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APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 19-2968 and 19-2993

[Filed: October 22, 2020]

PDX NORTH, INC.;

SLS DELIVERY SERVICES, INC.
(Intervenor in District Court)

v.

COMMISSIONER NEW JERSEY
DEPARTMENT OF LABOR AND
WORKFORCE DEVELOPMENT

PDX North, Inc.,
Appellant in No. 19-2968

SLS Delivery Services, Inc.,
Appellant in No. 19-2993

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 3-15-cv-07011)
District Judge: Honorable Brian R. Martinotti

App. 2

Argued: April 15, 2020

Before: CHAGARES, SCIRICA, and ROTH, *Circuit Judges*

(Filed: October 22, 2020)

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OPINION OF THE COURT

SCIRICA, *Circuit Judge*

This case involves a dispute over the employment classification of delivery drivers, either as independent contractors or as employees. The precipitating event in this litigation is the State of New Jersey's assertion of non-payment of unemployment compensation taxes because of the employers' misclassification. To resolve a part of this dispute, we must apply the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971).

PDX North, Inc., a last-mile shipper, long classified its delivery drivers as independent contractors. After audits by the New Jersey Department of Labor and Workforce Development (the "Department"), PDX was told that its drivers were misclassified. Because they were employees, the Department asserted PDX owed unemployment compensation taxes. PDX challenged this determination before the New Jersey Office of Administrative Law (the "New Jersey OAL") on February 19, 2015.

On September 22, 2015, PDX filed this suit in federal court against the Department's Commissioner contending New Jersey's statutory scheme for classifying workers was preempted by the Federal

Aviation Administration Authorization Act of 1994 (the "FAAAA") and was unconstitutional under the Interstate Commerce Clause.

On February 29, 2016, the New Jersey OAL action was stayed at PDX's request and with the consent of the Department. Since then, this stay has been renewed every six months and remains in effect.

Meanwhile, SLS Delivery Services, Inc., also a last-mile shipper, was audited by the Department. Because SLS classified its drivers as independent contractors, it moved to intervene in PDX's action against the Commissioner on December 1, 2017. Intervention was granted on July 27, 2018 and SLS filed a complaint alleging nearly identical claims to PDX. The Department's audit against SLS is still pending.

The Commissioner filed a motion for judgment on the pleadings in the federal action on October 7, 2018, contending the case was barred by the *Younger* abstention doctrine. The trial court agreed and dismissed the entire case. We hold that the trial court correctly dismissed PDX, but it erred in dismissing SLS. Accordingly, we will affirm in part, reverse in part, and remand this matter for further proceedings.[1]

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[1] The trial court possessed subject-matter jurisdiction under 28 U.S.C. § 1331, assuming that the Tax Injunction Act does not withdraw that jurisdiction. *See Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005) (noting that the *Younger* abstention doctrine "represents the sort of 'threshold question' [that] may be resolved before addressing jurisdiction"). We exercise jurisdiction under 28 U.S.C. § 1291 over the trial court's *Younger* abstention decision.

I.

PDX is a last-mile shipper of wholesale auto parts in New Jersey and other states along the Eastern Seaboard. Last-mile shippers, also known as same-day shippers, are companies providing domestic transportation of shipments within a 24-hour period, often on a same-day basis with geographic coverage generally limited to a single metropolitan area. Depending on the volume and timing of its customers' shipping needs, PDX hires "independent owner-operators" on an "as-needed" basis. PDX long classified these drivers as independent contractors.

In May 2012, after completing an audit of PDX for 2006 through 2009, the Department determined that PDX had misclassified its drivers, finding they were employees, not independent contractors. The Department reached the same conclusion in two subsequent audits examining 2010 through 2015. The parties do not provide the factual basis for this determination, nor do they provide the Department's reasoning.

Under N.J. Stat. Ann. § 43:21-19(i)(6) (the "Independent Contractor Test"), New Jersey presumes workers are employees unless three statutory elements are met. Those elements generally require the business to show the worker is "free from [its] control or direction," the worker provides a service "outside the usual course of business," and the worker is "customarily engaged in an independently established trade." N.J. Stat. Ann. § 43:21-19(i)(6)(A)–(C). Some working relationships, however, are exempt from the Independent Contractor Test. One exemption, the

Large Motor Carrier Exemption, may apply if, among other things, the drivers' vehicles weigh 18,000 pounds or more, the vehicles are used for the "highway movement of motor freight," and the driver receives "a percentage of the gross revenue generated." N.J. Stat. Ann. § 43:21-19(i)(7)(X) (the "Large Motor Carrier Exemption"). If the Large Motor Carrier Exemption applies, the elements of the Independent Contractor Test do not need to be satisfied for the worker to qualify as an independent contractor. *Id.*

Because the Department determined PDX had misclassified its drivers and did not qualify for the Large Motor Carrier Exemption, it concluded the drivers were employees for which PDX had not withheld unemployment compensation taxes. The Department assessed PDX for the amount owed, including principal, interest, and penalties, totaling $1,831,291.83 and filed administrative judgments for those assessments in 2015 and 2018.[2] As noted, PDX sought review of the assessment amounts before the New Jersey OAL on February 19, 2015 and that action is currently stayed by PDX's motion (and without objection by the Department or Commissioner).

As noted, after filing its challenges with the New Jersey OAL, PDX brought an action for declaratory and

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[2] After PDX's Amended Complaint was filed in July 2018, the Department filed an administrative judgment in New Jersey state court. In addition to the amount owed alleged in PDX's Amended Complaint, the judgment reveals $498,134.86 in interest, $81,540.00 in penalties, and $680.30 as an administrative cost assessment. As of September 2018, it appears PDX owed at least $2,411,645.91.

injunctive relief in federal court on September 22, 2015. PDX accepts, for purposes of this suit, that it can neither satisfy the elements of the Independent Contractor Test nor the requirements for the Large Motor Carrier Exemption. As a result, its drivers must be classified as employees. In addition to the state and federal tax burdens, PDX complains of the additional costs and obligations of employment. It asserts that classifying these drivers as employees would require additional administrative and human resources costs, the outlay of capital to buy and maintain a fleet of trucks, and a larger payroll to ensure it can always meet peak demand. If it must classify its drivers as employees, PDX alleges, "it will be driven out of business."

PDX contends the Independent Contractor Test and the Large Trucker Exemption are preempted by the FAAAA because they are "related to a price, route, or service" of an interstate motor carrier. 49 U.S.C. § 14501(c)(1). Moreover, PDX asserts these provisions violate the Interstate Commerce Clause, U.S. Const. art. I, § 8, cl. 3, because of the "undue burdens" they impose on its business. It requested the trial court to find the Independent Contractor Test and the Large Motor Carrier Exemption preempted by the FAAAA and unconstitutional under the Interstate Commerce Clause. It also requested the trial court to enjoin the enforcement of the administrative judgments and the performance of future audits.

In a motion to dismiss for failure to state a claim and for lack of jurisdiction under Rule 12(b) filed on October 30, 2015, the Commissioner contended PDX's

case should be dismissed on three separate abstention grounds. The Commissioner did not raise the *Younger* abstention doctrine. The trial court determined none of the cited abstention grounds were applicable, explicitly noting it did not rule on *Younger* abstention because no party had briefed the issue.

The case was reassigned to another judge and proceeded to discovery. As noted, SLS moved to intervene in the action on December 1, 2017 because it operated under a similar business model and was being audited by the Department. Intervention was granted on July 27, 2018, PDX submitted an amended complaint, and SLS submitted a complaint containing nearly identical allegations to PDX's amended complaint. After responding to the complaints, the Commissioner filed a motion for judgment on the pleadings under Rule 12(c) on October 7, 2018, contending for the first time that *Younger* abstention required dismissal.

The trial court granted the Rule 12(c) motion on *Younger* abstention grounds, dismissing the case in its entirety. It reasoned the *Younger* abstention doctrine applied because the proceeding was quasi-criminal in nature as to both PDX and SLS. The trial court then considered the applicable *Middlesex* factors[3] for both

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[3] In *Middlesex*, the Supreme Court announced three factors for courts to consider when determining whether *Younger* abstention is appropriate: (1) whether there is an ongoing judicial proceeding, (2) whether an important state interest is implicated in the state proceeding, and (3) whether the state proceedings provide an

PDX and SLS and concluded each factor favored abstention. Importantly, the trial court held the Department's audit of SLS was an ongoing state judicial proceeding. In the alternative, the trial court noted SLS may have waived its argument that it was not subject to an ongoing state proceeding. The trial court also raised the Tax Injunction Act ("TIA"), sua sponte, and stated it had "significant doubts that the TIA would permit this action to go forward" because this was "an action to enjoin the collection of New Jersey unemployment compensation contributions." But the trial court never ruled on the application of the Tax Injunction Act.

PDX and SLS timely appealed, focusing on two main issues.[4] First, they contend either Federal Rule of Civil Procedure 12 or judicial estoppel prevented the invocation of the *Younger* abstention doctrine. Second, they contend the trial court incorrectly applied *Younger* abstention.

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adequate opportunity to present constitutional arguments. *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).

[4] On appeal, the parties briefed and argued whether the TIA bars this action. Because the trial court never made any findings nor ruled on this issue, we decline to address it in the first instance. *See Forestal Guarani S.A. v. Daros Int'l, Inc.*, 613 F.3d 395, 401 (3d Cir. 2010) ("We ordinarily decline to consider issues not decided by a district court, choosing instead to allow that court to consider them in the first instance.") (citations omitted). On remand, we direct the trial court to address the application of the Tax Injunction Act as to SLS.

II.[5]

First, we will consider whether Federal Rule of Civil Procedure 12 prohibited the trial court from considering *Younger* abstention. PDX and SLS contend the trial court should not have considered the Rule 12(c) motion because it was filed after extensive discovery was completed. They also contend the trial court should not have considered the *Younger* abstention argument, because the Commissioner consented to federal jurisdiction by not arguing it in the first motion to dismiss or by consenting to a stay in PDX's state action. We conclude it was not an abuse of discretion for the trial court to consider the Commissioner's 12(c) motion or to consider the *Younger* abstention arguments.

A.

PDX and SLS's first contention is that the Commissioner's Rule 12(c) motion could not be considered because it was filed too late. They argue because "PDX ha[d] already submitted all of its discovery" it was inappropriate for the trial court to consider the Rule 12(c) motion. Appellants' Br. 21. We disagree.[6]

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[5] PDX and SLS couch these alleged Rule 12 violations as equitable issues but fail to specify which equitable doctrines were violated. As such, we will consider these issues under Rule 12, not under equitable doctrines.

[6] Generally, "matters of docket control," like whether to consider a motion, "are committed to the sound discretion of the district court." *In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 817 (3d Cir. 1982) (citations omitted). We review for abuse of discretion and

Rule 12(c) states that such motions must be filed "[a]fter the pleadings are closed—but early enough not to delay trial." The pleadings in this case closed on October 5, 2018, only after SLS was permitted to intervene. The Commissioner's Rule 12(c) motion was filed on October 7, 2018. The motion therefore satisfies the first requirement of Rule 12(c). It also satisfies the second requirement because no trial date had been set—and therefore no trial date could have been delayed by its filing.[7] The trial court did not abuse its discretion in considering the Commissioner's Rule 12(c) motion.

"will not interfere with a trial court's control of its docket 'except upon the clearest showing that the procedures have resulted in actual and substantial prejudice to the complaining litigant.'" *Id.* at 817 (quoting *Eli Lilly & Co. v. Generix Drug Sales, Inc.*, 460 F.2d 1096, 1105 (5th Cir. 1972)).

[7] PDX and SLS cite three cases contending the Rule 12(c) motion was too late. But they are distinguishable because they confronted the appropriateness of ruling on a Rule 12(c) motion notwithstanding factual disputes on the merits, not considerations of the timeliness of abstention. *See Grajales v. P.R. Ports Auth.*, 682 F.3d 40, 45–46 (1st Cir. 2012) (considering "the question of whether it is appropriate to apply the plausibility standard after substantial pretrial discovery has taken place"); *Ideal Steel Supply Corp. v. Anza*, 652 F.3d 310, 325 (2d Cir. 2011) (discussing appropriateness of Rule 12(c) because "evidence that had already been produced during discovery would fill the perceived gaps in the Complaint"); *Ion Wave Techs., Inc. v. SciQuest, Inc.*, 21 F. Supp. 3d 376, 380 (D. Del. 2014) (finding disposition of a claim involved "material factual disputes" and declining to decide its merits on a Rule 12(c) motion).

B.

PDX and SLS's second contention is that the Commissioner consented to federal jurisdiction over these matters. PDX and SLS point to the Commissioner's agreement to stay PDX's state court matter pending the outcome of the federal case and their failure to raise *Younger* abstention in their first motion to dismiss.[8] The Commissioner asserts he has never formally consented to federal court jurisdiction or waived his *Younger* abstention argument.

Consent to a stay of the state court proceeding in this case was not a waiver of *Younger* abstention, nor is it consent to federal jurisdiction. *See Ohio Civil Rights Comm'n v. Dayton Christian Sch.*, 477 U.S. 619, 626 (1986) (holding there was no waiver or consent because the state had not requested the federal court to adjudicate the merits); *Addiction Specialists, Inc. v. Twp. of Hampton*, 411 F.3d 399, 409 (3d Cir. 2005) (concluding state's consent to stay of state action is irrelevant to *Younger* abstention analysis and does not constitute consent or waiver). The trial court did not err in considering the Commissioner's *Younger* abstention argument.

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[8] PDX and SLS have not argued *Younger* abstention was waived under Rule 12. Although it appears to be without merit, we will not consider whether a failure to raise *Younger* abstention in a 12(b) motion would have prohibited the Commissioner from raising it in a 12(c) motion. *See Leyse v. Bank of Am. Nat'l Ass'n*, 804 F.3d 316, 322, 322 n.5 (3d Cir. 2015) (stating Rule 12 permits filing a Rule 12(c) motion on grounds that were available, but not previously raised, in a Rule 12(b)(6) motion).

III.

Second, we will consider whether the Commissioner is judicially estopped from asserting *Younger* abstention.[9] PDX and SLS argue the Commissioner was estopped from asserting the *Younger* abstention doctrine based on inconsistent litigation positions: consenting to a stay of PDX's state court action and asserting *Younger* abstention in federal court. Judicial estoppel "applies to preclude a party from assuming a position in a legal proceeding inconsistent with one previously asserted." *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 419 (3d Cir. 1988). As stated previously, the Commissioner's position is not inconsistent. *Addiction Specialists, Inc.*, 411 F.3d at 409 (concluding state's consent to stay of state action is irrelevant to *Younger* abstention analysis). Accordingly, judicial estoppel did not preclude the trial court from considering *Younger* abstention.[10]

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[9] We review the invocation of judicial estoppel for abuse of discretion. *Montrose Med. Grp. Participating Sav. Plan v. Bulger*, 243 F.3d 773, 780 (3d Cir. 2001). A court "abuses its discretion when its ruling is founded on an error of law or a misapplication of law to the facts." *Id.* (quoting *In re O'Brien*, 188 F.3d 116, 122 (3d Cir. 1999)).

[10] PDX and SLS also contend the law-of-the-case doctrine foreclosed the trial court from deciding whether there was an "ongoing judicial proceeding" for *Younger* purposes. "Courts apply the law of the case doctrine when their prior decisions in an ongoing case either expressly resolved an issue or necessarily resolved it by implication." *United Artists Theatre Cir. v. Twp. of Warrington*, 316 F.3d 392, 397–98 (3d Cir. 2003) (emphasis omitted) (quoting *Aramony v. United Way of Am.*, 254 F.3d 403, 410 (2d Cir. 2001)). Whether the law-of-the- case doctrine applies

IV.

Third, we determine whether the trial court erred in dismissing PDX and SLS's cases under *Younger* abstention.[11]

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is subject to plenary review. *Coca-Cola Bottling Co. of Shreveport v. Coca-Cola Co.*, 988 F.2d 414, 429 (3d Cir. 1993). Reviewing the previous trial court opinion, we conclude no issue relating to *Younger* abstention was either explicitly or implicitly decided.

[11] "We exercise plenary review over a trial court's . . . determination of whether *Younger* abstention is proper." *Hamilton v. Bromley*, 862 F.3d 329, 333 (3d Cir. 2017) (citation omitted). At an earlier time, we reviewed the decision to abstain—after ensuring the legal requirements had been met—for abuse of discretion. *See, e.g.*, *Addiction Specialists, Inc.*, 411 F.3d at 408 ("Once we determine that the requirements have been met, we review a district court's decision to abstain under *Younger* abstention principles for abuse of discretion." (quoting *Gwynedd Props., Inc. v. Lower Gwynedd Twp.*, 970 F.2d 1195, 1199 (3d Cir. 1995)) (citations omitted)). But the Supreme Court in *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013) stated "*Younger* exemplifies one class of cases in which federal-court abstention is required . . . ." And since then we have applied a de novo standard.

This practice is not uniform throughout the circuits, but several have found the same. *Compare Sirva Relocation, LLC v. Richie*, 794 F.3d 185, 191 (1st Cir. 2015) (applying de novo standard of review to *Younger* abstention), *Trump v. Vance*, 941 F.3d 631, 636 (2d Cir. 2019) (same), *Aaron v. O'Connor*, 914 F.3d 1010, 1015 (6th Cir. 2019) (same), *Mulholland v. Marion Cnty. Election Bd.*, 746 F.3d 811, 816 (7th Cir. 2014) (same), *Rynearson v. Ferguson*, 903 F.3d 920, 924 (9th Cir. 2018) (same), and *Elna Sefcovic, LLC v. TEP Rocky Mt., LLC*, 953 F.3d 660, 669 (10th Cir. 2020) (same), *with Golphin v. Thomas*, 855 F.3d 278, 286 (4th Cir. 2017) (applying abuse of discretion standard of review to *Younger* abstention), *Gates v. Strain*, 885 F.3d 874, 879 (5th Cir. 2018)

The trial court correctly dismissed PDX's case but erred in dismissing SLS's case because, for SLS, there was no ongoing judicial proceeding.

Generally, "a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'" *Sprint Commc'ns., Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). *Younger* abstention is an exception to that rule that applies when certain types of state proceedings are ongoing at the time a federal case is commenced. *Id.* Abstention serves a dual-purpose in these situations: (1) to promote comity, "a proper respect for state functions," by restricting federal courts from interfering with ongoing state judicial proceedings and (2) to restrain equity

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(applying de novo standard of review for legal determinations and abuse of discretion standard of review for decision to abstain to *Younger* abstention), *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603, 609–10 (8th Cir. 2018) (same), *Tokyo Gwinnett, LLC v. Gwinnett Cnty.*, 940 F.3d 1254, 1266 (11th Cir. 2019) (applying abuse of discretion standard of review to *Younger* abstention), and *Handy v. Shaw, Bransford, Veilleux & Roth*, 325 F.3d 346, 349 (D.C. Cir. 2003) (applying de novo standard of review for legal determinations and abuse of discretion standard of review for decision to abstain to *Younger* abstention).

When we review a district court's judgment on a Rule 12(c) motion for judgment on the pleadings, we must "view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party," and we may not affirm the grant of such a motion "unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." *Wolfington v. Reconstructive Orthopaedic Assocs. II PC*, 935 F.3d 187, 195 (3d Cir. 2019) (quotation marks omitted).

jurisdiction from operating when state courts provide adequate legal remedies for constitutional claims and there is no risk of irreparable harm. *Id.*

Younger abstention is only appropriate in three types of underlying state cases: (1) criminal prosecutions, (2) civil enforcement proceedings, and (3) "civil proceedings involving orders in furtherance of the state courts' judicial function." *ACRA Turf Club, LLC v. Zanzucchi*, 748 F.3d 127, 138 (3d Cir. 2014) (citing *Sprint Commc'ns., Inc.*, 571 U.S. at 78). In this case, the parties agree that *Younger* abstention is only proper if we determine the underlying state proceedings are civil enforcement proceedings that are quasi-criminal in nature.

To assess whether underlying proceedings are quasi-criminal in nature, we consider whether:

> (1) the action was commenced by the State in its sovereign capacity, (2) the proceeding was initiated to sanction the federal plaintiff for some wrongful act, and (3) there are other similarities to criminal actions, such as a preliminary investigation that culminated with the filing of formal charges. . . . We also consider whether the State could have alternatively sought to enforce a parallel criminal statute.

ACRA Turf Club, LLC, 748 F.3d at 138 (citing *Sprint Commc'ns., Inc.*, 571 U.S. at 79–80).

If we conclude the civil proceeding here was quasi-criminal in nature, we must then consider the *Middlesex* factors: (1) whether there are "ongoing judicial proceeding[s]"; (2) whether those "proceedings

implicate important state interests"; and (3) whether there is "an adequate opportunity in the state proceeding to raise constitutional challenges." *Middlesex Cnty. Ethics Comm.*, 457 U.S. at 432.

A.

We will consider three factors described in *Sprint* to determine whether PDX and SLS are subject to civil enforcement actions that are quasi-criminal in nature.[12] As described below, each factor supports a finding that the underlying proceedings are civil enforcement actions that are quasi-criminal in nature.

1.

First, we consider whether the underlying action was commenced by New Jersey in its sovereign capacity. PDX contends it initiated the challenge to the assessment, not New Jersey. We disagree. The state administrative action was commenced by New Jersey in its sovereign capacity as to PDX. Unlike in *ACRA Turf Club, LLC*, where "no state actor conducted an investigation or filed any type of formal complaint," here the Commissioner performed multiple audits of PDX and issued multiple formal assessments after the culmination of those audits. *ACRA Turf Club, LLC*, 748 F.3d at 138. The New Jersey OAL action only occurred

[12] We will not evaluate whether there are "other similarities to criminal actions," as it is sufficiently clear from the other factors that this is a civil enforcement action that is quasi-criminal in nature.

because of the Commissioner's actions.[13] As the trial court explained, "[t]he fact that PDX is technically the party seeking review before the [New Jersey OAL] is a mere function of New Jersey administrative procedure." As to PDX, the New Jersey OAL action was, for *Younger* purposes, commenced by New Jersey in its sovereign capacity.

2.

Second, we consider whether the proceeding sanctions wrongful conduct. PDX and SLS contend the proceeding does not because the only remedies available are civil in nature. The Commissioner disagrees, pointing out that misclassification of workers and failure to withhold unemployment compensation taxes is wrongful and can result in penalties, fines, and imprisonment. *See* N.J. Stat. Ann. § 43:21-14 (describing civil penalties for failing to report or withhold unemployment compensation taxes); N.J. Stat. Ann. § 43:21-16(e) (describing criminal fine and term of imprisonment for intentionally false or fraudulent report). As to both PDX and SLS, assessment may result in sanctions for a wrongful act.

"Sanctions are retributive in nature and are typically imposed to punish the sanctioned party 'for some wrongful act.'" *ACRA Turf Club, LLC*, 748 F.3d at 140 (quoting *Sprint Commc'ns., Inc.*, 571 U.S. at 79). Misclassification of workers that results in the non-payment of state taxes is "wrongful conduct."

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[13] The Supreme Court does not require the state to commence the judicial proceedings, as PDX seems to suggest, but only notes it is often the case. *See Sprint Commc'ns., Inc.*, 571 U.S. at 79.

Further, the Commissioner has imposed over $30,000 in penalties on PDX—in addition to the back taxes and interest allegedly owed—and could penalize SLS similarly. *See* N.J. Stat. Ann. § 43:21-14 (describing civil penalties for failing to report or withhold unemployment compensation taxes). Penalties are, by their very nature, retributive: a sanction for wrongful conduct. *See Gonzalez v. Waterfront Comm'n of N.Y. Harbor*, 755 F.3d 176, 182 (3d Cir. 2014) (concluding a "disciplinary hearing" and possible termination of employment were sanctions for wrongful conduct, making false statements). Accordingly, we find this second factor favors finding this is a civil enforcement action that is quasi-criminal in nature.

3.

Third, we consider whether there is also a criminal analog to this action. PDX and SLS contend there is no criminal analog because they have not been criminally charged. But the question is not whether the current action is criminal or whether criminal charges are warranted. To hold as PDX and SLS contend would erase the quasi-criminal category of abstention, as it would require criminal charges to be brought for a quasi-criminal action to exist.

The question is whether there is a criminal analog. *See Gonzalez*, 755 F.3d at 182 (holding this factor satisfied because "New Jersey could have vindicated similar interests by enforcing its criminal perjury statute"). Under New Jersey law, employers who do not pay or withhold contributions as lawfully required may face a $1,000 fine and a sentence of imprisonment of up

to ninety days. N.J. Stat. Ann. § 43:21-16(e). PDX and SLS acknowledge the risk of New Jersey criminally charging them in their pleadings, stating they fear criminal consequences. There is a criminal analog here. This third factor favors finding this civil enforcement action is quasi-criminal in nature. Considering these factors together, we hold this is a civil enforcement action that is quasi-criminal in nature.

B.

Because we have determined this is a civil enforcement action that is quasi-criminal in nature, we will consider the *Middlesex* factors as to PDX and SLS. The trial court did not err in finding the *Middlesex* factors favored *Younger* abstention as to PDX's case. PDX's New Jersey OAL action is an ongoing judicial proceeding in which New Jersey has a strong interest and PDX may raise any constitutional claims. But the trial court erred in finding there was an ongoing judicial proceeding as to SLS and in dismissing SLS's case on *Younger* abstention grounds, because SLS is not subject to an ongoing state judicial proceeding. Because the analyses diverge, we will discuss PDX and SLS separately.

1.

First, we consider whether PDX is involved in ongoing judicial proceedings. PDX contends it is not subject to an ongoing state judicial proceeding because the New Jersey OAL matter is stayed.[14] But "state

[14] PDX does not disagree that the New Jersey OAL matter is judicial in nature. We note proceedings presided over by an

proceedings are 'ongoing' for *Younger* abstention purposes, notwithstanding [a] state court's stay of proceedings" if the state proceeding "was pending at the time [the plaintiff] filed its initial complaint in federal court." *Addiction Specialists, Inc.*, 411 F.3d at 408–09. The New Jersey OAL action was ongoing at the time PDX brought its federal action. This *Middlesex* factor favors *Younger* abstention as to PDX.

Second, we consider whether these proceedings implicate an important state interest. PDX sidesteps this issue by pointing to the merits of its federal case and arguing federal preemption supersedes any state interest to the contrary. Even assuming PDX is correct about the merits of its claims, we do not consider the merits "when we inquire into the substantiality of the State's interest in its proceedings." *O'Neill v. City of Phila.*, 32 F.3d 785, 791–92 (3d Cir. 1994) (quoting *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 364–65 (1989)). "Rather, what we look to is the importance of the generic proceedings to the State." *Id.* New Jersey has an interest in the collection of unemployment compensation taxes through proper enforcement actions in the New Jersey OAL and its courts. PDX provides nothing to rebut this fact. The state administrative proceedings implicate important state interests.

Administrative Law Judge at the New Jersey OAL are judicial for purposes of *Younger* abstention. *See, e.g.*, *Zahl v. Harper*, 282 F.3d 204, 209 (3d Cir. 2002) (discussing a New Jersey OAL action presided over by an ALJ and concluding "[s]tate administrative proceedings such as this have long been recognized as judicial in nature").

Finally, we consider whether there is an adequate opportunity in the state proceedings for PDX to present its constitutional claims. PDX is currently subject to a New Jersey OAL action. PDX argues the New Jersey OAL lacks the authority to consider their constitutional claims because the New Jersey OAL may only consider constitutional issues that are necessary to the issue presented. They narrowly define the issue presented to the New Jersey OAL to include only whether the workers were properly classified. But PDX admits that constitutional questions may be reserved for the judicial review process, after the administrative process is complete.

"The Supreme Court has held that this third element is satisfied in the context of a state administrative proceeding when the federal claimant can assert his constitutional claims during state-court judicial review of the administrative determination." *O'Neill*, 32 F.3d at 792 (citing *Dayton Christian Sch.*, 477 U.S. at 629; *Middlesex Cnty. Ethics Comm.*, 457 U.S. at 436). As noted, PDX admits its claims may be heard at the judicial review phase. Our review of New Jersey law confirms that these constitutional claims may be raised in this state judicial proceeding. PDX has an adequate opportunity to present those claims.

Balancing these factors, we will affirm the trial court's conclusion that it should abstain as to PDX. All the *Middlesex* factors point towards abstention and the trial court did not err in dismissing PDX's case on *Younger* abstention grounds.

2.

The trial court erred in dismissing SLS's case on *Younger* abstention grounds. We first consider whether there was an ongoing judicial proceeding. The first *Middlesex* factor does not favor *Younger* abstention as to SLS because it is still at the audit stage. The Commissioner urges us not to reach the issue, offering three points in rebuttal: (1) SLS waived this argument in the trial court; (2) SLS concedes a state action is imminent; and (3) SLS is stonewalling the Commissioner, thwarting its ability to conclude the audit and issue an assessment. We disagree with each contention.

We see no waiver. The trial court erred because "failures to raise [an] issue in the District Court . . . are . . . more properly characterized as forfeitures rather than as waivers." *Barna v. Bd. of Sch. Dirs. of Panther Valley Sch. Dist.*, 877 F.3d 136, 148 (3d Cir. 2017). Moreover, SLS twice pointed out in its opposition brief that *Younger* abstention does not apply because there is no pending state proceeding. While this contention may have benefitted from further factual and legal development, it was neither waived nor forfeited.

The Commissioner's final two contentions are inapposite. If a judicial proceeding is only *imminent*, *Younger* abstention is inappropriate because that proceeding is not *pending* or *ongoing*. *See Malhan v. Sec'y U.S. Dep't of State*, 938 F.3d 453, 463–64 (3d Cir. 2019) ("That Malhan's garnishment proceeding is merely threatened . . . makes abstention 'clearly erroneous.'" (quoting *Miller v. Mitchell*, 598 F.3d 139, 146 (3d Cir. 2010))). The Commissioner's assertion that

SLS is stonewalling cannot be considered under our standard of review: we must draw all reasonable inferences in favor of SLS based on the allegations in its complaint. It is also unsupported by the evidence of record.

Accordingly, we consider whether SLS's audit is an "ongoing judicial proceeding." The Commissioner's position seems to be that once the Department initiates a formal audit, an "ongoing judicial proceeding" exists for *Younger* purposes. SLS's position is that a proceeding is only ongoing once it becomes judicial in nature. On these facts, we find the initiation of an audit is insufficient to serve as an ongoing judicial proceeding for *Younger* purposes.

The trial court—and the Commissioner—rely on two cases that involved the issuance of a search warrant and a grand jury subpoena.[15] Both cases are inapposite because they (1) are criminal *Younger* cases, (2) rely on New York state law as to the definition of "criminal proceeding," and (3) involve judicial oversight not part of the Department's audit process. *Nick v. Abrams*, 717 F. Supp. 1053, 1056 (S.D.N.Y. 1989) (search warrant); *Notey v. Hynes*, 418 F. Supp. 1320, 1326 (E.D.N.Y. 1976) (grand jury subpoena). These cases do not inform our decision here.

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[15] The trial court also cited one of our precedential cases, but that involved a child support order that subjected an individual to an ongoing obligation, even though he was not then obligated to attend a judicial hearing. *Anthony v. Council*, 316 F.3d 412, 418–21 (3d Cir. 2003). There is no such judicial order here.

On the relevant facts in this case, the Department's audit did not involve judicial oversight and cannot be considered an ongoing judicial proceeding for *Younger* abstention purposes. We believe our colleagues on the First, Fourth, Fifth, Seventh, and Eleventh Circuits would agree. *See Google, Inc. v. Hood*, 822 F.3d 212, 224 (5th Cir. 2016) (holding "that the issuance of a non-self-executing administrative subpoena does not, without more, mandate *Younger* abstention"); *Mulholland v. Marion Cnty. Election Bd.*, 746 F.3d 811, 813 (7th Cir. 2014) (holding an ongoing election board investigation was "too preliminary a proceeding to warrant *Younger* abstention"); *Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 519 (1st Cir. 2009) (holding an "agency's investigation . . . was at too preliminary a stage to constitute a 'proceeding' triggering *Younger* abstention"); *Telco Commc'ns., Inc. v. Carbaugh*, 885 F.2d 1225, 1229 (4th Cir. 1989) ("We decline to hold that *Younger* abstention is required whenever a state bureaucracy has initiated contact with a putative federal plaintiff. Where no formal enforcement action has been undertaken, any disruption of state process will be slight."); *Major League Baseball v. Butterworth*, 181 F. Supp. 2d 1316, 1321 n.2 (N.D. Fla. 2001), *aff'd sub nom. Major League Baseball v. Crist*, 331 F.3d 1177 (11th Cir. 2003) (holding *Younger* abstention inappropriate when Florida's attorney general served civil investigative demands).

The first *Middlesex* factor does not favor *Younger* abstention as to SLS. Because SLS is not subject to an ongoing state proceeding, there is no state interest in those proceedings and SLS does not have the

opportunity to present its constitutional claims. Accordingly, we will reverse the trial court's dismissal of SLS's case because it erred by invoking the *Younger* abstention doctrine. We will remand this matter to the trial court to allow SLS to pursue its legal and constitutional challenges.[16]

V.

For the reasons expressed, we will affirm in part, reverse in part, and remand this matter to the trial court for further proceedings.

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[16] The trial court did not address the merits of the action. The Commissioner contends we may still consider the merits of the action and should affirm the trial court's dismissal of the case, even if we conclude *Younger* abstention is inapplicable. While we may affirm on any grounds apparent from the record, we decline to address the merits here. *Khazin v. TD Ameritrade H2olding Corp.*, 773 F.3d 488, 491 (3d Cir. 2014).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 19-2968 and 19-2993

[Filed: October 22, 2020]

PDX NORTH, INC.;

SLS DELIVERY SERVICES, INC.
(Intervenor in District Court)

v.

COMMISSIONER NEW JERSEY DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT

PDX North, Inc.,
Appellant in No. 19-2968

SLS Delivery Services, Inc.,
Appellant in No. 19-2993

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 3-15-cv-07011)
District Judge: Honorable Brian R. Martinotti

Argued: April 15, 2020

Before: CHAGARES, SCIRICA, and ROTH, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued on April 15, 2020. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the order of the District Court entered July 29, 2019, be, and the same is hereby AFFIRMED in part, REVERSED in part and REMANDED. No costs will be taxed. All the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

DATED: October 22, 2020

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Case No.: 3:15-cv-7011-BRM-TJB

[Filed: July 29, 2019]

PDX NORTH, INC.

Plaintiff,

and

SLS DELIVERY SERVICES, INC.

Plaintiff-Intervenor,

v.

ROBERT ASARO-ANGELO, in his capacity as Commissioner of the New Jersey Department of Labor and Workforce Development

Defendant.

OPINION

MARTINOTTI, DISTRICT JUDGE

Before this Court are Defendant Robert Asaro-Angelo's Motion for Judgment on the Pleadings or for a Stay of Proceedings (ECF No. 63) and Plaintiff PDX North, Inc.'s ("PDX") Cross-Motion for Summary Judgment (ECF No. 69). Both motions are opposed (ECF Nos. 70, 74, & 78). Having reviewed all parties' submissions filed in connection with the motion and having declined to hear oral argument pursuant to Federal Rule of Civil Procedure 78(b), for the reasons set forth below and for good cause having been shown, the Defendant's Motion for Judgment on the Pleadings is **GRANTED**, and PDX's Cross-Motion for Summary Judgment is **ADMINISTRATIVELY TERMINATED**.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

A. New Jersey's Unemployment Compensation Law

Robert Asaro-Angelo (the "Commissioner") is New Jersey's Commissioner of Labor and Industry and leads the state's Department of Labor and Workforce Development. *See* N.J. Stat. Ann. § 34:1A-2. The Commissioner enforces New Jersey's unemployment compensation law. *See id.* § 43:21-7f. The unemployment compensation law requires employers to pay into the state's unemployment compensation

[1] When reviewing a motion for judgment on the pleadings, "[t]he court will accept the complaint's well-pleaded allegations as true, and construe the complaint in the light most favorable to the nonmoving party, but will not accept unsupported conclusory statements." *DiCarlo v. St. Mary Hosp.*, 530 F.3d 255, 262-63 (3d Cir. 2008).

fund an amount in proportion to the wages each employer pays to its employees. *See id.* § 43:21-7. The statutory calculation exempts payments both to independent contractors and to certain commercial freight truck drivers. *See id.* § 43:21-19(i)(6), (i)(7)(X).

B. PDX North, Inc.

"PDX is a company that facilitates, brokers, and provides distribution and transportation services of wholesale auto parts to auto dealers and third-party auto suppliers throughout New Jersey, Pennsylvania, New York, Connecticut, Rhode Island, Massachusetts, and Vermont." (PDX's Am. Compl. ¶ 11.) The company specializes in providing its customers with these auto parts on demand, often on short notice. (*Id.* ¶ 20.) Given the nature of its business model, PDX's "shipments are often time-sensitive and unscheduled." (*Id.*) To meet customers' needs, the company contracts with drivers to perform deliveries. (*Id.*)

PDX characterizes its drivers as an independent contractors. (*Id.*) However, the company fears that its drivers will not meet the statutory exemption in § 43:21-19(i)(6) or (i)(7)(X). (*Id.* ¶ 6.) The company alleges that if it were forced to treat its drivers as employees for purposes of the unemployment compensation law, the company would incur additional costs so great that its current business model would no longer be viable. (*Id.* ¶ 5.)

The Commissioner audited PDX three times in connection with the company's obligations under the unemployment compensation law, covering the years 2006-09 (first audit), 2010-12 (second audit), and 2013-

15 (third audit). (*Id.* ¶¶ 22-25.) Following the audits, the Commissioner determined PDX owed a total of approximately $1.83 million in unpaid contributions to the unemployment compensation fund, interest on those unpaid contributions, and financial penalties. (*Id.*) PDX appealed the Commissioner's decision to the New Jersey Office of Administrative Law. *See PDX N., Inc. v. N.J. Dep't of Labor & Workforce Dev.*, OAL Dkt. No. LID 02451-2015 S (filed Feb. 19, 2015). PDX also brought this action seeking declaratory and injunctive relief against the Commissioner, alleging that the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), 49 U.S.C. § 14501(c)(1), preempts New Jersey's unemployment compensation law, and the Dormant Commerce Clause, *see* U.S. Const., art. I, § 8, bars the enforcement of New Jersey's unemployment compensation law. (ECF No. 52 ¶¶ 50-67.)

The Court previously denied the Commissioner's motion to dismiss, holding that neither sovereign immunity nor the the *Rooker-Feldman*,[2] *Colorado River*,[3] or *Burford*[4] doctrines barred the Court from hearing this case on the merits, and PDX stated a valid claim for relief under Federal Rule of Civil Procedure 12(b)(6). (ECF No. 22, at 6-10.) The Court also denied PDX's motion for summary judgment. (ECF No. 22, at

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[2] *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 482-87 (1983)*; Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-17 (1923).

[3] *Burford v. Sun Oil Co.*, 319 U.S. 315, 331-34 (1943).

[4] *Colo. River Water Consv'n Dist. v. United States*, 424 U.S. 800, 817-20 (1976).

12.) The Commissioner subsequently moved for judgment on the pleadings, while PDX moved again for summary judgment.

C. SLS Delivery Services, Inc.

"SLS is a motor carrier that facilitates and provides interstate distribution, delivery[,] and transportation services of packages as a contractor to national and international carriers between and within the States of New Jersey and New York." (SLS's Compl. ¶ 11.) The company's business model is to transport packages on-demand and as-needed between shipping companies—for instance, between the U.S. Postal Service and private shipper DHL. (*Id.* ¶¶ 24-25.) These inter-carrier "shipments are often time-sensitive and as-needed." (*Id.* ¶ 26.) SLS contracts with drivers to shuttle packages between shipping companies. (*Id.*)

SLS also characterizes its drivers as independent contractors. (*Id.* at ¶ 25.) However, the company alleges that its drivers will not meet the statutory exemption in § 43:21-19(i)(6). (*Id.* ¶ 6.) SLS alleges that if it were forced to treat its drivers as employees for purposes of the unemployment compensation law, the company would incur additional costs so great that its current business model would no longer be viable. (*Id.* ¶ 5.)

The Commissioner initiated an audit of SLS for the years 2013 to the present, in an effort to determine whether SLS improperly characterized its drivers as independent contractors and therefore underpaid its obligations to New Jersey's unemployment compensation fund. (*Id.* ¶ 28.) Although the audit is not yet complete, SLS expects that the audit will determine

that SLS improperly characterized its drivers as independent contractors because the Commissioner "audited a substantially smaller entity affiliated with SLS with the same business model as SLS," and found that the smaller entity should not have characterized its drivers as independent contractors. (*Id.* ¶ 31.)

The Court granted SLS's motion to intervene as a plaintiff on July 27, 2018. (ECF No. 50.) The company filed its own complaint seeking declaratory and injunctive relief, arguing that the FAAAA preempts New Jersey's unemployment compensation law and that the Dormant Commerce Clause bars the enforcement of New Jersey's unemployment compensation law.

II. LEGAL STANDARD

"After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). When reviewing a motion for judgment on the pleadings, the Court may not review matters outside the pleadings without converting the motion into a motion for summary judgment. Fed. R. Civ. P. 12(d).

"A court will grant a motion for judgment on the pleadings if the movant establishes that 'there are no issues of material fact, and that he is entitled to judgment as a matter of law.'" *Allstate Prop. & Cas. Ins. Co. v. Squires*, 667 F.3d 388, 390 (3d Cir. 2012) (quoting *Sikirica v. Nationwide Ins. Co.*, 416 F.3d 214, 220 (3d Cir. 2005)). "In considering the motion for judgment on the pleadings, [this] Court [is] required to accept all of the [non-movants'] allegations as true and

draw all reasonable inferences in their favor." *Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255, 257 (3d Cir. 2013).

A motion for judgment on the pleadings is an appropriate vehicle to address an argument for abstention. *See Disability Rights N.Y. v. New York*, 916 F.3d 129, 131 (2d Cir. 2019).

III. *YOUNGER* ABSTENTION

The Commissioner argues that this Court should abstain from exercising jurisdiction over the plaintiff's and plaintiff-intervenor's claims. *See Younger v. Harris*, 401 U.S. 37, 44-45 (1971). The Court agrees.

The *Younger* abstention doctrine provides that federal courts should generally abstain from exercising jurisdiction over cases that seek to interfere with certain types of pending state litigation, when "the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987). One qualifying type of state litigation is "civil enforcement proceedings." *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans* ("*NOPSI*"), 491 U.S. 350, 368 (1989).

A qualifying "civil enforcement proceeding" has certain characteristics. Traditionally, courts looked to three so-called *Middlesex* factors: (1) whether there was an ongoing state proceeding that was judicial in nature, (2) whether the state proceeding implicated important state interests, and (3) whether the state proceeding offered an adequate opportunity for the federal plaintiff

to litigate federal constitutional challenges. *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). However, recent decisions caution that "these three factors [are not] the alpha and omega of the abstention inquiry," and "were never intended to be independently dispositive." *Gonzalez v. Waterfront Comm'n of N.Y. Harbor*, 755 F.3d 176, 182 (3d Cir. 2014); *see also Hamilton v. Bromley*, 862 F.3d 329, 337 (3d Cir. 2017). Before analyzing the *Middlesex* factors, courts must first determine whether the state proceedings possess a quasi-criminal character. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 81 (2013).

A. Quasi-Criminal Proceedings

"[Q]uasi-criminal proceedings of this ilk share several distinguishing features." *Gonzalez*, 755 F.3d at 181. For instance, the proceeding will "characteristically [be] initiated to sanction the federal plaintiff, *i.e.*, the party challenging the state action, for some wrongful act." *Sprint Commc'ns*, 571 U.S. at 79. This is more than mere "negative consequences." *ACRA Turf Club, LLC v. Zanzucchi*, 748 F.3d 127, 140 (3d Cir. 2014). "Sanctions are retributive in nature and are typically imposed to punish the sanctioned party 'for some wrongful act.'" *Id.* (quoting *Sprint Commc'ns*, 571 U.S. at 79). Sanctions must be more than the mere "cost of doing business, with the choice of whether to make such payment resting entirely with Plaintiffs." *Id.*

Additionally, "a state actor [will] routinely [be] a party to the state proceeding and often initiates the action." *Sprint Commc'ns*, 571 U.S. at 79. "To be sure, the Supreme Court has not directly held that *Younger*

applies only when a state actor files a complaint or formal charges." *ACRA Turf Club*, 748 F.3d at 140. However, "the state's 'initiation' procedure must proceed with greater formality than merely sending a targeted advisory notice to a class of people that may be affected by new legislation." *Id.*

Often, "the proceeding [will be] both in aid of and closely related to criminal statutes." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975). A proceeding is more likely to be quasi-criminal if "the State could have alternatively sought to enforce a parallel criminal statute" that "vindicates similar interests." *ACRA Turf Club*, 748 F.3d at 138; *see also Trainor v. Hernandez*, 431 U.S. 434, 444 (1977); *Gonzalez*, 755 F.3d at 182. For that reason, "[i]nvestigations are commonly involved, often culminating in the filing of a formal complaint or charges." *Sprint Commc'ns*, 571 U.S. at 79-80; *see also Gonzalez*, 755 F.3d at 182.

While quasi-criminal proceedings may share many attributes with actual criminal prosecutions, they will differ in one key respect: unlike a criminal prosecution, a quasi-criminal proceeding need not occur before the state's judiciary. To the contrary, abstention will apply "to state administrative proceedings in which important state interests are vindicated, so long as in the course of those proceedings the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim." *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 627 (1986); *see also Gonzalez*, 755 F.3d at 182 (describing a state administrative proceeding as "a textbook example of a quasi-criminal action").

The administrative proceedings in this case—which seek to recover unpaid unemployment compensation payments—constitute quasi-criminal proceedings because they meet all[5] of these elements. First, New Jersey's unemployment compensation law provides for sanctions against employers who are delinquent in their payment of unemployment compensation contributions. However, not all the remedies available to the Commissioner constitute sanctions. For instance, the Commissioner can institute a civil action to collect the unpaid contributions. N.J. Stat. Ann. § 43:21-14(b). Likewise, the Commissioner may collect interest on those unpaid contributions. *Id.* § 43:21-14(a). The statute authorizes the Commissioner to issue a certificate detailing an employer's liability for unpaid unemployment compensation contributions, and provides that the certificate "shall have the same force and effect as a judgment obtained in the Superior Court of New Jersey." *Id.* § 43:21-14(e).

The unemployment compensation law empowers the Commissioner with punitive remedies, as well. The Commissioner may fine an employer "who makes a

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[5] PDX argues a state proceeding necessarily lacks a quasi-criminal character if the proceeding is missing even a single one of the above attributes. This argument misunderstands the nature of the inquiry. These factors are not a mandatory checklist for quasi-criminal proceedings; instead, a court determining a state proceeding's quasi-criminal character weighs the factors above; no single factor is dispositive. *See Sprint Commc'ns*, 571 U.S. at 79-81 (noting that quasi-criminal proceedings "characteristically" exist to sanction the federal plaintiff, "commonly" following an investigation by a state actor who "routinely" is a party and "often" initiates the proceeding, "often" by the filing of formal charges).

false statement or representation, knowing it to be false, or who knowingly fails to disclose a material fact, . . . [in order] to avoid or reduce any contribution or other payment required" under the unemployment compensation law. *Id.* § 43:21-16(b)(1). "Any penalties imposed by this paragraph shall be in addition to those otherwise prescribed" by the unemployment compensation law. *Id.* The statutory scheme intends these fines to be punitive: the statute is itself entitled "Penalties; investigative staff." *Id.* Because these fines are more than the mere cost of doing business, they constitute sanctions as contemplated by the *Younger* abstention framework.

Second, a state actor—the Commissioner—is a party to administrative proceedings. *See* N.J. Stat. Ann. § 34:1A-1 (establishing[6] the Department of Labor and Workforce Development); *id.* § 34:1A-2 (creating a "Commissioner of Labor and Industry" to head the department). No party contests that the Commissioner is a state actor.

Third, the state in its sovereign capacity initiated the administrative proceedings with sufficient formality. After conducting multiple audits, the Commissioner gave PDX formal notice of its liability for unpaid unemployment compensation contributions, interest, and penalties—including the exact amounts

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[6] The New Jersey Legislature created the "Department of Labor and Industry" in 1948. *See* N.J. Stat. Ann. § 34:1A-1. A statute renamed the department to the "Department of Labor" in 1981. *See id.* § 34:1A-1.1. The department obtained its current name, "Department of Labor and Workforce Development," following a 2004 enactment. *See id.* § 34:1A-1.2.

owed in each category. The Commissioner also filed certificates concerning PDX's liability—certificates with the force and effect of court judgments. *See id.* § 43:21-14(e). Because there are few, if any, legal documents with more formality than a court judgment, the filing of certificates with the force and effect of court judgments constitutes sufficiently formal notice from the Commissioner that it sought to initiate proceedings against PDX for unpaid unemployment compensation contributions.

PDX and SLS focus their argument not on the formality of the notice, but on the identity of the party who initiated the administrative proceedings. They characterize PDX—not the Commissioner—as the initiating party because PDX filed an administrative appeal of the Commissioner's liability determination. This argument places form over function. The Commissioner, not PDX, initiated an investigation and audit of PDX's unemployment compensation contribution payments. The Commissioner, not PDX, filed the certificates concerning PDX's unemployment compensation liability—certificates with the force and effect of court judgments. The fact that PDX is technically the party seeking review before the Office of Administrative Law is a mere function of New Jersey administrative procedure.[7] PDX's request for review

[7] Generally speaking, administrative proceedings begin "in the State agency with appropriate subject matter jurisdiction." N.J. Admin. Code § 1:1-3.1(a). The agency then transmits these cases to the Office of Administrative Law. *See id.* However, the agency may issue a rule or regulation assigning to the private party the obligation of seeking review in the Office of Administrative Law. *See* N.J. Stat. Ann. § 52:14B-9(g). The Commissioner has issued

before the Office of Administrative Law merely continues the ongoing legal process initiated in substance by the state when the Commissioner began auditing PDX. Because the proceedings are, in substance, initiated by the state in its sovereign capacity, this factor weighs in favor of finding that the state administrative proceedings possess a quasi-criminal character.

Fourth, the administrative provisions to recover unpaid unemployment compensation contributions are in aid of, and are closely related to, criminal statutes. The criminal provisions are so closely related that they fall within the same statutory section as the civil enforcement language. *See* N.J. Stat. Ann. § 43:21-16. The criminal and civil enforcement provisions vindicate similar interests: namely, encouraging the prompt, full payment of unemployment compensation contributions and the recovery of unpaid payments. *Compare id.* § 43:21-16(e)(1) (criminal provisions), *with id.* § 43:21-16(b) (civil enforcement provisions). The investigation of civil non-payment violations in this case may lead to a potential criminal fraud prosecution. Accordingly, the close relationship between the administrative and criminal proceedings suggests that the administrative proceedings constitute quasi-criminal proceedings.

Because every factor weighs in this direction, the administrative proceedings at issue here possess a quasi-criminal character. The next step in the *Younger* analysis is to consider the *Middlesex* factors. *See Gonzalez*, 755 F.3d at 182.

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such a rule. *See* N.J. Admin. Code § 12:16-22.2(a).

B. *Middlesex* Factors

Middlesex outlines three factors weighing in favor of abstention. *See id.* First, a court determines whether there was an ongoing state proceedings that is judicial in nature. *See NOPSI*, 491 U.S. at 370. This is not to say the proceedings must occur before the state's judiciary: administrative proceedings suffice, if they "command the respect due court proceedings." *Dayton Christian Schs.*, 477 U.S. at 627 (quoting *Gibson v. Berryhill*, 411 U.S. 564, 576-77 (1973)). Courts consider whether the state proceeding shares the hallmarks of court litigation: the "present[ation] of facts and evidence in an open hearing;" a decision-maker "empowered to make factual determinations with respect to the charges filed" against the federal plaintiff; whether the state proceeding provides the federal plaintiff "with an opportunity to be heard, the right to be represented by counsel, and the right to present evidence and witnesses on [the federal plaintiff's] behalf;" and whether the state courts have jurisdiction over any appeal of the "ultimate decision." *Gonzalez*, 755 F.3d at 183.

Second, a court considers whether the proceeding implicates important state interests. *See Middlesex Cty. Ethics Comm.*, 457 U.S. at 432. This inquiry focuses "narrowly [on the state's] interest in the *outcome* of the particular case—which could arguably be offset by a substantial federal interest in the opposite outcome. Rather, what [courts] look to is the importance of the generic proceedings to the State." *NOPSI*, 491 U.S. at 365.

Finally, a court inquires into whether the federal plaintiff has an adequate opportunity to raise federal constitutional claims in the state proceeding. *See Dayton Christian Schs.*, 477 U.S. at 627. Federal plaintiffs "need be accorded only an opportunity to fairly pursue their constitutional claims in the ongoing state proceedings, and their failure to avail themselves of such opportunities does not mean that the state procedures were inadequate." *Juidice v. Vail*, 430 U.S. 327, 337 (1977) (citing *Berryhill*, 411 U.S. at 577). Where the decision-maker in the state proceeding is an attorney (not a lay-person), or is a body made up primarily of attorneys (rather than lay-persons`), courts assume that the decision-maker will entertain federal constitutional claims in the state proceeding. *Middlesex Cty. Ethics Comm.*, 457 U.S. at 435. The right to appeal the proceeding's result in a state court also demonstrates that a federal plaintiff will receive a hearing on any federal constitutional claims. *See Dayton Christian Schs.*, 477 U.S. at 629 (citing *Middlesex Cty. Ethics Comm.*, 457 U.S. at 436); *Gonzalez*, 755 F.3d at 184. Generally speaking, courts will assume the existence of an adequate opportunity to raise federal constitutional claims in the state proceeding unless state law explicitly prohibits the state decision-maker from considering them. *See Pennzoil*, 481 U.S. at 14; *Moore v. Sims*, 442 U.S. 415, 425-26 (1979); *Gonzalez*, 755 F.3d at 184.

All three *Middlesex* factors weigh in favor of abstention. First, the administrative proceedings at issue in this case are ongoing and judicial in nature. New Jersey's Administrative Procedure Act ("APA"), N.J. Stat. Ann. § 52:14B-1 *et seq.*, governs these

administrative proceedings. *See* N.J. Admin. Code § 12:16-22.4. Courts routinely find that administrative proceedings governed by New Jersey's APA are "judicial in nature." *See Howard v. N.J. Div. of Youth & Fam. Servs.*, 398 F. App'x 807, 811 (3d Cir. 2010); *Zahl v. Harper*, 282 F.3d 204, 209 (3d Cir. 2002); *Getson v. New Jersey*, Civ. No. 07-3509, 2008 WL 11161698, at *6 (D.N.J. July 31, 2008).

The nature of APA proceedings demonstrates why. An administrative law *judge* presides over the hearing. *See* N.J. Stat. Ann. § 52:14B-10(c) (emphasis added). The proceeding must allow "all parties to respond, appear and present evidence and argument on all issues involved." *Id.* § 52:14B-9(c). This includes the introduction of documentary evidence and the presentation of witnesses, including the right to cross-examination. *See id.* § 52:14B-10(a). New Jersey's APA generally requires that proceedings remain open to the public. *See* N.J. Admin. Code § 1:1-14.1(a). The state APA also entitles the parties to representation by counsel. *See id.* § 1:1-5.1. Following the close of evidence and argument, the administrative law judge makes findings of fact and conclusions of law. *See* N.J. Stat. Ann. § 52:14B-10(c); N.J. Admin. Code § 1:1-18.1. The Commissioner issues a final decision. *See* N.J. Stat. Ann. § 52:14B-10(d); N.J. Admin Code § 12:16-22.6(a). The state judiciary has jurisdiction over any appeal from the Commissioner's decision. *See* N.J. Court Rule 2:2-3(a)(2); N.J. Admin. Code § 12:16-22.6(b). Given these features, the administrative proceeding at issue here qualifies as judicial in nature. *See Zahl*, 282 F.3d at 209; *Getson*, 2008 WL 11161698, at *6.

Second, the proceedings below implicate an important state interest—namely, the timely and prompt collection of unemployment compensation payments. *Cf. Ardan v. Bd. of Rev.*, 177 A.3d 768, at 774-75 (N.J. 2018) (noting, outside the context of *Younger* abstention, that "[t]he Legislature enacted the Unemployment Compensation Law to further an important public policy"). This Court agrees with its sister courts that a state's "interest in the administration of its unemployment compensation system is a sufficiently important state interest to bring the case within the ambit of the *Younger* doctrine." *Kelly v. Lopeman*, 680 F. Supp. 1101, 1108 (S.D. Ohio 1987); *see also Bridgeforth v. U.S. Dep't of Labor*, Civ. No. 13-120, 2013 WL 1914313, at *4 (D. Del. May 7, 2013); *Lorah v. Delaware*, 2010 WL 2132059, at *3 (D. Del. May 25, 2010); *cf. Moore v. Ross*, 502 F. Supp. 543, 550 (S.D.N.Y. 1980) (finding that "the administration of unemployment insurance programs arguably constitutes a significant state interest" but declining to abstain under *Younger* because "there is presently no on-going proceeding").

Finally, the federal plaintiffs will have an adequate opportunity to raise any federal constitutional challenges in the state proceeding in light of their right to appeal any adverse administrative determination to the New Jersey judiciary. *See* N.J. R. Ct. 2:2-3(a)(2); N.J. Admin. Code § 12:16-22.6(b). The right to "appeal to the New Jersey Superior Court, Appellate Division" satisfies the requirement that the federal plaintiff have an adequate opportunity to raise constitutional claims in the state proceeding. *Gonzalez*, 755 F.3d at 184.

Because this quasi-criminal proceeding satisfies all three *Middlesex* factors, the Court will abstain from exercising jurisdiction over this case. As a result, PDX's complaint is dismissed. *Berryhill*, 411 U.S. at 577. PDX remains free to present its federal claims in the state proceedings. *Id.*

C. "Pending" Proceedings

SLS argues that even if *Younger* requires this Court to abstain from deciding PDX's action, *Younger* does not apply to SLS because unlike PDX, SLS is not a party to any "pending" state "proceedings." The Court disagrees in light of the broad scope of the phrase "pending proceeding" under *Younger*.[8]

The Supreme Court has issued dicta stating that *Younger* applies to federal actions that seek "to restrain an already-pending *or an about-to-be-pending* state criminal action, or civil action involving important state interests." *Morales v. TWA, Inc.*, 504 U.S. 374, 381 n.1 (1992) (emphasis added). For example, the Third Circuit held that federal plaintiffs subject to state child support obligations were parties to an

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[8] Additionally, the Court finds that SLS has waived its argument that SLS is not party to any pending proceeding. "[C]asual mention of an issue in a brief is cursory treatment insufficient to preserve the issue" for review. *Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993); *see also Vente v. Gonzales*, 415 F.3d 296, 299 n.3 (3d Cir. 2005). "[A]n argument consisting of no more than a conclusory assertion such as the one made here (without even a citation to the record) will be deemed waived." *Reynolds v. Wagner*, 128 F.3d 166, 178 (3d Cir. 1997). SLS's brief makes only a passing reference to *Younger*'s "pending proceeding" requirement, without citing any authority. (ECF No. 74, at 16.)

"ongoing proceeding" for *Younger* purposes, even though the plaintiffs were "not currently appearing or scheduled to appear in any particular child support hearing." *Anthony v. Council*, 316 F.3d 412, 419 (3d Cir. 2003). "For purposes of *Younger*," the Third Circuit explained, "such a comprehensive and fluid system designed to address the ever-present and ever-changing realities of child support orders must be viewed as a whole, rather than as individual, discrete hearings," especially in light of the fact that the plaintiffs could expect to "be subject to future ongoing contempt proceedings." *Anthony*, 316 F.3d at 420-21. In the criminal context, courts have determined that the issuance of a grand jury subpoena and the issuance of a search warrant each constitute a "pending proceeding" under *Younger*, irrespective of whether any indictment was yet pending. *See Nick v. Abrams*, 717 F. Supp. 1053, 1056 (S.D.N.Y. 1989) (search warrants); *Notey v. Hynes*, 418 F. Supp. 1320, 1326 (E.D.N.Y. 1976) (grand jury subpoena).

SLS finds itself in a similar situation: the Commissioner has audited SLS for multiple tax years, and an assessment and subsequent administrative challenge are imminent. On these facts, the Commissioner's audit is part of a "pending proceeding" under *Younger*, even though SLS has not yet formally requested review before the Office of Administrative Law.

Because the Court previously considered and rejected all other arguments against *Younger*

abstention,[9] *see* parts III.A. & III.B., *supra*, abstention is appropriate. Accordingly, SLS's complaint is dismissed. *See Berryhill*, 411 U.S. at 577. SLS remains free to submit its federal claims in the state proceedings. *See id.*

IV. TAX INJUNCTION ACT

No party briefed whether the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, deprives this Court of jurisdiction over this case. Even so, a district court is generally "required to raise the issue on [its] own motion, as a determination that the [TIA] precludes a suit deprives the federal courts of subject matter jurisdiction over that action, and a state cannot waive the [TIA]'s protection" by failing to raise the issue. *In re Hechinger Inv. Co. of Del.*, 335 F.3d 243, 247 n.1 (3d Cir. 2003). While the general rule requires *sua sponte* consideration of the TIA, the general rule yields when there are multiple threshold issues which preclude a court from considering a case's merits. *See, e.g.*, *Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005) (noting that a court may choose to dismiss a case on abstention before addressing jurisdiction). Because the parties briefed the abstention issue but not the application of the TIA,

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[9] SLS also adopts PDX's *Younger* arguments by reference and incorporates them into its brief. This Court generally permits this practice. *See, e.g.*, *Polanco v. Omnicell, Inc.*, 988 F. Supp. 2d 451, 466 n.15 (D.N.J. 2013); *cf.* Fed. R. App. P. 28(i). Therefore, SLS has not waived any of the *Younger* arguments that PDX briefed and argued. However, PDX did not address the existence of a "pending proceeding." Accordingly, SLS's adoption and incorporatation of PDX's arguments does not save SLS from waiver of any "pending proceeding" argument.

judicial economy weighs in favor of deciding this case on the basis of abstention.

Nonetheless, the Court has significant doubts that the TIA would permit this action to go forward, even if abstention did not compel the same result. The TIA provides, "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. This action to enjoin the collection of New Jersey unemployment compensation contributions would appear to qualify. *See Sipe v. Amerada Hess Corp.*, 689 F.2d 396, 402-03 (3d Cir. 1982) (holding that "it cannot be seriously disputed that the unemployment compensation and disability benefits contributions mandated by New Jersey law are 'taxes' within the meaning of the" TIA and that the TIA's prohibition against judicial interference with any "essential administrative mechanism for the orderly collection of taxes" likewise applies to state unenemployment compensation statutes).

V. CONCLUSION

For the reasons set forth above, the Commissioner's Motion for Judgment on the Pleadings is **GRANTED**, and PDX's Cross-Motion for Summary Judgment is **ADMINISTRATIVELY TERMINATED**. An appropriate order will follow.

Dated: July 29, 2019

/s/ Brian R. Martinotti
HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Case No.: 3:15-cv-7011-BRM-TJB

[Filed July 29, 2019]

PDX NORTH, INC.

Plaintiff,

and

SLS DELIVERY SERVICES, INC.

Plaintiff-Intervenor,

v.

ROBERT ASARO-ANGELO, in his capacity as Commissioner of the New Jersey Department of Labor and Worforce Development

Respondent.

ORDER

THIS MATTER is before the Court on on Defendant Robert Asaro-Angelo's ("Defendant") Motion

for Judgment on the Pleadings or for a Stay of Proceedings (ECF No. 63) and Plaintiff PDX North, Inc.'s ("Plaintiff") Cross-Motion for Summary Judgment (ECF No. 69). Having reviewed all parties' submissions filed in connection with the motions and having declined to hear oral argument pursuant to Federal Rule of Civil Procedure 78(b), for the reasons set forth for the reasons set forth in the accompanying Opinion, and for good cause shown,

IT IS on this 29th day of July, 2019,

ORDERED that the Defendant's Motion of Judgment on the Pleadings (ECF No. 63) is **GRANTED**; and it is further

ORDERED that the Plaintiff's Cross-Motion for Summary Judgment (ECF No. 69) is **ADMINISTRATIVELY TERMINATED**; and it is further

ORDERED that this case is **DISMISSED**; and it is further

ORDERED that the matter shall be marked **CLOSED**.

/s/ Brian R. Martinotti
HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE

APPENDIX E

STATUTORY PROVISIONS INVOLVED

N.J.S.A. 43:21-14

43:21-14. Collection of contributions

Effective: November 9, 2015
Currentness

(a)(1) In addition to such reports as may be required under the provisions of subsection (g) of R.S.43:21-11, every employer shall file with the controller periodic contribution reports on such forms and at such times as the controller shall prescribe, to disclose the employer's liability for contributions under the provisions of this chapter (R.S.43:21-1 et seq.), and at the time of filing each contribution report shall pay the contributions required by this chapter (R.S.43:21-1 et seq.), for the period covered by such report. The controller may require that such reports shall be under oath of the employer. Any employer who shall fail to file any report, required by the controller, on or before the last day for the filing thereof shall pay a penalty of $10.00 for each day of delinquency until and including the fifth day following such last day and for any period of delinquency after such fifth day, a penalty of $10.00 a day or 25% of the amount of the contributions due and payable by the employer for the period covered by the report, whichever is the lesser; if there be no liability for contributions for the period covered by any contribution report or in the case of any report other

than a contribution report, the employer or employing unit shall pay a penalty of $10.00 a day for each day of delinquency in filing or $50.00, whichever is the lesser; provided, however, that when it is shown to the satisfaction of the controller that the failure to file any such report was not the result of fraud or an intentional disregard of this chapter (R.S.43:21-1 et seq.), or the regulations promulgated hereunder, the controller, in his discretion, may remit or abate any unpaid penalties heretofore or hereafter imposed under this section. On or before October 1 of each year, the controller shall submit to the Commissioner of Labor and Workforce Development a report covering the 12-month period ending on the preceding June 30, and showing the names and addresses of all employers for whom the controller remitted or abated any penalties, or ratified any remission or abatement of penalties, and the amount of such penalties with respect to each employer. Any employer who shall fail to pay the contributions due for any period, on or before the date they are required by the controller to be paid, shall pay interest on the amount thereof from such date until the date of payment thereof, at the rate of 1% a month through June 30, 1981 and at the rate of 1 1/4% a month after June 30, 1981. Upon the written request of any employer or employing unit, filed with the controller on or before the due date of any report or contribution payment, the controller, for good cause shown, may grant, in writing, an extension of time for the filing of such report or the paying of such contribution, with interest at the applicable rate; provided no such extension shall exceed 30 days and that no such extension shall postpone payment of any contribution for any period beyond the day preceding

the last day for filing tax returns under Title IX of the federal Social Security Act[1] for the year in which said period occurs.

(2)(A) For the calendar quarter commencing July 1, 1984 and each successive quarter thereafter, each employer shall file a report with the controller within 30 days after the end of each quarter in a form and manner prescribed by the controller, listing the name, social security number and wages paid to each employee and the number of base weeks (as defined in subsection (t) of R.S.43:21-19) worked by the employee during the calendar quarter. (B) Any employer who fails without reasonable cause to comply with the reporting requirements of this paragraph (2) shall be liable for a penalty in the following amount for each employee with respect to whom the employer is required to file a report but who is not included in the report or for whom the required information is not accurately reported for each employee required to be included, whether or not the employee is included:

(i) For the first failure for one quarter in any eight consecutive quarters, $5.00 for each employee;

(ii) For the second failure for any quarter in any eight consecutive quarters, $10.00 for each employee; and

(iii) For the third failure for any quarter in any eight consecutive quarters, and for any failure in any eight consecutive quarters, which failure is subsequent to the third failure, $25.00 for each employee.

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[1] See 42 U.S.C.A. § 1101 et seq.

(C) Information reported by employers as requested by this paragraph (2) shall be used by the Department of Labor and Workforce Development for the purpose of determining eligibility for benefits of individuals in accordance with the provisions of R.S.43:21-1 et seq. Notwithstanding the provisions of subsection (g) of R.S.43:21-11, the Department of Labor and Workforce Development is hereby authorized to provide the Department of Human Services and the Higher Education Student Assistance Authority with information reported by employers as required by this paragraph (2). For each fiscal year, the Director of the Division of Budget and Accounting of the Department of the Treasury shall charge the appropriate account of the Department of Human Services and the Higher Education Student Assistance Authority in amounts sufficient to reimburse the Department of Labor and Workforce Development for the cost of providing information under this subparagraph (C).

(D) (Deleted by amendment, P.L.2015, c. 135)

(b) The contributions, penalties, and interest due from any employer under the provisions of this chapter (R.S.43:21-1 et seq.), from the time they shall be due, shall be a personal debt of the employer to the State of New Jersey, recoverable in any court of competent jurisdiction in a civil action in the name of the State of New Jersey; provided, however, that except in the event of fraud, no employer shall be liable for contributions or penalties unless contribution reports have been filed or assessments have been made in accordance with subsection (c) or (d) of this section before four years have elapsed from the last day of the

calendar year with respect to which any contributions become payable under this chapter (R.S.43:21-1 et seq.), nor shall any employer be required to pay interest on any such contribution unless contribution reports were filed or assessments made within such four-year period; provided further that if such contribution reports were filed or assessments made within the four-year period, no civil action shall be instituted, nor shall any certificate be issued to the Clerk of the Superior Court under subsection (e) of this section, except in the event of fraud, after six years have elapsed from the last day of the calendar year with respect to which any contributions become payable under this chapter (R.S.43:21-1 et seq.), or July 1, 1958, whichever is later. Payments received from an employer on account of any debt incurred under the provisions of this chapter (R.S.43:21-1 et seq.) may be applied by the controller on account of the contribution liability of the employer and then to interest and penalties, and any balance remaining shall be recoverable by the controller from the employer. Upon application therefor, the controller shall furnish interested persons and entities certificates of indebtedness covering employers, employing units and others for contributions, penalties and interest, for each of which certificates the controller shall charge and collect a fee of $2.00 per name; no such certificate to be issued, however, for a fee of less than $10.00. All fees so collected shall be paid into the unemployment compensation administration fund.

(c) If any employer shall fail to make any report as required by the rules and regulations of the division pursuant to the provisions of this chapter (R.S.43:21-1

et seq.), the controller may make an estimate of the liability of such employer from any information it may obtain, and, according to such estimate so made, assess such employer for the contributions, penalties, and interest due the State from him, give notice of such assessment to the employer, and make demand upon him for payment.

(d) After a report is filed under the provisions of this chapter (R.S.43:21-1 et seq.) and the rules and regulations thereof, the controller shall cause the report to be examined and shall make such further audit and investigation as it may deem necessary, and if therefrom there shall be determined that there is a deficiency with respect to the payment of the contributions due from such employer, the controller shall assess the additional contributions, penalties, and interest due the State from such employer, give notice of such assessment to the employer, and make demand upon him for payment.

(e) As an additional remedy, the controller may issue to the Clerk of the Superior Court of New Jersey a certificate stating the amount of the employer's indebtedness under this chapter (R.S.43:21-1 et seq.) and describing the liability, and thereupon the clerk shall immediately enter upon his record of docketed judgments such certificate or an abstract thereof and duly index the same. Any such certificate or abstract, heretofore or hereafter docketed, from the time of docketing shall have the same force and effect as a judgment obtained in the Superior Court of New Jersey, and the controller shall have all the remedies and may take all the proceedings for the collection

thereof which may be had or taken upon the recovery of such a judgment in a civil action upon contract in said court. Such debt, from the time of docketing thereof, shall be a lien on and bind the lands, tenements and hereditaments of the debtor.

The Clerk of the Superior Court shall be entitled to receive for docketing such certificate, $0.50, and for a certified transcript of such docket, $0.50. If the amount set forth in said certificate as a debt shall be modified or reversed upon review, as hereinafter provided, the Clerk of the Superior Court shall, when an order of modification or reversal is filed, enter in the margin of the docket opposite the entry of the judgment, the word "modified" or "reversed," as the case may be, and the date of such modification or reversal.

The employer, or any other party having an interest in the property upon which the debt is a lien, may deposit the amount claimed in the certificate with the Clerk of the Superior Court of New Jersey, together with an additional 10% of the amount thereof, or $100.00, whichever amount is the greater, to cover interest and the costs of court, or in lieu of depositing the amount in cash, may give a bond to the State of New Jersey in double the amount claimed in the certificate, and file the same with the Clerk of the Superior Court. Said bond shall have such surety and shall be approved in the manner required by the Rules Governing the Courts of the State of New Jersey.

After the deposit of said money or the filing of said bond, the employer, or any other party having an interest in the said property, may, after exhausting all administrative remedies, secure judicial review of the

legality or validity of the indebtedness or the amount thereof, and the said deposit of cash shall be as security for, and the bond shall be conditioned to prosecute, the judicial review with effect.

Upon the deposit of said money or the filing of the said bond with the Clerk of the Superior Court, all proceedings on such judgment shall be stayed until the final determination of the cause, and the moneys so deposited shall be subject to the lien of the indebtedness and costs and interest thereon, and the lands, tenements, and hereditaments of said debtor shall forthwith be discharged from the lien of the State of New Jersey and no execution shall issue against the same by virtue of said judgment.

Notwithstanding the provisions of subsections (a) through (c) of this section, the Department of Labor and Workforce Development may, with the concurrence of the State Treasurer, when all reasonable efforts to collect amounts owed have been exhausted, or to avoid litigation, reduce any liability for contributions, penalties and interest, provided no portion of those amounts represents contributions made by an employee pursuant to subsection (d) of R.S.43:21-7.

(f) If, not later than two years after the calendar year in which any moneys were erroneously paid to or collected by the controller, whether such payments were voluntarily or involuntarily made or made under mistake of law or of fact, an employer, employing unit, or employee who has paid such moneys shall make application for an adjustment thereof, the said moneys shall, upon order of the controller, be either credited or refunded, without interest, from the appropriate fund.

For like cause and within the same period, credit or refund may be so made on the initiative of the controller.

(g) All interest and penalties collected pursuant to this section shall be paid into a special fund to be known as the unemployment compensation auxiliary fund; all moneys in this special fund shall be deposited, administered and disbursed in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State Treasury, and shall be expended, under legislative appropriation, for the purpose of aiding in defraying the cost of the administration of this chapter (R.S.43:21-1 et seq.); for the repayment of any interest bearing advances made from the federal unemployment account pursuant to the provisions of section 1202(b) of the Social Security Act, 42 U.S.C. s.1322; and for essential and necessary expenditures in connection with programs designed to stimulate employment, as determined by the Commissioner of Labor and Workforce Development, except that any moneys in this special fund shall be first applied to aiding in the defraying of necessary costs of the administration of this chapter (R.S.43:21-1 et seq.) as determined by the Commissioner of Labor and Workforce Development. The Treasurer of the State shall be ex officio the treasurer and custodian of this special fund and, subject to legislative appropriation, shall administer the fund in accordance with the directions of the controller. Any balances in this fund shall not lapse at any time, but shall be continuously available, subject to legislative appropriation, to the controller for expenditure. The State Treasurer shall give a separate

and additional bond conditioned upon the faithful performance of his duties in connection with the unemployment compensation auxiliary fund, in an amount to be fixed by the division, the premiums for such bond to be paid from the moneys in the said special fund.

(h) All disputes under R.S.43:21-1 et seq. unless specifically indicated otherwise, shall be resolved in accordance with the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B-1 et seq.).

(i) Notwithstanding any of the provisions of this section, or any other law, to the contrary, all functions, powers and duties of the controller and the Commissioner of Labor and Workforce Development relating to receiving reports, receiving billings, receiving correspondence, remittance processing, data entry and imaging required pursuant to this section shall be performed by the Division of Revenue in the Department of the Treasury.

N.J.S.A. 43:21-16

43:21-16. Penalties; investigating staff

Effective: January 17, 2014
Currentness

(a)(1) Whoever makes a false statement or representation, knowing it to be false, or knowingly fails to disclose a material fact, to obtain or increase or attempts to obtain or increase any benefit or other payment under this chapter (R.S.43:21-1 et seq.), or under an employment security law of any other state or of the federal government, either for himself or for any other person, shall be liable to a fine of 25% of the amount fraudulently obtained, to be recovered in an action at law in the name of the Division of Unemployment and Temporary Disability Insurance of the Department of Labor and Workforce Development of the State of New Jersey or as provided in subsection (e) of R.S.43:21-14, said fine when recovered shall be immediately deposited in the following manner: 10 percent of the amount fraudulently obtained deposited into the unemployment compensation auxiliary fund for the use of said fund, and 15 percent of the amount fraudulently obtained deposited into the unemployment compensation fund; and each such false statement or representation or failure to disclose a material fact shall constitute a separate offense. Any penalties imposed by this subsection shall be in addition to those otherwise prescribed in this chapter (R.S.43:21-1 et seq.).

(2) For purposes of any unemployment compensation program of the United States, if the department

determines that any benefit amount is obtained by an individual due to fraud committed by the individual, the department shall assess a fine on the individual and deposit the recovered fine in the same manner as provided in paragraph (1) of subsection (a) of this section. As used in this paragraph, "unemployment compensation program of the United States" means:

(A) Unemployment compensation for federal civilian employees pursuant to 5 U.S.C. 8501 et seq.;

(B) Unemployment compensation for ex-service members pursuant to 5 U.S.C. 8521 et seq.;

(C) Trade readjustment allowances pursuant to 19 U.S.C. 2291-2294;

(D) Disaster unemployment assistance pursuant to 42 U.S.C. 5177(a);

(E) Any federal temporary extension of unemployment compensation;

(F) Any federal program that increases the weekly amount of unemployment compensation payable to individuals; and

(G) Any other federal program providing for the payment of unemployment compensation.

(b)(1) An employing unit or any officer or agent of an employing unit or any other person who makes a false statement or representation, knowing it to be false, or who knowingly fails to disclose a material fact, to prevent or reduce the payment of benefits to any individual entitled thereto or to avoid becoming or remaining subject hereto or to avoid or reduce any

contribution or other payment required from an employing unit under this chapter (R.S.43:21-1 et seq.), or under an employment security law of any other state or of the federal government, or who willfully fails or refuses to furnish any reports required hereunder (except for such reports as may be required under subsection (b) of R.S.43:21-6) or to produce or permit the inspection or copying of records, as required hereunder, shall be liable to a fine of $100.00, or 25% of the amount fraudulently withheld, whichever is greater, to be recovered in an action at law in the name of the Division of Unemployment and Temporary Disability Insurance of the Department of Labor and Workforce Development of the State of New Jersey or as provided in subsection (e) of R.S.43:21-14, said fine when recovered to be paid to the unemployment compensation auxiliary fund for the use of said fund; and each such false statement or representation or failure to disclose a material fact, and each day of such failure or refusal shall constitute a separate offense. Any penalties imposed by this paragraph shall be in addition to those otherwise prescribed in this chapter (R.S.43:21-1 et seq.).

(2) Any employing unit or any officer or agent of an employing unit or any other person who fails to submit any report required under subsection (b) of R.S.43:21-6 shall be subject to a penalty of $25.00 for the first report not submitted within 10 days after the mailing of a request for such report, and an additional $25.00 penalty may be assessed for the next 10-day period, which may elapse after the end of the initial 10-day period and before the report is filed; provided that when such report or reports are not filed within the

prescribed time but it is shown to the satisfaction of the director that the failure was due to a reasonable cause, no such penalty shall be imposed. Any penalties imposed by this paragraph shall be recovered as provided in subsection (e) of R.S.43:21-14, and when recovered shall be paid to the unemployment compensation auxiliary fund for the use of said fund.

(3) Any employing unit, officer or agent of the employing unit, or any other person, determined by the controller to have knowingly violated, or attempted to violate, or advised another person to violate the transfer of employment experience provisions found at R.S.43:21-7 (c)(7), or who otherwise knowingly attempts to obtain a lower rate of contributions by failing to disclose material information, or by making a false statement, or by a misrepresentation of fact, shall be subject to a fine of $5,000 or 25% of the contributions under-reported or attempted to be under-reported, whichever is greater, to be recovered as provided in subsection (e) of R.S.43:21-14, and when recovered to be paid to the unemployment compensation auxiliary fund for the use of said fund. For the purposes of this subsection, "knowingly" means having actual knowledge of, or acting with deliberate ignorance or reckless disregard for the prohibition involved.

(c) Any person who shall willfully violate any provision of this chapter (R.S.43:21-1 et seq.) or any rule or regulation thereunder, the violation of which is made unlawful or the observance of which is required under the terms of this chapter (R.S.43:21-1 et seq.), and for which a penalty is neither prescribed herein nor

provided by any other applicable statute, shall be liable to a fine of $50.00, to be recovered in an action at law in the name of the Division of Unemployment and Temporary Disability Insurance of the Department of Labor and Workforce Development of the State of New Jersey or as provided in subsection (e) of R.S.43:21-14, said fine when recovered to be paid to the unemployment compensation auxiliary fund for the use of said fund; and each day such violation continues shall be deemed to be a separate offense.

(d)(1) When it is determined by a representative or representatives designated by the Director of the Division of Unemployment and Temporary Disability Insurance of the Department of Labor and Workforce Development of the State of New Jersey that any person, whether (I) by reason of the nondisclosure or misrepresentation by him or by another of a material fact (whether or not such nondisclosure or misrepresentation was known or fraudulent), or (ii) for any other reason, has received any sum as benefits under this chapter (R.S.43:21-1 et seq.) while any conditions for the receipt of benefits imposed by this chapter (R.S.43:21-1 et seq.) were not fulfilled in his case, or while he was disqualified from receiving benefits, or while otherwise not entitled to receive such sum as benefits, such person, unless the director (with the concurrence of the controller) directs otherwise by regulation, shall be liable to repay those benefits in full. The employer's account shall not be charged for the amount of an overpayment of benefits if the overpayment was caused by an error of the division and not by any error of the employer. The sum shall be deducted from any future benefits payable to the

individual under this chapter (R.S.43:21-1 et seq.) or shall be paid by the individual to the division for the unemployment compensation fund, and such sum shall be collectible in the manner provided for by law, including, but not limited to, the filing of a certificate of debt with the Clerk of the Superior Court of New Jersey; provided, however, that, except in the event of fraud, no person shall be liable for any such refunds or deductions against future benefits unless so notified before four years have elapsed from the time the benefits in question were paid. Such person shall be promptly notified of the determination and the reasons therefor. The determination shall be final unless the person files an appeal of the determination within seven calendar days after the delivery of the determination, or within 10 calendar days after such notification was mailed to his last-known address, for any determination made on or before December 1, 2010, and any initial determination made pursuant to paragraph (1) of subsection (b) of R.S.43:21-6 after December 1, 2010, or within 20 calendar days after the delivery of such determination, or within 20 calendar days after such notification was mailed to his last-known address, for any determination other than an initial determination made after December 1, 2010.

(2) Interstate and cross-offset of state and federal unemployment benefits. To the extent permissible under the laws and Constitution of the United States, the commissioner is authorized to enter into or cooperate in arrangements or reciprocal agreements with appropriate and duly authorized agencies of other states or the United States Secretary of Labor, or both, whereby:

(A) Overpayments of unemployment benefits as determined under subsection (d) of R.S.43:21-16 shall be recovered by offset from unemployment benefits otherwise payable under the unemployment compensation law of another state, and overpayments of unemployment benefits as determined under the unemployment compensation law of another state shall be recovered by offset from unemployment benefits otherwise payable under R.S.43:21-1 et seq.; and

(B) Overpayments of unemployment benefits as determined under applicable federal law, with respect to benefits or allowances for unemployment provided under a federal program administered by this State under an agreement with the United States Secretary of Labor, shall be recovered by offset from unemployment benefits otherwise payable under R.S.43:21-1 et seq., or any federal program administered by this State, or under the unemployment compensation law of another state or any federal unemployment benefit or allowance program administered by another state under an agreement with the United States Secretary of Labor, if the other state has in effect a reciprocal agreement with the United States Secretary of Labor as authorized by subsection (g) of 42 U.S.C.s.503, and if the United States agrees, as provided in the reciprocal agreement with this State entered into under subsection (g) of 42 U.S.C.s.503, that overpayments of unemployment benefits as determined under subsection (d) of R.S.43:21-16 and overpayments as determined under the unemployment compensation law of another state which has in effect a reciprocal agreement with the United States Secretary of Labor

as authorized by subsection (g) of 42 U.S.C.s.503, shall be recovered by offset from benefits or allowances otherwise payable under a federal program administered by this State or another state under an agreement with the United States Secretary of Labor.

(e)(1) Any employing unit, or any officer or agent of an employing unit, which officer or agent is directly or indirectly responsible for collecting, truthfully accounting for, remitting when payable any contribution, or filing or causing to be filed any report or statement required by this chapter, or employer, or person failing to remit, when payable, any employer contributions, or worker contributions (if withheld or deducted), or the amount of such worker contributions (if not withheld or deducted), or filing or causing to be filed with the controller or the Division of Unemployment and Temporary Disability Insurance of the Department of Labor and Workforce Development of the State of New Jersey, any false or fraudulent report or statement, and any person who aids or abets an employing unit, employer, or any person in the preparation or filing of any false or fraudulent report or statement with intent to defraud the State of New Jersey or an employment security agency of any other state or of the federal government, or with intent to evade the payment of any contributions, interest or penalties, or any part thereof, which shall be due under the provisions of this chapter (R. S.43:21-1 et seq.), shall be liable for each offense upon conviction before any Superior Court or municipal court, to a fine not to exceed $1,000.00 or by imprisonment for a term not to exceed 90 days, or both, at the discretion of the court. The fine upon conviction shall be payable to the

unemployment compensation auxiliary fund. Any penalties imposed by this subsection shall be in addition to those otherwise prescribed in this chapter (R.S.43:21-1 et seq.).

(2) Any employing unit, officer or agent of the employing unit, or any other person, who knowingly violates, or attempts to violate, or advise another person to violate the transfer of employment experience provisions found at R.S.43:21-7 (c)(7) shall be, upon conviction before any Superior Court or municipal court, guilty of a crime of the fourth degree. For the purposes of this subsection, "knowingly" means having actual knowledge of, or acting with deliberate ignorance or reckless disregard for the prohibition involved.

(f) Any employing unit or any officer or agent of an employing unit or any other person who aids and abets any person to obtain any sum of benefits under this chapter to which he is not entitled, or a larger amount as benefits than that to which he is justly entitled, shall be liable for each offense upon conviction before any Superior Court or municipal court, to a fine not to exceed $1,000.00 or by imprisonment for a term not to exceed 90 days, or both, at the discretion of the court. The fine upon conviction shall be payable to the unemployment compensation auxiliary fund. Any penalties imposed by this subsection shall be in addition to those otherwise prescribed in this chapter (R.S.43:21-1 et seq.).

(g) There shall be created in the Division of Unemployment and Temporary Disability Insurance of the Department of Labor and Workforce Development

of the State of New Jersey an investigative staff for the purpose of investigating violations referred to in this section and enforcing the provisions thereof.

(h) An employing unit or any officer or agent of an employing unit who makes a false statement or representation, knowing it to be false, or who knowingly fails to disclose a material fact, to reduce benefit charges to the employing unit pursuant to paragraph (1) of subsection (c) of R.S.43:21-7, shall be liable to a fine of $1,000, to be recovered in an action at law in the name of the Division of Unemployment and Temporary Disability Insurance of the Department of Labor and Workforce Development of the State of New Jersey or as provided in subsection (e) of R.S.43:21-14. The fine when recovered shall be paid to the unemployment compensation auxiliary fund for the use of the fund. Each false statement or representation or failure to disclose a material fact, and each day of that failure or refusal shall constitute a separate offense. Any penalties imposed by this subsection shall be in addition to those otherwise prescribed in R.S.43:21-1 et seq.

(i) The Department of Labor and Workforce Development shall arrange for the electronic receipt of death record notifications from the New Jersey Electronic Death Registration System, pursuant to section 16 of P.L.2003, c. 221 (C.26:8-24.1), and establish a verification system to confirm that benefits paid pursuant to the "Temporary Disability Benefits Law," P.L.1948, c. 110 (C.43:21-25 et al.), and the "unemployment compensation law," R.S.43:21-1 et seq., are not being paid to deceased individuals.

(j) The Department of Labor and Workforce Development shall arrange for the electronic receipt of identifying information from the Department of Corrections, pursuant to section 6 of P.L.1976, c. 98 (C.30:1B-6), and from the Administrative Office of the Courts and any county which does not provide county inmate incarceration information to the Administrative Office of the Courts, and establish a verification system to confirm that benefits paid pursuant to the "unemployment compensation law," R.S.43:21-1 et seq., are not being paid to individuals who are incarcerated.