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DARLENE SANDERS

Plaintiff-Appellant

v.

THE LEVARI GROUP, LLC d/b/a  
FIRST CHOICE FREEZER

Defendant-Appellee

SUPERIOR COURT OF NEW  
JERSEY- APPELLATE DIVISION

DOCKET NO: A-002715-23 Team 04  
LAW DIVISION DOCKET NO.:  
CUM-L-000196-23

SAT BELOW: Hon. Niki Arbittier,  
J.S.C.

PLAINTIFF-APPELLANT'S BRIEF

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**PLAINTIFF-APPELLANT'S BRIEF IN SUPPORT OF HER APPEAL  
FROM THE SUPERIOR COURT OF NEW JERSEY FOR CUMBERLAND  
COUNTY LAW DIVISION'S (HON. NIKI ARBITTIER, J.S.C.)  
NOVEMBER 3, 2023 AND APRIL 2, 2024 ORDERS DISMISSING  
PLAINTIFF'S CLAIMS AND GRANTING JUDGMENT TO DEFENDANT-  
APPELLEE**

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## ISSUES ON APPEAL

1. Whether the Trial Court erred in determining that CREAMMA does not provide for a private right of action and because of this ruling, dismissing Plaintiff's CREAMMA claim with prejudice.

2. Whether the Trial Court erred in determining that Plaintiff could not bring a common-law claim for failure to hire in violation of public policy pursuant to *Pierce v. Ortho Pharm. Corp.*, 84 N.J. 58, 65, (1980) and because of this ruling, dismissing Plaintiff's *Pierce* claim with prejudice.

3. Whether the Trial Court erred in determining that amending Plaintiff's complaint to assert a claim of negligence *per se* in connection with Defendant's failure to follow CREAMMA's drug testing mandates would be futile, and therefore erred in denying Plaintiff leave to amend her complaint to assert this claim.

4. Whether the Trial Court erred in determining that amending Plaintiff's complaint to assert a claim for violation of privacy in connection with Defendant conducting an unlawful employment drug test on Plaintiff would be futile, and therefore erred in denying Plaintiff leave to amend her complaint to assert this claim.

5. Whether the Trial Court erred in determining that Plaintiff's allegations in her Amended Complaint did not sufficiently plead a breach of contract claim, and therefore erred in dismissing her breach of contract claim with prejudice.

## **PROCEDURAL HISTORY**

Plaintiff filed the instant action against Defendant on April 7, 2023, alleging that Defendant had wrongfully terminated Plaintiff in violation of the Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (“CREAMMA”) and New Jersey Common Law. (1a-5a). Defendant moved to dismiss Plaintiff’s complaint, (6a-7a), which Plaintiff opposed while also cross-moving to file an amended complaint. (8a-9a). On November 3, 2023, the Trial Court heard oral argument<sup>1</sup>, granted Defendant’s motion to dismiss, and granted in part and denied in part Plaintiff’s cross-motion to amend, allowing Plaintiff to plead that Defendant’s conduct constituted a breach of contract and the covenant of good faith and fair dealing. (10a-11a). On February 14, 2024, Plaintiff filed an amended complaint in conformity with the Trial Court’s order. (12a-18a). Defendant filed a second motion to dismiss. (19a-20a). On March 28, 2024, the Trial Court heard oral argument<sup>2</sup>, and granted Defendant’s second motion to dismiss, with the order entered on April 2, 2024. (21a-22a). On May 10, 2024, Plaintiff filed her notice of appeal. (23a-27a).

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<sup>1</sup> 1T, Transcript of Hearing (Vol. 01), dated November 3, 2023

<sup>2</sup> 2T, Transcript of Hearing (Vol. 02), dated March 28, 2024

## **STATEMENT OF FACTS**

Given that this matter was resolved on a motion to dismiss asserting that Plaintiff had failed to state a claim upon which relief had been granted pursuant to R: 4:6-2(e), Plaintiff is granted “every reasonable inference of fact” from the complaint. *Printing Mart-Morristown v. Sharp Electronics Corps.*, 116 N.J. 739 (1989); *Major v. Maguire*, 224 N.J. 1, 26 (2016). Accordingly, the facts set forth herein are taken operative complaint.

In December 2022, Plaintiff interviewed for employment with Defendant. (2a at ¶ 7). On December 15, 2022, Defendant offered and Plaintiff accepted the position. (2a at ¶ 9). After Plaintiff accepted, Defendant subjected Plaintiff to a drug test indicating cannabis had been used within the past 30 days. (2a at ¶¶ 10-11). It did not indicate when cannabis had been used, and Plaintiff had not used any cannabis on the day of the drug test or during the interview process (2a at ¶¶ 13-14).

On or around January 3, Plaintiff contacted Defendant about her start date. (2a at ¶ 15). In response, Defendant told Plaintiff that she had tested positive for cannabis and Defendant would not allow Plaintiff to work unless she took and passed a second test (at her own expense). (2a at ¶ 16). Plaintiff could not afford same, and Defendant rescinded the job offer. (2a at ¶ 18). But for the positive drug test, Plaintiff would have been hired.

## **INTRODUCTION TO PLAINTIFF'S ARGUMENT**

Since February 2021, it has been illegal in New Jersey for employers to refuse to hire potential employees because they test positive for cannabis on a pre-employment drug test, under the Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act ("CREAMMA"). Here, the facts are accepted as pleaded—Defendant refused to hire Plaintiff for precisely this reason. The Trial Court's determination that Plaintiff has no remedy, despite being the victim of this clear statutory violation, renders CREAMMA's employment protections meaningless. The further determination that Plaintiff has no common law remedies for this conduct leaves Plaintiff and thousands of other New Jersey residents without recourse despite Defendant's violation of law.

Beyond rendering CREAMMA a dead-letter, the Trial Court's decision misunderstands CREAMMA's structure and purpose and New Jersey's nearly fifty years of precedent that civil rights and employee protection statutes include implied private rights of action. CREAMMA's employment protection provisions should be construed consistent with this precedent—that the civil rights contained in CREAMMA must be enforceable through a private action to effectuate the statute's remedial purpose.

Any suggestion that such a private right of action does not exist because enforcement of these civil rights was delegated to the Cannabis Regulatory

Commission (“CRC”) is belied by the statutory text and the legislative history. No such delegation exists. In order to avoid implying a private right of action, the Trial Court’s ruling suggests that the legislature implied an entire administrative adjudicative apparatus and subjected every doctor, school, landlord, and employer in New Jersey to the unguided fiat of an agency meant to regulate the issuance of cannabis dispensary licenses. There is no indication that the agency actually possesses this vast adjudicative authority, or that the agency has even contemplated seizing such power for itself.

The Trial Court also erred in dismissing Plaintiff’s related claims. It incorrectly held that Pierce’s common law protection against wrongful termination in violation of public policy cannot extend to pre-employment situations, even where, as here, a firm offer of employment was extended and then rescinded solely for an unlawful reason. The court further erred in finding that Plaintiff’s breach of contract claim failed despite acknowledging that the drug test—which, as a matter of law, Plaintiff passed—made the employment offer an enforceable options contract. Finally, the court improperly denied Plaintiff leave to amend to add negligence and privacy claims.

The Trial Court’s rulings have left Plaintiff with no remedy, and effects a judicial repeal of a controversial statute which was enacted to codify a New Jersey constitutional amendment enacted through a referendum of the citizens of New

Jersey. The Trial Court's rulings contravenes the democratic process and the enacted will of the people of New Jersey by misapplying judicial precedent and canons of statutory construction to achieve the opposite result of the one intended by the statute. This Court should reverse, hold that CREAMMA both provides and requires an implied private right of action to vindicate its consumer and employment protections, and that, likewise, Plaintiff and individuals like her can also vindicate these protections through common law causes of action sounding in tort and contract.

## **LEGAL ARGUMENT**

### **A. Standard of Review**

The standard for granting or denying a motion to dismiss for failure to state a claim upon which relief can be granted under R: 4:6-2(e) is whether a cause of action is "suggested" the facts. *Printing Mart-Morristown v. Sharp Electronics Corps.*, 116 N.J. 739 (1989). The Court's inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." *Id.* at 746. The plaintiff is granted "every reasonable inference of fact." *Major v. Maguire*, 224 N.J. 1, 26, 128 A.3d 675, 690 (2016). On appeal, such decisions are reviewed *de novo*. *Rezem Family Assocs., LP v. Borough of Millstone*, 423 N.J. Super. 103, 114, 30 A.3d 1061, 1067 (Super. Ct. App. Div. 2011). No deference is owed to the trial court's conclusions. *Id.*



**B. The Trial Court erred in finding that CREAMMA does not provide an implied private right of action (10a-11a, 1T11 to 1T12)**

Since February 2021, it has been illegal in New Jersey for employers to refuse to hire potential employees because they test positive for cannabis on a pre-employment drug test. Here, there is no dispute that Defendant refused to hire Plaintiff because she had tested positive for cannabis on a pre-employment test. Logically, Defendant's conduct is a clear and undeniable violation of New Jersey law.

Despite this, the Trial Court held that Plaintiff—though a victim of Defendant's violation of law—has no remedy. The Trial Court held that Plaintiff's CREAMMA claim was non-viable because it construed CREAMMA to not provide for a private right of action. (10a-11a, 1T11 to 1T12). This issue is a matter of first impression within the New Jersey judiciary.

The Trial Court erred because New Jersey precedent holds that when the legislature enacts civil rights statutes with a broad grant of protection to New Jersey citizens/residents, such laws create a private right of action regardless of whether the private right is explicitly delineated. Because CREAMMA is such a civil rights law, and because depriving individuals like Plaintiff of this private right of action would render the employment-protection provisions of CREAMMA meaningless, the Court should reverse the decision of the Trial Court.

In February 2021, in response to a constitutional amendment approved by the voters, New Jersey enacted the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (“CREAMMA”). N.J.S.A. § 2C:35-5 to -10; N.J.S.A. § 24:6I-24. To effectuate the stated purpose of CREAMMA to legalize adult cannabis use, CREAMMA bars employers from refusing to hire, disciplining, or fire for testing positive for cannabis. N.J.S.A. § 24:6I-52.

The doctrine of implied private rights of action stems the principle that “where there is a legal right, there is also a legal remedy, by suit or action at law, wherever that right is invaded.” 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (1783). “Both the United States Supreme Court and [the New Jersey Supreme] Court have held that a statute that does not expressly create a private cause of action may, nonetheless, implicitly create one.” *Jarrell v. Kaul*, 223 N.J. 294, 307 (2015) (citing *Cort v. Ash*, 422 U.S. 66, 78 (1975), and *In re: State Comm’n of Investigation*, 108 N.J. 35, 40-41 (1987)).

With respect to implied private rights of action, New Jersey courts distinguish between statutes which invest individuals with civil rights which create implied rights of action, versus regulatory and licensing laws which typically do not.

Here, the Trial Court erred by conflating the sections of CREAMMA which set up a regulatory and licensing scheme for the legalization and commercialization of adult-use cannabis (and in which aggrieved licensee applicants would not have an

implied private right of action, under New Jersey precedent) with those portions of the statute which unambiguously create positive civil rights for **individuals** and do not impose or create a licensing or regulatory framework for implementing, policing, or enforcing that right.

Though CREAMMA's protection provisions' status as a civil rights statute is apparent on its face and is not an edge case, formalistically, New Jersey courts employ a three-prong test that inquires: (1) whether the plaintiff is a member of a class for whose special benefit the statute was enacted; (2) whether there is any evidence the legislature intended to create or deny a private right of action under the statute; (3) whether implication of a private cause of action in this case would be consistent with the underlying purposes of the legislative scheme. *In re: State Comm'n of Investigation*, 108 N.J. at 41 (adopting and modifying the *Cort* factors to New Jersey statutory construction). Here, these factors must be applied consistent with New Jersey precedent such that general civil rights statutes—like prohibitions on gender discrimination in education, retaliation for filing a workers complaint, wage them, or discrimination against cannabis-users—contain an implied private right of action to ensure that these statutory civil rights are enforceable.

When the New Jersey Law Against Discrimination was enacted, it had no explicit private right of action. Despite this, in *Peper v. Princeton Univ. Bd. of Trustees*, 151 N.J. Super. 15, 23, 376 A.2d 535, 539 (App.Div.1977), *reversed on*

*other grounds*, 77 N.J. 55, 389 A.2d 465 (1978), a private action was implied despite statutory language which only authorized administrative remedies, because the “mandate of the law was unequivocal.” In *Lally v. Copygraphics*, 85 N.J. 668, 670-71, 428 A.2d 1317, 1318-19 (1981), the New Jersey Supreme Court affirmed the reasoning of *Peper* and found an implied private of action for workers’ compensation retaliation under the Workers’ Compensation statute. In *Winslow v. Corp. Exp., Inc.*, 364 N.J. Super. 128, 136, 834 A.2d 1037 (App. Div. 2003)., the New Jersey Superior Court reaffirmed that the Wage Payment Act also contained an implied right of action. “[E]ven in the absence of a statutory provision . . . our courts have readily found an implied private right of action in statutes enacted to protect employees from wrongful conduct by employers.” *Id.*

Accordingly, any reticence to implying a private right of action announced in *Cort* does not apply in New Jersey to employment civil rights created by a statute. Moreover, the New Jersey’s legislatures intentions should be read in the context of these other laws, which are all meant to be “liberally construed” to further the Legislature’s “broad remedial objectives.” See, e.g., *L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ.*, 189 N.J. 381, 400, 915 A.2d 535, 546 (2007). CREAMMA is no different. On February 14, 2023 (a little more than a month before Defendant violated Plaintiff’s right), the New Jersey Supreme Court held CREAMMA should

be construed “broadly and robustly,” consistent with the Legislator’s “remedial purposes.” *State v. Gomes*, 253 N.J. 6, 33 (2023).

Applying the *Cort* factors merely confirm that this CREAMMA must be interpreted consistent with *Lally*, *Peper*, and *Winslow*. CREAMMA’s employment protection provisions contain an implied right of action because: (1) CREAMMA created a class of individuals for whose special benefit the employment protection provisions of the statute was enacted, and Plaintiff is a member of that class; (2) the legislative history of the statute and the statute’s structure is evidence the legislature intended the employment protections to be vindicated through a private right of action, not administrative enforcement; and (3) implication of a private cause of action is be consistent with the underlying purposes of the law, which seeks to prohibit a type of employment action which can be applied to any individual in New Jersey, and therefore can only be effectively enforced through private actions brought by private actors.

The alternative—attempted enforcement through the CRC—is not authorized by the statute and would be *ultra vires* and unlawful and ineffective. Nor has the CRC or New Jersey suggested the CRC could or should attempt such enforcement.

**1. The Trial Court correctly found that the first Cort factor—whether Plaintiff is a member of the class for whose special benefit the statute was enacted—supports finding a private right of action.**

CREAMMA was enacted to benefit adult users of cannabis in several ways, including through employment protections. Accordingly, the Trial Court correctly found the first *Cort* factor is satisfied. (1T12-8 to 1T12-10) (“I do agree that the plaintiff here is... a member of a class who’s entitled to benefit from this action”).

CREAMMA’s first substantive section lists 15 findings and declarations explaining the purpose behind the enactment of the act. The first declaration state “it is the intent of the people of New Jersey to adopt a new approach to our marijuana policies by controlling and legalizing a form of marijuana, to be referred to as cannabis, in a similar fashion to the regulation of alcohol for adults.” N.J.S.A. § 24:6I-32(a). Many of the declarations and findings confirm that the Act is intended to benefit adult users of cannabis, focusing on how the criminalization of cannabis use can have debilitating effects on, for instance, the job prospects and financial health of cannabis users, and noting that New Jersey cannot sacrifice individuals’ civil rights by continuing to keep cannabis unlawful. *Id.* at § (n), (o).

Adult users of cannabis are further protected by Section 51 and Section 52 of the Act. Section 51 of the Act is entitled “Licensee and Consumer Protections” and provides broad protections for adult cannabis users throughout all areas of modern

society, including housing, education, employment, medical care, and having a family:

The presence of cannabinoid metabolites in the bodily fluids of a person engaged in conduct permitted under P.L.2021, c.16 (C.24:6I-31 et al.):

(1) with respect to a student, tenant, or employee, other than as set forth in section 48 of P.L.2021, c.16 (C.24:6I-52), shall not form the basis for refusal to enroll or employ or lease to or otherwise penalize that person, unless failing to do so would put the school, employer, or landlord in violation of a federal contract or cause it to lose federal funding;

(2) with respect to a patient, shall not constitute the use of an illicit substance resulting in denial of medical care, including organ transplant, and a patient's use of cannabis items may only be considered with respect to evidence-based clinical criteria; and

(3) with respect to a parent or legal guardian of a child or newborn infant, or a pregnant woman, shall not form the sole or primary basis for any action or proceeding by the Division of Child Protection and Permanency, or any successor agencies; provided, however, that nothing in this paragraph shall preclude any action or proceeding by the division based on harm or risk of harm to a child or the use of information on the presence of cannabinoid metabolites in the bodily fluids of any person in any action or proceeding.

N.J.S.A. § 24:6I-51.

These protections for adult cannabis users are clarified in even greater detail in Section 52, entitled "Employers, Driving, Minors and Control of Property." The first part of this section provides in relevant part as follows:

(1) No employer shall refuse to hire or employ any person or shall discharge from employment or take any adverse action against any employee with respect to compensation, terms, conditions, or other privileges of employment because that person does or does not smoke, vape, aerosolize or otherwise use cannabis items, and an employee shall not be subject to

any adverse action by an employer solely due to the presence of cannabinoid metabolites in the employee's bodily fluid from engaging in conduct permitted under P.L.2021, c.16 (C.24:6I-31 et al.) ...

N.J.S.A. § 24:6I-52(a)(1) (emphasis added).

This section makes clear that not only is CREAMMA intended to benefit adult users of cannabis, but it is specifically intended to protect adult users of cannabis who apply for employment. In CREAMMA's legislative history, the Assembly described these sections as CREAMMA's "Consumer and Employee Protections, and Employer Workplace Policies", and stated that if passed, "an employer would not be permitted to refuse to hire or employ a person, or discharge or take any adverse action against an employee because that person or employee does or does not use cannabis items." 78a.

Accordingly, as the Trial Court correctly held, the first *Cort* factor supports Plaintiff. The Trial Court erred in failing to find that Plaintiff's satisfaction of this factor strongly militates towards finding a private right of action.

**2. The second *Cort* factor—legislative intent—also supports finding that the legislature intended to create a private right of action to enforce the employee protection provisions of the statute.**

The second *Cort* factor, adopted by New Jersey courts, looks at whether there is any indication of legislative intent, explicit or implicit, either to create a private remedy or to deny one. *Cort v. Ash*, 422 U.S. 66, 78 (1975). The Trial Court did not explicitly make a ruling as to whether the second *Cort* factor was satisfied, but at



oral argument suggested that the existence of the CRC weighs against finding an implied private right of action, referencing *Castro v. NYT Television and State Commission of Investigation*. (1T12-13 to 1T13-5).

Such was error. As set forth below, four different subfactors establish that the second *Cort* factor—inferred legislative intent—supports an implied right of action: (1) the statutory structure; (2) the legislative history; (3) the prospect of a remediless right; and (4) the specific grant of **licensing powers** to the administrative agency as contrasted with the absence of any grant of **adjudicative powers** to the agency with respect to the Act's employee protection provisions.

- a) The statutory structure supports an implied private right of action because it contains right-conferring language in its employee protection provisions, has no alternative enforcement mechanism for these rights, and would leave plaintiffs remediless absent a private right of action.

The second *Cort* factor—whether there is any evidence the legislature intended to create or deny a private right of action under the statute--looks to the statute's legislative history to discern legislative intent, and determine whether there is explicit or implicit intent either create a private remedy or to deny one. *Cort*, 422 U.S. at 78. With respect to inferring legislative intent for purposes of satisfying the second *Cort* factor, courts have recognized that where a private right of action was not explicitly included in a statute, it will typically be the case that the legislative history will be equally silent or ambiguous on that point. *Cannon v. University of*

*Chicago*, 441 U.S.677, 694 (1979). Accordingly, to allow the second *Cort* factor to not be infinitely self-defeating, courts infer a legislative intent for a private right of action where the statute contains **rights-creating language** conferring a new right on individuals covered by the act. *Id.*

**“Where it is clear [the law] has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling.”**

*Id.* Using this logic, the Supreme Court in *Cannon* found Title VI and the Voting Rights Act evidenced a legislative intent to have an implied private-of-action by dint of this **rights-creating** language. *Id.* at 694-699. In contrast, if the statute provides no indication there was an intent to create new individual rights, then it can be inferred from the statutory structure that no implied right of action was intended. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286 (2002).

Other courts have looked for similar right-creating language. *See Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 96 (11<sup>th</sup> Cir. 2015); *see also Indiana Protection and Advocacy Services v. Indiana Family and Social Services Administration*, 603 F.3d 365, 383 (7<sup>th</sup> Cir. 2010). The Fifth Circuit has described this “rights creating” language as “the most accurate indicator of the propriety of implication of a cause of action.” *La. Landmarks Soc., Inc. v. City of New Orleans*, 85 F.3d 1119, 1124 (5<sup>th</sup> Cir. 1996).

The New Jersey Supreme Court agreed that statutes with “rights creating” language that lack explicit remedies evidence an intent by the legislature that the statute be enforced via an implied private cause of action. In *R.J. Gaydos Ins. Agency, Inc. v. Nat’l Consumer Ins. Co.*, the New Jersey Supreme Court cited approvingly to prior New Jersey Superior Court decisions holding that violation of a statute without a civil remedy creates a private right of action if the legislative provision is for the benefit of plaintiff’s class of persons. 168 N.J. 255, 274 (2001) (citing to *Parks v. Pep Boys*, 282 N.J. Super. 1, 15, 659 A.2d 471 (App.Div.1995); *Bortz v. Rammel*, 151 N.J. Super. 312, 321, 376 A.2d 1261 (App.Div.), *certif. denied*, 75 N.J. 539, 384 A.2d 518 (1977); *Restatement (Second) of Torts* § 874A).

Indeed, New Jersey courts have consistently found that a private right of action was implied in employment protection statutes with rights-creating language. For instance, when the New Jersey Law Against Discrimination was first enacted, it did not have an explicit private right of action, but in *Peper v. Princeton Univ. Bd. of Trustees*, 151 N.J. Super. 15, 23, 376 A.2d 535, 539 (App.Div.1977), *reversed on other grounds*, 77 N.J. 55, 389 A.2d 465 (1978), the N.J. Appellate Division court found that the private action was implied regardless of the statutory language which only authorized administrative remedies, because “mandate of the law was unequivocal.”

In *Lally v. Copygraphics*, 85 N.J. 668, 670-71, 428 A.2d 1317, 1318-19 (1981), the New Jersey Supreme Court affirmed the reasoning of *Peper* in finding that there was implied private of action to vindicate wrongful terminations for retaliation for filing a workers' compensation claim, such retaliation being illegal under the Workers' Compensation statute.

Finally, in *Winslow v. Corp. Exp., Inc.*, 364 N.J. Super. 128, 136, 834 A.2d 1037 (App. Div. 2003)., the New Jersey Superior Court Appellate Division reaffirmed that the Wage Payment Act contained an implied right of action, because “even in the absence of a statutory provision . . . **our courts have readily found an implied private right of action in statutes enacted to protect employees from wrongful conduct by employers.**”

This trilogy provides the rule of decision for the instant case. CREAMMA's employment protection provisions contains the same type of **rights-creating language** as the employment protection laws considered in *Peper*, *Lally*, and *Winslow*, and this Court's decision should follow the same result.

- b) Legislative intent to provide a private right of action is further supported because CREAMMA specifically grants the Commission significant powers and responsibilities, but it does not direct the Commission to investigate or litigate violations of the employee protection provisions.

To hold that the CRC was delegated the authority to enforce the employment protection provisions would mean the Legislature hid CREAMMA's employment

and consumer protection enforcement mechanism in a vague grant of authority to the CRC to enact necessary regulations to help it carry out its duties to enforce CREAMMA. But as the late Justice Scalia once opined, legislatures do not typically “alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468, 121 S. Ct. 903, 910 (2001).

In contrast, to hold that the CRC Has this power would mean that CREAMMA secretly empowered the CRC to enact any sort of employment and consumer protection enforcement scheme it likes, subject only to the limits of the New Jersey Administrative Procedure Act. Under this view, the CRC could set up anonymous complaint hotlines, serve administrative subpoenas for drug testing policies, prosecute class actions without the requirement for an individual representative plaintiff with standing or the procedural requirements of Rule 23(b)(3). It could enact limits on the abilities of employers to fully defend themselves or to take discovery. And it could do all this without any specific grant of authority from the Legislature or guidance from the Legislature as to how it should exercise these awesome powers.

There are more than 900,000 small businesses in New Jersey, who collectively employ more than 1.9 million employees. 86a-87a. The Trial Court held that the CRC has the unannounced and unlegislated (and unused) authority, based only on the mandates in the Employment Protection provisions of CREAMMA, to enact

whatever complex regulatory enforcement scheme it chooses to investigate, regulate, and control all these small businesses. But nothing in the statute suggests the CRC has this power.

The second *Cort* supports finding an implied right of action because the Legislature did not intend employees and prospective employees and the other consumers (tenants, students, medical patients) to be remediless, but it also did not intend **through silence** to give the CRC an unspecified power to create a new regulatory and enforcement regime that could issue an administrative subpoena on the business' drug testing policies to any business in the State.

When the Legislature **wanted** the CRC to regulate, it did so by creating a carefully calibrated and delineated “comprehensive enforcement scheme” as it related to the licensing of cannabis-related businesses. Indeed, the existence of the comprehensive enforcement scheme empowering the Commission to enforce the licensing of cannabis-related businesses demonstrates that **if** the Legislature had wanted the Commission to investigate and prosecute violations of the employee protection provisions, it would have **specifically authorized** the Commission to do so in the same way it directed the Commission with respect to licensing. *See, e.g.*, N.J.S.A. § 24:6I-4, 24:6I-5.1(c); 24:6I-5.3(c); 24:6I-7 *et seq.*; 24:6I-10; 24:6I-11; 24:6I-12; 24:6I-13; 24:6I-18; 24:6I-35; 24:6I-20.

Accordingly, far from CREAMMA containing a detailed enforcement scheme demonstrating a legislative intent to empower the Commission to investigate and prosecute employee protection violations, the detail of the licensing enforcement scheme makes clear that the Legislature would have also detailed how the Commission was to enforce employee protection violations if the legislature intended that to be part of the Commission's responsibilities. This also supports a finding that legislative intent supports finding a private cause of action.

- c) CREAMMA's Legislative History demonstrates the Legislature did not intend to empower the Commission to enforce the employee protection provisions of the Act.

The second *Cort* factor is also established in support of an implied private right of action based on an examination of CREAMMA's legislative history. As set forth above, because *Cort* is attempting to determine whether a private right of action should be *implied* notwithstanding the lack of any explicit statutory provision allowing for same, it is rare that the legislative history would address that question directly. *Cannon*, 441 U.S. at 694.

Nevertheless, here, the legislative history does show that (a) the Legislature intended this right to be enforceable; and (b) the Legislature did not intend the Cannabis Regulatory Commission to enforce it.

The CREAMMA bill was accompanied by a statement from the sponsors, and the bill was submitted to two committees of the Assembly. 29a-30a. The Assembly

Oversight, Reform and Federal Relations Committee issued one report on the pending bill adopting the statement of the sponsors. The Assembly Appropriations Committee issued two reports on the bill, one on November 19, 2020, and a second on December 15, 2020.

The first version of the bill made no mention of the Commission in connection with the Licensee and Consumer Protections section or the Employers, Driving, Minors, and Control of Property section. 32a-34a.

In the Appropriations Committee first report, they proposed that the act be amended to (1) clarify the balance between a general protection for a person to not have an employer refuse to hire or employ, or take an adverse employment against the person, because the person does or does not use cannabis items, with an employer's authority to require an employee undergo a drug test upon reasonable suspicion of an employee's use of cannabis at work, and (2) require the Commission create standards and a certification process for a Workplace Impairment Recognition Expert. 78a-79a. The bill was duly amended to include these provisions. 56a.

Accordingly, this legislative history shows (a) the legislature specifically considered that the employment protection provisions would be enforced and enforceable, such that it was important to clarify these standards to avoid creating too great a hardship on employers; but (b) the role the CRC would play in that process would be the promulgation of standards for drug tests. Had the Legislative



intended that the CRC actually enforce the general prohibition against discriminating against cannabis users with respect to hire, the Committee would have undoubtedly pointed out that the statute had made no explicit provision or standards for how the CRC should go about establishing such an adjudicative apparatus, and would have suggesting making those procedures explicit through additional requirements imposed on the CRC.

Accordingly, this Committee Report is a strong case of the “Dog that Did Not Bite”—given the Committee was looking directly at the employment protection provisions, those employment protection provisions were utterly silent as to an administrative enforcement mechanism, and the Committee proposed substantive modifications to the provisions plus allocated specific rule-making powers to the CRC in connection with post-employment drug tests, but did not allocate any specific powers to the CRC with respect to enforcing the prohibition on the use of pre-employment drug tests to deny employment, the legislative history confirms that the Legislature did not intend the CRC to enforce this provision—but did intend it to be enforced.

The first Statement accompanying the Bill provided various information about the powers of the CRC to regulate the personal use cannabis marketplace through licensing and regulation of cannabis dispensaries. 35a-53a.

That first Statement was divided into the following X separate sections detailing the separate sections and areas of the proposed bill: (1) Cannabis Regulatory Commission (2) Ethical and Conflicts-Of-Interest Considerations for the Commission, Its Employees, and Other Parties; (3) Licensing of Cannabis Businesses; Updated Certain Medical Cannabis Alternative Treatment Centers' Permitted Operations; (4) Certification of Cannabis Handlers; (5) Transition to Full Legal Market for Cannabis Items; (6) Cannabis Consumption Areas; (7) Business Treatment of Cannabis Licenses; (8) Optional Municipal-Level Taxation; (9) Legalized and Protected Activities Concerning Personal Use Cannabis Items; (10) De-Scheduling Marijuana as a Schedule I Controlled Dangerous Substance; (11) Sentencing Relief for Certain Marijuana and Hashish Offenses; (12) Reporting Requirements by the Commission.

In a revised second statement attached to the Appropriation Committee's report, the Report included an additional section titled (13) Consumer and employee protections and employer workplace policies. 78a. The additional sections are: (14) Optional Social Equity Excise Fee on Cultivation Activities (74a-75a); (15) Law Enforcement Drug Recognition Experts (79a), and (16) No Forfeiture or Postponement of Driving Privileges for Certain Marijuana and Hashish Offenses. 79a-80a.

For each section discussed in the Statement, where the Bill empowered the Commission to act, that section said so explicitly. For instance, the section on “Licensing of Cannabis Businesses” describes that the **“the commissions would be responsible for reviewing each application in full”** (62a-63a); the section “Certification of Cannabis Handlers” provides that such individuals **“need to have a valid certification issued by the commission”** (67a); the section “Transition to Full Legal Market” provides that within 180 days of the bill being signed, **“the commission would . . . adopt rules and regulations it prepared that are necessary and proper to enable it carry out the commission’s duties, functions and powers with respect to activities associated with the personal use of cannabis,”** and **“the commission would begin accepting and processing applications within licenses,”** and **“the commission would determine the first date . . .cannabis retailers . . . may begin retail sales[.]”** 68a.

Accordingly, the Statement clearly delineates the specific powers and duties of the Commission. If the Legislature had also wanted the Commission to enforce the “Consumer and Employee Protections,” that section would have included a directive for the actions the legislature wanted the Commission to take to engage in that enforcement. To believe that the Legislature intended this result is to believe that the Legislature gave detailed and specific instructions to every aspect of the Commission’s work except the setting up a new Cannabis Employment Opportunity

Commission to punish the businesses of this State—including employers, doctors, landlords, schools—when they violated these protections—without providing any guidance as to the due process or procedural requirements of such an enforcement mechanism. The legislative history does not support that inference.

d) The lack of a remedy other than an implied private of action further supports finding legislative intent to allow for such.

Where a statutory scheme provides no means to enforce its provisions apart from an implied private right of action, “it is appropriate to infer [the legislature] did not intend to enact unenforceable requirements” and “it is fair to imply a private right of action from the statute at issue.” *First Pac. Bancorp., Inc. v. Helfer*, 224 F.3d 1117, 1126 (9<sup>th</sup> Cir. 2002); *see also Steele v. Louisville Nashville R.R.*, 323 U.S. 192, 207 (1955) (finding that where statute prohibited unions from discriminated against minority workers, but provided for no enforcement mechanism, it was appropriate to infer a judicially implied remedy).

Here, CREAMMA provides no enforcement mechanisms for the explicit or consumer employment protection provisions of the Act. The Cannabis Regulatory Commission has not enacted any enforcement procedures for these protections. The federal court in *Zanetich* agreed that without a private right of action, the “failure to hire” employment protection provisions of CREAMMA are “meaningless.” *Zanetich v. Wal-Mart Stores East, Inc.*, 2023 U.S. Dist. LEXIS 91570, at \*28 (D.N.J. May 25, 2023). The Trial Court stated the CRC “does not make it easy for a violation

of the Act for something other than licensing issues” even though the Act “specifically says that employers are not allowed to fail to hire somebody strictly for their use of cannabis.” (1T11-15 to 1T12-15). And the effect of the Trial Court’s ruling was not lost on the Court: “Unfortunately, that doesn’t give the plaintiff much relief.” (1T13-5 to 1T13-6). In this statement, the Trial Court exaggerated—because, as set forth above, the CRC cannot enact an enforcement mechanism for the employment protections of the Act, and certainly, has not, the Trial Court’s decision has left Plaintiff with no relief.

In the Second Statement, the Committee describing the Consumer and Employment Protections as creating the following positive rights (and limitations on those rights) (numbering added):

- (1) Individuals (and licensed cannabis businesses) would not be subject to . . . penalty in any manner, or denied any right or privilege, including but not limited to civil liability or disciplinary action by a business, occupational, or professional licensing board or bureau, solely for engaging in conduct with respect to personal use cannabis activities as permitted under the bill.
- (2) The presence of cannabinoid metabolites in the bodily fluids of a person engaged in such permitted conduct:
  - a. with respect to a student, tenant, or employee, other than as discussed below concerning employer actions and policies, could not form the basis for refusal to enroll or employ or lease to or otherwise penalize that person, unless failing to do so would put the school, employer, or landlord in violation of a federal contract or cause it to lose federal funding;
  - b. With respect to a patient, could not constitute the use of an illicit substance resulting in denial of medical care, including organ

transplant, and a patient's use of cannabis items may only be considered with respect to evidence-based clinical criteria; and

- c. with respect to a parent or legal guardian of a child or newborn infant, or a pregnant woman, could not form the sole or primary basis for any action or proceeding by the Division of Child Protection and Permanency, or any successor agencies; provided, however, that nothing would preclude any action or proceeding by the division based on harm or risk of harm to a child or the use of information on the presence of cannabinoid metabolites in the bodily fluids of any person in any action or proceeding.

- (3) An employer would not be permitted to refuse to hire or employ a person, or discharge or take any adverse action against an employee because that person or employee does or does not use cannabis items;

(78a).

That the absence of an implied private of action would make all of the above rights **remediless** is a strong indication that the legislative in fact intended to create and allow an implied private of action.

- e) Assessing the totality of the above factors demonstrates significant evidence of legislative intent to permit an implied private of action, satisfying the second *Cort* factor.

Together, then, the **rights-creating language** inherent to the statutory scheme, the inference-from-omission derived from the statutory text that it would be absurd and implausible for the legislature to *silently and ambiguously* given the CRC the power to set up an *implied* administrative court system without any guidance or guardrails rather than allow aggrieved individuals an *implied* private right of action, and the statutory history which, again, details the powers of the CRC but does not

identify adjudicating violations of the employment protections as one of those powers, together demonstrates that the second *Cort* factor is satisfied in favor of finding an implied private right of action: that there is significant evidence of implicit legislative intent to create a private remedy, even though that private remedy is implied and not explicit. *Cort*, 422 U.S. at 78.

**3. A Private Right of Action would be consistent with the underlying purpose of the statute, satisfying the third Cort factor.**

The third *Cort* factor assesses whether a private right of action would be consistent with the underlying purpose of the statutory scheme. 422 U.S. at 78. Here, again, that answer is yes.

CREAMMA's purpose is to adopt a new approach to marijuana policies by controlling and legalizing marijuana, to be referred to as cannabis, in a similar fashion to the regulation of alcohol for adults. N.J.S.A. § 24:6I-32. The consumer and employee protection provisions enacts that purpose by ensuring that recreational users of cannabis are not treated differently in terms of their civil rights and ability to participate in civic society, including employment, while also protecting employers' rights to maintain drug-free workplaces and preclude any cannabis impairment at work. N.J.S.A. § 24:6I-51 and 52.

However, creating these consumer and employee protections without creating a process for enforcing these protections would undermine the statutory scheme.

And private litigation is **far** more efficient and protective than an administrative scheme which has not been set up and which would subject to every employer in the state to unbounded and uncontrolled regulation by the CRC.

Accordingly, the private right of action is consistent with the CREAMMA's purpose to create consumer and employee protections for adult cannabis users as part of the legalization and destigmatization of cannabis use.

**4. The three *Cort* factors together demonstrate that the legislature intended to create a private right of action to enforce the consumer and employee protections of the Act.**

The *Cort* factors are meant to ultimately be used as a canon of statutory construction to themselves infer whether the legislature intended to implicitly create a private cause of action to remedy violations of the rights-conferring portions of a particular act. Here, the foregoing analysis shows that the legislature intended such a result. Accordingly, this Court should reverse the decision of the Trial Court and find that CREAMMA contains a private right of action, and deny Defendant's motion to dismiss Count I of Plaintiff's Complaint.

**C. Finding a private right of action for the employee protections of CREAMMA would harmonize it with other employee protection statutes passed by the New Jersey Assembly. (10a-11a, 1T11 to 1T12).**

As noted above, New Jersey courts have found that a private right of action was implied most regularly in employment protection statutes. For instance, when the New Jersey Law Against Discrimination was first enacted, it did not have an



explicit private right of action, but in *Peper v. Princeton Univ. Bd. of Trustees*, 151 N.J. Super. 15, 23, 376 A.2d 535, 539 (App.Div.1977), *reversed on other grounds*, 77 N.J. 55, 389 A.2d 465 (1978), the N.J. Appellate Division court found that the private action was implied despite statutory language which only authorized administrative remedies, where the “mandate of the law was unequivocal.” In *Lally v. Copygraphics*, 85 N.J. 668, 670-71, 428 A.2d 1317, 1318-19 (1981), the New Jersey Supreme Court affirmed the reasoning of *Peper* in finding that there was implied private of action to vindicate wrongful terminations for retaliation for filing a workers’ compensation claim, such retaliation being illegal under the Workers’ Compensation statute. And In *Winslow v. Corp. Exp., Inc.*, 364 N.J. Super. 128, 136, 834 A.2d 1037 (App. Div. 2003)., the New Jersey Superior Court Appellate Division reaffirmed that the Wage Payment Act contained an implied right of action, because “even in the absence of a statutory provision . . . **our courts have readily found an implied private right of action in statutes enacted to protect employees from wrongful conduct by employers.**”

There is no basis to distinguish CREAMMA’s consumer and employment protection provisions from the rights-creating statutes addressed in *Peper*, *Lally*, and *Winslow*. The logic that supported finding an implied right of action for the NJLAD in 1977, and the Wage Payment Act until it was amended in 2019, holds with equal force for CREAMMA. Certainly, the Trial Court did not distinguish these cases,

failing to reference any of these cases in the decision or oral argument. Such was error.

Clear New Jersey case law precedent of finding implied private rights of action for employment protection statutes provides further reason to find the Trial Court erred. Indeed, failing to do so would undermine the Constitutional protections that New Jersey voters intended to confer on adult cannabis users, the legalization, decriminalization, and destigmatization of cannabis to bring it onto the same level as alcohol.

**D. Other States have found an implied private right of action under their cannabis legalization laws when the laws were silent as to how consumer or employee protections could be enforced. (10a-11a, 1T11 to 1T12).**

Finding an implied private right of action for the violations of CREAMMA's employee protections would be consistent with the other state courts which have interpreted similar statutes which were similarly silent and found that these statutes nevertheless contained a private right of action. In this context, *Zanetich* is a significant outlier. Most courts to examine this issue with respect to other states' cannabis laws which do not contain explicit private rights of action have nevertheless found that persons whose individual rights are violated are entitled to their day in court.

For instance, in *Whitmire v. Wal-Mart Stores Inc.*, 59 F. Supp. 3d 761, 775-76 (D. Ariz. 2019), a federal court construing Arizona's medical cannabis statute found

that it had an implied cause of action because one was needed to implement the statutory directive. The Supreme Court of Nevada likewise found that the Nevada legislature intended to provide a private right of action to implement employee protections contained in Nevada’s medical cannabis law, where the act “provides that the Division of Public and Behavioral Health . . . is tasked with enforcing many provisions, but the chapter is silent as to enforcement regarding employment issues[.]” *Freeman Expositions, LLC v. Eighth Judicial Dist. Court*, 520 P.3d 803, 808-09 (Nev. 2022).

The Rhode Island Superior Court reached a similar result construing a nearly identical provision to CREAMMA’s consumer and employment protections in its cannabis law. *Callaghan v. Darlington Fabrics Corp.*, No. PC-2014-5680, 2017 R.I. Super. LEXIS 88, at \*20-21 (Super. Ct. May 23, 2017). Noting that this was the only section in the statute which referenced employers, and reaching the non-controversial determination that “the General Assembly expected [this provision] to be enforced,” the court found that there was an implied private right of action for violations of the employee protection provisions. *Id.* at \*24.

Similarly, the intermediate Pennsylvania appellate court found that the state’s legislature intended to provide an implied private cause of action for the employment discrimination prohibition in Pennsylvania’s medical cannabis law. *Palmiter v. Commonwealth Health Systems, Inc.*, 2021 PA Super 159, 260 A.3d 967 (Pa. Super.

Ct. 2021). The Eastern District of Pennsylvania reached a similar result a year earlier with respect to the same law. *Hudnell v. Thomas Jefferson Univ. Hosps., Inc.*, 537 F. Supp. 3d 852, 860 (E.D. Pa. 2020). An implied right of action to enforce Connecticut’s cannabis’ law’s employee protection was also found by a federal district court in Connecticut, *Noffsinger v. SSC Niantic Operating Co.*, 273 F. Supp. 3d 326, 338-40 (D. Conn. 2017), and by the Delaware Superior Court with respect to Delaware’s law in *Chance v. Kraft Heinz Foods Co.*, No. CV-K18C-01-056 NEP, 2018 Del. Super. LEXIS 1773, 2018 WL 6655670, at \*6 (Del. Super. Ct. Dec. 17, 2018).

As noted, while these decisions are not binding, there are a persuasive cross-check that states with significantly less generous employment protections than New Jersey (i.e., Pennsylvania has still not raised its minimum wage from the federal floor of \$7.25 an hour) have found implied private rights of action for such laws.

**E. Plaintiff’s Common Law Cause of Action is cognizable as both a wrongful termination and as a failure to hire. (10a-11a, 1T11 to 1T12).**

- 1. Nothing in *Pierce* suggests that it precludes a failure-to-hire case after the Defendant has made a conditional job offer, thereby creating an “employment contract” through which the tort can operate.**

The Trial Court also held that that Plaintiff cannot assert a *Pierce* common-law claim for wrongful termination because Plaintiff was never hired, and *Pierce* does not apply to failure-to-hire cases. While two New Jersey lower-level courts

have reached that conclusion, a close reading of *Pierce* shows that there is no support for such distinctions, at least when the Defendant has made a firm job offer to hire prior to rescinding the offer for a reason that violates public policy.

In *Pierce*, the New Jersey Supreme Court grounded the cause of action within the context of the at-will nature of the employment contract. *Pierce v. Ortho Pharm. Corp.*, 84 N.J. 58, 65, (1980). The New Jersey Supreme Court noted that by the modern era, many states had modified the at-will doctrine to protect individuals not a party to collective bargaining agreements or other contract from abusive practice by employers. *Id.* at 67. The success of these actions was dependent on showing that the termination violated public policy. *Id.* The balancing act of a *Pierce* claim was careful to not interfere with a business' right to make business decisions and choose the best personnel for the job. *Id.* at 69. Ultimately, the New Jersey Supreme Court adopted the cause of action by balancing the needs of the employee, the employer, and the public. *Id.* at 71. "Employees have an interest in knowing they will not be discharged for exercising their legal rights. Employers have an interest in knowing they can run their businesses as they see fit as long as their conduct is consistent with public policy. The public has an interest in employment stability and in discouraging frivolous lawsuits by dissatisfied employees." *Id.*

Here, Plaintiff alleges she was provided an offer of employment, which she accepted, and she would have been employed by Defendant but for the illegal

condition, i.e., the unlawful drug test. In other words, Plaintiff alleges that there was an employment contract at issue which was rescinded/breached in violation of public policy. This “breach of contract” supplies the necessary privity of contract to take Plaintiff’s claim out of a simple failure to hire claim (for instance, if Defendant pre-announced its intention to not hire cannabis users and Plaintiff never applied) into a sufficient contractual relationship to warrant applying even a classic *Pierce* claim.

Accordingly, regardless of whether *Pierce* would apply or be extended to pre-offer applicants screened out of employment for cannabis usage, here, an employment contract existed between Plaintiff and Defendant, and, accordingly, the values balanced in *Pierce*—the expectations and ability of employees to both work and comply with the mandates of public policy, the policing of abusive employers, the public’s interest in the stability of employment—all are equally applicable to the instant matter.

*Pierce* holds that public policy mandates modifying the common law rule for when an employment law contract can be terminated. That logic does not depend on where the parties are temporally in their performance of their contract.

**2. New Jersey courts should extend *Pierce* to failure to hire cases where a company excludes a group of applicants from consideration in violation of a clear mandate of public policy that specifically limits the ability of employers to refuse to hire a certain class of people.**

The New Jersey Supreme Court has not weighed in on whether *Pierce* extends to failure-to-hire claims, but this Court has the power to apply it to failure-to-hire cases. The reasoning of *Pierce* supports extending the cause of action to the failure-to-hire context in the limited context of where a prospective employer affirmatively disqualifies a large swatch of applicants for a reason that violates a clear mandate of public policy—and the public policy is itself a **restriction on refusing to hire the specific class of people that the Plaintiff belongs too**. No such policy was at issue in *Lerner* or *Sabatino*, so those decisions do not control whether this Court should extend *Pierce* in this manner.

In finding a public policy wrongful termination claim grounded in the common law, the New Jersey Supreme Court reaffirmed that the common law develops and adapts to current needs. *Id.* It cited *Jersey Shore Med. Ctr.-Fitkin Hosp. v. Estate of Baum*, 84 N.J. 137, 141, 417 A.2d 1003, 1005 (1980), in which the Supreme Court noted that the common law rule that imposed liability on a husband for the necessities furnished to his wife, but not vice versa, needed to yield to the modern understanding of gender equality and marriage as an equal financial partnership. Likewise, it cited *Collopy v. Newark Eye & Ear Infirmary*, 27 N.J. 29,

44, 141 A.2d 276, 285 (1958), in which the common law rule granting tort immunity to nonprofits was rejected.

In speaking to the ability of the common law to adapt, *Collopy* cited the 19<sup>th</sup> century case of *Bell v. Gough*, 23 N.J.L. 624, 657 (E. & A. 1852), in which Justice Elmer “aptly pointed out that one of the excellencies of the common law system is that it is not so inflexible as a statute, but may be modified from time to time, as circumstances require.”

To the extent the common law does not yet extend the rule modifying at-will termination to whether to permit or limit at-will hiring, logic and justice dictates that the common law should be extended in this manner. Extending the common law is more than permissible; it is necessary:

One of the great virtues of the common law is its dynamic nature that makes it adaptable to the requirements of society at the time of its application in court. There is not a rule of the common law in force today that has not evolved from some earlier rule of common law, gradually in some instances, more suddenly in others, leaving the common law of today when compared with the common law of centuries ago as different as day is from night. The nature of the common law requires that each time a rule of law is applied it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice. Dean Pound posed the problem admirably in his *Interpretations of Legal History* (1922) when he stated, 'Law must be stable, and yet it cannot stand still.' And what has been done in the past is but one of the factors determinative of the present course of our law -- a truism which has not gone unrecognized among the great thinkers of the legal profession.



*State v. Culver*, 23 N.J. 495, 503 (1957), certiorari denied, 354 U.S. 925, 77 S. Ct. 1387, 1 L. Ed. 2d 1441 (1957).

If *Pierce* only prohibits employment terminations in violation of public policy, not unlawful refusal to hire, the flexibility of the common law would nevertheless require extending the logic of *Pierce* to the refusal to hire in violation of public policy fact pattern. The interests of employers, employees, and the public at issue in *Pierce* are the same as those at issue in the instant case—the interest in stable employment which complies with and reinforces the rule of law, the interest in employers having freedom of action consistent with public policy, the interest of the public in seeing the public policy upheld, both on the merits and because of the benefits such will have towards a respect for lawfulness in general.

Moreover, the need for a common-law *Pierce*-analogue for failure-to-hire claim is more necessary than ever, as new recruiting methods and software allow prospective employers to (a) gather vast private information about potential employees; (b) use algorithmic filtering techniques to preemptively bar applicants who had engaged in a particular protected activity.

For instance, modern software would allow potential employers to compile instant background checks of applicants which might identify whether they had ever filed a workers' compensation claim. It is unlawful under *Pierce* to **fire** someone for filing a workers' compensation claim. See *Lally v. Copygraphics*, 85 N.J. 668, 670-

71, 428 A.2d 1317, 1318-19 (1981). But failing to extend *Pierce* to failure-to-hire claims under this fact pattern would allow companies to filter out *en masse* those who had engaged in the protected activity, resulting in the same evil which justified the wrongful discharge tort.

Similarly, the rise of the gig economy, freelancing, and moonlighting has opened the possibility of individuals being terminated and rehired on a regular basis. In such a world, not permitting individuals to assert *Pierce* failure-to-hire claims will allow companies to wait out a particular employee until the employee is furloughed, and then, use the protected activity to not “rehire” the employee for the next season, gig, etc. Such a practice would be economically identical to a wrongful discharge, and, again, work the same evil.

Finally, *Pierce* **most** naturally extends to failure-to-hire cases when the public policy being violated is **refusing to hire a protected class of individuals**, such as workplace compensation filers, people who served on juries, people who filed whistleblower claims against other employers, or people who tested positive for cannabis. Each case must be taken on its own, to identify whether in fact the failure-to-hire violates public policy. But distinguishing between an individual on the day before she starts working versus on the day after is not relevant to effectuating the public policy in question.

When the Congress passed Title VII, it understood that in order achieve the public policy at issue, the modification to at-will employment could not be **limited** to cases of discharge, but needed to **include** refusals to hire. They reached the same conclusion when they enacted the ADA, the ADEA, and GINA. New Jersey reached the same conclusion when it enacted NJLAD. And the New Jersey Assembly understood that the same limit had to be put in place with respect to CREAMMA, by making clear that the public policy at issue extended to the pre-hire context. Given same, the Court should reverse the decision of the Trial Court and find that it is a violation of the common law to refuse to hire in violation of a public policy stating that denying work because of this illegitimate criterion is unlawful and antithetical to the New Jersey Constitution and statutes.

**F. The Court erred in denying Plaintiff's motion to amend to add negligence and violation of privacy causes of action. (10a-11a, 1T11 to 1T12).**

The Trial Court also erred in denying Plaintiff's motion to amend to add a claim that Defendant's conduct constituted negligence *per se* and violated Plaintiff's right to privacy because the Trial Court held that such claims were futile.

Rule 4:9-1 requires that motions for leave to amend be granted liberally" and that "the granting of a motion to file an amended complaint always rests in the court's sound discretion." *Kernan v. One Washington Park Urban Renewal Assocs.* 154 N.J. 437, 456-57, 713 A.2d 411 (1998). That "broad power of amendment should be

liberally exercised at any stage of the proceedings, including on remand after appeal, unless undue prejudice would result.” *Id.* Courts have held that amendments do not create an undue burden on defendants where the new claims are based on closely related factual allegations. *Id.* at 457.

Even when certain statutes do not contain an implied private right of action, New Jersey courts have nevertheless found that the same conduct may nevertheless support recovery under another cause of action. *See, e.g., Wild v. Carriage Funeral Holdings, Inc.*, 458 N.J. Super. 416, 428 (Super. Ct. App. Div. 2019) (holding that even if Compassionate Use Act did not provide for a private right of action against disability discrimination, the legalization of medical cannabis could be vindicated through a disability action brought under NJLAD); *Steinberg v. Sahara Sam's Oasis, LLC*, 226 N.J. 344, 361-62, 142 A.3d 742, 752-53 (2016) (violations of standards meant to protect individuals may be considered as evidence of negligence in a common-law cause of action).

In Plaintiff’s proposed amended complaint, Plaintiff asserted that Defendant’s conduct constitutes negligence or negligence *per se*, insofar as CREAMMA created a duty of employers toward job applicants in how it conducts pre-employment drug testing, and Defendant violated that duty by failing to follow those standards, resulting in harm to the Plaintiff. *See Steinberg v. Sahara Sam's Oasis, LLC*, 226 N.J. 344, 361-62, 142 A.3d 742, 752-53 (2016) (violations of standards meant to protect

individuals may be considered as evidence of negligence in a common-law cause of action). Plaintiff further asserted that Defendant's conduct resulted in a violation of Plaintiff's right to privacy, as she submitted to a drug test under false pretenses, reasonably assuming that Defendant would comply with the law if she did so.

The Trial Court denied Plaintiff's motion to amend to add these complaints without providing any reasoning other than that they sought recovery for the same conduct which supported Plaintiff's CREAMMA claim. But neither the Trial Court nor the Defendant cited to any precedent which suggests that the existence of a statutory standard precludes asserting a negligence *per se* action or privacy violation, nor did it distinguish the cases cited above by Plaintiff. Accordingly, the Trial Court's determination that asserting these claims would be futile was in error, and should also be reversed.

**G. The Trial Court erred in dismissing Plaintiff's Breach of Contract Claim (21a-22a, 2T22-23)**

The Trial Court dismissed Plaintiff's breach of contract claim because it found that no contract had been created between the parties. (2T22-23). Specifically, while the Trial Court accepted Plaintiff's premise that Plaintiff's drug test was consideration provided by Plaintiff to Defendant such as to make the offer of employment a firm offer/options-contract, the fact that once Defendant refused to honor the offer based on the results of the first drug test, Defendant suggested it would honor the offer if Plaintiff took a second drug test at her own expense (and,

presumably did not show cannabis usage on that test), “that was additional consideration that the defendant asked Ms. Sanders to undertake to complete the offer of the employment contract,” and “because she did not do that, . . . the contract did not proceed, and, thus, there was no breach of contract.” (2T22-23).

This reasoning is inconsistent and in error. The Trial Court accepted that the existence of a firm offer would have created an employment contract the violation of which could sustain Plaintiff’s breach of the covenant of good faith and fair dealing, **and** that Plaintiff participating in a drug test could indeed form the consideration necessary to change the offer into a firm offer/options contract. But agreeing with the Plaintiff this far, the Court concluded that because Defendant changed the goal posts and added a new condition which would have to be met before Defendant **honored** the offer, no contract had been formed.

But it was the original offer which had offer (the employment offer), acceptance (Plaintiff’s verbal acceptance **and** the passing of her drug test), and consideration (Plaintiff submitting to the drug test). And it is Defendant’s refusal to honor that original offer which forms Plaintiff’s breach of contract claim. Given that the Court (a) found that submitting to a drug test could be consideration turning the employment offer into an enforceable options contract; (2T22) and (b) Plaintiff had adequately alleged she **passed** the drug test under New Jersey law, the Court erred in finding that Plaintiff had failed to plead a breach of contract simply because

Defendant's refusal to honor the original contract included a suggestion that Defendant might honor a new option contract if Plaintiff took a second drug test.

The Court interpreted this demand for new consideration for the same performance as a permissible modification of a two-part firm offer/options contract rather than breach for violating the pre-existing duty rule. RD Legal Funding Partners, LP v. Powell, No. A-4909-15T2, 2019 N.J. Super. Unpub. LEXIS 1694, at \*20 (Super. Ct. App. Div. July 29, 2019) (*citing M. N. Axinn Co. v. Gibraltar Dev., Inc.*, 45 N.J. Super. 523, 533, 133 A.2d 341 (App. Div. 1957)).

Because the Trial Court found that Plaintiff had pleaded that there was a valid offer and acceptance and that a drug test was properly pleaded as consideration, this Court should reverse the Trial Court's error that a firm offer/options contract was not formed, vacate the dismissal of that claim, and remand for further proceedings.

**1. A contract was formed because Plaintiff satisfied the condition by passing the drug test.**

The conditional contract was perfected when Plaintiff passed her drug test—she tested negative for every drug tested except cannabis, and under New Jersey law, this, by law, constitutes a “passing grade.” There is nothing in the pleadings that states that Defendant told Plaintiff at the time it made her the conditional offer of employment that she had to test negative for cannabis in order to commence work, only that she had to submit to a drug test. She submitted to the drug test; she was not found to be positive for illegal drugs; accordingly, the condition was satisfied, and

the contract was perfected. If the meaning of a contract term is ambiguous, under New Jersey law, that term is construed against the drafter. *Roach v. BM Motoring, LLC*, 228 N.J. 163, 174, 155 A.3d 985, 991 (2017).

The Trial Court found that no contract was created because the Defendant had left open the possibility that it would honor its agreement if Plaintiff re-submitted to a second test and, at that point, test negative for cannabis.(2T22-12 to 2T23-4). But there was nothing in the contract that specified that there would be multiple testing rounds or multiple hurdles to cross, or that, after a successful **lawful** test, Defendant could then require Plaintiff pass an **unlawful test** as a new condition. Accordingly, because the contract was formed when Plaintiff satisfied the condition, the contract was perfected and the covenant attaches.

**2. A contract was formed because the condition was a condition precedent to performance, not a condition precedent to formation.**

The Court should also reverse the Trial Court's dismissal because it assumes that the condition at issue was a condition precedent to formation instead of being a condition precedent to performance. The Court should reject this because Plaintiff has pleaded that the contract at issue was a **conditional contract**, not a **conditional offer**. See 15a at ¶ 32. And the factual background supports this construction of the contractual relationship, by averring that the Defendant made an offer of employment to Plaintiff, which she had the option to accept or reject, and which she



decided to accept. *See* 13a at ¶¶ 7-9. Indeed, it was only after the offer and acceptance that Defendant directed Plaintiff to take a drug test. (13a at ¶ 10).

There are two types of conditions precedent: a condition precedent to formation of a contract; and a condition precedent to performance of a contract. Conditions precedent to the **formation** of a contract typically relate to whether it goes to the offer and acceptance of the contract. *See* Corbin on Contracts § 628 (1960 & Supp. 1990). Conditions precedent to formation have become disfavored by our courts. *In re Fairfield Gen. Corp.*, 75 N.J. 398, 411, 383 A.2d 98, 105 (1978); *Wendell v. 22 Grove Assocs. L.P.*, No. A-1395-14T2, 2016 N.J. Super. Unpub. LEXIS 1447, at \*13-14 (Super. Ct. App. Div. June 23, 2016). *See, also* 3 Corbin on Contracts § 589 n. 63 at 300 (Supp. 1971).

Here, there is nothing obscure about Plaintiff's allegation that an enforceable promise of future at-will employment had been formed which imposed a duty of good faith and fair dealing on Defendant, which Defendant violated when it unlawfully **rescinded the offer** and, in violation of its enforceable promise, **refused to hire** Plaintiff. This is no different than a contract to buy property subject to the condition of receiving adequate funding within 30 days. The seller is not free to cancel the contract on the 10<sup>th</sup> day merely because the funding has not yet been secured, and therefore, the condition has not been met. Rather, it is **performance** which is delayed until after the condition is satisfied, and, if the condition is never

satisfied, the contract is not void *ab initio*—rather, the mutual performances are excused.

To put it another way, consider if Plaintiff had been scheduled to take the drug test, but before Plaintiff did so, the Defendant found out that Plaintiff had filed a workers compensation claim at a prior employer and rescinded the offer because of this. Defendant could not **defend** its conduct by claiming that no contract had yet been formed because Plaintiff had not yet taken the drug test. The same applies to the instant fact pattern, and demonstrates that a contract of employment was formed, and Defendant had a duty of good faith and fair dealing in its dealings with Plaintiff with respect to that contract.

**3. Under the Restatement of Contracts, 2<sup>nd</sup>, the condition was unenforceable, not necessary to the purpose of the contract, and, accordingly, non-occurrence of an illegal condition is excused.**

The Restatement of Contracts, 2<sup>nd</sup>, provides that the term of an agreement is “unenforceable on grounds of public policy if legislation provides that it is unenforceable.” Restat. 2d of Contracts, § 178. Here, CREAMMA provides that the condition in question as applied to a positive cannabis test is unlawful. Accordingly, the condition is unenforceable on grounds of public policy. If, however, the rest of the agreement can be enforced, the court *may* enforce the rest of the agreement “in favor of a party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is not an essential part of the agreed

exchange.” Restat 2d of Contracts, § 184. Here, Plaintiff did not engage in serious misconduct, and the pleadings show that the cannabis positive test was not an essential part of the agreed exchange—Defendant was willing to let Plaintiff re-test, (13a at ¶ 16), so it was not *morally* opposed to past cannabis usage, and, regardless, the essentials of the agreed exchange was for Plaintiff to commence employment, and for Defendant to be assured that Plaintiff was not testing positive for unlawful drugs such as heroin, cocaine, methamphetamine, etc. Accordingly, there is nothing essential to the agreement which would prevent a court from enforcing it without the term that violates public policy. Given same, the Trial Court erred for this reason as well.

### **CONCLUSION**

For the foregoing reasons, the Court should reverse the decisions of the Trial Court and remand this case for further proceedings.

Respectfully submitted,

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Dated: December 6, 2024

DARLENE SANDERS

Plaintiff-Appellant,

v.

THE LEVARI GROUP, LLC d/b/a  
FIRST CHOICE FREEZER

Defendant-Respondent

SUPERIOR COURT OF NEW  
JERSEY  
APPELLATE DIVISION  
DOCKET NO.: A-002715-23

CIVIL ACTION

ON APPEAL FROM

SUPERIOR COURT, LAW  
DIVISION, CUMBERLAND  
COUNTY

SAT BELOW Honorable Niki  
Arbittier, J.S.C.

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**DEFENDANT-RESPONDENT'S BRIEF IN OPPOSITION TO  
PLAINTIFF-APPELLANT'S APPEAL OF THE TRIAL COURT'S  
NOVEMBER 3, 2023 and APRIL 2, 2024 ORDERS DISMISSING  
PLAINTIFF'S CLAIMS**

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**JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED**

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Complaint, dated November 3, 2023, Entered November 6, 2023 .....Pa10

Order Granting Defendant’s Motion to Dismiss Plaintiff’s Amended  
Complaint, Entered April 2, 2023 .....Pa21

### **PRELIMINARY STATEMENT**

The Trial Court correctly held that the New Jersey’s Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act, L. 2021, c. 16 (amending N.J.S.A. 18A, 24, 40 and 54) (hereinafter referred to as “CREAMMA”) does not provide litigants with either an express or implied private right of action. In this matter, Plaintiff filed suit alleging, in part, that the decision to not hire her violated the provisions of CREAMMA. Defendant moved to dismiss the Plaintiff’s Complaint on the basis that CREAMMA does not confer individuals a private right of action and the Trial Court, agreeing with Defendant’s position, dismissed Plaintiff’s Complaint.

In doing so, the Trial Court placed an emphasis on the Statute’s creation of powers provided to the Cannabis Regulatory Commission (“CRC”), including all powers necessary or proper to enable it to carry out the Commission’s duties, functions, and powers. The existence of this regulatory body coupled with the primary objective of CREAMMA, decriminalizing marijuana, led the Trial Court to properly find that the Plaintiff’s sole remedy is through the CRC. The Trial Court was also unwilling to overlook the absence of any indication by the Legislature that it had intended to confer an express or implied right of action for individuals under CREAMMA.

Plaintiff has not set forth any basis in the present appeal which demonstrates that the Trial Court erred in its decision. As an initial matter, Plaintiff is not an especial beneficiary of the Statute. Rather, a clear reading of CREAMMA indicates that it applies to both users and non-users of cannabis and Plaintiff, who alleges that she was not hired due to testing positive for cannabis, was not a member of any particular group for which the Statute was specifically intended to benefit. Further, there is not even the slightest indication contained in the legislative history that the Legislature intended to create private rights or remedies. Notably, the Legislature has historically been transparent when it intends to create private rights and remedies such as in regard to the State's employment statutes, and such intentions are wholly absent when reviewing CREAMMA.

As such, it is respectfully asserted that the Trial Court not only correctly dismissed Plaintiff's CREAMMA claims, but also properly denied Plaintiff's subsequent efforts to seek relief under other legal theories. Those claims are not viable as a matter of law and are merely an attempt by Plaintiff to litigate a private right of action pursuant to CREAMMA despite such a claim not being available under the law.

Accordingly, and for the reasons more fully set forth below, the Plaintiff's appeal should be denied in its entirety.



### **PROCEDURAL HISTORY**

On April 7, 2023, Plaintiff commenced an action in the Cumberland County Superior Court against defendant, The Levari Group, LLC d/b/a First Choice Freezer. Pa1. The action was “initiated [...] to redress violations by Defendant of the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (‘CREAMMA’) and/or New Jersey common law.” Pa1. More specifically, the Complaint alleges that “Defendant subjected Plaintiff to a pre-employment drug screening and then refused to hire Plaintiff based on Plaintiff’s recreational use of cannabis items.” Pa1.

Based on these allegations, Plaintiff asserted two claims against Defendant. First, Plaintiff claimed that defendant “violated Plaintiff’s rights under the CREAMMA by refusing to hire her on the basis of her recreational use of cannabis items.” Pa3. Second, Plaintiff brought a claim for “[d]ischarge from [e]mployment” in violation of New Jersey common law, in violation of public policy under Pierce v. Ortho Pharm. Corp., 84 N.J. 58 (1980). Pa3.

On July 5, 2023, Defendant filed a Motion to Dismiss the Complaint in Lieu of an Answer in accordance with Rule 4:6-2(e) for failure to state a claim upon which relief can be granted. Pa6-7.

On August 29, 2023, Plaintiff filed an opposition to Defendant’s Motion to Dismiss and a Cross-Motion to Amend the Complaint to include a breach of

contract claims based on the breach of the covenant of good faith and fair dealing, negligence/negligence per se, and violations of plaintiff's right to privacy. Pa8-9.

After oral argument was held on September 22, 2023, the Trial Court allowed Plaintiff an opportunity to "submit any other additional information with regard to" whether there was "an actual avenue in the CRC for these types of disputes."<sup>1</sup>

Following a second round of oral arguments, on November 3, 2023, the Trial Court dismissed Plaintiff's originally filed Complaint and allowed Plaintiff the opportunity to amend her Complaint to include Count III – Breach of Contract – Covenant of Good Faith and Fair Dealing<sup>2</sup>. Pa10-11.

On February 14, 2024, Plaintiff filed an Amended Complaint in accordance with the Court's Order. Pa12-18. Thereafter, on February 28, 2024, Defendant filed a Motion to Dismiss the Amended Complaint for failure to state a claim. Pa19-20.

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<sup>1</sup> 3T, Transcript of Hearing (Vol. 03), dated September 22, 2023; the transcripts are out of chronological order due to being ordered after the Appellant's brief was filed.

<sup>2</sup> 1T, Transcript of Hearing (Vol. 01), dated November 3, 2023

Oral arguments were held on March 28, 2024, and on April 3, 2024, the Trial Court entered an Order dismissing the Plaintiff's amended complaint in its entirety<sup>3</sup>. Pa21-22.

### **COUNTERSTATEMENT OF FACTS**

Defendant concurs with the majority of the facts stated in Plaintiff's brief. However, Plaintiff's statement of facts omits key portions of the underlying Complaint. Plaintiff incorrectly states that, in response to Plaintiff contacting Defendant about her start date, Defendant told Plaintiff that she had tested positive for cannabis and Defendant would not allow Plaintiff to work unless she took and passed a second test (at her own expense). Pb3.

In reality, and according to the underlying Complaint, on or around January 3, 2023, Plaintiff contacted Human Resource Representative, Gary Levari ("HR Levari") inquiring about her start date. Pa1. On or around January 4, 2023, HR Levari offered Plaintiff the opportunity to submit to a repeat drug test within a weeks' time at Plaintiff's expense. Pa1. As Plaintiff did not have the funds to submit to a retest at her own expense, Plaintiff did not retake the test. Pa1.

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<sup>3</sup> 2T, Transcript of Hearing (Vol. 02), dated March 28, 2024

## **LEGAL ARGUMENT**

### **A. STANDARD OF REVIEW ON APPEAL**

The Appellate Division “review[s] a dismissal for failure to state a claim pursuant to Rule 4:6-2(e) de novo, following the same standard as the trial court.” Grillo v. State, 469 N.J. Super. 267, 273 (App. Div. 2021) (citing Castello v. Wohler, 446 N.J. Super. 1, 14 (App. Div. 2016)). The court may not consider anything other than whether the complaint states a cognizable cause of action. Ibid. (quotations and citations omitted). “It is the existence of the fundament of a cause of action in those documents that is pivotal; the ability of the plaintiff to prove its allegations is not at issue.” Ibid. (quoting Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005); citing Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)).

Under Rule 4:6-2(e), a motion to dismiss for failure to state a claim must be denied if, giving plaintiff the benefit of all the allegations asserted in the pleadings and all favorable inferences, a claim has been established. Grillo, supra, 478 N.J. Super. at 273. “At this preliminary stage of the litigation the Court is not concerned with the ability of [appellants] to prove the allegation contained in the complaint.” Ibid. (quoting Printing Mart, supra, 116 N.J. at 746); citing Somers Constr. Co. v. Bd. of Educ., 198 F. Supp. 732, 734 (D.N.J. 1961)).

The Appellate Division also reviews matters of statutory interpretation de novo. Id. at 274 (citing Verry v. Franklin Fire Dist. No. 1, 230 N.J. 285, 294 (2017)). The Court’s ultimate “task in statutory interpretation is to determine and effectuate the Legislature’s intent.” Ibid. (quoting Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 553 (2009)). Courts “look first to the plain language of the statute, seeking further guidance only to the extent that the Legislature’s intent cannot be derived from the words that it has chosen.” Ibid. (citing McGovern v. Rutgers, 211 N.J. 94, 108 (2012); quoting Bosland, supra, 197 N.J. at 553). “The Legislature’s intent is the paramount goal when interpreting a statute and, generally, the best indicator of that intent is the statutory language.” Ibid. (quoting DiProspero v. Penn, 183 N.J. 477, 492 (2005); citing Frugis v. Bracigliano, 177 N.J. 250, 282 (2003)). Thus, any analysis to determine legislative intent begins with the statute’s plain language. Ibid. (citing DiProspero, supra, 184 N.J. at 493). The Court’s authority is bound by clearly defined statutory terms. Ibid. See Febbi v. Bd. of Rev., 35 N.J. 601, 606 (1961). Where a specific definition is absent, the Court “must presume that the Legislature intended the words that it chose and the plain and ordinary meaning ascribed to those words.” Ibid. (citing Paff v. Galloway Twp., 229 N.J. 340, 353 (2017); DiProspero, supra, 183 N.J. at 492).

Furthermore, “[t]he Legislature is presumed to be familiar with its own enactments, with judicial declarations relating to them, and to have passed or preserved cognate laws with the intention that they be construed to serve a useful and consistent purpose.” *Id.* at 275 (quoting *State v. Federanko*, 26 N.J. 119, 129 (1958); citing *In re N.Y. State Realty & Terminal Co.*, 21 N.J. 90 (1956)).

“Where a statute does not explicitly confer a private right of action for persons who may be harmed by violations of it, the determination whether a private cause of action implicitly exists is governed, in part, by the standards articulated by the United States Supreme Court for testing federal rights of action in *Cort v. Ash*, 422 U.S. 66 (1975), as adopted by the Supreme Court of New Jersey in *In re State Comm'n of Investigation*, 108 N.J. 35 (1987):

[w]hether the plaintiff is ‘one of the class for whose especial benefit the statute was enacted;’ whether there is any evidence that the Legislature intended to create a private cause of action under the statute; and whether implication of a private cause of action in this case would be ‘consistent with the underlying purposes of the legislative scheme.’

[*Crusco v. Oakland Care Ctr., Inc.*, 305 N.J. Super. 605, 614–15 (App. Div. 1997) (quoting *In re State Comm’n of Investigation*, *supra*, 108 N.J. at 41).]

## **B. THE TRIAL COURT CORRECTLY HELD THAT CREAMMA DOES NOT PROVIDE AN IMPLIED PRIVATE RIGHT OF ACTION**

As set forth more fully below, the Trial Court did not err in dismissing Plaintiff’s Complaint, as CREAMMA does not provide an express or implied

private right of action for prospective employees whom allege to have been denied employment after testing positive for cannabis. Notably, since the filing of the present appeal, the Third Circuit has issued a decision which confirms that the Trial Court correctly evaluated the issues before this Court.

On December 9, 2024, the United States Court of Appeals for the Third Circuit issued a precedential opinion in Zanetich v. Wal-Mart Stores E., Inc., 123 F.4th 128, 142 (3d Cir. 2024). The Zanetich case involves the same set of facts and legal issues that are involved in the present appeal. The Third Circuit's decision should be deemed particularly persuasive as the Zanetich case involves strikingly similar facts and arguments to those made by the Plaintiff in this matter.<sup>4</sup>

In Zanetich, the plaintiff filed a Complaint against Walmart and Sam's Club Fulfillment Center on behalf of himself and a putative class of job applicants because his offer of employment was rescinded after he tested positive on a pre-employment drug test. Plaintiff thereafter filed a two-count complaint. Zanetich

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<sup>4</sup> “[F]ederal court decisions, while not binding on New Jersey courts, are entitled to respectful consideration in the interests of judicial comity.” Achey v. Cellico P'ship, 475 N.J. Super. 446, 456 (App. Div. 2023) (citing Glukowsky v. Equity One, Inc., 180 N.J. 49, 71 (2004)). Although the court is not bound by federal decisions when interpreting our State's constitution, “federal decisional law may serve to guide [the court] in [its] resolution of New Jersey issues [.]” Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ., 176 N.J. 568, 583 (2003) (quoting State v. Cooke, 163 N.J. 657, 670 (2000)).

first sought redress on the theory that CREAMMA implies a remedy for violations of its employment protections. Zanetich, supra, 123 F.4th at 134. In the second count, the plaintiff asserted a claim for pre-employment discrimination in violation of public policy. Ibid. Essentially, the plaintiff in Zanetich asserted the same claims as the Plaintiff in this matter.

Following a thorough review of CREAMMA, the Third Circuit looked to the New Jersey Supreme Court's modified version of the Cort factors to determine whether the Legislature intended to create a private right of action when it enacted CREAMMA. With this framework, the Third Circuit found that none of the three Cort factors were met and, therefore, held that there is no implied private right of action under CREAMMA and further declined to certify the question to the New Jersey Supreme Court. Zanetich, 123 F.4th at 134, 147.

For these reasons, and the arguments set forth below, Defendant urges the Court to adopt a similar analysis of the issues in the present appeal and find that the Trial Court did not err in dismissing Plaintiff's CREAMMA violations claims.

### **1. CREAMMA Does Not Confer a Special Benefit on Job Applicants Who Test Positive for Cannabis**

The first of the Cort factors examines whether the Plaintiff "is a member of the class for whose special benefit the statute was enacted." R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co., 168 N.J. 255, 272 (2001). The question



of whether Plaintiff can satisfy the first Cort factor is a matter of statutory interpretation.

By way of background, CREAMMA was adopted “as a new approach to [New Jersey’s] marijuana policies by controlling and legalizing a form of marijuana, to be referred to as cannabis, in a similar fashion to the regulation of alcohol for adults.” N.J.S.A. 24:6I-32. The New Jersey Supreme Court has described CREAMMA as “a sweeping law that largely decriminalizes the simple possession of certain previous marijuana offenses.” State v. Gomes, 253 N.J. 56, 11 (2023).

In enacting CREAMMA, the Legislature established the Cannabis Regulatory Commission (“CRC”) as the governing body responsible for regulating both the medicinal and recreational cannabis programs in New Jersey. The Legislature further directed the CRC to oversee the development, regulation, and enforcement of activities associated with the personal use of cannabis. 54 N.J.R. 8(a). To achieve this goal, the CRC was empowered to “adopt rules and regulations prepared by the [C]ommission necessary or proper to enable it to carry out the [C]ommission’s duties, functions, and powers with respect to overseeing the development, regulation, and enforcement of activities associated with the personal use of cannabis...” Ibid. See N.J.S.A. 24:6I-

34.d(1)(a). The CRC first exercised these duties when it promulgated the Personal Use Cannabis Rules on February 8, 2023.

It is respectfully asserted that the Trial Court incorrectly concluded that the first Cort factor was met. 1T12:8-12. CREAMMA sets forth fifteen (15) findings and declarations relative to the regulation and use of cannabis. These findings and declarations do not demonstrate nor provide any basis for the argument that CREAMMA was enacted for the particular benefit of Plaintiff as a prospective employee.

Rather, as the findings and declarations indicate, CREAMMA was intended to control cannabis in a manner similar to alcohol, preventing sales of cannabis items to minors, and address issues caused by the unregulated manufacturing and use of illegal marijuana eliminating problems caused by the unregulated manufacturing, distributing and use of illegal marijuana within New Jersey, striking a blow to illegal enterprises, gangs, and cartels, and freeing resources for serious criminal activities. N.J.S.A. 24:6I-32(a) to (d). The Act also indicates that it is tailored to Black New Jerseyans who are nearly three times more likely to be arrested for marijuana possession. Id. at 32(e). The findings also reveal that the Act's purpose was to address the significant sums of money spent on enforcing marijuana possession charges, strengthening drug use prevention programs and enhancing public health. Id. at 32(f) to (m).

Notably, out of the fifteen (15) separate findings incorporated in CREAMMA, the only mention or reference to employment within the findings and declaration portion of the Act is included in the context of and in connection with the Statute's central purpose of decriminalizing personal cannabis use. Specifically, the fourteenth declaration which provides: "[a] marijuana arrest in New Jersey can have a debilitating impact on a person's future, including consequences for one's job prospects, housing access, financial health, familial integrity, immigration status, and educational opportunities..." Id. at 32(n). See 1T7:4-13.

There is not even the slightest indication contained in these findings which demonstrates that the Legislature's primary focus in drafting CREAMMA was to confer a special benefit specifically for prospective employees. To the contrary, it is clear that the central purpose of CREAMMA was focused on and intended to address criminal justice reform, protection of minors who use cannabis, and members of groups who have historically been adversely affected by marijuana enforcement and other health considerations. Ultimately, prospective employees "[were] at best a secondary concern" Cort, supra, 422 U.S. at 80-81 (wherein the Court rejected an implied remedy when the protection of a particular class was a "subsidiary purpose" of the legislation).

The Appellate Division in Jalowiecki v. Leuc, 182 N.J. Super. 22, 24 (App. Div. 1981) rejected a plaintiff's request for a court to infer a regulatory private cause of action. R.J. Gaydos Ins., supra, 168 N.J. at 273. In Jalowiecki, the plaintiff-homebuyers claimed that the defendant-sellers violated a regulation governing the design and installation of individual sewage disposal systems, and that the violation was a proximate cause of the malfunctioning septic system that caused damage to the plaintiffs' home. Ibid. After considering the Cort factors, the Appellate Division concluded that the environmental regulations did not authorize an implied private right of action because “the legislative intent of the statutory schemes which the Department [of Environmental Protection] is charged with enforcing is to protect the environment for the public as a whole, not for any single person or group of people.” Ibid. (quoting Jalowiecki, supra, 182 N.J Super. at 31). Similar to our present matter, CREAMMA was clearly not targeted at a single person or group of people.

In support of the present appeal, Plaintiff refers to other portions of the Statute and legislative history to argue that CREAMMA was intended to benefit “adult users of cannabis, focusing on how the criminalization of cannabis use can have debilitating effects on, for instance, the job prospects and financial health of cannabis users.” Pb22 (citing N.J.S.A. 24:6I-32(a)).

However, to reiterate, regardless of whether CREAMMA provides protections for prospective employees, and even though there is some mention of employment protections in the Statute, this was clearly not the Legislature's primary motivation in enacting CREAMMA. As stated, a plain reading of the Statute indicates that there were other clearly more pressing public policy matters such as criminal justice reform and protection of minors. See N.J.S.A. 24:6I-32. Plaintiff, as a prospective employee, was no more than a subsidiary benefactor under CREAMMA.

Furthermore, as the Third Circuit has recently held:

CREAMMA's first employment protection prohibits adverse employment actions because a person 'does *or does not* smoke, vape, aerosolize or otherwise use cannabis items.' By protecting both users and non-users of cannabis, this provision sweeps very broadly, as every member of the public is either a cannabis user or a cannabis non-user. And without an unmistakable textual focus on cannabis users in particular, this provision does not confer a special benefit on any particular class.

[Zanetich, supra, 123 F.4th at 142 (quoting N.J.S.A. 24:6I-52(a)(1) (emphasis added) (other citations omitted)).]

For these reasons, Defendant respectfully asserts that the first Cort factor cannot be met, as CREAMMA does not confer a special benefit of any particular class, let alone prospective employees, thereby supporting a finding that CREAMMA does not provide Plaintiff with an express or implied private right of action.

**2. The Trial Court Correctly Held that the Second Cort Factor was not Met as the Legislature did not Intend to Create a Private Right of Action under CREAMMA**

The second Cort factor requires the Court to evaluate whether “there is any evidence that the Legislature intended to create a private right of action under the statute.” R.J. Gaydos, supra, 168 N.J. at 272. To be clear, nowhere in the record is there mention of the Legislature’s intent to create an express private right of action. Similarly, in light of the comprehensive enforcement scheme created through the Cannabis Regulatory Commission, there is no basis for concluding that CREAMMA impliedly authorizes a private cause of action. Although courts give varying weight to each one of [the Cort factors], “the primary goal has almost invariably been a search for the underlying legislative intent.” R.J. Gaydos, supra, 168 N.J. at 272-273 (quoting Jalowiecki v. Leuc, supra, 182 N.J. Super. at 30).

On appeal, Plaintiff urges the Court to imply a private cause of action, arguing that statutes with “rights creating” language that lack explicit remedies evidence an intent by the Legislature that the statute should be enforced through an implied private cause of action. Pb16. However, contrary to this assertion, “even where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action must still show that the statute manifests an intent ‘to create not just a private *right* but also a private *remedy*.’” Gonzaga

Univ. v. Doe, 536 U.S. 273, 284 (2002) (emphasis in original). The Court should not imply remedies which were not set forth by the Legislature. “[W]here, as here, the plain language of the provision weighs against implication of a private remedy, the fact that there is no suggestion whatsoever in the legislative history that [C.24:6I-52] may give rise to suits for damages reinforces our decision not to find such a right of action implicit within the section.” Touche Ross & Co. v. Redington, 442 U.S. 560, 571 (1979) (citing Cort, supra, 422 U.S. at 82-84 (1975); Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975); National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453 (1974); T. I. M. E. Inc. v. United States, 359 U.S. 464, 479 (1959)).

In the within matter, the Trial Court correctly held that the Legislature did not intend to create a private right of action or remedy, nor can one be implied under CREAMMA. As a threshold consideration, the Trial Court, relying on precedent from the New Jersey Supreme Court, exercised caution in overturning or overreading the Legislature’s express intent, where it clearly seeks to assign oversight authority to a regulatory body. 1T12:17-25. See Castro v. NYT Television, 370 N.J. Super. 282 (2004); In re State Comm’n of Investigation, 108 N.J. 35 (1987).

As the Trial Court stated, in drafting CREAMMA, the Legislature specifically created the Cannabis Regulatory Commission (“CRC”) and assigned the CRC the authority to create all necessary regulations needed to implement the purpose of the Act and to prosecute any violations thereunder. 1T13:1-4. Based on the express creation of and assignment of authority to the CRC, the Trial Court found that Plaintiff’s remedy was, in fact, through the CRC and not the Superior Court. 3T16:19-23.

“Our Supreme Court has indicated that a court should be especially hesitant in implying a right to a private cause of action against an entity that is subject to such pervasive regulation by a State agency.” Castro, supra, 370 N.J. at 293–94 (citing R.J. Gaydos, supra, 168 N.J. at 280–81 (noting that “refusing to recognize implied private cause of action against insurance company in light of ‘comprehensive regulation’ of insurance industry”); Campione v. Adamar of New Jersey, Inc., 155 N.J. 245, 266 (1998) (noting that “‘Given the elaborate regulatory scheme’ under which casinos operate, the Court ‘decline[d] to imply a cause of action [against casino] when no such cause of action exist[ed] at common law.’”)). Therefore, in view of the compelling legislative history indicating that the Legislature provided for a comprehensive enforcement scheme through the CRC, there is no basis for concluding that CREAMMA impliedly authorizes a private cause of action.



Notwithstanding, Plaintiff will argue that the Legislature did in fact intend to create a private right of action to enforce the employee protection provisions of the statute based upon statutory structure, legislative history, the prospect of a remediless right and the specific grant of licensing powers to an administrative agency yet in absence of any adjudicative powers. Pb15.

However, those arguments are not persuasive nor sufficient to justify overturning the Trial Court's decision. First, there are no statements, findings or declarations contained within CREAMMA's legislative history that even remotely indicate an express intention by the Legislature to provide a private remedy for a prospective employer's alleged failure to hire a job applicant based on a positive drug test for cannabis. Zanetich, supra, 123 F.4th at 142. In fact, the legislative history on the issue is limited to the following statement: "An employer shall not be permitted to refuse to hire or employ a person, or discharge or take any adverse action against an employee because that person or employee does or does not use cannabis items." Id. at 142-143 (citing Appropriations Committee Report on A.21 (Nov. 19, 2020 at 20)).

But that statement addresses private rights conferred by CREAMMA; it does not announce a legislative intention to confer a private remedy for their violation. Id. at 143. In addition, the Legislature's silence should not be deemed as its intention to confer such rights. New Jersey courts have been reluctant to

infer a statutory private right of action where the Legislature has not expressly provided for such action. R.J. Gaydos, supra, 168 N.J. at 271. “The fact that no general cause of action for violation of the [ ] provisions of the Act has been created is to us some reliable evidence that the Legislature neither intended to create such a cause of action by silence nor desired the judiciary to create.” Miller v. Zoby, 250 N.J. Super. 568, 576 (App. Div. 1991).

Furthermore, Plaintiff’s claim that the lack of an alternative mechanism for enforcement of CREAMMA’s employment protections implies a legislative intent to provide a private right of action does not permit Plaintiff to meet the second Cort factor. As the Third Circuit recently held, this argument takes too broad a view of New Jersey precedent. Zanetich, supra, 123 F.4th at 143. More specifically, the New Jersey courts have historically held that the absence of an alternative enforcement mechanism does not, in and of itself, explicitly lead to the conclusion that Legislature intended to provide a private remedy. Ibid. “Rather, the lack of an express statutory remedial provision and the absence of legislative history are consistent with the conclusion that the New Jersey Legislature did not intend to create a private remedy.” Ibid. As the Third Circuit has also found, the existence of the CRC lends against a finding that there exists implied rights or remedies under CREAMMA. Id. at 144.

Plaintiff however argues that the CRC does not have the authority to enact any of the protection schemes set forth in the Act and that the Legislature did not intend for employees to remain remediless. Pb18-21. As the Third Circuit has noted, while the provision does not appear to extend to all employers, it is not the sole source of powers vested in the CRC. Zanetich, supra, 123 F.4th at 143. More specifically, the CRC has also been granted the power to:

- oversee development, regulation and enforcement of activities associated with personal use of cannabis (citing N.J.S.A. 24:6I-34(d)(1)(a));
- [t]o investigate and aid in the prosecution of every violation of the statutory laws of [the State of New Jersey] relating to cannabis and cannabis items and to cooperate in the prosecution of offenders before any State court of competent jurisdiction (citing 24:6I-34(b)(3)).

Notably, the CRC issued guidance that concerned cannabis-related employment actions which applies to “all employers.” Zanetich, supra, 123 F.4th at 143 (citing Jeff Brown, New Jersey Cannabis Regulatory Commission Guidance on “Workplace Impairment” (Sept. 9, 2022)). Moreover, effective February 8, 2023, the CRC amended and recodified the language related to workplace impairment to read: (e) Notwithstanding the provisions at N.J.S.A. 24:6I-52, until such time that the Commission, in consultation with the Police Training Commission established pursuant to N.J.S.A. 52:17B-70, develops standards for Workplace Impairment Recognition Expert certification no physical evaluation of an employee being drug tested in accordance with N.J.S.A. 24:6I-52 shall be required. [N.J.A.C. 17:30-2.3.] Further, when the

CRC issued Guidance on “Workplace Impairment” on September 9, 2022, it included a disclaimer, which provided:

The purpose of this guidance is to clarify and explain the NJ-CRC’s understanding of the existing legal requirements under the governing law. **This guidance does not impose any additional requirements that are not included in the law *and does not establish additional rights for any person or entity.*** Please note, however, that adverse employment actions may impact employees’ protected rights under various laws including, but not limited to, state and federal anti-discrimination laws. When incorporating this guidance, employers should ensure compliance with all state and federal employment laws.

[Jeff Brown, New Jersey Cannabis Regulatory Commission Guidance on “Workplace Impairment” (Sept. 9, 2022) (emphasis added).]

The guidance cautions that “adverse employment actions may impact employees’ protected rights under various laws, including, but not limited to, state and federal anti-discrimination laws.” Ibid. This language makes clear that the Legislature did not intend to create a private cause of action. Rather, the Legislature intended for the CRC to be granted a wide array of authority to address numerous different aspects of CREAMMA including disputes that arose in the employment context. There have been no legislative findings, guidance documents or other materials which provide even the slightest indication that the Legislature intended to confer a private right of action to individuals in the alternative.

Moreover, while Plaintiff argues that the CRC has not created any employment-related enforcement mechanisms, the Third Circuit has found that the lack of such mechanisms may in fact “reflect [the CRC’s] relative priorities instead of a lack of legal authority to initiate such proceedings.” Zanetich, supra, 123 F.4th at 143. To reiterate, nothing within the findings and declarations incorporated in CREAMMA evidence an intention by the Legislature to create a private right of action for employment discrimination. Id. at 143-144. As set forth above, the findings indicate that CREAMMA was enacted to primarily address “law enforcement and public health concerns” see N.J.S.A. 24:6I-32(d) to (o) and the only employment-related comments concern “the negative effect a prior marijuana arrest may have on a person’s job prospects.” Zanetich, supra, 123 F.4th at 144 (citing N.J.S.A. 24:6I-32(n)). It is respectfully asserted that this Court should not find there to exist a private right of action under CREAMMA in the absence of even the slightest indicia of legislative intent. See Miller, supra, 250 N.J. Super. at 576.

It should also be noted that the Third Circuit interpreted the Legislature’s silence regarding private remedies under CREAMMA as its intention not to create them. Ibid. In fact, CREAMMA expressly states that “its cannabis-related provisions should not be construed to “amend or affect in any way any State...law pertaining to employment matters.” Ibid. (citing N.J.S.A. 24:6I-

55(a)). Arguably, had the Legislature intended to create such remedies, it would have done so, and it would have considered whether such provisions under the Act should more appropriately be included under the New Jersey Law Against Discrimination (“LAD”) or other similar employment related statutes in this State. However, despite several years having passed since CREAMMA was enacted, the Legislature has still not amended the Act nor clarified that there exists any such private rights or remedies. The Legislature has also not taken any action to amend the limited job protection language of CREAMMA to more closely reflect that of the Law Against Discrimination which actually does provide private rights and remedies.

- i. There are Distinct Differences Between the Employment Statutes of this State and CREAMMA which Clearly Indicate that the Legislature did not Intend to Create a Private Right of Action

On appeal, Plaintiff argues that New Jersey courts have found that a private right of action was implied most regularly in employment protection statutes and, therefore, the Court should follow the same in finding such implied rights under CREAMMA. However, the cases cited by Plaintiff do not support this contention. Plaintiff first points to Lally v. Copygraphics, 85 N.J. 668 (1981) and Peper v. Princeton Univ. Bd. Of Trustees, 151 N.J. Super. 15 (App. Div. 1977), rev’d on other grounds, 77 N.J. 55 (1978), in support of her arguments. Pb17-18.

In Lally, the New Jersey Supreme Court found there to exist a common-law cause of action for a retaliatory firing “attributable to the filing of a workers’ compensation claim.” Zanetich, supra, 123 F.4th at 146. However, the Third Circuit found that Lally is not instructive as it was decided before New Jersey adopted the modified Cort test. Ibid. The Peper case also does not support Plaintiff’s appeal for the same reasons. Ibid.

The Third Circuit found that the case of Winslow v. Corporate Express, Inc., 364 N.J. Super. 128 (App. Div. 2003) is also distinguishable. Zanetich, supra, 123 F.4th at 146. In Winslow, the Court concluded that “a private cause of action could be implied for an employee against the employer for failure to provide updated notice of the method for calculating the employee’s commission.” Ibid. (citing Winslow, supra, 364 N.J. Super. at 1042-43). The Winslow Court relied upon both Lally and Peper in support of its decision. Ibid. The only other case that the court invoked in support of its decision was Mulford v. Computer Leasing, Inc. 334 N.J. Super. 385 (1999). Ibid. Notably, the Mulford Court “relied on two Cort factors – special benefit and statutory purpose – albeit without attribution to Cort.” Zanetich, supra, 123 F4th at 146. As the Third Circuit found:

Thus, Mulford, and by extension Winslow, are best understood as implicit application of the modified Cort test, as opposed to separate rules for an implied remedy in employment disputes. And if doubts remained about New

Jersey's dedication to Cort, they should have evaporated upon the New Jersey Supreme Court's subsequent reliance on the modified Cort test.

[Ibid.]

In addition, the Trial Court correctly held that statutory construction of employment statutes such as the New Jersey Law Against Discrimination ("LAD") and New Jersey Conscientious Employee Protection Act ("CEPA") are clearly different than the manner in which the Legislature created and constructed CREAMMA. As the Court knows, the LAD and CEPA were enacted with the central focus of protecting individuals against discrimination and retaliation such as in the employment context. 3T16:8-13. These two statutes are particularly noteworthy in terms of the striking differences in how they were constructed by the Legislature. More specifically, it is clear when reviewing the plain language of the LAD and CEPA that the Legislature intended to create a private right of action under those statutes in contrast to CREAMMA.

Indeed, as the Court knows, "[o]riginally enacted in 1945, New Jersey's LAD prohibited employment discrimination on the basis of 'race, creed, color, and national origin or ancestry' and provided an express private cause of action for violations of those protections." Zanetich, supra, 123 F.4th at 144 (citing L. 1945, c. 169). Similarly, CEPA states: "[u]pon a violation of the provisions of this act, an aggrieved employee or former employee may, within one year, institute a civil action in a court of competent jurisdiction." N.J.S.A. 34:19-5. Notably, the



Legislature specifically provided limitations periods under which aggrieved employees can bring suit. A comparable provision is absent from CREAMMA.

“When the Legislature creates a statutory cause of action without including a limitations provision, a court will apply the general limitations provision which governs that category of claim.” Troise v. Extel Commc'ns, Inc., 345 N.J. Super. 231, 236 (App. Div. 2001), aff'd, 174 N.J. 375 (2002) (citing McGrogan v. Till, 167 N.J. 414, 420–24 (2001); Montells v. Haynes, 133 N.J. 282, 291–95 (1993)). The determination of what statute of limitations applies does not “turn on the complaint-specific legal theories that plaintiffs plead, but rather on the nature of the injuries generally identified with the specific cause of action.” Ibid. (quoting McGrogan, supra, 167 N.J. at 423). Attempting to apply this test is futile in this matter, as CREAMMA lacks any express time limitation, there is nothing in the statute that speaks to an employee’s injuries, and the Act does not authorize an employee to bring a civil action.

Further examination of the legislative history and language in the context of employment statutes underscores that the Legislature did not intend to create a private cause of action under CREAMMA. In the Findings and Declarations incorporated in the LAD, the Legislature specifically detailed the harm caused by violations of the statute stating:

The Legislature further finds that because of discrimination, people suffer personal hardships, and the State suffers a grievous harm. The

personal hardships include: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning difficulty; career, education, family and social disruption; and adjustment problems, which particularly impact on those protected by this act. Such harms have, under the common law, given rise to legal remedies, including compensatory and punitive damages. The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this State.

[N.J.S.A. 10:5-3.]

In addition, the Legislature expressly stated that CEPA required rather than permit[ted], that the remedies ordered by a court in a civil action for a violation of the act include, to the fullest extent possible, the following:

1. An injunction against any continuing violation of the act;
2. Reinstatement of the employee to the same, or comparable, employment with full fringe benefits and seniority rights;
3. Compensation for all lost remuneration; and
4. Payment of reasonable costs and lawyers fees.

[New Jersey Senate Committee Statement to S.B. 1886 (Oct. 14, 2004).]

In contrast, CREAMMA is silent as to the scope and nature of available relief, and whether individuals can seek an injunction, reinstatement, compensation or other payments. The Legislature also did not include any provisions speaking to the applicable statute of limitations for any such purported private rights of action under the Act. As is clear, this is strikingly

different to the clear legislative intent gleaned from the actual employment-related statutes of this State and in which the Legislature has clearly intended to create such private rights and remedies. Arguably, the absence of similar language being incorporated in CREAMMA is because the Legislature did not intend to create private rights and remedies under the Act. (“[W]here, as here, the plain language of the provision weighs against implication of a private remedy, the fact that there is no suggestion whatsoever in the legislative history that [C.24:6I-52] may give rise to suits for damages reinforces our decision not to find such a right of action implicit within the section.”) Touche, supra, 442 U.S. at 571 (1979) (citing Cort, supra, 422 U.S. at 82-84 (1975); Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975); National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453 (1974); T. I. M. E. Inc., supra, 359 U.S. at 479 (1959)). Furthermore, and as the Third Circuit has noted, after the 2020 amendments to New Jersey’s Constitution, the Legislature has not even “created an express cause of action for employment discrimination based on cannabis use.” Zanetich, supra, 123 F.4th at 144-145.

For these reasons, it is respectfully asserted that the Trial Court did not commit error when it held that the second Cort factor has not been met as there is no indication through a review of the legislative history that the Legislature

intended to create a private right of action or confer private remedies for individuals like the Plaintiff.

**3. The Trial Court Correctly Held that Implying a Private Right of Action would not Further the Purposes of CREAMMA**

As the Court knows, the third Cort factor examines “whether implying a private cause of action would further “the underlying purpose of the legislative scheme.” Cannon v. University of Chicago, 441 U.S. 677, 703 (1979). See also Cort, supra, 422 U.S. at 84. Here, implying a private right of action for the Plaintiff would not further the purposes of CREAMMA.

On appeal, Plaintiff argues that CREAMMA’s purpose is to adopt marijuana policies by controlling and legalizing marijuana in a similar fashion to the regulation of alcohol for adults. Pb29. Plaintiff further asserts that the Act’s protection provisions enact that purpose by ensuring cannabis users are not treated differently in terms of their civil rights. Ibid. Plaintiff continues that since private litigation is far more efficient than an administrative scheme which has not been established, a private right of action is consistent with CREAMMA’s ultimate purpose. Ibid. However, these arguments are not supported by the plain language and purpose of the Act.

As set forth in Zanetich, the first underlying purpose of CREAMMA is to regulate cannabis “in a similar fashion to the regulation of alcohol for adults.” Zanetich, supra, 123 F.4th at 145 (citing 24:6I-32(a)). However, there does not

exist any private cause of action for employment discrimination based upon an individual's consumption of alcoholic beverages. Ibid. As such, this particular provision does not lend any support for the argument that a private cause of action would then similarly be available, in the absence of the Legislature's express language, for the consumption of cannabis.

The second purpose of the act is to "prevent the sale or distribution of cannabis to persons under 21 years of age." Ibid. (citing N.J.S.A. 24:6I-32(b)). However, as is the case in this matter, conferring the Plaintiff, an individual who alleges to have been denied employment due to testing positive for cannabis, a private right of action does nothing to further the second purpose which is tied to the protections of individuals who are under the age of 21.

The third purpose of CREAMMA is "to eliminate the problems caused by the unregulated manufacturing, distribution, and use of illegal marijuana within New Jersey." Ibid. (citing N.J.S.A. 24:6I:32(c)). As the Third Circuit notes, inferring a cause of action for the use of cannabis may not only not further purposes of the Statute – it may impede it since it could have the unintended consequence of protecting individuals who consumed illegal, unregulated cannabis which would be in direct contradiction of the essence of CREAMMA. Ibid.

Furthermore, and as set forth above, the findings and declarations incorporated in CREAMMA reveal that Legislature's primary focus was on criminal justice reform and public health issues. Finding an implied right of action or private remedies under CREAMMA, especially considering the Legislature's silence on the issue, does not further the principal purposes of the Statute.

Accordingly, the Trial Court correctly held that the third Cort factor was not met, and the Trial Court did not commit error by finding that CREAMMA does not provide a private cause of action.

**4. Balancing of the Cort Factors does not Permit a Finding that there Exists an Implied Private Right of Action Under CREAMMA**

As set forth above, the Trial Court correctly held that that the three Cort factors were not met and, as such, CREAMMA did not provide an express or implied private cause of action. As the Zanetich Court held regarding individuals who are not hired after testing positive for cannabis: (i) CREAMMA does not specially benefit job applicants who fail cannabis drug tests; (ii) there was not a legislative intent to imply a remedy for job applicants who fail cannabis drug tests; and (iii) implying a remedy for job applicants who fail cannabis drug tests is inconsistent with CREAMMA's stated purposes. Zanetich, supra, 123 F.4th at 145.

For the reasons set forth above, it is respectfully asserted that the Trial Court correctly held that CREAMMA does not confer individuals with either an express or private right of action and, therefore, the present appeal should be denied.

### **5. CREAMMA is Distinguishable from Cannabis Legislation Enacted in Other States**

Plaintiff urges the Court to consider the decisions of other states that have found an implied private right of action for violations of similar statutes. However, the cases cited by Plaintiff are distinguishable from our present matter and are not otherwise persuasive. Pb32-34. The court's decision in Freeman Expositions, LLC v. Eighth Judicial Dist. Court, 520 P.3d 803 (Nev. 2022), a case of first impression, concerns a statute that is entirely distinct from CREAMMA, as the "Legislature enacted NRS Chapter 678C to enforce the Nevada Constitution, see Nev. Const. art. 4, § 38(1), and to allow Nevadans who suffer from certain medical conditions to be able to obtain medical cannabis safely and conveniently, see NRS 678A.005(2)." Freeman Expositions, supra, 520 P.3d at 808. The Nevada statute is starkly different from CREAMMA in that its only purpose is to prevent discrimination associated with medical marijuana use. The plaintiffs in Freeman Exposition were already members of a protected class as they were deemed as having a disability. Ibid. Therefore, the Nevada cannabis statute operated in conjunction with other laws protecting individuals

with disabilities which, on their own, provided a private right of action. There is no such interplay between CREAMMA and any other statute in our present matter.

Furthermore, the cases cited by Plaintiff reference State statutes that do not empower a state agency to enforce their employment provisions. See Freeman Expositions, supra, 520 P.3d at 808-809; see also Callaghan v. Darlington Fabrics Corp. 2017 WL 2321181 (R.I. Super. 2017) (“[N]o state department is given authority to administer” the provision in question.). Here, the CRC clearly has broad authorities granted by the Legislature. The other cases cited by Plaintiff are clearly distinguishable given the Trial Courts’ application of the Cort test without attaching the same significance to any specific factor whereas the New Jersey Courts require that all factors be evaluated. See Palmiter v. Commonwealth Health Sys., Inc., 260 A.3d 967 (Pa. Super. C. 2021) (giving no particular weight to the second Cort factor); Whitmore v. Wal-Mart Stores, Inc., 359 F. Supp. 3d 761 (D. Ariz. 2019) (not applying the Cort framework in the same manner as New Jersey).

Accordingly, the other cases cited by Plaintiff lend no further support for the position that CREAMMA provides an implied private right of action.



### C. THE TRIAL COURT DID NOT COMMIT ERROR IN DISMISSING PLAINTIFF'S COMMON LAW (Pierce) CAUSE OF ACTION

As set forth above, Plaintiff alleges that she was not permitted to commence her employment with Defendant after she tested positive for cannabis during a pre-hire drug test. The Trial Court correctly held that New Jersey's common-law public policy exception to at-will employment was not a cognizable claim that Plaintiff could pursue as Pierce does not apply to failure-to-hire cases. This decision is consistent and in harmony with this Court's prior decisions.

In Lerner v. City of Jersey City, A-1024-17T4, 2019 WL 1468735 (N.J. Super. Ct. App. Div. Apr. 2, 2019), this Court found that:

Because plaintiffs were never employed by [defendant] ... we thus agree with the motion judge that they do not have a cause of action under Pierce again [defendant]. And, since a Pierce claim only lies against an employer, not individual employees, the claim was properly dismissed...

There is an additional basis to dismiss the Pierce claims against defendants. As defendants contend, plaintiffs' claims are more aligned with a failure to hire claim. Plaintiffs allege in their complaint that 'defendants' decision not to hire them as Jersey City employees was against public policy.' However, **the failure to hire is not a cause of action that is recognized under Pierce.**

[Id. at \*4 (emphasis added) (See Sabatino v. Saint Aloysius Parish, 288 N.J. Super. 233, 240 (App. Div. 1996) (holding that school's failure to hire the principal of a parochial school, did not state a claim under Pierce)).]

The Third Circuit also recognized that while certain public policy violations constitute claims under Pierce, "[the instances involved in those cases have] involved claims by former employees, not failure-to-hire claims brought

by job applicants.” Zanetich, *supra*, 123 F.4th at 147-148 (citing Ballinger v. Del. River Port Auth., 172 N.J. 586 (2002); Barratt v. Cushman & Wakefield of N.J., Inc., 144 N.J. 120 (1986); Young v. Schering Corp., 141 N.J. 16 (1996) (all current employees)). This conclusion is consistent with decisions in the federal courts which have characterized the Pierce exception as “covering claims brought by employees or former employees – not job applicants.” Zanetich, *supra*, 123 F.4th at 148 (citing Conoshenti v. Pub. Serv. Elec. & Gas Co., 364 F.3d 135, 149 (3d Cir. 204) (“The Pierce doctrine is about wrongful discharge.”)).

On appeal, Plaintiff argues that the Court should nevertheless disregard this precedent as the Lerner and Sabatino cases do not involve claims of refusing to hire a specific class of people. Pb47. However, again, the plaintiffs in those cases were actual employees at the time they alleged to have been terminated and clearly indicate that a Pierce claim cannot be pursued by a prospective employee such as the Plaintiff.

Thus, the Trial Court did not err in dismissing plaintiff’s common law public policy claim and Plaintiff’s appeal of this decision should be denied.

**D. THE TRIAL COURT DID NOT ERR IN DENYING PLAINTIFF’S  
MOTION TO AMEND HER COMPLAINT TO ADD COUNTS FOR  
NEGLIGENCE AND VIOLATION OF PRIVACY**

The Trial Court correctly denied Plaintiff’s request to amend her complaint to include additional causes of action which were viewed as “a renaming of the other count with regard to the violation of [CREAMMA].” 1T13:18-19. The Trial Court found that Plaintiff would not be able to establish these claims as it would require her to essentially demonstrate a private right of action under CREAMMA – which, as the Court found, was not available under the Act. The court did not err in so finding.

While Plaintiff sought to amend her complaint to add a negligence claim and a claim for violation of privacy, this was nothing more than an attempt to circumvent CREAMMA by using a different legal theory, essentially trying to achieve the same outcome through a different route. These are end-run claims in which the Plaintiff is seeking to obtain a private right of action for allegedly not being hired due to testing positive for cannabis – despite such rights or remedies not being available. The arguments are futile, as plaintiff is trying to find a loophole where the law does not allow for a private remedy. Notably, the Third Circuit in Zanetich also found that the plaintiff’s attempts to make curative amendments after finding that CREAMMA did not provide a private cause of action was not an issue that would succeed. Zanetich, *supra*, 123 F.4th at 149.

Plaintiff argues that the trial court denied Plaintiff's motion to amend without providing any reasoning. However, the Trial Court did consider Plaintiff's arguments related to Wild v. Carriage Funeral Holdings, Inc., 241 N.J. 285 (2020) and Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344 (2016). As noted, the decision in Steinberg was made based on the Court's determination that "[a]lthough the [ ] Act does not give rise to a private cause of action or set forth a tort-liability scheme, it does articulate legislative and regulatory standards of conduct intended to protect members of the public who patronize amusement parks, and, as such, violations of those standards may be considered as evidence of negligence, or even gross negligence, in a common-law cause of action." Steinberg, *supra*, 226 N.J. at 361 (citations omitted). The Court further concluded: "in given circumstances, the violation of a statutory duty of care' may be admissible as evidence of negligence." *Id.* at 363 (quoting Waterson v. Gen. Motors Corp., 111 N.J. 238, 263 (1988) (internal citations omitted)).

The Trial Court determined that the Steinberg holding was "plainly different than what we have here," because "Plaintiff's argument is that the violation of CREAMMA should at least be considered in this breach of ... covenant of good faith and fair dealing." 2T20:6-10. In essence, because businessowners owe an established duty of care, the fact that there was no private cause of action under the specific act was somewhat immaterial, whereas

here, a claim for negligence related to a failing drug test cannot be separated from CREAMMA.

Therefore, the Trial Court's decision was appropriate and Plaintiff's appeal seeking remand to file an amended Complaint should be denied.

**E. THE TRIAL COURT DID NOT ERR IN FINDING THAT PLAINTIFF COULD NOT AS A MATTER OF LAW ESTABLISH A CLAIM FOR BREACH OF CONTRACT**

The Trial Court correctly held that Plaintiff is not able to demonstrate a claim for breach of contract as a matter of law. By way of background, after the Trial Court dismissed Plaintiff's claims pursuant to CREAMMA, Plaintiff, with permission from the Court, filed an Amended Complaint to assert a claim for breach of contract and breach of the covenant of good faith and fair dealing. 1T13:14-15:6. Defendant filed a motion to dismiss the Amended Complaint on the basis that it was merely an attempt to refashion her CREAMMA claims under a different cause of action.

Plaintiff argued before the Trial Court that the violation of CREAMMA should be considered in connection with Plaintiff's breach of the covenant of good faith and fair dealing claim. 2T14-15.

The Trial Court, in reviewing the record, stated:

[..] the plaintiff interviewed for and accepted a conditional offer of employment with defendant. And – as part of the hire – hiring process, she was required to take a drug test that results, um, showed that at some point Cannabis in her system. In January of 2023, the defendant offered the

plaintiff the opportunity to repeat a drug test at the plaintiff's expense. And plaintiff in her complaint alleges that she didn't repeat the test because she didn't have the money to do so. As a result, the defendant rescinded the employment offer. And that basically she broke the law – (indiscernible) because the CREAMMA Act does provide a protection to people in employment – (indiscernible) with regard to use of Cannabis. Um. Of course – (indiscernible) this is essentially – (indiscernible) of the CREAMMA violation. Um. And that Levvari was not permitted to – (indiscernible) – permitted to make an offer on the use of Cannabis.

[2T18:19-19:16.]

CREAMMA does not provide individuals with private rights or remedies or the ability to privately seek redress for claims under the Act. Thus, Plaintiff breach of contract claims are nothing more than a derivative claim of those based upon CREAMMA violations which are unsustainable as a matter of law.

Plaintiff also argued that a contract existed and that it was satisfied because the Plaintiff underwent the first drug test as part of her conditional employment and passed the test because cannabis is now legal in the State of New Jersey. 2T20:21-21:2. In addition, Plaintiff asserts that Defendant's act of requesting that she submit to a second drug test at her own expense constituted a breach of the employment contract. 2T21:3-5.

While the Trial Court found that a contract may have existed between the parties, it also sought to evaluate whether such contract would permit a claim for breach of the covenant of good faith and fair dealing. 2T17-20. In

determining that such a claim could not be sustained under the facts of this case, the Trial Court held as follows:

[..] I think the situation here is that the consideration may have been that, um – that Ms. Sanders take this drug test. But what ended up happening here essentially is we’ve already asked her take a second drug test. Whether – we don’t know what the, um, purpose of that was. Other than we asked for as part of the original consideration to take a second test. Um. And that was – (indiscernible) that was in fact asked of Ms. Sanders, and, um, she declined to do so simply because of funds. And when I look at this complaint based on those straightforward facts that are not in dispute regarding – (indiscernible) was behind it, um, that was additional consideration that the defendant asked, um, Ms. Sanders to undertake to complete the offer, um, of the employment contract. And because she did not do that, um, I do find that the contract did not proceed, and, thus, there was no breach of contract. And that there’s not been a breach of the good faith and fair dealing.

[2T21:5-23:6.]

On appeal, Plaintiff argues that while the Trial Court accepted that the drug test constituted consideration provided by Plaintiff to Defendant so as to make a firm offer/options contract, Defendant committed a breach when it did not honor that offer and instead required a second drug test. Pb44. Plaintiff also argues that a demand for new consideration (i.e., the second drug test) constituted a modification of a two-part firm offer/options contract rather than breach for violating the pre-existing duty rule. Pb45.

In support of these arguments, Plaintiff reiterates that she did in fact pass the first drug test as cannabis is a legal drug. Plaintiff also argues that a contract was formed because she satisfied the condition by passing the drug test. Pb45.

It is further argued on appeal that “there is nothing obscure about Plaintiff’s allegation that an enforceable promise of future at-will employment had been formed which imposed a duty of good faith and fair dealing on Defendant, which Defendant violated when it unlawfully rescinded the offer and, in violation of its enforceable promise, refused to hire Plaintiff.” Pb47.

These arguments do not warrant overturning the Trial Court’s decision. To reiterate, Plaintiff was required to undergo a drug test as part of Defendant’s pre-hiring conditions. This was clearly a conditional offer of employment. Defendant subsequently presented Plaintiff with an opportunity to take a second drug test. Plaintiff refused to undergo the second drug test due to financial reasons and therefore, did not meet the conditions of the offer presented by Defendant which was thereafter rescinded.

Under New Jersey law, a conditional offer of employment does not mature into a contract until the conditions are satisfied. Bonczek v. Carter-Wallace, Inc., 304 N.J. Super. 593 (App. Div.). It is well established under New Jersey law that a contingent offer of at-will employment does not create a binding contract for employment. See e.g. Bonczek, *supra*, 304 N.J. Super. at 599 (employment with defendant never commenced because he did not satisfy the conditions of defendant's contingent offer of at-will employment); Peck v. Imedia, Inc., 293 N.J. Super. 151, 160-61 (App. Div.), certif. denied, 147 N.J.



262 (1996) (same); Pardo v. Port Auth. of N.Y. and N.J., C.A. No. 08-1311 (JLL), 2009 WL 689730, at \*4 (D. N. J. Mar. 10, 2009) (plaintiffs employment with defendant never commenced because the contingent offer of employment was expressly conditioned upon satisfactory completion of psychological and medical testing and evaluations; thus there is no breach of contract claim).

In sum, the allegations asserted by Plaintiff demonstrate that Plaintiff was presented with a conditional offer of employment which became absolute only “upon performance of the prescribed condition.” Jevic v. Coca Cola Bottling Co. of New York, CIV. A. 89-4431, 1990 WL 109851, at \*3 (D. N.J. June 6, 1990) (quoting Duff v. Trenton Beverage Co., 4 N.J. 595, 605 (1950)). Plaintiff failed to satisfy the express condition of the offer and, therefore, no contractual relation with [Defendant] ever arose. Ibid. As the Trial Court held, Plaintiff was asked for additional consideration, i.e., taking a second drug test to secure the offer of employment and when she refused to do so, the offer of employment was cancelled. 2T18:19-19:16. As set forth above, as Plaintiff fails to allege that she met the conditions of the offer, a contract was not formed. In the absence of a contract, Plaintiff cannot sustain a claim for breach of an implied covenant of good faith and fair dealing. Noye v. Hoffmann-La Roche Inc., 238 N.J. Super. 430, 434 (App. Div. 1990).

Furthermore, Plaintiff's appeal of the dismissal of her breach of contract claims are based on the premise that she passed the first drug test because, although cannabis was detected, it's not an illegal drug pursuant to CREAMMA. However, Plaintiff only alleges in her Amended Complaint that after inquiring about her start date, that she was offered the opportunity to submit to a repeat drug test within a weeks' time at her expense. Pa13. Plaintiff does not allege that the conditional offer of employment was rescinded based upon the results of her drug test. Nor does Plaintiff identify in the Amended Complaint a specific breach by Defendant. Instead, Plaintiff merely alleges in Count Three of the Amended Complaint that Defendant's failure to honor the contract violated defendant's covenant of good faith and fair dealing.

In addition, even if the Plaintiff's Amended Complaint is interpreted as including allegations that she was not hired due to testing positive for cannabis, there does not exist a private right of action or common law cause of action for such a claim. As set forth above, there does not even exist such a permissible private cause of action under CREAMMA – the very statute that was enacted to enforce and regulate cannabis use, distribution and sales throughout the State of New Jersey.<sup>5</sup> Rather, any such claims must be pursued by the CRC.

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<sup>5</sup> The Trial Court also held that: "[t]his is essentially - - (indiscernible) of the CREAMMA violation," and further found that "plaintiff's argument is that the violation of CREAMMA should at least be considered in this ... breach of

Accordingly, Plaintiff's appeal of the Trial Court's denial of her breach of contract and breach of the covenant of good faith and fair dealing should be denied.

### **CONCLUSION**

As the Plaintiff has failed to demonstrate that the Trial Court committed error in dismissing the underlying Amended Complaint, it is respectfully requested that the Honorable Court deny Plaintiff's appeal in its entirety.

Respectfully submitted,  
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Dated: February 10, 2025

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covenant of good faith and fair dealing when there's no contract." 2T19:12-14; 20:7-12).

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DARLENE SANDERS,

Plaintiff-Appellant,

v.

THE LEVARI GROUP, LLC d/b/a  
FIRST CHOICE FREEZER,

Defendant-Appellee.

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**SUPERIOR COURT OF NEW  
JERSEY- APPELLATE DIVISION**  
DOCKET NO: A-002715-23 (Team 04)

**Superior Court of New Jersey  
Law Division – Cumberland County**  
Docket No.: CUM-L-000196-23  
Sat Below: Hon. Niki Arbittier, J.S.C.

**PLAINTIFF-APPELLANT’S  
REPLY BRIEF**

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**PLAINTIFF-APPELLANT’S REPLY BRIEF IN FURTHER SUPPORT OF  
HER APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY FOR  
CUMBERLAND COUNTY LAW DIVISION’S (HON. NIKI ARBITTIER,  
J.S.C.) NOVEMBER 3, 2023 AND APRIL 2, 2024 ORDERS**

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## **LEGAL ARGUMENT**

### **A. The Trial Court erred in finding that CREAMMA does not provide an implied private right of action. (Pa10-11, 1T11-12)**

#### **1. *Zanetich* is not Binding, and was Wrongly Decided**

Defendant urges this Court to adopt the Third Circuit's recent decision in *Zanetich v. Wal-Mart Stores E., Inc.*, 123 F.4th 128 (3d Cir. 2024) to affirm the Trial Court's ruling, which was issued after Plaintiff filed the opening brief in this matter.

As the New Jersey Supreme Court has unambiguously held: "Although we often look to the decisions of federal courts for guidance, we are not bound by their decisions in respect of our own state law. They are bound by ours." *Becker v. Baron Bros.*, 138 N.J. 145, 165 (1994).

Federal decisions interpreting state law represent merely a federal court's "best effort" to "predict" what a state court would decide—not authoritative declarations of state law. *Uniroyal, Inc. v. Am. Re-Insurance Co.*, No. A-6718-02T1, 2005 N.J. Super. Unpub. LEXIS 794, at \*27 (Super. Ct. App. Div. Sep. 13, 2005). Pra98. The Third Circuit itself has acknowledged the "serious problems of predicting the direction of state law in troublesome cases." *Huddell v. Levin*, 537 F.2d 726, 738 (3d Cir. 1976). Indeed, New Jersey courts have recognized that "the trial and intermediate appellate courts of a state are better able to predict the state's law than are any of the federal courts." *Uniroyal*, 2005 N.J. Super. Unpub. LEXIS 794, at \*27

(citing *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1046-47 (3d Cir. 1993)).  
Pra98.

The inherent limitations of the Third Circuit's "prediction" in *Zanetich* are particularly evident from the sharp division within the panel itself. Judge Freeman's dissent methodically dissected the majority's errors and demonstrated why a proper application of New Jersey precedent supports finding an implied private right of action. The existence of this detailed dissent undermines Defendant's contention that *Zanetich* represents a straightforward application of established principles. Rather, it confirms that reasonable jurists—including a Third Circuit judge—can and do disagree about the proper interpretation of CREAMMA.

Moreover, the majority's analysis in *Zanetich* suffers from fundamental flaws. It markedly diverges from the Supreme Court's analytical framework established in *Cannon v. University of Chicago*, 441 U.S. 677, 691 (1979). Insofar as it found that prospective employees are not a specially benefitted class of CREAMMA, this finding is irreconcilable with New Jersey precedent.

However, the Third Circuit's misapplication of New Jersey law is most clearly illustrated by its treatment of the Cannabis Regulatory Commission's (CRC) role. The *Zanetich* majority suggests the CRC "may have" jurisdiction to enforce CREAMMA's employment protections—despite the CRC's own statements to the contrary. This speculative interpretation effectively nullifies explicit statutory

protections by creating an enforcement vacuum that the New Jersey Legislature could not have intended—while adducing vast regulatory authority to an administrative agency which the statutory text specifically disclaims.

Finally, *Zanetich* fundamentally disregards the New Jersey Supreme Court's clear directive that courts must "construe CREAMMA and its companion bills broadly and robustly so as to achieve their remedial purposes." *State v. Gomes*, 253 N.J. 6, 33 (2023). The majority's interpretation—which renders CREAMMA's employment protections wholly unenforceable—cannot be reconciled with this mandate. This Court, unlike the federal courts, is bound by the New Jersey Supreme Court's interpretive guidance on CREAMMA.

For these reasons, this Court should conduct its own independent analysis of whether CREAMMA provides an implied private right of action under New Jersey's established framework, rather than deferring to either federal court's interpretation in *Zanetich*.

## **2. The First *Cort* Factor Is Satisfied.**

The first *Cort* factor examines whether the plaintiff "is a member of the class for whose special benefit the statute was enacted." *R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co.*, 168 N.J. 255, 272 (2001). Defendant attempts to evade this straightforward inquiry by subtly but significantly altering the legal standard. Throughout its brief, Defendant repeatedly shifts from asking whether CREAMMA

confers a "special benefit" on a class that includes Plaintiff to whether CREAMMA's "primary focus" or "primary motivation" was to benefit that class. Db15, 17. This shift distorts the legal standard and misunderstands how courts identify specially benefited classes.

Under established precedent, a statute need not have a particular class as its "primary focus" to satisfy the first *Cort* factor. Rather, a statute satisfies this factor when it contains rights-creating language that explicitly prohibits specific conduct affecting an identifiable class. *Cannon*, 441 U.S. at 691-93. CREAMMA's employment provisions contain precisely this type of rights-creating language, explicitly prohibiting employers from refusing to hire any person because that person uses cannabis. N.J.S.A. § 24:6I-52(a)(1). This explicit prohibition creates a special benefit for cannabis users seeking employment—a class that unquestionably includes Plaintiff.

Defendant's emphasis on CREAMMA's broader purposes related to regulation and criminal justice reform is irrelevant to this inquiry. A statute can have multiple purposes while still conferring special benefits on particular classes. The operative question is not whether the Legislature's "primary focus" was employment protections, but whether the statutory text provides special benefits to an identifiable class that includes Plaintiff. The plain language of CREAMMA unambiguously does so.

Defendant's reliance on *Jalowiecki v. Leuc*, 182 N.J. Super. 22 (App. Div. 1981) is misplaced. Unlike CREAMMA, the environmental regulations at issue in *Jalowiecki* did not contain rights-creating language specifically protecting any particular class, but rather regulated the placement of sewage disposal sites were situated. 82 N.J. Super. at 27 (citing *N.J.A.C. 7:9-2.22*). Given the absence of statutory language focusing on a class, *Jalowiecki* found the regulations were broadly directed at "protect[ing] the environment for the public as a whole." *Id.* at 31. By contrast, CREAMMA's employment provisions do not merely protect "the public as a whole"—they specifically prohibit discriminatory employment actions against specific individuals—cannabis users who apply for jobs. This explicit prohibition demonstrates an "unmistakable focus on the benefited class," which is the hallmark of statutes that satisfy the first *Cort* factor. *Cannon*, 441 U.S. at 691.

Defendant's wholesale adoption of the *Zanetich* majority's reasoning—that CREAMMA doesn't confer special benefits because it protects both users and non-users of cannabis—fundamentally misunderstands how courts identify specially benefited classes. Under this flawed reasoning, Title IX would not confer special benefits on women because it formally protects both men and women from sex discrimination. Yet in *Cannon*, the Supreme Court held that Title IX's anti-discrimination provisions specially benefited women seeking equal educational opportunities, despite the statute's facially neutral protection against sex

discrimination. 441 U.S. at 694. CREAMMA's employment provisions similarly protect cannabis users from discrimination while using facially neutral language.

Moreover, CREAMMA specifically protects individuals who test positive for cannabis metabolites from adverse employment actions. N.J.S.A. § 24:6I-51(b) expressly states that "[t]he presence of cannabinoid metabolites in the bodily fluids of a person engaged in conduct permitted under [CREAMMA]... with respect to a... employee... shall not form the basis for refusal to... employ... or otherwise penalize that person." This provision creates a special benefit for precisely the class of which Plaintiff is a member—prospective employees who test positive for cannabis.

New Jersey courts have consistently recognized specially benefited classes in employment statutes with similar protective frameworks. In *Peper v. Princeton Univ. Bd. of Trustees*, the Appellate Division found that the Law Against Discrimination specially benefited particular classes despite protecting all persons from discrimination. 151 N.J. Super. 15, 23-24 (App. Div. 1977). Similarly, in *Winslow v. Corp. Express, Inc.*, the court recognized that wage protection laws specially benefited employees despite their universal application to all workers. 364 N.J. Super. 128, 135-36 (App. Div. 2003).

The Trial Court correctly recognized that Plaintiff "is a member of a class who's entitled to benefit from this action." 1T12:8-10. However, the Trial Court



failed to properly weigh this factor in its analysis or recognize its significance to the implied private right of action inquiry. This error warrants reversal.

**3. The second Cort factor strongly supports an implied private right of action.**

The second *Cort* factor examines "whether there is any evidence that the Legislature intended to create a private right of action under the statute." *R.J. Gaydos*, 168 N.J. at 272. Defendant's argument on this factor begins with a circular assertion: "nowhere in the record is there mention of the Legislature's intent to create an express private right of action." Db16. This argument fundamentally misunderstands the nature of an *implied* private right of action analysis, which, by definition, applies where a statute lacks *express* authorization.

Several compelling indications demonstrate that the Legislature intended to create a private right of action under CREAMMA. Most significantly, the Legislature's disparate treatment of private rights of action in contemporaneously enacted cannabis legislation provides persuasive evidence of intent. When enacting CREAMMA, the Legislature explicitly disclaimed private rights of action in a companion bill (N.J.S.A. § 34:6B-21) but deliberately chose not to do so in CREAMMA. As the New Jersey Supreme Court explained in *Coleman v. Martinez*, 254 A.3d 632, 647 (N.J. 2021), when the Legislature enacts multiple related statutes, courts must "assume that the Legislature knew precisely what it was doing" when it includes a provision in one statute but omits it from another.

Defendant argues that CREAMMA contains a "comprehensive enforcement scheme" through the Cannabis Regulatory Commission (CRC). Db16. This assertion is demonstrably false. Nothing in CREAMMA grants the CRC authority over employment matters. The CRC's statutory powers relate exclusively to licensing and regulating cannabis businesses—not policing employment relationships. N.J.S.A. § 24:6I-34(a). Indeed, the CRC itself has disclaimed such authority, stating in its guidance that it "does not perform any law enforcement duties or regulate unpermitted or unlicensed entities in any way."

The CRC's own guidance document on workplace impairment—which Defendant relies upon—explicitly states: "This guidance does not impose any additional requirements that are not included in the law and does not establish additional rights for any person or entity." Rather than supporting Defendant's position, this document confirms that the CRC does not view itself as having authority to create or enforce employment rights under CREAMMA.

Defendant's suggestion that the Legislature created employment rights with no enforcement mechanism violates fundamental principles of statutory construction. As the United States Supreme Court recognized in *Marbury v. Madison*, courts should not construe statutes to create meaningless rights without remedies. 5 U.S. 137, 163 (1803). Yet Defendant's interpretation would create

exactly that result—explicit statutory protections that no entity has authority to enforce.

Defendant attempts to distinguish New Jersey cases recognizing implied private rights of action in employment statutes by suggesting they predate the *Cort* test or involve different statutory schemes. Db24-26. This argument ignores that New Jersey courts have consistently reaffirmed these precedents even after adopting the *Cort* framework. In *Winslow*, the Appellate Division recognized an implied private right of action under the Wage Payment Act, explicitly stating that "even in the absence of a statutory provision... our courts have readily found an implied private right of action in statutes enacted to protect employees from wrongful conduct by employers." 834 A.2d at 1043.

Defendant's reliance on federal cases like *Gonzaga* and *Touche Ross* is similarly misplaced. Db16-17. Those cases reflect a restrictive approach to implied private rights of action under federal law that New Jersey courts have explicitly declined to follow. Instead, New Jersey courts have adopted a more flexible approach that recognizes the need for private enforcement mechanisms to effectuate statutory rights, particularly in the employment context. *See Lally v. Copygraphics*, 85 N.J. 668 (1981); *Peper*, 151 N.J. Super. at 23-24.

Finally, Defendant's suggestion that the Legislature intended the CRC to have enforcement authority but simply failed to exercise it strains credulity. Db22-23. No

statute authorizes the CRC to adjudicate employment disputes, issue cease-and-desist orders to employers, or provide remedies to aggrieved employees. The Legislature could not have intended to delegate such sweeping authority to a cannabis licensing agency through mere silence.

The Trial Court's finding that Plaintiff's remedy was "through the CRC and not the Superior Court" (3T16:19-23) was based on a fundamental misunderstanding of the CRC's statutory authority. This error, carried forward by Defendant's brief, warrants reversal.

#### **4. The Third *Cort* Factor is Satisfied**

The third *Cort* factor examines "whether implication of a private cause of action in this case would be 'consistent with the underlying purposes of the legislative scheme.'" *In re State Comm'n of Investigation*, 108 N.J. 35, 41 (1987) (quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975)). Defendant argues that permitting private enforcement of CREAMMA's employment protections would not further the statute's purpose because: (1) CREAMMA's primary aim is to regulate cannabis like alcohol; (2) no private right of action exists for alcohol consumption discrimination; and (3) private enforcement might protect individuals who consumed illegal cannabis. Db30-32. These arguments fundamentally misunderstand CREAMMA's purpose and structure.

The New Jersey Supreme Court has directed courts to "construe CREAMMA and its companion bills broadly and robustly so as to achieve their remedial purposes." *State v. Gomes*, 253 N.J. 6, 33 (2023). Defendant's narrow view of CREAMMA's purpose cannot be reconciled with this directive. While regulating cannabis like alcohol is indeed one purpose of CREAMMA, the statute's text reveals multiple purposes, including protecting cannabis users from various forms of discrimination. N.J.S.A. § 24:6I-51 and N.J.S.A. § 24:6I-52 explicitly prohibit discrimination against cannabis users in employment, housing, education, and healthcare. These protections are not incidental to CREAMMA's regulatory framework—they are integral components of the Legislature's comprehensive approach to cannabis reform.

Moreover, Defendant looks to the enumerated purposes and legislative history while ignoring the plain meaning of the text. The purpose of a statute prohibiting homicide is to prohibit homicide, regardless of what is contained in its preamble or legislative history. The purpose of a statute **prohibiting** vehicles in parks is to **prohibit** vehicles in parks. The purpose of a statute prohibiting refusing to employ individuals who test positive for cannabis is to **prohibit** refusing to employ individuals who test positive for cannabis. When a statute is phrased as "Thou Shalt Not X," its purpose to prohibit X is self-evident and inescapable.

Given this single purpose, it would be a mistake to over-analyze how the specific purpose of the employment protections fits in with other purposes of the law. A law may have a single purpose, or it may have multiple purposes. Those multiple purposes might be logically related, or they might not. The anti-gender-discrimination protections of Title IX had little connection with the other provisions of the Education Amendments Act of 1972, but that did not mean that the purpose to eliminate gender discrimination in education was not contemplated or critical to the enactment of that provision.

Within that context, recognizing a private right of action directly advances CREAMMA's employment protection purposes—regardless of what effect that might have on the other purposes the legislature may have had in enacted CREAMMA. It ensures that the employment protections are meaningful rather than illusory. Without private enforcement, these protections would be effectively unenforceable, as the CRC lacks authority to adjudicate employment disputes. Second, private enforcement promotes compliance with CREAMMA's anti-discrimination provisions, furthering the Legislature's goal of destigmatizing legal cannabis use. Third, it facilitates the full integration of cannabis consumers into the workforce, supporting the economic aspects of cannabis legalization.

Given same, that there is no companion statute that makes it unlawful to deny employment due to the presence of alcohol metabolites in a testing regime is the

largest non-sequitur imaginable. There is simply no evidence that one could even *test* for such metabolites (i.e., a test which showed that someone had consumed alcohol in the last several weeks), and certainly no common practice where any employer uses such tests to regulate employment. Prohibiting such tests for *cannabis* allows for cannabis to be treated the same as alcohol.

As for whether the purpose is not served because the employment protections will not distinguish between users of cannabis who purchased cannabis lawfully versus unlawfully, again, that one of CREAMMA's purpose is to foster a lawful cannabis market and weaken the unlawful cannabis market is separate and a part from CREAMMA's other purpose that users of cannabis, regardless of source, be protected from adverse employment actions for cannabis-positive drug tests.

**B. The Trial Court Erroneously Dismissed Plaintiff's *Pierce* Claim (Pa10-11, 1T11-12)**

The Trial Court's dismissal of Plaintiff's claim under *Pierce v. Ortho Pharm. Corp.*, 84 N.J. 58 (1980) erroneously adopted a categorical rule that the doctrine cannot apply in pre-employment contexts. This rigid interpretation misunderstands both the purpose of the *Pierce* doctrine and the unique factual context of this case, where Plaintiff received a firm employment offer contingent only on passing a drug test. Unlike the plaintiffs in *Lerner v. City of Jersey City*, 2019 WL 1468735 (N.J. Super. Ct. App. Div. Apr. 2, 2019) and *Sabatino v. Saint Aloysius Parish*, 288 N.J. Super. 233 (App. Div. 1996), who were merely job applicants, Plaintiff had

received and accepted a firm offer of employment subject only to a condition that, under CREAMMA, could not lawfully be enforced.

The modern employment landscape has evolved significantly since *Pierce* was decided in 1980. Many employers now use a conditional offer stage precisely to conduct screenings that would raise legal concerns if conducted earlier in the application process. Refusing to extend *Pierce* to cover conditional offers of employment would create a significant loophole through which employers could circumvent important public policy protections.

**C. The Trial Court Erred in Denying Plaintiff's Motion to Amend (Pa10-11, 1T11-12)**

The Trial Court improperly denied Plaintiff's motion to amend her complaint to add claims for negligence and violation of privacy, characterizing these claims as "a renaming of the other count with regard to the violation of [CREAMMA]." 1T13:18-19. This conclusion fundamentally misunderstands the independent legal bases for these claims and conflicts with New Jersey's liberal amendment standards.

New Jersey courts have long recognized that drug testing implicates both negligence principles and privacy interests that exist independently of any statutory scheme. In *Hennessey v. Coastal Eagle Point Oil Co.*, the New Jersey Supreme Court explicitly recognized that "mandatory random urine testing by private employers can be an invasion of privacy sufficient to breach public policy, deriving from both the common law and New Jersey's Constitution." 129 N.J. 81, 99, 609 A.2d 11, 19



(1992). Similarly courts have recognized that entities conducting drug tests owe a duty of care to the individuals being tested. *See, e.g., Smithkline Beecham Corp. v. Doe*, 903 S.W.2d 347, 351-52 (Tex. 1995) (collecting cases).

The Trial Court's summary rejection of these claims without proper consideration of their independent legal bases conflicts with New Jersey's liberal amendment standards and constitutes reversible error.

**D. The Trial Court Erroneously Dismissed Plaintiff's Breach of Contract Claim (Pa21-22, 2T22-23)**

The Trial Court fundamentally misunderstood contract formation principles in dismissing Plaintiff's breach of contract claim. A conditional offer of employment creates a binding contract once the offeree accepts and satisfies the lawful conditions. Here, Plaintiff accepted Defendant's offer and satisfied all lawful conditions by submitting to the initial drug test, and passing it as a matter of law. Defendant's demand for a second test at Plaintiff's expense constituted a breach of the covenant of good faith and fair dealing, not a valid modification of the original agreement.

**CONCLUSION**

For the foregoing reasons, and the reasons set forth in Plaintiff's opening brief, the Court should reverse the decisions of the Trial Court and remand this case for further proceedings.

Respectfully submitted,

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Dated: March 9, 2025

DARLENE SANDERS,

Plaintiff-Appellant,

v.

THE LEVARI GROUP, LLC d/b/a  
FIRST CHOICE FREEZER,

Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-002715-23

Civil Action

On Appeal from Orders of the  
Superior Court of New Jersey,  
Law Division, Cumberland County  
Docket No. CUM-L-000196-23

Sat Below:  
Hon. Niki Arbittier, J.S.C.

Submitted on: April 21, 2025

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**BRIEF OF AMICUS CURIAE MATTHEW J. PLATKIN,  
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## **PRELIMINARY STATEMENT**

In 2021, our Legislature enacted the Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA) to implement the will of New Jersey voters to legalize recreational cannabis use. The statute decriminalizes such activity while providing for the licensure, control, and oversight of businesses involved at every level of the recreational cannabis industry. CREAMMA places the Cannabis Regulatory Commission in charge of regulating this industry, granting the Commission jurisdiction over all cannabis businesses. Separately, CREAMMA prohibits cannabis-use-based discrimination in several contexts. Central to this appeal, it contains an employment-discrimination provision, providing that “[n]o employer shall refuse to hire or employ any person ... because that person does or does not ... use cannabis items.” N.J.S.A. 24:6I-52(a)(1). The Act is silent regarding enforcement of this particular provision. The trial court inferred from this silence that the Legislature did not intend to empower individuals aggrieved by cannabis-related employment discrimination to seek redress in court. Instead, the court held that only the Commission may enforce the employment-discrimination provision.

That holding was incorrect. Where regulations are designed for the general welfare and enforced by a clear administrative-enforcement scheme, our



courts have reasonably inferred that the Legislature did not intend to create an implied cause of action for individuals to sue in court. But that same inference does not apply to a remedial civil-rights provision that the Legislature has not explicitly tasked any agency with enforcing. If our Legislature intended to preclude private enforcement of CREAMMA's employment-discrimination provision, it certainly could have done so expressly; that's exactly what it did in another marijuana-related law enacted the same day as CREAMMA. Against this backdrop, the Legislature likely intended to allow private lawsuits. Because the trial court erred in holding otherwise, this Court should reverse.

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

The Attorney General adopts Plaintiff-Appellant's Procedural History and Statement of Facts, Ab2-3, adding the following.

#### **A. CREAMMA, The Commission, And The Employment-Discrimination Provision.**

In November 2020, New Jersey voters amended our Constitution to legalize recreational cannabis use, effective January 2021. State v. Gomes, 253 N.J. 6, 23-24 (2023). The amendment declares that the manufacture, retail, and consumption of cannabis "by persons 21 years of age or older ... shall be lawful and subject to regulation by the Cannabis Regulatory Commission." N.J. Const.

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<sup>1</sup> For the Court's convenience, this brief combines these related sections.

art. IV, § 7, ¶ 13. Swiftly thereafter, the Legislature enacted several laws “to regulate the newly legalized activity and achieve the constitutional amendment’s public policy goals.” Gomes, 253 N.J. at 24 (quotation omitted)). It enacted Chapter 16, L. 2021, c. 16, known as CREAMMA, see N.J.S.A. 24:6I-31, which “legaliz[es] a form of marijuana, to be referred to as cannabis,” and regulates it “in a similar fashion to the regulation of alcohol.” N.J.S.A. 24:6I-32(a). CREAMMA, along with Chapter 19—a simultaneously enacted set of “criminal and civil justice reforms” aimed at mitigating the consequences of prior marijuana offenses, L. 2021, c. 19—modified the criminal code to decriminalize recreational cannabis use. See N.J.S.A. 2C:35-5 to -10. It then provided for the Commission to oversee the recreational cannabis industry.

CREAMMA grants the Commission jurisdiction over “any person who buys, sells, cultivates, produces, manufactures, transports, or delivers any cannabis or cannabis items within this State.” N.J.S.A. 24:6I-34(a). Consistent with this authority, the Commission licenses cannabis cultivators, manufacturers, wholesalers, distributors, retailers, and deliverers; and can revoke or suspend licenses for non-compliance with its regulations. See N.J.S.A. 24:6I-34(b); N.J.S.A. 24:6I-37 to -43; N.J.A.C. 17:30-20.5. Those regulations range from “[h]ealth and safety” requirements for cannabis

cultivation, N.J.S.A. 24:6I-35(a)(8), to restrictions on how cannabis products are packaged, branded, and advertised, see N.J.S.A. 24:6I-35(a)(7), (9).

While much of CREAMMA deals with the regulation of the cannabis industry, the act also prohibits discrimination based on lawful cannabis use. For example, it prohibits adverse employment action, housing discrimination, or impacts on child custody solely because of a person's recreational cannabis use as permitted by CREAMMA. See N.J.S.A. 24:6I-51. Among these anti-discrimination provisions is the employment-discrimination provision at issue in this appeal, which prohibits employers from "refus[ing] to hire or employ any person ... because that person does or does not ... use cannabis items." N.J.S.A. 24:6I-52(a)(1). But employers may prohibit employees from using cannabis recreationally, or being impaired from the use thereof, while at work. N.J.S.A. 24:6I-52(b)(1)(a). To assist employers with identifying cannabis impairment in the workplace, the Commission is instructed to promulgate standards for individuals to be certified as "Workplace Impairment Recognition Expert[s]." N.J.S.A. 24:6I-52(a)(2)(a).

**B. This Case.**

Plaintiff alleges that Defendant offered her employment but then rescinded that offer solely because a drug test indicated she had used cannabis

within the last month. (Pa2).<sup>2</sup> She brought a civil action against Defendant in Superior Court, claiming, among other things, that the rescission of her employment offer violated CREAMMA. (Pa3). The trial court dismissed the CREAMMA claim after determining that the act did not empower private individuals to sue for violations of the employment-discrimination provision. (T13:4-5). Although the court accepted that Plaintiff was “a member of a class who’s entitled to benefit from this action,” it held that only the Commission had “authority to ... prosecute violations of the Act.” (T11:14-13:13). Plaintiff appealed. (Pa23-27).

After Plaintiff filed her opening brief, the Third Circuit held that there is no implied private right of action to enforce the employment-discrimination provision. See Zanetich v. Wal-Mart Stores E., Inc., 123 F.4th 128, 142-47 (3d Cir. 2024). Although the majority found this novel state law question insufficiently important or difficult for certification to our Supreme Court, id. at 149-50, Judge Freeman dissented, both because she predicted that our courts would recognize an implied private right of action, id. at 153-58, and because she believed our courts should be the ones to resolve how the Legislature “balance[d] private and administrative enforcement mechanisms” when

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<sup>2</sup> “Pa” refers to Plaintiff’s appendix; “Db” refers to Defendant’s brief; and “T” refers to the transcript of the November 3, 2023 hearing on Defendant’s motion to dismiss.

implementing our voters’ “watershed statewide referendum” legalizing recreational cannabis use, id. at 159.

Given that this appeal implicates the enforcement of civil rights under CREAMMA, the Attorney General submits this amicus brief to address the proper interpretation of the employment-discrimination provision.

### **ARGUMENT**

#### **THIS COURT SHOULD IMPLY A PRIVATE RIGHT OF ACTION TO ENFORCE CREAMMA’S EMPLOYMENT-DISCRIMINATION PROVISION.**

To determine whether a statute should be construed to have an implied private right of action, our courts look to three key factors drawn from Cort v. Ash, 422 U.S. 66 (1975). See Matter of State Comm’n of Investigation, 108 N.J. 35 (1987) (SCI). They are (1) “whether the plaintiff is ‘one of the class for whose especial benefit the statute was enacted,’” (2) “whether there is any evidence that the Legislature intended to create a private cause of action,” and (3) “whether implication of a private cause of action ... would be ‘consistent with the underlying purposes of the legislative scheme,’” Jarrell v. Kaul, 223 N.J. 294, 307 (2015). The ultimate touchstone is legislative intent. R.J. Gaydos Ins. Agency, Inc. v. Nat’l Consumer Ins. Co., 168 N.J. 255, 273 (2001). Here, the first factor weighs heavily in favor of an implied private right of action to enforce the employment-discrimination provision, and neither of the other two

factors dispels that notion. This is especially true given the Legislature’s intent that CREAMMA be construed “broadly ... to achieve [its] remedial purposes.” Gomes, 253 N.J. at 33.

**A. The Employment-Discrimination Provision  
Was Enacted Especially For The Benefit Of  
Individuals Like Plaintiff.**

The first factor—“whether the plaintiff is ‘one of the class for whose especial benefit the statute was enacted’”—is critical. Jarrell, 223 N.J. at 307. That is because courts often look to “the right- or duty-creating language of [a] statute” as “the most accurate indicator” of whether there should be an implied cause of action. Cannon v. Univ. of Chicago, 441 U.S. 677, 690 n.13 (1979) (collecting cases); see also, e.g., Nat’l Ass’n of the Deaf v. Trump, 486 F. Supp. 3d 45, 54 (D.D.C. 2020). Indeed, in Cort v. Ash itself, the U.S. Supreme Court explained that, where a statute expressly “grant[s] a class of persons certain rights,” further evidence of legislative intent to permit private enforcement of those rights “is not necessary” absent “an explicit purpose to deny” it. 422 U.S. at 82.; see Winslow v. Corp. Express, Inc., 364 N.J. Super. 128, 136 (App. Div. 2003) (explaining our courts “readily” imply “private rights of action in statutes enacted to protect employees from wrongful conduct by employers”).

To determine whether this critical first factor is satisfied, courts ask whether the provision especially benefits a particular class of persons or instead

“benefit[s] the public at large through a general regulatory scheme.” California v. Sierra Club, 451 U.S. 287, 298 (1981). Here, CREAMMA’s prohibition on any employer “refus[ing] to hire or employ any person ... because that person does or does not ... use cannabis items,” N.J.S.A. 24:6I-52(a)(1), is plainly enacted for the “especial benefit” of individuals, like Plaintiff, whom an employer refuses to hire due to their cannabis use. Jarrell, 223 N.J. at 307; see Zanetich, 123 F.4th at 153 (Freeman, J., dissenting in part) (reaching same conclusion). This particular provision is not part of a “general regulatory scheme” designed to benefit “the public at large.” Sierra Club, 451 U.S. at 298.

In this way, the employment-discrimination provision is similar to other provisions that confer a special benefit for a particular class of individuals. That principle is most readily apparent for statutory provisions that prohibit discrimination or exploitation, rather than broadly to benefit the public at large. See, e.g., Peper v. Princeton Univ. Bd. of Trustees, 151 N.J. Super. 15, 23 (App. Div. 1977), rev’d on other grounds, 77 N.J. 55 (1978) (LAD’s ban on sex-based discrimination); Cannon, 441 U.S. at 709 (Title IX’s ban on sex-based discrimination); Winslow, 364 N.J. Super. at 136-38 (WPL’s ban on pay

decreases without advanced notice); Boldt v. Correspondence Mgmt., Inc., 320 N.J. Super. 74, 88 (App. Div. 1999) (ban on overcharging for medical records).<sup>3</sup>

By contrast, CREAMMA’s employment-discrimination provision is nothing like provisions our courts have found were not enacted for the “especial benefit” of putative private plaintiffs, Jarrell, 223 N.J. at 307, but rather to “benefit the public at large through a general regulatory scheme,” Sierra Club, 451 U.S. at 298. For example, the complex car insurance regulations at issue in R.J. Gaydos, 168 N.J. at 268-70, were designed “to benefit New Jersey auto insureds, not insurance agents” like the plaintiffs in that case, id. at 279. Similarly, in Jalowiecki v. Leuc, 182 N.J. Super. 22 (App. Div. 1981), the regulations governing sewage system construction were intended “to preserve the public health” by safeguarding the community’s “potable water supply,” not especially to benefit individuals, like the plaintiffs, whose property was damaged when their sewage system malfunctioned. Id. at 31.

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<sup>3</sup> Although Defendant dismisses Peper and Winslow as inconsistent with our Supreme Court’s adoption of the Cort factors in SCI, see (Db25), these cases are consistent with the Cort analysis. As explained, supra at 7, Cort instructs that implying a private right of action is appropriate where a statute “grant[s] a class of persons certain rights,” and there are no affirmative indications the Legislature intended to preclude private enforcement. Cort, 422 U.S. at 82. Further, the Cort factors simply guide identification of legislative intent, which has always been the touchstone for statutory interpretation. See R.J. Gaydos, 168 N.J. at 273.



Defendant's counterarguments fall flat. Ignoring CREAMMA's employment-discrimination provision, Defendant argues that individuals suffering cannabis-related employment discrimination are not the intended beneficiaries of other CREAMMA provisions. See (Db11-15). But the question is whether the Legislature enacted the employment-discrimination provision to benefit individuals whom an employer refuses to hire based on cannabis use. And the answer is yes.

Defendant also argues that the employment-discrimination provision was not enacted for the special benefit of individuals like Plaintiff because it "protect[s] both users and non-users of cannabis" and thus benefits "every member of the public." (Db15). But that misses the point. The idea here is not that the employment-discrimination provision specially benefits users and non-users of cannabis but that it specially benefits those who suffer cannabis-related employment discrimination. If Defendant's reasoning were correct, quintessential civil-rights provisions prohibiting discrimination on the basis of (for example) sex, would not benefit employees exposed to such discrimination because those provisions prohibit discrimination against all sexes. See Lehmann v. Toys R Us, Inc., 132 N.J. 587, 604 (1993) (recognizing LAD "protects both men and women"). Yet those provisions are plainly designed to benefit

employees of all genders who suffer sex-related employment discrimination. See Peper, 151 N.J. Super. at 23; Cannon, 441 U.S. at 694-99.

In short, CREAMMA grants job seekers the right not to be denied employment based on cannabis use—a right obviously intended to benefit job seekers by preventing discrimination. This creates a strong presumption that there is an implied private right of action to enforce CREAMMA’s employment-discrimination provision. See Cort, 422 U.S. at 82; Winslow, 364 N.J. at 136.

**B. The Legislature Did Not Intend To Preclude Private Enforcement Actions.**

Given that the first Cort factor is satisfied, further evidence of legislative intent to create a private right of action “is not necessary” absent “an explicit purpose to deny” one. Cort, 422 U.S. at 82; see Winslow, 364 N.J. Super. at 136. An explicit purpose to deny a private right of action could be evidenced by legislative history indicating that the Legislature considered, but declined to adopt, a private right of action. See Castro v. NYT Television, 370 N.J. Super. 282, 291-92 (App. Div. 2004). Or it could be evidenced by the Legislature’s establishment of an alternative enforcement scheme. See Jarrell, 223 N.J. at 307; R.J. Gaydos, 168 N.J. at 280. After all, “[w]hen the Legislature has expressly created specific remedies, a court should always hesitate to recognize another unmentioned remedy.” Jarrell, 223 N.J. at 307.

Here, there is no such evidence. CREAMMA does not clearly contain an alternative enforcement mechanism for the employment-discrimination provision. And the Legislature explicitly precluded private enforcement of similar protections in a simultaneously enacted law, suggesting the Legislature would have done the same if it intended to preclude private enforcement here.

1. CREAMMA Does Not Clearly Provide An Alternative Remedy For Violations of the Employment-Discrimination Provision.

Whenever our courts have declined to imply private rights of action, the statutory scheme has expressly included alternative enforcement mechanisms for the provision at issue. See Jarrell, 223 N.J. at 307 (medical malpractice insurance requirement expressly provided for enforcement via agency “disciplinary action ... and civil penalties”); Castro, 370 N.J. Super. at 293 (violations of hospital patients’ rights enforceable via license revocations and civil penalties); R.J. Gaydos, 168 N.J. at 280 (insurers who violate car insurance regulations subject to civil penalties); Miller v. Zoby, 250 N.J. Super. 568, 577 (App. Div. 1991) (casinos that violate Casino Control Act subject to “elaborate regulatory sanctions”); Jalowiecki, 182 N.J. Super. at 28 (those who violate sewage disposal construction regulations expressly subject to civil penalties). But unlike all those statutory schemes, CREAMMA does explicitly provide for alternative enforcement of its employment-discrimination provision.

The primary enforcer would presumably be the Commission.<sup>4</sup> See (Db21-22). But the Commission’s ability to enforce the CREAMMA’s employment discrimination provision is questionable at best. The statute makes clear that “[t]he jurisdiction, supervision, duties, functions, and powers of the commission extend to any person who buys, sells, cultivates, produces, manufactures, transports, or delivers any cannabis or cannabis items within this State.” N.J.S.A. 24:6I-34(a). It then explains that the “duties, functions and powers of the commission shall include,” among other things, the ability to “investigate and aid in the prosecution of every violation of the statutory laws of this State relating to cannabis and cannabis items and to cooperate in the prosecution of offenders before any State court of competent jurisdiction.” N.J.S.A. 24:6I-34(b)(3).

It is not impossible to read these provisions as granting the Commission the ability to enforce CREAMMA’s employment-discrimination provision. After all, violations of that provision are certainly “laws of this State relating to cannabis.” N.J.S.A. 24:6I-34(b)(3). And the fact that the Commission’s “jurisdiction, supervision, duties, functions, and powers” extends to those in the cannabis industry does not necessarily take away from the Commission’s ability to

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<sup>4</sup> The Attorney General does not represent the Commission in this case and therefore does not present the Commission’s views on this issue.

enforce CREAMMA’s provisions against those outside the cannabis industry. Compare id., with N.J.S.A. 24:6I-34(a).

But it is perhaps more plausible that the Commission cannot enforce the employment-discrimination provision. While CREAMMA tasks the Commission with comprehensively regulating the cannabis industry, its jurisdiction does not seem to cover employers who are not engaged in that industry. Compare N.J.S.A. 24:6I-34(b)(1)-(2), with N.J.S.A. 24:6I-34(a). So while the Commission has the duty to “aid in the prosecution of every violation of the statutory laws of this State relating to cannabis,” N.J.S.A. 24:6I-34(b)(3), that duty may only extend to violators within its jurisdiction, i.e., those who “buy[], sell[], cultivate[], produce[], manufacture[], transport[], or deliver[]” cannabis in New Jersey. N.J.S.A. 24:6I-34(a). The same goes for the investigative and regulatory powers in N.J.S.A. 24:6I-34(b)(5) and N.J.S.A. 24:6I-34(d)(1)(a). So the Commission is conceivably without jurisdiction to enforce the employment-discrimination provision against employers outside the cannabis industry.

That interpretation is consistent with the Commission’s actions. For example, the Commission is statutorily required to adopt all regulations necessary to carry out its functions under CREAMMA, N.J.S.A. 24:6I-34(d)(1)(a), yet its regulation authorizing enforcement actions only permits actions against licensed

cannabis businesses, N.J.A.C. 17:30-20.5. Indeed, Plaintiff contacted the Commission to lodge a complaint, but the Commission declined to take any action, ostensibly because it did not view this employment dispute as within its charge. (T5:22-23).

The Commission’s guidance on workplace impairment—which clarifies when an employer may penalize an employee for cannabis use consistent with CREAMMA—does not tip the balance either way. See (Db21-22). That guidance simply references an interim measure until the Commission promulgates more permanent regulations. See N.J.S.A. 24:6I-52(a)(2)(a); supra at 4. And just because the Commission possesses expertise in cannabis-use impairment—and therefore may reasonably promulgate “standards in regulation for a Workplace Impairment Recognition Expert certification,” N.J.S.A. 24:6I-52(a)(2)(a)—does not necessarily mean it has the authority to enforce CREAMMA’s employment-discrimination provision.

In short, CREAMMA is far from clear that the Commission can enforce the employment-discrimination provision against employers outside the cannabis industry. This is therefore unlike every other statute that our courts have found unenforceable via private suit due to an explicit alternative enforcement mechanism. See supra at 12. Most importantly, the uncertainty (at least) or

nonexistence (at most) of any Commission enforcement cannot demonstrate “an explicit purpose to deny” a private right of action. Cort, 422 U.S. at 82.

2. The Legislature Chose Not To Explicitly Preclude Private Enforcement Suits.

The Legislature’s express preclusion of private suits to enforce Chapter 19’s employment provisions, which were enacted the same day as CREAMMA, see supra at 3, further undermines any argument that the Legislature harbored “an explicit purpose to deny” a private right of action to the beneficiaries of CREAMMA’s employment discrimination provision. Cort, 422 U.S. at 82.

Adopted simultaneously with CREAMMA, Chapter 19 prohibits employers from making employment decisions based on an individual’s having been arrested, charged, or convicted for certain marijuana offenses. See N.J.S.A. 34:6B-21(a). Chapter 19 expressly precludes private enforcement of this prohibition, id. 34:6B-21(c), while granting the Commissioner of Labor and Workforce Development the power to impose civil penalties for violations, ibid.

In other words, the Legislature explicitly precluded private enforcement of Chapter 19’s employment protections, while expressly providing for agency enforcement, “in the same session” that it enacted CREAMMA. Coleman v. Martinez, 247 N.J. 319, 345 (2021). This strongly suggests that, had the Legislature intended to preclude private enforcement of CREAMMA’s employment-discrimination provision, it would have adopted the same

approach. That is, if the Legislature intended that provision to be enforced by an agency rather than private individuals, it would have expressly provided for agency enforcement and precluded private enforcement. It did neither.

**C. A Private Right Of Action Is Consistent With  
The Purposes Underlying CREAMMA.**

The final factor—“whether implication of a private cause of action ... would be consistent with the underlying purposes of the legislative scheme,” Jarrell, 223 N.J. at 307—is also satisfied. CREAMMA’s prohibition on cannabis-related employment discrimination is consistent with the constitutionally mandated legalization of cannabis, and CREAMMA’s broad purpose to redress “adverse consequences” flowing from cannabis use. See N.J. Const., Art. IV, § 7, ¶ 13; Gomes, 253 N.J. at 11, 23-24, 33. This purpose is advanced by empowering job applicants or employees to enforce their rights to use cannabis lawfully without being discriminated against by employers.

In arguing otherwise, Defendant takes a cramped view of CREAMMA’s purposes, following the Third Circuit’s misguided approach and zeroing in on three of fifteen legislative findings in a precatory section of the Act. See (Db30-31) (discussing N.J.S.A. 24:6I-32(a)-(c)). This narrow approach is inconsistent with our Supreme Court’s direction that CREAMMA, as a remedial statute, should be construed “broadly and robustly,” Gomes, 253 N.J. at 33, as well as with our courts’ general approach to statutory interpretation, see Warren Cnty.



Bar Ass’n v. Bd. of Chosen Freeholders, 386 N.J. Super. 194, 201 (App. Div. 2006) (“look[ing] to the statute as a whole and consider[ing] all of its related sections”); Matturri v. Bd. of Trustees of Jud. Ret. Sys., 173 N.J. 368, 383-84 (2002) (cautioning against placing “undue emphasis on any particular word or phrase ... so as to do justice to [a statute’s] overall meaning” (quotation omitted)).

In failing to consider all aspects of CREAMMA, Defendant ignores the evident purpose underlying the employment-discrimination provision itself: to confer a right on job seekers and employees to be free from cannabis-related discrimination. N.J.S.A. 24:6I-52(a)(1); see also N.J.S.A. 24:6I-51(a), (b)(1) (further detailing rights of employees to be free from “penalty in any manner” for using cannabis consistent with CREAMMA); cf. N.J.S.A. 24:6I-32(o) (finding that “New Jersey cannot afford to sacrifice ... individuals’ civil rights by continuing” with its prior approach to marijuana).

In any event, Defendant fails to explain how recognizing an implied private right of action would undermine any legislative finding at issue. Defendant repeats the Third Circuit’s speculation that allowing private enforcement could “protect[] individuals who consumed illegal, unregulated cannabis.” See (Db31) (citing Zanetich, 123 F.4th at 145). But this concern is premised on a misreading. CREAMMA bars employers from taking action against employees or job seekers based on their “cannabis” use, N.J.S.A. 24:6I-

52(a)(1), and CREAMMA defines “cannabis” to exclude unlawful or unregulated cannabis, see N.J.S.A. 24:6I-33. So nothing in CREAMMA’s employment-discrimination provision protects unlawful drug use.

And contrary to Defendant’s suggestion, N.J.S.A. 24:6I-55(a) has no bearing on whether the employment-discrimination provision impliedly creates a private right of action. See (Db23-24). This provision instructs that CREAMMA should “not be construed ... [t]o amend or affect in any way any State or federal law pertaining to employment matters.” N.J.S.A. 24:6I-55(a). Interpreting the employment-discrimination provision to be enforceable via private suits is consistent with this instruction because it does not “amend or affect” any preexisting employment law. It simply allows CREAMMA’s employment-discrimination provision itself to be enforced.

### **CONCLUSION**

This Court should reverse the trial court’s holding that CREAMMA lacks an implied private right of action to enforce N.J.S.A. 24:6I-52(a)(1).

Respectfully submitted,

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