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

Appendix

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-2624

ALFRED J. PETIT-CLAIR, JR.;
MATTHEW J. PETIT-CLAIR,
Appellants

v.

ATTORNEY GENERAL FOR THE STATE OF NEW JERSEY; COMPTROLLER FOR THE STATE OF NEW JERSEY; TREASURER FOR THE STATE OF NEW JERSEY; CITY OF PERTH AMBOY; STATE OF NEW JERSEY; GREGORY FEHRENBACH; JOEL PABON, SR.; WILLIAM A. PETRICK; KENNETH BALUT; HON. WILDA DIAZ

On Appeal from the United States District Court
for the District of New Jersey
District Court No. 2-14-cv-07082
District Judge: The Honorable William J. Martini

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
March 19, 2018

Before: SMITH, *Chief Judge*, HARDIMAN, and
ROTH, *Circuit Judges*

(Opinion Filed: April 12, 2018)

OPINION*

SMITH, Chief Judge.

Two issues are raised in this appeal. First, Alfred J. Petit-Clair, Jr., ("Petit-Clair") appeals the District Court's dismissal with prejudice of his Second Amended Complaint against one of the defendants, Gregory Fehrenbach. Second, Petit-Clair and his son, Matthew J. Petit-Clair ("Matthew"), appeal the District Court's order enforcing a settlement agreement with another defendant, the City of Perth Amboy (the "City"). We will affirm the judgment of the District Court.[1]

I.

Petit-Clair's Second Amended Complaint arose from an underl ying dispute with the City relating to his health benefits in retirement. That dispute centered on whether Petit-Clair's work as an attorney for the Perth Amboy Zoning Board of Adjustment was

*This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

[1]The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1367. We have jurisdiction under 28 U.S.C. § 1291.

performed as a part-time employee of the City or as an independent contractor. As a parttime employee, Petit-Clair would apparently be entitled to health benefits in retirement; as an independent contractor, he would not. Upon Petit-Clair's application for retirement in 2011, the City informed him that, as an independent contractor, he would not be entitled to health benefits once he stopped working.

Petit-Clair appealed the City's determination to the New Jersey Division of Pensions and Benefits, which manages the New Jersey Public Employee Retirement S ystem (PERS). The Division agreed with the City that Petit-Clair was an independent contractor. According to Petit-Clair's complaint, the Division made its determination based at least in part upon false information provided by Fehrenbach, the Perth Amboy city administrator, to a law firm, the IRS, and PERS. With correct information, Petit-Clair believes the Division would have concluded that he was an employee.

The District Court concluded that the sections of Petit-Clair's complaint related to PERS and Fehrenbach's alleged misrepresentation did not contain a "short and plain statement of the claim showing that the pleader is entitled to relief," as required by Fed. R. Civ. P. 8(a)(2). It therefore dismissed the claims against Fehrenbach with prejudice. We exercise plenary review over a District Court's grant of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *Fleisher v. Standard Ins. Co.* , 679 F.3d 116, 120 (3d Cir. 2012).

On appeal, Petit-Clair argues that his complaint sufficiently stated a claim against Fehrenbach for either fraud or negligent misrepresentation. He also argues, in the alternative, that he should be given another opportunity to amend his complaint and correct any pleading deficiencies.

In New Jersey, a cause of action for common-law fraud[2] must allege five elements: "(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; reasonable reliance thereon by the other person; and (5) resulting damages." *Allstate New Jersey Ins. Co. v. Lajara*, 117 A.3d 1221, 1231 (N.J. 2015) (quoting *Banco Popular Am. v. Gandi*, 876 A.2d 253, 260 (N.J. 2005)); *Williams v. BASF Catalysts LLC* , 765 F.3d 306, 317 (3d Cir. 2014).

The dispute on appeal is whether, under New Jersey law, the "other person" who relies upon the material misrepresentation may be a person other than the plaintiff. Petit-Clair argues that his

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[2]Petit-Clair argues that if he has not sufficiently pleaded a claim for common-law fraud, he has at least pleaded a claim for negligent misrepresentation. Under New Jersey law, "[t]he element of reliance is the same for fraud and misrepresentation." *Kaufman v. i-Stat Corp.*, 754 A.2d 1188, 1195 (N.J. 2000). Petit-Clair's negligent misrepresentation argument fails for the same reason as his fraud argument: he has not pleaded facts sufficient to show that he, rather than PERS, was misled.

complaint sufficiently pleaded common-law fraud because it alleged that PERS relied upon Fehrenbach's false statements, causing damage to Petit-Clair as a result. Fehrenbach, by contrast, argues that to be successful, any fraud claim would necessarily require Petit-Clair to plead that he himself detrimentally relied upon the false statements. Fehrenbach argues that New Jersey law does not support a common-law fraud claim based on a third party's reliance when the plaintiff himself did not rely upon the false statement. Petit-Clair cites two cases to support his theory: *Kaufman v. i-Stat Corp.*, 754 A.2d 1188, 1195 (N.J. 2000), and *District 1199P Health & Welfare Plan v. Janssen, L.P.* , 784 F. Supp. 2d 508, 532 (D.N.J. 2011). Neither case supports Petit-Clair's argument. *Kaufman* discusses the principle of indirect reliance, in accordance with which "a plaintiff [may] prove a fraud action when he or she heard a statement not from the party that defrauded him or her but from . . . someone to whom the party communicated the false statement with the intent that the victim hear it, rely on it, and act to his or her detriment." *Kaufman*, 754 A.2d at 1195. In such cases, the plaintiff still relies upon a false statement made by the defendant. In this case, Petit-Clair was not misled; he believed Fehrenbach's statements to be false, and he had the opportunity to challenge them in proceedings before the Division of Pension and Benefits.

Petit-Clair's reliance on *District 1199P* is similarly unavailing. The court dismissed certain claims because the plaintiffs had not "plead[ed] a single instance in which they, themselves, [their PBMs], or any of their prescribing doctors received a

misrepresentation of fact from Defendants and relied upon that misrepresentation in deciding to prescribe one of the Subject Drugs to Plaintiffs." *District 1199P*, 784 F. Supp. 2d at 532 (second alteration in original) (quoting *In re Schering-Plough Corp. Intron/Temodar Consumer Class Action*, No. 2:06-cv-5774, 2009 WL 2043604, at *33 (D.N.J. July 10, 2009)). Petit-Clair appears to argue that this language implies that, had a "prescribing doctor[]" rather than the plaintiff relied upon misrepresentations, the complaint would not have been dismissed. Contrary to Petit-Clair's implication, however, "a plaintiff must prove that he or she was an intended recipient of the defendant's misrepresentations," and that the plaintiff relied upon those misrepresentations. *Port Liberte Homeowners Ass'n, Inc. v. Sordoni Constr. Co.*, 924 A.2d 592, 601 (N.J. Super. Ct. App. Div. 2007); *see also In re Schering-Plough Corp.*, 2009 WL 2043604, at *33.

Petit-Clair has not presented any other authority supporting his position. Thus, we will affirm the District Court's dismissal of Petit-Clair's claims against Fehrenbach.[3]

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[3]Petit-Clair argues that his claims should not have been dismissed with prejudice, and that he should have been granted leave to amend. We review a District Court's denial of leave to amend for abuse of discretion. *United States ex rel. Schumann v. AstraZeneca Pharm. L.P.*, 769 F.3d 837, 849 (3d Cir. 2014). A District Court "should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a). Nevertheless, it may deny leave to amend when amendment would be futile. *AstraZeneca*, 769 F.3d at

II.

Petit-Clair, joined by his son Matthew, raises a second issue on appeal. They challenge the District Court's order enforcing their settlement agreement with the City that resolved their claim that the city marina was not in compliance with the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.* The Petit-Clairs contend that the District Court erred because an enforceable settlement agreement never existed.

We review a District Court's grant of a motion to enforce a settlement *de novo*, in much the same way as we review the grant of a motion for summary judgment. *Tiernan v. Devoe*, 923 F.2d 1024, 1031–32 & n.5 (3d Cir. 1991). The movant is entitled to an order enforcing the settlement if, treating the nonmovant's assertions as true, the movant is entitled to the enforcement of the settlement as a matter of law. *Id.* at 1032. New Jersey contract law governs our interpretation of the settlement agreement. *See id.*

The Petit-Clairs do not dispute that, in November 2016, they reached an oral agreement with

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849. Petit-Clair argues that amendment would not be futile because his allegations could be supported with further factual development. Appellants' Br. 20. Nevertheless, the legal inadequacy of Petit-Clair's claim will not be fixed by additional factual development. We will affirm the dismissal of Petit-Clair's claim with prejudice. *See AstraZeneca*, 769 F.3d at 849.

the to settle the ADA claims.[4] In January 2017, the Petit-Clairs purportedly withdrew what they refer to as their "settlement offer." The following month, the passed a formal resolution authorizing the settlement in accordance with the November agreement.

The District Court concluded, over the Petit-Clairs' objections, that the November oral agreement was enforceable, and as a consequence, the Petit-Clairs' purported revocation of their offer was ineffective.

The Petit-Clairs make three arguments on appeal. First, they argue that the November agreement was not enforceable because they withdrew from it before the City passed a formal resolution authorizing the settlement, which the Petit-Clairs view as necessary for the City to accept the agreement. Second, the Petit-Clairs argue that the formal resolution eventually passed by the omitted a material term of the agreement, and was therefore ineffective as an acceptance. Finally, the Petit-Clairs argue that the agreement contained several conditions precedent to their performance which have not been fulfilled, and therefore they are not obligated to release their claims against the City.

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[4]The parties' settlement discussions were mediated in part by the Honorable Mark Falk, United States Magistrate Judge for the District of New Jersey. App. at 140. Petit-Clair later confirmed the existence of the oral agreement in writing, in a letter to the City's counsel dated November 16, 2016. App. at 112, 141.

As a general rule in New Jersey, "a municipal corporation may . . . deal with its contracts and adjust and settle claims against it in the same manner as a natural person." *Edelstein v. of Asbury Park*, 143 A.2d 860, 872 (N.J. Super. Ct. App. Div. 1958). And again, generally speaking, oral agreements are enforceable even if they are not fixed in writing. *Pascarella v. Bruck*, 462 A.2d 186, 189 (N.J. Super. Ct. App. Div. 1983). The Petit-Clairs argue, however, that a municipality, unlike a natural person, may not be bound by an oral agreement, since a municipality can "only act by resolution or ordinance." *Kress v. La Villa*, 762 A.2d 682, 687 (N.J. Super. Ct. App. Div. 2000). In the Petit-Clairs' view, the was required to perfect its acceptance of the offer before the settlement became binding on the Petit-Clairs. The City, on the other hand, argues that the need to ratify a settlement to which counsel have agreed is "an implied condition precedent to the maturation of the remaining duties under the settlement agreement." *Ostman v. St. John's Episcopal Hosp.*, 918 F. Supp. 635, 644 (E.D.N.Y. 1996).

Under New Jersey law, "terms may be implied in a contract . . . because they are necessarily involved in the contractual relationship so that the parties must have intended them and have only failed to specifically express them because of sheer inadvertence or because the term was too obvious to need expression." *Palisades Props., Inc. v. Brunetti*, 207 A.2d 522, 531 (N.J. 1965). More specifically, to find that an implied condition precedent exists, the fulfillment of that condition must have "constituted such an essential and requisite element of the agreement that its destruction

or cessation demolishes the attainment of the vital and fundamental purpose of the contracting parties, not merely one or a few of a variety of their purposes." *Edwards v. Leopoldi*, 89 A.2d 264, 271 (N.J. Super. Ct. App. Div. 1952).

As the District Court found, Petit-Clair was well-aware of the City's resolution process used in approving payments of fees and settlements, and had in fact received payment from the by that mechanism regularly in the past. App. at 141. Given the parties' familiarity with the resolution process, we conclude that the City's need to pass a resolution to authorize performance under the settlement agreement was "too obvious to need expression." *Palisades*, 207 A.2d at 531. And we have no difficulty concluding that the City's failure to pass a resolution authorizing the settlement would have "demolishe[d] the . . . fundamental purpose of the contracting parties," *Edwards*, 89 A.2d at 271, since it appears that the could not comply with the settlement agreement without such a resolution. As a result, we conclude that the City's obligation to pass a resolution authorizing the settlement was an implied condition precedent to the Petit-Clairs' performance. Ultimately, the City did pass such a resolution. App. at 120.

The Petit-Clairs next argue that the City's resolution omitted a material term of the agreement, such that it constituted a counter-offer rather than an acceptance of the Petit-Clairs' initial offer. Because we will affirm the District Court's conclusion that the

settlement contract was formed at the time of the oral agreement, we need not consider this argument.[5]

Finally, the Petit-Clairs argue that several other conditions precedent were not satisfied, including the receipt of a fully executed original copy of the settlement agreement, the payment of $7,500 to the Petit-Clairs, and the execution of a consent order regarding the settlement. To the extent these conditions existed, the District Court held that they were not satisfied because the Petit-Clairs " *refused to respond* " to the City's written draft of the agreement and began insisting that there was no settlement agreement. App. at 142. We agree with the District Court. The Petit-Clairs may not escape their settlement by simply refusing to respond to the City's effort to memorialize it in writing.

We will affirm the District Court's order enforcing the settlement.

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[5]The parties are bound by the terms of their agreement. It is that agreement, not the content of the City's resolution, that controls, and the absence of a material term from the resolution does not excuse the from the full performance it owes the Petit-Clairs.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ALFRED J. PETIT-CLAIR CLAIR., and MATTHEW J. PETIT-CLAIR, Plaintiffs, v. STATE OF NEW JERSEY, A. MATTHEW BOXER, Comptroller of the State of New Jersey, CITY OF PERTH AMBOY, GREGORY FEHRNBACH,Former Business Administrator of the City of Perth Amboy, WILLIAM A. PETRICK, Councilman, City of Perth Amboy, KENNETH BALUT, former City Councilman of the City of Perth Amboy, JOHN DOES A-Z (fictitious names) and XYZ CORPORATION A-Z fictitious names), Defendant.	Civ. No. 2:14-07082 (WJM) OPINION

WILLIAM J. MARTINI, U.S.D.J.:

Pro se Plaintiffs Alfred and Matthew Petit-Clair have filed the instant action alleging the unlawful revocation of retirement benefits at both the City and State levels. They also allege violation of the Americans with Disabilities Act ("ADA"). This matter comes before the Court on motions to dismiss filed by the State of New Jersey and related defendants (hereinafter, "the State Defendants"), and the City of

Perth Amboy and related defendants (hereinafter, "the Perth Amboy Defendants"). Plaintiffs have also filed a motion for leave to amend and a motion for a preliminary injunction. For the reasons stated below, the State Defendants' motion to dismiss is **GRANTED**; the Perth Amboy Defendants' motion to dismiss is **GRANTED in part,** with the Court reserving its decision on the ADA claim; Plaintiffs' motion for leave to amend is **GRANTED in part and DENIED in part**; and Plaintiffs' motion for a preliminary injunction is **DENIED**.

I. BACKGROUND

Unless otherwise noted, the following facts are alleged in Plaintiffs' second amended complaint ("SAC"). Plaintiff Alfred J. Petit-Clair is a resident of Perth Amboy, New Jersey and serves as an attorney for Perth Amboy's Zoning Board of Adjustment. Plaintiff Matthew J. Petit-Clair is Alfred J. Petit-Clair's son and a resident of Yonkers, New York. The Court will refer to Alfred J. Petit-Clair as "Petit-Clair," and Matthew J. PetitClair as "Matthew."

A. Petit-Clair's Benefits

Plaintiffs allege that the Perth Amboy Defendants unlawfully revoked Petit-Clair's post-retirement benefits. Specifically, Plaintiffs allege that in 1990, the mayor of Perth Amboy hired Petit-Clair to serve as the attorney to the City's Board of Adjustment. At the time of hiring, the mayor assured Petit-Clair that he was a "permanent part time employee" of the City and would receive

post-retirement health insurance benefits if he held his position for a long enough period of time. Indeed, a 1994 Ordinance further provided that the City "was to provide paid health insurance in retirement to all employees, whether full or part time, who acquired 25 years of service . . . or who have retired and reached age 62 or older with at least 15 years of service to the city." Those benefits were dealt a blow in 2009 when Perth Amboy enacted Ordinance 1484-2009 (hereinafter, "the 2009 Ordinance"), which established that part-time employees, like Petit-Clair, would no longer receive post-retirement health benefits. At that point in time, Petit-Clair would have been entitled to post-retirement benefits under the 1994 Resolution because he was over 65 years old and had worked for the City for over 23 years. According to Petit-Clair, Matthew also would have been entitled to benefits had these alterations not taken place.

Petit-Clair also alleges that the State Defendants, which include the State of New Jersey and its former Comptroller, Matthew Boxer, unlawfully revoked his registration in the State's Public Employment Retirement System ("PERS"). As a public employee, Petit-Clair had previously been entitled to enrollment in PERS, which provides for certain pension benefits. In 2007, however, the State Legislature passed a law that precluded Professional Service Contractors ("PSCs") from receiving benefits under PERS. *See* N.J.S.A. 43:15A-7.2. PSCs included individuals providing services pursuant to a professional services contract or individuals who otherwise met the definition of an independent contractor as set forth by the Internal Revenue Service

("IRS"). *Id.* at (a)-(b). In line with that legislation, Matthew Boxer issued an "investigative report . . . expressing dissatisfaction that any attorney with a private practice is still carried in PERS…[and] that any professional with a private office is unlikely to be an employee, [and] to remove [such] professionals from PERS membership." In response, Defendant Fehrenbach, who formerly served as Perth Amboy's business administrator, retained a law firm to assist in determining whether Petit-Clair met the definition of a PSC under N.J.S.A. 43:15A-7.2. The law firm answered that question in the affirmative, finding that Petit-Clair met the definition of an independent contractor as set forth by the IRS. Subsequently, the New Jersey Division of Pension & Benefits adopted the law firm's opinion and determined that Petit-Clair was not entitled to PERS enrollment. According to Petit-Clair, Defendant Fehrenbach also submitted false information to the IRS, which further contributed to his PSC classification. Once Petit-Clair was classified as a PCS, he visited the Attorney General website to retrieve opinions regarding independent contractor status. To his surprise, those opinions were no longer available.

B. State Court Litigation and PERS Appeal

The revocation of Petit-Clair's benefits, both at the State and Citylevels, has already been the subject of judicial proceedings. On September 24, 2012, Petit-Clair filed an Order to Show Cause with Verified Complaint claiming that he had been incorrectly classified as an independent contractor. The next day, the parties mutually agreed to a dismissal of the

complaint without prejudice, pending Petit-Clair's appeal to the Division of Pensions. On January 24, 2014, the Division of Pensions denied Petit-Clair's appeal. The appeal was then transferred to the New Jersey Office of Administrative Law, and remained pending at the time Petit-Clair filed this action. The Court has not received any indication that Petit-Clair has received a Final Agency Determination on his claim.

While Petit-Clair has challenged the revocation of his PERS eligibility through administrative channels, he contested the City's decision to revoke his post-retirement benefits by filing an action in lieu of a prerogative writ with the Superior Court of New Jersey. The action asserted that Perth Amboy was equitably estopped from revoking Petit-Clair's retirement benefits and that the 2009 Ordinance was *ultra vires* as "an irregular exercise of basic power." After discovery took place, The Honorable Frank M. Ciuffani, P.J., Ch. issued a decision granting Perth Amboy's motion for summary judgment. The decision first noted that the applicable statute of limitations barred Petit-Clair's action. It then proceeded to conclude that the City was within its power when it enacted the 2009 Ordinance and was not equitably estopped from applying the Ordinance to Petit-Clair.

C. ADA Claim

Matthew also asserts an ADA claim against the City. The SAC alleges that Matthew suffers from a progressive disability and the City has failed to provide reasonable accommodations for him at its

marina facility. It further accuses the City of refusing to allow Plaintiffs to install their own lift for their boat dock at their own expense.

D. The Instant Action

Plaintiffs filed their initial complaint on November 12, 2014, and have filed two amended complaints since then. The SAC names the State of New Jersey, former State Comptroller Matthew Boxer, the City of Perth Amboy, and a number of current and former Perth Amboy officials as Defendants. The SAC asserts violations of "the United States Constitution, the New Jersey Constitution, Federal Statutes, State Statutes, Case Law, New Jersey Attorney General Opinions, 42 U.S.C. Sec. 126, *et seq*." The State Defendants and the Perth Amboy Defendants filed separate motions to dismiss the SAC in its entirety. Plaintiffs have filed a motion for leave to file a third amended complaint and a motion for a preliminary injunction.

II. MOTION TO DISMISS

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint, in whole or in part, if the plaintiff fails to state a claim upon which relief can be granted. The moving party bears the burden of showing that no claim has been stated. *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005). In deciding a motion to dismiss under Rule 12(b)(6), a court must take all allegations in the complaint as true and view them in the light most favorable to the plaintiff. *See Warth v. Seldin*, 422 U.S.

490, 501 (1975); *Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc.*, 140 F.3d 478, 483 (3d Cir. 1998).

Although a complaint need not contain detailed factual allegations, "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, the factual allegations must be sufficient to raise a plaintiff's right to relief above a speculative level, such that it is "plausible on its face." *See id.* at 570; *see also Umland v. PLANCO Fin. Serv., Inc.*, 542 F.3d 59, 64 (3d Cir. 2008). 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) (citing *Twombly*, 550 U.S. at 556). While "[t]he plausibility standard is not akin to a 'probability requirement' . . . it asks for more than a sheer possibility." *Id.* Courts have generally held that "[a] pro se complainant . . . must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). "However, a pro se litigant, who is also an attorney, is not afforded the latitude ordinarily accorded to the typical pro se claimant." *U.S. v. Pearson*, No. 10-442, 2012 WL 924879, *5 (D.Del. Mar. 19, 2012) (quoting *Ning Ye v. Holder*, 664 F.Supp.2d 112, 116 (D.D.C. 2009).

In assessing Defendants' motions to dismiss, the Court will break the SAC into its three components

parts: (1) claims against the Perth Amboy Defendants arising out of the 2009 Ordinance; (2) claims arising out of the revocation of Petit-Clair's PERS enrollment; and (3) Matthew's ADA claim.

A. 2009 Ordinance Claims

Plaintiffs contend that Perth Amboy and related individuals violated the Contracts Clause of the United States Constitution by adopting the 2009 Ordinance and determining that Petit-Clair was no longer entitled to post-retirement benefits. The Court concludes that Plaintiffs' Contracts Clause claim, in addition to an y other claims in the SAC that arise out of the 2009 Ordinance, are barred by New Jersey's "entire controversy doctrine." The entire controversy is codified in New Jersey Civil Practice Rule 4:30A, which provides that "[n]on-joinder of claims or parties required to be joined by the entire controvers y doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine." The doctrine is premised on the notion that "the adjudication of a legal controversy should occur in one litigation in only one court; accordingly, all parties involved in a litigation should at the ver y least present in that proceeding all of their claims and defenses that are related to the underlying controversy." *DiTrolio v. Antiles*, 142 N.J. 253, 267 (1995) (quoting *Cogdell v. Hospital Ctr.*, 116 N.J. 7, 15 (1989)).

Here, Petit-Clair already filed a state court action against Perth Amboy challenging the validity of the 2009 Ordinance, and the trial judge presiding over

that action determined that Perth Amboy was entitled to judgment as a matter of law. Under the entire controversy doctrine, Petit-Clair was required to join the Contracts Clause claim with the other claims he asserted in the state court action. The same goes for any other claim arising out of the 2009 Ordinance and Perth Amboy's decision to revoke Petit-Clair's post-retirement benefits. To hold otherwise would result in the type of consequences the entire controversy doctrine expressly seeks to avoid–namely, a system of piecemeal litigation in which an unsuccessful litigant may file a second action that is based on the same facts but asserts a new legal theory. And while it is true that Petit-Clair did not present any constitutional claims in his state court action, the relevant question is whether he "*could* have raised his claims before the [Superior Court], and whether such claims would have constituted a full and fair opportunity to litigate them." *Fioriglio v. City of Atlantic City*, 963 F.Supp. 415, 424 (D.N.J. 1997) (citations omitted) (emphasis added). The Superior Court of New Jersey is vested with "original general jurisdiction throughout the state in all causes . . . " N.J. Const. art. VI, §3, ¶ 2. Therefore, Petit-Clair could have asserted his Contracts Clause claim, along with any related § 1983 claim, in his Superior Court action. *See, e.g.*, *General Food Vending Inc. v. Town of Westfield*, 288 N.J.Super. 442, 455 (N.J. Super. Ct. Law Div.) Because he failed to do so, Plaintiffs' claims arising out of the 2009 Ordinance must be **DISMISSED WITH PREJUDICE**.

B. PERS Claims

While the SAC as a whole is far from a model of clarity, Plaintiffs' claims relating to PERS are particularly difficult to construe. Plaintiffs appear to allege that the State Defendants acted unlawfully when they applied N.J.S.A. 43:15A-7.2 to Petit-Clair. Plaintiffs further allege that the State Defendants violated their constitutional rights by removing Attorney General Opinions from a website. Plaintiffs also allege that Matthew Boxer issued a report containing "advice and attitude" that was unlawful. Finally, Plaintiffs allege that Defendant Fehrenbach submitted incorrect information to the IRS relating to whether Petit-Clair should be classified as a PSC. After reviewing these allegations, the Court concludes that Plaintiffs have failed to state any cognizable claims relating to PERS.

First, Plaintiffs fail to allege how applying N.J.S.A. 43:15A-7.2 to Petit-Clair creates a legally cognizable claim in this Court. To the extent Petit-Clair seeks to assert a substantive due process claim, the Court agrees with other judges in this district who have concluded that pension benefits do not constitute a property interest under the substantive due process clause. *See, e.g., McGovern v. City of Jersey City*, No. 98-CV-5186, 2006 WL 42236, *13 (D.N.J. Jan. 6, 2006) (citing *Nicholas v. Pennsylvania State University*, 227 F.3d 133, 141 (3d Cir. 2000)). Moreover, Plaintiffs have alleged no facts indicating that Petit-Clair has been denied procedural due process at the state administrative level, which is where he is currently challenging his PSC

classification. *Id.* (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Simply put, the fact that Plaintiffs disagree with the PSC classification does not mean that they have stated a claim upon which relief can be granted. *See Thrower v. New Jersey Dept. of Corrections*, No. 07-3434, 2007 WL 2683007, *7 (D.N.J. Sep. 7, 2007) (plaintiff fails to state a claim where his argument is effectively "limited to [his] disagreement with the outcome of the [administrative] hearing.") (citations omitted).

Any claims arising out of the "advice and attitude" contained in Matthew Boxer's investigative report are similarly meritless. Plaintiffs appear to argue that Boxer's report violated N.J.S.A. 43:15A-7.2; however, while that statute concerns who is eligible for membership in PERS, it does not create a private right of action. *See, e.g., R.J. Gaydos Ins. Agency v. Nat'l Consumer Ins. Co.*, 168 N.J. 255, 271 (2001). Moreover, Plaintiffs cannot state a claim against Boxer merely because they disagree with one of his non-binding investigative reports. Similarly, Plaintiffs do not point to (nor is the Court aware of) any authority providing that a cause of action may arise out of the removal of Attorney General Opinions from a website.

Finally, insofar as Plaintiffs seek to state a claim against Defendant Fehrenbach for submitting incorrect information to the IRS, that claim also fails. Like much of the SAC, Plaintiffs do not tie a cause of action to their allegations regarding Fehrenbach's conduct. Consequently, their complaint fails to comply with Rule 8 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 8(a)(2) (a pleading that states a claim

for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief.") Plaintiffs have not presented a single argument as to why Fehrenbach's submission of incorrect information to the IRS may give rise to a cause of action. Therefore, any claims arguably asserted against Fehrenbach, along with any other claims relating to PERS, are **DISMISSED WITH PREJUDICE**.[1]

C. ADA Claim

Plaintiffs allege that Perth Amboy violated the ADA by failing to provide reasonable accommodations for Matthew at its marina. Currently, Perth Amboy does not contend that Plaintiffs have failed to state an ADA claim. Instead, it claims that it wishes to engage in further dialogue to ascertain whether the parties can agree upon a reasonable accommodation. Plaintiffs do not appear to take issue with that position in their reply brief. Therefore, the Court will hold this portion of Perth Amboy's motion to dismiss in abeyance. Within forty-five days, the parties are to provide the

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[1]Additionally, Petit-Clair is already challenging his PSC classification at the administrative level. *Cf. Trinity Resources, Inc. v. Township of Delanco*, 842 F.Supp. 782, 801 (D.N.J. 1994) (courts should not interfere with the administrative process) (citing *Felmeister v. Office of Attorney Ethics*, 856 F.2d 592, 535 (3d Cir. 1988)).

Court with an update regarding Plaintiffs' request for accommodations at Perth Amboy's marina.[2]

III. MOTION FOR LEAVE TO AMEND

Plaintiffs also seek leave to file a third amended complaint ("TAC"). The proposed TAC seeks to (1) demand prospective relief on the grounds that N.J.S.A. 43:15A-7.2 is unconstitutional; (2) clarify that the case arises under 42 U.S.C. § 1983; and (3) add claims against Defendants for using the wrong test in their independent contractor analyses. Once a party is no longer permitted to amend its complaint as a matter of course, as is the case here, a party "may amend it pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." FED.R.CIV.P. 15(a)(2). In the absence of substantial or undue prejudice to the nonmoving party–which "is the touchstone for the denial of an amendment"–denial instead must be based on bad faith or dilatory motives, truly undue or unexplained delay, repeated failures to cure the deficiency by amendments previously allowed, or futility of amendment." *USX Corp. v. Barnhart,* 395 F.3d 161, 166 (3d Cir. 2004) (citing *Lorenz v. CSX Corp.,* 1 F.3d 1406, 1413-14 (3d Cir. 1993)).

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[2]While the ADA claim against the City will be held in abeyance, the Complaint against the individual Perth Amboy Defendants will be dismissed with prejudice.

A. Constitutionality of N.J.S.A. 43:15A-7.2

Plaintiffs wish to assert a new claim that they are entitled to prospective relief because, as applied to Petit-Clair, N.J.S.A. 43:15A-7.2 violates the Contracts Clauses of the United States and New Jersey Constitutions.[3] Although difficult to construe, it appears that Plaintiffs seek a prospective remedy for a constitutional violation under *Ex parte Young*, 209 U.S. 123 (1908), which allows a party to seek prospective relief against a state official that has some connection with the enforcement of an unconstitutional law. Defendant Matthew Boxer is no longer New Jersey's Comptroller. Even if he was previously responsible for enforcing N.J.S.A. 43:15A-7.2 during his tenure as Comptroller–which is doubtful–he has no role in the statute's enforcement now. Therefore, if Plaintiffs wish to add an *Ex parte Young* claim, they must name a proper defendant.

The State of New Jersey argues that even if Plaintiffs named a proper defendant in their *Ex parte Young* claim, amendment would still be futile. In order to state a claim under the Contracts Clause, Plaintiffs must allege that (1) a contractual right existed, (2) a

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[3]The New Jersey Constitution's Contracts Clause mirrors the United States Constitution's Contracts Clause. *Burgos v. State*, --- A.3d ----, 2015 WL 3551326, *34 n. 3 (N.J. June 9, 2015) (citing *N.J. Const.* art. IV, § 7, ¶ 3.) However, the *Ex parte Young* doctrine is applicable only to violations of federal law. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984).

change in state law impaired the contract, and (3) the impairment was substantial. *Transp. Workers Union of Am. V. Se. Pa. Transp. Auth.*, 145 F.3d 619, 621 (3d Cir. 1998). Here, the State of New Jersey points out that N.J.S.A. 43:15A-7.2 does not affect preexisting contracts; rather, it applies only to contracts entered into after a certain date. It then argues that because Petit-Clair served as Perth Amboy's Board of Adjustment Attorney on a year-to-year basis, the statute impacts only Petit-Clair's *future* contract extensions with Perth Amboy, and the Contracts Clause is therefore not implicated. Although not entirely apparent from the briefing, Petit-Clair appears to argue that he operated under a single contract with Perth Amboy since 1990. If Petit-Clair can allege sufficient, credible facts supporting that claim, he may be able to demonstrate that N.J.S.A. 43:15A-7.2 impaired a preexisting contract to which he was a party. Plaintiffs will be granted leave to amend for the sole purpose of adding the claim that N.J.S.A. 43:15A-7.2 violates the Contracts Clause.[4] It is up to Plaintiffs to name a proper defendant and allege sufficient facts to withstand a motion to dismiss.

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[4]Exhaustion requirements would not bar Plaintiffs' *Ex parte Young* claim because Defendants have not even suggested that the Office of Administrative Law has the power to decide the constitutionality of N.J.S.A. 43:15A-7.2. *See, e.g., Daud v. Gonzales*, 207 Fed.Appx. 194, 201 (3d Cir. 2006) (exhaustion requirements do not apply to constitutional claims that the administrative tribunal has no power to resolve).

Absent extraordinary circumstances, this will be the final time the Court grants Plaintiffs leave to amend.[5]

B. Other Proposed Amendments

Plaintiffs' other proposed amendments are futile and therefore cannot be asserted in a new complaint. While Plaintiffs seek to clarify that their complaint arises under 42 U.S.C. § 1983, their proposed SAC contains no new specific factual allegations tied to their § 1983 claims. *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988). To the extent that Plaintiffs' § 1983 claims arise out of the alleged substantive due process and Contracts Clause violations asserted in the SAC, those claims are not cognizable for reasons previously given in this opinion. If Plaintiffs seek to assert their § 1983 claim premised on the New Jersey Legislature's passing of N.J.S.A. 43:15A-7.2, that claim would be time-barred. The applicable statute of limitations for § 1983 claims in this case is two years. *287 Corporate Center Associates v. Twp. of Bridgewater*, 101 F.3d 320, 323 (3d Cir. 1996). At the very latest, Plaintiffs' claim would have accrued on August 14, 2012, the date that Petit-Clair was notified of his removal from PERS pursuant to the 2007 statute. Petit-Clair, however, did not initiate this action until November 12, 2014. Consequently, insofar as Plaintiffs claim that the enactment of N.J.S.A. 43:15A-7.2 and its application to Petit-Clair constituted a violation of § 1983, that claim is time-barred. Finally, even accepting as true the

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[5]Plaintiffs have already filed two amended complaints in this action.

allegation that Perth Amboy employed the wrong test when determining Petit-Clair's status, the proposed SAC does nothing to establish why that allegation gives rise to a cognizable claim. *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1385 n. 2 (3d Cir. 1994). Consequently, with the exception of the *Ex parte Young* claim discussed in the foregoing section, Plaintiffs' request to add additional claims is **DENIED** on futility grounds.

IV. MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs have also moved for a preliminary injunction seeking (1) a continuation of Petit-Clair's health benefits and (2) a waiver that would allow Plaintiffs to bypass certain exhaustion requirements; and (3) enjoining the City from replacing Petit-Clair as attorney for the Zoning Board of Adjustment. A preliminary injunction is an extraordinary remedy that is not routinely granted. *See, e.g., Groupe SEB USA v. Euro-Pro Operating LLC*, 774 F.3d 192, 197 (3d Cir. 2014); *Hoxworth v. Blinder, Robinson Co. Inc.*, 903 F.2d 186, 189 (3d Cir. 1990) (the preliminary injunction remedy "must be reserved for extraordinary circumstances. . . ."). Moreover, "the decision to grant or deny a preliminary injunction is committed to the sound discretion of the district court." *U.S. v. Price*, 688 F.2d 204, 2010 (3d Cir. 1982). In order to obtain the extraordinary remedy of a preliminary injunction, Plaintiffs must show (1) they are likely to succeed on the merits; (2) denial will cause them irreparable harm; (3) granting the injunction will not result in irreparable harm to Defendants; and (4) granting the injunction is in the public interest. *Nutrasweet Co. v.*

Vit-Mar Enterprises, 176 F.3d 151, 153 (3d Cir. 1999). As explained above, Plaintiffs have at this point failed to state a cognizable claim related to Petit-Clair's health benefits. Consequently, Plaintiffs have failed to demonstrate a likelihood of success on the merits entitling them to the preliminary injunction they seek. Therefore, Plaintiffs' motion for a preliminary injunction is **DENIED**.

V. CONCLUSION

For the foregoing reasons, the Perth Amboy Defendants' motion to dismiss is **GRANTED in part**, with the Court withholding its decision on the ADA claim. The State Defendants' motion to dismiss is **GRANTED**. Plaintiffs' motion for leave to amend is **GRANTED in part and DENIED in part**; and their motion for a preliminary injunction is **DENIED**.

/s/ William J. Martini
WILLIAM J. MARTINI, U.S.D.J.

Date: August 4, 2015

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ALFRED J. PETIT-CLAIR, JR., and MATTHEW J. PETIT-CLAIR, **Plaintiffs,** **v.** **JOHN JAY HOFFMAN, Acting Attorney General for the State of New Jersey, MARC LARKINS, Acting Comptroller for the State of New Jersey, ROBERT A. ROMANO, Acting Treasurer for the State of New Jersey, and CITY OF PERTH AMBOY,** **Defendants.**	Civ. No. 2:14-07082 **OPINION**

WILLIAM J. MARTINI, U.S.D.J.:

Plaintiffs Alfred J. Petit-Clair, Jr. and Matthew J. Petit-Clair ("Plaintiffs") bring this action against the City of Perth Amboy ("Defendant"), alleging violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 126, *et seq*. This matter comes before the Court on Defendants' motion to enforce settlement. There was no oral argument. Fed. R. Civ. P. 78(b). For the reasons set forth below, Defendants' motion to enforce settlement is **GRANTED**.

I. BACKGROUND

On November 12, 2014, Plaintiffs filed a complaint, alleging multiple claims, including a violation of the ADA. Defendant purportedly violated

the ADA "by completing construction of a municipally owned and operated Marina in Perth Amboy without providing handicapped accessibility to disabled boaters, and then by refusing to permit plaintiff . . . to install a handicap lift at his own expense at the boat slip rented by him so that his son might enjoy boating this last summer." *See* Compl. ¶ 1, ECF No. 1. Plaintiffs filed multiple amended complaints, alleging claims against various government officials, all of which this Court dismissed except for the ADA claim. *See* Orders, ECF Nos. 39, 79. The Court also denied Defendant's motion for summary judgment. *See* Order, ECF No. 89.

The parties subsequently entered into extensive settlement discussions, including a telephone conference mediated by Magistrate District Court Judge Mark Falk on November 3, 2016. Shortly thereafter, the parties reached a settlement agreement that entailed "the placement of a handicap lift on a portion of the dock no later than June, 2017, and payment of $7,500.00 counsel fees . . . ." *See* Pls.' Letter 1, ECF No. 101. In January 2017, however, Plaintiffs alleged that they were the victims of Defendant's bad faith because it had refused to pay counsel fees to Plaintiff Petit-Clair, Jr. in two other matters. *See* Pls.' Letters, ECF Nos. 103, 106. Plaintiffs formally requested that the Court rescind the agreement and proceed with litigation. *See* ECF No. 106 at 2.

For its part, Defendant informed the Court that it had taken affirmative steps to execute the agreement, including the preparation of a draft

settlement release and consent order, which Defendant forwarded to Plaintiffs for their review on January 10, 2017. *See* Def.'s Letter, ECF No. 105. The city formally authorized the settlement for payment on February 22, 2017. *See* Council Chambers Agenda 3, ECF No. 109-1. Plaintiffs maintained their position that they rescinded their offer of settlement prior to the city's authorization and that the agreement was not binding. *See* Pls.' Letter, ECF No. 109. Defendant subsequently moved to enforce the settlement. *See* Mot. for Settlement Enforcement ("Def.'s Mot."), ECF No. 110.

II. LEGAL STANDARD

"It is well settled that a federal court has the inherent power to enforce and to consider challenges to settlements entered into in cases originally filed therein." *Fox v. Consol. Rail Corp.*, 739 F.2d 929, 932 (3d Cir. 1984). "The stakes in summary enforcement of a settlement agreement and summary judgment on the merits of a claim are roughly the same—both deprive the party of his right to be heard in the litigation." *Tiernan v. Devoe*, 923 F.2d 1024, 1031 (3d Cir. 1991). For this reason, the Third Circuit applies a summary judgment standard of review to settlement enforcement. *See id.* at 1032. A court, therefore, must treat the non-moving party's assertions as true and will enforce a settlement only if the moving party is entitled to enforcement as a matter of law. *See id.*

State law governs the viability of settlement agreements. *See id.* at 1032–33. "A settlement agreement between parties to a lawsuit is a contract." *Nolan by Nolan v. Lee Ho*, 577 A.2d 143, 146 (N.J.

1990). In New Jersey, there is a strong public policy in favor of settlement agreements. *See id.* "Consequently, [New Jersey] courts have refused to vacate final settlements absent compelling circumstances." *Id.* The party seeking to enforce a settlement bears the burden of proving the existence of the agreement in the first instance. *United States v. Lightman*, 988 F. Supp. 448, 458 (D.N.J. 1997) (citation omitted). "In general, settlement agreements will be honored absent demonstration of fraud or other compelling circumstances." *See Nolan by Nolan*, 577 A.2d at 146 (quotation and citations omitted). "Before vacating a settlement agreement, [New Jersey] courts require 'clear and convincing proof' that the agreement should be vacated." *Id.* (citing *DeCaro v. DeCaro*, 97 A.2d 658 (N.J. 1953)).

II. DISCUSSION

"A contract is formed where there is offer and acceptance and terms sufficiently definite that the performance to be rendered by each party can be ascertained with reasonable certainty." *Lightman*, 988 F. Supp. at 458 (citing *Weichert Co. Realtors v. Ryan*, 608 A.2d 280 (N.J. 1992)). "That contract is enforceable if the parties agree on essential terms, and manifest an intention to be bound by those terms." *Id.* The parties do not dispute that they verbally reached a settlement agreement in November 2016. *See* Pls.' Br. in Opp'n ("Pls.' Opp'n") 8, ECF No. 111 ("Although the initial settlement was verbal . . . ."); Certification of Counsel in Supp. of Def.'s Mot. to Enforce Settlement ("Def.'s Cert.") ¶¶ 9–11. Plaintiffs' letter from that same period reflects that the essential terms

of the agreement were the construction of a boatlift by June 2017 and payment of $7,500 in counsel fees. *See* ECF No. 101. The letter clearly expresses an intention to be bound by the terms stated therein. The offer was accepted and the parties formed a legally binding contract through their verbal expressions and Plaintiffs' subsequent written confirmation. *See Pascarella v. Bruck*, 462 A.2d 186, 191 (N.J. Super. Ct. App. Div. 1983), *cert. denied*, 468 A.2d 233 (N.J. 1983) ("parties may orally, by informal memorandum, or by both agree upon the essential terms of a contract and effectively bind themselves thereon") (quoting *Comerata v. Chaumount, Inc.*, 145 A.2d 471 (N.J. Super. Ct. App. Div. 1958)).

Plaintiffs argue that they rescinded their offer to settle before Defendant perfected its acceptance by adopting a resolution that approved the agreement. *See* Pls.' Opp'n at 4–7. Plaintiffs correctly state that a municipal government "can ordinarily act only by adoption of an ordinance or resolution at a public meeting," which includes "giving consent to the settlement of litigation." *See City of Jersey City v. Roosevelt Stadium Marina, Inc.*, 509 A.2d 808, 815 (N.J. Super. Ct. App. Div. 1986). Defendant argues, however, that its passage of a resolution was an implied condition precedent of the settlement agreement. *See* Reply Br. in Further Supp. of Def.'s Mot. ("Def.'s Reply") 6–7, ECF No. 112.

In New Jersey, "under general contract law terms may be implied in a contract . . . because they are necessarily involved in the contractual relationship so that the parties must have intended them and have

only failed to specifically express them because of sheer inadvertence or because the term was too obvious to need expression." *Palisades Props., Inc. v. Brunetti*, 207 A.2d 522, 531 (N.J. 1965). "Implied conditions precedent . . . are applied only where 'the state of the thing or things which has been destroyed constituted such an essential and requisite element of the agreement that its destruction or cessation demolishes the attainment of the vital and fundamental purpose of the contracting parties . . . .'" *See Nye v. Ingersoll Rand Co.*, 783 F. Supp. 2d 751, 766–67 (D.N.J. 2011) (quoting *Edwards v. Leopoldi*, 89 A.2d 264 (N.J. Super. Ct. App. Div. 1952)).

Plaintiffs' letter demonstrates their familiarity with the resolution process that Defendant undertakes in approving payments of fees and settlements. *See* ECF No. 101 (describing how Defendant typically approves payment to Plaintiff through the adoption of a "Council Resolution"). Plaintiffs undoubtedly understood this requirement when the parties reached an agreement. The Court, therefore, finds that Defendant's passage of a resolution approving settlement was an implied condition precedent of the settlement agreement. Consequently, Plaintiffs were bound to the terms that they verbally agreed to in November 2016 pending the passage of a resolution, which subsequentl y occurred in February 2017. *See Pascarella*, 462 A.2d at 191.

Plaintiffs next argue that the settlement agreement is unenforceable because Defendant's resolution does not reference the construction of the boatlift. *See* Pls.' Opp'n at 7–8. Plaintiffs are correct

that the City Council Agenda does not reference construction of the boatlift; however, the Agenda does not supersede the contract. The parties verbally formed the contract and then Plaintiffs informally memorialized it in their letter. The final iteration of the contract was the draft from January 10, 2017, which Defendant sent to Plaintiffs for their review and comments. *See* Def.'s Cert. at ¶ 15, Ex. A. That draft includes the construction of the boatlift, although it does not reference a completion date. *Id.*, Ex. A at ¶ 11. Plaintiffs could have responded to Defendant and included the date of completion, June 2017. Instead, Plaintiffs attempted to rescind their "offer," which was impossible because the contract was fully formed by that point.

Plaintiffs argue that the contract is unenforceable because certain conditions precedent were not met. Pls.' Opp'n at 8–11. Those conditions were Plaintiffs' receipt of an executed original of the agreement, $7,500 payment and an executed consent order. *Id.* at 9. Plaintiffs fail to note that these conditions were not met because *Plaintiffs refused to respond* to Defendant's draft agreement. Plaintiffs cannot now use their own inaction as a defense against the enforcement of the contract.

Finally, Plaintiffs assert the doctrine of unclean hands against Defendant due to its purported bad faith in failing to pay Plaintiff Petit-Clair, Jr.'s counsel fees from unrelated matters. Plaintiff Petit-Clair, Jr. raised the issue of Defendant's non-payment in his November 2016 letter. *See* ECF No. 101. The letter clearly confirms the terms of settlement and then

subsequently addresses Defendant's non-payment as *a separate business matter* between the parties. *Id.* The Court finds that payment of these additional fees was not an essential term of the settlement agreement. Defendant's non-payment thereof is, therefore, irrelevant to the validity of the instant agreement. Plaintiffs have not met their burden of showing clear and convincing proof of fraud or other compelling circumstances that warrant vacation of the settlement agreement. *See Nolan by Nolan*, 577 A.2d at 146. Accordingly, the Court finds the settlement agreement enforceable.

CONCLUSION

For the reasons stated above, Defendant's motion to enforce the settlement agreement is **GRANTED**. An appropriate order follows.

s/William J. Martini

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WILLIAM J. MARTINI, U.S.D.J.

Date: June 29, 2017

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-2624

ALFRED J. PETIT-CLAIR, JR.;
MATTHEW J. PETIT-CLAIR,
Appellants

v.

ATTORNEY GENERAL FOR THE STATE OF NEW JERSEY; COMPTROLLER FOR THE STATE OF NEW JERSEY; TREASURER FOR THE STATE OF NEW JERSEY; CITY OF PERTH AMBOY; STATE OF NEW JERSEY; GREGORY FEHRENBACH; JOEL PABON, SR.; WILLIAM A. PETRICK; KENNETH BALUT; HON. WILDA DIAZ

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, BIBAS, and ROTH, [*] Circuit Judges

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[*]The vote of the Honorable Jane R. Roth, Senior Judge of the United States Court of Appeals for the Third

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en bane, is denied.

BY THE COURT,

s/ D. Brooks Smith
Chief Circuit Judge

Dated: May 15, 2018
tmm/cc: Alfred J. Petit-Clair, Jr., Esq.
Douglas V. Sanchez, Esq.

Circuit, is limited to panel rehearing.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ALFRED J. PETIT-CLAIR, JR., and MATTHEW J. PETIT-CLAIR, Plaintiffs, v. STATE OF NEW JERSEY, A. MATTHEW BOXER, Comptroller of the State of New Jersey, CITY OF PERTH AMBOY, GREGORY FEHRENBACH, Former Business Administrator of the City of Perth Amboy, HON. WILDA DIAZ, Mayor of the City of Perth Amboy, JOEL PABON SR., Councilman, City of Perth Amboy, WILLIAM A. PETRICK, Councilman,City of Perth Amboy, KENNETH BALUT, former City Councilman of the City of Perth Amboy, JOHN DOES A–Z (fictitious names), and XYZ CORPORATION A–Z (fictitious names). Defendants.	Civil Action No. 2:14-CV-07082-WJM-MF Hon. William J. Martini, U.S.D.J. Hon. Mark Falk, U.S.M.J. SECOND AMENDED COMPLAINT, DEMAND FOR JURY TRIAL, PLAINTIFF'S DEMAND FOR RELIEF, DESIGNATION OF TRIAL COUNSEL, AND CERTIFICATION AS TO CIVIL RULE 11.2

Plaintiff Alfred J. Petit-Clair, Jr. resides at 358 Rector Street, Apt. 707, Perth Amboy, New Jersey. Plaintiff Matthew J. Petit-Clair resides at 95 Walsh Road, Apt. 8C, Yonkers, New York. By way of

Complaint, through their undersigned attorney, Plaintiffs Alfred Petit-Clair, Jr. ("Plaintiff") and Matthew J. Petit-Clair ("Matthew") (collectively "Plaintiffs") hereby state the following:

JURISDICTION PURSUANT TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION X, cl. 1; 28 U.S.C. SECTIONS 1331, 1343, AND 1367; AND THE AMERICANS WITH DISABILITIES ACT, 42 U.S.C. SECTION 126 *ET SEQ.*

1. The Court has jurisdiction to hear the above matter pursuant to Article I, Section X, cl. 1 of the United States Constitution, as Plaintiffs allege violations by Defendants to deprive Plaintiffs by detrimentally altering the retirement benefits of Plaintiff, which had vested while he was an active member of the New Jersey Public Employees' Retirement System ("PERS"), a New Jersey state-administered retirement system, with an accrued 25-year service credit; and alleged violations of the Americans with Disabilities Act, 42 U.S.C. Section 126 *et seq.*, by detrimentally altering the retirement benefits of Plaintiff, including the denial of vested rights to health insurance in retirement to deprive his disabled son and dependent, Matthew, from being benefitted by it. And, Defendant City of Perth Amboy ("Defendant City" or the "City") further violated the Americans with Disabilities Act, cited above, by completing construction of a municipally owned and operated marina in Perth Amboy without providing handicapped accessibility to disabled boaters, and then by refusing to permit Plaintiff to install a handicap lift

at his own expense at the boat slip rented by him so that his son might enjoy boating this last summer.

2. Defendants have willfully, and with intent to deprive Plaintiff of his vested pension benefits, undertaken actions that are direct violations of both the Constitutions of the United States of America and the State of New Jersey, and in disregard of four Formal Opinions of the New Jersey Attorney General, and N.J.S.A. 40A:9-22.3(g) and 43:15A-7.1, which was intended to curtail participation of those working under professional service contracts (or otherwise independent contractors) from participation in PERS.

3. Defendants all undertook actions (or idly permitted the undertaking of such actions) to detrimentally alter the retirement benefits earned by Plaintiff and the health insurance that was to be provided to him and his disabled son, Matthew, in direct violation of the United States Constitution, the New Jersey Constitution, federal statutes, state statutes, case law, New Jersey Attorney General Opinions, 42 U.S.C. Sec. 126 *et seq.*, and an Ordinance of the City of Perth Amboy, to wrongfully, maliciously, and unconscionably deny Plaintiff his earned rights to full retirement benefits, including health benefits in retirement.

4. Although Plaintiff, the Zoning Board of Adjustment Attorney for the City of Perth Amboy and a member of PERS for over 25 years, was owed a duty of good faith by his employer, Defendants have conspired and worked to deny the good faith owed him,

and they secretly undertook dishonest action through the use of false allegations and misrepresentations to outside counsel to obtain a legal opinion justifying their denial, and false information to government agencies, such as the Internal Revenue Service ("IRS") and PERS, to thwart Plaintiff's attempts to obtain the benefits that a quarter of a century of labor had earned.

5. As a result of the actions of Defendants, Plaintiffs have endured three full years of legal battles, expenditures expected to exceed One Hundred Thousand Dollars in legal fees, and genuine emotional duress and pain, and will continue to so suffer in the future.

6. This case arises under 42 U.S.C. Section 1983 for violation of Plaintiff's civil rights. This Court has original jurisdiction in this matter pursuant to 28 U.S.C. Sections 1331 and 1343. This Court has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. Section 1367 since the state law claims "are so related to claims" over which this Court has original jurisdiction "that they form part of the same case or controversy under Article III of the United States Constitution." These state and federal law claims "derive from a common nucleus of operative fact." United Mine Workers of America v. Gibbs, 383 U.S. 715, 725, 86 S. Ct. 1130, 1138 (1966).

7. This Court is an appropriate venue for this cause of action pursuant to 28 U.S.C. Sections 1391(b)(1) and (b)(2). The acts and omissions giving rise to Plaintiffs' claims occurred in Perth Amboy, New

Jersey, and elsewhere in this state, and therefore the appropriate venue for this action is the United States District Court for the District of New Jersey.

FACTS AS TO PLAINTIFF'S RIGHTS

1. On or about January 1986, after having attended a land use seminar at Rutgers University, which had been paid for by the City of Perth Amboy, Plaintiff was hired by Mayor George Otlowski ("Otlowski") as an employee to serve as attorney to the Perth Amboy Board of Adjustment at the salary set by ordinance, which also included health insurance for Plaintiff and his dependents.

2. The position required Plaintiff to give up legal work in his own practice that might involve the City, and since he had a base of Perth Amboy policemen and teachers as clients, and since his late wife had a health insurance plan for the family through her employer, he resigned after six months.

3. In 1987, Plaintiff's wife died, but he and their daughter were still covered by her health insurance policy. However, by 1990, Plaintiff was remarried with a newborn son, Matthew, and desired health insurance for him.

4. On July 24, 1990, Plaintiff was hired by Otlowski as Attorney to the City's Zoning Board of Adjustment. Although the Municipal Land Use Law provides at N.J.S.A. 40:55D-71(b) that "(t)he board of adjustment may employ, or contract for, and fix the compensation of legal counsel," the City of Perth

Amboy always fixed the salary of the Board of Adjustment Attorney by ordinance, and the mayor always hired the attorneys to the Board of Adjustment, a practice of some municipalities as noted by William M. Cox, Esq., in his treatise, "New Jersey Zoning and Land Use Administration," at Section 2-5.3.

5. Plaintiff's salary was fixed by ordinance at $6,420.00 at hire, and subject to increases and cost of living adjustments as enjoyed by other employees. The salary only covered attendance at public hearings held at the employer's premises at City Hall, at dates and times as set by the City, and Plaintiff's duties involved providing advice to the Board at those meetings. Plaintiff did not set his hours, nor the date and time of meetings, nor the duration of the meetings, and the City was at liberty to add extra meetings when it felt they were needed, but the salary remained fixed.

6. Otlowski advised Plaintiff that he was a permanent part-time employee of the City of Perth Amboy, and would be a member of PERS, and that he would have health insurance for himself and his dependents, and that if he held the position long enough, he would have health insurance in retirement.

7. In furtherance of these representations, Defendant City prepared a Request for Personnel Action/Employee Profile on 9/17/90 confirming that Plaintiff was a part-time employee hired on 7/26/90, which was filed with the New Jersey Department of Personnel – County & Municipal Government Services. (See Exhibit A annexed to First Amended Complaint.) Defendant City also sought Request for

Waiver of Plaintiff's hire as a permanent part-time employee with the New Jersey Department of Civil Service. (See Exhibit B annexed to First Amended Complaint.) After a three-month waiting period for enrollment in the group health insurance plan for employees of the City, Plaintiff completed the health insurance enrollment form on 10/26/90. (See Exhibit C annexed to First Amended Complaint.)

8. During the next 25 years, there was only one other Request for Personnel Action/Employee Profile completed by Defendant City for filing with the New Jersey Department of Personnel. That was on 6/1/93, when the department in which Plaintiff was employed changed its name from Environment Control to Code Enforcement. (See Exhibit D annexed to First Amended Complaint.) Thus, Plaintiff had only one date of hire for his 25 years of employment.

9. Plaintiff was a permanent part-time employee of the City of Perth Amboy and, accordingly, he was given an Employee ID Badge (see Exhibit E annexed to First Amended Complaint), provided letterhead (see Exhibit F annexed to First Amended Complaint), provided with a Cox land use treatise and updated volumes when he needed them at the City's expense, had been sent to a Rutgers seminar at the City's expense, and was often invited to attend League of Municipality Conventions at the City's expense.

10. Plaintiff had other duties for the Board that were not covered by his salary. These other duties were as acknowledged by four formal New Jersey Attorney General Opinions issued in 1991 (see Exhibit

G annexed to First Amended Complaint) (referred to as Nos. 91-0092, 91- 0093, 91-0133, and 91-0134) which concluded that an attorney to a Board of Adjustment is a "local government officer," and in Opinion No. 91-0133, declared that:

> by the nature of his responsibilities, an attorney for a planning board or a zoning board must exercise independent legal judgment and affecting issues of public concern, albeit in the specialized area of land use, in the same manner that a municipal attorney does in his representation of the municipality. Further, an attorney who advises a public body "wields considerable power and influence by virtue of his ability and opportunity to interpret the law and advise on legal matters. The force of his influence is subtle and pervasive…."
>
> It should be noted that there may be circumstances when a planning board or zoning board engages counsel for a special, limited capacity (e.g., to handle a particular civil action…) This type of representation is more akin to that of an "independent contractor" and, in our view, would not be subject to the new Ethics law.

11. Thus, Plaintiff was an employee in his capacity of attending meetings and advising the Board, and that work was paid by salary that Plaintiff

received biweekly in the form of a payroll check with payroll deductions under his Social Security number (see Exhibit H annexed to First Amended Complaint), and at year's end, he received a W-2. (See Exhibit I annexed to First Amended Complaint.) Currently, the payroll checks are directly deposited into Plaintiff's personal checking account with his Social Security number and a W-2.

12. The other two duties performed by Plaintiff consisted of: (1) representing the Board in civil litigation; and (2) work on the applications before the Board outside of the hearings on those applications conducted at public hearings. As recognized by the aforesaid Attorney General Opinions, civil litigation requires authorization by the Board and a fixing of compensation by the Board that ultimately is paid by the City; and the work conducted by the attorney on each application outside of the hearing is to be billed to and paid from the applicant's escrow deposit made pursuant to the City Professional Fee Escrow Ordinance. (See Exhibit J annexed to First Amended Complaint.) These are paid by City vendor checks sent to Plaintiff's office under his office federal tax ID number. (See Exhibit K annexed to First Amended Complaint.)

13. Despite the Municipal Land Use Law, which permitted the Board to fix compensation of its attorney, Defendant City always took control of that. In 1990, after Otlowski resigned and was replaced by Mayor Joseph Vas, the new City Attorney, Dennis Gonzalez, Esq., after receiving a Board resolution authorizing Plaintiff to represent it in Court for

$100.00 per hour, called Plaintiff to say, "The City will not pay you $100.00 per hour for Court work or other extra work…that is what we pay our attorney, James Nolan, Esq.…. The City will only pay you $75.00 per hour." Because Plaintiff's primary concern was retirement and health benefits in retirement, he reduced his fee to $75.00 per hour. Today, 25 years later, Plaintiff continues to bill at $75.00 per hour. As to the work on applications outside of meetings, Plaintiff was aware of the rumor in City Hall that the fee escrow ordinance was being abused by some professionals (not Plaintiff), but since the concern focused on the cost of bills to applicants, Plaintiff ceased all bills for work performed outside of meetings and in his office, and as many as 22 years may have gone by with those services not being paid, which totals an enormous sum as evidenced by the current billings of the Planning Board Attorney.

14. On January 18, 1994, Defendant City adopted Resolution 43-1/94 (the "1994 Resolution") codifying its past practice of providing full free health and hospital benefit coverage to employees. (See Exhibit L annexed to First Amended Complaint.) This Resolution was moved for passage by Councilman David Szilagyi with no "nay" votes and was to provide paid health insurance in retirement to all employees, whether full or part-time, who acquired 25 years of service, including Plaintiff as attorney for the Board of Adjustment. (See Certification of Councilman Szilagyi, annexed to First Amended Complaint as Exhibit M.)

15. The 1994 Resolution also contained a vesting provision: "or who have retired and reached

age 62 or older with at least 15 years of service with the City." It was common knowledge in Perth Amboy that part-time employees with 25 years of service receive fully free health benefits in retirement for themselves and their dependents. Under this policy, other part-time employees received paid health benefits in retirement, such as Alan Papp, Esq., Astrubel Pagan, Robert Levine, Esq., and Alex Eger, Esq.

16. In about 2006, Defendant State of New Jersey was concerned with financial issues and the cost of PERS, and sought input from legal counsel on whether the legislature could reduce the retirement benefits provided to members of the system. On August 21, 2006, the Office of Legislative Services of the New Jersey State Legislature issued the following opinion to the members of the Joint Legislative Committee on Public Employee Benefits Reform:

> Legislation that has the effect of detrimentally altering the retirement benefits of active members of State-administered retirement systems who have accrued at least five years of service credit, or of retired members, would be unconstitutional as violative of the federal and State constitutional proscription against impairment of the obligation of contracts. (See Exhibit N annexed to First Amended Complaint.)

17. Notwithstanding the strong warning to the New Jersey Legislature, N.J.S.A. 43:15A-7.2 (the

"Statute") was enacted in 2007, which was intended to curtail the participation of professional service providers in PERS. The Statute deemed professional service providers retained by government entities pursuant to a professional services contract, or otherwise acting as independent contractors, to be ineligible to participate in PERS as of the expiration date of their existing contract or annual appointment. The Statute mandated use of the IRS Guidelines in analyzing whether a particular person was an employee or an independent contractor.

18. The Statute substantially impaired the employment contract between the City and Plaintiff, under which Plaintiff had been employed since 1990, which also encompassed the 1994 Resolution, as it rendered obsolete the legitimate expectations of the parties; that is, that Plaintiff would continue serving as the City of Perth Amboy's Board of Adjustment Attorney in exchange for, *inter alia*, the promise of health care benefits in retirement. In this respect, the Statute violated the Contract Clause of the United States Constitution, Article I, Section X, cl. 1, as well as the Contract Clause of the Constitution of the State of New Jersey, Article II, Section VII, Paragraph 3.

19. Defendant State of New Jersey's enactment of the Statute thus violated Plaintiff's substantive due process rights since it had the effect of denying him his right to receive full, free health and hospital coverage in retirement as guaranteed by the 1994 Resolution, which can be characterized either as a contractual right, a property interest, or amalgamation of the two.

20. The Statute's directive to use the IRS Guidelines for making an employee/independent contractor determination contravenes New Jersey law. New Jersey precedent for more than two decades, as stated by the Supreme Court of New Jersey in Hargrove v. Sleep y's, LLC , 220 N.J. 289, 316, 106 A.3d 449, 465 (2015), has been to use the "ABC" test to make this determination.

21. Plaintiff's position as Attorney to the Board of Adjustment was not a professional service contract position. The position had been declared by the Attorney General in Opinion No. 91-0133 to be that of a "local government officer" or "managerial employee," and not independent contractor in the role of attending meetings and advising the Board at a fixed salary.

22. Matthew was diagnosed with a progressive disability in 2007, while a junior in high school and 17 years of age. In 2008, he graduated from high school, but his legs had weakened enough so that Matthew chose not to attend his graduation ceremony and avoid the embarrassment of falling. After graduation, he entered William Patterson University.

23. In 2009, Matthew's condition had progressed enough to disable him, and on February 1, 2009, he was awarded Social Security disability (see Exhibit O annexed to First Amended Complaint), but he remained in school.

24. In 2010, Defendant City notified Plaintiff to remind him that Cigna requires annual verification

of a dependent's full-time college attendance to continue insurance. (See Exhibit P annexed to First Amended Complaint.) Cigna was not Defendant's carrier, but merely the claim processor, because the City is self-insured. Plaintiff told Matthew to obtain proof of full-time enrollment, but Matthew instead called Defendant City and advised personnel that he is disabled and entitled to coverage as a matter of law, which caused Defendant to terminate Plaintiff's benefits in any way that it could.

25. In 2011, approaching 25 years in PERS, Plaintiff put in an application to retire, effective 6/l/11.

26. Defendant City filed a Certification of Service and Final Salary with the State. (See Exhibit Q annexed to First Amended Complaint.) Defendant City also filed proof that Plaintiff was hired on 7/26/90 and had one organizational transfer on 5/20/93 when the name of the department changed. (See Exhibit R annexed to First Amended Complaint.) And Defendant State of New Jersey certified on 5/17/11 that Plaintiff had 25 years service credit. (See Exhibit S annexed to First Amended Complaint.)

27. Defendant City mailed a COBRA notice to Plaintiff. Thinking that the City made a mistake, Plaintiff called the personnel office and was advised that, "Mr. Fehrenbach said that you aren't entitled to health insurance in retirement." To avoid the loss of insurance, Plaintiff immediately withdrew his retirement application and remained employed.

28. Plaintiff engaged in correspondence with the City, and spoke on more than one occasion with Defendant Councilman William A. Petrick, advising him of the merits of his case.

29. Plaintiff even encountered Defendant Mayor Diaz in City Hall before the start of a Board of Adjustment meeting, and the mayor said, "Al, about your problem, don't worry, we'll work it out."

30. Plaintiff then withheld action believing that the mayor was working on getting health benefits into his retirement package.

31. Instead, Defendants were busy at work engineering a scheme to deprive Plaintiff of his legal rights in violation of the Constitution, statutes, good faith, and his contract, utilizing false information, illegal mechanisms, and tortious conduct to retroactively remove even earned pension credits to terminate the health coverage of both Plaintiffs, violating the ADA also. By letter dated 8/14/2012, Defendant City commenced termination of Plaintiff's employment, termination of health benefits for Plaintiffs, and a retroactive removal of the preceding five years of earned pension credits. (See Exhibit T annexed to First Amended Complaint.)

32. To counter these illegal acts, Plaintiff instituted a Verified Complaint against Defendants City and Gregory Fehrenbach ("Defendant Fehrenbach" or "Fehrenbach") (see Exhibit U annexed to First Amended Complaint), assigned Docket No. C-206-12 in the Chancery Division of Superior Court,

and proceeded by way of Order to Show Cause that concluded with a Consent Order (see Exhibit V annexed to First Amended Complaint) enabling Plaintiff to remain in his employment and the health insurance to be continued, conditioned upon Plaintiff's pursuit of an administrative appeal with PERS on the pension issue, which Plaintiff is following at great expense.

33. Because Defendants continued on their wrongful and illegal course, Plaintiffs were compelled to file several Notices of Claim of Title 59 actions. (See grouping annexed to First Amended Complaint as Exhibit W.) Ultimately, Plaintiff retained counsel who advised and filed a complaint in lieu of prerogative writ (Docket No. L-3703-13) seeking to compel Defendant City to provide health benefits to Plaintiff in retirement, and seeking damages and counsel fees. After extensive discovery, Defendant City moved for summary judgment based upon untimely filing and made substantive argument that Defendant's actions were proper. The Court advised Plaintiff's counsel to file a cross motion for summary judgment, which was done. The Court found that the complaint in lieu of prerogative writ was untimely filed, justifying dismissal, but then took the unusual and erroneous step of ruling on the merits of the dispute (although lacking proper jurisdiction by virtue of a pleading filed out of time) to dismiss Plaintiff's claims with prejudice. (See Exhibit X annexed to First Amended Complaint.)

34. Although the recent decision in Morris v. City of Trenton, Civil Action No. 13-6142 (MAS), 2014 WL 4798871 (D.N.J. Sept. 26, 2014), declares that

collateral estoppel, *res judicata*, and New Jersey's entire controversy doctrine do not bar a plaintiff's relief under constitutional and federal statutory claims, Plaintiffs will seek to alter the Superior Court's decision by Motion for Reconsideration before filing appeal.

35. Plaintiff has been a tenant in Defendant City's marina since 2012. Superstorm Sandy destroyed the marina, and Defendant City constructed a new marina in 2013, but aside from the bathrooms, there are no provisions for disabled boaters. By 2014, Matthew's disability had made boarding and de-boarding difficult and dangerous. Plaintiffs requested permission from Defendant City to permit Plaintiffs to install a lift (see Exhibit Y annexed to First Amended Complaint) at Plaintiff's boat dock at Plaintiff's own expense.

36. Defendant City refused twice. (See Exhibit Z annexed to First Amended Complaint.)

37. As a result of the wrongful actions of Defendants, who have undertaken efforts to systematically deprive Plaintiffs of their rights in violation of the Constitutions of the United States and New Jersey, the Americans with Disabilities Act, state statutes, prevailing case law, and formal New Jersey Attorney General Opinions, by breaching contract and committing acts of misrepresentation and tort extending up to the current date, Plaintiffs have already suffered enormous loss of money, emotional distress, and disruption of their lives, personal and professional. The specific acts of Defendants'

wrongdoing are as set forth in the following "Wrongful Acts of Defendants" section.

WRONGFUL ACTS OF DEFENDANTS

l. In 2007, Defendant State of New Jersey enacted N.J.S.A. 43:15A-7.2 to preclude professional service contractors who are not public employees from membership in PERS. It directed that the following non-employee professional service contractors be removed from PERS:

> (a) professionals providing services pursuant to a professional services contract awarded under New Jersey's public contract laws (N.J.S.A. 43:15A-7.2(a)); and
>
> (b) professionals who otherwise meet the definition of independent contractor as set forth by the IRS (N.J.S.A. 43:15A-7.2(b)).

2. Since the New Jersey Attorney General had already promulgated four Formal Opinions (see Exhibit G annexed to First Amended Complaint) following review of the New Jersey Employer-Employee Relations Act and the Local Government Ethics Law and declared that attorneys to local boards of adjustment are "local government officers" as opposed to independent contractors, Defendants in this action have actual notice that Plaintiff is an employee entitled to membership in PERS, which they chose to ignore.

3. Defendant A. Matthew Boxer ("Defendant Boxer" or "Boxer"), State Comptroller, issued an investigative report to all municipalities dated July 17, 2012, expressing dissatisfaction that any attorney with a private practice is still carried in PERS, urging them to utilize the New York State Guidelines and the IRS presumption that any professional with a private office is unlikely to be an employee, in order to remove professionals from PERS membership. That advice and attitude violates the Statute. The Statute was directed against professionals who are retained pursuant to the public contract law, which does not apply to Plaintiff, and it applied to professionals who meet the definition of independent contractor as set forth by the IRS, which is impossible because the New Jersey Attorney General issued a Formal Opinion (No. 91-0133) stating that attorneys who receive a salary to attend meetings and advise the Board of Adjustment are "local government offices" and not independent contractors.

4. Although the New Jersey precedent for making an employee/independent contractor determination for more than two decades has been to use the "ABC" test, as stated by the Supreme Court of New Jersey in Hargrove, 220 N.J. at 316, 106 A.3d at 465, Defendant Boxer, with actual malice and by an act of willful misconduct, unlawfully directed municipalities to utilize the New York State Guidelines in making this determination, because the ABC test begins with a presumption that a worker is an employee unless proven otherwise, and the New York State Guidelines start with a presumption that a worker is an independent contractor unless proven otherwise. Boxer purposely encouraged use of the New

York State Guidelines in order to steer the determinations made by local municipalities more toward findings of "independent contractor." He did so by providing the New York State form used for making this determination as Appendix A to his July 2012 Report, which was the only appendix to this report. These actions committed by Defendant Boxer remove him from the cloak of immunity provided the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 to 59:12-3, for public officials acting in their official capacities.

5. Defendants have willfully ignored the law established by Formal Opinions of the New Jersey Attorney General, and Defendant State of New Jersey has gone so far as to remove the four Opinions from the list of Attorney General Opinions for 1991 from its website.

6. Defendant State of New Jersey has removed New Jersey Attorney General Opinion Nos. 91-0092, 91-0093, 91-0133, and 91-0134 from the Attorney General website list of Formal Attorney General Opinions. (See Exhibit AA annexed to First Amended Complaint.) Plaintiff telephoned the New Jersey Attorney General at 609-292-4925 and asked for a copy of Opinion No. 91-0092, which is the only Opinion not included in Exhibit G (annexed to First Amended Complaint), and was told, "that is confidential." When Plaintiff told the gentleman that he possessed Opinion Nos. 91-0093, 91-0133, and 91-0134, Plaintiff was told that he should not possess them because they are confidential also. In a democracy, which is supposed to be transparent, this is a reprehensible, illegal, and unconstitutional

attempt to conceal truth and evidence from employees like Plaintiff and the public at large.

7. On October 14, 2009, Defendant City enacted Ordinance 1484-2009, which limited health benefits in retirement to full-time employees who were employed prior to January 1, 2008 and who worked continuously full-time for 25 years. (See Exhibit BB annexed to First Amended Complaint.) At the time of its enactment, Plaintiff was over 65 years old with over 23 years of pension credit, thus vested under the prior practice and the 1994 Ordinance that codified it.

8. In 2010, Matthew telephoned Defendant City and spoke to the personnel office to advise that he was disabled, and under the law was entitled to health insurance as a disabled dependent, and need no longer submit proof of full-time college attendance to retain coverage. Unfortunately, Plaintiff's son was unaware that the City was self-insured, using Cigna for claims processing only, and would attempt to thwart lifetime liability for his medical claims.

9. Defendant City first exhibited its desire to violate the law and deprive Plaintiffs of their rights in 2011, when Plaintiff was prepared to retire, effective on 6/1/l l. After that, Defendant City sped ups its illegal, unconstitutional, tortious, and wrongful actions.

10. On November 9, 2011, the self-dealing Council, who were elected to serve the people, decided to serve themselves. They enacted Ordinance 1615-201l, which denied health care coverage to any

individual elected or appointed after 12/31/2011 that is less than full-time. (See Exhibit CC annexed to First Amended Complaint.) However, the Ordinance did not apply to them because it expressly did not apply to any individual elected to an office prior to 12/31/2011 who thereafter holds that office continuously by virtue of re-election or reappointment. Defendants William A. Petrick, Joel Pabon Sr., Kenneth Balut, and Mayor Wilda Diaz enacted that ordinance.

11. Defendant City falsified information to the IRS on Plaintiff's Form 1099 for the 2011 tax year. In all prior years, Form 1099s were issued under Plaintiff's law office's tax ID number for work conducted outside of attending meetings for which Plaintiff received a salary and W-2 form bearing his Social Security number. Defendant City wrongfully used Plaintiff's Social Security number to identify the recipient, rather than the proper office tax ID number. (See Exhibit DD annexed to First Amended Complaint.) The City ignored the Purchase Order, which always bore the tax ID number. (See Exhibit EE annexed to First Amended Complaint, for 2011.)

12. Defendant City owed Plaintiff the duty of good faith when Defendant Boxer directed it (as well as all municipalities) to review its professional staff (see Paragraph 3 *supra*). It breached that duty by not advising Boxer that Plaintiff was already declared an employee, and not an independent contractor, by virtue of the Attorney General's Formal Opinions. It breached that duty when it failed to advise Plaintiff of the review demanded by Boxer and requested information from him on his position. It breached its

duty to Plaintiff because it was its intent to deprive Plaintiff of his earned rights and to strip away five years of earned pension credit, and to deny Plaintiff's health benefits in violation of the United States Constitution, the New Jersey Constitution, the Americans with Disabilities Act, and other state statutes and municipal ordinances.

13. Defendant Fehrenbach and Defendant City, without notice to Plaintiff, submitted their false, inaccurate, and incomplete factual synopsis of Plaintiff's position, the positions of the City Attorney, and the Municipal Prosecutor's position to the law firm of Javerbaum Wurgraft to obtain its opinion as to whether: (a) they are disqualified from PERS or DCRP State- administered retirement plans; and (b) they are ineligible for health insurance in retirement. The mere negative wording of the request evidences Defendants' intent to harm Plaintiffs.

14. Although Defendant Boxer's Investigative Report to the municipalities (see Paragraph 3 in "Wrongful Acts of Defendants," *supra*) was dated 7/12/12, the Javerbaum Wurgraft opinion directed to the City is dated 7/25/12 (see Exhibit FF annexed to First Amended Complaint), which evidences that Defendant Fehrenbach and Defendant City were ahead of Boxer in their scheme to strip Plaintiffs of their rights.

15. The Javerbaum Wurgraft opinion found Plaintiff and the municipal prosecutors to be independent contractors, which directly violates the Formal Opinions of the New Jersey Attorney General

as to Plaintiff, and found the City Attorney to be an employee, even though his pay was previously made out to his law firm, and was not a payroll check like Plaintiff's and the Prosecutor's.

16. Although N.J.S.A. 40:55D-71(b) states, "(t)he board of adjustment may employ, or contract, and fix the compensation of legal counsel, other than the municipal attorney…," there is no time limit set on the term of employment, but it is unnecessary in Defendant City's case because Defendant City hired Plaintiff, certified Plaintiff as a permanent part-time employee, and, after 25 years of service, there is only one entry on the date of hire, which was 7/26/90. Nonetheless, to make it appear as if Plaintiff is appointed for only a one-year term, Defendant City, Defendant Councilpersons, and Defendant Fehrenbach concocted Ordinance 1658- 2012, enacted on 12/27/2012, declaring that the Board of Adjustment shall annually appoint and fix the compensation of its attorney. (See Exhibit GG annexed to First Amended Complaint.) But with the transparency of those who engage in deception, that very same day it enacted another ordinance, Ordinance 1658-2012, fixing the salary of the Board Attorney. (See Exhibit HH annexed to First Amended Complaint.) Defendant City had no authority to limit the Board's appointment to one-year terms since the statute pre-empted municipal authority, and, of course, it ignored the fact that it had certified Plaintiff as a part-time employee and carried Plaintiff with that certification for over 26 years before enacting the 2012 ordinance.

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. (See Exhibit II annexed to First Amended Complaint, dated 8/26/2013). The office work is to be paid from the Professional Fee Escrow Ordinance (see Paragraph 12 in "Facts as to Plaintiff's Rights," *supra*), and on 9/29/94 when Plaintiff abstained from participating in a Board of Education application, the Board appointed Harold Miller, Esq. to substitute for Plaintiff. (See Exhibit JJ annexed to First Amended Complaint.)

18. At a public meeting in 2012 which was recorded by video, Defendant Fehrenbach and the City Attorney acknowledged that if the Council confirmed that Plaintiff was exempt from the 2009 Ordinance that limited health insurance in retirement to full-time employees, Councilmen Fernando Gonzalez and Kenneth Gonzalez would have argued in favor of passing such a resolution. However, Defendants Councilmen William A. Petrick and Joel Pabon Sr. sat idly by, taking no position and, thus, were derelict in their duties, while Defendant Kenneth Balut insulted Plaintiff by calling him a "political hack," all of which compounds the wrongs and violations.

19. Defendant City and Defendant Fehrenbach even violated the Municipal Land Use

Law on May 8, 2014 by delivering a letter to the Board of Adjustment that day in which Defendant Fehrenbach requested that the Board not grant the variance that was to be presented that very evening. (See Exhibit KK annexed to First Amended Complaint.) The Board proceeded and granted the variance that night. (See Exhibit LL annexed to First Amended Complaint.)

20. Believing that Defendant City had successfully won Plaintiff's legal battle (see Paragraph 33 in "Facts as to Plaintiff's Rights," *supra*) Defendant Councilman William A. Petrick, who has not spoken with Plaintiff in over two years and with whom neither party even acknowledged one another at a wake only one month ago, very loudly yelled out to Plaintiff, "Hello, Al," in a public restaurant only to taunt and mock him in front of others, and when Plaintiff left, again yelled out, "Goodbye, Al", to mock and ridicule Plaintiff.

WHEREFORE, Plaintiffs demand judgment against Defendants for compensatory, treble, and punitive damages with interest, costs of suit and attorneys' fees, prospective relief, and any such other relief as this Court may determine to be equitable, just, and necessary.

Dated: April 30, 2015

By: /s/ALFRED J. PETIT-CLAIR. JR., ESQ.
ALFRED J. PETIT-CLAIR, JR, ESQ.
Attorney for Plaintiffs

JURY DEMAND

Plaintiffs hereby demand a trial by jury on all of the issues contained herein.

DESIGNATION OF TRIAL COUNSEL

ALFRED J. PETIT-CLAIR, JR., or his successor is hereby designated as trial counsel in this matter.

PLAINTIFFS' DEMAND FOR RELIEF

Plaintiffs demand damages from Defendants in the amount of Three Million ($3,000,000.00) dollars. Plaintiffs further demand prospective relief in the form of a declaration that N.J.S.A. 43:15A-7.2 is unconstitutional and that Plaintiff be afforded due process with regard to the determination of his employment status.

Dated: April 30, 2015

By: /s/ALFRED J. PETIT-CLAIR. JR., ESQ.
ALFRED J. PETIT-CLAIR, JR, ESQ.
Attorney for Plaintiffs

CERTIFICATION AS TO CIVIL RULE 11.2

Pursuant to Civil Rule 11.2, it is hereby certified that the matter in controversy, being explicitly for violations under the Constitution of the United States of America, and laws thereunder, including the Americans with Disabilities Act, 42 U.S.C. Sec. 126 *et seq.*, is not subject to any other action pending in any

Court of arbitration proceeding, and Plaintiffs do not contemplate any other action or arbitration proceeding. There are/have been prior proceedings between the parties dealing with some of the facts that are involved herein, such as the Chancery action, administrative proceeding with the New Jersey Public Employees' Retirement System, and the action in lieu of prerogative writ, as mentioned in this Complaint, and all of those actions were filed prior to discovery of the alleged ongoing tortious violations of U.S. Constitutional rights, and the violations of the Americans with Disabilities Act, which occurred in the summers of 2013 and 2014, within the statute of limitations period. This action is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; the claims and legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; the factual contentions have evidentiary support; and the foregoing statements made by me are true and correct to the best of my knowledge and information. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: April 30, 2015

By: /s/ALFRED J. PETIT-CLAIR. JR., ESQ.
ALFRED J. PETIT-CLAIR, JR, ESQ.
Attorney for Plaintiffs