NO.

In the Supreme Court of the United States

ALFRED J. PETIT-CLAIR JR. and
MATTHEW J. PETIT-CLAIR,

Petitioners,

v.

ATTORNEY GENERAL FOR THE STATE
OF NEW JERSEY et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether the U.S. Court of Appeals for the Third Circuit erred in affirming the District Court for the District of New Jersey's judgment dismissing with prejudice the tort claims against one of the individual defendants.

2. Whether the U.S. Court of Appeals for the Third Circuit erred in affirming the District Court for the District of New Jersey's judgment granting the municipal defendant's motion to enforce settlement with regard to the Americans with Disabilities Act claims.

LIST OF ALL PARTIES TO THE PROCEEDING

1. Alfred J. Petit-Clair Jr., Petitioner and Plaintiff

2. Matthew J. Petit-Clair, Petitioner and Plaintiff

3. Attorney General for the State of New Jersey, Defendant

4. Comptroller for the State of New Jersey, Defendant

5. Treasurer for the State of New Jersey, Defendant

6. City of Perth Amboy, New Jersey, Respondent and Defendant

7. State of New Jersey, Defendant

8. Gregory Fehrenbach, Respondent and Defendant

9. Joel Pabon Sr., Defendant

10. William A. Petrick, Defendant

11. Kenneth Balut, Defendant

12. Wilda Diaz, Defendant

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CITATIONS OF THE OPINIONS AND ORDERS ENTERED BELOW

The U.S. Court of Appeals for the Third Circuit's decision to affirm the trial court's judgment in this case was unpublished but is available at 2018 WL 1768215 and is reproduced here at A-1 to A-11. The Third Circuit's denial of the motion for rehearing in this case was also unpublished but is reproduced here at A-38 to A-39.

STATEMENT OF JURISDICTION

The U.S. Court of Appeals for the Third Circuit affirmed the trial court's judgment in this matter on April 12, 2018 and then denied rehearing on May 15, 2018. *See* A-1 to A-11 & A-38 to A-39, respectively. This Petition for Writ of Certiorari was filed within 90 days from the date the Third Circuit denied the motion for rehearing in this matter. *See* Sup. Ct. R. 13.1, 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

In relevant part, the Federal Rules of Civil Procedure establish that a complaint states a claim for relief provided that it contains "(2) a short and plain statement of the claim showing that the pleader is entitled to relief; . . . and (3) a demand for the relief sought." Fed. R. Civ. P. 8(a)(2)-(3). Moreover, "[n]o technical form is required," Fed. R. Civ. P. 8(d)(1), and "[p]leadings must be construed so as to do justice," Fed. R. Civ. P. 8(e).

Summary judgment is appropriate only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

The Americans with Disabilities Act provides that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, . . . any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). "The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) . . . shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title." *Id.* § 794a(a)(2).

STATEMENT OF FACTS AND PROCEEDINGS BELOW

Dismissal Of The Tort Claims

In July 1990, the Petitioner, Alfred J. Petit-Clair Jr. ("Petit-Clair"), was hired by the Respondent, City of Perth Amboy, New Jersey (the "City"), to serve as the attorney for the City's Zoning Board of Adjustment ("ZBA"). *See* A-13.

Petit-Clair accepted the position based upon the package offered to him, to wit, as a permanent part-time City employee who was eligible to and did, in fact, participate in City-provided medical and dental

coverage (for both himself and his dependents) as well as the New Jersey Public Employees' Retirement System ("PERS"). *See* A-13 to A-14.

As compensation for his services as ZBA Attorney, Petit-Clair received a fixed salary, subject to increases and cost of living adjustments as enjoyed by other City employees. Specifically, the City paid Petit-Clair's salary every two weeks with various payroll deductions, and at year's end, provided Petit-Clair with an Internal Revenue Service ("IRS") Form W-2.

Additionally, however, Petit-Clair had other duties for the ZBA that were not covered by his salary, such as working on applications to the ZBA outside of the public meetings and communicating with applicants and their legal counsel. As compensation for these additional services, the City paid Petit-Clair pursuant to the City's Professional Fee Escrow Ordinance.

Upon learning that the City was keen on reducing its expenses, coupled with the fact that Petit-Clair's primary concern pertained to pension and health benefits in retirement rather than to current pay, Petit-Clair did not increase his hourly rate for his nonsalaried work and eventually ceased billing the City for his work outside of City Hall altogether.

The State of New Jersey conducted an investigation into possible improper participation by professional service providers in the state pension system, which investigation ultimately resulted in the enactment of N.J. Stat. Ann. § 43:15A-7.2, effective

July 1, 2008. *See* A-14. In relevant part, the statute provides as follows:

> A person who performed professional services for a political subdivision of this State . . . shall not be eligible, on the basis of performance of those professional services, for membership in [PERS], if the person meets the definition of independent contractor as set forth in regulation or policy of the federal Internal Revenue Service for the purposes of the Internal Revenue Code.

N.J. Stat. Ann. § 43:15A-7.2(b).

In July 2008, the City's Interim Business Administrator, Respondent Gregory Fehrenbach ("Fehrenbach"), not only sought to comply with the new statutory mandate but also sought to deal with the City's financial troubles by eliminating, or at least minimizing, the City's expenses. *See* A-15.

In October 2009, the City enacted an ordinance that limited health benefits in retirement to full-time employees who had worked continuously for at least 25 years and were employed prior to January 1, 2008. *See* A-14, A-19.

In 2011, after Petit-Clair had met the years of service and age requirements for postemployment pension and health-care benefits, he informed the City that he was contemplating retirement. *See* A-3. At that time, however, the City (at Fehrenbach's

direction) informed Petit-Clair that he was no longer entitled to paid health-care benefits in retirement. *See* A-3, A-15. When Petit-Clair inquired of the mayor, he was told not to worry and that it would be straightened out. Believing the determination was made in error, Petit-Clair immediately withdrew his retirement application with the intention to remain on the job until the matter was resolved.

In 2012, Fehrenbach retained outside legal counsel to review Petit-Clair's status with the City, but in doing so, he provided counsel with false facts so as to elicit a conclusion that Petit-Clair was not an employee with, but rather an independent contractor of, the City. *See* A-15, A-21. Notably, Fehrenbach did not notify Petit-Clair of his ongoing investigation, nor did Fehrenbach solicit any information from Petit-Clair in the matter.

In August 2012, the City formally notified Petit-Clair (and PERS) that Petit-Clair was being retroactively removed from PERS effective January 1, 2008 and that his continued service to the City would need to be in the form of a professional services contract.

In February 2013, Fehrenbach collaborated with the City's Chief Financial Officer to complete two forms which sought to determine whether Petit-Clair was an employee or an independent contractor. The City's answers on the forms heavily favored a finding of independent contractor status, and, thus, the City concluded that Petit-Clair was an independent contractor rather than an employee of the City.

In filling out these forms, however, Fehrenbach answered the questions falsely and incompletely in an effort to substantiate his desire to characterize Petit-Clair as an independent contractor rather than as an employee. In depositions of Fehrenbach taken in March 2014, Fehrenbach's falsehoods were exposed and he admitted to numerous incorrect answers.

For instance, Fehrenbach admitted that a former part-time prosecutor for the City who retired in September 2009 was receiving health benefits in retirement even though the City had adopted the ordinance limiting health benefits in retirement to full-time retirees three months before the former prosecutor's retirement. Although Fehrenbach claimed that this was an error of a staff person, six years later, at the time of Fehrenbach's depositions, the former prosecutor was still receiving health insurance in retirement.

Also as part of the PERS investigation, Fehrenbach responded to a proffered IRS questionnaire by providing additional false and misleading information about Petit-Clair's employment with the City. *See* A-21. For instance, Fehrenbach falsely asserted that Petit-Clair was hired pursuant to a request for proposal when that was clearly not the case. Moreover, Fehrenbach provided several pieces of misleading information. For instance, Fehrenbach asserted that the City never provided Petit-Clair with a performance evaluation or with vacation/sick/administrative leave; although all true, that was solely because Petit-Clair was a part-time employee, and the City provided those things only to

full-time employees. Similarly, Fehrenbach asserted that Petit-Clair was appointed on a yearly basis; although true, the undisputed evidence was that the City routinely had appointed Petit-Clair every single year for in excess of 25 years.

In January 2014, PERS notified Petit-Clair that as a result of its investigation, Petit-Clair's eligibility to participate in PERS was terminated effective January 1, 2008.

In November 2014, Petit-Clair commenced the instant litigation alleging, inter alia, that based upon the above-recited actions and omissions, Fehrenbach had tortiously injured Petit-Clair. *See* A-17. In August 2015, the District Court granted Fehrenbach's motion to dismiss the claims against him, and it dismissed those claims with prejudice. *See* A-3, A-22 to A-23.

The Purported Settlement

As previously noted, Petit-Clair's employment included City-provided health-care coverage for both himself and his dependents, including Petit-Clair's son, Petitioner Matthew J. Petit-Clair ("Matthew"). *See* A-13 to A-14.

In 2007, at 17 years of age, Matthew was diagnosed with a progressive disability that weakened his legs. *See* A-16. In 2009, Matthew's condition had progressed such that he became eligible for Social Security disability benefits.

Since 2012, Petit-Clair has been a tenant in the City's marina. After Superstorm Sandy destroyed the marina, the City rebuilt the marina in 2013. Yet other than the bathrooms, the rebuilt marina made no provisions for disabled boaters. *See* A-16 to A-17.

By 2014, Matthew's disability had rendered it difficult and dangerous for him to get on and off Petit-Clair's boat at the City's marina. The City repeatedly refused Petit-Clair's requests to permit him to install a lift at the boat dock at Petit-Clair's own expense. *See* A-17, A-31.

In November 2014, Petit-Clair and Matthew commenced the instant litigation, alleging, inter alia, that based upon the above-recited actions and omissions, the City had violated the Americans with Disabilities Act ("ADA"). *See* A-7, A-30 to A-31.

In October 2016, the parties allegedly verbally agreed to a settlement regarding the pending ADA claims. *See* A-7 to A-8. In short, the substantive terms of the purported agreement were as follows: (1) the City would construct and/or install an ADA-compliant lift for Petit-Clair's son in the marina for the start of the 2017 boating season (i.e., April 15, 2017); and (2) the City would pay Petit-Clair $7,500 as and for attorney's fees. *See* A-31.

Shortly thereafter, however, Petit-Clair and Matthew withdrew their purported agreement to a settlement and sought to proceed with litigation. *See* A-8, A-31. After the instant lawsuit was filed, the City engaged in bad faith with regard to Petit-Clair and the

payment of attorney's fees due and owing for services rendered. *See* A-31. Furthermore, Petit-Clair and Matthew recognized that the installation of a lift at the marina would not be sufficient to permit Matthew to safely utilize the boat slip without ADA-compliant grading of the ramp also.

Meanwhile, however, in January 2017, the City forwarded a draft copy of a settlement agreement to Petit-Clair for review, and in February 2017, the City formally authorized the settlement by resolution. *See* A-8, A-31 to A-32.

In March 2017, the City filed a Motion to Enforce Settlement. *See* A-30, A-32. Over Petit-Clair and Matthew's opposition, the District Court granted the City's Motion to Enforce Settlement of the ADA claims. *See* A-8, A-37.

The Proceedings Below

The District Court for the District of New Jersey had original jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1367. *See* A-2.

The District Court dismissed Petit-Clair's Second Amended Complaint against Fehrenbach with prejudice. *See* A-23, A-29. The District Court also granted the City's Motion to Enforce Settlement on the Petitioners' ADA claims. *See* A-30, A-37.

The Court of Appeals for the Third Circuit had jurisdiction over this matter pursuant to 28 U.S.C. § 1291. *See* A-2.

The Third Circuit affirmed both of the above-referenced decisions of the District Court and then denied the Petitioners' Motion for Rehearing. *See* A-1 to A-11 & A-38 to A-39, respectively.

Thereafter, the Petitioners timely filed the instant Petition for Writ of Certiorari. *See supra* Statement of Jurisdiction.

REASONS FOR GRANTING THE WRIT

In the instant case, the District Court committed two distinct errors, contained in two distinct orders, both of which require that this Court reverse and remand the case for further proceedings. Despite the well-established standards of review for a motion to dismiss and a motion for summary judgment, the lower courts' decisions here have so far departed from the accepted and usual course of judicial proceedings (as defined by this Court and the rules promulgated by this Court) as to call for an exercise of this Court's supervisory power.

First, Petit-Clair stated plausible tort claims against Fehrenbach. Liberally construing the complaint, as amended, as required by the applicable standard of review, Petit-Clair sufficiently stated a claim for fraud and/or negligent misrepresentation against Fehrenbach based on Fehrenbach's false and misleading information about Petit-Clair's employment status with the City, which proximately caused Petit-Clair to lose significant retirement benefits. Further, even if Petit-Clair's current allegations failed to state a claim against Fehrenbach,

the District Court abused its discretion by dismissing the tort claims with prejudice rather than allowing Petit-Clair an opportunity to amend the allegations.

Second, there was no valid and enforceable settlement agreement between the Petitioners and the City regarding the ADA claims. Viewing the facts and evidence in the light most favorable to the Petitioners, as required by the applicable standard of review, no reasonable factfinder could conclude that there was a valid and enforceable contract between the parties to settle the dispute. Substantively, this is so for any one of three reasons: (1) the Petitioners withdrew the offer to settle prior to the City's acceptance thereof; (2) the City's purported acceptance failed to include a material provision of the alleged terms of settlement; and (3) several express conditions precedent to the purported agreement remained unsatisfied.

With regard to both of the errors summarized above, the Petitioners were prematurely precluded from having their day in court. If this pattern and practice is permitted to continue, it will have widespread and detrimental effects on the ability of all plaintiffs to have a full and fair trial on the merits of their civil claims within the federal judiciary. Accordingly, this case presents a question of exceptional importance, potentially affecting all persons who are or may become plaintiffs in the federal court system.

I. THE DISTRICT COURT ERRED IN GRANTING THE MOTION TO DISMISS THE TORT CLAIMS AGAINST FEHRENBACH

A. Petit-Clair Stated Plausible Tort Claims Against Fehrenbach

1. Standard of Review

The party seeking dismissal "bears the burden of showing that no claim has been presented." *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005). "To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to state a claim to relief that is plausible on its face." *Santiago v. Warminster Twp.*, 629 F.3d 121, 128 (3d Cir. 2010) (quoting *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 262 n.27 (3d Cir. 2010)).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While "[t]he plausibility standard is not akin to a 'probability requirement' . . . it asks for more than a sheer possibility." *Id.*

Significantly, in making that determination, the courts are "required to accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the nonmovant." *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 154 n.1 (3d Cir.

2014) (quoting *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994)).

Moreover, "[i]n deciding a Rule 12(b)(6) motion, a court must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010). Thus, the court "may consider documents 'integral to or explicitly referred to in the complaint' without turning a motion to dismiss into a motion for summary judgment." *In re Lipitor Antitrust Litig.*, 868 F.3d 231, 250 (3d Cir. 2017) (quoting *Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014)).

2. Petit-Clair Stated a Plausible Fraud Claim Against Fehrenbach

There are five elements of a common-law fraud claim under New Jersey law: "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." *Allstate N.J. Ins. Co. v. Lajara*, 222 N.J. 129, 147, 117 A.3d 1221, 1231 (2015) (quoting *Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 172-73, 876 A.2d 253, 260 (2005)).

In the instant case, Petit-Clair sufficiently alleged that Fehrenbach (1) made several material misrepresentations of fact regarding Petit-Clair's

position as ZBA Attorney, *see* A-62 (¶ 13), A-64 (¶ 17); (2) knowing them to be false, *see* A-62 (¶ 13), A-63 (¶ 16); (3) with the intent that the City Council and PERS rely thereon, *see* A-63 (¶ 16); (4) that the City Council and PERS did, in fact, reasonably rely thereon by reclassifying Petit-Clair as an independent contractor rather than as an employee, *see* A-60 (¶ 7), A-62 (¶ 13) to A-63 (¶ 15); and (5) Petit-Clair suffered damage thereby when the City Council terminated Petit-Clair's employment and retirement benefits and PERS removed several years of earned pension credits, *see* A-56 to A-57 (¶ 37).

Admittedly:

> With allegations of fraud, "a party must state with particularity the circumstances constituting fraud or mistake," although "intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b); *see also U.S. ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 307 (3d Cir. 2016) ("A plaintiff alleging fraud must therefore support its allegations 'with all of the essential factual background that would accompany the first paragraph of any newspaper story—that is, the who, what, when, where and how of the events at issue.'" (quoting *In re Rockefeller Ctr. Props., Inc. Securities Litig.*, 311 F.3d 198, 217 (3d Cir. 2002))) . . . . In doing so, "a party must plead [its] claim with

> enough particularity to place defendants on notice of the 'precise misconduct with which they are charged.'" *United States ex rel. Petras v. Simparel, Inc.*, 857 F.3d 497, 502 (3d Cir. 2017) (quoting *Lum v. Bank of Am.*, 361 F.3d 217, 223-24 (3d Cir. 2004), *abrogated on other grounds by Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

Lipitor Antitrust Litig., 868 F.3d at 249.

In the instant case, Petit-Clair clearly satisfied this heightened pleading requirement. *See* A-62 (¶ 13) ("Defendant Fehrenbach . . . submitted false, inaccurate, and incomplete factual synopsis of [Petit-Clair's] position . . . to . . . obtain [an] opinion . . . [that he was] disqualified from PERS . . . [and] ineligible for health insurance in retirement, [all with the] intent to harm Plaintiffs."), A-63 (¶ 16) (although the ZBA hired Petit-Clair just once, as permanent part-time employee in 1990, pursuant to statutory authority giving the ZBA broad discretion in such matters, "Defendant Fehrenbach concocted Ordinance 1658-2012, enacted on 12/27/2012, declaring that the [ZBA] shall annually appoint and fix the compensation of its attorney" "to make it appear as if Plaintiff is appointed for only a one-year term"), A-64 (¶ 17) ("In 2013, Plaintiff filed an SS-8 application with the IRS to attempt to get its determination of his status as an employee. In response to the IRS inquiry to Defendant City, Defendant Fehrenbach indicated that Plaintiff's salary covers his preparation of resolutions in his office

(which is false), and he falsely represented that if Plaintiff is unable to attend a meeting, he must pay for another attorney to cover him.").

Therefore, taking the factual allegations of the Complaint as true, as the courts must on a Rule 12(b)(6) motion to dismiss, Petit-Clair sufficiently alleged a plausible fraud claim against Fehrenbach.

3. Petit-Clair Stated a Plausible Negligent Misrepresentation Claim Against Fehrenbach

Under New Jersey law, "[n]egligent misrepresentation is . . . [a]n incorrect statement, negligently made and justifiably relied on, [and] may be the basis for recovery of damages for economic loss . . . sustained as a consequence of that reliance." *Kaufman v. i-Stat Corp.*, 165 N.J. 94, 109, 754 A.2d 1188, 1195 (2000) (quoting *H. Rosenblum, Inc. v. Adler*, 93 N.J. 324, 334, 461 A.2d 138, 142-43 (1983)).

"The elements of negligent misrepresentation are essentially the same as those of common law fraud except negligent misrepresentation does not require scienter." *Intarome Fragrance & Flavor Corp. v. Zarkades*, Civ. No. 07-873 (DRD), 2009 WL 931036, at *12 (D.N.J. Mar. 30, 2009) (not for publication). Indeed, "[b]ecause negligent misrepresentation does not require scienter as an element, it is easier to prove than fraud." *Kaufman*, 165 N.J. at 110, 754 A.2d at 1196.

Thus, for the same reasons specified above with regard to fraud, so too did Petit-Clair sufficiently allege negligent misrepresentation against Fehrenbach. *See supra* Part I.A.2.

Therefore, taking the factual allegations of the complaint as true, as the courts must on a Rule 12(b)(6) motion to dismiss, Petit-Clair sufficiently alleged a plausible negligent misrepresentation claim against Fehrenbach.

B. Alternatively, Even If Petit-Clair Failed To State Tort Claims Against Fehrenbach, Such Claims Should Not Have Been Dismissed With Prejudice

Even if the dismissal of the tort claims against Fehrenbach were warranted, the question remains whether such dismissal should have been with prejudice or whether Petit-Clair should have been permitted to file an amended complaint to remedy the deficiencies of the previous complaint.

1. Standard of Review

"The Federal Rules of Civil Procedure allow for the liberal amendment of pleadings[1] and the decision whether such leave should be granted is 'committed to the sound discretion of the district court.' As such, we review a district court's determination only for abuse

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[1] *See* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave when justice so requires.").

of discretion." *Langbord v. U.S. Dep't of Treas.*, 832 F.3d 170, 188 (3d Cir. 2016) (quoting *CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612, 629 (3d Cir. 2013)).

2. The District Court Abused Its Discretion in Dismissing the Tort Claims with Prejudice

This Court has characterized dismissal with prejudice as a "harsh remedy." *New York v. Hill*, 528 U.S. 110, 118 (2000). Accordingly:

> The Third Circuit has adopted a particularly liberal approach in favor of permitting pleading amendments to ensure that "a particular claim will be decided on the merits rather than on technicalities." *Dole v. Arco Chem. Co.*, 921 F.2d 484, 487 (3d Cir. 1990). Indeed, where a complaint is dismissed on Rule 12(b)(6) grounds "a District Court *must* permit a curative amendment, unless an amendment would be inequitable or futile." *Alston v. Parker*, 363 F.3d 229, 235 (3d Cir. 2004) (emphasis added).

Animal Sci. Prods., Inc. v. China Minmetals Corp., 34 F. Supp. 3d 465, 515-16 (D.N.J. 2014).

In the context of a Rule 12(b)(6) motion, "futility" means that even if amended, the complaint would still fail to state a claim upon which relief could

be granted. *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997).

In the instant case, Petit-Clair's tort claims against Fehrenbach are not futile, because even if somewhat vague, the allegations in the Second Amended Complaint reflect a realistic possibility that the facts may well establish the alleged torts. *See Bhd. Mut. Ins. Co. v. ADT LLC*, 978 F. Supp. 2d 1001, 1003 (D. Minn. 2013) (dismissal without prejudice was warranted where plaintiff's negligence allegation, though vague, sufficiently reflected possibility that facts might demonstrate that negligence occurred); *cf. Cowell v. Palmer Twp.*, 263 F.3d 286, 296 (3d Cir. 2001) (where the plaintiff cannot overcome a statute of limitations, a proposed amendment would be futile).

In the context of a Rule 12(b)(6) motion, "inequitable" means "undue delay, bad faith or dilatory motives" by the amending party or "prejudice [to] the other party." *Hill v. City of Scranton*, 411 F.3d 118, 134 (3d Cir. 2005). Here, Petit-Clair's tort claims against Fehrenbach are not inequitable.

"Delay is 'undue' when it places an unwarranted burden on the Court or if the plaintiff has had previous opportunities to amend." *In re Caterpillar Inc.*, 67 F. Supp. 3d 663, 668 (D.N.J. 2014) (citing *Estate of Oliva ex rel. McHugh v. New Jersey*, 604 F.3d 788, 803 (3d Cir. 2010)). Even though Petit-Clair is seeking to file a fourth amended complaint, that alone is no basis to dismiss with prejudice. *See, e.g.*, *Bush v. Dep't of Human Servs.*, No. 2:11-CV-2612, 2013 WL 6164072 (E.D. Pa. Nov. 20, 2013) (dismissing third amended

complaint without prejudice and granting plaintiff another opportunity to amend the complaint and state a claim upon which relief can be granted).

Moreover, there is no evidence of bad faith on Petit-Clair's part but, rather, solely good-faith attempts to set forth the claims in an effort to right a perceived wrong. *See "Bad Faith," Black's Law Dictionary* (10th ed. 2014) ("Dishonesty of belief, purpose, or motive").

Nor will Fehrenbach be prejudiced by granting Petit-Clair leave to amend.

> Prejudice involves the irretrievable loss of evidence, the dimming of witnesses' memories, or the excessive irremediable burdens or costs imposed on the non-moving party if an amendment is granted. *Briscoe v. Klaus*, 538 F.3d 252, 259 (3d Cir. 2008); *Cureton v. NCAA*, 252 F.3d 267, 273 (3d Cir. 2001). Prejudice also may include significantly delaying the resolution of the case. *Long v. Wilson*, 393 F.3d 390, 400 (3d Cir. 2004). Incidental prejudice and delay are insufficient grounds on which to deny leave to amend. *TransWeb, LLC v. 3M Innovative Properties Co.*, C.A. No. 10-4413(FSH), 2011 WL 2181189, at *8 (D.N.J. June 1, 2011). None of this will result from plaintiffs' amendment.

Caterpillar Inc., 67 F. Supp. 3d at 668.

Therefore, even assuming, arguendo, that dismissal is appropriate for Petit-Clair's tort claims against Fehrenbach, such dismissal should have been without prejudice so that Petit-Clair would have had an opportunity to cure the perceived defects in the complaint.

II. THE DISTRICT COURT ERRED IN GRANTING THE MOTION TO ENFORCE SETTLEMENT REGARDING THE ADA CLAIMS

A. Standard Of Review

"Courts treat a motion to enforce settlement under the same standard as a motion for summary judgment because the central issue is whether there is any disputed issue of material fact as to the validity of the settlement agreement." *Brumbaugh v. US Airways Group, Inc.*, No. 09-5981, 2011 WL 1983356, at *2 (D.N.J. May 20, 2011) (citing *Washington v. Klem*, 388 F. App'x 84, 85 (3d Cir. 2010) (in turn citing *Tiernan v. Devoe*, 923 F.2d 1024, 1031 (3d Cir. 1991))).

The court may grant summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In resolving a motion for summary judgment, the court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

In making this determination, the court must view the evidence and facts in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). In fact, "a district court may not make credibility determinations or engage in any weighing of the evidence; instead, the non-moving party's evidence 'is to be believed and all justifiable inferences are to be drawn in his favor.'" *Brumbaugh*, 2011 WL 1983356, at *2 (quoting *Marino v. Indus. Crating Co.*, 358 F.3d 241, 247 (3d Cir. 2004) (in turn quoting *Anderson*, 477 U.S. at 255)).

B. There Was No Valid And Enforceable Settlement Agreement Between The Parties

"The validity and enforceability of settlement agreements is governed by state contract law." *Shell's Disposal & Recycling, Inc. v. City of Lancaster*, 504 F. App'x 194, 200 (3d Cir. 2012).

"A settlement agreement between parties to a lawsuit is a contract." *Cumberland Farms, Inc. v. N.J. Dep't of Envtl. Prot.*, 447 N.J. Super. 423, 438, 148 A.3d 767, 776 (App. Div. 2016) (quoting *Nolan v. Lee Ho*, 120 N.J. 465, 472, 577 A.2d 143, 146 (1990)).

The burden of proving that the parties entered into a settlement agreement is upon the party seeking to enforce the settlement. *See Amatuzzo v. Kozmiuk*, 305 N.J. Super. 469, 475, 703 A.2d 9, 12 (App. Div. 1997). "It is only where a contract of settlement is actually held to exist that the party seeking to vacate

the settlement must show compelling circumstances." *Id.*, 703 A.2d 11-12 (citing *Nolan*, 120 N.J. at 472, 577 A.2d at 146).

In the instant case, the City failed to establish on any one of three grounds a valid and enforceable settlement agreement as a matter of law. *See infra* Part II.B. At worst, there exists a genuine issue of material fact as to the purported settlement. In either event, there was no basis to grant the City's Motion to Enforce Settlement. *See, e.g.*, *Brumbaugh*, 2011 WL 1983356, at *3; *Castrellon v. Ocwen Loan Servicing, LLC*, 721 F. App'x 346 (5th Cir. 2018).

1. Petit-Clair Withdrew the Offer to Settle Prior to the City's Acceptance

The pertinent law on contract formation has long been well established:

> "A contract arises from offer and acceptance, and must be sufficiently definite 'that the performance to be rendered by each party can be ascertained with reasonable certainty.'" *Weichert Co. Realtors v. Ryan*, 128 N.J. 427, 435, 608 A.2d 280 (1992) (quoting *West Caldwell v. Caldwell*, 26 N.J. 9, 24-25, 138 A.2d 402 (1958)). . . . Thus, "[i]t is requisite that there be an unqualified acceptance to conclude the manifestation of assent." *Weichert Co. Realtors, supra*, 128 N.J. at 435-36, 608 A.2d 280 (quoting

> *Johnson & Johnson* [*v. Charmley Drug Co.*, 11 N.J. 526, 539, 95 A.2d 391 (1953)]). "In the very nature of the contract, acceptance must be absolute" and "unequivocally shown." *Johnson & Johnson, supra*, 11 N.J. at 538, 95 A.2d 391.

Cumberland Farms, 447 N.J. Super. at 439, 148 A.3d at 776.

Moreover, "parties in New Jersey are . . . presumed to have contracted with reference to the existing law." *Camden Bd. of Educ. v. Alexander*, 181 N.J. 187, 195, 854 A.2d 342, 347 (2004) (quoting *Silverstein v. Keane*, 19 N.J. 1, 13, 115 A.2d 1, 7 (1955)). Being that the City is a municipal corporation, the City has limited authority in how it goes about taking certain actions.

> "It is axiomatic that municipal bodies in this State have no powers other than those granted by the Legislature, and must perform their prescribed activities within the statutory ambit." *Sinclair Refining Co. v. County of Bergen*, 103 N.J.Super. 426, 433, 247 A.2d 484 (App.Div.1968), *certif. denied*, 53 N.J. 272, 250 A.2d 136 (1969). "[T]here is no inherent right of local self-government. Municipalities are but creatures of the State, limited in their powers and capable of exercising only those powers of government granted to

> them by the Legislature." *Sussex Woodlands, Inc. v. Mayor and Council of West Milford*, 109 N.J.Super. 432, 434-35, 263 A.2d 502 (Law Div.1970) (citation and internal quotation marks omitted).

Kress v. La Villa, 335 N.J. Super. 400, 409-10, 762 A.2d 682, 687 (App. Div. 2000).

As is relevant here, although "a municipal corporation may, generally speaking, deal with its contracts and adjust and settle claims against it in the same manner as a natural person," *Edelstein v. City of Asbury Park*, 51 N.J. Super. 368, 389-90, 143 A.2d 860, 872 (App. Div. 1958), the power of a municipality to enter into contracts is limited by the authority granted to it by the Legislature, and the Legislature has provided that a municipality can "'only act by resolution or ordinance,'" *Kress*, 335 N.J. Super. at 411, 762 A.2d at 687 (quoting *Midtown Props., Inc. v. Twp. of Madison*, 68 N.J. Super. 197, 208, 172 A.2d 40, 46 (Law Div. 1961)). *See also Cooper Med. Ctr. v. Johnson*, 204 N.J. Super. 79, 82, 497 A.2d 909, 910 (Law Div. 1985) ("It is well settled that a municipal corporation cannot be bound in contract, express or implied, unless the officer or employee has authority to enter into such a contract on behalf of the corporation. . . . The authority to contract on behalf of a municipality is vested solely in the governing body of that municipality.").

In the instant case, before the City adopted a resolution approving the proposed settlement, Petit-

Clair rescinded his offer and thus thwarted the purported agreement.

Accordingly, Petit-Clair withdrew his offer to settle the matter prior to the City's acceptance thereof. *See, e.g.*, *Cumberland Farms*, 447 N.J. Super. at 439, 148 A.3d at 776 (a state agency did not accept citizen's offer to settle their dispute and, thus, no enforceable settlement agreement was created where the state employees did not have authority to unilaterally enter into a binding settlement agreement); *Lenape Reg'l High Sch. Dist. Bd. of Educ. v. G.P.*, 2010 WL 4054130, at *4 (N.J. Super. Ct. App. Div. Aug. 23, 2010) (unpublished opinion) ("In this case, we have no indication that the district's board of education formally approved the agreements it now seeks to enforce. Without the board's express and formal approval, no contract can be deemed legally enforceable.").

In the decision(s) below, the courts ruled that the parties had previously verbally agreed to the settlement. *See* A-8 to A-11, A-33. Significantly, however, the courts' analysis skips over the threshold issue of the City's limitations as a municipal corporation, i.e., the City could not take any action, including entering into an enforceable contract to settle the parties' dispute, absent a resolution or ordinance. *See City of Jersey City v. Roosevelt Stadium Marina, Inc.*, 210 N.J. Super. 315, 327, 319, 509 A.2d 808, 815, 811 (App. Div. 1986) (given that "municipalities can ordinarily act only by adoption of an ordinance or resolution at a public meeting," "it would seem to be belaboring the obvious to observe

that formal governmental action was required to approve a settlement"), *cert. denied*, 110 N.J. 152, 540 A.2d 156 (1988); *accord Pote v. Pine Hill Mun. Utils. Ass'n*, 2013 WL 3357654 (N.J. Super. Ct. App. Div. July 5, 2013) (unpublished opinion) (affirming trial court's denial of plaintiff's motion to enforce settlement where plaintiff failed to establish that the parties had entered into a verbal settlement agreement between the respective attorneys given that the utility never obtained municipal approval therefor).

Indeed:

> "Any exercise of a delegated power by a municipality in a manner not within the purview of the governing statute is capricious and ultra vires of the delegated powers." *Giannone v. Carlin*, 20 N.J. 511, 517, 120 A.2d 449 (1956). "A municipality in exercising the power delegated to it must act within such delegated power and cannot go beyond it. Where the statute sets forth the procedure to be followed, no governing body, or subdivision thereof, has the power to adopt any other method of procedure." *Midtown Properties, Inc., supra*, 68 N.J. Super. at 207, 172 A.2d 40.

Kress, 335 N.J. Super. at 410-11, 762 A.2d at 687.

And, as previously noted, a municipal contract can only be authorized by ordinance or resolution of the governing body. *See id.* at 411, 762 A.2d at 687;

Cooper Med. Ctr., 204 N.J. Super. at 82, 497 A.2d at 910. Thus, the City's purported preresolution acceptance was a legal nullity.

Also in its opinions, the courts below ruled that the passage of a municipal resolution approving the settlement was merely an implied condition precedent of the settlement contract. *See* A-9 to A-10, A-34 to A-35. Once again, however, this skips over the threshold matter of the City's limitations as a municipal corporation. *See supra* discussion in text.

"Traditionally, the general rule that prohibits a court from rewriting the parties' agreement while purporting to construe it also prevents a court from adding terms or provisions to the contract." 11 *Williston on Contracts* § 31:6 (4th ed. & Westlaw database updated May 2017) (footnotes omitted); *accord Nationwide Emerging Mgrs., LLC v. NorthPointe Holdings, LLC*, 112 A.3d 878, 897 (Del. 2015) ("An interpreting court cannot use an implied covenant to re-write the agreement between the parties[.]").

Clearly, if the parties truly intended for the agreement to be contingent upon such an implied term, the parties easily could have so stated in their express agreement. *See* 17A C.J.S. *Contracts* § 450 (Westlaw database updated Sept. 2017) ("A condition precedent may not be implied when it might have been seen and provided for by express agreement." (footnote omitted)).

Thus, the judicial imposition of an implied condition precedent to the alleged contract here is wholly unwarranted. *See, e.g.*, *Bistrian Gravel Corp. v. Wainscott N.W. Assocs.*, 116 A.D.2d 681, 681, 497 N.Y.S.2d 748, 749 (1986) ("[T]he oral agreement between the parties did not make approval of the fire department a condition precedent for payment [and thus] the trial court properly refused to construe the parties' agreement as being conditioned upon an implied duty to obtain such fire department approval.").

2. The City's Purported Acceptance of the Offer Failed to Include a Material Term Thereof

It is a fundamental concept of contract law that "there must be an unqualified acceptance of the offer for there to be a contract." *Gamble v. Connolly*, 399 N.J. Super. 130, 141, 943 A.2d 202, 208 (Civ. Div. 2007) (citing *Weichert Co. Realtors v. Ryan*, 128 N.J. 427, 608 A.2d 280 (1992)).

In the instant case, Petit-Clair made an offer to the City to settle the litigation if the City would agree to pay Petit-Clair $7,500 in legal fees as well as construct and install an ADA-compliant lift in the municipal marina so that Matthew could use and enjoy the marina slip. Yet the City Council's purported formal approval of the alleged settlement of this matter by resolution authorized only the monetary payment of $7,500 and was silent as to the

construction and/or installation of an ADA-compliant lift.

Accordingly, the City resolution was not an unqualified acceptance of the Petit-Clairs' offer but, rather, was a counteroffer. *See Carlin v. City of Newark*, 36 N.J. Super. 74, 89, 114 A.2d 761, 768 (Law Div. 1955) ("A qualified or conditional acceptance containing terms and conditions not found in the original proposal may operate as a counter-offer but does not constitute an acceptance and does not result in the formation of a valid contract binding upon the parties.").

Given that Matthew was unable to utilize the marina slip without the ADA-compliant lift, such term was clearly essential to the Petit-Clairs' offer of settlement. *See Roach v. BM Motoring, LLC*, 228 N.J. 163, 174-75, 155 A.3d 985, 991-92 (2017) ("'[A] breach is material if it goes to the essence of the contract.' *Ross Sys. v. Linden Dari–Delite, Inc.*, 35 N.J. 329, 341, 173 A.2d 258 (1961). To determine if a breach is material, we adopt the flexible criteria set forth in Section 241 of the Restatement (Second) of Contracts (1981) . . . [which includes] 'the extent to which the injured party will be deprived of the benefit which he reasonably expected[,]' quoting *Restatement (Second) supra*, § 241(a).").

Thus, the City's purported approval of the proposed settlement failed to include a material provision of the agreed terms of settlement. "In the event of a 'breach of a material term of an agreement, the non-breaching party is relieved of its obligations

under the agreement.'" *Id.* at 174, 155 A.3d at 991 (quoting *Nolan*, 120 N.J. at 472, 577 A.2d at 146); *see also Racing Props., L.P. v. Baldwin*, 885 So. 2d 881, 883 (Fla. Dist. Ct. App. 2004) ("To ignore one term of the agreement, but uphold the others, would be tantamount to the creation of a new contract.").

Accordingly, even the City's formal resolution purporting to approve the alleged settlement is invalid and/or defective. *See, e.g.*, *Beverly v. Abbott Labs.*, 817 F.3d 328, 334 (7th Cir. 2016) (applying Illinois law) (the omission of a material term in a settlement agreement renders the agreement unenforceable); *Lindsay v. Lewandowski*, 139 Cal. App. 4th 1618, 1622, 43 Cal. Rptr. 3d 846, 849-50 (2006) ("A settlement agreement, like any other contract, is unenforceable if the parties fail to agree on a material term or if a material term is not reasonably certain."; holding that a stipulated settlement agreement was unenforceable due to an uncertainty regarding a material term thereof).

3. Several Express Conditions Precedent to the Alleged Settlement Were Unfulfilled

"The parties to a contract 'may make contractual liability dependent upon the performance of a condition precedent.'" *Liberty Mut. Ins. Co. v. President Container, Inc.*, 297 N.J. Super. 24, 34, 687 A.2d 760, 766 (App. Div. 1997) (quoting *Duff v. Trenton Beverage Co.*, 4 N.J. 595, 604, 73 A.2d 578, 583 (1950)).

"A condition precedent is a fact or event . . . which must exist or occur before there is a right to immediate performance, before there is a breach of contract duty or before the usual judicial remedies are available." *Moorestown Mgmt., Inc. v. Moorestown Bookshop, Inc.*, 104 N.J. Super. 250, 262, 249 A.2d 623, 630 (Ch. Div. 1969).

In the instant case, in January 2017, the City provided Petit-Clair with a written copy of the proposed settlement agreement. *See* Full and Final Release of Plaintiffs' ADA Claims & Settlement Agrmt. (the "Writing").

Although the initial settlement terms were verbal, the Writing may be considered as evidence of the parties' intent regarding their oral agreement. *See* 17B C.J.S. *Contracts* § 961 (Westlaw database updated Sept. 2017) ("Where the existence of an alleged oral contract is in issue in the case, and the making of such a contract is disputed, all the . . . facts connected with the history of the transaction, . . . including written proposals . . . , even though never completed, are admissible in the case." (footnotes omitted)); *see also Willingboro Mall, Ltd. v. 240/242 Franklin Ave., LLC*, 421 N.J. Super. 445, 453, 24 A.3d 802, 807 (App. Div. 2011) ("The addition of terms to effectuate the settlement that do not alter the basic agreement will not operate to avoid enforcement of an agreement to settle a litigated matter.").

Alternatively, the Writing may be considered a modification of the previous oral terms of the agreement. *See Wells Reit II-80 Park Plaza, LLC v.*

Dir., Div. of Tax'n, 414 N.J. Super. 453, 465-66, 999 A.2d 489, 497 (App. Div. 2010) ("New Jersey has long recognized the ability to modify one's contract, [which] can be proved by . . . 'the actions and conduct of the parties.'" (quoting *DeAngelis v. Rose*, 320 N.J. Super. 263, 280, 727 A.2d 61, 70 (App. Div. 1999))).

In either event, the Writing states, in relevant part, that "this Agreement is made conditional upon [(1)] Plaintiffs' receipt of a fully executed original of this Agreement and [(2)] receipt of the [$7,500] payment[] . . . and [(3)] the execution of a consent order [regarding the settlement of the subject litigation]." Written Agrmt. ¶ 1(c).

Accordingly, the Writing states, in plain and unambiguous terms, that the "Agreement is made conditional upon" the happening of the above-described three events, meaning that those three events are conditions precedent to a binding and enforceable contract. *See Manahawkin Convalescent v. O'Neill*, 217 N.J. 99, 118, 85 A.3d 947, 958-59 (2014) ("If the language of a contract 'is plain and capable of legal construction, the language alone must determine the agreement's force and effect.'" (quoting *Twp. of White v. Castle Ridge Dev. Corp.*, 419 N.J. Super. 68, 74-75, 16 A.3d 399, 403 (App. Div. 2011))); *Liberty Mut. Ins.*, 297 N.J. Super. at 34, 687 A.2d at 766 (although conditions precedent are not favored, they will be enforced if clearly intended).

Significantly, none of the three conditions precedent noted in the Writing has occurred. Accordingly, the purported agreement is not a valid

and binding contract. *See, e.g.*, *Cumberland Farms*, 447 N.J. Super. at 440-41, 148 A.3d at 777 ("[T]he draft agreement expressly stated that the settlement would not be effective until it was executed by both parties. . . . Because neither party signed the marked-up version of the agreement . . . there was no final, enforceable contract between the parties."); *Felipe v. 2820 W. 36th St. Realty Corp.*, 20 A.D.3d 503, 503, 798 N.Y.S.2d 738, 738 (2005) (the delivery of a fully executed copy of the contract was a condition precedent to the formation of a binding contract, and, thus, vendor's failure to deliver a copy to the purchasers precluded an action by the purchasers to enforce the purported contract); *Racing Props.*, 885 So. 2d at 882-83 (purported settlement agreement was rendered unenforceable by lender's failure to timely complete required documentation, which was a condition precedent under the agreement).

The lower courts held that these conditions precedent were not satisfied only because of Petit-Clair's actions and omissions. *See* A-11. Indeed, the duty of good faith and fair dealing is an implied covenant in all contracts "that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Roach*, 228 N.J. at 175, 155 A.3d at 992 (quoting *Sons of Thunder, Inc. v. Borden, Inc.*, 148 N.J. 396, 420, 690 A.2d 575, 587 (1997) (in turn quoting *Palisades Props., Inc. v. Brunetti*, 44 N.J. 117, 130, 207 A.2d 522, 531 (1965))).

Yet Petit-Clair's conduct did not destroy or injure the City's rights because there was no valid and

enforceable contract between the parties in the first place. *See supra* Part II; *cf. Seidenberg v. Summit Bank*, 348 N.J. Super. 243, 258, 791 A.2d 1068, 1076 (App. Div. 2002) ("[T]he implied covenant requires that a contracting party act in good faith when exercising . . . discretion *in performing its contractual obligations*[.]" (emphasis added)).

In any event, at least one of the conditions precedent (for the City to pay Petit-Clair $7,500) was not satisfied solely due to the City's own actions and omissions; Petit-Clair's conduct had absolutely nothing to do with the failure to satisfy that condition precedent.

Although the City finally paid Petit-Clair the $7,500 in April 2017, that was only *after* Petit-Clair had withdrawn his offer to settle the case. *See supra* Part II.B.1. Accordingly, the City's purported compliance with the condition precedent was too late to be effective. *See, e.g.*, *Adams v. Suozzi*, 433 F.3d 220, 227-28 (2d Cir. 2005) (applying New York law).

CONCLUSION

In light of the foregoing arguments and authorities cited, the Petitioners respectfully request that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the Third Circuit on the questions presented herein.

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