leave payouts to employees but they were now

initiating "terminal leave payments for both pre and post-MSRA employees." (Pa239). Again, a specific rationale for why November 9, 2016 was the critical date was not provided in this correspondence. Ibid.

However, Defendants did not even follow their own unilaterally designated timeline for paying out uncapped versus capped terminal leave. During discovery, Plaintiffs established that an employee referred to in the record as A.D. retired in December 2016. (Pa898-899, Rogs. #2). Although this employee retired after November 9, 2016,[3] Defendants gave him a terminal leave payout of $44,950.18. Ibid.

By way of discovery, Plaintiffs also uncovered the fact that in November 2019 Defendants paid out uncapped terminal leave benefits to civilian Atlantic City employees who retired before November 9, 2016 but who did not have a contractual right to terminal leave. Irving Jacoby received $33,469.47 in terminal leave payments even though he did not have a written contractual agreement with Atlantic City to receive a retiree sick time payout. (Pa886, Rogs., $44-45). In November 2018, Defendants paid civilian Joanne Jiacopello $95,164.92 in terminal leave

[3] In its opposition brief, Defendants accuse the undersigned of misleading the Court regarding this issue and in the same breath they falsely assert, "the individuals identified by Plaintiffs as receiving payments in excess of $15,000 post-November 9, 2016 did **not** retire post-MSRA." (Db44) (emphasis in original). However, it is undisputed that A.D. retired "post-MSRA" as his retirement date was in December 2016, after the November 9, 2016 deadline.

despite not having a written contractual agreement with the City to receive such benefits. Defendants also paid civilian Eleanor Derry $26,655.73 as a sick time payout despite the lack of a contractual agreement for same.

In sum, in October 2018, Defendants retroactively announced that November 9, 2016 was going to be the trigger date for whether Atlantic City employees would received sick leave benefits capped at $15,000 or uncapped payouts. However, as set forth above, Defendants did not even fully comply with this trigger date. Thus, for the foregoing reasons, the Court should grant Plaintiffs' appeal and remand this matter to the Trial Court for further proceedings.

III. PLAINTIFFS RAISED THEIR CONSTITUTIONAL ARGUMENTS BEFORE THE TRIAL COURT AND, AS SUCH, THOSE CLAIMS ARE NOT WAIVED.

At page 29 of their brief, footnote 5, Defendants argue that Plaintiffs' constitutional arguments are waived on appeal. The Court should reject this argument as Plaintiffs raised their constitutional claims below. Those claims were briefed at length by way of several rounds of motion practice.

"Generally, an appellate court will not consider issues, even constitutional ones, which were not raised below." State v. Galicia, 210 N.J. 364, 383 (2012). "[A]ny error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result[.]" Galicia, 210 N.J. at 386; R. 2:10-2. Further, the Appellate Courts retain the inherent

authority to "notice plain error not brought to the attention of the Trial Court[,]" provided it is "in the interests of justice" to do so. R. 2:10-2.

On February 14, 2019, in opposition to Defendants' motion to dismiss for failure to state a claim, Plaintiffs briefed at length their arguments in support of their constitutional claims. (Pa27-Pa35 & Pa37).[4] Specifically, Plaintiffs briefed their arguments in support of their claims that there was a violation of the following clauses of the New Jersey Constitution: the Takings Clause, the Contracts Clause, the Equal Protection Clause, the Substantive Due Process Clause, and the Procedural Due Process Clause. (Pa27-Pa35).

Defendants filed their 2023 motion for reconsideration in response to a December 15, 2023 email from the Honorable John C. Porto, P.J. Cv.'s Law Clerk requesting sur reply briefs for Plaintiffs' motion for leave to file an amended complaint. (Pa738). In this email, the Court requested "further briefing on R. 1:36-3 and whether it applies to this matter." Ibid. The Trial Court also requested the parties to brief the overarching goal of the M.S.R.A. and "the application or non-application of res judicata, collateral estoppel, and the single controversy doctrine." Ibid.

In their brief in support of their motion for reconsideration, Defendants first argued that the Complaint should be dismissed because the *Superior Officers*

[4] Pursuant to R. 2:6-1(a)(2), Plaintiffs have submitted a supplemental appendix with briefs the parties filed with the Trial Court because Defendants raised the question of whether an issue was raised in the Trial Court.

decision should be given preclusive effect on Plaintiffs claims. (Pa1091-Pa1092). Specifically, Defendants argued that the entire controversy doctrine applied to this matter. (Pa1092-Pa1093). Second, Defendants argued generally that the Legislature instructed the courts to liberally construe the MSRA to assist municipalities in fiscal distress. (Pa1095-Pa1096).

Based upon the Trial Court's December 15, 2023 email to the parties requesting additional briefing, Plaintiffs' opposition brief to Defendants' motion for reconsideration primarily focused on countering Defendants' preclusion arguments. (Pa1107-Pa1114). Plaintiffs also argued that the *Superior Officers* decision was not binding authority for this litigation and distinguishable. (Pa1125-Pa1126). Further, Plaintiffs also explicitly briefed the Takings Clause constitutional argument. (Pa1119-Pa1123).

For the foregoing reasons, the Court should reject Defendants' argument that there has been a waiver of any of Plaintiffs' claims. Plaintiffs fully briefed their arguments before the Trial Court during the initial motion to dismiss for failure to state a claim motion practice. Further, Plaintiffs raised their Takings Clause argument in response to Defendants' motion for reconsideration.

CONCLUSION

For the foregoing reasons, the Trial Court's decision to grant Defendants' cross-motion reconsideration and reverse the denial of the initial order regarding their motion to dismiss for failure to state a claim upon which relief may be granted should be reversed. This matter should be remanded back to the Trial Court for further proceedings.

Respectfully submitted,
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