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PATRICIA OCKENHOUSE, JENNIFER ORANCHAK, KIMBERLY PACE, DONNA PALAGONIA, VIVIAN PERCOCO, EMMA PEREZ, LISA RAHNER, MYRNA RAZAK, FARHAT REHMANI, KELLIANNE RIZK, CHRISTINEE ROMAN, JANETE ROSEMAN, ADRIENNE SABATINO, MELIKE SAHIN, MARIA SAMULKA, CHRISTINA SCHMITT, MARLA SCHNEIDER, KELSEY SCHUSTER, RAINA SFEIR, MAGDA SHEHATA, SAMINA SHEIKH, MICHELE SHERMAN, JAEKYOUNG SHIM, RENEE SIMON-RADOCZY, MOONIA SOHERWARDY, LAURA SOUTHON, NANCY STETZ, VIVIAN TADROS, CHRISTINE TAMBINI MCCANN, MUI LING TANG, JAYNE TOKASH, ESTELA VALDEZ, JOSLYN VELEZ, MELISSA WHYTE, JOSY WIENER, MARIA WOOD, LORRAINE ZEMBRO, AND PATRICIA ZIMMERMAN, Plaintiffs-Respondents, v. EAST BRUNSWICK BOARD OF EDUCATION, Defendant-Appellant	

APPELLATE BRIEF OF DEFENDANT EAST BRUNSWICK BOARD OF EDUCATION

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Table of Contents

R. 2:6-2(a)(2) Table of Judgments, Orders and Rulings Appealed

Orders entered June 7, 2024 (Da15-18)
3T (Da181-222)

Table of Authorities

Statutes

Rules

Regulations

PRELIMINARY STATEMENT

This brief is submitted on behalf of defendant, the East Brunswick Board of Education (the "Board"), in support of its appeal from the trial court's June 7, 2024 order denying its motion to dismiss the complaint with prejudice as well as the accompanying order allowing for the plaintiffs to amend their complaint (collectively, the "Order"). This brief addresses the issues the Appellate Division identified in its July 5, 2024 order granting the Board's motion for leave to appeal along with other related issues.

This matter involves the plaintiffs' efforts to obtain damages without a cognizable cause of action. Specifically, plaintiffs seek damages for untimely enrollment in the Defined Contribution Retirement Program ("DCRP") but the DCRP law expressly bars such a cause of action and instead provides for a comprehensive regulatory framework which mandates an administrative procedure consigning plenary control over the DCRP to the DCRP Administration with appeal to the DCRP Board of Trustees ("DCRP Board") and review thereof in the Appellate Division. Thus, the trial court never had subject matter jurisdiction over the complaint and never could assert such jurisdiction under the DCRP law's framework. Accordingly, the complaint should have been dismissed with prejudice given the lack of any cognizable cause of action for untimely enrollment in the DCRP.

Instead, the trial court entered the Order which maintained a prior dismissal of the complaint without prejudice in order to afford plaintiffs another bite at the proverbial apple to restyle their damage claims for untimely enrollment in the DCRP even though: (1) the plaintiffs never identified a cognizable cause of action; and (2) the trial court conceded its lack of subject matter jurisdiction. The Order invites the plaintiffs to circumvent the Appellate Division's exclusive jurisdiction over final decisions of State administrative agencies by recasting their damages claims for untimely enrollment in the DCRP -- claims which the DCRP Board ruled are not cognizable under the governing statute and regulations. In addition, the Order frustrates the DCRP law's framework for comprehensive, centralized administrative control of the DCRP by permitting plaintiffs to circumvent that framework in pursuing damage claims for delayed DCRP enrollment even though such claims are unavailable under the DCRP law. The DCRP law provides plaintiffs with the remedy of catch-up contributions for untimely DCRP enrollment -- which was implemented -- but plaintiffs seek interest/investment damages which the Legislature did not see fit to include in the DCRP law.

Moreover, the Order failed to dismiss with prejudice plaintiffs' breach of contract claim even though the trial court ruled that the claim is subject to

arbitration under the parties' Collective Bargaining Agreement. Faced with this ruling, plaintiffs changed their argument to assert that their breach of contract claim was instead based upon the DCRP law as incorporated into some unidentified individual contracts which are not part of the record. This new argument cannot overcome the DCRP law's bar against such contract actions.

Dismissal of the complaint with prejudice is warranted in order to prevent an improvident exercise of subject matter jurisdiction, overreach and subversion of the DCRP law.

In addition, the trial court's Order and its October 25, 2022 order are not final because they were expressly entered without prejudice to plaintiffs' amendment of their pleading. Therefore, the orders did not end the action but rather contemplate plaintiffs' return to the trial court to reassert claims arising from the same facts.

Finally, the breach of contract claim is time-barred as to 33 plaintiffs given that their claims accrued outside the governing six-year statute of limitations.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

The Procedural History and Statement of Facts are discussed together as they are intertwined.

A. Plaintiffs File a Complaint instead of Required Arbitration

Plaintiffs and the Board are parties to a Collective Bargaining Agreement ("CBA") mandating contractual grievance and arbitration procedures for resolution of claims asserting any violation of the CBA. *See* CBA, Article III at p. 6-9 (Da49-52). Pursuant thereto, plaintiffs filed a grievance which was denied. 3T32:6-11.

Instead of proceeding with arbitration, the next step under the CBA, on August 13, 2021 plaintiffs filed an action alleging damages from their untimely enrollment in the DCRP. Complaint, ¶3 (Da3). According to the complaint, DCRP eligible employees are required to contribute 5.5% of their salary to the DCRP fund while the employer contributes an additional 3% to the fund. Complaint, ¶3 (Da4). The complaint alleges that plaintiffs are current and former Board employees who were eligible for enrollment in the DCRP, but the Board did not timely enroll them therein resulting in interest and/or investment income not accruing to their accounts during the period in

[1] The transcripts are: "1T" January 1/31/22 transcript, "2T" October 25, 2022 transcript and "3T" June 6, 2024 transcript.

which they were not enrolled.[2] Complaint, ¶1, ¶9, ¶13 (Da2, 4). During the delay in DCRP enrollment, plaintiffs were paid the 5.5% of their salary that would have otherwise been deposited to the DCRP fund. 1T20:23-21:5; 3T11:23-13:19; 3T42:17-19.

The complaint also alleges that some plaintiffs have since enrolled in other funds and incurred additional loss resulting from their inability to rollover their DCRP accounts. Complaint, ¶10, ¶14 (Da4). The complaint contains two counts. Count One (breach of contract) alleges that the DCRP law "constitute[s] an implied and/or express part of a contract between Plaintiffs and the" Board. Complaint, ¶12 (Da4). Count Two purports to assert damages for lost interest/investment income as a result of untimely enrollment in the DCRP "by operation of law." Complaint, ¶16-19 (Da5).

B. Court Denies Motion to Dismiss

On October 8, 2021, the Board filed a motion to dismiss based on lack of subject matter jurisdiction, failure to plead a contractual relationship and statute of limitations grounds. Matthew J. Giacobbe, Esq. Certification, ¶3 and Exhibit 2 thereto (Da18; Da23). On January 31, 2022, the trial court held oral

[2] It is undisputed that, upon discovering plaintiffs' eligibility for enrollment in the DCRP, the Board enrolled them and the parties began making retroactive catch-up contributions as of September 2020 pursuant to the DCRP Administrator's instructions. Thus, most plaintiffs only seek lost interest/investment income rather than any lost contribution. 1T18:20-19:1; 1T19:22-20:8; 1T23:6-7; 3T27:1-5.

argument on the motion. During argument it was established that the parties were making catch-up contributions thus plaintiffs sought alleged lost interest/investment income on account of their untimely DCRP enrollment. 1T6:24-7:4; 1T19:22-20:14; 1T21:5-9; 1T27:1-4. Plaintiffs' counsel represented that: (1) plaintiffs did not file a claim with the DCRP because "we decided that" "the best … forum … would be … the Courts" (1T18:6-19; 1T19:6-14); and (2) the DCRP is "integrated into the" CBA creating an implied contract. 1T16:15-17:7.

On January 31, 2022, the court denied the motion to dismiss. 1T28:16-29:9; 1/31/22 Order (Da31-32). The court opined that it "is not … an appropriate result" that plaintiffs have "no remedy." 1T26:22-27:12. The court concluded that: (1) it had subject matter jurisdiction (1T26:14-21); and (2) the alleged lost interest/investment income "that the plaintiff seeks … [is] incorporated into the … [CBA] and … there … is a private cause of action … under … breach of … contract." 1T28:10-15. The court did not analyze the statute of limitations issue but denied that aspect of the motion without prejudice. 1T28:16-29:8; Da31.

C. Court Reconsiders and Dismisses Complaint without Prejudice

The Board sought reconsideration of the order denying its motion to dismiss (Da33-34). On October 25, 2022, the trial court held oral argument on the motion, vacated its prior order and dismissed the complaint without prejudice (Da167-168); 2T. Plaintiffs admitted that they pursued a breach of contract action, instead of mandatory arbitration under the CBA, because it was "doubtful that the arbitrator could have granted the remedy" they sought despite their contention that "the DCRP regulation is incorporated into the C[B]A" and is "an implied term of the contract…." 2T24:6-23; 2T25:17-26:2. The court ruled that plaintiffs' "remedy was to go to arbitration" on the Count One breach of contract claim because:

> [Y]ou have a contract that says …, if there's a claim under the contract and **you're saying this is a claim under the contract**, … go through the grievance procedure … and through the point of arbitration. It looks like you started that process … but then didn't … pursue the arbitration because you're making a decision what?

2T24:13-14; 2T25:2-10 (emphasis added). *See also* 2T26:3-8.

On the Count Two claim (seeking damages "by operation of law"), plaintiffs' counsel conceded that the DCRP regulations do not "provide[] for damages or any remedy as a result of the Board's failure to timely enroll employees" and that "there is no identification of any such right that affords the plaintiffs damages" yet maintained "that … there's got to be another

method by which the" plaintiffs could obtain damages which are unavailable under the DCRP law. 2T28:25-29:5; 2T29:21-23.

The trial court ruled that Count Two of the complaint was subject to the DCRP's jurisdiction and had to be heard by the DCRP Board (2T46:10-15; 2T48:22-24). The court found that, based on the DCRP regulations, Count Two "has to be filed" with the DCRP Board "and that's where the claim initially should have been filed with the board." 2T50:7-11. The court further reasoned as follows:

> [T]his matter has to go to the DRCP [Board] … based on the codes that were provided … that by the terms of the program, the claimant or the aggrieved shall not be entitled to take any action or otherwise seek to enforce a claim to benefit their rights under the program until he or she has exhausted all claims and appeals procedures provided by the program … N.J.A.C. 17:6-16.4.

2T39:6-15.

> [N.J.A.C. 17:6-]16.4(a) … says that an aggrieved person shall not be entitled to take any legal action until …. he or she has exhausted all claims and appeals procedures.

2T40:4-8.

> [A] claimant or aggrieved individual … shall file a claim with the director [of] the Division of Pensions and Benefits. And we certainly know from case law that "shall" … is … not … permissive.

2T39:22-40:3 *citing* N.J.A.C. 17:6-20.9.

> [T]hat part of the statute seems very clear and part of the code seems very clear … that the matter needs to go over to the DRCP [Board] ….

2T40:9-12.

> [I]t needs to go … to that board … for review and for a decision … because [the DCRP Board has] the authority and the ability to manage this program and we need uniformity within that program …. and these decisions that are being asked to be made … really affect the uniformity of the program … and how it's going to be run.

2T41:19-42:4.

The trial court declined to adjudicate Count One (breach of contract) of the complaint pending the outcome of the DCRP Board's ruling even though the trial court, in agreement with the Board, had ruled that the claim was subject to arbitration under the CBA. 2T23:22-24:4; 2T33:14-25; 2T43:19-44:4; 2T48:24-49:4. The court also declined to decide whether plaintiffs could return to the trial court after the DCRP Board's ruling even though Board counsel observed that any ruling by the DCRP Board was subject to the Appellate Division's exclusive review. 2T44:5-46:8.

The trial court speculated that "interest rates are great," "interest was being accrued to the benefit of the Board" during the delay in DCRP enrollment and the Board "benefitted from holding that three percent and being able to obtain interest and, uh, income from it, which is all that plaintiffs want." 2T18:25-19:8; 2T20:10-16; 2T22:4-5.

D. The DCRP Administration Declines to Award Damages

On December 28, 2022, plaintiffs filed a claim for damages with the Division of Pensions and Benefits. On May 22, 2023, the DCRP Administration ruled that it could not award damages because "the New Jersey Statutes and regulations do not provide any provision in regard to non-compliance by an employer enrolling a member into DCRP. **New legislation would be required** in regard to any employer non-compliance with current DCRP regulations." (Da176) (emphasis added). The DCRP Administration recognized the mechanism of catch-up contributions for delayed enrollment of current employees but noted that "[t]here are no provisions for the employer to make or collect contributions for an employee that is no longer on their payroll." (Da176)

E. The DCRP Board Affirms the DCRP Administration

On June 8, 2023, plaintiffs appealed the DCRP Administration's ruling to the DCRP Board. On August 8, 2023, the DCRP Board heard oral argument, conferred with the Attorney General's office in executive session and affirmed the DCRP Administration's ruling. On February 23, 2024, the DCRP Board issued its written decision affirming the DCRP Administration "**based on the statutes and regulations governing the DCRP**." (Da178) (emphasis added). The DCRP Board reasoned that:

> The DCRP was established within the Department of the Treasury pursuant to N.J.S.A. 43:15C-1…. **There is no information in this statute regarding the calculation of lost interest and/or investment income**.
> ….
> **There are no** specific **statutory provisions that deal with lost interest or investment income due to delayed or delinquent enrollment**.

(Da180) (emphasis added).

> In accordance with its statutory authorization, the DCRP regulations discuss contributions in N.J.A.C. 17:6-5.2-5.3. These regulations provide instructions on the calculation of catch-up contributions, but **consistent with the statutory authority there is no provision for damages due to unearned interest or investment income due to delayed enrollment**.

(Da181) (emphasis added). The DCRP Board advised plaintiffs' counsel of their right to appeal to the Appellate Division within 45 days (Da181).

F. Plaintiffs Return to the Trial Court instead of Appealing

The time for plaintiffs to appeal the DCRP Board's ruling expired on April 8, 2024. Instead of appealing, on April 10, 2024, plaintiffs filed a motion in the trial court to reinstate the complaint and vacate the court's October 25, 2022 order dismissing the complaint without prejudice (Da169-171). The Board opposed the motion and filed a cross-motion to dismiss the complaint with prejudice (Da182-183).

The trial court heard oral argument on June 6, 2024. Again, the court speculated that the Board earned money from the contributions that were not

made during the period of delayed enrollment further assuming these were discrete amounts that were somehow earmarked and invested. 3T37:9-38:10; 3T40:1-3; 3T46:14; 3T68:2-8; 3T76:25. The court proposed discovery on "whether … [the Board] benefitted from th[e] delay[ed] enrollment" to be provided "independent of the … rules of discovery…." 3T67:1-13; 3T63:20-23. The court did not require plaintiffs to identify a viable claim but instead asked the Board's counsel whether plaintiffs could assert some damages claim for delayed DCRP enrollment "outside of the DCRP Law" and further speculated "What … if … [plaintiffs'] claim was phrased that … [the Board] made money … due to" the delayed enrollment? 3T45:14-46:1. Board counsel questioned how plaintiffs could "phrase a claim outside the DCRP law" and explained that any claim "would not exist but for the DCRP law" as "the entire basis of any claim here is the … DCRP program. And it's governed by a comprehensive set of regulations. I don't see how you … discard them and chart your own path for a cause of action that has no substantive [basis] …. if it's not under the DCRP law, what is the substantive cause of action?" 3T46:2-6; 3T46:21-47:1; 3T47:5-7. The court replied, "Well … that might be the subject of another motion …." 3T47:8-9 (Da204).

The trial court repeatedly mischaracterized the Board's position, including as follows: "your position is that a municipality could hold onto the

money as long as they want, they can make money on it, they can delay enrollment to their benefit" and "You're saying that [the Board] should be able to benefit from the delay…." 3T42:20-25; 3T68:15-17. *See also* 3T41:19-24; 3T71:4-8; 3T75:22-25. Board counsel explained, "there's no evidence in the record that" the Board reaped any benefit from the delay and "that's not what I'm saying. I'm saying that … everyone … is subject to the law as it's written, not as we would want it to be written." 3T43:7-8; 3T68:18-21.

The trial court encouraged the plaintiffs to restyle their damages claims for delayed DCRP enrollment. 3T9:15-10:3; 3T13:21-14:4; 3T17:12-23; 3T30:10-11. Indeed, plaintiffs' counsel recognized as much to the court stating, "even though Your Honor is not sure whether … what's plead is … how it should have been plead … I think that one way or another … there is some type of cause of action here …. And that's … the reason … why you suggested that there may be other ways…." 3T64:4-12.

Further, the trial court questioned the DCRP Board's ruling (3T25:9-14) ("I'm questioning … whether or not they … are so right") and "wonder[ed] whether or not" plaintiffs could access the DCRP Board's executive session minutes (3T73:19-12).

Nevertheless, the trial court held that plaintiffs had to file an appeal from the DCRP Board's ruling instead of returning to the trial court so as to

maintain uniform agency administration of the DCRP and avoid "a whole lot of different Superior Courts making decisions" regarding the DCRP. 3T74:1-3; 74:13-21.

Incomprehensibly, the trial court rejected the premise that any damage claim for delayed DCRP enrollment must derive from the DCRP law. 3T75:13-18. The court speculated, "I don't know" but "there may be claims against" the Board "outside the DCRP" "for the money … that they [the Board] made by … not timely enrolling" plaintiffs in the DCRP. 3T76:1-10. Based thereon, the court denied the Board's motion to dismiss with prejudice in order "to leave it open to see whether … there are claims that could exist that did not have to go through the [DCRP] board … [and] the Appellate Division… but which could address … [plaintiffs'] claims for damages" for delayed DCRP enrollment. 3T77:3-12. According to the court, plaintiffs "can refile" their damages claims for delayed DCRP enrollment outside of the DCRP law's framework "and then we can deal with the issues later on." 3T77:19-20. The court advised plaintiffs "you have a right under this statute to get the relief you want" (3T26:20-22) but cited no provision in the DCRP law affirmatively granting a right to file an action in the trial court for lost interest/investment income on account of delayed DCRP enrollment.

On June 7, 2024, the trial court entered an order denying plaintiffs' motion to vacate without prejudice and another order denying the Board's cross-motion for dismissal with prejudice (Da186-189). The court did not specify a time frame for plaintiffs to recast their claims.

The Board filed a timely motion for leave to appeal (Da190-202). By order entered on July 5, 2025, the Appellate Division granted the Board's motion and ordered the parties to address the following issues in their briefs: (1) whether the trial court ever had jurisdiction of plaintiffs' claims; (2) defendant's statute of limitations defense; (3) whether the trial court's order entered on October 25, 2022, was a final order subject to appeal to this court; and (4) whether the June 7, 2024 orders are final orders subject to appeal to this court (Da203-205). In addition, plaintiffs' brief must explain what further action, if any, they intend to take to pursue their claims, the specific time when they will pursue their claims, and in what forum they believe they can pursue their claims (Da203-205). On July 8, 2024, the Appellate Division entered a scheduling order (Da206-208).

On July 12, 2024, plaintiffs filed a notice of appeal (Da209-211) with respect to the trial court's June 7, 2024 order denying their motion to reinstate the complaint -- which order is already the subject of this appeal. That appeal was assigned docket number A-003506-23.

On July 17, 2024, plaintiffs filed a cross-motion in this appeal seeking leave to appeal the trial court's June 7, 2024 order denying their motion to reinstate the complaint (Da212-214).

On July 17, 2024, the trial court filed a submission on this appeal confirming that its Order does not "foreclose the Plaintiff[s] from filing a motion to amend … [the] Complaint" "**if** a legitimate claim outside the DCRP statute exists." (Da217, 219) (emphasis added). The trial court's submission did not identify any cognizable claim.

On July 29, 2024, the Appellate Division granted plaintiffs' cross-motion in this appeal seeking leave to appeal and consolidated plaintiffs' appeal (A-3506-23) with this appeal. A new scheduling order issued on July 30, 2024.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT NEVER HAD SUBJECT MATTER JURISDICTION OVER COUNT TWO PURSUANT TO THE DCRP LAW (2T; 3T; Da167-168; Da186-189)

(A) The Trial Court Never had Subject Matter Jurisdiction

The trial court recognized that it lacked subject matter jurisdiction pursuant to the DCRP's comprehensive regulatory framework. Therefore, the trial court maintained its prior dismissal of the complaint without prejudice and denied plaintiffs' motion to reinstate the complaint, albeit without prejudice. 2T43:16-19; 2T46:10-15; 3T78:17-20. The trial court admonished plaintiffs that, under the DCRP Law, "all claims … arising out of disbursements, monies that's supposed to be made, **anything to do with the DCRP** and those monies … have to go to the [DCRP] board. And your claim … had to be filed" with the DCRP Board "because your claim directly arose out of it [the DCRP]." 3T72:21-73:4 (emphasis added). *See also* 3T74:1-3; 3T74:19-21; 3T75:5-9. In its July 17, 2024 submission to the Appellate Division, the trial court again acknowledged its lack of jurisdiction pursuant to the DCRP Law (Da217-218).

In 2007, the Legislature established the DCRP, a retirement program, in the Department of the Treasury and authorized the State Treasurer to "adopt rules and regulations necessary to implement the" DCRP statute. N.J.S.A.

43:15C-1; N.J.S.A. 43:15C-4.[3] The State Treasurer adopted implementing regulations codified at N.J.A.C. 17:6-1.1 to N.J.A.C. 17:6-20.9. The statute and regulations are referred to herein as the "DCRP Law." Pursuant to the DCRP Law, the employee contributes 5.5% of his/her base salary while the employer contributes an amount equal to 3% of the employee's base salary to an investment fund. N.J.S.A. 43:15C-3. *See* Estate of Smith v. N.J. Div. of Taxation, 29 N.J. Tax 408, 417 (N.J. Tax, 2016) (DCRP was crafted as a defined contribution plan in which the State and the employee pay a specified or "defined" amount of money to an outside investment fund for the benefit of the employee but "the payout to the employee on retirement is unknown and speculative").

The DCRP regulations designate the Director of the Division of Pensions and Benefits as the Plan Administrator with "**full power and discretionary authority** to construe and interpret the" DCRP "and **to adjudicate claims thereunder**", "full and complete authority and discretion to control and manage the operation of the Program" and **"complete discretionary authority to decide all matters and questions under the Program**." N.J.A.C. 17:6-2.1;

[3] The DCRP was established to control pension costs and eliminate pension abuses. Cookson v. Bd. of Trustees, Pub. Employees' Ret. Syst., 2010 WL 816790, at *2 (App. Div. 2010) (Da155); Legislative History (Da162-163) (Legislative intent of "providing long-term cost savings and limiting abuses of the state administered pension systems").

N.J.A.C. 17:6-20.9; N.J.A.C. 17:6–15.1(a) (emphasis added). The Plan Administrator's "discretionary decisions … are **final, binding and conclusive on all interested persons for all purposes**." N.J.A.C. 17:6–15.1(a) (emphasis added).

The DCRP regulations contain the following provisions barring court actions and mandating an exclusive claims procedure ending in the Appellate Division:

> **No rights other than those provided by the Program**
> The establishment of **the Program** and the Plans under the Program and the purchase of any investment option(s) under the Retirement Plan **shall not be construed as giving to any participant, beneficiary**, alternate payee **or any other person any legal or equitable right against the employer** or the Plan Administrator or their representatives, **except as is expressly provided by the Program**.

N.J.A.C. 17:6–16.12 (emphasis added).

> **Claims procedure**
> By the terms of the Program, the **claimant** (or other aggrieved person) **shall not be entitled to take any legal action or otherwise seek to enforce a claim to benefits or rights under the Program until he or she has exhausted all claims and appeals procedures provided by the Program**.

N.J.A.C. 17:6–16.4(a) (emphasis added).

> **Resolution of Claims**
> In accordance with this chapter, **a claimant** or aggrieved individual **shall file a claim with the Director of the Division of Pensions and Benefits.** The Director has full power and discretionary authority to construe and interpret the provisions of the Defined Contribution Retirement Program and this chapter and

> to adjudicate claims thereunder. **Decisions of the Director shall be rendered in accordance with N.J.A.C. 17:1–1.3**.

N.J.A.C. 17:6-20.9 (emphasis added). Significantly, N.J.A.C. 17:6-20.9 incorporates N.J.A.C. 17:1–1.3 which provides for an appeal to the DCRP Board and then to the Appellate Division:

> **17:1-1.3 Hearing request**
> If the granted appeal involves solely a question of law, the Board, Commission or Division Director may retain the matter and issue a final determination, which shall include detailed findings of fact and conclusions of law, based upon the documents, submissions and legal arguments of the parties. **The Board's**, Commission's or Division Director's final **determination may be appealed to the** Superior Court, **Appellate Division**.

N.J.A.C. 17:1-1.3(g) (emphasis added).

Thus, the DCRP Law's comprehensive framework contemplates primary and exclusive agency jurisdiction over any and all claims relating to the DCRP since it bars court review until after agency action and the remedy which the DCRP is empowered to grant (i.e., catch-up contributions) is the only remedy available under the DCRP Law. *See* N.J.A.C. 17:6–16.12 (no legal or equitable rights against employer other than those provided by the DCRP); Swede v. City of Clifton, 22 N.J. 303, 315 (1956) (administrative jurisdiction is primary and exclusive where it bars judicial review until after agency action); Nordstrom v. Lyon, 424 N.J. Super. 80, 97–98 (App. Div. 2012) (jurisdiction of an administrative agency is exclusive when the remedy which

the agency is empowered to grant is the only available remedy for the given situation); Muise v. GPU, Inc., 332 N.J. Super. 140, 163 (App. Div. 2000) (where the Legislature has explicitly limited the available relief, the agency has exclusive jurisdiction with the attendant effect of limiting cognizable remedies to those within the agency's authority).

As the DCRP Administration and the DCRP Board confirmed, the DCRP Law only provides for catch-up contributions as to current employees for any delayed enrollment (Da176; Da181). *See* N.J.A.C. 17:6-5.2 - N.J.A.C. 17:6-5.3; N.J.S.A. 43:15C-2(b)(2) - (3). Notably, "[t]here are no provisions for the employer to make or collect contributions for an employee that is no longer on their payroll" (Da176) and "there is no provision for damages due to unearned interest or investment income due to delayed enrollment." (Da180-181).

(B) The Complaint Should Have Been Dismissed with Prejudice

Based on the DCRP Law, the trial court dismissed the complaint without prejudice given its lack of subject matter jurisdiction. *See* Royster v. New Jersey State Police, 439 N.J. Super. 554, 568 (App. Div. 2015) *aff'd* 227 N.J. 482 (2017) (a court must dismiss the matter if it determines that it lacks subject matter jurisdiction); R. 4:6-7 (court must dismiss matter whenever it appears to lack subject matter jurisdiction); Abbott v. Burke, 100 N.J. 269, 297

(1985) (plaintiff may not seek relief in trial courts where the legislature vests exclusive primary jurisdiction in an agency) .

That dismissal should have been with prejudice because plaintiffs never articulated a cognizable cause of action and none arose from the complaint's factual allegations. Plaintiffs must "show that the complaint contains allegations which, if proven, would constitute a valid cause of action" and "dismissal with prejudice is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted…." Mac Prop. Group LLC & The Cake Boutique LLC v. Selective Fire and Cas. Ins. Co., 473 N.J. Super. 1, 16, 17 (App. Div. 2022); Big Smoke LLC v. Twp. of West Milford, 478 N.J. Super. 203, 226 (App. Div. 2024) (same); Johnson v. Glassman, 401 N.J. Super. 222, 246-247 (App. Div. 2008) (affirming dismissal with prejudice where plaintiffs did not offer a proposed amended pleading curing the defects of their complaint); Rubin v. Tress, 464 N.J. Super. 49, 54 (App. Div. 2020) ("the proper focus on a motion to dismiss is whether plaintiff has pleaded a cause of action").

Thus, in Nostrame v. Santiago, 213 N.J. 109, 127 (2013), the New Jersey Supreme Court affirmed the Appellate Division's dismissal of a complaint with prejudice where the complaint did not assert, and plaintiff did not adduce, any fact suggesting a viable cause of action. The Supreme Court further held

that the plaintiff could not file his complaint in the hopes of uncovering actionable facts in discovery. Id. at 128 *followed by* Lakeview Mem'l Park Ass'n v. Burlington Cnty. Constr. Bd. of Appeals, 463 N.J. Super. 459, 471-472 (Law Div. 2019) (dismissal with prejudice is warranted where the complaint lacks suggestion of a claim or plaintiff has no further facts to plead without utilizing discovery). *See also* Big Smoke, 478 N.J. Super. at 225 (affirming dismissal of complaint with prejudice where plaintiff did not plead any viable cause of action, no additional facts could be pled that would give rise to a cause of action and further proceedings would only be a fishing expedition); Edwards v. Prudential Prop. & Cas. Co., 357 N.J. Super. 196, 202 (App. Div. 2003) (a motion to dismiss "may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for plaintiff's claim must be apparent from the complaint itself").

Similarly, in Camden County Energy Recovery Associates, L.P. v. New Jersey Dept. of Envtl. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999) *aff'd* 170 N.J. 246 (2001), the trial court denied the State's motion to dismiss reasoning that the parties should be permitted to engage in limited discovery to provide "an opportunity to determine what equitable basis or what relief should be considered and on what grounds." Id. at 64. The Appellate Division reversed reasoning, "[N]o party has articulated, either to the trial court or to us, a legal

basis entitling it to relief against the State. Discovery is intended to lead to facts supporting or opposing an asserted legal theory; it is not designed to lead to formulation of a legal theory." Id. at 64. The Appellate Division reasoned that, even though the State's waste control and disposal policy may have been constitutionally flawed, the "policy did not … create judicially-enforceable contractual rights for the litigants. These parties must approach the legislative and executive branches of government to obtain relief. To permit this case to proceed would represent an inappropriate judicial incursion into the responsibilities of co-ordinate branches of government." Id. at 68.

The same rationale applies here where the trial court's dismissal without prejudice (so that plaintiffs could amend their damage claim for delayed DCRP enrollment) represents an inappropriate judicial incursion into, and circumvention of, the Legislature's comprehensive regulation vesting the DCRP Administration with "full and complete authority and … control" over "all matters and questions under the" the DCRP. N.J.A.C. 17:6-15.1(a). Moreover, an "impediment such as a" lack of subject matter jurisdiction "indicates the dismissal should be with prejudice." Doe v. Estate of C.V.O., 477 N.J. Super. 42, 55 (App. Div. 2023).

As confirmed by the Appellate Division in Camden County Energy, *supra*, plaintiffs cannot pursue a claim for damages without a legally

cognizable cause of action. *See* River Edge Sav. & Loan Ass'n v. Hyland, 165 N.J. Super. 540, 545 (App. Div. 1979) ("Without any substantive basis there is no cause of action upon which claims for damages may be properly rested"); In re HomeBanc Mortgage Corp., 945 F.3d 801, 812 (3d Cir. 2019) (defining "damages" as a "debt" or "loss" without any associated legal claim would contradict common understanding within the legal profession); Sun Chem. Corp. v. Fike Corp., 243 N.J. 319, 339 (2020) (it is the theory of liability underlying the claim that determines the recoverable damages).

Thus, the complaint should have been dismissed with prejudice.

(C) The Order Improperly Arrogates Subject Matter Jurisdiction

(i) DCRP Law Bars Damages Claims

The trial court cannot entertain plaintiffs' claim for a damages remedy (however styled) because it is inconsistent with the DCRP Law's framework. *See* Hardy v. Jackson, 476 N.J. Super. 394, 405 (App. Div. 2023) (court cannot issue remedy inconsistent with statutory law principles). Specifically, the Order invites plaintiffs to repackage and reassert their damages claim for untimely DCRP enrollment in contravention of the DCRP regulation barring "any legal action" "to enforce a claim to benefits or rights" under the DCRP "until … exhaust[ion of] all claims and appeals procedures provided by the" DCRP. N.J.A.C. 17:6-16.4(a). Plaintiffs did not -- and cannot -- exhaust all claims and appeals

procedures provided by the DCRP because they never filed a timely appeal of the DCRP Board's decision as provided by the DCRP regulations. N.J.A.C. 17:6-20.9 *incorporating* N.J.A.C. 17:1–1.3. The Order also contravenes N.J.A.C. 17:6–16.12 (no rights against employer except as expressly provided by DCRP).

Plaintiffs squarely admit that they are "seeking … to enforce a claim to benefit[s] or rights under the" DCRP -- irrespective of the phrasing of their claim. 3T18:11-19:2; 3T10:4-5; 3T10:12-15; 3T10:23-25. Irrespective of whatever manner plaintiffs restyle their damage claims for untimely DCRP enrollment, those claims will always be inextricably linked to the DCRP as they cannot be conceived without reference to the DCRP. As the trial court admitted, "all claims … arising out of disbursements, monies that's supposed to be made, **anything to do with the DCRP** and those monies" arise out of the DCRP and are subject to the DCRP Board's jurisdiction. 3T72:21-73:4 (emphasis added). Therefore, the trial court cannot entertain plaintiffs' damages claim for untimely DCRP enrollment -- however repackaged.

Thus, the Order frustrates the DCRP Law and "constitute[s] a judicial undoing of a considered legislative judgment, something courts should avoid." Stancil v. ACE USA, 418 N.J. Super. 79, 88 (App. Div. 2011). "A court's equitable authority is not boundless" and must "follow[] the law…otherwise, a

judge's personal proclivities alone could negate the will of the Legislature." Hardy, 476 N.J. Super. at 405. Our courts "are bound by legislative regulation of the rights of the parties…." Natovitz v. Bay Head Realty Co., 142 N.J. Eq. 456, 464 (E. & A. 1948). "Legislation has primacy over areas formerly within the domain of the common law. Legislation reflects the will of the people as enacted through their elected representatives." Farmers Mut. Fire Ins. Co. of Salem v. N.J. Prop.-Liab. Ins. Guar. Ass'n, 215 N.J. 522, 545 (2013). Thus, "common law must bow to statutory law" because any "other notion is inconsistent with the most basic principles of our democratic form of government." Id.

Therefore, the Order should be reversed and the complaint dismissed with prejudice because otherwise the trial court is free to devise remedies inconsistent with the DCRP Law. *See* Berg v. Christie, 225 N.J. 245, 280 (2016) (declining to provide a remedy that was not available under the governing statute). Jarrell v. Kaul, 223 N.J. 294, 307 (2015) ("When the Legislature has expressly created specific remedies, a court should always hesitate to recognize another unmentioned remedy" as "the courts "are compelled to conclude that the Legislature provided precisely the remedies it considered appropriate").

(ii) Exclusive Appellate Jurisdiction

The Order enables plaintiffs to collaterally attack the Appellate Division's exclusive jurisdiction to review the DCRP Board's final decision contrary to R. 2:2-3(a)(2) and N.J.A.C. 17:6-20.9 *incorporating* N.J.A.C. 17:1-1.3(g) (providing for Appellate Division review of Board's final determination). [4]

R. 2:2-3(a)(2) vests the Appellate Division with "exclusive jurisdiction to review any action or inaction of a state administrative agency." Mutschler v. N.J. Dep't of Envtl. Prot., 337 N.J. Super. 1, 9 (App. Div. 2001); Prado v. State, 186 N.J. 413, 422 (2006). "Jurisdiction to consider an attack on a final decision of a state administrative agency is vested exclusively in the Appellate Division by way of appeal; **the Law Division may not entertain such a challenge**." State v. Ferrier, 294 N.J. Super. 198, 200 (App. Div. 1996) (emphasis added).

The Appellate Division's exclusivity may not be circumvented by instituting actions in the trial court where, as here, the essence of the relief sought is review of agency action. Pressler & Verniero, Current N.J. Court Rules, Comment 3.2.1 (GANN 2024). Significantly, "**[t]he Appellate Division's exclusive jurisdiction does not turn on the theory of the**

[4] Any appeal of the DCRP Board's decision is now time-barred.

challenging party's claim or the nature of the relief sought." Mutschler, 337 N.J. Super. at 9, 10 (trial court erred in undertaking to review the DEP's interpretation of permit condition) (emphasis added). Rather, the Appellate Division's exclusive jurisdiction "**may not be circumvented by framing a claim as one ordinarily presented in the trial court … or through procedural maneuvers**…." N.J. Election Law Enforcement Comm'n v. DiVincenzo, 451 N.J. Super. 554, 569 (App. Div. 2017) (emphasis added) *citing* Prado, *supra*, 186 N.J. at 423–424 (reversing Appellate Division decision that found exception to R. 2:2–3(a)(2) exclusive jurisdiction on efficient judicial administration grounds when a case was already pending in the Law Division).

The Appellate Division's decision in Beaver v. Magellan Health Services, Inc., 433 N.J. Super. 430, 442 (App. Div. 2013) is dispositive and bars plaintiffs from repackaging their claims in the trial court. In Beaver, the Appellate Division held that the Law Division lacked jurisdiction over a plaintiff's tort and breach of contract claims against his insurance carrier for denial of coverage because the claims amounted to a collateral attack on a prior final agency action of the State Health Benefits Commission ("SBHC") upholding the denial of coverage. Id. at 444. The plaintiff in Beaver, a former public employee, received health benefits for himself and his family through

the NJ Direct health benefits programs which were administered by Horizon on behalf of the State Health Benefits Program. As in this case, this program and its governing body, the SBHC, were established by statute. The SBHC contracted with insurers to provide benefit plans to plan participants but retained authority to adjudicate claim disputes. Horizon hired Magellan to manage mental health and substance abuse benefits. Magellan denied coverage for part of plaintiff's son's stay at a residential treatment facility for substance abuse. The SBHC affirmed that determination and advised the plaintiff that he could appeal to the Appellate Division. As in this case, the SHBC had a comprehensive regulatory appeals process providing for administrative adjudication with an appeal to the Appellate Division. Id. at 438.

Instead of pursuing an appeal of the SBHC's ruling with the Appellate Division, the plaintiff sued Horizon and Magellan for the denial of benefits alleging, *inter alia*, breach of contract and unjust enrichment. The trial court dismissed the action reasoning that "plaintiff should have instituted this action in the Appellate Division and that a transfer of the matter to the Appellate Division under R. 1:13-4(a) at that point was time-barred." Id. at 437. The Appellate Division affirmed and, in doing so, "recognized the statutory and regulatory scheme that requires disputes over eligibility and benefits to be

submitted first to the SHBC, and, only thereafter, to this court for resolution." Id. at 439.

Notably, the Appellate Division rejected the plaintiff's argument that his complaint "does not challenge the SHBC's final administrative action, but rather is a separate action at law alleging statutory and common law causes of action against Magellan and Horizon." Id. at 437, 439. The Appellate Division ruled that plaintiff could not pursue a private cause of action (Id. at 443) and reasoned that "plaintiff's claims, sounding in tort and contract, amount to no more than a collateral challenge to the … SHBC final agency action" (Id. at 442) as they are "necessarily dependent upon the merits of … the SHBC's final agency action rejecting his claim for health care coverage." Id. at 443. The Appellate Division further observed that the plaintiff's complaint "is squarely predicated upon the contention that defendants wrongfully denied coverage for health care claims" and "that he was damaged by the denial of benefits -- a claim fully adjudicated on the administrative level, and for which plaintiff has abandoned his right to appellate review." Id. at 443, 444. Thus, the Appellate Division held:

> [P]laintiff's claims in the Law Division are dependent upon the resolution of an issue contrary to the final agency action of the SHBC -- an issue fully adjudicated on the administrative appeal before the SHBC -- as to which plaintiff has abandoned his appeal. Accordingly, plaintiff's complaint in the Law Division must be dismissed for lack of jurisdiction. To hold otherwise would permit

> plaintiff to collaterally attack a State administrative determination in the Law Division. **The Law Division is without jurisdiction to adjudicate such claims**. R. 2:2–3(a).

Id. at 444 (emphasis added).

More recently, the Appellate Division followed Beaver in reversing a trial court order which granted injunctive relief to an emergency transportation company pursuant to its complaint asserting state civil rights claims against the State Office of Emergency Medical Services ("OEMS") arising from OEMS's suspension of the company's license to operate. Citing to Beaver, the Appellate Division held that "plaintiff's complaint in the Law Division must be dismissed for lack of jurisdiction. To hold otherwise would permit plaintiff to collaterally attack a State administrative determination in the Law Division." AmeriCare Emergency Med. Serv. Inc. v. City of Orange Twp., 463 N.J. Super. 562, 574 (App. Div. 2020). *See also* Degnan v. Nordmark & Hood Presentations, Inc., 177 N.J. Super. 186, 191 (App. Div. 1981) ("attempts to question or attack collaterally prior decisions of an administrative agency are rejected by the courts"); Greer v. N.J. Bureau of Sec., 291 N.J. Super. 365, 374 (App. Div. 1994) (an action to correct a decision of a state agency must be brought in the Appellate Division).

Accordingly, pursuant to R. 2:2-3(a)(2) and the governing precedent, plaintiffs cannot return to the trial court with repackaged damage claims for

untimely DCRP enrollment. Yet the Order enables plaintiffs to do just that. Notably, the DCRP Board ruled that damages for untimely DCRP enrollment are unavailable as a matter of law because the DCRP Law has "no provision for damages due to delayed enrollment" so "new legislation would be required" in order to afford such damages (Da176-181). Thus, any of plaintiffs' damage "claims in the Law Division [for delayed DCRP enrollment] are dependent upon the resolution of an issue contrary to the final agency action of the" DCRP Board. Beaver, 433 N.J. Super. at 444. Therefore, any amendment of the complaint to reassert damage claims arising from delayed DCRP enrollment is a collateral attack on the DCRP Board's ruling. Any contention otherwise is disingenuous. Indeed, as Board counsel noted, plaintiffs would not have returned to the trial court but for the DCRP Board's denial of damages. 3T51:17-52:3.

As in Beaver, the plaintiffs' failure to file a timely appeal with the Appellate Division required dismissal of the complaint with prejudice -- not an opportunity to restyle their damage claims because "absent an attack on that final agency decision, plaintiff[s]' … claims are patently without basis in fact or law." Beaver, 443 N.J. Super. at 442.

POINT II

THE TRIAL COURT NEVER HAD SUBJECT MATTER JURISDICTION OVER THE COUNT ONE BREACH OF CONTRACT CLAIM BECAUSE THE DCRP LAW BARS THE CLAIM AND THE PARTIES' CBA SUBJECTS IT TO ARBITRATION (2T; 3T; Da167-168; Da186-189)

For the same reasons delineated above at Point I, the trial court never had subject matter jurisdiction over the Count One breach of contract claim. In addition, further grounds, which are discussed below, deprived the trial court of subject matter jurisdiction over the Count One breach of contract claim and mandated its dismissal with prejudice.

(A) The DCRP Expressly Bars the Breach of Contract Claim

Plaintiffs cannot assert a breach of contract claim for their untimely DCRP enrollment because the DCRP Law squarely bars any such claim:

> **No Contract of Employment**
> **Under no circumstances shall the Program constitute or modify a contract of employment** or in any way obligate the employer to continue the services of any employee.

N.J.A.C. 17:6–16.11 (emphasis added).

> **No rights other than those provided by the Program**
> The establishment of **the Program** and the Plans under the Program and the purchase of any investment option(s) under the Retirement Plan **shall not be construed as giving to any participant, beneficiary**, alternate payee **or any other person any legal or equitable right against the employer** or the Plan Administrator or their representatives, **except as is expressly provided by the Program**.

N.J.A.C. 17:6–16.12 (emphasis added).

Thus, the DCRP regulations cited above expressly preclude plaintiffs' assertion of an implied contract action from the DCRP Law. This accords with the "long-held presumption against contracts by statute." Berg, 225 N.J. at 262. "Under well-settled rules of construction, a statute will not be presumed to create private, vested contractual rights, unless the intent to do so is clearly stated. This is because the effect of such authorization is to surrender the fundamental legislative prerogative of statutory revision and amendment and to restrict the legislative authority of succeeding legislatures." New Jersey Educ. Ass'n v. State, 412 N.J. Super. 192, 206–207 (App. Div. 2010) (citations omitted). Thus, our courts require "a high bar for the creation of contracts by statute" and "**only the clearest expression of statutory language and evidence of legislative intent** for such creation will do." Berg, 225 N.J. at 260, 261 (emphasis added). There must be "an expression of unequivocal intent by the Legislature" to create a contract and "the expression of a statutory contract … must be unmistakably clear." Id. at 260-261, 278 (reversing Appellate Division's decision finding contract from statute).

Notably, not only does the DCRP Law lack "the clearest expression of statutory language and evidence of legislative intent" to create a contract between employer and employee but it expressly bars any such creation. Id. at

260, 261. Therefore, a breach of contract claim does not, and cannot, arise from the DCRP Law.

(B) Based on Plaintiffs' Initial Representations to the Court, the Count One Breach of Contract Claim is Subject to Arbitration

On January 31, 2022, plaintiffs' counsel argued that plaintiffs had a breach of contract claim because "pensions are a type of contract that's integrated into the Collective Bargaining Agreement" (1T16:15-17) and the DCRP Law "was incorporated into that contract" (1T16:23-24). Again, on October 25, 2022, plaintiffs' counsel argued that "the DCRP regulation is incorporated into the C[B]A" while admitting that the DCRP is not mentioned in the CBA (2T24:16-19; 2T25:17-26:2).

Plaintiffs' complaint asserts a breach of contract claim which the trial court recognized is subject to arbitration under the CBA given plaintiffs' representations that the CBA incorporates the DCRP (2T24:13-14; 2T25:2-16; 2T26:3-8). Indeed, the trial court faulted plaintiffs for skipping arbitration "because you felt you were not going to win … and you thought your best claim was in the Superior Court." 3T30:17-24. *See also* 3T5:22-25; 3T32:21-33:4. Nevertheless, the court declined to dismiss with prejudice.

It is well-established that "in situations involving collective bargaining agreements, it has long been the rule in New Jersey that the aggrieved employee must exhaust the remedies provided by the agreement before

resorting to the court for redress." Fregara v. Jet Aviation Business Jets, 764 F. Supp. 940, 951 (D.N.J. 1991) *citing* Thompson v. Joseph Cory Warehouses, Inc., 215 N.J. Super. 217, 220 (App. Div. 1987) ("an employee seeking to bring a contract grievance must … use … the contract grievance procedure agreed upon by employer and union as the mode of redress"). *See also* Arafa v. Health Express Corp., 243 N.J. 147, 171 (2020) ("by entering into an arbitration agreement, … [plaintiffs] waived the … right to sue"); Minkowitz v. Israeli, 433 N.J. Super. 111, 134 (App. Div. 2013) ("when binding arbitration is contracted for by litigants, the judiciary's role to determine the substantive matters subject to arbitration ends"); N.J. Tpk. Auth. v. Local 196, 190 N.J. 283, 292 (2007) ("arbitration is … a substitute for and not a springboard for litigation").

The decision in Poll v. Holmdel Twp. of Bd. of Educ., 2023 WL 221112 (App. Div. Jan. 18, 2023) provides apt guidance. In Poll, the Appellate Division affirmed the trial court's dismissal of a complaint *with prejudice* where the plaintiff alleged violation of the Wage Payment Law (N.J.S.A. 34:11-4.1 to -33.6) and breach of contract arising from his employer's failure to pay him a stipend. The Appellate Division rejected plaintiff's contention that his claim was not subject to the parties' CBA as subversive of the Legislative framework governing public employees and "an end run to avoid

the CBA grievance process." Id. at *2 *following* Fregara and Thompson, *supra*. The same result -- dismissal with prejudice -- was warranted in this case where the trial court ruled that plaintiffs' contract claim is subject to arbitration. 2T24:13-14; 2T25:2-10; 2T26:3-8.

(C) Based on Plaintiffs' Changed Representations to the Court, the Count One Breach of Contract Claim Lacks a Contract

At the June 6, 2024 oral argument, plaintiffs changed their position and disavowed their prior representations to the trial court that the DCRP Law was incorporated into the CBA. 1T16:15-17; 1T16:23-24; 2T24:16-19; 2T25:17-26:2. Instead, plaintiffs now argued that the DCRP Law was not incorporated into the CBA but rather into some unidentified "individual employment contracts" which are not part of the record below -- as the trial court confirmed. 3T28:20-29:1; 3T34:2-4; 3T65:22-25. The only contract on record is the CBA (3T59:2-61:11) which plaintiffs have now disavowed as the basis for their breach of contract claim.

Therefore, plaintiffs cannot maintain a breach of contract action because they lack the requisite contract. *See* Nelson v. Elizabeth Bd. of Educ., 466 N.J. Super. 325, 342 (App. Div. 2021) ("To establish a claim for breach of contract, a plaintiff must provide proof of a valid contract between the parties"); Coyle v. Englander's, 199 N.J. Super. 212, 223 (App. Div. 1985) (same); Globe Motor Co. v. Igdalev, 225 N.J. 469, 482 (2016) (plaintiff must

prove that the parties entered into a contract containing certain terms); Goldfarb v. Solimine, 245 N.J. 326, 338 (2021) (same). In any event, any breach of contract action is barred by the DCRP Law as set forth above at Point II(A).

Accordingly, the entire complaint, including Count One for breach of contract, should be dismissed with prejudice as set forth above, Point I(B).

POINT III

THE TRIAL COURT'S OCTOBER 25, 2022 ORDER WAS NOT A FINAL ORDER SUBJECT TO APPEAL (2T; Da167-168)

The trial court's October 25, 2022 dismissal order was not a final order because it was entered without prejudice to plaintiffs' reassertion of their claims in the trial court. To that end, the order expressly preserved the statute of limitations. Da167-168; 2T49:4-5. "An order entered without prejudice generally allows plaintiffs to move to amend their complaint and is therefore not a final order." Johnson v. City of Hoboken, 476 N.J. Super. 361, 370 (App. Div. 2023). A dismissal "without prejudice … normally suggests that there was more to do in the trial court" and "that the dismissed claim has not been finally resolved and may be reinstated in the same action…." Devers v. Devers, 471 N.J. Super. 466, 472-473 (App. Div. 2022); Big Smoke, 478 N.J. Super. at 228 (a "dismissal without prejudice allows a plaintiff to amend and refile a complaint that addresses and corrects prior deficiencies"). *See also*

Scalza v. Shop Rite Supermarkets, 304 N.J. Super. 636, 639 (App. Div. 1997) (granting leave to appeal *nunc pro tunc* from order of dismissal without prejudice).

Indeed, the trial court deferred ruling on plaintiffs' breach of contract (Count One) claim to a later date after the outcome of the DCRP Board's decision on Count Two. 2T43:19-44:4; 2T48:24-49:4. In addition, the trial court left open the issue of plaintiffs' ability to return to the trial court on their Count Two claim after the DCRP Board decision thereby negating finality. 2T44:5-46:8. The court opined that "it's premature to decide whether or not it should be allowed back here…." 2T45:4-9.

Therefore, the order was interlocutory as it merely held the issues in abeyance pending the DCRP Board's decision and did not bar plaintiffs from returning to the trial court -- which they did. *See* Grow Co., Inc. v. Chokshi, 403 N.J. Super. 443, 459 (App. Div. 2008) (order placing issue in abeyance is interlocutory). *See also* House of Fire Christian Church v. Zoning Bd. of Adjustment of Clifton, 379 N.J. Super. 526, 531 (App. Div. 2005) (order is interlocutory when court retains jurisdiction).

POINT IV

THE TRIAL COURT'S JUNE 7, 2024 ORDERS WERE NOT FINAL ORDERS SUBJECT TO APPEAL (3T; Da186-189)

The trial court's June 7, 2024 orders were not final because the court expressly left the case open so that plaintiffs could amend their complaint and restyle their damage claims for untimely DCRP enrollment. Johnson, 476 N.J. Super. at 370 (an "order entered without prejudice generally allows plaintiffs to move to amend their complaint and is therefore not a final order"). Specifically, the court determined, "I'm going to leave it open to see whether … there are claims that could exist that did not have to go through the [DCRP] board … [and] the Appellate Division… but which could address … [plaintiffs'] claims for damages" for delayed DCRP enrollment. 3T77:3-12. According to the court, plaintiffs "can refile and then we can deal with the issues later on." 3T77:19-20. More recently, the trial court confirmed that, in its view, plaintiffs are free to amend their complaint essentially indefinitely. 7/17/24 trial court submission (Da217, 219). Hence, the Appellate Division's instruction to plaintiffs that they "explain what further action, if any, they intend to take to pursue their claims, the specific time when they will pursue their claims, and in what forum they believe they can pursue their claims" (Da203-205).

Final judgments "are judgments that finally resolve all issues as to all parties…." R. 2:2-3(b). *See also* Tradesoft Technologies, Inc. v. Franklin Mut. Ins. Co., Inc., 329 N.J. Super. 137, 140 (App. Div. 2000) (a judgment is not final and hence is not eligible for an appeal as of right unless it disposes of all claims and issues as among all parties). Courts "concentrate on the legal right allegedly violated when determining whether a trial court has resolved all issues as to all parties." Moon v. Warren Haven Nursing Home, 182 N.J. 507, 513 (2005). Thus, an order which grants "plaintiff[s] the opportunity to litigate [their damages] claims … is not a final adjudication of all the issues as to all the parties." Id. at 513. In this case, plaintiffs alleged a purported right to damages consisting of interest/investment income that would have accrued on contributions during the delay in DCRP enrollment. The trial court dismissed plaintiffs' complaint only "based on the way that it's pled." 3T77:13-18. *See also* 3T9:15-10:3; 3T17:11-23; 3T30:10-11; 3T72:21-73:4. That dismissal, however, was without prejudice to plaintiffs' reassertion of the same purported right to damages in an amended pleading (3T77:3-12; 3T77:19-20; Da217, 219).

A dismissal which "would permit plaintiff … to refile the complaint" "creates only the illusion of finality" and is interlocutory. Ruscki v. City of Bayonne, 356 N.J. Super. 166, 168 (App. Div. 2002). *See also* CPC Int'l, Inc.

v. Hartford Accident & Indem. Co., 316 N.J. Super. 351, (App. Div. 1998) (dismissal without prejudice to reinstatement of claims is interlocutory); Grow Co., 403 N.J. Super. at 460 (order which permits subsequent adjudication of some pleaded issue is interlocutory). As the trial court confirmed in its submission to the Appellate Division (Da217, 219), the June 7, 2024 orders do not foreclose plaintiffs from filing a motion to amend their pleadings and therefore are not appealable final orders.

POINT V

A THIRD OF THE PLAINTIFFS ARE TIME-BARRED FROM ASSERTING A BREACH OF CONTRACT CLAIM (1T; Da31-32)

Although the Board's initial motion to dismiss asserted a statute of limitations defense to the breach of contract claim, the defense is academic for the reasons delineated above at Points I and II, namely: (1) lack of subject matter jurisdiction; (2) the DCRP Law squarely bars contract claims against the employer; (3) any contract claim is subject to arbitration under the CBA; and (4) to the extent plaintiffs purport to assert a contract claim outside the CBA, plaintiffs lack an actual, underlying contract.

Nevertheless, any breach of contract claim is time-barred for 1/3 of the plaintiffs because they were hired before August 13, 2015 -- the six-year

statute of limitations cut-off under N.J.S.A. 2A:14-1. 1T13:16-14:1.[5] Plaintiffs' breach of contract claims are entirely based on the DCRP Law which became effective on July 1, 2007. Therefore, the conceptual basis for plaintiffs' breach of contact claims existed as of July 1, 2007 and the claims accrued as of that date for those plaintiffs employed by the Board as of July 1, 2007. New Jersey Div. of Taxation v. Selective Ins. Co. of Am., 399 N.J. Super. 315, 326 (App. Div. 2008) (breach of contract claim accrues the moment the right to commence an action comes into existence); Holmin v. TRW, Inc., 330 N.J. Super. 30, 35 (App. Div. 2000); Metromedia Co. v. Hartz Mountain Assoc., 139 N.J. 532, 535 (1995). The accrual date for those employed after July 1, 2007 would be their respective dates of hire. N.J.A.C. 16:6-5.1 (a)(1).

Although plaintiffs relied upon case law applying the installment contract method of accrual, that case law is inapposite because it is predicated upon the existence of an installment contract -- which is lacking here. *See* In re Estate of Balk, 445 N.J. Super. 395 (App. Div. 2016) (promissory note stipulating to four payments on specified dates and payment of remaining balance within 24 months); Metromedia, *supra* (tenant and landlord negotiated

[5] Plaintiffs concede that 33 of the 99 plaintiffs were hired six years before the complaint was filed. 1T17:19-23.

agreement for monthly payment of cleaning service fees); Nat'l Util. Serv., Inc. v. Cambridge-Lee Indus., Inc., 199 Fed. Appx. 139 (2006) (consulting contract for monthly utility bills).

The only contract on record is the CBA which is not an installment contract. Lonergan v. Twp of Scotch Plains, 2019 WL 2293445, at *2, n. 1 (App. Div. May 29, 2019) ("We reject plaintiff's argument that the CBA is an installment contract and each year that the Township failed to pay his health insurance costs constituted a continuing breach for calculating accrual of his cause of action"). In any event, plaintiffs have disavowed that the CBA is the basis of their breach of contract claim and there is no installment contract in the record.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Order should be reversed and the complaint should be dismissed with prejudice and plaintiffs' motion to reinstate the complaint should be denied with prejudice.

Respectfully submitted,
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By: */s/ Jessica V. Henry*
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Dated: August 29, 2024

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SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Docket No.: A-003443-23

Civil Action

On Appeal From:
Superior Court of New Jersey
Middlesex County, Law Division
Docket No: MID-L-4816-21

Sat below:
Hon. Bruce J. Kaplan, J.S.C.

NASHED, RENEE NESSIEM-BASSILI, PATRICIA O'LEARY JONES, PATRICIA OCKENHOUSE, JENNIFER ORANCHAK, KIMBERLY PACE, DONNA PALAGONIA, VIVIAN PERCOCO, EMMA PEREZ, LISA RAHNER, MYRNA RAZAK, FARHAT REHMANI, KELLIANNE RIZK, CHRISTINEE ROMAN, JANETE ROSEMAN, ADRIENNE SABATINO, MELIKE SAHIN, MARIA SAMULKA, CHRISTINA SCHMITT, MARLA SCHNEIDER, KELSEY SCHUSTER, RANIA SFEIR, MAGDA SHEHATA, SAMINA SHEIKH, MICHELE SHERMAN, JAEKYOUNG SHIM, RENEE SIMON-RADOCZY, MOONIA SOHERWARDY, LAURA SOUTHON, NANCY STETZ, VIVIAN TADROS, CHRISTINE TAMBINI MCCANN, MUI LING TANG, JAYNE TOKASH, ESTELA VALDEZ, JOSLYN VELEZ, MELISSA WHYTE, JODY WIENER, MARIA WOOD, LORRAINE ZEBRO, and PATRICIA ZIMMERMAN,

Plaintiffs - Cross-Appellants

v.

EAST BRUNSWICK BOARD OF EDUCATION,

Defendant - Appellant

BRIEF ON BEHALF OF CROSS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF JUDGEMENTS, ORDERS, AND RULINGS BEING APPEALED

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

State Statutes

Rules

Regulations

PRELIMINARY STATEMENT

The Defined Contribution Retirement Program ("DCRP") required the East Brunswick Board of Education ("Defendant" or "Board") to enroll eligible employees ("Plaintiffs") in this pension fund. There is no dispute the Board failed to do so in a timely manner. While the individuals who still remain employed by the Board are presently making back contributions, and the Board its respective shares, they have lost interest and/or investment income that would have accrued.

Contributions are a mandatory requirement. By statute, employees are required to contribute 5.5% of their base salary to the fund. The Board is required to contribute an additional 3%. In addition, investment earnings are part of the DCRP plan. By virtue of being enrolled in the DCRP, the member automatically earns investment income and the DCRP statutes provide that contributions shall be invested.

In this case, the trial court erred when it denied Plaintiffs' motion to reinstate the complaint. It erroneously determined that it did not have jurisdiction over Plaintiffs' claim for damages due to a breach of contract and by operation of law. It further determined that Plaintiffs were required to exhaust their administrative remedies prior to seeking relief with the trial court, which necessarily includes appealing the DCRP Board's Final Decision to the Appellate Division. While the

trial court recognized that Plaintiffs have a cognizable claim for damages, it ultimately denied Plaintiffs' motion to reinstate the complaint.

However, the trial court is vested with the authority to grant a damages remedy in this case. It has jurisdiction over the claims asserted in the complaint, which are not barred by the DCRP law. The DCRP Board also does not retain exclusive jurisdiction, but instead it retains concurrent jurisdiction with the trial court.

The trial judge's initial ruling in October 2022 directed Plaintiffs to exhaust their administrative remedies. He did not direct, nor does the law require, the parties to seek an appeal to the Appellate Division after obtaining a final agency order. While Plaintiffs were not required to exhaust their administrative remedies, however, they did so to comply with the trial court's directive and obtained a final agency decision. This decision confirmed that the DCRP Board had no authority to grant the damages remedy sought. In fact, the Board argued below that no such agency remedy exists. Following this, an appeal to this Court was not required because an appeal constitutes judicial intervention, not an administrative remedy, and was not required either by law or the trial court's directive.

At this juncture, Plaintiffs intend to pursue their claims solely through this appeal by requesting this Court find the trial court has jurisdiction to issue the damages remedy sought. In doing so, this matter should be returned to the trial court and litigated on the merits. Plaintiffs do not intend to seek arbitration; re-file a new

complaint in Superior Court with different claims, which may be subject to dismissal on grounds of res judicata or estoppel; nor file another claim with the DCRP.

For the reasons set forth herein, it is respectfully submitted this Court reverse the trial court's denial of the June 7, 2024 order denying Plaintiffs' motion to vacate the October 25, 2022 order and reinstate the complaint. In addition, the June 7, 2024 order denying Defendant's motion to dismiss with prejudice should be affirmed.

STATEMENT OF FACTS & PROCEDURAL HISTORY

On July 1, 2007, the Defined Contribution Retirement Fund ("DCRP") was established for the benefit of public employees who are not eligible for other state-administered pension funds. Enrollment in the DCRP is mandatory for eligible employees. N.J.S.A. 43:15C-2(a). Pursuant N.J.S.A. 43:15C-1 et seq., the employer contributes 3% of the employee's base salary and employee contributes 5% percent of their base salary to the fund. N.J.S.A. 43:15C-3(a)-(b). Interest, or investment earnings, accrue as a result of the employee and employer contributions and may be allocated into investment alternatives, such as mutual funds. N.J.S.A. 43:15C-5.

The East Brunswick Board of Education ("Defendant" or "Board") failed to enroll eligible employees in the DCRP in a timely manner. On May 7, 2021, the Board and affected employees began making back contributions to account for funds that should have been contributed had employees been timely enrolled. Nevertheless, the Board contends it is not liable for interest or investment income.

On August 13, 2021, Plaintiffs filed a Complaint in the Superior Court, Law Division seeking damages. (Da1) Specifically, Plaintiffs alleged that current employees have lost interest and/or investment income from the Defendant's failure to timely enroll them in the DCRP. (Da4, Da5) Additionally, certain members subsequently became members of another fund (i.e. Public Employees' Retirement System ("PERS") or the Teachers' Pension and Annuity Fund ("TPAF")) or have since resigned or retired. Id. These individuals have lost employer and employee contributions, in addition to interest and/or investment income, that they otherwise would have been entitled to. Id.

On October 8, 2021, the Board filed a motion to dismiss the complaint. (Da16) On January 31, 2022, the trial court denied the Board's motion. (1T);[1] (Da31) On February 20, 2022, the Board filed its answer to the complaint. (Da11) On August 24, 2022, the Board filed a motion for reconsideration, seeking to vacate the trial court order denying its previous motion to dismiss. (Da33) On October 25, 2022, the trial court granted the motion for reconsideration. (Da167) This order dismissed the complaint and, all claims, without prejudice and held that the issue of damages should first go before the DCRP for adjudication. (2T); (Da167-169)

[1] The transcripts from the oral arguments in Superior Court are designated as follows: "1T" is the January 1/31/22 transcript; "2T" is the October 25, 2022 transcript; and "3T" is the June 6, 2024 transcript.

In rendering its decision, the trial court held that the terms of the DCRP program provide for a reviews procedure and a claimant shall not take any legal action until his administrative remedies are exhausted. (2T40:4-8) In addition, the trial court noted that it is premature for it to decide the powers and authority of the DCRP. (2T40:12-210) Therefore, the trial court ordered that Plaintiffs must first exhaust their administrative remedies with the DCRP. (2T41:19-21; 2T50:6-11). That decision included no requirement to appeal to the Appellate Division in the event the DCRP's decision was unfavorable. (2T40:4-8; 2T40:12-210; 2T41:19-21; 2T50:6-11)

On December 28, 2022, Plaintiffs filed a claim with the DCRP. On May 22, 2023, the DCRP issued its administrative decision. (Da176) The DCRP held that it "is unable to provide a determination or guidance since the New Jersey Statutes and regulations do not provide any provisions in regard to non-compliance by an employer enrolling a member into DCRP. New legislation would be required in regard to any employer non-compliance with current DCRP regulations." Id.

On June 8, 2023, Plaintiffs filed an appeal of this determination with the DCRP Board in accordance with the DCRP's claims procedure. On February 23, 2024, the DCRP Board issued its Final Decision. (Da178) In its determination, the DCRP Board held that it could not order damages because it lacked the statutory authority to do so. (Da23) It held that "[t]here are no specific statutory provisions

that deal with lost interest or investment income due to delayed or delinquent enrollment." Id. Ultimately, the DCRP Board held that "the DCRP enabling statutes ***do not provide authorization for the Board to assess damages for damages of interest and investment income*** for members' delayed enrollment in the DCRP by the employer." (emphasis added) (Da181)

On April 10, 2024, Plaintiffs filed a motion in the trial court pursuant to R. 4:50-1 to vacate the October 25, 2022 order and to reinstate the complaint. (Da169) On May 2, 2024, the Defendant filed a cross-motion to dismiss the complaint with prejudice. (Da182) Of note, the Board contends that there is no administrative remedy available to Plaintiffs. (3T38:13-16) Following oral argument, the trial court denied both motions. (Da186, Da189) The trial court held that Plaintiffs were required to appeal the DCRP Board's Final Decision to the Appellate Division in order to exhaust their administrative remedies. (3T72:7-8) In rendering its decision, the trial court cited no case or decision supporting its reasoning. (3T72:1-20)

On June 14, 2024, the Board filed a motion for leave to file an interlocutory appeal of the trial court's June 7, 2024 order denying dismissal of the complaint with prejudice. (Da190). On July 5, 2024, this Court granted the Board's motion. (Da203) On July 12, 2024, Plaintiffs filed a notice of appeal of the June 7, 2024 order denying the motion to reinstate the complaint. (Da209) On July 17, 2024, Plaintiffs additionally filed a cross-motion for leave to appeal. (Da212-214). On July 17, 2024,

the trial court filed an amplification statement pursuant to R. 2:5-1. (Da215) On July 29, 2024, this Court granted Plaintiffs' cross-motion for leave to appeal. (Da220) This order further consolidated the interlocutory appeal and Plaintiffs' appeal as of right. (Da222)

LEGAL ARGUMENT

I. THE OCTOBER 25, 2022 ORDER AND THE JUNE 7, 2024 ORDERS ARE FINAL ORDERS THAT ARE SUBJECT TO AN APPEAL AS OF RIGHT. (Da167; Da186; Da189)

The trial court's underlying orders in this case are final orders. The October 25, 2022 trial court order granted the Board's motion for reconsideration. (167a) This order dismissed the complaint, without prejudice, and held that the issue of damages and the administrative remedy should be heard by the DCRP. (2T48:21-49:5); (Da167-169). The June 7, 2024 orders denied Plaintiffs' motion to vacate the October 25, 2022 order and reinstate the complaint and further denied Defendant's motion to dismiss the complaint with prejudice. (Da186; Da189) Ultimately, all three orders dismissed the complaint and all of Plaintiffs' claims.

R. 2:2-3(a) governs appeals to the Appellate Division as of right. Such appeals may be taken "from final judgments of the Superior Court trial divisions, or the judges thereof sitting as statutory agents; the Tax Court; and in summary contempt proceedings in all trial courts except municipal courts…" R. 2:2-3(a)(1). "The term 'final judgment' as used in R. 2:2-3(a)(1) and its predecessors has long and

consistently been interpreted as meaning a judgment "disposing of all issues as to all parties." State in Interest of R.L., 202 N.J. Super. 410, 411 (App. Div. 1985) (quoting Hudson v. Hudson, 36 N.J. 549, 553 (1962)); see also In re Application of Tiene, 19 N.J. 149, 160, 115 A.2d 543 (1955) (holding that where an order is in effect "similar to a dismissal of a complaint" the order is final and appealable as of right); Scalza v. Shop Rite Supermarkets, Inc., 304 N.J. Super. 636, 638 (App. Div. 1997) ("the actual dismissal of a complaint, when the only other pleading is an answer, should generally be considered a final judgment for purposes of appeal."); State v. Burten, 207 N.J. Super. 53, 60 (App. Div. 1986) (the dismissal of the complaints in the municipal court was a final rather than interlocutory order as the dismissal terminated the proceedings); Parker v. City of Trenton, 382 N.J. Super. 454 (App. Div. 2006) (dismissing the appeal as interlocutory when two counts remained pending for trial).

Here, the court orders are all final judgments. The Defendant contends that because the trial court deferred ruling on the breach of contract claim initially, and left open the possibility of returning to court, this action negates any finality. However, the October 25, 2022 order dismissed the action and all claims. The fact that a claim was pursued with the DCRP does not make the litigation in Superior Court active in any manner.

Even if the order was appealable to this Court at that time, Plaintiffs followed the trial court's directive to seek a decision from the DCRP. Plaintiffs cannot now be faulted for not appealing this order, and attempting to obtain an agency remedy, as directed by the trial court.

The subsequent June 7, 2024 orders denied Plaintiffs' request to reinstate the complaint. In doing so, the trial court foreclosed Plaintiffs from pursuing its claims in the trial court and even from amending the complaint if such action was warranted. Although the trial judge noted that Plaintiff could refile the complaint or move to reinstate it at a later date, presumably after an appeal of the DCRP's Final Decision had been pursued, that does not render the order interlocutory. The outcome remains that the claims remain dismissed. No issues were held in "abeyance" as Defendant alleges. Had that been the case, the complaint would remain active but frozen. Ultimately, each of the orders resulted in the complaint, and all claims therein, being dismissed.

Simply because a claim or proceeding could potentially be initiated following dismissal does not render the orders interlocutory. If that were the case, then no order would ever be final because a proceeding in another forum or initiation of a new case with different claims could always be contemplated. Therefore, although the dismissals were without prejudice, the proceedings in the trial court were terminated and thus they constitute final orders.

II. THE TRIAL COURT HAS JURISDICTION OVER PLAINTIFFS' CLAIMS SEEKING A DAMAGES REMEDY PURSUANT TO COUNT ONE- BREACH OF CONTRACT. (Da186)

A. Plaintiffs are Not Barred by the Statute of Limitations as Defendant's Actions in Failing to Make Appropriate DCRP Contributions Each Pay Period is a Continuous Violation. (Da186)

Defendant argues that because a portion of the named Plaintiffs were hired more than six years prior to the filing of the complaint, they are outside the applicable statute of limitations to allege a breach of contract claim. However, each new paycheck Plaintiffs received failed to make the required DCRP deductions. As such, the continuing violation doctrine applies and tolls the statute of limitations.

N.J.S.A. 2A:14-1 provides an action for breach of contract must commence "within 6 years next after the cause of any such action shall have accrued." Defendant contends that thirty-three Plaintiffs are out of time because of their hire date. However, the Defendant was in continuing breach of contract every time it failed to deduct pension contributions or contribute its own required amount every pay period.

Each new paycheck during which the Board failed to deduct DCRP contributions from the employee and make its own respective contributions constitutes a new breach. Because Plaintiffs are paid biweekly, during which DCRP contributions should have been made, the "installment contract" approach applies. The installment contract method provides that "claims based on installment

contracts or other divisible, installment-type payment requirements accrue with each subsequent installment. In other words, a new statute of limitations begins to run against each installment as that installment falls due and a new cause of action arises from the date each payment is missed." In re Estate of Balk, 445 N.J. Super. 395, 400 (App. Div. 2016) (quoting Metromedia Co. v. Hartz Mt. Assocs., 139 N.J. 532, 535 (1995)).

Nat'l Util. Serv. v. Cambridge-Lee Indus., 199 Fed. Appx. 139, 2006 U.S. App. LEXIS 24226 (3d Cir. N.J. 2006) is illustrative. In this case, the contract obligated a client to submit its utility bills and other information to a utility service corporation every month during the contract term. The client failed to submit this monthly information to the corporation for sixty months. The court ultimately held therefore that the client was in continuing breach of contract within the six-year statute of limitations period under N.J.S.A. 2A:14-1.

Similarly, the case of Board of Educ. of Borough of Alpha, Warren County v. Alpha Educ. Ass'n, 190 N.J. 34 (2006) held the continuous violation doctrine applies when there is an ongoing violation. The issue in Alpha dealt with a board of education improperly denying health insurance benefits to certain part-time employees. Although the collective negotiations agreement provided that a grievance must be filed within seven school days, the association did not file a

grievance until more than two years after the board discontinued providing the benefits.

The New Jersey Supreme Court reversed the Appellate Division's determination that the arbitrator exceeded his authority in applying the continuing violation doctrine. It recognized that "each time the Board failed to provide paid health insurance benefits to a part-time employee working twenty hours or more. . . such action was a separate violation of the Agreement." Id. at 47. "The continuing violation doctrine recognizes that there are violations of a collective negotiations agreement that by their nature may be recurring. Thus, when an agreement is consistently being violated, it would be inappropriate to apply the strict time limitations in the agreement for the filing of a grievance of an ongoing contractual right." Id. at 43.

Here, Defendant committed a new breach for every pay period it failed to deduct employee contributions for the DCRP and/or make its own contributions on behalf of that employee. This resulted in an ongoing, continuous breach of contract every time the employee received a paycheck. While thirty-three Plaintiffs were hired more than six years prior to filing the complaint, their employment with the Board resulted in them receiving paychecks, and not being enrolled in the DCRP, well within the requisite six-year timeframe. Thus, all Plaintiffs are within the statute of limitations to bring this action.

Defendant contends that this installment contract method of accrual is inapplicable because "[t]he only contract on record is the CBA which is not an installment contract." Df. Br. at 45. However, the Defendant ignores that discovery has not been conducted and that the matter involved a cross-motion to dismiss in the absence of any factual record. Plaintiffs each have individual contracts setting forth their respective salary. In addition, the installment method applies to instances in which the payment is incorrectly rendered. See County of Morris v. Fauver, 153 N.J. 80 (1998) (court holding that a cause of action accrued each time a new voucher for payment was submitted).

Even if any Plaintiffs are deemed to be time-barred, this does not prohibit them from seeking relief under Count Two. As explained below, these individuals are entitled to monetary damages resulting from the Board's failure to timely enroll them in the DCRP.

B. The DCRP Regulations Do Not Bar a Contractual Claim. (Da186)

N.J.A.C. 17:6-16.11 states the following: "Under no circumstances shall the Program constitute or modify a contract of employment or in any way obligate the employer to continue the services of any employee." N.J.A.C. 17:6-12 states: "The establishment of the Program and the Plans under the Program and the purchase of any investment option(s) under the Retirement Plan shall not be construed as giving to any participant, beneficiary, alternate payee or any other person any legal or

equitable right against the employer or the Plan Administrator or their representatives, except as is expressly provided by the Program."

These regulations do not, as Defendant claims, bar a contractual claim. They merely indicate that the Program cannot create a distinct, separate contract of employment or guarantee continued employment. Plaintiffs' breach of contract is implied and incorporated by reference into the employment contracts, as explained below.

Moreover, Plaintiffs are seeking damages based upon unequivocal rights the DCRP Program was established to provide them- namely, contributions from being timely enrolled and interest that would have accrued. Defendant ignores that the DCRP law provides no damages authority for the Plan Administrator and the DCRP regulations permit individuals to pursue a legal action. See N.J.A.C. 17:6-16.4(a); N.J.A.C. 17:6-16.7; and N.J.A.C. 17:6-16.20. Therefore, the DCRP laws do not bar legal action, much less a contractual claim.

C. The DCRP Statutes and Regulations are Incorporated by Reference into Plaintiffs' Individual Employment Contracts. (Da186)

Defendant claims that the breach of contract claim should be dismissed because the DCRP regulations bar incorporation of this statute into the individual employment contracts. It argues that unless the statute contains evidence of legislative intent, then there is no basis to create a contract. Further, it misconstrues

the DCRP regulations to argue that a claim against the Board is barred. These claims fail.

At the outset, Defendant's argument regarding the conflicting representation Plaintiffs provided to the trial court is irrelevant and not entirely accurate. While initially Plaintiffs asserted that DCRP pension rights are incorporated into the parties' collective negotiations agreement ("CNA"), after careful review of the law, during the June 6, 2024 oral argument, it was clarified that this right was actually incorporated into the individuals' employment contracts.[2] In any event, this does not change the fact that pension rights are implied into a type of contractual agreement between each individual Plaintiff and the Defendant.

In addition, the claim that the only document in evidence being the collective negotiations is irrelevant. This matter has been protracted and no discovery has taken place. Therefore, Plaintiffs have not been afforded the opportunity to procure and/or produce documents to support its claims. Nonetheless, pensions are incorporated into the individual's employment contract with the Board.

Pensions are well-established as contract terms. In the case of such contracts, "the duty defines the contract." Id. at 576 (quoting Insulation Contractor & Supply v. Kravco, Inc., 209 N.J. Super. 367 (App. Div. 1986)). The party's obligation

[2]This is consistent with the law providing that pensions are not a negotiable subject and thus are not incorporated into the collective agreement.

"arises not from the consent but from law or natural duty." Insulation Contractor & Supply v. Kravco, Inc. at 376. Laws which are mandatory in nature become part of the parties' contract. As stated by the New Jersey Supreme Court in State v. State Supervisory Employees Ass'n**,** 78 N.J. 54, 80 (1978):

> All such statutes and regulations which are applicable to the employees who comprise a particular unit are effectively incorporated by reference as terms of any collective agreement covering that unit.

See also Warren v. Employers' Fire Ins. Co., 53 N.J. 308, 311 (1969) (holding that a period of limitations required by statue "is nonetheless part of the contract and becomes part of the contractual provisions."); N.J. Sports & Exposition Auth. v. Del Tufo, 210 N.J. Super. 664, 667 (Law Div. 1986) (holding that a plan of merger providing for dissenters' rights under the relevant statute are "provisions of the statute became a part of the contract."); and Wall Township Education Asso. v. Board of Education, 149 N.J. Super. 126 (App. Div. 1977) (holding that military service credit granted by statute applied to teachers as a term of their collective negotiations agreement). While these cases apply to collective agreements, the same principle applies to individual contracts.

When the statute in question bears direct relevance to the claimant's employment it is deemed to be incorporated into the individual employment contract. "Whether the benefit flowing from a statute is to be considered a statutory entitlement or a term of the public employee's contract of employment depends upon

the nature of the benefit and its relationship to the employment . . . attention should be directed to the purpose of the statute and its relevance and materiality to the employment." Lavin v. Board of Education, 90 N.J. 145, 150 (1982).

The case of Miller v. Board of Chosen Freeholders, 10 N.J. 398 (1952) is illustrative. In Miller, the plaintiff was employed as a prison guard. During his employment, the legislature enacted what is currently N.J.S.A. 30:8-13.1, which set a minimum and maximum salary. Plaintiff's salary remained below the minimum amount until his death, following which his estate sued for the difference. The Court held that the statute was incorporated into plaintiff's employment contract because it was directly related to the services rendered in plaintiff's position. The Court therefore held the statute was implicitly incorporated into the employment contract.

Here, Plaintiffs and Defendant are subject to the statutes governing employees' pensions. The pension statutes are necessarily incorporated into the parties' individual contracts. Any type of pension constitutes a benefit tied to one's employment because that is the only way in which to receive the pension. If an employee was terminated and no longer worked for the district, she is no longer entitled to receive the pension credit because she no longer has income earned from services provided to the district. Simply because the damages sought encompass funds that are not explicitly stated in the employment contract do not make it

unrelated to one's employment. As such, pension rights are incorporated by reference into the individual employment contracts.

D. The Breach of Contract Claim is Not Subject to Arbitration Because Pensions are not an Arbitrable Issue. (Da186)

Defendant contends that this matter must be arbitrated. However, while it is correct that a grievance was initially filed, and denied at all levels, the decision was made not to pursue arbitration because Plaintiffs determined that the right to a damages remedy did not stem from the union contract.

First, pensions are not a negotiable subject. "We recognize that the entire subject matter of public employee pensions must be insulated from negotiated agreement which would be inconsistent with comprehensive regulation of that area. Public employees and employee representatives may neither negotiate nor agree upon any proposal that would affect the subject of employee pensions." Matter of Morris School Dist. Bd. of Educ., 310 N.J. Super. 332, 339 (App. Div. 1998); see also N.J.S.A. 34:13A-8.1 ("Nothing in this act shall be construed to annul or modify, or to preclude the continuation of any agreement during its current term heretofore entered into between any public employer and any employee organization nor shall any provision hereof annul or modify any pension statute or statutes of this State."); State v. State Supervisory Employees Ass'n**,** 78 N.J. 54, 83 (1978) ("Public employees and employee representatives may neither negotiate nor agree upon any proposal which would affect the sacrosanct subject of employee pensions.").

Therefore, because pensions are not subject to negotiation, they are accordingly not subject to the arbitration process. See Bd. of Educ. v. Woodstown-Pilesgrove Reg'l Educ. Asso, 81 N.J. 582 (holding that only matters that are negotiable may be arbitrated).

Second, even if pension issues were negotiable, the DCRP pension falls outside the scope of what a "grievance" is as defined in the collective negotiations agreement. The grievance procedure in the collective negotiations agreement states:

> A. Definition - A "grievance" shall mean a complaint by an employee (1) that there has been as to him/her a violation, misinterpretation or inequitable application of any of the provisions of this Agreement, or (2) that there has been as to him/her a violation, misinterpretation, or improper application of a Board policy, or an administrative decision affecting negotiable terms and conditions of employment, except that the term "grievance" shall not apply to any matter as to which (a) a method of review is prescribed by law or any rule or regulation of the State Commissioner of Education having the force and effect of law, or (b) the Board of Education is without authority to act…

(Da49) Pensions are an implied term of the individual employment contracts, not a term of the CNA, and therefore not a "grievance" that could collectively be brought by the bargaining unit representative.

Third, the Board could have at any point filed an application to compel arbitration upon this case's inception had it believed that was the correct forum. At no point has it done so. Nonetheless, such an application would fail. "[A] party cannot be compelled to arbitrate unless that party has entered into a written

agreement to arbitrate that covers the dispute . . . We determine whether a party has done so by applying "ordinary state-law principles that govern the formation of contracts," not by applying a presumption in favor of arbitration." Century Indem. Co. v. Certain Underwriters at Lloyd's, 584 F.3d 513, 526 (3d Cir. 2009). The parties here had no agreement to arbitrate pension issues. In the absence of such an agreement, the arbitration clause is inapplicable.

III. THE TRIAL COURT HAS JURISDICTION OVER PLAINTIFFS' CLAIMS SEEKING A DAMAGES REMEDY PURSUANT TO COUNT TWO- BY OPERATION OF LAW. (Da186)

The trial court incorrectly concluded that it did not have the authority to issue a damages remedy. It held that Plaintiffs must first exhaust their administrative remedies, which includes seeking review of the DCRP Board's Final Decision by the Appellate Division. (3T74:1-6) For the reasons set forth below, the trial court erred in this determination.

A. The Individual Plaintiffs Retain a Private Right of Action to Pursue a Damages Remedy. (Da186)

Plaintiffs, by operation of the law itself, are granted a private right of action to pursue the remedies sought in this case. At the outset, the regulations referring to the Plan Administrator's powers to adjudicate claims are regulations, not statutes, and therefore it cannot limit the right to a remedy, especially because nothing in the statute supports the prohibition of a damages remedy. Moreover, even if relevant, the regulations provide support for Plaintiffs' position.

As Defendant points out, the regulations explicitly state that no "legal action" shall be taken until the claims procedure under the DCRP has been exhausted. N.J.A.C. 17:6-16.4(a). The remaining regulations provide that the Plan Administrator has the authority to adjudicate claims and decide matters and questions under the Program. N.J.A.C. 17:6–15.1(a); N.J.A.C. 17:6–16.4(b); and N.J.A.C. 17:6–20.9. However, the Defendant ignores that the DCRP law contains no remedy for the Plan Administrator to fashion. Contrary to the cases cited by Defendant, there is no enforcement mechanism in the DCRP statutes and regulations.

Plaintiffs therefore retain a private right of action to pursue the damages remedy sought in this case. To determine if a statute confers an implied private right of action, courts consider whether:

1) Plaintiff is a member of the class for whose special benefit the statute was enacted;

2) There is any evidence that the Legislature intended to create a private right of action under the statute; and

3) It is consistent with the underlying purposes of the legislative scheme to infer the existence of such a remedy.

R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co., 168 N.J. 255, 272-73 (2001). "Although courts give varying weight to each one of those factors, 'the primary goal has almost invariably been a search for the underlying legislative

intent.'" Id. at 272-73 (citing Jalowiecki v. Leuc, 182 N.J. Super. 22, 30, 440 A.2d 21 (App. Div. 1981)).

Here, the DCRP clearly creates a private right of action. First, the named Plaintiffs are those individuals currently or formerly employed by Defendant and who suffered damages as a result of the Board's failure to enroll Plaintiffs in the program. This element is not disputed by Defendant.

Second, the Legislature intended to create a private right under the statute, common law, or contract because the DCRP does not have any enforcement mechanism of its own. Rather, a damages remedy was omitted from the legislation to permit individuals to pursue litigation on their own behalf. This is further evidenced by the DCRP regulations. See N.J.A.C. 17:6-16.4(a) ("the claimant (or other aggrieved person) shall not be entitled to take any legal action or otherwise seek to enforce a claim to benefits or rights under the Program until he or she has exhausted all claims and appeals procedures provided by the Program"); N.J.A.C. 17:6-16.7 (the "statute of limitations for such actions shall be governed by and enforced by the laws of the State of New Jersey and shall be construed, to the extent that any construction beyond this chapter is necessary, according to the laws of the State of New Jersey…"); and N.J.A.C. 17:6-16.20 ("as to any action at law or in equity under or with respect to this Program, the action shall be governed by (or precluded by) the relevant statute of limitations according to New Jersey law.").

Therefore, the DCRP regulations contemplate that legal action may be taken with respect to the DCRP.

Third, it is consistent with the underlying purpose of the DCRP to permit Plaintiffs to bring this action, as the law does not provide for enforcement through other means. Pensions are intended to benefit public employees for their service. Depriving them of contributions that are mandated by law and the interest income that naturally accrues from investment of those contributions would not serve the DCRP's purpose if Plaintiffs were barred from bringing this damages action. In fact, it would frustrate the legislative intent and expectation if one could not maintain a cause of action. Therefore, Plaintiffs retain a right of action to pursue their damages claim before the trial court.

B. The Trial Court Has the Authority to Issue a Damages Remedy Due to the Board's Failure to Timely Enroll Employees in the DCRP. (Da186)

Enrollment in the DCRP is mandatory for eligible employees. N.J.S.A. 43:15C-2(a). The DCRP accrued benefit is based on contributions by the employee, who contributes 5.5% percent of their base salary, and the employer, who contributes 3% of the employee's base salary. N.J.S.A. 43:15C-3(a)-(b). Interest, or investment earnings, accrue as a result of the employee and employer contributions. See N.J.S.A. 43:15C-5 (providing that participants shall be allowed to allocate the contributions into investment alternatives, such as mutual funds, and all

contributions shall be invested in accordance with the provisions of this Act). Notably, N.J.S.A. 43:15C-5 further provides: "all assets and income of the program shall be held in trust for the exclusive benefit of participating employees and their beneficiaries."

Pension statutes are "remedial in character" and "should be liberally construed and administered in favor of the persons intended to be benefitted thereby." Geller v. Department of Treasury, 53 N.J. 591, 597-98 (1969); see Saccone v. Board of Trustees of Police and Firemen's Retirement System, 219 N.J. 369, 381 (2014) ("Pension benefits . . . are part of the member's recompense for past service.") "Although an employee's rights are to be construed within the framework of the statutory language . . . the court should keep in mind that pension statutes are designed to benefit the public employee, the primary objective in establishing pensions for public employees being to induce able persons to enter and remain in public employment, and to render faithful and efficient services while so employed." In re Van Orden, 383 N.J. Super. 410, 420-21 (App. Div. 2006) (internal citations omitted).

The recent Supreme Court decision in Seago v. Bd. of Trs., Teachers' Pension & Annuity Fund, 257 N.J. 381 (2024) held that public employees must be afforded equity when justice so requires. This case held that a member's interfund transfer application must be processed when the district failed to submit the interfund transfer

application prior to her PERS account expiring. The Supreme Court reversed the Appellate Division and held that equity requires the TPAF Board to grant the interfund transfer application in light of the district's responsibility in failing to file the application coupled with the absence of harm to the fund.

The Supreme Court noted that the TPAF Board has "'the authority to apply equitable principles to provide a remedy when justice so demands, provided the power is used rarely and sparingly, and does no harm to the overall pension scheme.'" (quoting Sellers v. Board of Trs. of the Police & Firemen's Retirement System, 399 N.J. Super. 51, 62 (App. Div. 2008)). In doing so, it relied upon the following factors: whether the government failed to turn squarer corners, whether the member acted in good faith and reasonably, the harm the member will suffer; the harm to the pension scheme; and any other relevant factors in the interest of fairness. Id. at 25-26.

The trial court's authority to issue a damages remedy for a pension violation is not novel. See Stopford v. Boonton Molding Co., 56 N.J. 169 (1970) (holding plaintiffs were entitled to monetary damages when the employer terminated its pension plan and refused future retirement benefits); Blum v. Witco Chemical Corp., 829 F.2d 367 (3d Cir. 1987) ("[p]ension benefits, unlike lesser fringe benefits, are an integral part of an employee's compensation package, and indeed are generally referred to as deferred compensation. Because of the paramount importance of

pension benefits to an employee's future financial security, it would be unfair to exclude them from a calculation of front pay"); Thigpen v. City of East Orange, 408 N.J. Super. 331 (App. Div. 2009) (payment of pension benefits appropriate where "conduct of defendants has allegedly deprived DeHerde of benefits that would otherwise have accrued . . . we find nothing fundamentally unfair or contrary to law in requiring defendants to pay all damages for which DeHerde demonstrates entitlement.").

The purpose of the DCRP legislation is to benefit the public employees who are eligible for participation and who notably make significantly less than their counterparts enrolled in other higher-earning pensions systems, such as PERS or TPAF. Defendant is failing to fulfill the DCRP's intent by now depriving employees of their earned benefits.

C. The DCRP Does Not Retain Exclusive Jurisdiction to Issue a Damages Remedy, But the DCRP and the Trial Court Share Concurrent Jurisdiction. (Da186)

The DCRP Board has not been vested with the exclusive jurisdiction to decide the issue of Plaintiffs' entitlement to damages. At most, it had primary jurisdiction. In fact, there is no reference in the DCRP statutes or regulations to damages. Yet in the absence of such exclusive jurisdiction, Plaintiffs are not barred from obtaining a damages remedy in the trial court.

New Jersey law has long held that there is a meaningful difference between "primary jurisdiction" and "exclusive jurisdiction." When the Legislature vests exclusive jurisdiction with an agency, this preempts a court's original jurisdiction over the subject matter. Smerling v. Harrah's Entertainment, Inc., 389 N.J. Super. 181, 188 (App. Div. 2006). "The Legislature 'may vest an administrative agency with exclusive primary jurisdiction over common-law claims,' but only if it does so expressly, and by 'explicitly' granting that agency the power to 'award damages in private matters.'" Id. at 187 (quoting Campione v. Adamar, Inc., 155 N.J. 245 (1998)). "'As a general rule, jurisdiction of an administrative authority may be said to be exclusive when the remedy which the agency is empowered to grant is the only available remedy for the given situation.'" Id. (quoting In re Hoboken Teachers' Asso., 147 N.J. Super. 240 (App. Div. 1977)).

When an administrative agency retains primary jurisdiction, "the case is properly before the court, but agency expertise is required to resolve the questions presented . . .'" Id. (quoting Muise v. GPU, Inc., 332 N.J. Super. 140, 159 (App. Div. 2000)). Under these circumstances, the court declines original jurisdiction and refers the case to the appropriate administrative agency. Id. "[E]xcept in those cases where the legislature vests exclusive primary jurisdiction in an agency, a plaintiff may seek relief in our trial courts." Abbott v. Burke, 100 N.J. 269, 297 (1985). "[W]here the agency cannot definitively or conclusively resolve the issues, and further, cannot

provide any relief for plaintiffs, any delay in confronting the merits will work an injustice." Id. at 298.

Campione v. Adamar of New Jersey, Inc., 155 N.J. 245 (1998) is illustrative of these principles. Plaintiff, a professional card counter, sued defendant casino owners for common law claims stemming from plaintiff's ejection from the casino. While the Appellate Division held the governing administrative agency, the Casino Control Commission ("CCC"), had exclusive jurisdiction over plaintiff's common-law claims, the Supreme Court reversed.

The Court noted that the CCC did retain primary jurisdiction to resolve issues concerning the interpretation of the CCC regulations. Yet it also found that "[n]owhere, however, does the Act delegate to the CCC the adjudication of a patron's common-law claims." Id. at 260. "[T]he Legislature did not intend to prevent patrons from seeking vindication of common-law claims in the courts." Id. It held that upon review of the regulations the Legislature did not grant authority to determine plaintiff's common-law claims. Id. at 260-61.

The Court further stated that "[w]hen however, the Legislature has not vested such [exclusive] jurisdiction in an agency, a plaintiff may still seek relief in the courts. Generally, courts decline to grant relief when an adequate administrative remedy exists. If an adequate administrative remedy is available, a party ordinarily must exhaust that remedy before seeking relief in the courts." Id. at 261. Specifically,

the Court found that "plaintiff did not enjoy an adequate administrative remedy to vindicate his damages claim." Id. at 262. It explained:

> If the Legislature intends that the CCC may award damages in private matters, it should so state explicitly . . . The Act, however, contains no such grant of authority. The CCC is limited to requiring restitution and imposing administrative sanctions, such as civil penalties and license revocation or suspension. N.J.S.A. 5:12-129.

Muise v. GPU, Inc., 332 N.J. Super. 140 (App. Div. 2000) is further illustrative. In Muise, the Appellate Division held the public utilities board did not have exclusive jurisdiction over damage claims and lacked the authority to consider damages because no explicit legislative authorization existed. The court held:

> Even when primary jurisdiction applies, the doctrine does not confer exclusive jurisdiction on an agency, with the attendant effect of limiting cognizable remedies to those within the agency's authority. ***On the contrary, a court can consider all judicial remedies, including damages, which are beyond the agency's authority; a legislative intent to defeat them will be inferred only if the Legislature has "explicitly limited the availability of that remedy or relief."*** Boldt v. Correspondence Management, Inc., 320 N.J. Super. 74, 87 (App. Div. 1999) (citing Campione v. Adamar, Inc., 155 N.J. 245, 262 (1998), and Lally v. Copygraphics, 173 N.J. Super. 162, 178-79, 413 A.2d 960 (App.Div.1980), aff'd, 85 N.J. 668, 428 A.2d 1317 (1981)).

(emphasis added) Id. at 163. Notably, Muise held that "[w]hen a claim presents some issues that are within an agency's special expertise and others which are not, the proper course is for the court to refer the former to the agency, and then to apply the

agency's findings or conclusions to its determination of the remaining issues. Our courts have repeatedly followed this approach." Id. at 161.

Here, similar to Campione, the DCRP statutes and regulations contain no grant of authority for issuing damages. While the DCRP arguably may have had primary jurisdiction, which served as the basis for this case initially being transferred to the DCRP for adjudication, it has certainly not been vested with exclusive jurisdiction. Defendant, and the trial court, failed to cite any authority in the statutes or implementing regulations demonstrating otherwise.

Ultimately, no adequate administrative remedy exists for Plaintiffs because damages are not within the agency's authority to consider. The Legislature has not granted the DCRP the authority to issue a damages remedy and the DCRP Board itself has determined it does not have the authority to grant such damages. Under these circumstances, Plaintiffs are entitled to seek relief in the courts which can now "apply the agency's findings or conclusions to its determination of the remaining issues." Muise v. GPU, Inc., 332 N.J. Super. 140 (App. Div. 2000). Therefore, this Court may evaluate all judicial remedies, including damages. Smerling v. Harrah's Entertainment, Inc., 389 N.J. Super. 181, 188 (App. Div. 2006).

IV. PLAINTIFFS WERE NOT REQUIRED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES BUT, IF EXHAUSTION WAS REQUIRED, PLAINTIFFS DID SO BY OBTAINING A FINAL AGENCY DECISION. (Da186)

The trial court erred in holding that Plaintiffs were required to exhaust their administrative remedies before seeking relief in the trial court, which allegedly includes appealing the DCRP Board's Final Decision to this Court. The trial judge stated that appeals of agency decisions "have to be made in order to exhaust administrative remedies." (3T72:7-8) In doing so, the trial judge did not cite any case or other authority supporting that exhaustion of administrative remedies was required or that doing so necessarily involves an appeal.

Although it appeared the DCRP's jurisdiction and ability to provide a damages remedy was doubtful, Plaintiffs nonetheless obtained a final agency decision and exhausted the administrative remedies available to them. In light of the absence of any case law on point, it was reasonable to follow the court's directive and seek the DCRP's input. However, as set forth below, the trial court erred in its determination that exhaustion of remedies is incomplete in the absence of an appeal to this Court.

A. The Circumstances of this Case Constitute an Exception to the Doctrine of Administrative Remedies. (Da186)

Plaintiffs were not required to exhaust their administrative remedies in this case. As explained in the prior section, the DCRP does not have exclusive

jurisdiction over damages, but rather the trial court and the DCRP have concurrent jurisdiction. Therefore, exhaustion is not required and Plaintiffs are entitled to obtain a damages remedy from the trial court.

However, even if the doctrine of exhaustion applied, the present circumstances warrant an exception to its application. New Jersey recognizes that exhaustion is "not absolute but a matter of discretion to be exercised after a careful weighing process in the interest of justice." Boldt v. Correspondence Management, Inc., 320 N.J. Super. 74, 82 (App. Div. 1999). "[T]he preference for exhaustion of remedies is 'one of convenience, not an indispensable pre-condition.'" Abbott v. Burke, 100 N.J. 269, 297 (1985) (quoting Swede v. City of Clifton, 22 N.J. 303, 315 (1956)). Thus, there are noted exceptions to this doctrine's applicability. "Exceptions exist when only a question of law need be resolved; when the administrative remedies would be futile; when irreparable harm would result; when jurisdiction of the agency is doubtful; or when an overriding public interest calls for a prompt judicial decision." (internal citations omitted) Garrow v. Elizabeth General Hospital & Dispensary, 79 N.J. 549, 561 (1979).

This case clearly falls outside the scope of the exhaustion doctrine. At no point has Defendant disputed that it failed to enroll eligible employees into the DCRP fund. The only issue to be determined is the question of whether employees are entitled to damages resulting from the Board's actions. This is a question of law, as

the DCRP Board acknowledged in its Final Decision. (181a) There are no additional facts that need to be determined. The DCRP Board also held that it did not have the authority to issue a damages remedy, establishing the futility of the agency with respect to the relief Plaintiffs seek. (181a) Finally, its jurisdiction was doubtful to begin with, as trial courts retain concurrent jurisdiction to grant damages, and that is even more doubtful now that the DCRP Board itself has proclaimed it cannot grant this remedy. Therefore, this case constitutes an exception to the exhaustion doctrine.

B. If the Doctrine of Exhaustion of Administrative Remedies Applies and Was Required, Plaintiffs Exhausted Their Remedies by Obtaining a Final Decision From the DCRP Board. (Da186)

Even if the doctrine of exhaustion of administrative remedies applies and was required in this case, Plaintiffs have fulfilled this requirement by obtaining a final agency decision.

Pursuant to this Court's directive and decision in granting Defendant's Motion for Reconsideration on October 25, 2022, Plaintiffs filed a claim for damages with the DCRP. This claim was denied. Plaintiffs thereafter filed an appeal to the DCRP Board, which also was denied. Plaintiffs have thus exhausted their administrative remedies.

N.J.A.C. 17:6-16.4(a) provides:

> By the terms of the Program, the claimant (or other aggrieved person) ***shall not be entitled to take any legal action*** or otherwise seek to enforce a claim to benefits or rights under the Program

> ***until he or she has exhausted all claims and appeals procedures provided by the Program***.

(emphasis added). Plaintiffs followed this claims procedure to completion with the DCRP Board. The regulation provides that "legal action" may be taken once the claims and appeals procedure "provided by the Program" is exhausted. N.J.A.C. 17:6-16.7 states:

> The Program, and actions under or relating to the Program or any Plan under the Program, and the statute of limitations for such actions shall be governed by and enforced by the laws of the State of New Jersey and shall be construed, to the extent that any construction beyond this chapter is necessary, according to the laws of the State of New Jersey or the Internal Revenue Code or other Federal law, where applicable.

This regulation specifically refers to "actions" pertaining to the DCRP Program in stating that they shall be governed by New Jersey law. Finally, N.J.A.C. 17:6-16.20 states:

> As to any action at law or in equity under or with respect to this Program, the action shall be governed by (or precluded by) the relevant statute of limitations according to New Jersey law.

This regulation provides that "any action at law" pertaining to the DCRP Program is governed by the relevant statute of limitations. Thus, the regulations support that other claims and actions may be brought apart following the DCRP Board's Final Decision.

C. An Appeal to the Appellate Division is Not Required to Exhaust Administrative Remedies. (Da186)

The DCRP Board's Final decision noted that the parties may "may appeal this final administrative action to the Superior Court of New Jersey, Appellate Division, within 45 days of the date of this letter in accordance with the Rules Governing the Courts of the State of New Jersey." (181a) R. 2:2-3(a)(2) provides, in relevant part, that appeals may be made to the Appellate Division "to review final decisions or actions of any state administrative agency or officer . . . except that review pursuant to this subparagraph shall not be maintainable so long as there is available a right of review before any administrative agency or officer, unless the interest of justice requires otherwise." However, Plaintiffs do not seek any decision reversing the DCRP Board and an appeal to this Court does not constitute an administrative remedy.

First, Plaintiffs do not seek appellate review of the merits of the DCRP's Final Decision. The DCRP does not retain authority to grant damages, as it explicitly advised in its Final Decision, which is a decision that Plaintiffs do not disagree with but had been directed by the trial court to seek. This is especially the case because the Board itself argued before the DCRP that the DCRP Board could not provide damages. (3T38:13-16)

Second, an appeal to this Court is not an administrative remedy. It is judicial intervention, or an external remedy. To exhaust an administrative remedy, the

applicant must go through the agency's internal procedure to completion. However, the process ends when a final determination by the agency's board or highest authority is reached. See Medinets v. Hansen, 33 N.J. Super. 237 (App. Div. 1954) (plaintiffs' failure to appeal to the board of adjustment necessitated dismissal of their appeal because they failed to exhaust their administrative remedy); Triano v. Division of State Lottery, 306 N.J. Super. 114 (App. Div. 1997) (holding plaintiffs failed to exhaust all administrative remedies where they failed to file a complaint with the executive director who had the final determination regarding the award of prizes); Ortiz v. N.J. Dep't of Corr., 406 N.J. Super. 63 (App. Div. 2009) (holding that an appeal may not be maintained where a party fails to exhaust administrative remedies by not exercising a statutory right to an administrative appeal); Musconetcong Watershed Association v. New Jersey Dept. of Environmental Protection, 476 N.J. Super. 465, 478 (App. Div. 2023) ("to decide whether a state agency action was final action that had to be appealed within forty-five days, a court must determine whether there was any available avenue of internal administrative review . . . this principle requires exhausting available procedures, that is, pursuing them to their appropriate conclusion and correlatively . . . awaiting their final outcome before seeking judicial intervention.") (internal citations omitted).

Plaintiffs are not circumventing the Appellate Division's authority to review an agency decision as Defendant contends. Beaver v. Magellan Health Services, Inc.,

433 N.J. Super. 430 (App. Div. 2013) is not dispositive. The integral difference in Beaver is that the issue for which the plaintiff sought relief, coverage for certain health care claims, was adjudicated and decided before the State Health Benefits Commission. When plaintiff received the adverse decision, he then filed a complaint in court with collateral claims attempting a different avenue to obtain relief. Irrespective of the causes of action the plaintiff asserted, he ultimately sought coverage for his son's inpatient substance abuse treatment. The court held that "plaintiff's claims in the Law Division are dependent upon the resolution of an issue contrary to the final agency action of the SHBC - an issue fully adjudicated on the administrative appeal before the SHBC - as to which plaintiff has abandoned his appeal." Id. at 443. In that case, pursuant to the enabling legislation's grant, the SHBC adopted a comprehensive regulatory appeals process, which included consideration of substantive claims. "[W]e have consistently recognized the statutory and regulatory scheme that requires disputes over eligibility and benefits to be submitted first to the SHBC, and, only thereafter, to this court for resolution." Id. at 438. Therefore, the only recourse for plaintiff was the SHBC appeals process because the plaintiff sought a substantive right to health benefits over which the agency had exclusive jurisdiction. This is unlike the DCRP law, which contains no such scheme to resolve disputes over damages.

The Beaver court conceded that certain actions or inactions of state agencies do not constitute the type of "administrative" agency action that is mandatorily subject to review by the Appellate Division pursuant to R. 2:2-3(a)(2). The court held:

> One obvious example is tortious conduct that subjects a State agency or officer to liability under the Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 12-3. Ibid. Another example is an action for breach of contract under the Contractual Liability Act (CLA), N.J.S.A. 59:13-1 to -10, "which does not constitute State administrative agency action within the intent of Rule 2:2-3(a)(2) and thus jurisdiction over such a claim resides in the appropriate trial court rather than the Appellate Division." Id. at 192, 811 A.2d 952.

Beaver at 442.

AmeriCare Emergency Med. Serv., Inc. v. City of Orange Twp., 463 N.J. Super. 562, 570 (App. Div. 2020) is also unsupportive. Following an order to show cause, OEMS was granted leave to appeal for a determination of the following issues: 1) whether plaintiff failed to exhaust its administrative remedies; 2) even if plaintiff were not required to exhaust its administrative remedies, the trial court lacked jurisdiction to consider plaintiff's claims because review of agency action lies with the Appellate Division; and 3) plaintiff's claims lack merit. Id. at 570.

Again, this case dealt with a situation where the trial court retained jurisdiction and one party disagreed with the continuation of the action in the trial court. In

addition, while the Appellate Division held that exhaustion was not required due to the "broad remedial purpose" of the statute at issue, it nonetheless was a collateral attack on the agency's decision. Id. at 572-73. This was because in order to recover, the plaintiff must secure a reversal of the agency's decision that goes directly to the merits of the parties' case. Id. at 576. Similar to Beaver, the agency is the entity that decides the merits of the case and therefore they had to be one to make the decision. This is directly contrary to the situation at bar, where Respondents do not contest the fact the DCRP has no authority to issue a damages remedy and the trial court has dismissed the complaint so therefore there is no active case.

The claim that uniformity in the administration of the DCRP plan likewise falls short. The trial court held that such agency decisions must be uniform and therefore the trial courts cannot be given the authority to make different decisions. (3T74:13-23) However, granting damages would not disrupt any uniformity in the DCRP Program. In fact, it would place Plaintiffs on even footing as other DCRP participants and restore them to the position they would have been in had the District complied with its statutory obligations. At issue is the legal question of whether Plaintiffs are entitled to damages, nothing more. As the DCRP Board already advised it cannot make that determination, it is even more so within the trial court's jurisdiction to assess.

In this case, the merits of Plaintiffs' claim have not been adjudicated. Plaintiffs have yet to receive a determination from any administrative agency or court that they are not entitled to damages due to the Board's failure to enroll them in the DCRP. The only determination that has been made to date is that the DCRP Board does not retain the authority to grant damages. Therefore, Plaintiffs' claim falls outside the purview of R. 2:2-3(a)(2).

V. THE TRIAL COURT ERRED IN DENYING THE MOTION TO REINSTATE THE COMPLAINT AND SHOULD HAVE PERMITTED PLAINTIFFS LEAVE TO AMEND. (Da186)

As stated previously, Plaintiffs do not intend to re-file this action in Superior Court as Plaintiffs believe the trial court had jurisdiction to issue a damages remedy from this case's inception. Nonetheless, the law requires that if there is a cause of action to be gleaned from the complaint, then leave to amend must be afforded. Plaintiffs noted this in arguing that when the facts suggest a cause of action the complaint must be amended. 3T65:6-12. However, while the trial judge acknowledged a claim for damages may exist outside the DCRP's purview, he denied reinstatement of the complaint.

The trial judge held that Plaintiffs do have a cause of action but failed to grant the motion to reinstate the complaint. Once reinstated, Plaintiffs could have amended the complaint as necessary to restyle their claims accordingly. 3T9:15-10:3; 3T13:21-14:4; 3T17:12-23; 3T30:10-11. Overall, the trial court held that the way

the complaint was framed is the reason the claims fall under the DCRP's alleged jurisdiction. Id.

New Jersey Court Rule 4:6-2(e) permits a defendant, in lieu of filing an answer, to move to strike all or part of a complaint for a failure to state a claim upon which relief can be granted. Additionally, a court may dismiss a complaint for lack of subject matter jurisdiction. R. 4:6-2(a). On such a motion, "the inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim." Rieder v. State, 221 N.J. Super. 547, 552 (App. Div. 1987) (citing P. & J. Auto Body v. Miller, 72 N.J. Super. 207, 211 (App. Div. 1962)). In determining whether a motion to dismiss should be granted, the court accepts as true all facts alleged in the complaint as well as any legitimate inferences that may be drawn. Id.

It is well-established that a complaint must be examined "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989) (citing Di Cristofaro v. Laurel Grove Memorial Park, 43 N.J. Super. 244, 252 (App.Div.1957)). "If the complaint states no basis for relief and discovery would not provide one, dismissal is the appropriate remedy." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005).

Ultimately, the party bringing the claim is not required to prove the allegation claimed. Rather, "[f]or purposes of analysis plaintiffs are entitled to every reasonable inference of fact. The examination of a complaint's allegations of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach." Id.

Here, the trial judge erred in denying Plaintiffs' motion to reinstate the complaint. In his holding, he specifically declined to dismiss the complaint with prejudice because he reasoned that there were claims that may fall outside the DCRP's jurisdiction. 3T76:7-10. He stated that he could not tie every potential claim to the DCRP and therefore there may be claims that would not be required to be brought before the DCRP Board and the Appellate Division. 3T77:3-12. This could encompass a claim for damages from money lost or money the Board gained by failing to enroll employees. Id. The judge therefore held that Plaintiffs could refile the complaint on such grounds. 3T77:19-20.

Yet in recognizing that there were potential claims that could be brought outside the DCRP's jurisdiction, the trial judge should have permitted Plaintiffs leave to amend the complaint. This verges on sophistry because the money the Board gained is necessarily money that Plaintiffs lost. If Plaintiffs were required to appeal the first decision, they cannot now be faulted for doing what the trial court ordered, especially in the absence of case law on point and the absence of any damages

remedy in the DCPR law. Thus, Plaintiffs are entitled to be restored to position they would have been in had the Board timely enrolled them in the program.

VI. THE TRIAL COURT'S ORDER DENYING DEFENDANT'S MOTION TO DISMISS THE COMPLAINT WITH PREJUDICE SHOULD BE AFFIRMED. (Da189)

The Defendant appeals the trial court's order denying its motion to dismiss the complaint with prejudice. Its basis for doing so is because while it agrees with the trial court the complaint should not be reinstated, and that an appeal to this Court was warranted, it contends that the trial court should have dismissed the motion with prejudice.

However, an appeal on these grounds is improper. The Board's appeal is based upon disagreement with the trial court's reasoning, not its ultimate decision. Merely the fact that it does not agree with the trial court's reasoning, but agrees with its ultimate decision of dismissal, does not permit it to seek an appeal. A party can only appeal from an adverse decision, not the reasoning for a favorable decision. Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001) ("it is well-settled that appeals are taken from orders and judgments and not from opinions, oral decisions, informal written decisions, or reasons given for the ultimate conclusion"). Therefore, the Board's appeal was improperly filed on these grounds and the trial court's order in that respect should be affirmed.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court vacate the trial court's June 7, 2024 order denying reinstatement of the complaint and affirm the June 7, 2024 order denying dismissal of the complaint with prejudice.

Respectfully submitted,

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PATRICIA OCKENHOUSE, JENNIFER ORANCHAK, KIMBERLY PACE, DONNA PALAGONIA, VIVIAN PERCOCO, EMMA PEREZ, LISA RAHNER, MYRNA RAZAK, FARHAT REHMANI, KELLIANNE RIZK, CHRISTINEE ROMAN, JANETE ROSEMAN, ADRIENNE SABATINO, MELIKE SAHIN, MARIA SAMULKA, CHRISTINA SCHMITT, MARLA SCHNEIDER, KELSEY SCHUSTER, RAINA SFEIR, MAGDA SHEHATA, SAMINA SHEIKH, MICHELE SHERMAN, JAEKYOUNG SHIM, RENEE SIMON-RADOCZY, MOONIA SOHERWARDY, LAURA SOUTHON, NANCY STETZ, VIVIAN TADROS, CHRISTINE TAMBINI MCCANN, MUI LING TANG, JAYNE TOKASH, ESTELA VALDEZ, JOSLYN VELEZ, MELISSA WHYTE, JOSY WIENER, MARIA WOOD, LORRAINE ZEMBRO, AND PATRICIA ZIMMERMAN, Plaintiffs-Respondents, v. EAST BRUNSWICK BOARD OF EDUCATION, Defendant-Appellant	

APPELLATE REPLY BRIEF OF DEFENDANT EAST BRUNSWICK BOARD OF EDUCATION

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Table of Contents

R. 2:6-2(a)(2) Table of Judgments, Orders and Rulings Appealed

Orders entered June 7, 2024 (Da15-18)
3T (Da181-222)

Table of Authorities

Statutes

Rules

Regulations

PRELIMINARY STATEMENT

This reply brief is submitted on behalf of defendant, the East Brunswick Board of Education (the "Board"), in further support of its appeal from the trial court's June 7, 2024 order denying its motion to dismiss the complaint with prejudice and the accompanying order allowing plaintiffs to amend their complaint (collectively, the "Order"), and in response to plaintiffs' brief.

The plaintiffs fail to adduce any competent legal authority granting the trial court subject matter jurisdiction over their claims for delayed DCRP enrollment. Rather, the DCRP Law consigns all matters pertaining to the DCRP to exclusive administrative agency control subject to Appellate Division review.

Plaintiffs assert claims which derive entirely from the DCRP Law while seeking damages which the Legislature declined to provide. There is no provision in the DCRP Law granting Plaintiffs a right to file an action for damages based on unearned interest/investment income. Plaintiffs would have the Court usurp the Legislature's prerogative to prescribe the rules and procedures governing the DCRP, and essentially legislate contrary to the legislative decisions to: (1) omit a private right of action in favor of an exclusive administrative claims procedure; and (2) assign plenary oversight over the DCRP to the DCRP Board with judicial intervention limited to review

in the Appellate Division. Because Plaintiffs are unhappy with the Legislature's decision they seek to have the courts legislate a cause of action which the Legislature did not see fit to create.

Plaintiffs accept the DCRP Board's decision (3T16:15-18) but not its import. Specifically, Plaintiffs ask the Court to grant them damages which the DCRP Board squarely ruled are unavailable under the DCRP Law. In addition, Plaintiffs seek to undermine the Appellate Division's exclusive jurisdiction over final agency decisions by rehashing the same issue decided by the DCRP Board -- *i.e.*, unearned interest/investment income -- in the trial court when this issue is subject to the Appellate Division's exclusive jurisdiction over the DCRP Board's decision.

Plaintiffs seek to obtain damages without identifying a cause of action cognizable in the trial court. Therefore, the complaint should have been dismissed with prejudice.

The trial court's October 25, 2022 and June 7, 2024 orders were not final orders subject to appeal as neither foreclosed an amended complaint.

Plaintiffs' brief does not comply with the Appellate Division's directive that plaintiffs "explain what further action, if any, they intend to take to pursue their claims, the specific time when they will pursue their claims, and in what forum they believe they can pursue their claims." (Da205). Plaintiffs assert

that, had the trial court granted their motion to reinstate their complaint, they "could have amended the complaint as necessary to restyle their claims accordingly" (Pb40) but fail to articulate how they would restyle their claims. Plaintiffs merely state that "at this juncture" they do not intend to refile a new complaint with different claims but do not state their intentions in the event the Appellate Division denies their request to "find the trial court has jurisdiction to issue the damages remedy sought" and have "this matter … returned to the trial court and litigated" (Pb2).

STATEMENT OF FACTS

The Board relies upon and incorporates herein the Procedural History and Statement of Facts of its initial brief but corrects misstatements in plaintiff's Statement of Facts and Procedural History. Under the DCRP Law, the employer does not "contribute 3% of the employee's base salary" (Pb3; Pb23); rather, the employer makes its own contribution to the plan provider "at a rate equal to 3% of the employee's base salary…." N.J.S.A. 43:15C-3(b).

The DCRP Law does not state that "Interest or investment earnings accrue" (Pb3; Pb23) as it cannot predict the market or interest rates but rather provides that DCRP participants can allocate contributions into investment alternatives as determined by the DCRP. N.J.S.A. 43:15C-5.

The Board did not contend "that there is no administrative remedy available to the plaintiffs" (Pb6) but rather that, assuming interest/investment income would have accrued during the delay in enrollment,[1] such unearned interest/investment income does not afford a claim cognizable by the court given the statutory framework (3T36:17-18; 3T40:11-18; 3T46:13-47:7; 3T57:20-58:1; 3T58:16-24). Indeed, plaintiffs have a remedy under the DCRP Law's framework affording them catch up contributions (which were implemented) as well as a determination before the administrator, appeal to the DCRP Board and appeal to the Appellate Division.

POINT I

THE TRIAL COURT NEVER HAD SUBJECT MATTER JURISDICTION OVER COUNT TWO PURSUANT TO THE DCRP LAW (2T; 3T; Da167-168; Da186-189)

(A) Under DCRP Law, the Trial Court Never had Subject Matter Jurisdiction

As set forth at Point I(A) of the Board's initial brief, the DCRP Law's framework deprived the trial court of jurisdiction over this matter. Plaintiffs are unable to counter the DCRP Law's framework with any competent legal authority. Instead, plaintiffs try to dismiss the regulations (Pb20) promulgated by statutory fiat by the very agency entrusted by the Legislature to "adopt rules and regulations necessary to implement the" DCRP statute. N.J.S.A. 43:15C-

[1] There is no evidence in the record that contributions would have earned any income during the delay in enrollment.

1; N.J.S.A. 43:15C-4. The Legislature did not create any cause of action in the DCRP statute but instead saw fit to provide for agency control over the DCRP with judicial intervention limited to Appellate Division review of the DCRP Board's final decisions. *See* N.J.A.C. 17:6-16.4(a); N.J.A.C. 17:6-20.9; N.J.A.C. 17:1-1.3(g).

The DCRP regulations were enacted in 2011 and since that time the Legislature has not acted to repeal them. Thus, with the Legislature's express authority, the DCRP regulations designate the Director of the Division of Pensions and Benefits as the Plan Administrator with "**full power and discretionary authority to construe and interpret the" DCRP** "and **to adjudicate claims thereunder**", "full and complete authority and discretion to control and manage the operation of the Program" and **"complete discretionary authority to decide all matters and questions under the Program**." N.J.A.C. 17:6-2.1; N.J.A.C. 17:6-20.9; N.J.A.C. 17:6–15.1(a) (emphasis added).

Moreover, the DCRP Law requires that "any determination or decision … to be made … by the Plan Administrator shall be uniformly and consistently made according to reasonable procedures established and maintained by the Plan Administrator" (N.J.A.C. 17:6-15.3) thereby assuring centralized and consistent decision-making by the administrative agency

charged with the DCRP's administration instead of "a whole lot of different Superior Courts making decisions" (3T74:16-18) which "could introduce confusion where uniformity is needed." Campione v. Adamar of N.J., Inc., 155 N.J. 245, 264 (1998).

Plaintiffs misrepresent the law in asserting that the "DCRP Law contains no remedy for the Plan Administrator to fashion" (Pb21) when the Plan Administrator directed the remedy of catch–up contributions[2] which was implemented as of September 2020. 1T18:20-19:1; 1T19:22-20:8; 1T23:6-7; 3T27:1-5. It may not be the remedy plaintiffs would have chosen but it is the remedy the Legislature chose. N.J.A.C. 17:6-5.2(a)(1); N.J.A.C. 17:6-5.3(a)(1).

(B) The DCRP Law Mandates Exclusive Administrative Jurisdiction over DCRP Claims

Plaintiffs misrepresent that the DCRP Board has "not been vested with exclusive jurisdiction" over DCRP issues and the Board "failed to cite any authority in the statutes or implementing regulations demonstrating" the DCRP Board's exclusive jurisdiction (Pb30). Plaintiffs ignore that the DCRP Law provides an exclusive administrative claims procedure which limits judicial intervention over DCRP matters to Appellate Division review of the DCRP

[2] Both the DCRP Administration and DCRP Board commented on the availability of catch-up contributions. Da176; Da181.

Board's final decisions. N.J.A.C. 17:6-16.4; N.J.A.C. 17:6-20.9; N.J.A.C. 17:1-1.3. The DCRP Board has: (1) "**complete discretionary authority to decide all matters and questions under the**" **DCRP** (N.J.A.C. 17:6–15.1(a)); (2) **"full power and discretionary authority to construe and interpret the provisions of the**" **DCRP** (N.J.A.C. 17:6–16.4(b)); (3) "**to adjudicate claims** thereunder" (N.J.A.C. 17:6–20.9); and (4) **to render** "discretionary **decisions" that are** "**final, binding and conclusive on all interested persons for all purposes**." N.J.A.C. 17:6–15.1(c). In addition, the remedies provided by the DCRP Board (such as catch-up contribution) are the only ones available for DCRP claims because there can be no "legal or equitable right against the employer … except as is **expressly** provided by the" DCRP. N.J.A.C. 17:6-16.12.

Therefore, the DCRP Board's jurisdiction is exclusive. *See* Swede v. City of Clifton, 22 N.J. 303, 315 (1956) (administrative jurisdiction is primary and exclusive where it bars judicial review until after agency action); Nordstrom v. Lyon, 424 N.J. Super. 80, 97–98 (App. Div. 2012) (jurisdiction of an administrative agency is exclusive when the remedy which the agency is empowered to grant is the only available remedy for the given situation); Muise v. GPU, Inc., 332 N.J. Super. 140, 163 (App. Div. 2000) (where the Legislature has explicitly limited the available relief, the agency has exclusive

jurisdiction with the attendant effect of limiting cognizable remedies to those within the agency's authority); Abbott v. Burke, 100 N.J. 269, 297 (1985) (plaintiff may not seek relief in trial courts where the legislature vests exclusive primary jurisdiction in an agency).[3]

Plaintiffs' assertion that "no adequate remedy exists … because damages are not" (Pb30) provided by the DCRP Law is best addressed to the Legislature. Plaintiffs may dislike the Legislature's decision to omit a cause of action for damages in favor of an exclusive administrative claims procedure but that is no basis for subversion of the DCRP Law's framework.

In the face of a comprehensive regulatory scheme, as exists here, courts will not afford a private right of action for money damages "where no such cause of action exists at common law." Campione 155 N.J. at 266. Plaintiffs herein assert no discrete common law claims but rather both counts of their complaint (even the breach of contract) derive entirely from the DCRP Law. Plaintiffs admit that they are "seeking … to enforce a claim to benefit[s] or rights under the" DCRP -- irrespective of the phrasing of their claim. 3T18:11-19:2; 3T10:4-5; 3T10:12-15; 3T10:23-25. Therefore, there is no separate common law claim cognizable by the trial court. Plaintiffs cannot maintain a claim for damages without a cognizable claim. *See* River Edge Sav. &

[3] In Abbott, the Court transferred the matter to the administrative agency.

Loan Ass'n v. Hyland, 165 N.J. Super. 540, 545 (App. Div. 1979) ("Without any substantive basis there is no cause of action upon which claims for damages may be properly rested"); In re HomeBanc Mortgage Corp., 945 F.3d 801, 812 (3d Cir. 2019) (defining "damages" as a "debt" or "loss" without any associated legal claim would contradict common understanding within the legal profession); Sun Chem. Corp. v. Fike Corp., 243 N.J. 319, 339 (2020) (it is the theory of liability underlying the claim that determines the recoverable damages).

This case is one of exclusive, as opposed to concurrent or primary, jurisdiction over claims deriving from the DCRP. "In primary jurisdiction, the case is properly before the court but the agency expertise is required to resolve the questions presented." Muise, 332 N.J. Super. at 158. In contrast, plaintiffs' institution of an action in the trial court for delayed DCRP enrollment was in direct contravention of the DCRP's express provisions consigning "complete discretionary authority to decide all matters and questions under the" DCRP to the DCRP Board. N.J.A.C. 17:6-15.1(a). Indeed, the Legislature has affirmatively barred "any legal or equitable right against the employer" based on the DCRP "except as is expressly provided by the" DCRP Law (N.J.A.C. 17:6-16.12), and the DCRP Law provides no damages action against the employer.

Neither Muise nor Campione avail Plaintiffs as both were decided under the doctrine of primary jurisdiction and both merely acknowledged court jurisdiction over specific common law claims as opposed to damages claims implied from statutes. Significantly, Campione actually declined to imply a private right of action for damages from the Casino Control Act's statutory or administrative provisions "[g]iven the elaborate regulatory scheme…." Id. at 266. Campione merely held that the court retained jurisdiction over the plaintiff's common law claims (malicious prosecution, contract, discrimination) but that the Casino Control Commission had jurisdiction over issues concerning the interpretation and application of the Casino Control Act and its regulations. Id. at 253, 263. Muise is to the same effect and held that common law claims for negligence, fraud, breach of contract/warranty were cognizable by the court while the Board of Public Utilities retained exclusive jurisdiction over the areas consigned to its discretion by the Legislature. Muise, 332 N.J. Super. at 158, 165. *See also* Smerling v. Harrah's Entertainment Inc., 389 N.J. Super. 181, 190 (App. Div. 2006) (court had jurisdiction over Consumer Fraud Act and Truth in Consumer Contract claims where they did not involve areas within the Casino Control Commission's exclusive control such as rules of casino games and gaming related advertising).

In contrast to this case, the administrative agency in Muise appeared as amicus to affirmatively decline jurisdiction over plaintiffs' common law tort claims (negligence, fraud, breach of contract/warranty) arising from service outages and the court deferred to that assessment. Id. at 158. Similarly, in Campione, 155 N.J. at 260, 263, the administrative agency affirmatively disclaimed jurisdiction over the plaintiff's discrimination and contract claims and the agency did not provide for hearings. In this case, the DCRP Board held a hearing wherein it ruled that the DCRP Law does not afford damages for delayed enrollment and therefore "New legislation would be required" (Da176). Seventeen years after the DCRP's enactment, the Legislature has not seen fit to adopt new legislation granting a cause of action for damages nor has it revoked the DCRP Board's plenary discretion and exclusive jurisdiction.

(C) Subject Matter Jurisdiction is the Dispositive Issue, not Exhaustion of Administrative Remedies

The dispositive question here is not whether plaintiffs exhausted their administrative remedies before resorting to the trial court (Pb31-34). Considerations regarding the exhaustion of administrative remedies prior to trial court access are superfluous "where the legislature vests exclusive primary jurisdiction in an agency" because claimants are barred from seeking relief in the trial courts by the agency's exclusive jurisdiction. *See* Town of Kearny v. Hackensack Meadowlands Dev. Comm'n, 344 N.J. Super. 55, 60-61

(App. Div. 2001) (where Appellate Division determined that DEP had exclusive jurisdiction to determine issue it "need not further analyze the applicability of the exhaustion of administrative remedies doctrine"). *See also* Abbott, 100 N.J. at 297; Rumana v. County of Passaic, 397 N.J. Super. 157, 173-174 (App. Div. 2007).

Rather, the pivotal question, as this Court correctly identified, is "whether the trial court ever had jurisdiction of plaintiffs' claims" (Da205). As set forth *supra*, Point I(A)-(B), the trial court never had subject matter jurisdiction over plaintiffs' claims pursuant to the DCRP Law framework which confers plenipotentiary control over the DCRP to the DCRP Board with judicial intervention limited to Appellate Division review. N.J.A.C. 17:6-20.9 *incorporating* N.J.A.C. 17:1–1.3. Thus, it is not a question of exhausting administrative remedies as a prerequisite to a trial court action. Instead, there can never be a trial court action for DCRP claims under the DCRP Law's claims procedure. Indeed, plaintiffs admit that they are "seeking … to enforce a claim to benefit[s] or rights under the" DCRP -- irrespective of the phrasing of their claim. 3T18:11-19:2; 3T10:4-5; 3T10:12-15; 3T10:23-25. Plaintiffs seek damages for untimely enrollment in the DCRP (Pb32).

As set forth at Point I(B), *supra*, Plaintiffs err in asserting that the trial court had concurrent jurisdiction over their claims (Pb33). In addition,

Plaintiffs erroneously conflate the availability of damages with futility (Pb33). Futility requires a showing that the claimant is barred from administrative relief -- which is not the case here where plaintiffs received a decision from the DCRP Administration, a hearing before the DCRP Board and the opportunity for Appellate Division review (which they forfeited). The New Jersey Supreme Court rejects arguments of purported futility "[i]n the absence of clear evidence that administrative relief is foreclosed to plaintiffs…." Griepenburg v. Twp. of Ocean, 220 N.J. 239, 263 (2015). *See also* Triano v. Div. of State Lottery, 306 N.J. Super. 114, 126 (App. Div. 1997) (requiring plaintiffs to obtain a final determination by the State Lottery, before appealing to the Appellate Division, where the State Lottery rules specifically provided that the Director would make all final decisions).

Plaintiffs simply dislike the relief prescribed by the Legislature (administrative claims procedure and catch-up remedy) but that is no basis to subvert a comprehensive regulatory scheme promulgated pursuant to Legislative fiat which consigns the adjudication and decision of "claims" and "all matters and questions" arising from the DCRP to the DCRP Board's full discretion without exception. N.J.A.C. 17:6-15.1(a); N.J.A.C. 17:6-16.4(b); N.J.A.C. 17:6-20.9. The regulations Plaintiffs cite (Pb34) do not afford

Plaintiffs a private right of action for the reasons delineated at Point I(D)(i), *infra*.

(D) Under Supreme Court Precedent, the Trial Court Cannot Imply a Private Right of Action

Plaintiffs cannot "retain a private right of action to pursue the damages sought in this case" (Pb21) because: (1) there is no evidence the Legislature intended to create a private cause of action under the DCRP Law; and (2) the implication of a private cause of action is inconsistent with the legislative scheme. Jarrell v. Kaul, 223 N.J. 294, 307 (2015).

In deciding whether a statute confers a private right of action the courts consider whether: (1) the plaintiff is one of the class for whose especial benefit the statute was enacted; (2) there is any evidence that the Legislature intended to create a private cause of action under the statute; and (3) implication of a private cause of action would be consistent with the underlying purposes of the legislative scheme. Jarrell, 223 N.J. at 307. While the first factor arguably weighs in plaintiffs' favor as the supposed beneficiaries of the DCRP, the last two factors bar a private cause of action because there is no evidence the Legislature intended to create a private cause of action and a private cause of action is inconsistent with the legislative scheme prescribing a mandatory claims procedure to the exclusion of lawsuits.

(i) No Evidence of Legislative Intent to Create Cause of Action

There is no evidence that the Legislature intended to create a private cause of action under the DCRP Law. The lack of *any* expressed Legislative intent to create a private cause of action and the DCRP Law's express directive that the Plan Administrator "**decide all matters and questions under the**" DCRP (N.J.A.C. 17:6–15.1(a) pursuant to the comprehensive regulatory framework enacted "to implement the" the DCRP statute (N.J.S.A. 43:15C-1) conclusively negate *any* Legislative creation of a private cause of action. Instead of conferring a private right of action, the DCRP Law vests enforcement powers exclusively in the Plan Administrator with opportunity for appeal to the Appellate Division. *See* R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co., 168 N.J. 255, 280 (2001) (statute did not confer a private right of action where statutory scheme vested enforcement powers exclusively in the Commissioner of Banking & Insurance); Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 360 (2016) (statute did not confer a private right of action where its regulations provided an administrative framework for enforcement). The implementing regulations mandate recourse to the Plan Administrator and provide that a claimant "**shall** not be entitled to take any legal action" until s/he has exhausted the prescribed claims procedure.

N.J.A.C. 17:6-16.4(a) (emphasis added).[4] To that end, the regulations endow the Plan Administrator with: (1) "**full power and discretionary authority to construe and interpret the" DCRP** "and **to adjudicate claims thereunder**" (N.J.A.C. 17:6–20.9), (N.J.A.C. 17:6–16.4(b)); (2) "full and complete authority and discretion to control and manage the operation of the Program" and "**complete discretionary authority to decide all matters and questions under the Program**" (N.J.A.C. 17:6–15.1(a)); and (3) the power to render "discretionary decisions" that are "**final, binding, and conclusive** on all interested persons for all purposes." N.J.A.C. 17:6–15.1(a) (emphasis added).

"When the Legislature has expressly created specific remedies, a court should always hesitate to recognize another unmentioned remedy." Jarrell, 223 N.J. at 307. Absent strong indicia of legislative intent otherwise, the courts "are compelled to conclude that the Legislature provided precisely the remedies it considered appropriate." Id. at 307-308. *See also* Jalowiecki v. Leuc, 182 N.J. Super. 22, 27-28 (App. Div. 1981) (declining to imply private cause of action from regulation violation). In the face of a comprehensive regulatory scheme, as exists here, courts will not imply a

[4] The regulation uses the mandatory "shall" in reference to its mandate that claims proceed before the Plan Administrator. *See* Aponte-Correa v. Allstate Ins. Co., 162 N.J. 318, 325 (2000) (for statutory construction, the word "may" is permissive and the word "shall" is mandatory).

private right of action for money damages "where no such cause of action exists at common law." Campione, 155 N.J. at 266 (1998).[5]

Furthermore, the legislative history is devoid of any reference to a private cause of action and instead identifies the Legislature's intent as "providing long-term cost-savings and limiting abuses of the state-administered pension systems." Da162. Any inference of a cause of action would violate the tenet that courts "construe and apply the statute as enacted" and cannot "write in an additional qualification which the Legislature" omitted. DiProspero v. Penn, 183 N.J. 477, 492 (2005); Donelson v. DuPont Chambers Works, 206 N.J. 243, 261 (2011).

Plaintiffs concede that the DCRP Law does not contain a damages remedy yet erroneously conclude that this omission signals an intent "to permit individuals to pursue litigation" (Pb22) despite all of the DCRP Law provisions to the contrary. Plaintiffs' very conclusion was rejected by the Appellate Division in Nordstrom where it reversed the trial court's creation of a remedy in a matter consigned to exclusive agency jurisdiction and where the agency was not authorized to afford that remedy. The Appellate Division

[5] Plaintiffs have no common law claims since both counts of their complaint derive entirely from the DCRP. 3T18:11-19:2; 3T10:4-5; 3T10:12-15; 3T10:23-25. Moreover, Plaintiffs cannot assert a contract claim based on the DCRP Law and, even if they could, Plaintiffs lack a contract (*see* Point II, *infra*).

reasoned that the "trial court gave considerable weight to ELEC's inability to provide the precise remedy sought by [plaintiff]. However, merely because the agency was unable to accede to the relief demanded by [plaintiff] does not" authorize the trial court to provide the requested remedy. Nordstrom, 424 N.J. Super. at 101. The Appellate Division further reasoned that the trial court "discounted" the agency's jurisdiction "because ELEC had 'no authority to grant the relief sought by [plaintiff]...' That, we observe, is the point. The management, control, and remediation of excess campaign contributions are best left with the agency most experienced and equipped by the Legislature to handle such matters: ELEC, not the judiciary…." Id. at 102.

Plaintiffs misstate that the "DCRP does not have any enforcement mechanism of its own" (Pb22; Pb23) when the DCRP Law provides an administrative claim procedure culminating in the Appellate Division and the DCRP Administration implemented catch-up contributions.

Critically, plaintiffs have not -- and cannot -- adduce *any* DCRP Law provision actually granting them a private right of action for damages. Rather, every enactment of the DCRP Law is to the contrary as evinced by its comprehensive regulatory framework for the disposition of claims. None of the regulatory provisions which plaintiffs cite (Pb22) grants a right of action for delayed DCRP enrollment. Nor do the provisions gainsay the DCRP Law's

framework for administrative resolution of claims with judicial intervention limited to institution of an action in the Appellate Division.[6] Rather, these provisions, which are reproduced below, are entirely consistent with the DCRP Law's framework and simply provide for application of New Jersey law.

> **Claims procedure**
>
> (a) By the terms of the Program, the claimant (or other aggrieved person) shall not be entitled to take any legal action or otherwise seek to enforce a claim to benefits or rights under the Program until he or she has exhausted all claims and appeals procedures provided by the Program.
>
> (b) In considering claims under the Program and/or any Plan hereunder, the Plan Administrator has full power and discretionary authority to construe and interpret the provisions of the Program or Plan.

N.J.A.C. 17:6–16.4

> **Governing law**
>
> The Program, and actions under or relating to the Program or any Plan under the Program, and the statute of limitations for such actions shall be governed by and enforced by the laws of the State of New Jersey and shall be construed, to the extent that any construction beyond this chapter is necessary, according to the laws of the State of New Jersey or the Internal Revenue Code or other Federal law, where applicable.

N.J.A.C. 17:6–16.7

> **Statute of limitations**
>
> As to any action at law or in equity under or with respect to this Program, the action shall be governed by (or precluded by) the relevant statute of limitations according to New Jersey law.

N.J.A.C. 17:6–16.20.

[6] *See* Beaver v. Magellan Health Services, Inc., 433 N.J. Super. 430, 473 (App. Div. 2013) ("plaintiff should have instituted this action in the Appellate Division").

The "Legislature certainly knows how to authorize private causes of action when it desires to do so." Estate of Burns by and through Burns v. Care One at Stanwick, LLC, 468 N.J. Super. 306, 319 (App. Div. 2021). When the Legislature declines to grant a private right of action the courts must accord weight to "the Legislature's presumably conscious decision not to recognize [a] new cause of action." Id. at 320. Significantly, besides Appellate Division review of the DCRP Board's final decisions, the only other provision for judicial intervention is for: (1) resolution of any dispute as to the proper payee of any payment to be made by the Plan Administrator (N.J.A.C. 17:6-16.18); and (2) a proceeding against the Plan Administrator or the DCRP Board by persons bound by DCRP decisions. N.J.A.C. 17:6-16.22.

(ii) Implication of Cause of Action Contravenes DCRP Scheme

Implication of a private right of action would be inconsistent with the DCRP Law's scheme for centralized control over the DCRP. The regulatory grant of full discretion to the Plan Administrator over the DCRP presupposes that jurisdiction over disputes relating to the DCRP is reserved for the Plan Administrator; otherwise, the grant of discretion would be rendered a nullity. *See* Jersey Cent. Power & Light Co. v. Melcar Util. Co., 212 N.J. 576 (2013) (court should avoid statutory construction which renders statutory language superfluous); In re Attorney General's Directive, 200 N.J. 283, 297–298

(2009) (same). When a statute is clear and unambiguous on its face, courts "need delve no deeper than the act's literal terms to divine the Legislature's intent." State v. Brannon, 178 N.J. 500, 506 (2004). Here, the DCRP statute clearly and unambiguously provides for "rules and regulations" "to implement the provisions" thereof (N.J.S.A. 43:15C-1) and those regulations clearly and unambiguously mandate an exclusive claims procedure which expressly bars litigation.

Accordingly, implementation and oversight of the DCRP resides exclusively with the Plan Administrator by express legislative fiat. This mechanism is conducive to uniformity in the development and implementation of the DCRP and its regulations. *See* Daaleman v. Elizabethtown Gas Co., 142 N.J. Super. 531, 535–536 (Law Div. 1976) (centralized control must be entrusted to an agency whose continually developing expertise will assure uniformity throughout the State). To allow [plaintiffs] to bypass [the DCRP's] statutory and regulatory schemes and litigate alleged [DCRP] violations in the judicial system … [w]ould undermine the State's ability to properly regulate the" DCRP. R.J. Gaydos, 168 N.J. at 281.

In Nordstrom, 424 N.J. Super. at 99, *supra*, the Appellate Division reversed the trial court's provision of a "judicially-authorized" remedy which could not be imposed by the Election Law Enforcement Commission

("ELEC") under the New Jersey Campaign Contributions and Expenditures Reporting Act (the "Reporting Act"). The Appellate Division held that the trial court "transgressed far beyond ELEC's authority when it fashioned a remedy beyond the scope of the Reporting Act" "thereby creating the very real potential for disparate outcomes in the future, depending upon the forum of a complainant's grievance." Nordstrom, 424 N.J. Super. at 101. The same concerns arise here and proscribe implication of a cause of action in contravention of the DCRP Law's scheme. Plaintiffs' damages claim usurps the Legislature's prerogative to prescribe "rules and procedures … to implement the provisions of" the DCRP statute via the administrative agency of its choice. N.J.S.A. 43:15C-1.

In Burns, 468 N.J. Super. at 320, the Appellate Division reversed a trial court decision implying a private cause of action for breach of statutory bill of rights for residents of assisted living facilities where the subject statute did not provide for a cause of action – even though the plaintiff fell within the class of individuals the statute meant to protect and implication of a cause of action would be consistent with the purpose underlying the statute (to protect the elderly and infirm). The Appellate Division rejected that "the common law should recognize a private cause of action or that the Legislature intended to include a private cause of action in its enactments concerning assisted living

residences." Burns, 468 N.J. Super. at 319. The Appellate Division affirmed that "the Legislature certainly knows how to authorize private causes of action when it desires to do so" (Id.) and cautioned circumspection:

> The common law may spread to places where the Legislature has not ventured but not without great and careful consideration for the wisdom of the extension, lest before long courts and legislative bodies find themselves on divergent and conflicting paths. If today's judgment is overly cautious or mistaken about the legislative intent, the Legislature is in the best position to correct or alter our course. See Plastic Surgery Ctr., P.A. v. Malouf Chevrolet-Cadillac, Inc., 241 N.J. 112, 113, 226 A.3d 53 (2020). Until then, we conclude there is no private cause of action for the breach of the assisted living facility's bill of rights contained in N.J.S.A. 26:2H-128(b).

Burns, 468 N.J. Super. 306, 321-222.

Such circumspection is especially apt in this matter which is governed by a comprehensive regulatory framework expressly authorized by the Legislature.

(E) The Order Improperly Arrogates Subject Matter Jurisdiction

(i) DCRP Law Bars Damages Claims

Plaintiffs ignore the DCRP Law provisions barring their claims as set forth at Point I(C)(ii) of the Board's initial brief as well as the case law cited therein establishing deference to legislative judgment. Plaintiffs adduce no statutory authority or case law to the contrary. Rather, Plaintiffs assume that the trial court can award damages for delayed DCRP enrollment based upon a

string of inapposite cases (Pb24-26) -- none of which pertain to the DCRP but rather to other statutory frameworks such as the Teachers' Pension and Annuity Fund ("TPAF"), the Police and Firemen's Retirement System ("PFRS") and the Public Employees' Retirement System ("PERS"). Significantly, the DCRP Board held that other statutory frameworks and their precedent do not inform application of the DCRP (Da181). Nor do any of Plaintiffs' cases endorse the judicial creation of a damages remedy against an employer in contravention of the governing statutory/regulatory framework. None of the cases cited by Plaintiffs afford a basis to usurp the Legislature's prerogative to prescribe the "rules and procedures … to implement the provisions of" the DCRP statute. N.J.S.A. 43:15C-1. None of the cases afford a damages action against an employer. Rather, the cases directed the TPAF, PERS and PFRS boards to take specified action consonant with mechanisms inherent in the statutory scheme and did not legislate a damages action inimical to the statutory scheme.

For instance, Geller v. Dep't of Treasury, Div. of Pensions and Annuity Fund, 53 N.J. 591, 600 (1969) merely held that the TPAF Fund had to grant a teacher credit for her years of service predating the expiration of her TPAF membership account provided the teacher paid the statutorily required lump sum with interest. Specifically, the teacher in Geller forfeited her TPAF

membership account when she overstayed her maternity leave. The TPAF Fund advised her that a new TPAF membership account would be opened for her but, in order for her to receive credit for her prior years' service, she would have to either make a lump sum payment or authorize the TPAF Fund to make increased deductions from her salary. The teacher authorized the increased deduction but the TPAF Fund failed to implement her authorization. The Court held that the TPAF Fund should grant the teacher credit for her prior years' service if she paid the TPAF Fund the required lump sum with interest running from the date of her authorization.

Saccone v. Bd. of Trustees of Police and Firemen's Ret. Sys., 219 N.J. 369, 386-388 (2014) merely held that the PFRS statute did not bar the use of a special needs trust to protect the ability of a retired PFRS member's disabled child to receive PFRS survivors' benefits and maintain eligibility for public assistance programs. The Court ruled that the PFRS Board should have granted a retired PFRS member's request to pay PFRS survivors' benefits to a special needs trust in his disabled son's name instead of paying them to his son individually.[7] The holding was based upon interpretation of Federal Social Security Income law, New Jersey's special needs trust statutes and the PFRS

[7] The PFRS member was trying to maintain his son's eligibility for public assistance programs as his son would become ineligible for such assistance if he received any income over $772.25.

statute including the interpretation of the word "child" under the PFRS statute -- none of which is at issue here.

Similarly, In re Van Orden, 383 N.J. Super. 410, 421 (App. Div. 2006) merely held that there was good cause for the PERS Board to reconsider its denial of a retiree's request to change his payment option despite the expiration of time for making changes where the retiree selected his prior option in compliance with a court order that no longer applied. Specifically, the retiree originally selected a payment option affording him maximum benefits during his life but no payments to his wife upon his death. The family court ordered him to change his payment option so as afford benefits to his wife upon his death and he complied. Thereafter, the family court entered a judgment of divorce wherein the wife relinquished all of her interest to the retiree's pension and the retiree sought to revert to his originally selected payment option but his request fell outside the 30-day period for changes to payment options. Significantly, In re Van Orden does not authorize creation of damages in contravention of a comprehensive statutory/regulatory framework but instead emphasizes that "employee's rights are to be construed within the framework of the statutory language…." Id. at 420.

In Seago v. Bd. of Trustees, Teachers' Pension and Annuity Fund, 257 N.J. 381, 396, 398, 401 (2024), the Court directed the TPAF Board to grant a

teacher's untimely application for a transfer of service credits and contributions from her expired PERS account to her active TPAF account where the application's untimeliness was not her fault[8] and where the TPAF Board had the authority to grant the application. Significantly, the Court held that its "holding is a narrow one that applies specifically to [the] unique circumstances" of that case. Id. at 400, 400-401.

In Sellers v. Bd. of the Police and Firemen's Ret. Sys., 399 N.J. Super. 51, 55, 62 (App. Div. 2008), the Appellate Division directed the PFRS Board to reconsider its denial of a firefighter's application for enrollment in PFRS because his age exceeded the statutory maximum (35 years) where PFRS had the authority to do so[9] and where both the firefighter and his employer mistakenly, but reasonably, believed that he would meet the statutory age requirement once his age was reduced for prior police and military service under applicable statutory law.

In Thigpen v. City of East Orange, 408 N.J. Super. 331, 337, 338 (App. Div. 2009), the Appellate Division reversed an award of past and future pension benefits to a retired police officer and required him to prove, on

[8] The employer inadvertently failed to submit the application in a timely manner.

[9] Given prior confusion surrounding the enforceability of age restrictions in hiring, the PFRS Board was authorized to grant PFRS membership notwithstanding the applicant's age on a case-by-case basis, and it did so in the past. Id. at 57.

remand, that he actually held the position of traffic unit supervisor entitling him to the pension benefits of that position -- as opposed to just assuming such duties. In significant contrast to this case, the officer sought redress pursuant to a statute which expressly provided for a cause of action. Id. at 336.

Neither Stopford v. Boonton Molding Co, Inc., 56 N.J. 169 (1970) nor Blum v. Witco Chem. Corp., 829 F.2d 367 (3d Cir. 1987) involved any state retirement statutory framework -- much less the DCRP Law. Instead Stopford involved a contract between a private company and its president to pay the president a lifetime pension upon retirement which has no application to the DCRP. Blum involved an employment action alleging wrongful termination and age discrimination under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C.A. §621 *et seq*. Blum merely held that the successful age discrimination plaintiffs could recover the loss in value of their pension benefits as part of front pay damages under the ADEA under the circumstances presented in that case.[10] Id. at 373, 374.

Plaintiffs cite no authority to support their conclusion that the DCRP Law was "to benefit public employees who … make … less than their counterparts enrolled in other higher-earning pension systems…." (Pb26). In

[10] The plaintiffs in Blum presented an expert who quantified the difference between the present value of the company's pension plan to plaintiffs at their termination and the value had plaintiffs remained employed until retirement.

addition, Plaintiffs misrepresent the record in asserting that Plaintiffs are deprived "of their earned benefits" (Pb26) when there is nothing in the record as to earned benefits. Rather, Plaintiffs allege unearned interest/investment income. Complaint, ¶9 (Da4).

(ii) Exclusive Appellate Jurisdiction

Plaintiffs' assertion that they are "not circumventing the Appellate Division's authority to review an agency decision" (Pb36) is disingenuous at best. Having forfeited appellate review of the DCRP Board's decision, Plaintiffs now ask the Appellate Division to allow the trial court to afford the very damages remedy which the DCRP ruled is unavailable as a matter of DCRP Law thereby undermining the DCRP Board's decision and rendering it nugatory.

Plaintiffs cannot cherry pick the DCRP Board's decision (Pb40). They cannot separate the DCRP Board's determination that it could not afford damages from the rationale for its determination, *i.e.*, that the DCRP Law affords no right to damages (Da176-181). Plaintiffs fail in their efforts to distinguish governing cases, Beaver, *supra*, and AmeriCare Emergency Med. Serv. Inc. v. City of Orange Twp., 463 N.J. Super. 562 (App. Div. 2020). Both cases hold that final agency decisions cannot be collaterally attacked by asserting repackaged claims in the trial court. Plaintiffs' effort to distinguish

Beaver because the DCRP Law does not provide for damages (Pb37) is amiss and foreclosed by Nordstrom, 424 N.J. Super. at 101 (trial court could not fashion remedy unavailable under statute "merely because the agency was unable to accede to the relief demanded by" plaintiff. "That, we observe, is the point. The management, control, and remediation of" the issues "are best left with the agency"). Plaintiffs also fail to distinguish Beaver on the basis of dicta therein referencing claims under the Tort Claims Act and Contractual Liability Act (Pb38) -- neither of which is at issue here.

Plaintiffs fail in their attempt to distinguish Beaver on the basis that "the issue for which the plaintiff [in Beaver] sought relief … was adjudicated and decided before the agency" (Pb37). Plaintiffs also fail in their attempt to distinguish Americare on the basis that the plaintiffs therein sought a trial court adjudication "that goes directly to the merits of the parties' case" and that the agency therein "decides the merits of the case" (Pb39). The DCRP Board squarely decided plaintiffs' claims and plaintiffs seek a trial court adjudication of their claims contrary to the DCRP Board's decision.[11] Notably, the DCRP Administration and DCRP Board ruled that damages for untimely DCRP enrollment are unavailable as a matter of law because: (1) "the New

[11] As Board counsel noted, plaintiffs would not have returned to the trial court but for the DCRP Board's denial of damages. 3T51:17-52:3.

Jersey statutes and regulations do not provide any provisions" affording damages for belated DCRP enrollment (Da176); (2) "New legislation would be required" for such damages (Da176); (3) "There is no information in this statute regarding … lost interest and/or investment income" (Da180); (4) "There are no specific statutory provisions that deal with lost interest or investment income due to delayed … enrollment. No specific rate or amount of interest is specified" (Da180); and (5) "consistent with the statutory authority there is no provision for damages due to delayed enrollment." (Da181)

Adjudication of plaintiffs' damage "claims in the Law Division [for delayed DCRP enrollment] are dependent upon the resolution of an issue contrary to the final agency action of the" DCRP Board. Beaver, 433 N.J. Super. at 444. Plaintiffs admit that they are "seeking … to enforce a claim to benefit[s] or rights under the" DCRP -- irrespective of the phrasing of their claim. 3T18:11-19:2; 3T10:4-5; 3T10:12-15; 3T10:23-25. The DCRP Board decided that claim. The DCRP Board never asserted that it could not decide the claim for damages but rather determined that it could not afford the damages sought because of the Legislature's decision to omit damages. *See* Burns, 468 N.J. Super. at 320 (respecting "the Legislature's presumably conscious decision not to recognize [a] new cause of action"). Plaintiffs would

have the trial court effectively undermine the DCRP Board's decision and fashion its own remedy which it cannot. *See* Nordstrom, 424 N.J. Super. at 101 (trial court could not fashion remedy unavailable under statute "merely because the agency was unable to accede to the relief demanded by" plaintiff).

Contrary to plaintiffs' conclusion that allowing a court to grant them damages for belated DCRP enrollment "would not disrupt … uniformity in the" administration of the DCRP, our State Supreme Court holds that "[p]ermitting courts … across the State to interpret statutory and administrative regulation could introduce confusion where uniformity is needed." Campione, 155 N.J. at 264.

POINT II

THE TRIAL COURT NEVER HAD SUBJECT MATTER JURISDICTION OVER THE COUNT ONE BREACH OF CONTRACT CLAIM BECAUSE THE DCRP LAW BARS THE CLAIM AND THERE IS NO CONTRACT IN THE RECORD (2T; 3T; Da167-168; Da186-189)

(A) The DCRP Expressly Bars the Breach of Contract Claim

Plaintiffs cite no case law nor DCRP Law provision to negate the clear bar against contract actions. The DCRP Law plainly states that **the DCRP "shall not constitute or modify a contract of employment**…." N.J.A.C. 17:6-16.11 (emphasis added). Therefore, the DCRP cannot be "incorporated by reference into … employment contracts" (Pb14). In addition, the DCRP Law also plainly states that **the DCRP "shall not" afford "any legal or**

equitable right against the employer … except as is expressly provided" by the DCRP. N.J.A.C. 17:6-16.12 (emphasis added). The DCRP Law makes no provision for its incorporation into contracts but rather the opposite.

Plaintiffs just choose to ignore the plain language of the DCRP Law assuming, with no support whatsoever, that the DCRP Law merely bars "a distinct, separate contract or employment or guarantee continued employment" (Pb14). Plaintiffs, however, are bound by the plain language of the DCRP Law. *See* Brannon, 178 N.J. at 506 (when a statute is clear and unambiguous on its face, courts "need delve no deeper than the act's literal terms to divine the Legislature's intent"); DiProspero, 183 N.J. at 492 (courts "construe and apply the statute as enacted" and cannot "write in an additional qualification which the Legislature" omitted); Donelson, 206 N.J. at 261 (courts "will not rewrite a plainly-written enactment or engraft an additional qualification which the Legislature … omitted").

Here, the DCRP statute clearly and unambiguously provides for "rules and regulations" "to implement the provisions" thereof (N.J.S.A. 43:15C-1) and those regulations clearly and unambiguously bar this action. The DCRP Law prohibits the DCRP from "modify[ing] a contract" (N.J.A.C. 17:6-16.11) and therefore from being incorporated into a contract. The DCRP Law further provides that the DCRP "shall not" afford "any legal or equitable right against

the employer … except as is expressly provided" by the DCRP. N.J.A.C. 17:6-16.12. The right "expressly provided" by the DCRP Law consists of administrative resolution of claims with judicial intervention limited to review in the Appellate Division. *See* N.J.A.C. 17:6-16.4(a); N.J.A.C. 17:6-20.9; N.J.A.C. 17:1-1.3(g).

As delineated at Point I(D)(i), *supra*, a review of the regulations which plaintiffs cite reveal that plaintiffs misrepresent the DCRP Law in asserting that the "DCRP regulations permit individuals to pursue a legal action." (Pb14). The pertinent regulations do not grant a cause of action in the trial courts and do not gainsay the DCRP Law's framework for administrative resolution of claims with judicial intervention limited to institution of an action in the Appellate Division. *See* Beaver, 433 N.J. Super. at 473 ("plaintiff should have instituted this action in the Appellate Division").

(B) The DCRP Law is Not Incorporated into any Contracts

Aside from the DCRP Law's bar against its incorporation into contracts (N.J.A.C. 17:6-16.11), binding New Jersey Supreme Court case law bars incorporation of the DCRP into contracts because the Court upholds a "long-held presumption against contracts by statute." Berg v. Christie, 225 N.J. 245, 262 (2016). Pursuant thereto, our courts require "a high bar for the creation of contracts by statute" and "**only the clearest expression of statutory language**

and evidence of legislative intent for such creation will do." Id. at 260, 261 (emphasis added). There must be "an expression of unequivocal intent by the Legislature" to create a contract and "the expression of a statutory contract … must be unmistakably clear." Id. at 260-261, 278 (reversing Appellate Division's decision finding contract from statute). The DCRP Law contains no such clear expression but rather the exact opposite. Therefore, the DCRP cannot be incorporated into any contracts for the purpose of creating a contract action.

The cases Plaintiffs cite are not to the contrary. Plaintiffs do not (and cannot) cite any case law holding that the DCRP Law is incorporated into contracts and all their cases are inapposite (Pb15-17). Insulation Contracting & Supply v. Kravco, 209 N.J. Super. 367 (App. Div. 1986) did not even involve pensions but only held that sub-subcontractors cannot recover payment from general contractors. Plaintiff erroneously relies upon Insulation's discussion of quasi-contract which the Appellate Division actually rejected. Id. at 376-379. *See also* Warren v. Employers' Fire Ins. Co., 53 N.J. 308, 311-312 (1969) (limitations period in insurance coverage dispute) N.J. Sports & Exposition Auth. v. DelTufo, 210 N.J. Super. 664, 668 (Law Div. 1986) (stockholders not entitled to jury trial because their action was a statutory action not existing at common law); Wall Twp. Educ. Ass'n v. Bd. of Educ. of Wall, 149 N.J. Super. 126, 132 (App. Div. 1977)

(statutory military service credit did not apply towards extraordinary longevity increment given CBA's limitation to service in township).

Similarly, State v. State Supervisory Employees Ass'n, 78 N.J. 54, 79-80 (1978) addressed the scope of labor negotiations under the New Jersey Employer-Employee Relations Act and held that employers cannot negotiate regarding terms and conditions of employment expressly set by statute -- questions not at issue here. Id. at 79-80. The Court held that employee pensions cannot be the subject of contract negotiations given the Legislature's "comprehensive regulation of that area." Id. at 83.

In addition, neither Lavin v. Bd. of Educ. of Hackensack, 90 N.J. 145 (1982) nor Miller v. Bd. of Chosen Freeholders of Hudson County, 10 N.J. 398 (1952) avail plaintiffs. In order to be incorporated into an employment contract, the unearned interest/investment income which Plaintiffs seek must be "for services rendered", that is, "directly related to the employment service…." Lavin, 90 N.J. at 150, 151. Otherwise, it is just a statutory entitlement which cannot be incorporated into a contract. Id. at 151. Lavin ruled that the statutory benefit sought therein (employment credit for military service) was not incorporated into the public employee's contract because it was not an "essential term" of the employee's contract but rather a statutory entitlement granted by the Legislature. Lavin, 90 N.J. at 149. The Lavin court

held that the statutory benefit at issue was "not for services rendered or to be rendered for school teaching as such. It was established by the Legislature as a reward or bonus for service in the military, and not for performance as a teacher. Accordingly, the payment should be considered as a statutory entitlement, rather than as an element of the employment contract." Lavin, 90 N.J. at 151.

The Court in Lavin distinguished the case of Miller where a statute prescribing a rate of pay was incorporated into the employment contract because it directly informed an already existing essential term of the contract, *i.e.*, payment for services rendered. *See* Lavin, 90 N.J. at 150 (distinguishing Miller). Lavin distinguished Miller because that case involved a claim for payment of (county prison guards') salary at the rate fixed by statute which is "directly related to the services to be rendered. The … incorporation of such a provision in the employment contract was appropriate, since it went to the essence of the contract, namely, rate of pay for services to be performed." Lavin, 90 N.J. at 150. In Miller, the court held that the prison guards[12] had a substantive right to recover salary stemming from their rendition of services and "the statutory rate of pay is the measure by which the true value of the

[12] The prison guards were deceased so their widows filed claims for underpayment of salary alleging that the prison guards were paid less than the rate provided by statute.

service performed is proved." Miller, 10 N.J. at 409. The Miller court emphasized that the plaintiffs' claims "rested not in statute but upon the contractual status" of the deceased prison guards "as employees of the county, the substance of their action was one for compensation for services rendered raising the implied contract to pay the reasonable value thereof as established by statute." Id. at 415. The Miller court explained that the statute at issue therein actually limited "counties in the exercise of their powers in relation to agreements with their employees with respect to the remuneration … for the services they perform." Miller, 10 N.J. at 410.

Whether a benefit flowing from statute is a term of the public employee's contract or just a statutory entitlement depends on the nature of the benefit and its relationship to the employment; the focus is on the purpose of the statute and its materiality to the employment. Lavin, 90 N.J. at 150. Significantly, the purpose of the statute herein is not to specify the rate of compensation for services rendered but rather to control pension costs and eliminate pension abuses. Cookson v. Bd. of Trustees, Pub. Employees' Ret. Syst., 2010 WL 816790, at *2 (App. Div. 2010) (Da154-159); Legislative History (Da162-163).

As in Lavin, the interest/investment income sought from delayed DCRP enrollment is not an essential term of the Plaintiffs' unidentified contracts and

is not salary for services rendered. Plaintiffs represented that the individual contracts do not differ from the CBA (3T65:22-66:4); thus, like the CBA they make no mention of the DCRP. Plaintiffs have been paid for all services rendered irrespective of the DCRP and the interest/investment income sought from delayed DCRP enrollment is not contingent on plaintiffs' services and is not salary, but rather is a concept that operates independently of contract and can only exist in reference to the DCRP Law. Indeed, were the Legislature to repeal the DCRP Law, Plaintiffs would continue receiving their salary. The happenstance that DCRP contributions are calculated as a percentage of salary does not convert them into a benefit conferred for services rendered nor into an essential term of any contacts. This is because DCRP benefits are not afforded for services rendered but rather under legislative mandate.

Plaintiffs' statement that "If an employee was terminated and no longer worked for the district, she is no longer entitled to receive the pension credit" (Pb17) is immaterial. The DCRP Law's eligibility requirements (including employment) do not establish that the lost interest/investment income is "directly related to services rendered" as is required for incorporation. Lavin, 90 N.J. 150. Rather, the interest/investment income derives from a benefit "established by the Legislature" and "not for performance" in the plaintiffs'

respective jobs and, therefore, is "considered as a statutory entitlement, rather than as an element of the employment contract." Lavin, 90 N.J. 150.

Lavin is controlling here and Lavin holds that a statutory benefit must be "directly related to the employment service" in order to be incorporated into an employment agreement and rejected "the legal theory that every statutory provision having some effect on the employee has been impliedly incorporated into the contract, so that failure to comply with that provision constitutes a breach of the employment agreement." Lavin, 90 N.J. 150. Lavin's rationale applies with equal force here and bars plaintiffs' contract claims based on incorporation of the DCRP Law into any contracts. Therefore, binding precedent and the DCRP's regulations bar incorporation of the DCRP into any purported contracts.

(C) Plaintiffs Admittedly Abandoned their Initial Representations to the Court on the Count One Breach of Contract Claim

Plaintiffs concede that they filed a grievance in this matter but failed to follow through with arbitration (Pb18). Plaintiffs also concede that, from the inception of this case on August 13, 2021 until almost three years later on June 6, 2024 (Pb15), they represented to the trial court that the DCRP was incorporated into the CBA (Pb15). Plaintiffs now disavow that representation (Pb15) and no longer base their contract claim on the CBA but rather upon "individual[] employment contracts" which they concede were never made part

of the record and were not mentioned until June 6, 2024 at oral argument (Pb15).

Notably, Plaintiffs inconsistently argue that the DCRP cannot be part of the CBA because of the "comprehensive regulation of that area" (Pb18) but then argue that the DCRP can be incorporated into unidentified individual employment contracts (Pb19) notwithstanding its comprehensive regulation.

(D) Based on Plaintiffs' Changed Representations to the Court, there is No Contract in the Record

Plaintiffs concede that: (1) they made conflicting representations to the trial court regarding incorporation of the DCRP Law (Pb15); and (2) the purported "individual[] employment contracts" were never made part of the record or even mentioned until June 6, 2024 at oral argument (Pb15). Indeed, when plaintiffs changed their position and, for the first time on June 6, 2024, alluded to some individual contracts the trial court asserted, "I don't know anything about any individual contracts … The only thing I have … is the collective bargaining agreement" (3T61:3-10).

Thus, these purported contracts are not part of the record and cannot be considered on appeal. *See* R. 2:5-4(a) ("The record on appeal shall consist of all papers on file in the court"). Appellate review is "confined to the record" below. Wallach v. Williams, 52 N.J. 504, 505 (1968). Appellate courts will not consider evidence submitted on appeal that was not in the record below as

this is "a gross violation of appellate practice and rules…." Middle Dep't Insp. Agency v. Home Ins. Co., 154 N.J. Super. 49, 56 (App. Div. 1977); Townsend v. Pierre, 221 N.J. 36, 45, n. 1 (2015) (court will not consider evidence "that was not presented to the trial court"); R. 2:5-4, comment 1; Venner v. Allstate, 306 N.J. Super. 106, 111 (App. Div. 1997) ("if not part of the record below, we cannot consider these matters"). Thus, there is no predicate contract as required for a breach of contract claim. Globe Motor Co. v. Igdalev, 225 N.J. 469, 482 (2016).

POINT III

THE COMPLAINT SHOULD HAVE BEEN DISMISSED WITH PREJUDICE (3T; Da189)

A cognizable claim must be discernible from the face of a complaint. *See* Pace v. Hamilton Cove, 258 N.J. 82, 96 (App. Div. 2024). Neither Plaintiffs nor the trial court have identified such a claim. Rather, they insist upon damages for belated DCRP enrollment without a cognizable cause of action. *See* River Edge Sav. & Loan Ass'n, 165 N.J. Super. at 545 ("Without any substantive basis there is no cause of action upon which claims for damages may be properly rested"); In re HomeBanc Mortgage Corp., 945 F.3d at 812 (defining "damages" as a "debt" or "loss" without any associated legal claim would contradict common understanding within the legal profession); Sun

Chem. Corp., 243 N.J. at 339 (it is the theory of liability underlying the claim that determines the recoverable damages).

Plaintiffs' wholly unsupported speculation on "the money the Board gained" (Pb42) does not articulate a cognizable claim. Plaintiffs ignore the body of precedent set forth in the Board's initial brief, at Point I(B), mandating dismissal with prejudice when a complaint lacks facts which, if proven, would constitute a valid cause of action. Plaintiffs also ignored precedent requiring dismissal when a court lacks subject matter jurisdiction -- which the trial court conceded.

Plaintiffs' contention that the Board's appeal is improper because it "is based upon disagreement with the trial court's reasoning, not its ultimate decision" (Pb43) is fatuous and meritless. As the plaintiffs note, appeals are from orders and the Board appealed from the trial court's order denying its motion to dismiss with prejudice.

POINT IV

THE TRIAL COURT'S OCTOBER 25, 2022 AND JUNE 7, 2024 ORDERS WERE NOT FINAL ORDERS SUBJECT TO APPEAL (2T; Da167-168) (3T; Da186-189)

Plaintiffs do not, and cannot, cite any case law supporting their conclusion that an order of dismissal without prejudice to amending the complaint is final (Pb9). None of the cases plaintiffs cite support that proposition. For instance, State in Interest of R.L., 202 N.J. Super. 410 (App. Div. 1985) merely held

that the Chancery Division, Family Part's waiver of jurisdiction over a juvenile delinquency proceeding in favor of referral for criminal prosecution was an interlocutory order appealable only by leave, and not a final judgment appealable as of right. Application of Tiene, 19 N.J. 149, 158, 161 (1955) held that the order appealed from therein (refusing to limit discovery) was not a final judgment and that "an order [cannot] be made a final judgment by merely labeling it as such. Whether it is a final determination depends on its nature rather than on any characterization of it." Significantly, Tiene did not analyze order of dismissals without prejudice but rather considered dismissals which allowed for "no relief" -- in contrast to dismissals without prejudice to amended pleadings. Tiene, 19 N.J. at 160. State v. Burten, 207 N.J. Super. 53, 60 (App. Div. 1986) addressed dismissal of a criminal complaint which "completely terminated the proceedings" as opposed to leaving the matter open for amended pleadings. Moreover, Burten was decided under the rules governing criminal practice which are not applicable here. Burten, 207 N.J. Super. at 60 ("the fact that a dismissal under R. 3:24(b) is a final judgment is inferentially recognized in R. 3:24(c) which provides that appeals under R. 3:24(b) are taken by filing a notice of appeal rather than a motion for leave to appeal as in the case of an appeal from an interlocutory order under R. 3:24(a)"). Parker v. City of Trenton, 382 N.J. Super. 454, 457 (App. Div.

2006) only ruled that partial summary judgment is not a final order. It did not address dismissal without prejudice to amending the complaint. Scalza v. Shop Rite Supermarkets, 304 N.J. Super. 636, 639 (App. Div. 1997) actually granted leave to appeal *nunc pro tunc* from an order of dismissal without prejudice thereby recognizing that the order was interlocutory.

Plaintiffs ignore that the trial court's October 25, 2022 never foreclosed plaintiffs from returning and amending their complaint. In fact, plaintiffs returned and filed a motion to reinstate their complaint which the trial court entertained. *See* House of Fire Christian Church v. Zoning Bd. of Adjustment of Clifton, 379 N.J. Super. 526, 531 (App. Div. 2005) (order is interlocutory when court retains jurisdiction). Therefore, the October 25, 2022 dismissal without prejudice did not end the case.

Indeed, the trial court's rationale underlying its June 7, 2024 order confirmed that its October 25, 2022 dismissal without prejudice never foreclosed plaintiffs from amending their complaint. The court's June 7, 2024 order maintained the prior dismissal without prejudice precisely because the trial court opted to "leave [the case] open to see whether … there are claims that could exist that did not have to go through the [DCRP] board … [and] the Appellate Division… but which could address … [plaintiffs'] claims for damages" for delayed DCRP enrollment. 3T77:3-12. The trial court opined that plaintiffs

have some unidentified "private right of action" (3T53:8-12; 3T57:13-16; 3T72:1-2) which they "could come here" to pursue later on (3T74:9-12) and ruled that plaintiffs "can refile and then we can deal with the issues later on." 3T77:19-20.

Plaintiffs misrepresent that the trial court's June 7, 2024 order denying their motion to reinstate "foreclosed Plaintiffs from … amending the complaint" (Pb9). To the contrary, the trial court's June 7, 2024 order denied the Board's motion to dismiss the complaint with prejudice expressly to afford plaintiffs the opportunity to amend their complaint. Indeed, the trial court confirmed in its submission to the Appellate Division that it denied the Board's "requested order to foreclose the Plaintiff from filing a motion to amend its Complaint" (Da217) so that plaintiffs "[w]ould not be foreclosed from seeking redress" via "a motion for an amended complaint…." (Da219).

Notably, Plaintiffs ignore governing precedent establishing that an "order entered without prejudice generally allows plaintiffs to move to amend their complaint and is therefore not a final order." Johnson v. City of Hoboken, 476 N.J. Super. 361, 370 (App. Div. 2023). *See also* Devers v. Devers, 471 N.J. Super. 466, 472-473 (App. Div. 2022) (dismissal "without prejudice … suggests that there was more to do in the trial court" and "that the dismissed claim has not been finally resolved and may be reinstated in the same

action…."); Big Smoke LLC v. Twp. of West Milford, 478 N.J. Super. 203, 228 (App. Div. 2024) (a "dismissal without prejudice allows a plaintiff to amend and refile a complaint").

Nor do Plaintiffs address precedent establishing that a dismissal which "would permit plaintiff … to refile the complaint" "creates only the illusion of finality" and is interlocutory. Ruscki v. City of Bayonne, 356 N.J. Super. 166, 168 (App. Div. 2002). *See also* CPC Int'l, Inc. v. Hartford Accident & Indem. Co., 316 N.J. Super. 351, 365-366 (App. Div. 1998) (dismissal without prejudice to reinstatement of claims is interlocutory); Grow Co. v. Chokshi, 403 N.J. Super. 443, 460 (App. Div. 2008) (order which permits subsequent adjudication of some pleaded issue is interlocutory).

POINT V

A THIRD OF THE PLAINTIFFS ARE TIME-BARRED FROM ASSERTING A BREACH OF CONTRACT CLAIM (1T; Da31-32)

As set forth in the Board's initial brief, the statute of limitations issue is mooted by the lack of subject matter jurisdiction over plaintiffs' contract claim, the DCRP Law's bar against contract claims as well as the lack of any contract in the record (now that Plaintiffs abandoned their prior contention that the CBA incorporated the DCRP).

Moreover, the cases plaintiffs rely upon in support of their continuing violation theory are inapposite because they are predicated upon the existence

of an installment contract -- which is neither alleged nor in the record. *See* In re Estate of Balk, 445 N.J. Super. 395 (App. Div. 2016) (promissory note stipulating to four payments on specified dates and payment of remaining balance within 24 months); Metromedia Co. v. Hartz Mountain Assoc., 139 N.J. 532 (1995) (tenant and landlord negotiated agreement for monthly payment of cleaning service fees); Nat'l Util. Serv., Inc. v. Cambridge-Lee Indus., Inc., 199 Fed. Appx. 139 (2006) (consulting contract for monthly utility bills).

Similarly, County of Morris v. Fauver, 153 N.J. 80 (1988) does not avail plaintiffs as that case involved a contract pursuant to which the State would remit periodic reimbursement to Morris County for housing State prisoners, *i.e.*, an installment contract.

In addition, Bd. of Educ. of Alpha v. Alpha Educ. Ass'n, 190 N.J. 34 (2006) does not avail plaintiffs because that decision involved deference to an arbitrator's award rendered in an arbitration conducted pursuant to a collective bargaining agreement. Such deference is not at issue in this case. *See* Koch v. Superior Court of New Jersey, 2016 WL 1048738, at *4-5 (App. Div., March 17, 2016) ("plaintiff's reliance upon Alpha Education Ass'n is misplaced. This case does not involve the review of an arbitrator's decision, where the court must defer to the arbitrator's decision if it is reasonably debatable"). In Bd. of Educ. of

Alpha, 190 N.J. at 42, 43, 45, the Court "was obliged to accept" and defer to the arbitrator's decision (finding a continuing violation of the collective bargaining agreement) so long as it was reasonably debatable. In contrast, this case does not involve review of an arbitration award.

Plaintiffs do not -- and cannot -- dispute that there is no installment contract in the record. Nor do Plaintiffs cite any case law applying the installment contact theory to a statute prescribing a specific and comprehensive framework for adjudication of claims much less to the DCRP Law. *See* N.J.A.C. 17:6-2.1; N.J.A.C. 17:6-20.9; N.J.A.C. 17:6–15.1(a).

CONCLUSION

For all of the foregoing reasons as well as the reasons set forth in the Board's initial brief, it is respectfully submitted that the Order should be reversed and the complaint should be dismissed with prejudice and plaintiffs' motion to reinstate the complaint should be denied with prejudice.

Respectfully submitted,
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By: */s/ Jessica V. Henry*
Jessica V. Henry, Esq.

Dated: September 26, 2024

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SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Docket No.: A-003443-23

Civil Action

On Appeal From:
Superior Court of New Jersey
Middlesex County, Law Division
Docket No: MID-L-4816-21

Sat below:
Hon. Bruce J. Kaplan, J.S.C.

NASHED, RENEE NESSIEM-BASSILI, PATRICIA O'LEARY JONES, PATRICIA OCKENHOUSE, JENNIFER ORANCHAK, KIMBERLY PACE, DONNA PALAGONIA, VIVIAN PERCOCO, EMMA PEREZ, LISA RAHNER, MYRNA RAZAK, FARHAT REHMANI, KELLIANNE RIZK, CHRISTINEE ROMAN, JANETE ROSEMAN, ADRIENNE SABATINO, MELIKE SAHIN, MARIA SAMULKA, CHRISTINA SCHMITT, MARLA SCHNEIDER, KELSEY SCHUSTER, RANIA SFEIR, MAGDA SHEHATA, SAMINA SHEIKH, MICHELE SHERMAN, JAEKYOUNG SHIM, RENEE SIMON-RADOCZY, MOONIA SOHERWARDY, LAURA SOUTHON, NANCY STETZ, VIVIAN TADROS, CHRISTINE TAMBINI MCCANN, MUI LING TANG, JAYNE TOKASH, ESTELA VALDEZ, JOSLYN VELEZ, MELISSA WHYTE, JODY WIENER, MARIA WOOD, LORRAINE ZEBRO, and PATRICIA ZIMMERMAN,

Plaintiffs - Cross-Appellants

v.

EAST BRUNSWICK BOARD OF EDUCATION,

Defendant - Appellant

AMENDED REPLY BRIEF ON BEHALF OF CROSS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

State Cases

State Statutes

Regulations

Other Authorities

TABLE OF JUDGEMENTS, ORDERS, AND RULINGS BEING APPEALED

PRELIMINARY STATEMENT

The trial court erred when it denied Plaintiffs' motion to reinstate the complaint. There is no prohibition in the DCRP Laws that preclude Plaintiffs' claim for damages stemming from a breach of the individual employment contracts or by operation of law. Damages are not something the DCRP Plan Administrator needs to interpret, nor does it require the agency's expertise. It remains undisputed that the DCRP Board itself acknowledged the DCRP Law does not address damages for this situation and the administrative agency lacks the authority to provide this remedy, or any remedy, for Plaintiffs.

Granting damages would not disrupt the DCRP Program's uniformity in any respect. Rather, it would merely restore Plaintiffs to the position they should have been in had they been timely enrolled in the Program and place them on even footing with other participants. Plaintiffs were not enrolled for a number of years, and the Board's position is that there is no consequence for its statutory breach. To allow this case to remain dismissed, in the absence of a substantive decision on the merits of Plaintiffs' claims, would permit employers to subvert the DCRP Law and the Legislature's intent in enacting the pension statutes. To the extent that Plaintiffs were required to exhaust their administrative remedies, they have done so. To the extent they were not required to exhaust, they should not be penalized for complying with the trial court's directive to seek a determination from the DCRP.

LEGAL ARGUMENT

At the outset, the Board misrepresents several facts to this Court that it claims to correct in Plaintiffs' submission. For clarification, Plaintiff will address these in turn.

First, the Board claims that Plaintiffs did not comply with the Appellate Division's directive to explain their intent with respect to taking any further action. However, Plaintiffs' brief specifically addresses this issue in the Preliminary Statement of their initial submission. (Pb2-3) Defendant misstates Plaintiffs by insinuating that there is another route by which Plaintiffs will proceed if their appeal is denied. Plaintiffs do argue that the trial court, by its own reasoning, should have permitted leave to amend if the trial judge had in fact believed that there was a cognizable claim. Yet had the trial court believed these claims should have been framed differently, then leave to amend should have been granted. Nonetheless, Plaintiffs do not intend to file a new complaint simply to restyle its suit. As such, Plaintiffs have clearly stated that this appeal is the only route by which Plaintiffs intend to proceed.

In addition, N.J.S.A. 43:15C-5, entitled "Allocations of Contributions by Participants," states in relevant part that "[p]articipants in the Defined Contribution Retirement Program shall be allowed to allocate their own contributions and the contributions of their employer into investment alternatives as determined by the

Defined Contribution Retirement Program Board, including, but not limited, to mutual funds . . .” The Board appears to deny that interest or investment earnings would naturally accrue as a result of investment. However, as it concedes, the market rate is not predictable and therefore it cannot say that would not have been the case had Plaintiffs’ contributions been timely made. This is especially so in the absence of such evidence in the record, a point which the Board disingenuously makes, as Plaintiffs have not had the opportunity to conduct full discovery in this matter because the case was dismissed prior to completion of the discovery phase.

Finally, the Board contends that there is a remedy afforded to Plaintiffs, which consists of the catch-up contributions and the DCRP Board’s determination. Catch-up contributions are merely the funds from the employee and employer that they were required to make by law. They are not the interest income that would have been earned had timely contributions been made. The sole reason this did not occur was because the Board failed to enroll employees in the DCRP program until years afterward. Most significantly, this ignores the fact that if timely contributions had been made, Plaintiffs would have earned interest or investment income on those contributions, which is the very point of the DCRP. To now claim that the catch-up contributions constitute a remedy for the damaged Plaintiffs defies reason and goes against the very purpose and core of the State’s pension system.

I. THE TRIAL COURT HAS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS. (3T; Da186)

A. The Trial Court Has Jurisdiction Over Count One- Breach of Contract. (3T; Da186)

First, none of the Plaintiffs are time-barred by the applicable statute of limitations. The Board argues that the installment contract method is inapplicable because there is no such contract in the record. Yet the Plaintiffs' individual employment contracts, which set forth their salary, constitute an installment contract because it is a periodic payment.[1] County of Morris v. Fauver, 153 N.J. 80 (1998) (a cause of action accrued each time a new voucher for payment was submitted). The fact it is not yet in the record below is because discovery remains incomplete.

The Board's reliance on Koch v. Superior Court of New Jersey, 2016 WL 1048738, at *4-5 (App. Div., March 17, 2016) is unsupportive. In this unpublished decision, which is not precedential, the plaintiff's claim arose from the defendant's failure to provide certain benefits during her disability leave. The Court in that case held that "[t]here was no continuing violation of the statute requiring pension contributions or of the collective negotiations agreement." Id. at *5. This is directly contrary to this situation, in which the Board's obligation for damages which flow from the DCRP Law remains owing and there is a violation of the relevant

[1]This Court may take judicial notice that Plaintiffs are paid on a bi-weekly basis. See N.J.S.A. §18A:27-6(3) (providing for payment of salaries in equal semimonthly installments).

employment agreements. Merely because the underlying decision dealt with an arbitration award does not render Board of Educ. of Borough of Alpha, Warren County v. Alpha Educ. Ass'n, 190 N.J. 34 (2006) inapplicable.

The Board committed a new breach of contract for every pay period it failed to deduct employee contributions for the DCRP and/or make its own contributions on behalf of that employee. While certain Plaintiffs were hired more than six years prior to filing the complaint, their employment with the Board resulted in them receiving paychecks well within the requisite six-year timeframe.

Second, the DCRP Law does not bar a claim for damages pursuant to a breach of contract. The DCRP regulations mean that the Program cannot create a distinct, separate contract of employment or guarantee continued employment. Defendant continues to ignore that the DCRP law provides no damages authority for the Plan Administrator and the DCRP regulations permit individuals to pursue a legal action. See N.J.A.C. 17:6-16.4(a); N.J.A.C. 17:6-16.7; and N.J.A.C. 17:6-16.20. In this connection, Defendant can point to no statute or regulation that specifically bars Plaintiffs' claim for damages to timely make DCRP contributions.

Plaintiffs' cited cases are not distinguishable, but they stand for the proposition that pension statutes should be liberally construed to benefit the pensioner. While the parties in these cases were in different pension funds and

different circumstances, the overarching point is this Court has the equitable powers to remedy the financial harm suffered as a result of the Board's action.

Third, pensions statutes are incorporated by reference into the individual employment contracts.[2] Defendant rejects the Lavin and Miller cases on the basis that the damages sought here are not an essential term of the employment contract. However, when the statute directly relates to the claimant's employment, it is incorporated into the individual employment contract. Simply because damages are not explicitly stated in the employment contract do not make it unrelated to one's employment. If the employee does not fulfill or provide the services as required in the contract, then they do not get a pension benefit.

B. The Trial Court Has Jurisdiction Over Count Two- By Operation of Law. (3T; Da186)

Contrary to the Board's argument, the DCRP law's framework does not divest the trial court of its jurisdiction. While the Plan Administrator is given the authority to control and manage the terms of the program (see N.J.A.C. 17:6-2.1; N.J.A.C. 17:6-20.9; N.J.A.C. 17:6–15.1(a)), nothing in the DCRP statues or its regulations address a remedy. Plaintiffs' overarching claim is for damages resulting from the

[2] The Board's argument pertaining to the representations Plaintiffs made to the trial court regarding whether the collective negotiations agreement or the individual contract is the employment contract at issue is misleading. Plaintiffs addressed this issue in their initial brief and acknowledged that they clarified during the June 6, 2024 oral argument that pension rights are incorporated into the individual contracts. The right to a damages remedy does not stem from the union contract because pensions are not negotiable. See Matter of Morris School Dist. Bd. of Educ., 310 N.J. Super. 332, 339 (App. Div. 1998); N.J.S.A. 34:13A-8.1.

Board's failure to timely enroll employees in the DCRP. This is not a term of the Program or a question the Plan Administrator can resolve, especially in light of the fact the DCRP Board determined it had no authority to issue a damages remedy.

In addition, the DCRP Law does not mandate exclusive jurisdiction over Plaintiffs' claims. The DCRP Board had primary jurisdiction at most. "The Legislature 'may vest an administrative agency with exclusive primary jurisdiction over common-law claims,' but only if it does so expressly, and by 'explicitly' granting that agency the power to 'award damages in private matters.'" Smerling v. Harrah's Entertainment, Inc., 389 N.J. Super. 181, 187 (App. Div. 2006) (quoting Campione v. Adamar, Inc., 155 N.J. 245 (1998)).

The DCRP explicitly stated it had no remedy for Plaintiffs' situation, similar to Campione v. Adamar of New Jersey, Inc., 155 N.J. 245 (1998), in which the New Jersey Supreme Court held that while the administrative agency did retain primary jurisdiction to resolve issues concerning the interpretation of the casino commission regulations, nothing in the law delegated the agency with the power to adjudicate the party's common-law claims. Therefore, such claims could be pursued in court. Notably, the Court stated "[w]hen however, the Legislature has not vested such [exclusive] jurisdiction in an agency, a plaintiff may still seek relief in the courts." Id. at 261. Specifically, the Court found that "plaintiff did not enjoy an adequate administrative remedy to vindicate his damages claim." Id. at 262. See also Muise

v. GPU, Inc., 332 N.J. Super. 140, 163 (App. Div. 2000) (holding that "a court can consider all judicial remedies, including damages, which are beyond the agency's authority; a legislative intent to defeat them will be inferred only if the Legislature has explicitly limited the availability of that remedy or relief.").

The Board's claim that these cases are differentiated on the basis the agencies retain jurisdiction to interpret and apply their respective regulations fails. Damages are not the type of claim arising under the DCRP Program that requires the Plan Administrator's interpretation or even requires any type of agency expertise. In fact, the Board acknowledges that Campione and Muise held that the parties could pursue common-law claims, including breach of contract claims, before the trial court.[3]

Moreover, there is no evidence the DCRP regulations afford the DCRP exclusive jurisdiction, as it permits actions at law and equity. The DCRP regulations therefore do not bar judicial intervention. N.J.A.C. 17:6-16.4(a) provides that a claimant "shall not be entitled to take any legal action . . . until he or she has exhausted all claims and appeals procedures provided by the Program." Plaintiffs followed this claims procedure to completion with the DCRP Board and the regulation provides that "legal action" may be taken upon doing so. N.J.A.C. 17:6-

[3] Contrary to the Board's representation that the DCRP Board held a hearing, (Db11), there was no such hearing held below. The DCRP Final Decision was issued in the absence of any hearing as it dealt solely with an issue of law. The parties submitted written statements and orally argued their respective positions, however, no hearing was held.

16.7 provides that "actions under or relating to the Program or any Plan under the program, and the statute of limitations for such actions shall be governed by and enforced by the laws of the State of New Jersey . . ." Finally, N.J.A.C. 17:6-16.20 provides "any action at law or in equity under or with respect to this Program, the action shall be governed by (or precluded by) the relevant statute of limitations according to New Jersey law." Clearly, the regulations support that lawsuits for damages may be and the DCRP Law does not bar actions at law over Plaintiffs' common law claims.

Finally, the DCRP law confers a private right action upon Plaintiffs. The court must consider certain factors as set forth in R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co., 168 N.J. 255, 272-73 (2001). The Board concedes that the first factor is met, as Plaintiffs are the employees the DCRP Law was intended to benefit, but nonetheless argue the last two factors are not met.

The second factor evaluates whether there is any evidence that the Legislature intended to create a private right of action under the statute. Although the Plan Administrator is vested with the power to decide matters that arise under the Program, damages resulting from the Board's failure to timely enroll employees in the Program is not the type of issue or claim that only the Plan Administrator can decide. The DCRP does not contain any enforcement mechanism of its own. A damages remedy was omitted from the legislation specifically to permit individuals

to pursue litigation on their own behalf. This is evidenced by the DCRP regulations. See N.J.A.C. 17:6-16.4(a); N.J.A.C. 17:6-16.7; and N.J.A.C. 17:6-16.20.

As to the third factor, damages are consistent with the underlying purposes of the legislative scheme to infer the existence of such a remedy. The purpose of the DCRP is to benefit public employees for their service. It would be consistent with the legislative scheme to infer a damages remedy in this case. Depriving employees of contributions that are mandated by law, and the interest income that naturally accrues from investment of those contributions, would only serve to frustrate the DCRP's purpose and undermine its intent. In fact, were the Board's position adopted, then employers would be at liberty to enroll employees at any given time of their choosing, as opposed to the date they become eligible for enrollment, without consequence. Naturally, districts may be inclined to pursue this course because then they would not be required to make their statutory contribution.

The Board's cited case of Nordstrom v. Lyon, 424 N.J. Super. 80 (App. Div. 2012) is easily differentiated. In that case, this Court concluded the administrative agency had exclusive jurisdiction solely over the issues of reporting violations because the Campaign Contributions and Expenditures Reporting Act, N.J.S.A. §19:44A-1 et seq., already had penalties for a candidate's failure to abide by the reporting obligations. The Appellate Division held that such exclusive jurisdiction was appropriate in this case because the remedy provided by the agency was the only

one for that given situation. Id. at 98. In addition, the issue of excess campaign contributions necessarily required agency expertise. While the Appellate Division held the trial court should "stay[] its hand to allow ELEC to determine whether an excess contribution violation has occurred, and then weigh in on an appropriate remedy," Id. at 101, this precisely occurred here when the trial court dismissed the complaint and required Plaintiffs to seek a decision before the DCRP Board.

II. THE ISSUE OF EXHAUSTION IS DISPOSITIVE BECAUSE THE TRIAL COURT DISMISSED THE COMPLAINT ON THE BASIS PLAINTIFFS DID NOT APPEAL THE DCRP BOARD'S FINAL DECISION TO THIS COURT. (3T; Da186)

The Board contends that it is irrelevant whether Plaintiffs exhausted their remedies. However, this was the very basis upon which the trial court denied Plaintiffs' motion to reinstate the complaint. Contrary to the Board's claim, returning to the trial is not a collateral attack as discussed in the cases of Beaver v. Magellan Health Services, Inc., 433 N.J. Super. 430 (App. Div. 2013) and AmeriCare Emergency Med. Serv. Inc. v. City of Orange Twp., 463 N.J. Super. 562 (App. Div. 2020).

In Beaver, the court held that "plaintiff's claims in the Law Division are dependent upon the resolution of an issue contrary to the final agency action of the SHBC - an issue fully adjudicated on the administrative appeal before the SHBC - as to which plaintiff has abandoned his appeal." Id. at 443. There, the only recourse for plaintiff was the SHBC appeals process because the plaintiff sought a substantive

right to health benefits, which a trial court cannot provide. In AmeriCare, it was deemed a collateral attack because in order to recover, the plaintiff had to reverse the agency's decision on the merits of the parties' case. Id. at 576. Similar to Beaver, the agency in Americare is the entity that decides the merits of the case and therefore it had to be one to make the decision.

Plaintiffs are not "repackaging" any of their claims. The trial court may grant damages because the DCRP is unable to provide any administrative relief. The claims procedure proved futile and catch-up contributions are not a remedy, as discussed previously. The Board's claim that permitting an action for damages would disrupt the DCRP Program's uniformity also fails, as granting Plaintiffs damages would put them on the same level as other employees who were timely enrolled.

III. THE TRIAL COURT CORRECTLY DENIED THE BOARD'S MOTION TO DISMISS THE COMPLAIINT WITH PREJUDICE. (3T; Da189)

The Board fails to cite any case law or authority for the proposition the trial court should have dismissed the complaint with prejudice. Its only basis for this contention is that the complaint fails to state a cognizable legal claim.

The trial court declined to decide on the breach of contract claim (Count I) or on the claim asserting damages by operation of law (Count II). Instead, the trial court held that Plaintiffs must first exhaust their administrative remedies, which required

seeking review of the DCRP Board's Final Decision by the Appellate Division. (3T74:1-6) The trial court did not make any determination as to whether Plaintiffs have a cause of action. Instead, the primary issue became whether Plaintiffs were required to make an appeal to this Court following the DCRP Board's Final Decision. (3T74:1-6)

The Board is requesting this Court make a determination on issues which the lower court did not address, namely whether Plaintiffs have a damages claim. However, it cannot appeal the trial court's reasoning, which held that an appeal to this Court was required, when this is a decision the Board clearly agrees with.

Therefore, an appeal of the order to dismiss with prejudice is a request for this Court to reverse the reasoning of the lower court. See Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001) ("it is well-settled that appeals are taken from orders and judgments and not from opinions, oral decisions, informal written decisions, or reasons given for the ultimate conclusion").

IV. THE OCTOBER 25, 2022 ORDER AND THE JUNE 7, 2024 ORDERS ARE FINAL ORDERS. (2T; Da167; Da186; Da189)

The underlying orders in this case are final because they resolved all issues that were before the trial court. The trial court did not retain jurisdiction of this case because the complaint was and remains dismissed. The Board's cited cases are inapplicable to the present circumstances. See Johnson v. City of Hoboken, 476 N.J. Super. 361, 370 (App. Div. 2023) (plaintiffs did not move to reinstate the complaint

but instead filed an appeal); Big Smoke LLC v. Twp. of West Milford, 478 N.J. Super. 203, 228 (App. Div. 2024) (plaintiff was deprived of the opportunity to amend the complaint and the court determined it could not consider the merits of plaintiff's argument without a statement of reasons from the trial court).

In fact, Devers v. Devers, 471 N.J. Super. 466, 472-474 (App. Div. 2022) supports Plaintiffs' position. In Devers, the plaintiff appealed the trial judge's finding of a lack of subject matter jurisdiction over the claim that an account controlled by the defendant was deemed a marital asset. The trial judge did not resolve any factual disputes about the account but only made a finding that the court lacked jurisdiction to determine the true nature of the account. Id. at 469. Accordingly, the trial court denied plaintiff's motion for summary judgment, without prejudice, due to lack of subject matter jurisdiction.

On appeal, the Appellate Division held that the summary judgment order entered without prejudice constituted a final order because "even though the disposition was not an adjudication on the merits . . . it represented a final resolution of the last remaining issue before the trial court." Id. at 472. Although the order "triggered doubt" about the finality of the case, the trial judge utilized the phrase without prejudice "as an acknowledgement that the denial of the claim on jurisdictional grounds did not preclude [plaintiff] from asserting her claim in another forum." Id. at 473. Ultimately, the court held that the order was a final order while

acknowledging the " 'without prejudice' label can give an order an interlocutory appearance despite its finality." Id. at 474.

Here, the trial court denied Plaintiffs' motion to reinstate the complaint, which necessarily precludes them from seeking to amend it. While the orders might have the appearance of being interlocutory, they are nonetheless final because they resolved all issues that were before the trial court, despite no conclusion on the merits having been made.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted this Court reverse the trial court's denial of the June 7, 2024 order denying Plaintiffs' motion to vacate the October 25, 2022 order and reinstate the complaint. In addition, the June 7, 2024 order denying Defendant's motion to dismiss with prejudice should be affirmed.

Respectfully submitted,

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