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CHRISTOPHER NEUWIRTH,	:	**SUPERIOR COURT OF NEW JERSEY**
	:	**LAW DIVISION: MERCER COUNTY**
Plaintiff,	:	**DOCKET NO.: MER-L-001083-20**
v.	:	**Civil Action**
STATE OF NEW JERSEY, COMPANIES (1-10) (fictitious names of unknown entities) and JOHN DOES (1-10) (fictitious names of unknown entities),	:	
Defendants.	:	

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Of Counsel and on the Brief:
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On the Brief:
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TABLE OF CONTENTS

Legal Table of Authorities

Court Rules

PRELIMINARY STATEMENT

This brief is submitted in support of Plaintiff Christopher Neuwirth's Motion for Partial Summary Judgment as to liability under the Conscientious Employee Protection Act ("CEPA"). This case presents the unique situation where an employer does not know the reason why or the persons who were involved in the decision to terminate an employee. Because the Plaintiff here has set forth an undisputable *prima facie* case under CEPA, and the State cannot articulate any legitimate, non-retaliatory reason for terminating him, the granting of partial summary judgment is required as a matter of law.

This case arises from the abrupt, and very public, termination of Plaintiff's employment as the New Jersey Department of Health ("DOH") Assistant Commissioner in the midst of the COVID-19 health emergency. A few weeks prior to his termination, Plaintiff made complaints to several persons with the State concerning being instructed by the Acting Superintendent of the New Jersey State Police, Colonel Callahan, to go to the home of a relative of Governor Murphy's Chief of Staff, George Helmy, and collect specimens for testing of SARS-COV- 2 to be performed at DOH's Public Health and Environmental Laboratories. The indisputable facts relating to Plaintiff's complaints, his reasonably belief that such instruction was unlawful, unethical and in violation of clear mandate of public policy and casual connection to this abrupt termination establish a prima facie case under CEPA, which shifts the burden of proof to the State to articulate a legitimate, non-retaliatory reason for the discharge. The State has failed to meet this burden.

After terminating Plaintiff for what he was told was "not for cause", "anonymous sources'' told news outlets that the reason he was terminated was because he failed to disclose outside consulting position with a private company, Margolis Healy and Associates ("MHA"). On May 29,

2020, the day after Plaintiff was terminated, Governor Murphy publicly validated rumors that the reason for his termination, by telling the media Plaintiff could not have "two sources of income" when asked about his termination. Governor Murphy's comments about Plaintiff authenticated media reports that he was terminated for failing to disclose and obtain proper approvals to provide consulting services to MHA. Unbeknownst to Governor Murphy, and those who perpetuated the defamatory narrative, Plaintiff's had disclosed and gained approval, as evidenced by Outside Activity Questionnaire ("OAQ"), authorizing his ability to perform consulting work for MHA. The OAQ irrefutably proves the purported reasons for his termination as stated by the Governor are false.

Since its receipt of the OAQ from Plaintiff and Plaintiff's request that Governor Murphy clarify that Plaintiff did not fail to obtain the required approvals, the State has gone silent and cannot provide any information about who was involved in the decision to terminate Plaintiff or why the decision was made. In its Answers to Plaintiff's First Set of Interrogatories, in response to the critical question of why Plaintiff was terminated, the State has responded that "several reasons justifying Plaintiff's termination will be identified during the course of discovery."

The fact that the State cannot articulate any reason for terminating Plaintiff, let alone a legitimate and non-retaliatory one, is dispositive of the issue of liability under CEPA. While the State has purportedly produced all responsive documents and answered Plaintiff's Interrogatories in full, it appears intent on using continuing discovery to launch a fishing expedition in search of a manufactured defense to justify its retaliatory discharge of Plaintiff. There is no document or information the State can glean from Plaintiff about its own motivation in firing him. The undisputed truth is the State retaliated against Plaintiff for engaging in whistle-

blowing activity, and unsuccessfully attempted to cite Plaintiff's work with MHA as a viable, non-retaliatory reason. Now that this pretext has been laid bare, the State has been forced to abandon it and cannot come up with a new one. There is nothing for the State "to discover" about why it terminated one of its top pandemic experts in the midst of a pandemic. Because the State refuses, or is unable, to articulate a legitimate, non-retaliatory reason for why it terminated Plaintiff, it cannot meet its burden under CEPA.

For all these reasons and those more specifically set forth herein, it is respectfully submitted that the Court grant Plaintiff partial summary judgment as to liability under CEPA.

STATEMENT OF FACTS

A. Parties and Relevant Individuals

Defendant State of New Jersey (the "State") is a state within the United States of America that makes and enforces laws via its local government. Certification of Christopher J. Neuwirth dated June 11, 2021 ("Neuwirth Cert.") at ¶2. The State of New Jersey Department of Health ("DOH") is a branch of the state government and is responsible for formulating and managing the state's health infrastructure by providing statewide support services to state and local government agencies as well as the citizens of New Jersey. *Id*. at ¶3. Governor Philip D. Murphy ("Murphy"), at times relevant herein, is a New Jersey resident and the Governor of the State of New Jersey. *Id*. at ¶4. Colonel Patrick J. Callahan ("Callahan"), at times relevant herein, is an individual serving in the position of the Acting Superintendent of the New Jersey State Police. *Id*. at ¶5. George Helmy ("Helmy"), at all times relevant, is an individual employed by the State in the position of Chief of Staff to the Governor. *Id*. at ¶6. Judith Persichilli ("Persichilli"), at times

relevant herein, is an individual employed by the State in the position of Commissioner of the DOH. *Id*. at ¶7. Andrea Martinez-Mejia (Martinez-Mejia"), at times relevant herein, is an individual employed by the State in the position of Chief of Staff of the DOH. *Id*. at ¶8. Joy Lindo ("Lindo"), at times relevant herein, is an individual employed by the State in the position of Division Director of the Office of Legal and Regulatory Compliance. *Id*. at ¶9. Lubna Qazi-Chowdhry ("Qazi-Chowdhry"), at times relevant herein, is an individual employed by the State in the position of Ethics Liaison Officer for the DOH. *Id*. at ¶10. Kaitlyn Woolford ("Woolford"), at times relevant herein, is an individual employed by the State in the position of Executive Assistant to the Deputy Commissioner of the Public Health Services Branch of the DOH. *Id*. at ¶11. Rahat Babar, at times relevant herein, is an individual employed by the State in the position of Special Counsel to the Governor. *Id*. at ¶12.

B. Plaintiff's Employment/Consulting History

From 2011 through 2013, Plaintiff was employed as the State Homeland Security Exercise Coordinator (Government Representative 2) for the New Jersey Office of Homeland Security and Preparedness. *Id*. at ¶13; **Exh. A**. From 2013 through 2016, Plaintiff worked for the DOH in the position of Director of Public Health Recovery (Government Representative 1) and then as an Information Security Officer (Information Technology Specialist). *Id*. at ¶14; **Exh. A**. From 2013 through 2015, Plaintiff also worked for Margolis Healy and Associates, LLC ("MHA"). *Id*. at ¶15; **Exh. A**. From 2016 through 2018, Plaintiff was employed in the position of Manager of the Emergency Management and Enterprise Resilience for New York University Langone Health. *Id*. at ¶16; **Exh. A**. Plaintiff did not work or provide any consulting services to MHA during this 2016-2018 timeframe. *Id*. at ¶17; **Exh. A**.

C. Plaintiff's Employment as DOH Assistant Commissioner

On or about October 29, 2018, Plaintiff commenced employment with the DOH as Assistant Commissioner. *Id*. at ¶18; **Exh. A.** In the position of Assistant Commissioner of DOH, Plaintiff was responsible for providing strategic leadership and guidance to the Division of Public Health Infrastructure, Laboratories and Emergency Preparedness which included approximately 250 staff across the Offices of Disaster Resilience, Emergency Medical Services and the Public Health and Environmental Laboratories. *Id*. at ¶19; **Exh. A.** Plaintiff was also responsible for managing an operational budget of approximately $57 million, including more than $28 million in federal grants from ASPR and the CDC for the Hospital Preparedness Program and the Public Health Emergency Preparedness program, respectively. *Id*. at ¶20; **Exh. A**. Plaintiff participated in cybersecurity threat identification and business continuity activities to strengthen enterprise resilience and ensure continuity of government during a disaster. *Id*. at ¶21; **Exh. A**. Plaintiff also partnered with the New Jersey Office of Homeland Security and Preparedness to complete the statewide threat and hazard identification risk assessment for the healthcare and public health sectors. *Id*. at ¶22; **Exh. A**. Plaintiff also conducted preparedness activities for numerous ongoing incidents, crises, and pre-planned large-scale events across the State of New Jersey and/or impacting the northeast United States. *Id*. at ¶23; **Exh. A**.

D. Plaintiff's Consulting Services with Margolis Healy and Associates

State employees are required to complete the Financial Disclosure Statement on an annual basis and to disclose, inter alia, all sources of income for the 12-month period prior to the filing. *Id*. at ¶24. State employees are also required to complete an Outside Activity Questionnaire

("OAQ") (1) when they commence State employment; (2) whenever there is a change in the employee's outside activity; and (3) at a minimum every three years. *Id*. at ¶25.

Plaintiff fully disclosed his outside business activities with MHA to the State and obtained the State's express approval to engage with MHA outside my job duties, responsibilities and hours working for the State. *Id*. at ¶26. At the time he began his employment as Assistant Commissioner, Plaintiff disclosed to the State that he owned, Emergency Manager Project, LLC, ("EMP") which administers Emergency Manager 1 and 2 courses. *Id*. at ¶29; **Exh. D**. Plaintiff licensed both courses to Crossroads Education, LLC prior to beginning his employment with the DOH. *Id*. at ¶30. At no time after starting his employment with the DOH in 2018 did Plaintiff administer any courses. Neuwirth Cert. at ¶31. Plaintiff disclosed the EMP outside activity in his 2019 Financial Disclosure Statement form and the OAQ he submitted at the onset of his employment. *Id*. at ¶32; **Exh. D**.

In or about August 2019, Plaintiff was contacted by Margolis Healy and Associates, LLC (who is now owned by Cozen O'Connor, P.C.) (collectively herein referred to as "MHA") regarding a Request for Proposal ("RFP") they were responding to on behalf of an out-of-state university client of the firm. *Id*. at ¶34. At the time of Plaintiff's hiring in October 2018, Plaintiff did not identify MHA on his Financial Disclosure Form because he did not currently work for MHA, and had not received any income from MHA in the calendar year preceding the commencement of his employment. *Id*. at ¶35. Plaintiff had not worked for, or provided any consulting services to MHA, since in or about 2015. *Id*. at ¶36.

The RFP for the out-of-state university was in response to a large-scale, full-scale enterprise-wide cybersecurity exercise it was interested in conducting in early 2020. *Id*. at ¶37.

MHA expressed an interest in including Plaintiff as the lead exercise designer/facilitator for this particular RFP. *Id*. at ¶38. Plaintiff was not to receive any compensation for being included in the RFP or by providing his input to MHA on their draft proposal prior to submission. *Id*. at ¶39.

Because the opportunity with MHA would constitute an outside activity and could result in future engagements, Plaintiff disclosed the opportunity to the State pursuant to N.J.A.C. 19:61-5.9(c). *Id*. at ¶40; **Exh. B**; **Exh. C**. In connection therewith, prior to working on any project with MHA in 2019, Plaintiff disclosed the consulting opportunity with MHA to Ethics Liaison Officer of the DOH, Nancy Kelly-Goodstein. *Id*. at ¶41; **Exh. B**; **Exh. C**.

Plaintiff submitted an updated OAQ in or about October 2019 to further disclose the consulting opportunity with MHA. *Id*. at ¶42; **Exh. B**; **Exh. C**. Plaintiff and Ms. Kelly-Goodstein had additional conversations concerning the opportunity during which Plaintiff provided additional clarifications on his relationship with both his own company, EMP, and MHA. *Id*. at ¶43; **Exh. B**; **Exh. C**. After discussing the opportunity with Plaintiff and reviewing the OAQ, Ms. Kelly-Goodstein informed Plaintiff that there was no conflict of interest. *Id*. at ¶44; **Exh. B**; **Exh. C**. Specifically, the State determined that because neither the DOH nor Plaintiff had any regulatory oversight of institutions of higher education (i.e. colleges and universities), there was no conflict of interest. *Id*. at ¶45. The State and Plaintiff's immediate supervisor, Andrea Martinez-Mejia, approved the OAQ on or about December 5, 2019. *Id*. at ¶46; **Exh. C**.

Thereafter, it was widely known among state employees, including DOH leadership and Plaintiff's staff, that Plaintiff provided outside consulting services to MHA in his free time. *Id*. at ¶47. In fact, Plaintiff listed his work with MHA on his resume, LinkedIn page and openly discussed his work with MHA to DOH leadership. *Id*. at ¶48.

At no time did anyone from the DOH question Plaintiff's outside consulting services with MHA during his employment with the State. *Id*. at ¶49. Indeed, there are no documents or other evidence produced showing that Plaintiff was ever questioned or subjected to any criticism concerning his outside consulting services with MHA at any time during his employment. Certification of Christopher J. Eibeler, Esq. dated June 11, 2021 ("Counsel Cert.") at ¶4. Plaintiff did not perform any work for any MHA clients once the State's COVID- 19 pandemic response began on January 24, 2020, other than minimal off-hours, remote work creating excel spreadsheets and attending an in-person, 4-hour tabletop exercise in or about late February, 2020. Neuwirth Cert. at ¶51.

E. Plaintiff's Performance as DOH Assistant Commissioner

Plaintiff performed above the expectations of the State at all times during his employment. *Id*. at ¶51. At no time during his employment, no one ever informed Plaintiff that he was not performing the expectations of his job position with the State. *Id*. at ¶52. Moreover, at no time did anyone inform Plaintiff that his job was in jeopardy. *Id*. at ¶53. Plaintiff was also never disciplined at any time during his employment. *Id*. at ¶54. Counsel Cert. at **Exh. A.** (No. 28). At no time during his employment was Plaintiff ever provided a negative performance evaluation. Neuwirth Cert. at ¶55. Moreover, at no time during his employment did anyone at the State ever question or inform Plaintiff of any concerns about Plaintiff's attendance. *Id*. at ¶56.

Plaintiff maintained a cordial and productive working relationship with Commissioner Persichilli at all times during his employment. *Id*. at ¶57. At no time during his employment did Commissioner Persichilli ever inform Plaintiff that he was not performing to her expectations. *Id*. at ¶58. Additionally, at no time did Commissioner Persichilli ever warn Plaintiff that his job was

in jeopardy. *Id*. at ¶59. There are no documents or other evidence showing that Plaintiff had, at any time, performed below the expectations of Commissioner Persichilli. Counsel Cert. at ¶5.

As the COVID-19 pandemic intensified, Plaintiff became one of Commissioner Persichilli's most trusted advisors. Neuwirth Cert. at ¶60. Indeed, Commissioner Persichilli regularly praised Plaintiff for all his efforts during the COVID-19 pandemic. *Id*. at ¶61. During several meetings concerning the State's COVID-19 response, Commissioner Persichilli openly complimented Plaintiff concerning his job performance to those in attendance. *Id*. at ¶62. Another DOH Assistant Commissioner, Dr. Christina Tan, told Plaintiff in April, 2020 that her staff members had begun referring to him as the "Golden Boy" because of the way Commissioner Persichilli treated and spoke about him in the preceding months. *Id*. at ¶63.

Plaintiff's other supervisors, Andrea Martinez-Mejia and Kaitlyn Woodard also never criticized Plaintiff's job performance during his employment. *Id*. at ¶64. Indeed, neither Andrea Martinez nor Kaitlyn Woodard ever informed Plaintiff that his job was in jeopardy or that he needed to improve any area relating to his job. *Id*. at ¶65.

F. COVID-19 Pandemic

Plaintiff regularly worked sixteen (16) plus hour days through the peak period of the pandemic. *Id*. at ¶66. On January 27, 2020, Plaintiff established the DOH Crisis Management Team, authorized the original Coronavirus Response Plan, and served as the initial Incident Commander for the state's pandemic response, coordinating all DOH activities related to COVID-19. *Id*. at ¶67.

On February 3, 2020, Governor Murphy signed Executive Order 102, creating a statewide Coronavirus Task Force. *Id*. at ¶68. On March 9, 2020, Governor Murphy declared a State of

Emergency in response to the COVID-19 outbreak and Plaintiff served as the DOH representative to the State's Unified Command. *Id*. at ¶69.

On March 10, 2020, Governor Murphy and Commissioner Persichilli agreed to have Plaintiff travel to Washington, D.C., to testify before the United States House of Representatives Homeland Security Subcommittee on Emergency Preparedness, Response and Recovery. *Id*. at ¶70. During the hearing, Plaintiff provided the Subcommittee with testimony concerning his experience and expertise and how New Jersey was preparing for and responding to the novel coronavirus public health crisis. *Id*. at ¶71. Plaintiff was also tasked with highlighting the need for additional funding from the federal government and with the distribution of items from the Strategic National Stockpile, and elsewhere, on behalf of New Jersey, which he did during his testimony. *Id*. at ¶72.

Following the World Health Organization declaring COVID-19 a pandemic on March 11, 2020, Governor Murphy signed numerous Executive Orders, including a stay-at-home order, the closure of non-essential businesses, retail and schools, prohibiting all social gatherings and mandating work from home arrangements. *Id*. at ¶73. There were widespread shortages of PPE and molecular testing supplies as the COVID-19 pandemic hit New Jersey. *Id*. at ¶74.

On April 10, 2020, Governor Murphy announced the acquisition of 15 point-of- care ID NOW testing instruments from the federal government to expand access to COVID-19 testing in New Jersey. Counsel Cert. at **Exh. B.** The portable, rapid testing machines were dispersed to health care systems throughout the state in an effort to assist New Jersey to meet the high demand for testing. *Id***.**

On May 13, 2020, the State announced that it would be investing hundreds of millions of dollars to expand COVID-19 testing and that the tests would be prioritized for vulnerable populations, their caregivers and frontline workers. Counsel Cert. at **Exh. C.** At this time, Governor Murphy said that he directed $6 million in federal funding to Rutgers University to help them scale up -- as much as five-fold -- production of a saliva-based test kit, allowing it to reach as many as 50,000 people daily. *Id*. Governor Murphy further publicly stated that there was a need to double the state's testing capacity so that it could screen 20,000 people a day for COVID-19 by the end of May, and that he wanted to see 25,000 tests done daily by the end of June. *Id*. Governor Murphy was quoted as saying, "Every day we take another step forward to ramp up our testing abilities. But we know that even this jump in testing is not enough. We need to have an even more robust testing program that is engrained throughout our communities and which go out to the people as much as the people can go to it." *Id*.

G. Plaintiff's Ethics Complaint

On April 24, 2020, Plaintiff and Colonel Callahan had a telephone conversation in which Colonel Callahan told Plaintiff that he "need[s] a favor". Neuwirth Cert. at ¶75. Colonel Callahan further explained that the "favor" was to go to the home of one of Helmy's relatives that weekend to collect specimens from two relatives for testing of SARS-COV- 2 to be performed at DOH's Public Health and Environmental Laboratories. *Id*. at ¶76.

Plaintiff did not want to participate in this because he believed it was unethical, unlawful, incompatible with public policy, a misuse of governmental resources and/or misuse of power. *Id*. at ¶77. However, fully understanding that the request for the "favor" was coming from top-

level people within the Governor's inner circle, Plaintiff responded to Colonel Callahan that he would look into it and check to see if he had staff available. *Id*. at ¶78.

Colonel Callahan instructed Plaintiff that the testing could occur anytime over the weekend, either Saturday or Sunday. *Id*. at ¶79. At the end of the conversation, Plaintiff requested Colonel Callahan to text him the details, which he did. *Id*. at ¶80; **Exh. E**. Shortly after the phone call ended, Colonel Callahan sent the text message to Plaintiff confirming the instruction. *Id*. at ¶81; **Exh. E**.

The following day, April 25, 2020, Colonel Callahan texted Plaintiff, "Just following up on request from yesterday. She was never called ref test. Thanks Chris." Neuwirth Cert. at ¶83; **Exh. E**. Plaintiff responded, "I'm going there myself tmrw. None of my staff were available this weekend. I'll call her tomorrow around noon. I'll be there between 2-5 because I have to pickup supplies at PHEL first." *Id*. at ¶85; **Exh. E.** Colonel Callahan responded, "Thanks Chris. I will let her know." *Id*. at ¶86; **Exh. E.**

Plaintiff complained to the State concerning being asked by Colonel Callahan to collect specimens of relatives of Chief of Staff Helmy for testing of SARS-COV-2 to be performed at DOH's Public Health and Environmental Laboratories. *Id*. at ¶80; **Exh. F**.; and Counsel Cert. at **Exh. A** (No. 37). Following his communications with Colonel Callahan, Plaintiff wrote an email to DOH Chief of Staff, Andrea Meija-Martinez, to disclose to his supervisor the improper request of being instructed to perform a private COVID-19 test on relatives of a Governor's Office employee. *Id*. at ¶87; **Exh. F**. The April 25, 2020 email to Ms. Martinez-Mejia reads, in relevant part:

> Clearly, we cannot say no, or advise them that this test doesn't matter, and it's a complete waste of an AC's time to spend literally 6-hours collecting one specimen.

> I'm sharing this with you simply for documentation and, in case, this continues to spiral out of control.

Id. at ¶88; **Exh. F**. On April 26 at 10:53 a.m., Ms. Martinez-Mejia responded as follows, "Thank you Chris. I will discuss this with Commissioner." *Id*. at ¶89; **Exh. F**.

On or about April 26, 2020, Plaintiff spoke over the phone with multiple state employees including Commissioner Persichilli, Dr. Christina Tan, Joy Lindo and Dana Johnson, about his complaint. *Id*. at ¶90; and Counsel Cert. at **Exh. A** (No. 37). On April 26, Plaintiff travelled from his home to the Public Health and Environmental Laboratories in West Trenton to obtain specimen collection tubes. *Id*. at ¶91. Thereafter, Plaintiff drove to the Health and Agriculture Building in Trenton to retrieve his state vehicle. *Id*. at ¶92. A few minutes later at 11:02 a.m., Plaintiff responded to Ms. Martinez-Mejia's email and stated, "I'm driving up there now." *Id*. at ¶93; **Exh. F**.

While Plaintiff was in the process of obtaining his state vehicle, Plaintiff called Joy Lindo from the DOH Office of Legal and Regulatory Compliance to complain and disclose to her that he had been instructed to perform private COVID-19 tests on relatives of a Governor's Office employee as "a favor." *Id*. at ¶94. Ms. Lindo agreed with Plaintiff that the request violated state ethics regulations. *Id*. at ¶95. Specifically, Ms. Lindo told Plaintiff, "[t]his is a textbook ethics violation." *Id*. at ¶96.

Ms. Lindo further directed Plaintiff to pull over on the side of the road, while she called Commissioner Persichilli to discuss his complaints directly with her. *Id*. at ¶97. Soon thereafter, Ms. Lindo called Plaintiff and informed him that she relayed his complaints to Commissioner Persichilli. *Id*. at ¶98. Ms. Lindo also informed Plaintiff that Commissioner Persichilli told her that Ms. Martinez-Mejia never sent Plaintiff's email to Commissioner Persichilli, nor did Ms. Martinez-

Mejia ever speak with Commissioner Persichilli about Plaintiff's complaints and disclosures concerning the situation. *Id*. at ¶99.

Ms. Lindo told Plaintiff that Commissioner Persichilli informed her to tell him to not proceed with the specimen collection and to "go home." *Id*. at ¶100. While en route back to Trenton, Plaintiff dropped off his state vehicle and called Commissioner Persichilli to discuss the situation. *Id*. at ¶101. Plaintiff told the Commissioner about his conversation with Ms. Lindo and Commissioner Persichilli confirmed her instruction for Plaintiff to go home and not perform the test on the relatives. *Id*. at ¶102. Commissioner Persichilli further told Plaintiff that she would inform Mr. Helmy that Plaintiff would not be performing the test. *Id*. at ¶103.

On April 27, Plaintiff called the State Ethics hotline to formally lodge an ethical complaint concerning the situation. *Id*. at ¶104. However, no one from the State Ethics hotline answered the call and it went to a voicemail. *Id*. at ¶105.

Thereafter, Plaintiff spoke to Ms. Lindo about the best method of contact for the State Ethics Commission. *Id*. at ¶106. Plaintiff informed Ms. Lindo that there was no answer at the State Ethics hotline and did not feel comfortable leaving a message on an unidentified voicemail. *Id*. at ¶107. In response, Ms. Lindo suggested that Plaintiff contact the DOH's internal ethics officer, Lubna Qazi-Chowdhry. *Id*. at ¶108.

Plaintiff spoke with Lubna Qazi-Chowdhry on several occasions during the period May 14, 2020 through May 18, 2020 about the instruction. *Id*. at ¶109; Counsel Cert. at **Exh. A** (No. 37).

A telephone meeting between Ms. Qazi-Chowdhry and Plaintiff was scheduled for May 14 to discuss his ethics complaint. Neuwirth Cert. at ¶110; **Exh. G**; Counsel Cert. at **Exh. A** (No. 35). In preparation for the meeting on May 14, Plaintiff attached screenshots of Callahan's

text message to the meeting invitation. Neuwirth Cert. at ¶111; **Exh. G**. During the call, Plaintiff complained to Ms. Qazi-Chowdry that he had been instructed to perform private COVID-19 tests on relatives of a Governor's Office employee as "a favor", and that he believed it violated state ethics rules. *Id*. at ¶112.

After listening to Plaintiff's complaint, Ms. Qazi-Chowdhry responded to Plaintiff's complaint by stating that she would not be the person to handle it because the situation involved misconduct of high-ranking individuals within the Governor's Office. *Id*. at ¶113. Ms. Qazi-Chowdhry further told Plaintiff that she would have to speak with the State Ethics Commission to determine the best way to handle the complaint, and that she would contact Plaintiff by the end of the day with further instruction on how he should proceed. *Id*. at ¶114.

Later that day, Ms. Qazi-Chowdry called Plaintiff. *Id*. at ¶115. During this call, Ms. Qazi-Chowdhry informed Plaintiff that she had spoken to the State Ethics Commission and instructed Plaintiff that "you need to have a consultation with a lawyer" before proceeding with processing the complaint. *Id*. at ¶116. Plaintiff was completely taken aback by Ms. Qazi-Chowdhry's direction and response to his complaints. *Id*. at ¶117. Plaintiff responded, "okay", and the conversation then ended. *Id*. at ¶118.

The following day, Plaintiff called Ms. Qazi-Chowdry to ask two questions to clarify her instructions from the day prior. *Id*. at ¶119. The first question Plaintiff asked: "what kind of lawyer were you suggesting I consult with" and the second: "what am I supposed to tell them?" *Id*. at ¶120. Ms. Qazi-Chowdhry responded to the first question, a "criminal defense lawyer." *Id*. at ¶121. Ms. Qazi-Chowdhry responded to the second question by instructing Plaintiff to have the criminal defense lawyer explain the "consequences of submitting the ethics complaint." *Id*. at

¶122. Based upon Ms. Qazi-Chowdhry's implication of criminal repercussions if Plaintiff went forward with the complaint, Plaintiff asked Ms. Qazi-Chowdhry whether his complaint is "dead in the water?" *Id*. at ¶123. Addressing the threat of criminal repercussions, Plaintiff further stated that he had young children and may not want to proceed with the complaint if he was going to be criminally prosecuted because of it. *Id*. at ¶124. Ms. Qazi-Chowdhry responded by assuring Plaintiff that she would not process the complaint until after he spoke with a criminal defense lawyer. *Id*. at ¶125. This conversation confirmed Plaintiff's initial concern that he was being threatened with criminal repercussions should he go forward with the ethics complaint. *Id*. at ¶126.

The following week, Ms. Qazi-Chowdhry and Plaintiff had another communication about the processing of the complaint. *Id*. at ¶127. During the conversation, Ms. Qazi-Chowdhry asked Plaintiff if he had the opportunity to meet with a criminal defense lawyer. *Id*. at ¶128. Plaintiff responded affirmatively and that after speaking with the criminal attorney, he was comfortable that he did not do anything wrong and certainly nothing criminal. *Id*. at ¶129. Ms. Qazi-Chowdhry responded, "Okay, good." *Id*. at ¶130. Plaintiff asked Ms. Qazi-Chowdhry for further clarification about his complaint and how it would proceed. *Id*. at ¶131. Ms. Qazi-Chowdhry responded that she would not be handling his ethics complaint and would not provide a direct answer to any of his questions about the next steps in processing the complaint. *Id*. at ¶132.

Ms. Qazi-Chowdhry was legally obligated to report Plaintiff's complaint to the state ethics commission. *Id*. at ¶133. The state ethics commission, however, never opened an investigation into Plaintiff's complaint. *Id*. at ¶134. Following this last communication with Ms. Qazi-Chowdry, senior staff removed scheduled meetings with Plaintiff from his calendar, refused to share

information with him, would not respond to his emails and would not participate in scheduled meetings with him. *Id*. at ¶135.

Plaintiff was no longer consulted on important matters, including the receipt and distribution of remdesivir to hospitals and the $613 million Epidemiology and Laboratory Capacity for Prevention and Control of Emerging Infectious Diseases (ELC) cooperative agreement grant. *Id*. at ¶136.

Plaintiff never spoke to Governor Murphy, Mr. Helmy or Colonel Callahan at any time after April 26, 2020. *Id*. at ¶137. Additionally, Plaintiff stopped receiving communications from other senior staff members including, but not limited to, Commissioner Persichilli, Ms. Martinez-Mejia and Ms. Woolford. *Id*. at ¶138.

On May 28, 2020 at approximately 10:30 a.m., Plaintiff was informed by the Director of Human Resources, Loreta P. Sepulveda, that he was terminated. *Id*. at ¶139. When Plaintiff asked if his termination was for cause or no-cause, Plaintiff was informed it was a "no-cause termination" and that his "services were no longer needed." *Id*. at ¶140. Plaintiff was provided a letter, which reads in relevant part:

> This letter is to inform you that your employment with the Department of Health, Public Health Infrastructure Laboratories & Emergency Preparedness will be terminated close of business May 28, 2020. You will be paid for the remainder of the pay period and receive payment for up to and including June 5, 2020. Attached is a packet prepared by the Payroll and Benefits Administration Unit regarding your health benefits and your prorated leave balances.
>
> Thank you for your services while employed with the Department of Health. I wish you success in your future endeavors.

Id. at ¶141; **Exh. H**.

H. The State Has Not Articulated any Reason Why Plaintiff Was Terminated or Who Was Involved in the Decision

On April 27, 2021, Defendants provided their responses to Plaintiff's First Set of Interrogatories and Document Requests. Counsel Cert. at **Exh. A**. Several State employees and/or representatives certify to some of the answers, including their Counsel, Ricardo Solano, Joy Lindo, Andrea Martinez-Mejia, Rahat Babar, Lubna Qazi-Chowdhry, Colonel Patrick J. Callahan, while the State has no one certify to other answers. *Id*.

In response to Interrogatory No. 24, which asks that the State "[i]dentify all reasons why Plaintiff was separated from his employment", the State provided the following answer: "the State states that several reasons justifying Plaintiff's termination will be identified during the course of discovery. Furthermore, Plaintiff was an at-will employee." Counsel Cert. *Id*. Andrea Martinzezz-Mejia certified to the State's Answer to Interrogatory No. 24. *Id*.

In response to Interrogatory No. 26, which asks that the State, "[i]dentify all persons who participated in the decision to terminate Plaintiff, the State answers, in relevant part, "the final decision to terminate Plaintiff was made by Commissioner Persichilli." *Id*.

Andrea Martinez-Mejia certified to the State's Answer to No. 26 concerning Commissioner Persichilli making the "final" decision to terminate, despite the fact that she does not know any of the reasons why Plaintiff was terminated (see her sworn Answer to Interrogatory No. 24) or any of the persons who were aware of the decision to terminate Plaintiff prior to the State informing Plaintiff of his termination (see Interrogatory No. 27). *Id*.

I. Governor Murphy's Public Statement Regarding Plaintiff's Termination is Irrefutably False

In the evening of February 28, 2020, hours after Plaintiff was told he was terminated, "anonymous sources" informed news outlets that the reason for Plaintiff's termination was because he failed to properly disclose and obtain approval for his consulting work for MHA. Counsel Cert. at **Exh. D**. However, Plaintiff properly disclosed and obtained approval for his consulting work for MHA. Neuwirth Cert. at **Exh. B**; **Exh. C**.

At no time prior to his termination, or during his termination meeting, did anyone from the State ever accuse Plaintiff of any wrongdoing associated with his outside employment relationship with MHA. *Id*. at ¶142. Plaintiff was also never informed of any ethics investigation being conducted concerning Plaintiff's outside business activities at any time during his employment. *Id*. at ¶143.

News media also were reportedly informed by anonymous sources that claim that Plaintiff was terminated "for cause." Counsel Cert. at **Exh. D**. Anonymous sources further told news outlets that Plaintiff became "overloaded" with work at his "other job" at MHA. *Id*. Anonymous sources further stated that Plaintiff faced criticism for poor attendance at the DOH post. *Id*.

At his May 29, 2020 press conference, Governor Murphy was asked the following question by New Jersey Globe Reporter, Nikita Birykov:

> Yeah, and then I have some questions for you about Chris Neuwirth. Were you aware of his part-time consulting gig? Why didn't you announce his firing?. Do you have a response to his claims about being made a scapegoat?. Lastly, are there any other senior members of your administration that have private, part-time jobs?

Id. at **Exh. E**.

Governor Murphy answered, in relevant part, as follows:

> …I've got no comment on Chris's situation. But I will say this, that folks are not – it's par for the course that you're not supposed to have another source of income, that's just as a general matter. We'll leave it there…

Id.

News reports interpreted Governor Murphy's comments as him confirming reports that Plaintiff was terminated for failing to disclose his consulting position with MHA. *Id*. at **Exh. F**.

For example, and not by limitation, a writer for the NJ Spotlight wrote…

> While state officials declined to explain the reason for his departure, Murphy appeared to confirm reports that it was related to a second job Neuwirth held in the private sector – something that was not included on his disclosure form for the state, as required by law.

Id.

Prior to his termination, no one from the Governor's Office or the State ever confronted Plaintiff regarding any accusation of impropriety concerning his association with MHA. Neuwirth Cert. at ¶144. As a result, Plaintiff was never provided any opportunity to defend himself against any accusations of impropriety concerning his association with MHA. *Id*. at ¶145.

LEGAL ARGUMENT

POINT I

PLAINTIFF IS ENTITLED TO PARTIAL SUMMARY JUDGMENT AS TO LIABILITY BECAUSE THE UNDISPUTED MATERIAL FACTS ESTABLISH THAT THE STATE CANNOT DISPUTE PLAINTIFF'S CLAIMS UNDER CEPA

A. Summary Judgment Standard

Pursuant to R. 4:46-2, a movant is entitled to summary judgment if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment as a matter of law." R. 4:46-2. The Supreme Court of New Jersey has held that a court "should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.' That means that a non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (emphasis in original). A court therefore is required "to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 523.

Rule 4:46-1 permits a party to file a motion for summary judgment before the close of discovery. When such a motion is filed, claims of incomplete discovery will not defeat summary judgment if further discovery will not patently alter the outcome. Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div. 2003). A party opposing a motion for summary judgment on the grounds that discovery is incomplete must "demonstrate with some degree of

particularity the likelihood that further discovery will supply the missing elements of the cause of action." Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 555 (2015) (quoting Wellington, 359 N.J. Super. at 496). In opposing summary judgment, a party must identify the specific discovery needed. See Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 166 (App. Div. 2007) ("A party opposing summary judgment on the ground that more discovery is needed must specify what further discovery is required, rather than simply asserting a generic contention that discovery is incomplete."). "[D]iscovery need not be undertaken or completed if it will patently not change the outcome." Minoia v. Kushner, 365 N.J. Super. 304, 307 (App. Div. 2004) (citations omitted).

B. Undisputed Facts Establish Plaintiff's Prima Facie Case

Enacted by the Legislature in 1986, and described as "one of the most far reaching whistleblower statutes in the nation[,]" Mehlman v. Mobil Oil Corp., 153 N.J. 163, 179 (1998), CEPA is intended "to protect and encourage employees to report illegal or unethical workplace activities and to discourage … employers from engaging in such conduct." Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405, 443 (1994). In Abbamont, the Supreme Court stated, "[w]e view [CEPA] as a reaffirmation of this State's repugnance to an employer's retaliation against an employee who has done nothing more than assert statutory rights and protections...." Id. The Abbamont Court continued, "'[i]n New Jersey, we are deeply committed to the principle that an employer's right to discharge an employee carries a correlative duty to protect his [or her] freedom to decline to perform an act that would constitute a violation of a clear mandate of public policy.'" Id. at 431-32. The Legislature intended that CEPA "encourage, not thwart, legitimate employee complaints." Id. at 431. Therefore, consistent with its significant public purpose, "CEPA must be considered 'remedial' legislation and therefore should be construed

liberally to effectuate its important social goal." Id.; see also Kolb v. Burns, 320 N.J. Super. 467, 477 (App. Div. 1999); Fleming v. Correctional Healthcare Solutions, Inc., 164 N.J. 90, 97 (2000); Donelson v. DuPont Chambers Works, 206 N.J. 243, 257-58 (2011) (noting CEPA's liberal construction in light of its "broad remedial purpose"); Dzwonar v. McDevitt, 177 N.J. 451, 463 (2003) (quoting Abbamont, at 431); Estate of Roach v. TRW, Inc., 164 N.J. 598, 610 (2000) (quoting Barratt v. Cushman & Wakefield of N.J., Inc., 144 N.J. 120 (1996) (same)).

Courts must construe CEPA's language in order to determine whether a plaintiff is entitled to pursue a claim under the statute. Lippman v. Ethicon, Inc., 222 N.J. 362, 377 (2015). "In this instance, any fair analysis of CEPA's scope must 'begin…by looking at the statute's plain language, which is generally the best indicator of the Legislature's intent.'" Id. at 380-381. Donelson, supra, 206 N.J. at 256, (citing DiProspero v. Penn, 183 N.J. 477, 492 (2005)).

N.J.S.A. 34:19-3 of CEPA provides that:

> An employer shall not take any retaliatory action against an employee because the employee does any of the following:
>
> a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer, or another employer, with whom there is a business relationship, that the employee reasonably believes:
>
> (1) is in violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care; or
>
> (2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder,

investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity;

b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer, or another employer, with whom there is a business relationship, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into the quality of patient care; or

c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:

(1) is in violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;

(2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity; or

(3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

The Supreme Court has adopted the four-prong test previously articulated by lower courts to determine whether a plaintiff has established a *prima facie* CEPA action. Lippman, 222 N.J. at 380. To set forth a *prima facie* CEPA claim a plaintiff must demonstrate that:

> (1) he or she reasonably believed that his or her employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy;
>
> (2) he or she performed a "whistle-blowing" activity described in *N.J.S.A.* 34:19–3;
>
> (3) an adverse employment action was taken against him or her; and
>
> (4) a causal connection exists between the whistle-blowing activity and the adverse employment action.

Id.; see also Dzwonar, 177 N.J. at 464. "These requirements must be liberally construed to effectuate CEPA's important social goals." Maimone v. City of Atlantic City, 188 N.J. 221, 230 (2006).

This case implicates the broad and important social remedial measures of CEPA. For claims of discrimination, "the evidentiary burden at the prima facie stage is 'rather modest: it is to demonstrate to the Court that plaintiff's factual scenario is compatible with discriminatory intent—i.e. that discrimination could be a reason for the employer's action." Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005), quoting Marzano v. Computer Science Corp., Inc., 91 F3d. 497, 508 (3d Cir. 1996). The Supreme Court further quoted Marzano for aptly describing the employee's *prima facie* burden under the *McDonnell Douglas* burden shifting framework as giving the plaintiff:

> the right, as in a poker game, to require the employer to show its hand—that is, to offer an explanation other than discrimination why the employee suffered an adverse employment action. It is as if plaintiff told the employer, "I cannot get into your mind to prove with certainty that you acted against me based on a discriminatory motive. You, on the other hand, know the reason why you acted against me. I have done the best I can, which is to show that discrimination could have been the motive. Therefore, it is your turn to prove me wrong by articulating the non-discriminatory reason for the action." If the employer is unable to proffer a nondiscriminatory reason, plaintiff is entitled to summary judgment or judgement as a matter of law, as the case may be, if the employer proffers a reason and the plaintiff can produce enough evidence to enable a reasonable fact

> finder to conclude that the proffered reason is false, plaintiff has earned the right to present his or her case to the jury.

Id. at 499, quoting Marzano, 91 F.3d at 508.

Plaintiff has met his burden in setting forth undisputed facts that establish a prima facie case under CEPA.

Regarding the first prong, the New Jersey Supreme Court has emphasized that the CEPA plaintiff need not show the employer actually violated the law, only that the plaintiff reasonably believed the employer was violating a clear mandate of public policy. Dzwonar, 177 N.J. at 462. In interpreting this element, CEPA was not intended to "make lawyers out of conscientious employees." FOP v. City of Camden, 842 F.3d 231, 240 (3d Cir. 2016). Therefore, to establish a practice is incompatible with a clear mandate of public policy, the plaintiff must identify an authority "that provides a standard against which the conduct of the defendant may be measured." Hitesman v. Bridgeway, Inc., 218 N.J. 8, 33-34 (2014) (finding that a clear mandate of public policy is a readily discernible course of action that is recognized to be in the public interest and that establishes a clear line between acceptable and unacceptable conduct). An employee's objection to or reporting of an employer's unethical conduct in contravention of a clear mandate of public policy is not the same as a routine workplace dispute over internal policies and procedures. Id. at 31.

There is no dispute that Plaintiff reasonably believed Colonel Callahan's instruction to perform COVID-19 tests on relatives of the Governor's Chief of Staff to be in violation of New Jersey's clear public policy regarding the careful use of scarce testing resources as well as a wasteful allocation of a key DOH leader's time and energy in the midst of a public health emergency affecting every citizen in New Jersey. At the time of Colonel Callahan's instruction,

Plaintiff had been working extensive hours to quell the toll COVID-19 was taking on the state in his role as DOH Assistant Commissioner. On a daily basis, Plaintiff was working to overcome severe shortages of personal protective equipment and testing kits throughout the State. For weeks both preceding and following Colonel Callahan's instruction to Plaintiff, Governor Murphy spoke publicly about the need to expand testing in New Jersey, the administration's efforts to help healthcare systems meet high testing demands, his decision to invest hundreds of millions of dollars to expand COVID-19 testing, and the need for tests to be prioritized for vulnerable populations, their caregivers and frontline workers. Neuwirth Cert., ¶¶ 75-77.

In light of the standards established by the State for testing priorities, Plaintiff believed, as any reasonable person would, that instructing a state employee to perform a "favor" to perform COVID-19 tests on relatives of the Chief of Staff at their private home, was unethical, unlawful, incompatible with public policy, a misuse of governmental resources and an abuse of power. This belief was shared with others to whom Plaintiff complained. As Joy Lindo, Division Director of the Office of Legal and Regulatory Compliance, responded to Plaintiff during their conversation about the instruction, these actions were "a textbook ethics violation." Ms. Lindo further suggested to Plaintiff that he contact the DOH's ethics liaison officer, Lubna Qazi-Chowdhry regarding his complaint.

Regarding the second prong, there is also no dispute that Plaintiff engaged in a whistle-blowing activity by disclosing and complaining to his supervisors, ethics liaison officer and other employees, including, but not limited to, Ms. Martinez-Mejia, Chief of Staff of the DOH, Ms. Lindo, Commissioner Perschilli and Ms. Qazi-Chowdhry. Each of these complaints and disclosures equates to a separate and distinct whistle-blowing activity as a matter of law.

Regarding the third prong, Plaintiff clearly suffered an adverse employment action in the form of termination.

Finally, the undisputed facts show that a causal connection exists between the whistle-blowing activity and Plaintiff's termination. In examining the absence of direct evidence of retaliation on the causation prong, a plaintiff may establish a causal connection between the protected activity and the adverse employment action by presenting circumstantial evidence from which an inference of retaliatory motive may be drawn. Romano v. Brown and Williamson Tobacco, 284 N.J. Super. 543, 550 (App. Div. 1995) (internal citations omitted) (holding that in a LAD retaliation case "proximity is [not] the only circumstance that justifies an inference of a causal connection."). Proof of causation may be established with a variety of evidence, including temporal proximity, a pattern of antagonism by the employer in response to the protected activity, and the employer's knowledge of that activity. See Drago v. Commc'n Workers of Am., No. A-0410-05T5, 2007 WL 92606, at *8-9 (App. Div. Jan. 16, 2007) (quoting Farrell v. Planters Lifesavers Co., 206 F.3d 271, 280 (3d Cir. 2000) for the proposition that "[a] 'broad array' of evidence" may be used to establish the causal link."); Brodowski v. Hudson Cty. Cmty. Coll., No. A-1917-18T1, 2021 WL 68795, at *7 (App. Div. Jan. 8, 2021); Robinson v. City of Pittsburgh, 120 F.3d 1286 (3d Cir. 1997), abrogated on other grounds; Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006); see also Krouse v. American Sterilizer Co., 126 F.3d 494, 503-504 (3d Cir. 1997). Plaintiff has established through several evidentiary means the causal connection between his whistle-blowing and termination.

First, looking at temporal proximity, Plaintiff's termination occurred less than two (2) weeks after he disclosed and complained to his supervisors, among others, and Ms. Qazi-

Choudhry refused to acknowledge his formal ethics complaint.

Second, there is irrefutable evidence of a pattern of antagonism towards Plaintiff from senior DOH members. Prior to his disclosure and complaints, Plaintiff was a trusted advisor to the Commissioner and the pandemic point person for the administration. Immediately afterwards, he was completely ostrasticized by senior members of the DOH, as well as Governor Murphy, Mr. Helmy and Colonel Callahan. Plaintiff was no longer consulted on any important matters, including the receipt and distribution of remdesivir to hospitals and the $613 million Epidemiology and Laboratory Capacity for Prevention and Control of Emerging Infectious Diseases (ELC) cooperative agreement grant.

In addition, it is indisputable that the State, through Ms. Qazi-Chowdhry, received an ethics complaint from Plaintiff and failed to investigate in gross violation of state ethics commission regulations. Instead, Ms. Qazi-Chowdhry implicitly threatened Plaintiff with criminal repercussions for his whistle-blowing activity by telling him that he needed to speak to a criminal attorney before moving forward with the processing of his ethics complaint. After Plaintiff consulted with a criminal attorney and stood firm in his desire to pursue a formal complaint and in clear violation of her job responsibilities, Ms. Qazi-Chowdhry refused to process Plaintiff's complaint. Even after the filing of this lawsuit, the State's Ethics Commission has refused to investigate Plaintiff's complaint.

Third, looking to the State's knowledge of Plaintiff's whistle-blowing activity, that fact is also undisputed. Plaintiff's supervisors and other upper level administrators for the State, including Commissioner Persichilli, Joy Lindo and Andrea Martinez-Mejia all had direct knowledge of Plaintiff's complaints against Colonel Callahan. Commissioner Persichilli made clear to Plaintiff

that she would let Mr. Helmy know of his complaints and her instruction for him to go home.

For all of these reasons, Plaintiff's prima facie case under CEPA is established and the State is unable to refute any of the material facts demonstrating its liability.

C. Defendants Have Failed to Articulate Any Legitimate, Non-Retaliatory Reason for Plaintiff's Termination

As Plaintiff has established undisputed facts showing a prima facie case under CEPA, the burden of proof shifts to the State to show it had a legitimate, non-retaliatory reason for terminating Plaintiff under the *McDonnell Douglas* burden shifting framework. The State has failed to meet their burden of proof because they cannot articulate any reason for terminating Plaintiff, and cannot even identify the persons involved in making the decision.

The "burden shifting analysis under the Law Against Discrimination (LAD) should be applied to CEPA cases." Zappasodi v. New Jersey, Dept. of Corrections, 335 N.J. Super. 83, 89 (App. Div. 2000) (citing Kolb, 320 N.J. Super. at 479). "[O]nce plaintiff establishes a *prima facie* case of retaliatory discharge, the defendant must then come forward and advance a legitimate reason for discharging plaintiff." Ibid.

More than one (1) year after Plaintiff's termination, the State still cannot identify anyone involved in the decision to fire him or articulate the reason why the decision was made. In its responses to Plaintiff's First Set of Interrogatories, the State responded in relevant part as follows:

> **Interrogatory No. 24: (a) Identify all reasons why Plaintiff was separated from his employment with the State.**
> . . .
> Subject to and without waiving its general and specific objections, the State states that *several reasons justifying Plaintiff's termination will be identified during the course of discovery*. Furthermore, Plaintiff was an at-will employee. (emphasis added)

> **<u>Interrogatory No. 26:</u> (a) Identify all persons who participated in the decision to terminate Plaintiff.**
> . . .
> The State further states that the final decision to terminate Plaintiff was made by Commissioner Persichilli.[1]
>
> **<u>Interrogatory No. 27:</u> (a) Identify all persons who were aware of the decision to separate Plaintiff from his employment prior to the State informing Plaintiff of his separation.**
> . . .
> Subject to and without waiving its general and specific objections, the State refers Plaintiff to the State's response to Interrogatory Nos. 1 and 26. *Discovery is ongoing, and the State reserves the right to amend, modify, and/or supplement this response*. (emphasis added)

The State has had the opportunity to put forward a legitimate, non-retaliatory reason for terminating Plaintiff and have made clear they do not have one. To their credit, the State has refrained from manufacturing a new pretextual reason for terminating Plaintiff in this lawsuit, since the one publicly stated by the Governor has been shown to be false. However, the law is clear that the State maintains the burden under *McDonnell Douglas*, and have failed to meet this burden. Discovery cannot not be used as a tool for an employer to conduct a fishing expedition to find information to use to manufacture a reason to justify a termination. Because the State has failed in this lawsuit to articulate a legitimate, non-retaliatory reason for terminating Plaintiff, the granting of partial summary judgment is appropriate.

D. Should the Court Consider Governor Murphy's Public Statement as a Reason for Termination, It Is Undisputed that it is a Pretext

To the extent the Court considers Governor Murphy's public statement that Plaintiff was

[1] Ms. Martinez-Mejia, Chief of Staff of the DOH, certified the responses to these two (2) Interrogatories. Notably, Commissioner Persichilli did not certify any of the State's Interrogatory responses, including those addressing her role in Plaintiff's termination.

not permitted to "have two sources of income" as the State's reason for his termination, partial summary judgment should still be granted because this reason is demonstrably false.

The Appellate Division has concluded that, in addition to the burden shifting analysis, the pretext theory under LAD should also apply to CEPA claims. Kolb, 320 N.J. Super. at 479. Once a *prima facie* case is established, and the employer has attempted to rebut the presumption of discrimination by articulating some legitimate, nondiscriminatory reason for the adverse employment action, the burden shifts back to the plaintiff. Id. at 478 (citing Andersen v. Exxon Co., U.S.A., 89 N.J. 483, 493 (1982); Mogull v. CB Commercial Real Estate Group, Inc., 319 N.J. Super. 53, 65 (App. Div. 1999), *rev'd on other grounds*, Mogull v. CB Com. Real Est. Grp., Inc., 162 N.J. 449 (2000) (finding no error with jury charge); Maiorino v. Schering–Plough Corp., 302 N.J. Super. 323, 346 (App. Div.), *certif. denied,* 152 N.J. 189 (1997).

In this third stage of burden shifting, the plaintiff has the burden of proving that the employer's proffered reasons were pretextual. Kolb, 320 N.J. Super. at 478 (citing Romano, 284 N.J. Super. 543, 551 (App. Div. 1995)). To carry his burden, Plaintiff is not required to provide direct evidence that the State acted in retaliation for his whistle-blowing. He "need only point to sufficient evidence to support an inference that the employer did not act for its proffered non-discriminatory reasons." Ibid. (quoting Kelly v. Bally's Grand, Inc., 285 N.J. Super. 422, 432 (App. Div. 1995)). Plaintiff can satisfy this prong by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them 'unworthy of credence,' and hence infer 'that the employer did not act for [the asserted] non-discriminatory reasons.'" Ibid. (quoting Fuentes v. Perskie, 32 F.3d 759, 765 (3rd Cir. 1994) (internal citations omitted)).

Plaintiff has demonstrated unequivocally that the Governor Murphy's proferred legitimate, non-retaliatory reason for terminating him is pretextual. Contrary to the Governor's remarks, Plaintiff fully disclosed to the State and obtained approval to provide consulting services for MHA consistent with the State Ethics Commissions regulations and policy. As such, to the extent the Court considers Governor Murphy's public statements as the reason for Plaintiff's termination, it amounts to an undisputed pretext.

POINT II

NO FURTHER DISCOVERY IS NECESSARY BECAUSE THE STATE CANNOT SET FORTH ANY LEGITIMATE, NON-RETALIATORY REASON FOR TERMINATING PLAINTIFF

The State may attempt to argue that it should be entitled to complete all discovery as a basis for defeating this motion. However, claims of incomplete discovery will not defeat a motion for summary judgment if further discovery will not patently alter the outcome. Wellington, 359 N.J. Super. at 496. A party opposing a motion for summary judgment on the grounds that discovery is incomplete must identify the specific discovery needed and demonstrate how it will change the material facts of the case. Badiali, 220 N.J. at 555; Trinity Church, 394 N.J. Super. at 166. The State cannot meet that burden.

The State's desire to discover "reasons justifying Plaintiff's termination" is not sufficient to meet its burden to defeat this motion. Only the State knows why it terminated Plaintiff and the fact they continue to refuse to answer this question speaks volumes. Any ability to conduct further discovery cannot possibly change the material facts evident in this case, and Plaintiff is not in a position to produce information related to the State's motivation for terminating him that the State does not already control and have access to. In fact, discovery is not intended as a

tool to allow an employer to conduct a fishing expedition searching for viable, non-retaliatory reasons it can posit for terminating an employee who asserted his rights under CEPA.

Because Plaintiff has established without dispute that he reasonably believed he was asked to engage in unethical conduct and in violation public policy, he performed a whistle-blowing activity, and he suffered an adverse employment action because of that whistle-blowing activity, a grant of partial summary judgment as to CEPA liability is warranted.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the Court grant Plaintiff partial summary judgment as to liability under CEPA.

Respectfully submitted,
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By: */s/ Christopher J. Eibeler*
CHRISTOPHER J. EIBELER
Attorneys for Plaintiff

Dated: June 11, 2021