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January 30, 2017

Via Hand Delivery
Civil Clerk's Office
175 South Broad Street - 1st floor
Post Office Box 8068
Trenton, New Jersey 08650-0068

Re: H.G., et al. v. Harrington, et al.
Docket No.: MER-L-2170-16

Dear Sir or Madam:

This firm is local counsel to the law firm of Arnold & Porter Kaye Scholer LLP. We represent Plaintiffs in the above-captioned matter.

Enclosed for filing, please find an original and three (3) copies of Plaintiffs' motion to compel discovery by defendants Newark Public School District. Kindly return a copy marked "filed" with our messenger, who has been instructed to stand-by. Additionally, please return a copy marked "filed" to this office in the enclosed self-addressed, stamped envelope. Please charge the appropriate fee to our firm account, No. 0103200.

Should you have any questions, please do not hesitate to contact me. Thank you for your attention in this matter.

Very truly yours,

Dated: 1/30/2017 WT

William H. Trousdale, Esq.
For TOMPKINS, McGUIRE,
WACHENFELD & BARRY, LLP

Enclosures

CC: Beth N. Shore
Natalie Watson, Esq.
Charlotte Hitchcock
Flavio L. Komuves
Steven P. Weissman
(by email and NJLS)

William H. Trousdale (N.J. Attorney ID No. 010921994)
TOMPKINS MCGUIRE, WACHENFELD & BARRY, LLP
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Attorneys for Plaintiffs

H. G., a minor, through her guardian TANISHA GARNER; F. G., a minor, through his guardian TANISHA GARNER; E.P., a minor, through his guardian NOEMÍ VAZQUEZ; M.P., a minor, through her guardian NOEMÍ VAZQUEZ; F.D., a minor, through her guardian NOEMÍ VAZQUEZ; W.H., a minor, through his guardian FAREEAH HARRIS; N.H., a minor, through her guardian FAREEAH HARRIS; J.H., a minor, through his guardian SHONDA ALLEN; O.J., a minor, through his guardian IRIS SMITH; M.R., a minor, through his guardian IRIS SMITH; Z.S., a minor, through her guardian WENDY SOTO; D.S., a minor, through his guardian WENDY SOTO;

Plaintiffs,

v.

KIMBERLY HARRINGTON, in her official capacity as Acting Commissioner of the New Jersey Department of Education; NEW JERSEY STATE BOARD OF EDUCATION; nominal defendant NEWARK PUBLIC SCHOOL DISTRICT; and nominal defendant CHRISTOPHER CERF, in his official capacity as Superintendent of the Newark School District;

Defendants,

AMERICAN FEDERATION OF TEACHERS, AFL-CIO; AFT NEW JERSEY, AFL-CIO; NEWARK TEACHERS UNION, AFT, AFL-CIO;

Defendants/Intervenors.

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY: LAW DIVISION

DOCKET NO. MER-L-2170-16

CIVIL ACTION

NOTICE OF MOTION FOR ORDER TO COMPEL PRODUCTION OF DOCUMENTS

TO: Natalie Watson, Esq.
McCARTER & ENGLISH, LLP
100 Mulberry Street, Four Gateway Center
Newark, New Jersey 07102

ON NOTICE TO COUNSEL OF RECORD

Dear Ms. Watson:

PLEASE TAKE NOTICE that on February 17, 2017 or as soon thereafter as the Court may consider this matter Plaintiffs H.G. et al., by and through their undersigned counsel, shall MOVE pursuant to *Rule* 4:23-1 and *Rule* 4:10-3 before the Superior Court of New Jersey, Law Division, in and for Mercer County, at the New Criminal Courthouse, 400 South Warren Street, Fourth Floor, Trenton, New Jersey, for an ORDER the compelling production of certain documents.

PLEASE TAKE FURTHER NOTICE that Plaintiffs shall rely on the Brief and Certification of Counsel with Exhibits submitted herewith.

PLEASE TAKE FURTHER NOTICE that a Certification of Service and a proposed form of Order have also been submitted herewith.

PLEASE TAKE FURTHER NOTICE that ORAL ARGUMENT IS REQUESTED.

Dated: 1/30/2017

WT

William H. Trousdale, Esq.
For TOMPKINS, McGUIRE,
WACHENFELD & BARRY, LLP

William H. Trousdale (N.J. Attorney ID No. 010921994)
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Defendants,

AMERICAN FEDERATION OF TEACHERS, AFL-CIO; AFT NEW JERSEY, AFL-CIO; NEWARK TEACHERS UNION, AFT, AFL-CIO;

Defendants/Intervenors.

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY: LAW DIVISION

DOCKET NO. MER-L-2170-16

CIVIL ACTION

BRIEF IN SUPPORT OF MOTION TO COMPEL DISCOVERY FROM DEFENDANT NEWARK PUBLIC SCHOOL DISTRICT

Plaintiffs, a group of minor children within the Newark Public School District, represented by their parents, respectfully submit this brief in support of their Motion to Compel Discovery from Defendant Newark Public School District ("NPS" or the "District").

PRELIMINARY STATEMENT

Nearly two months ago, Plaintiffs served their discovery requests (the "Requests") on the District. Thereafter, Plaintiffs and NPS engaged in a series of meet and confers, plagued by long delays from the District, during which no substantive objections to the Requests were raised, other than concerns about confidentiality. During those conversations, Plaintiffs repeatedly agreed to take steps to ensure confidentiality of any information produced. Despite Plaintiffs' assurances, NPS still has not produced a single document, objected to the Requests, or even provided a draft protective order in response. Delay seems to be the tactic taken by NPS here, and it should not be countenanced.

Delay actually seems to be a tactic advanced by all of the governmental entities named in this case. On January 26, 2017, Defendants New Jersey State Board of Education and Acting Commissioner Kimberly Harrington (the "State Defendants") filed a motion to hold this case in abeyance ("Motion to Stay") and, without requesting consent from Plaintiffs, to delay the filing of their answer one day before it was due. That same day, NPS informed Plaintiffs that it would not be producing any documents in response to the Requests and referenced the Motion to Stay. However, no stay of the entire case has been granted, and NPS's responses were already long overdue when the stay was first requested.[1]

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[1] On January 27, 2017, the Court issued a scheduling order holding all due dates in the matter in abeyance pending a decision on the Motion to Stay. Plaintiffs are filing this motion because the due date for NPS's responses has already passed, and Plaintiffs would like this motion heard at the same time as the Motion to Stay.

Discovery and the pending Motion to Stay (which should be denied) are separate processes, and NPS should be compelled by the Court to respond or object to the Requests.

STATEMENT OF FACTS

On November 1, 2016, Plaintiffs filed a Complaint alleging that New Jersey's LIFO provisions, N.J.S.A. 18A:28-10 and 18A:28-12 (the "LIFO Statute"), are unconstitutional because they deprive Plaintiffs, who all attend NPS, of their constitutional right to a "thorough and efficient" education, as well as children in similarly situated districts. Certification of William H. Trousdale (January 30, 2017) ("Trousdale Cert."), Ex. A ("Compl."). The LIFO Statute requires school districts in New Jersey, when engaged in a reduction-in-force ("RIF"), to terminate teachers based on their seniority (not quality), and after a RIF if available spots open, to hire those terminated teachers based on their seniority (not quality). Trousdale Cert., Ex. A at ¶¶ 3, 64-67.

As set forth in the Complaint, this required practice has harmed the children in Newark. *Id.* Recent data shows that there are higher concentrations of ineffective teachers in Newark than in other districts within the state; meanwhile, students in Newark, including students in the schools that Plaintiffs attend, are not meeting basic educational requirements. *See, e.g.*, Trousdale Cert., Ex. A at ¶¶ 31, 33, 35, 37, 47-48, 105, 106.

On December 4, 2016, Plaintiffs served the Requests. *See* Trousdale Cert. Ex. B., Plaintiffs' First Notice to Produce Documents to Defendant Newark Public School District, dated December 2, 2016. NPS first contacted Plaintiffs in response on December 20, 2016, after Plaintiffs first contacted NPS on December 15, 2016.

From December 20, 2016 until January 26, 2017, the parties engaged in a meet and confer process. On December 20, 2016, Plaintiffs' counsel conferred with counsel for NPS. During this meet and confer, Plaintiffs' counsel noted that the Requests were fairly

straightforward and that the ultimate goal was to decrease the burden on the District by serving targeted requests seeking, what Plaintiffs believed, were easily accessible categories of documents. With that in mind, Plaintiffs asked whether NPS could preview any potential objections to the Requests so Plaintiffs could quickly seek to resolve any objections. NPS demurred in providing any specific objections, but expressed a concern that some of the information sought in Plaintiffs' Document requests might include personally identifiable information ("PII"). Plaintiffs assured NPS that the Requests did not intend to seek PII. *See* Trousdale Cert. Ex. B, First Document Requests at ¶ hh. With this assurance in hand, NPS advised that they would get back to Plaintiffs with respect to a potential confidentiality stipulation or protective order.[2] *See* Trousdale Cert.

The parties engaged in another meet and confer on January 6, 2017. On this call, NPS again raised the issue of a protective order, which Plaintiffs reiterated they would be willing to review. NPS agreed to follow-up with their specific confidentiality concerns in writing the following week, but did not. As of the date of this motion, NPS still has not expressed its precise confidentiality concerns, as promised during the January 6, 2017 meet and confer, or provided a draft of a protective order for Plaintiffs to review.

NPS also has not served any responses or objections to the Requests. The Requests were originally due on January 9, 2017. R. 4:18-1(b)(2). The time for compliance has now come and gone without Plaintiffs receiving anything from the NPS. Finally, on January 26, 2017, more than twenty days after the last meet and confer, and after any response to the Requests was due, counsel for NPS called Plaintiffs' counsel to state that they would not be able to produce anything at this time, despite having never articulated any objection to the Requests (other than

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[2] On January 5, 2017, NPS contacted Plaintiffs to seek an extension of time to answer the Complaint until January 27, 2017, which Plaintiffs granted.

confidentiality). On the same day, the State Defendants filed their Motion to Stay, which has not yet been argued, and seeks to delay all proceedings in this case pending a decision by the New Jersey State Supreme Court.[3]

Plaintiffs filed their case almost three months ago to the day and have diligently litigated the case, offering professional courtesies of time extensions where needed. But Plaintiffs are now left with no choice. Nearly ninety days into this litigation—and ever-dangerously closer to another academic year—not one defendant has answered or moved to dismiss, the State Defendants yesterday moved to stay the proceedings, and NPS has failed to produce any documents. Plaintiffs seek judicial intervention to compel NPS to comply with its discovery obligations.

ARGUMENT

Rule 4:10-2(a) governs the parameters of discovery requests and provides, in relevant part, as follows:

> Parties may obtain discovery ***regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action***, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial ***if the information sought appears reasonably calculated to lead to the discovery of admissible evidence***; nor is it ground for objection that the examining party has knowledge of the matters as to which discovery is sought.

R. 4:10-2(a) (emphasis added).

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[3] Plaintiffs will be opposing the Motion to Stay in a separate filing.

Under New Jersey law, discovery rules are to be liberally interpreted. *See Huie v. Newcomb Hosp.*, 112 N.J. Super. 429, 432 (App. Div. 1970) (citations omitted). But here, liberal interpretation is not needed -- the Requests are narrowly tailored and seek plainly relevant materials. *See* Trousdale Cert., Ex. B; *see also* R. 4:10-2(a); *MarketRx, Inc. v. Turner*, No. SOM-C-012006-06, 2006 WL 851930, at *18 (N.J. Super. Ct. Ch. Div. Mar. 31, 2006) ("[T]he discovery sought by [Plaintiff] is presumed relevant, as it relates to its claims against [Defendant] . . . . Defendant must comply with Plaintiff's discovery requests.") (Trousdale Cert., Ex. C) . The Complaint alleges constitutional violations by NPS and the State Defendants due to operation of the LIFO Statute. *See* Trousdale Cert., Ex. A at ¶¶ 13, 15, 117, 127, 135, 139. These violations are premised on the inability of the majority of the students in the District schools to meet minimum State-level expectations in math and science, which Plaintiffs allege is in large part due to NPS's need to retain ineffective teachers (by not engaging in RIFs) in order to protect effective teachers who otherwise would be dismissed by operation of the LIFO Statute. *See* Trousdale Cert., Ex. A at ¶ 31, 33, 35, 37, 105, 106.

To prove this, Plaintiffs need data about the performance of teachers and students within the District. Consequently, the Requests seek straightforward data relating to teachers and students in the District, including but not limited to various previously identified teacher and student-level files and demographic data, metrics that the District possesses with respect to evaluating students' and teachers' performances, and documents and data relating to actions taken by the District to avoid layoffs during RIFs. *See* Trousdale Cert., Ex. B at ¶¶ 1-3, 5, 6, 8, 10. Moreover, Plaintiffs have set a timeframe in the Requests for the 2011/2012 academic year through the 2016/2017 academic year, which reduces any burden on the District because it should not have to dig through every file to find the relevant materials.

On their face, the Requests seek easily identifiable discovery plainly relevant to the subject matter involved in this pending action, and NPS has never stated, during any meet and confer, any contrary position. In fact, throughout the series of meet and confers between the parties, the District never once told Plaintiffs that it has any objections to the documents or data sought in the Requests. Yet, NPS has refused to comply with its basic discovery obligations by (i) failing to respond and/or object to the Requests; and/or (ii) failing to produce documents responsive to the Requests. *See* R. 4:18-1(b)(2) (stating party in receipt of document requests shall serve written response within 35 days after service of requests).

The District's repeated refusal to comply with its basic discovery obligations impairs Plaintiffs' ability to conduct meaningful discovery in this case, flouts their entitlement to relevant non-privileged information, and undermines their objective of moving this case forward to resolution before the next school year. Plaintiffs remain willing to engage in the meet and confer process with the District; however, at this point and given that NPS has stated there is nothing else it will do to move this production process forward, Plaintiffs believe judicial intervention is necessary. Moreover, Plaintiffs believe it is likely that the State Defendants, who are not a party to these Requests, are influencing the speed at which NPS is providing information and that the Motion to Stay is just one more tactic by the State Defendants to delay resolution of this action. If this is true, it is impermissible and the District should still be ordered to produce documents, as it must in response to the Requests.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter an Order (i) compelling the District to comply with and produce responsive documents to Plaintiffs' First

Document Requests pursuant to Rule 4:18-1(b)(4) and Rule 4:23-1(c); and (ii) granting such other relief as this Court deems just and proper.

Dated: 1/20/2017

William H. Trousdale, Esq.
For TOMPKINS, McGUIRE,
WACHENFELD & BARRY, LLP

William H. Trousdale (N.J. Attorney ID No. 010921994)
TOMPKINS MCGUIRE, WACHENFELD & BARRY, LLP
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Suite 402
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(973) 623-7893
Attorneys for Plaintiffs

H. G., a minor, through her guardian TANISHA GARNER; F. G., a minor, through his guardian TANISHA GARNER; E.P., a minor, through his guardian NOEMÍ VAZQUEZ; M.P., a minor, through her guardian NOEMÍ VAZQUEZ; F.D., a minor, through her guardian NOEMÍ VAZQUEZ; W.H., a minor, through his guardian FAREEAH HARRIS; N.H., a minor, through her guardian FAREEAH HARRIS; J.H., a minor, through his guardian SHONDA ALLEN; O.J., a minor, through his guardian IRIS SMITH; M.R., a minor, through his guardian IRIS SMITH; Z.S., a minor, through her guardian WENDY SOTO; D.S., a minor, through his guardian WENDY SOTO;

Plaintiffs,

v.

KIMBERLY HARRINGTON, in her official capacity as Acting Commissioner of the New Jersey Department of Education; NEW JERSEY STATE BOARD OF EDUCATION; nominal defendant NEWARK PUBLIC SCHOOL DISTRICT; and nominal defendant CHRISTOPHER CERF, in his official capacity as Superintendent of the Newark School District;

Defendants,

AMERICAN FEDERATION OF TEACHERS, AFL-CIO; AFT NEW JERSEY, AFL-CIO; NEWARK TEACHERS UNION, AFT, AFL-CIO;

Defendants/Intervenors.

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY: LAW DIVISION

DOCKET NO. MER-L-2170-16

CIVIL ACTION

CERTIFICATION OF SERVICE

TO: Deputy Clerk of the Superior Court
Mercer Vicinage
175 South Broad Street – 1st Floor
Trenton, NJ 08650

ON NOTICE TO COUNSEL OF RECORD

Dear Sir or Madam:

I, William H. Trousdale, Esq., of full age, hereby certify:

1. I am an attorney-at-law licensed to practice before this Court and a partner at the law firm of Tompkins, McGuire, Wachenfeld & Barry, LLP, 3 Becker Farm Road, Suite 402, Roseland, NJ 07068, attorneys for Plaintiffs Tanisha Garner, on behalf of her children H.G. and F.G., et al.

2. Today, January 30, 2017, I caused to be submitted, by hand delivery, the original and three (3) copies of Plaintiffs' Notice of Motion to Compel Discovery, Plaintiffs' Brief in Support of the Motion, a Certification of Counsel with Exhibits, a proposed Form of Order, and this Certification of Service to the Deputy Clerk of the Superior Court, Mercer Vicinage, 175 South Broad Street – 1st Floor, Trenton, NJ 08650 for filing purposes.

3. Today, January 30, 2017, I caused to be forwarded, via New Jersey Lawyers' Service, one copy of the above-noted documents to the Hon. Mary C. Jacobson, A.J.S.C., New Criminal Courthouse, 400 South Warren Street, 4th Floor, Trenton NJ, 08650.

4. Today, January 30, 2017, I caused to be forwarded, via email and New Jersey Lawyers' Service, one copy of the above-noted documents to the following parties in the above-captioned case:

Beth N. Shore
Deputy Attorney General
Education/Higher Education Section
Hughes Justice Complex
25 Market Street

Trenton, NJ 08625

Natalie Watson, Esq.
McCARTER & ENGLISH, LLP
100 Mulberry Street, Four Gateway Center
Newark, NJ 07102

Charlotte Hitchcock
Chief General Counsel
Newark Public School District
2 Cedar Street, Room 1003
Newark, NJ 07102

Flavio L. Komuves
Zazzali, Fagella, Novak, Kleinbaum & Friedman, PC
One Riverfront Plaza, Suite 320
Newark, NJ 07102

Steven P. Weissman
Weissman & Mintz LLC
One Executive Drive, Suite 200
Somerset, NJ 08873

I certify that the foregoing statements made by me are true. If any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 1/30/2017

WT

William H. Trousdale, Esq.
For TOMPKINS, McGUIRE,
WACHENFELD & BARRY, LLP

William H. Trousdale (N.J. Attorney ID No. 010921994)
TOMPKINS MCGUIRE, WACHENFELD & BARRY, LLP
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Attorneys for Plaintiffs

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Defendants,

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Defendants/Intervenors.

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY: LAW DIVISION

DOCKET NO. MER-L-2170-16

CIVIL ACTION

ORDER COMPELLING PRODUCTION OF DOCUMENTS

THIS MATTER having been raised before the Court on motion of Tompkins, McGuire, Wachenfeld & Barry LLP, local counsel to Arnold & Porter Kaye Scholer LLP, attorneys for Plaintiffs H.G. et al., for an Order compelling certain written discovery responses and attendant documents from defendant Newark Public School District; and for good and sufficient cause shown,

IT IS on this _____ day of _____, 2017:

ORDERED that Plaintiffs' motion to compel is GRANTED in full; and it is further

ORDERED that defendant Newark Public Schools shall produce to Plaintiffs the information and documentation demanded in Plaintiffs' moving brief by _____, 2017; and it is further

ORDERED that a true and correct copy of this Order be served on all counsel of record within _____ days of receipt thereof by Tompkins, McGuire, Wachenfeld & Barry, LLP.

SO ORDERED.

_____

The Honorable Mary C. Jacobson, A.J.S.C.

__ Opposed

__ Unopposed

William H. Trousdale (N.J. Attorney ID No. 010921994)
TOMPKINS MCGUIRE, WACHENFELD & BARRY, LLP
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Attorneys for Plaintiffs

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Defendants,

AMERICAN FEDERATION OF TEACHERS, AFL-CIO; AFT NEW JERSEY, AFL-CIO; NEWARK TEACHERS UNION, AFT, AFL-CIO;

Defendants/Intervenors.

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY: LAW DIVISION

DOCKET NO. MER-L-2170-16

CIVIL ACTION

CERTIFICAION OF COUNSEL WITH EXHIBITS

I, William H. Trousdale, Esq., of full age, hereby certify:

1. I am a partner in the law firm of Tompkins, McGuire, Wachenfeld & Barry, LLP, with offices at 3 Becker Farm Road, Suite 402, Roseland, New Jersey 07068.

2. This firm is local counsel to Arnold & Porter Kaye Scholer LLP; together, we represent Plaintiffs Tanisha Garner, on behalf of her children H.G. and F.G., et al.

3. From December 20, 2016 until January 26, 2017, Plaintiffs' counsel engaged in a meet and confer process with counsel for defendants Newark Public School District (NPS) regarding plaintiffs' discovery Requests.

4. During the December 20, 2016 meet and confer, Plaintiffs' counsel for NPS expressed a concern that some of the information sought might include personally identifiable information ("PII"); Plaintiffs assured NPS that the Requests did not intend to seek PII, and counsel for NPS advised that they would move forward with a confidentiality stipulation or protective order.

5. Annexed hereto as Exhibit A is a true and correct copy of the Complaint filed November 1, 2016.

6. Annexed hereto as Exhibit B is a true and correct copy of Plaintiffs' First Notice to Produce Documents, mailed December 4, 2016.

7. Annexed hereto as exhibit C is a true and correct copy of *MarketRx, Inc. v. Turner*, No. SOM-C-012006-06, 2006 WL 851930, at *18 (N.J. Super. Ct. Ch. Div. Mar. 31, 2006).

8. Plaintiffs are in compliance with all discovery orders and requests.

I certify that the foregoing statements made by me are true. If any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 1/30/2017

WT

William H. Trousdale, Esq.
For TOMPKINS, McGUIRE,
WACHENFELD & BARRY, LLP

EXHIBIT A

SUPERIOR COURT OF THE STATE OF NEW JERSEY
LAW DIVISION: MERCER COUNTY

H. G., a minor, through her guardian TANISHA GARNER; F. G., a minor, through her guardian TANISHA GARNER; E.P., a minor, through his guardian NOEMÍ VAZQUEZ; M.P., a minor, through her guardian NOEMÍ VAZQUEZ; F.D., a minor, through her guardian NOEMÍ VAZQUEZ; W.H., a minor, through his guardian FAREEAH HARRIS; N.H., a minor, through her guardian FAREEAH HARRIS; J.H., a minor, through his guardian SHONDA ALLEN; O.J., a minor, through his guardian IRIS SMITH; M.R., a minor, through his guardian IRIS SMITH; Z.S., a minor, through her guardian WENDY SOTO; D.S., a minor, through his guardian WENDY SOTO;

Plaintiffs,

v.

KIMBERLY HARRINGTON, in her official capacity as Acting Commissioner of the New Jersey Department of Education; NEW JERSEY STATE BOARD OF EDUCATION; nominal defendant NEWARK PUBLIC SCHOOL DISTRICT; and nominal defendant CHRISTOPHER CERF, in his official capacity as Superintendent of the Newark School District;

Defendants.

Case No.: MER-L-2170-16

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, by their undersigned counsel, bring this civil action for declaratory judgment and injunctive relief against Defendants Kimberly Harrington, in her official capacity as Acting Commissioner of the New Jersey Department of Education; New Jersey State Board of Education; Newark Public School District; and Christopher Cerf, in his official capacity as Superintendent of the Newark Public School District, (collectively "Defendants") for injuries

caused by Defendants' unconstitutional enforcement of the State statute prohibiting school districts from considering teacher quality when they have to resort to teacher layoffs due to a budgetary deficit. N.J.S.A. 18A:28-10 and 18A:28-12. Plaintiffs hereby allege as follows:

INTRODUCTION

1. The Education Clause of the New Jersey Constitution requires the Legislature to provide "for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State." Art. VIII, Sect. IV, ¶ 1.

2. Teacher effectiveness is the most important in-school factor affecting the quality of students' education. Students with high-quality, effective teachers do not just learn better than those without effective teachers in the short run—in the long run, they are more likely to graduate from high school, more likely to attend college, more likely to have good jobs and higher lifetime earnings, and less likely to become teenage parents.

3. Yet, the Legislature has passed a law that forces school districts faced with the possibility or reality of a reduction-in-force to follow quality-blind teacher layoff and reemployment statutes, N.J.S.A. 18A:28-10 and 18A:28-12 (the "quality-blind layoff statute" or "LIFO statute"), which mandate that school districts, when executing a reduction-in-force, lay off teachers based on seniority alone, ignoring any other factor, including the teacher's effectiveness. If there is a later need to hire teachers, the district must prioritize the re-hiring of these laid off teachers in order of their seniority, not their assessed quality.

4. The children affected by the LIFO statute are primarily located in low-income districts such as the Newark Public School District ("Newark"). Parents in those districts continuously need to fight to ensure that their children receive the high-quality education and opportunities they deserve.

5. Given declining student enrollment in Newark and the corresponding decrease in state funding, the reality of LIFO in Newark forces Newark and similar districts to wrestle with two untenable options that damage every child in the district: either (i) lay off effective teachers pursuant to the mandates of the LIFO statute, while leaving ineffective teachers clustered in an already under-performing school district, or (ii) refuse to institute reductions-in-force (even when faced with decreased funding), retain ineffective teachers to save the effective and highly-effective teachers, decline to hire new teachers, and cut spending elsewhere in the district's budget.

6. Thus far, Newark has opted not to fire effective classroom teachers; instead, it has created a pool of ineffective teachers that it will not place in full-time teaching positions in order to avoid reducing the number of effective teachers instructing students within the district. This pool of ineffective teachers, which is known as the Educators Without Placement Sites ("EWPS") pool, is unsustainable. It drains millions of dollars per year from Newark's budget that could be used to hire new, effective teachers and provide other beneficial programs. This detrimental budgetary impact is especially harmful in light of the State's misguided efforts to cut education funding to the Schools Development Authority ("SDA") districts, including Newark, which would further inhibit the district's ability to provide a thorough and efficient education to these students.

7. Other school districts similarly situated to Newark are faced with this same dilemma and have implemented workarounds to avoid the harms associated with implementing reductions-in-force pursuant to LIFO.

8. Because of its harmful effects on the students in struggling school districts, the LIFO statute violates the rights of Plaintiffs guaranteed by the New Jersey Constitution,

including those guaranteed by the Education Clause, as applied to Newark and similarly situated districts because that statute operates, when a reduction-in-force is necessitated, to strip schools in these districts of effective teachers, and prevents these districts from instead laying off ineffective teachers that have greater seniority.

9. New Jersey courts have a long and admirable history of protecting the fundamental right to education in the state and ensuring that lower-income and struggling districts—known as *Abbott* or SDA districts—receive the additional funding needed to assist in meeting their constitutional mandate.

10. Ensuring adequate funding to these districts is essential, but funding alone is not sufficient to provide a thorough and efficient education to these students. They need effective teachers.

11. In these districts, of which Newark is one, this fundamental right to a thorough and efficient education requires the State to provide an education that "exceeds that needed by students in more affluent districts," according to the New Jersey Supreme Court. Yet, the LIFO statute has the perverse effect of mandating that these less affluent school districts fire junior (but effective) teachers and instead retain senior (but ineffective) teachers during reductions-in-force, violating the rights guaranteed by the Education Clause.

12. Additionally, these children are inequitably harmed in comparison to children attending other districts, given the impact of the LIFO statute in less affluent districts like Newark where recent data shows that there are higher concentrations of ineffective teachers than other districts within the state. Children in Newark and other similarly situated districts suffer greater harms from the LIFO statute than students in other districts, given that a reduction-in-force pursuant to the LIFO statute would result in the dismissal of effective teachers and the

retention of ineffective teachers. On this basis, the LIFO statute, as applied to these children, also violates their rights pursuant to the New Jersey Constitution's Equal Protection Clause.

13. Moreover, these children are being deprived of their fundamental right to a thorough and efficient education by virtue of the operation of the LIFO statute, thereby violating their rights pursuant to the Due Process Clause of the New Jersey Constitution.

14. For these reasons, Newark and other similarly situated districts need to be rid of the LIFO statute's requirements and permitted to keep effective teachers in the classroom. Laying off teachers without any consideration of their quality prohibits children from being educated in the constitutionally mandated manner.

15. By enforcing the quality-blind layoff statute, Defendants violate the constitutional and statutory rights of Plaintiffs and other students in Newark and similarly situated districts throughout the State.

16. Therefore, Plaintiffs seek a judgment declaring that the State's quality-blind layoff statute, as applied to Newark and other similarly situated districts, is unconstitutional.

17. Plaintiffs further seek injunctive relief to prevent enforcement of the LIFO statute, or any law or policy substantially similar to the LIFO statute, which would prevent Newark and other similarly situated districts from considering teacher effectiveness—regardless of seniority—when making decisions in relation to reductions-in-force.

PARTIES

18. Plaintiff Tanisha Garner is the mother of two daughters, H.G. and F.G., who currently attend Hawkins Street Elementary School ("Hawkins") in Newark. Ms. Garner sues on behalf of each of her children.

19. Plaintiff Noemí Vazquez is the mother of E.P., M.P., and F.D. E.P. currently attends East Side High School; M.P. currently attends the Fourteenth Avenue School; and F.D. currently attends Hawkins. All three schools are located in Newark. Ms. Vazquez sues on behalf of each of her children.

20. Plaintiff Fareeah Harris is the mother of W.H. and N.H., both current students at Luis Muñoz Marín Elementary School ("Marín") in Newark. Ms. Harris sues on behalf of each of her children.

21. Plaintiff Shonda Allen is the mother of J.H., a current student at the Eagle Academy for Young Men of Newark ("Eagle Academy"). Ms. Allen sues on behalf of her child.

22. Plaintiff Iris Smith is the mother of O.J. and M.R., both current students at Speedway Academies ("Speedway") in Newark. Ms. Smith sues on behalf of each of her children.

23. Plaintiff Wendy Soto is the mother of Z.S. and D.S., both current students at the First Avenue School in Newark. Ms. Soto sues on behalf of each of her children.

24. Defendant Kimberly Harrington is the Acting Commissioner of the New Jersey Department of Education ("Commissioner") and charged with enforcing the quality-blind layoff statute by creating the standards by which teachers may be laid off and ensuring that all children in New Jersey receive a constitutionally effective education.

25. Defendant New Jersey State Board of Education is charged with enforcing the quality-blind layoff statute by approving the standards set by the Commissioner, which dictate how teachers may be laid off.

26. Defendant Newark Public School District is charged with enforcing the quality-blind layoff statute when executing a reduction-in-force within the district.

27. Defendant Christopher Cerf is the Superintendent of Newark and charged with enforcing the quality-blind layoff statute when executing a reduction-in-force within the district and ensuring that all children within Newark receive a constitutionally effective education.

VENUE

28. Venue is proper in Mercer County because the cause of action arises here, where Defendants enforce the quality-blind layoff statute. R. 4:3-2(a)(2).

FACTS

THE NEWARK SCHOOL DISTRICT

29. Newark is a struggling school district, with almost one-third of Newark students failing to graduate from high school. Of those who do graduate, only approximately 10% will be ready for college and careers. The long-term harm suffered by these students as a result of their deficient in-school educational experiences is devastating.

30. Approximately 50% of Newark's eighth-graders have received an education that allows them to meet the state's minimum proficiency for literacy. Only 40% of these same eighth graders have received an education that allows them to meet the minimum proficiency standards for mathematics.

31. Newark's students are in the state's bottom 25% for literacy and bottom 10% for math.

32. For example, Plaintiffs H.G., F.G., and F.D. currently attend Hawkins.

33. In the 2014-2015 school year, 94.3% of the children attending Hawkins were considered economically disadvantaged students.[1] Only 18% of the children at Hawkins received an education that allowed them to meet or exceed the State's minimum proficiency

[1] *See* New Jersey Department of Education, *New Jersey School Performance Report: Hawkins Street School: 2014-2015 School Year*, 29, *available at* http://www.nj.gov/education/pr/1415/13/133570460.pdf.

benchmarks in language arts, and only 10% received such an education in math.[2] These results place Hawkins in the bottom 11% of elementary schools in the State.

34. Plaintiffs W.H. and N.H. currently attend Marín.

35. Similar to Hawkins, students at Marín are struggling. For the 2014-2015 school year, 12% and 10% of children at Marín received an education in language arts and math, respectively, that met or exceeded the State's grade level expectations.[3] These results place Marín in the bottom 5% of elementary schools in the State. Like Hawkins, Marín educates a large percentage of children considered to be economically disadvantaged.

36. Plaintiffs M.P., O.J., and M.R. also attend elementary schools in Newark.

37. For the 2014-2015 school year at the Fourteenth Avenue School, which M.P. attends, only 18% of students met or exceeded the grade level expectations in language arts and only 12% of students met or exceeded grade level expectations in math.[4] At Speedway, which O.J. and M.R. attend, only 11% of students met or exceeded the State's grade-level expectations in language arts, and only 8% of those students met or exceeded the State's grade-level expectations in math.[5] The majority of students at both schools are considered economically disadvantaged.

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2 *Id.* at 3.

3 *See* New Jersey Department of Education, *New Jersey School Performance Report: Luis Muñoz Marín Elementary School: 2014-2015 School Year*, 3, *available at* http://www.nj.gov/education/pr/1415/13/133570301.pdf.

4 *See* New Jersey Department of Education, *New Jersey School Performance Report: Fourteenth Avenue School: 2014-2015 School Year*, 3, *available at* http://www.nj.gov/education/pr/1415/13/133570420.pdf.

5 *See* New Jersey Department of Education, *New Jersey School Performance Report: Speedway Avenue School: 2014-2015 School Year*, 3, *available at* http://www.nj.gov/education/pr/1415/13/133570690.pdf.

38. Z.S. and D.S. both attend the First Avenue School in Newark, at which less than half of the students met or exceeded the State's grade-level expectations.[6] However, Z.S. has been diagnosed with dyslexia, and her mother continues to struggle to have the school institute the appropriate educational plan to address this disability. At the First Avenue School, only 17.6% of children with a disability met the State standards.[7]

39. The issue is not limited to Newark's elementary schools, however. Plaintiff E.P. attends East Side High School. At this high school, only 13% of students met or exceeded the State's grade-level expectations in language arts during the last school year, and only 6% of them met or exceeded expectations in math.[8] This puts East Side High School in the bottom 10% of schools in the State. About one in three students failed to graduate from East Side High School on time.[9]

40. Likewise, Plaintiff J.H. attends the Eagle Academy. Ten percent of the students at Eagle Academy met or exceeded the State's expectations in language arts, and only 8% of the students met or exceeded the State's expectations in math.[10]

41. Despite these performance issues within Newark's schools, in 2016, Newark was forced to engage in a reduction-in-force of guidance counselors and librarians. This saved the

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[6] *See* New Jersey Department of Education, *New Jersey Performance Report for First Avenue School: 2014-2015 School Year*, 3, *available at* http://www.nj.gov/education/pr/1415/13/133570410.pdf (indicating 41% of students met or exceeded grade-level expectations in language arts, and 44% met or exceeded grade-level expectations in math).

[7] *Id.* at 4.

[8] *See* New Jersey Department of Education, *New Jersey School Performance Report: East Side High School: 2014-2015 School Year*, 3, *available at* http://www.nj.gov/education/pr/1415/13/133570040.pdf.

[9] *Id.* at 17 (70% of the students graduated in four years, which is below the State's target graduation rate of 78%).

[10] *See* New Jersey Department of Education, *New Jersey School Performance Report: Eagle Academy for Young Men of Newark*, 3, *available at* http://www.nj.gov/education/pr/1415/13/133570307.pdf.

district $1.5 million, but, as it was based solely on seniority, the district was forced to terminate staff it would have retained but for the mandates of the LIFO statute. Although not the primary classroom teachers, this reduction-in-force deprived Newark students of professionals who could have positively impacted their educational experience.

NEWARK'S 2014 UNANSWERED EFFORT TO WAIVE THE REQUIREMENT FOR QUALITY-BLIND LAYOFFS

42. In February 2014, Newark submitted a request to the Commissioner seeking a temporary reprieve from quality-blind layoffs in the form of an equivalency request under N.J.A.C. 6A:32-5.1 (the "Equivalency Request").[11] The request was driven by the declining enrollment in Newark, which resulted in the loss of almost $200 million in education funding.[12] This forced a difficult choice upon the district about what to do with its limited resources.

43. The request has gone unanswered by the State, and Newark is left to either engage in quality-blind layoffs or create alternatives to instituting reductions-in-force. Either option results in harm to students within the district. They will either suffer the lifelong harms that can result from instruction by ineffective teachers or, alternatively, suffer from budget cuts in other areas that result in losses in important educational programming and resources. All of this stems from the impact of the LIFO statute.

EFFECTIVE TEACHERS ARE ESSENTIAL FOR CHILDREN TO RECEIVE THE RIGHTS CONFERRED BY THE EDUCATION CLAUSE

44. The effectiveness or ineffectiveness of teachers has been found to be the single most influential school-based variable in determining the adequacy of a child's education and a critical determinant of educational success.

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[11] *See* Newark Public Schools, *Overview of Equivalency Request: Protecting Our Best Teachers During a Fiscal Crisis* (2014), *available at* http://content.nps.k12.nj.us/wp-content/uploads/2014/08/Overview_of_Equivalency_February_2014_FINAL.pdf.

[12] *See id.* at 1.

45. Recognizing this, New Jersey evaluates its teachers as "highly effective," "effective," "partially effective" or "ineffective." The final rating of a teacher is based on multiple factors generally evaluated based on student learning and teacher practice.[13] These considerations are designed to measure the quality of the teacher in the classroom, and are updated from time to time.

46. Ineffective or partially effective teachers are required to create a Corrective Action Plan with targeted professional development goals for the following year after the evaluation, and their progress is monitored.

47. In the last published Staff Evaluation report, the New Jersey Department of Education provided state- and district-level educator evaluation data.[14] In Newark, out of the 2775 teachers evaluated, 94 were rated "ineffective" and 314 were rated "partially effective." Statewide, there were only 205 teachers reported as being rated "ineffective," meaning that almost *half* of the ineffective teachers reported in the State worked in Newark at the time the evaluations were completed. Moreover, approximately 10% of the State's partially effective teachers were located in the district.

48. In comparison, of the 337 teachers evaluated in the Summit City School District ("Summit"), only a few miles from Newark, *not a single teacher* was reported as receiving a rating of ineffective or partially effective.

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[13] *See* http://www.nj.gov/education/AchieveNJ/teacher/ (setting forth explanations as to how teachers are evaluated in New Jersey).

[14] *See* N.J. Department of Education, *Staff Evaluation 2013-14, available at* www.state.nj.us/education/data/staff.

49. Therefore, even if Summit, a district with a median household income more than three times higher than Newark,[15] were forced to engage in a reduction-in-force, the students within the district would likely not be harmed in the same way as there were no teachers reported with ineffective or partially effective ratings that could be retained in place of effective teachers.

50. In essence, the effect of the LIFO statute in districts like Summit would not result in students being assigned to teachers reported as ineffective, given the nature of the district and the quality of the teaching staff. On the other hand, Newark has a disproportionately high concentration of teachers rated as less than effective. Therefore, when layoffs under the LIFO statute are based on an arbitrary standard of teacher seniority, not teacher effectiveness, while both districts can be injured, the data shows that Newark would retain less than effective teachers in place of effective teachers, while Summit, which reportedly has no ineffective teachers, would not suffer the same type of harm.

51. The importance to students of having effective teachers cannot be overstated. Study after study demonstrates that teacher quality is the most important in-school factor affecting student achievement.

52. One recent study found that replacing an ineffective teacher with simply an average teacher would increase the present value of students' lifetime income by over $250,000 per classroom—an amount reaching staggering proportions when aggregated over successive years of effective teaching.

53. Effective teachers can have an especially large effect on closing the achievement gap across class and racial lines.

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[15] Reported household median income for 2013 was $115,239 in Summit and $32,973 in Newark. *See* City-Data.com, *available at* www.city-data.com.

54. According to a recent national study, "[b]y every measure of qualifications . . . less-qualified teachers [are] to be found in schools serving greater numbers of low-income and minority students."

55. Studies show that, consistently, students of color in low-income communities are between three and ten times more likely to have unqualified teachers than students in predominantly white communities.

56. The New Jersey Department of Education found that using a measure of effectiveness premised upon a teacher's paper qualifications (i.e. degrees, certifications, demonstrated content knowledge in the subject taught), students in districts like Newark were five times more likely to be taught by teachers that did not possess even the minimum paper qualifications required by the federal No Child Left Behind Act.

57. Consequently, it is no surprise that one study found that the achievement gap narrows with each year a child of color is taught by an effective teacher.

58. Another study shows that, if this positive effect were to accumulate four consecutive years with a top-quartile teacher (a highly-effective teacher) rather than a bottom-quartile teacher (a highly-ineffective teacher), this would be sufficient alone to close the racial achievement gap between white students and their black counterparts.

59. Graduation rates in Newark are also low compared to other districts in New Jersey. According to 2015 graduation data published by the New Jersey Department of Education, the districtwide graduation rate from a four-year public high school in Newark was 69.59%. In comparison, the statewide graduation rate was 89.67%.[16]

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[16] *See* N.J. Department of Education, *2015 Adjusted Cohort 4 Year Graduation Rates*, *available at* www.state.nj.us/education/data/grate/2015/.

60. Moreover, within Newark, only 69.39% and 69.61% of Black and Hispanic students, respectively, graduate from a four-year high school. On a statewide basis, however, 81.51% of Black students and 82.81% of Hispanic students graduate high school, which indicates that students in other districts, who learn from effective teachers, achieve greater educational success.

61. The studies and metrics confirm what common sense and experience tell us—quality teaching is essential for quality education.

62. If, as the New Jersey Supreme Court has emphasized repeatedly, a thorough and efficient education is one that provides children the opportunity to achieve, enables them to perform their roles as citizens, and equips them with the skills needed to compete effectively in the contemporary labor market, then such an education is impossible without quality teachers.

TO THE DETRIMENT OF STUDENTS, QUALITY-BLIND LAYOFFS REQUIRE NEWARK TO EITHER (I) CONSISTENTLY LAY OFF EFFECTIVE TEACHERS AND RETAIN INEFFECTIVE TEACHERS OR (II) TAKE OTHER HARMFUL MEASURES TO AVOID LAYING OFF EFFECTIVE TEACHERS

63. The LIFO statute has two detrimental mandates dictating how districts must make certain personnel decisions.

64. First, when there is a reduction-in-force within a district, the district must dismiss teachers on the basis of seniority. Quality may not be considered. N.J.S.A. 18A:28-10.

65. Second, if a teacher is laid off due to such a reduction-in-force, the teacher must remain on a preferred eligibility list, which again is established on the basis of seniority alone. Quality may not be considered. N.J.S.A. 18A:28-12.

66. Seniority under the statute is not actually based on the individual's years of experience teaching, but, for the vast majority of teachers, on years teaching within the district where the reduction-in-force occurred. It is not truly teaching experience or teacher quality, but

tenure in the district that determines who gets preferential treatment in the event a district has the opportunity to fill vacancies following a reduction-in-force. This means that the ability of students to learn in an economically challenged district is dependent not on quality, and not even on actual years of experience, but on the arbitrary happenstance of teachers' years of service in a specific district.

67. Therefore, given the constraints of the reemployment provision of the LIFO statute, a district is (a) forced to ignore the quality of a teacher when able to re-hire previously laid off teachers and (b) prevented from bringing in new, effective teachers when a vacancy opens if there are qualified teachers on the eligibility list.

68. The primary persons who benefit from this mandate to consider *only* intra-district seniority are ineffective teachers who have held their jobs for many years despite their ineffectiveness. There is no empirical support for preferring this group of teachers. To the contrary, empirical studies show that seniority is weakly correlated with effective teaching. As a result, the length of employment is simply not a proxy for teacher effectiveness.

69. While layoffs based on effectiveness would cut the lowest performing and least effective teachers, LIFO undoubtedly cuts a number of higher performing teachers.

70. One study showed that 80% of those laid off on the basis of seniority alone are more effective than the lowest performing teachers. Put differently, the vast majority of teachers laid off during quality-blind layoffs are *not* ineffective teachers.

71. In response to a 2012 New Jersey Department of Education survey inquiring about the effects of quality-blind layoffs on student performance, school superintendents and administrators reported that such layoffs are a "tremendous handicap" because "the teacher with the most seniority is not always the best teacher."

72. The tremendous handicap suffered by superintendents and administrators that is inherent pursuant to the LIFO statute is especially felt in Newark, the state's largest school district.

73. In the Equivalency Request, Newark presented data from a simulation that used actual data from its teaching staff, and it showed the devastating impact of quality-blind layoffs on student achievement and the prospective benefits of performance-based layoffs.

74. Newark's data showed that, under the current quality-blind layoff system, if layoffs were implemented, 75% of the teachers it would lay off were considered effective or highly effective, and *only 4% of the teachers laid off would be rated ineffective.* Pursuant to the LIFO statute, three hundred of Newark's effective or highly effective teachers would be laid off while *72% of Newark's lowest-rated teachers would remain.*

75. Given the number of students each of these effective or highly effective teachers would otherwise instruct, this means that as many as 8,000 children in Newark would miss out on a high-performing teacher each year.

76. As previously described above, being taught by an ineffective teacher impacts these children not simply during that school year, but for the rest of their lives.

77. Unfortunately, Newark's experience is not unique. The same is true in other urban districts throughout the State that face layoffs this year and in the years ahead.

78. For example, the superintendent of the Camden School District ("Camden") has reported that quality-blind layoffs force Camden to lose some of the district's most-effective teachers, at a time when the district already struggles to educate its students competitively, and thus has no effective teachers to spare.

79. In an effort to avoid the necessity of quality-blind layoffs, these less affluent, urban districts take steps to avoid instituting reductions-in-force.

80. Consequently, Newark has resorted to the harmful and unsustainable tactic of keeping ineffective teachers on the district payroll.

81. When certain teaching positions become superfluous because of declining enrollment, Newark has refrained from imposing layoffs. Instead, it has created what is known as the EWPS pool for those teachers whom principals did not want to hire because of performance concerns.

82. Teachers in the EWPS pool do not have full-time classroom placements, but instead perform various support and teacher's aide functions. By definition, the teachers in this pool have been rated as ineffective or have other performance-related issues that made principals throughout the district decline to employ them.

83. During the 2013-2014 school year, there were 271 teachers in the EWPS pool, meaning there were 271 teachers that Newark had found to be so ineffective that they were not placed in a classroom, but still compensated as if these teachers were contributing full-time to student achievement.

84. This pool is largely composed of senior teachers. Approximately 70% of the teachers in this pool have ten or more years of experience.

85. Newark spent approximately $22.5 million dollars in the 2013-2014 school year keeping these ineffective teachers on its payroll and away from a permanent teaching placement within its district schools.

86. However, starting in 2015, Newark could not keep most of these EWPS teachers out of the districts' school.

87. Instead, the district had to force place these teachers as permanent teachers within district schools without the consent of the schools. For the 2016-2017 school year, this forced-teacher-placement represented more than $25 million in teacher salaries. Yet, $10 million in teachers' salaries remains in the EWPS pool.

88. In the event of any future quality-blind layoffs, teachers in this EWPS pool, rated partially effective or ineffective, and now serving as the principal teacher in classrooms in district schools, would largely avoid layoffs at the expense of less-senior, more-effective *and non-EWPS* teachers.

89. The largest component of any school district's budget is its personnel—almost 90% of any individual school's budget in Newark is tied to salaries. Spending the valuable resources of a district on ineffective teachers is not only nonsensical, but also inefficient and in direct contradiction with the mandate of the New Jersey Constitution. The EWPS pool would be wholly unnecessary were it not for the quality-blind layoff statute.

90. The EWPS pool is unsustainable, especially given the funding issues currently faced by Newark in light of continued declining enrollment and ongoing efforts by the State to cut the district's funding.

91. On September 15, 2016, the New Jersey Attorney General filed a Memorandum of Law in the State Supreme Court seeking to modify the Court's prior *Abbott* decisions and permit the State to institute a new funding scheme. Reports have stated that, if this funding scheme were to be enacted, Newark would lose almost 69% of its state aid, which is equivalent to a loss of $14,502.99 per pupil in the district.[17]

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[17] *See* Stephen Stirling, *How Christie's Controversial School Aid Plan Could Impact You*, NJ.COM (Jun. 22, 2016), *available at* http://www.nj.com/education/2016/06/how_christies_school_aid_proposal_could_impact_your_district.html.

92. However, the issues of funding and the LIFO statute should not be conflated. Newark, and other *Abbott* districts, need the money provided by the *Abbott* line of cases. Even with the court-mandated *Abbott* funding, Newark faces a crippling budget deficit, prompting the need to either conduct damaging reductions-in-force or place teachers from the EWPS pool within classrooms while the LIFO statute is in effect.

93. Put simply, between the quality-blind layoff statute and the EWPS program, Newark faces an impossible dilemma: the district must either lay off effective teachers and retain ineffective teachers, or it must bear the heavy burden of keeping ineffective teachers on staff (or engage in the time-consuming and expensive proceedings to terminate ineffective, tenured teachers on a case by case basis) rather than lose the effective teachers they have.

94. The loss of effective teachers from the classroom due to a reduction-in-force, or the insertion of ineffective teachers from the EWPS pool in order to avoid a reduction-in-force, impacts the education offered to the Plaintiff children, who already attend schools that are unable to educate the majority of their students in order to meet the State's base-level expectations for each grade-level.

95. As a result of the impossible dilemma, in connection with other factors facing the district, Newark continues to struggle with poor student performance, growing achievement gaps, and ever-more difficult challenges in recruiting and retaining high-quality teachers. And the Plaintiff children suffer as a result.

QUALITY-BLIND LAYOFFS ALSO UNDERMINE THE ABILITY OF SCHOOL DISTRICTS, LIKE NEWARK, TO ATTRACT AND RETAIN EFFECTIVE TEACHERS

96. High-poverty districts, like Newark, also face extraordinary difficulties in recruiting, hiring, and retaining highly-qualified teachers.

97. Elementary schools in Newark have difficulty hiring new, highly-qualified teachers from outside the district. Instead, they are forced to first hire qualified teachers from the EWPS pool to fill any staffing needs, even if the pool is made up of teachers rated as less than effective. The devastating result for children within the district is that the district is limited in its ability to find and place qualified and effective teachers in open positions. Even if a school were successful in removing an ineffective teacher from the classroom during layoffs, if a vacancy for which the teacher is deemed to fall within the job parameters exists elsewhere in the district, the principal is forbidden from hiring the most qualified and effective applicant, and instead must settle for that teacher who was previously deemed to be so ineffective that they had been removed from full-time teaching positions. For example, Newark recently needed to hire Spanish teachers, but was forced to require its schools to take Spanish teachers from the EWPS pool instead.

98. Therefore, schools in Newark, already stripped of effective teachers due to the prior periods of engaging in quality-blind layoffs, must add to their concentration of ineffective classroom teachers every time they look to fill a vacancy, as high-quality teachers who may otherwise have been available to fill the position will find alternative employment opportunities.

99. Although other districts have been less transparent than Newark about their dealings with the quality-blind layoff statute, it is clear that, if the statute must be enforced, it will continue to rob districts of effective teachers that they cannot afford to lose.

100. Moreover, outside of the impact of the EWPS pool and the LIFO statute, published studies and reports indicate that qualified teachers are reluctant to work in poorer, urban districts like Newark, which further reduces Newark's pool of potential candidates when it can hire new teachers.

101. Nevertheless, the specter of quality-blind layoffs at the end of every school year serves to exacerbate qualified teachers' reluctance to apply to work in districts like Newark, where the likelihood of layoffs is higher for teachers new to the district—even teachers with many years of experience. Consequently, qualified candidates seek employment opportunities in other districts where funding and declining enrollment are not concerns and greater employment stability exists.

102. Likewise, effective teachers voluntarily may decide to take their talents elsewhere.

103. Because of the quality-blind layoff statutes and the other factors that make teachers reluctant to come to less affluent districts, Newark is prevented from replenishing its supply of effective teachers with new hires from outside the district.

QUALITY-BLIND LAYOFFS UNDERMINE NEWARK'S ABILITY TO EFFECTIVELY EDUCATE ITS STUDENTS AND VIOLATE THE CONSTITUTIONAL RIGHTS OF PLAINTIFFS

104. Defendants' enforcement of the quality-blind layoff statute in Newark will remove quality teachers, which leads to lower test scores, lower high school graduation rates, lower college attendance rates, and sharply reduced lifetime earnings for students in Newark like the Plaintiff children.

105. Almost half of the students in Newark failed the State's high school proficiency assessment in math, and over 20% failed the assessment for language arts. This means those students did not possess the basic skills needed for obtaining a high school diploma.

106. Only 19% of Newark's students are on track to be ready for college and post-secondary careers. Of those who do graduate and go on to post-secondary education, virtually all require remedial work before they can obtain credits that count toward a college degree.

107. Plaintiffs' struggles in obtaining an effective education at their schools in Newark mirror the struggles facing other students in districts like Newark throughout the State.

108. In particular, information about Camden is worrisome. Less than 1% of Camden graduates are ready for college and careers. This means more than 99% of the students who graduate from Camden high schools, which has a 63.57% graduation rate, are not ready for college or careers.

109. This reality cannot be reconciled with the mandate under the State Constitution that children in New Jersey, and especially Plaintiff children who attend schools in an *Abbott* district, receive a thorough and efficient education giving them the opportunity to achieve, fulfill their role as citizens, and compete effectively in the contemporary labor market.

110. Draining districts like Newark of quality teachers, an inevitable result of the LIFO statute's quality-blindness, removes those within the schools who are in the best position to help these students achieve their constitutionally mandated thorough and efficient education and thereby violates the New Jersey Constitution on numerous fronts.

111. In sum, the quality-blind layoff statute violates the rights of Plaintiffs and similarly situated children in Newark and similar districts throughout the State.

112. The LIFO statute necessarily leads to the devastating result of laying off effective teachers in school districts that cannot afford to lose any effective teachers, and the retention of ineffective teachers to the detriment of the students in those districts. Moreover, the statute undermines the ability of districts like Newark to attract and retain desperately needed qualified and effective teachers.

113. The LIFO statute's overall effect is to prevent school districts from effectively educating their students by removing the necessary in-school ingredient for a constitutional education -- quality teachers.

FIRST CAUSE OF ACTION
Education Clause Violation

114. Plaintiffs incorporate the factual allegations set forth in the foregoing paragraphs as if fully set forth herein and further allege as follows:

115. The Education Clause requires that the State provide a "thorough and efficient" system of education to New Jersey's primary and secondary school students. In doing so, the Education Clause confers an individual right in those students to an effective education.

116. The quality-blind layoff statute, however, requires school districts conducting reductions-in-force to disregard teacher quality when deciding which teachers to lay off and, instead, requires districts to lay off teachers based upon seniority alone. Additionally, it mandates that subsequent vacancies in the district be filled in accordance with quality-blind, seniority-based eligibility. This policy has required, and will continue to require, Newark and other similarly situated districts to retain ineffective teachers while laying off effective teachers, with the effect of depriving students in those districts of a constitutionally guaranteed effective education.

117. Therefore, Defendants, by enforcing the quality-blind layoff statute in Newark and similarly situated districts, have violated the Education Clause and are not providing the mandated thorough and efficient public education to Plaintiffs and children similarly situated to them.

118. Enforcement of this statute must be enjoined in Newark and all similarly situated districts.

SECOND CAUSE OF ACTION

Equal Protection Violation

119. Plaintiffs incorporate the factual allegations set forth in the foregoing paragraphs as if fully set forth herein and further allege as follows:

120. Article I, Paragraph 1 of the New Jersey Constitution grants individuals the right to the equal protection of the law.

121. The quality-blind layoff statute disproportionately affects students attending school districts like Newark, which primarily serves children of color who live in areas of concentrated poverty, like Plaintiffs, who have a fundamental right guaranteeing them to a thorough and efficient education set forth by the Constitution and the rulings of the New Jersey Supreme Court.

122. The LIFO statute impinges on the children's constitutional right to a thorough and efficient education as this constitutional right is inextricably linked to the retention of effective teachers.

123. It is arbitrary to deny these children their fundamental right to a thorough and efficient education by requiring districts to retain, terminate, and hire teachers based solely on intra-district seniority, and not their effectiveness or quality or even their actual years of teaching experience.

124. These layoffs will occur and continue to occur in poor, urban areas with high populations of children of color, such as Newark, and will be comparatively rare in wealthier, whiter, suburban districts, such as Summit.

125. Accordingly, Plaintiffs and similarly situated children attending districts such as Newark are disproportionately and adversely harmed by the quality-blind layoff mandate of N.J.S.A. 18A:28-10 and 18A:28-12.

126. The harm to Plaintiffs and children attending schools in districts like Newark results from the denial of an equal opportunity to receive a thorough and efficient education, which is a fundamental right, is profound, and outweighs any governmental interest that may support the quality-blind layoff statute.

127. Because the quality-blind layoff statute as applied disproportionately impacts Plaintiffs and similarly situated students, the statute violates the equal protection principles embodied in Article I, Paragraph 1 of the New Jersey Constitution.

128. The statute must therefore be declared unconstitutional and its enforcement enjoined as applied to Newark and all similarly situated school districts.

THIRD CAUSE OF ACTION

Due Process Violation

129. Plaintiffs incorporate the factual allegations set forth in the foregoing paragraphs as if fully set forth herein and further allege as follows:

130. Article I, Paragraph 1 of the New Jersey Constitution grants individuals protection against government deprivation of their interests in life, liberty, or property.

131. The Education Clause grants every New Jersey child a right to and an interest in a thorough and efficient education. Art. VIII, Sect. IV. Moreover, New Jersey statutory law grants to all children the right to attend primary and secondary school. *See* N.J.S.A. 18A:38-25.

132. Accordingly, under the State Constitution, State statutes, and case law interpreting the New Jersey Constitution and State statutes, a thorough and efficient education is guaranteed to be provided by public school districts to such primary and secondary school students as Plaintiffs, and it is deemed to be a fundamental right.

133. By requiring school districts to reduce their teacher workforces on the basis of intra-district seniority alone, and without any regard to teacher performance, the quality-blind

layoff statute deprives Plaintiffs and similarly situated schoolchildren of their fundamental right to a thorough and efficient education.

134. No rational governmental interest justifies this deprivation.

135. Therefore, Defendants' enforcement of the quality-blind layoff statute is unconstitutional, as it violates the due process principles of Article I, Paragraph 1 of the New Jersey Constitution and must be enjoined in Newark and all similarly situated school districts throughout the State.

FOURTH CAUSE OF ACTION
Civil Rights Act Violation

136. Plaintiffs incorporate the factual allegations set forth in the foregoing paragraphs as if fully set forth herein and further allege as follows:

137. The New Jersey Civil Rights Act grants individuals the right to be free of deprivations by public officials of substantive rights secured by the laws or Constitution of New Jersey. *See* N.J.S.A. 10:6-2, *et seq.*

138. The New Jersey Constitution grants Plaintiffs and similarly situated students the substantive rights to a thorough and efficient education, equal protection under the law, and substantive due process.

139. By enforcing the quality-blind layoff statute, Defendants, acting under color of law, have violated the New Jersey Civil Rights Act. Therefore, Defendants' enforcement of the quality-blind layoff statute in Newark and similarly situated districts must be enjoined.

FIFTH CAUSE OF ACTION
Declaratory Judgment

140. Plaintiffs re-allege and incorporate by reference the preceding allegations in the foregoing paragraphs as if fully set forth here.

141. Plaintiffs seek relief under the New Jersey Declaratory Judgment Act, N.J.S.A. 2A:16-50 *et seq.* This act allows parties to sue for a judicial declaration in order to declare and settle the rights and obligations of the parties.

142. As alleged in the preceding counts and the general allegations above, the Education Clause of the New Jersey Constitution requires that the State provide a "thorough and efficient" education; Article I, Paragraph 1 of the New Jersey Constitution grants individuals the right to the equal protection of the law; and Article I, Paragraph 1 of the New Jersey Constitution protects individuals from the unwarranted deprivation of certain fundamental rights, including the right to an effective education.

143. Each of these constitutional rights is being and will in the future again be violated by the application of the LIFO statute in Newark and other similarly situated districts. The quality-blind layoff statute requires school districts conducting reductions-in-force to disregard quality in laying off teachers, instead mandating that these districts implement reductions-in-force based upon seniority alone. This policy has required and will require Newark and other similarly situated districts to retain ineffective and less-effective teachers, to the profound detriment of the Plaintiffs and other schoolchildren in those districts.

144. The quality-blind layoff statute deprives Plaintiffs and other similarly situated children in Newark and other similarly situated districts of their fundamental right to a thorough and efficient education, equal protection of the law, and the fundamental right to an education. Plaintiffs therefore seek a declaratory judgment that the application of the LIFO statute is unconstitutional.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against Defendants, as follows:

145. Declaring that the quality-blind layoff statute, N.J.S.A. 18A:28-10 and 18A:28-12, violates the Education Clause of the New Jersey Constitution as applied to Newark and similarly situated school districts throughout the State;

146. Declaring that the quality-blind layoff statute, N.J.S.A. 18A:28-10 and 18A:28-12, violates the Equal Protection principles of Article I, Paragraph 1 of the New Jersey Constitution as applied to Newark and similarly situated school districts throughout the State;

147. Declaring that the quality-blind layoff statute, N.J.S.A. 18A:28-10 and 18A:28-12, violates fundamental rights protected by the New Jersey Constitution as applied to Newark and similarly situated school districts throughout the State, and deprives children within those districts of their due process rights;

148. Declaring that the quality-blind layoff statute, N.J.S.A. 18A:28-10 and 18A:28-12, as applied to Newark and similarly situated school districts throughout the State, violates the New Jersey Civil Rights Act;

149. Permanently enjoining Defendants from enforcing the quality-blind layoff statute, N.J.S.A. 18A:28-10 and 18A:28-12, or any law or policy substantially similar to this statute in Newark and any similarly situated school district throughout the State;

150. Awarding Plaintiffs legal fees and costs of suit, under the New Jersey Civil Rights Act and otherwise; and

151. Awarding any and all such other relief as deemed just and warranted.

Dated: November 1, 2016

By: _____

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Of Counsel; Moving for Pro Hac Vice Admission

RULE 4:5-1 CERTIFICATION

I, William H. Trousdale, Esq., certify pursuant to Rule 4:5-1 that, to the best of my knowledge, information, and belief, the matter in controversy is not the subject of any other action or arbitration proceeding, now or contemplated, other than the Abbott v. Burke litigation (078257), and that no other parties should be joined in this action pursuant to Rule 4:28.

Dated: November 1, 2016

By: _____

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EXHIBIT B

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Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF NEW JERSEY
LAW DIVISION: MERCER COUNTY

H. G., a minor, through her guardian TANISHA GARNER; F. G., a minor, through her guardian TANISHA GARNER; E.P., a minor, through his guardian NOEMÍ VAZQUEZ; M.P., a minor, through her guardian NOEMÍ VAZQUEZ; F.D., a minor, through her guardian NOEMÍ VAZQUEZ; W.H., a minor, through his guardian FAREEAH HARRIS; N.H., a minor, through her guardian FAREEAH HARRIS; J.H., a minor, through his guardian SHONDA ALLEN; O.J., a minor, through his guardian IRIS SMITH; M.R., a minor, through his guardian IRIS SMITH; Z.S., a minor, through her guardian WENDY SOTO; D.S., a minor, through his guardian WENDY SOTO

Plaintiffs,

v.

KIMBERLY HARRINGTON, in her official capacity as Acting Commissioner of the New Jersey Department of Education; NEW JERSEY STATE BOARD OF EDUCATION; nominal defendant NEWARK PUBLIC SCHOOL DISTRICT; and nominal defendant CHRISTOPHER CERF, in his official capacity as Superintendent of the Newark School District

Defendants.

Docket No. MER-L-2170-16

PLAINTIFFS' FIRST NOTICE TO PRODUCE DOCUMENTS TO DEFENDANT NEWARK PUBLIC SCHOOL DISTRICT

TO: Christopher Cerf
Superintendent of the Newark Public School District
Room 1003
2 Cedar Street
Newark, New Jersey 07102

COUNSEL:

PLEASE TAKE NOTICE that Plaintiffs hereby demand that Defendant Newark Public School District ("NPS") produce the documents listed herein for inspection and photocopying at the offices of Tompkins, McGuire, Wachenfeld & Barry, LLP, 3 Becker Farm Road, Suite 402, Roseland, New Jersey 07068-1726 within the time period set forth in the Rules of Court.

TOMPKINS, McGUIRE, WACHENFELD & BARRY, LLP
Attorneys for Plaintiffs

Dated: November 30, 2016

By: WT
William H. Trousdale

DEFINITIONS

For the purposes of responding to Plaintiffs' First Notice to Produce Documents to Defendant Newark Public School District ("the "Requests"), the following definitions apply, unless otherwise specified in a particular itemized request:

a) The term "Begin Date" shall refer to the date the course began for students who were enrolled before the course began.

b) The term "Certification Areas" means the current areas in which a teacher is certified (e.g., special education, elementary, secondary math, secondary English language arts).

c) The term "Certification Type" shall refer to an indicator variable for the most recent type of certification a teacher has received (i.e., alternative, traditional, National Board Certification).

d) The term "Course Code" shall refer to an identifier for the course in which the student was enrolled.

e) The term "Course Enrollment" shall refer to the date the student enrolled in the course, as reported by NPS.

f) The term "Course Instructional Level" shall refer to information as to whether the course was on a regular track, remedial/developmental track, or honors track, to the extent this information is available.

g) The term "Course Title" means a title or description of the course in which the student was enrolled. The Course Title shall be associated with the Course Code.

h) The term "Course Withdrawal" shall refer to the date the student withdrew from the course, as reported by NPS.

i) The term "document" means the original and any copy, regardless of origin or location, of any and all written or recorded material, in whole or in part, including computer-stored and computer-retrievable information and includes, without limitation, text messages, instant messages, e-mails, letters, copies of letters, intra-corporate communications, minutes, bulletins, specifications, instructions, advertisements, literature, work assignments, reports, memoranda, memoranda of conversations, notes, notebooks, drafts, data sheets, work sheets, contracts, memoranda of agreements, assignments, licenses, sub-licenses, books of accounts, orders, invoices, statements, bills, vouchers, photographs, drawings, charts, catalogs, brochures, graphs, phono-records, checks or canceled checks, and other data compilations from which information can be obtained and translated, if necessary, by the party to whom this Notice is addressed through electronic devices into reasonably usable form, and all other written materials of whatever kind known to or in the possession or control of the party to whom this Notice is addressed.

j) The term "Educators Without Placement Sites" or "EWPS" shall refer to the pool of teachers created by NPS in order to avoid placing ineffective teachers in full-time teaching

positions and avoid reducing the number of effective teachers instructing students within the district.

k) The term "End Date" shall refer to the date the course ended for those who completed the course.

l) The term "English Language Learner Classification" shall refer to a student's proficiency in English, including whether a student separately participates in English remediation programs offered by NPS.

m) The term "Enrollment Date" shall refer to the date the student began enrollment at the specific school. This may be one specific date that does not change from year to year, only from school to school, or it may be a date that is specific to each school each year.

n) The term "Gifted/Talented Classification" shall refer to whether a student is enrolled in above average or particularly challenging classes offered by NPS.

o) The term "Grade Level" shall refer to a student's current grade level between K-12.

p) The term "Grade Levels Served" shall refer to the range of grades served by the school (e.g., K-5, 6-8, K-8, 9-12).

q) The term "Highest Degree Obtained" shall refer to a teacher's highest level of education (e.g., bachelor's degree, master's degree, doctorate).

r) The term "Hire Date" means the date a teacher began working as a certified full-time classroom teacher in the NPS. The term "Hire Date" shall also refer to the date a teacher began working in the NPS, to the extent that the date on which a teacher began working as a full-time classroom teacher is not available.

s) The term "Human Resources Database" shall refer to any database used to keep information about individual employees and administrators within NPS, including, but not limited to, PeopleSoft.

t) The term "Licensure Type" shall refer to an indicator variable for a teacher's licensure area (e.g., English language arts, mathematics, special education).

u) The term "Mean Achievement" shall refer to mean achievement scores on state tests and/or percent performing at or above proficient.

v) The term "NPS" shall refer to the Newark Public School District.

w) The term "Overall Evaluation Rating" shall refer to a teacher's rating on the four-category scale.

x) The term "NPS Framework for Effective Teaching" shall refer to the current four-category evaluation scale for teachers in the NPS and any other evaluation rubric previously used to evaluate teachers in the NPS.

y) The term "Salary" means total annual base salary plus bonuses and stipends.

z) The term "Salary Group Code(s)" means an identifying number(s), phrase(s), code(s), symbol(s) or other marker(s) that identifies the experience step, education level, or other details that contribute to the teacher's specific place on the salary scale.

aa) The term "School ID" means an identifying number, phrase, code, symbol, or other marker that identifies each individual school within the NPS.

bb) The term "Section Code" shall refer to an identifier used to separate different classes of the same course taught by the same teacher. To the extent that NPS's data does not include a section code, please provide room number and meeting period data instead.

cc) The term "Special Education Classification" shall refer to whether a student participates in special education classes or has an individualized education program ("IEP") provided by NPS.

dd) The term "State Accountability Rating" shall refer to school grades or ratings on the New Jersey state accountability system.

ee) The term "Student Absences" shall refer to total student absences by year, as well as any sub-categories of absence tracked by the NPS.

ff) The term "Student ID" means an identifying number, phrase, code, symbol, or other marker that remains with individual students across years and across data files.

gg) The term "Teacher Absences" shall refer to total teacher absences by year, as well as any sub-categories of absence tracked by the NPS (i.e., excused vs. unexcused, sick days, personal days, etc.).

hh) The term "Teacher ID" means an identifying number, phrase, code, symbol, or other marker that remains with individual teachers across years and across data files. This term is not meant to include any personally identifiable information that would result in discovery of a teacher's identity.

ii) The term "Raw Score" shall refer to the raw count of the number of questions answered correctly on a test.

jj) The term "Retained in Grade," shall refer to an indicator for whether or not the student was retained in his or her grade for a given year.

kk) The term "Scaled Score" shall refer to the score received on a test regardless of how it is scaled.

ll) The term "Standardized Score" shall refer to a standardized (i.e., mean zero, standard deviation) version of the test score. To the extent that New Jersey calculates standardized scores, this information should be provided.

mm) The term "Sub-Component Evaluation Rating" shall refer to scores from all measures that contribute to the Overall Evaluation Rating.

nn) The term "Student State Test Scores" shall refer to the scores students received on the required New Jersey standardized state tests, including but not limited to, the New Jersey Assessment of Skills and Knowledge test (or NJASK) or the Partnership for Assessment of Readiness for College and Careers (or PARCC) tests.

oo) The term "Teacher Evaluation Platform" shall refer to any database or records used to keep information about the evaluations of individual teachers in the NPS, including, but not limited to, Bloomboard.

pp) The term "Teacher Seniority in the District" shall refer to the number of years of full-time employment as a classroom teacher in NPS.

qq) The term "Tenure Status" shall refer to whether the teacher has received tenured status, as determined by the NPS.

rr) The term "Test Date" means the date on which the test was taken (if known).

ss) The term "Test Subject" shall refer to the subject of the given test (e.g., math, English language arts, science, social studies) if not already identified in the Test Name variable.

tt) The term "Title" shall refer to the classification group each teacher would be placed in for layoffs.

uu) The term "Achievement Level" shall refer to the categories of test scores used for accountability and classification under No Child Left Behind (e.g., advanced, mastery, basic, approaching basic, unsatisfactory).

vv) The term "Teaching Experience" means the variables used by NPS to determine any teacher's experience (i.e. experience in-state, experience out-of-state, certified experience, etc.).

ww) The term "Relevant Time Period," shall refer to six years of panel data covering the 2011/2012 academic year through the 2016/2017 academic years.

xx) The term "Withdrawal Date" means the date the student ended enrollment at the specific school.

yy) The term "Withdrawal Reason" shall refer to any code or descriptive reason provided along with the withdrawal (e.g., moving out of the district, dropping out).

zz) The terms "You" and "Your" shall refer to Defendant Newark Public School District and any present or former employees, attorneys, agents, and other persons or entities acting or purporting to act on behalf of the Newark Public School District.

aaa) The terms "related" or "relating to" means constituting, comprising, containing, setting forth, showing, disclosing, describing, explaining, summarizing, concerning or referring to directly or indirectly.

bbb) The conjunctions "and" and "or" shall be interpreted conjunctively and shall not be interpreted to exclude any information otherwise within the scope of any interrogatory.

ccc) In no instance shall the term "including" be construed to limit the scope of any particular Request.

INSTRUCTIONS

a) In responding to the Requests, furnish all documents available to You, including those in the possession of Your agents and attorneys and not merely such documents as You may have within Your immediate control. For each document produced, indicate each numbered Request or part thereof which calls for its production. If You are unable to respond in full to any particular Request after exercising due diligence to obtain all the documents requested, so state; furnish the documents that are available; and indicate in writing Your inability to provide the rest of the documents that are responsive to the Request, setting forth whatever information, knowledge or belief You have concerning the unavailable documents.

b) Plaintiffs reserve the right to supplement these Requests by future notices to You to produce documents.

c) In responding to the Requests, furnish all documents responsive to each Request for the Relevant Time Period, unless indicated otherwise in the actual request.

d) If any of the Requests cannot be responded to in full, then respond to the extent possible, specifying the reasons for Your inability to respond to the remainder of the Request.

e) The documents requested below should be produced in the manner in which they are kept in the usual course of business. Documents should be produced with the label or labels from any file folder, binder, file drawer, file box, notebook, computer disk or other container in which the document was found. Documents on computers or computer disks should be produced in a readable electronic format. Even if only part of a document is responsive to a Request below, You should still produce the entire document including all attachments.

f) All documents are to be produced in their entirety, without redaction, including all attachments and enclosures. If, for any reason, a document cannot be produced in full, please state with particularity the reason or reasons it is not produced in full, and describe, to the best of Your knowledge, information and belief, and with as much particularity as possible, those portions of the document that are not produced.

g) Documents attached to each other should not be separated.

h) Label each page of each document with a unique identifying control number (Bates number).

i) In responding to the Requests, with respect to all documents that are maintained in digital, electronic, or imaged form, produce both a tangible copy and a copy of the document in its native format.

j) With respect to electronic data, identify the location of each document, the computer program by which the document was created, the computer program, if any, that compresses or otherwise stores the document, and the configuration of the computer on which the document is found.

k) In responding to the Requests, You must search all document management systems, electronic media, computer archives, or backup tapes or disks. You must produce documents that are capable of being retrieved from archives or backup tapes/disks regardless of whether the user of the documents attempted to delete them.

l) The Requests are continuing in nature, and You shall produce in the form of supplementary document productions any document requested herein that is unavailable to You at the time of Your response hereto but that becomes available to You or to Your agents or representatives up to the time of trial.

m) The use of a definition for the purposes of the Requests shall not be deemed to constitute an agreement or acknowledgment on the part of the Plaintiffs that such definition is accurate, meaningful or appropriate for any other purpose in this action.

n) In response to document requests relating to "Free or Reduced Price Lunch Eligibility," please provide a variable with three values: free lunch, reduced lunch, not eligible.

UNAVAILABILITY OF DOCUMENTS

To the extent a document is sought herein and such document was, but is no longer, in Defendant's possession, or subject to Defendant's control, or in existence, state whether it (i) is missing or lost, (ii) has been destroyed, (iii) has been transferred, voluntarily or involuntarily, to others, or (iv) has been otherwise disposed of, and, in each instance, explain the circumstances surrounding, and authorization for, such disposition thereof; state the date or approximate date thereof; the contents of said document; and the person who authorized the transfer, destruction or other disposition of said document.

Please inform Plaintiffs of specific years for which the requested data does not exist.

PRIVILEGE

Identify by (i) date, (ii) author, (iii) recipient, (iv) distribution list and (v) subject matter, each document (or portion of document if redacted) that is responsive to a specific request for production, but that You do not intend to produce, in whole or in part, based upon the assertion of a claim of privilege or other asserted justification for non-production (e.g., attorney work product), and with respect thereto, specifically identify the alleged privilege asserted for each document.

REQUESTED DOCUMENTS

Plaintiffs request that Defendant produce the following:

1. Teacher-level files from the Relevant Time Period, including but not limited to, teacher demographic data from the Human Resources Database or a comparable software, specifically including the following variables:

   a. Teacher ID

   b. School year

   c. Teacher gender

   d. Teacher race/ethnicity

   e. School Site

   f. Teaching Experience

   g. Teacher Seniority in the District

   h. Tenure Status

   i. Hire Date

   j. Salary

   k. Salary Group Code

   l. Certification Areas

   m. Highest Degree Obtained

   n. Licensure Type

   o. Certification Type

   p. Title

   q. Teacher Absences

   r. Student Absences

2. Teacher evaluation files from the Teacher Evaluation Platform for the Relevant Time Period, including but not limited to, documents relating to NPS's Framework for Effective Teaching. In responding to this request, please provide the following variables:

a. NPS's observation rubric;

b. Individual ratings on all measures used to inform the overall rating;

c. Individual ratings for each domain on the observation rubric, as well, information on each observation, dates of observations, whether or not each observation was announced or unannounced, observer ID numbers, and titles or positions of each observer (e.g., principal, vice-principal, department chair, etc.);

d. Additionally, for each observation, please provide:

i. Teacher ID

ii. School ID

iii. Overall Evaluation Rating on NPS's evaluation scale

iv. Sub-Component Evaluation Ratings

v. Individual observation rubric ratings from NPS's Framework for Effective Teaching

3. All student demographic data within NPS from the Relevant Time Period, the specific variables of which are set forth below. In response to this request, please provide the following variables:

a. Student ID

b. School ID

c. School year

d. Gender

e. Race/ethnicity

f. Grade Level

g. Free or Reduced Price Lunch Eligibility

h. English Language Learner Classification

i. Special Education Classification

j. Gifted/Talented Classification

k. Retained in Grade

l. Enrollment Date

m. Withdrawal Date

n. Withdrawal Reason

o. Days enrolled

p. Days attended

q. Days absent

r. Days suspended

4. All documents from the Relevant Time Period and relating to Student State Test Scores within NPS. In response to this request, please provide the following variables for each tested student:

a. Student ID

b. School ID

c. School year

d. Test Date

e. Test Name

f. Test Subject

g. Test Level

h. Scaled Score

i. Raw Score

j. Achievement Level

k. Standardized Score

5. Class roster files from the Relevant Time Period that link students with their respective teachers within NPS. In response to this request, please provide the following variables for each student tested:

a. Student ID

b. Teacher ID

c. School year

d. School ID

e. Course Code

f. Course Title

g. Section Code

h. Semester or term

i. Course Enrollment or Begin Date

j. Course Withdrawal or End Date

k. Course Instructional Level

6. All NPS individual school files that provide the following information for the Relevant Time Period:

a. School ID

b. School name

c. School year

d. School type (public charter, adult, alternative, etc.)

e. Grade Levels Served

f. Total school enrollment

g. Percentage of demographics across racial and ethnic groups, such as African American, White, Hispanic, Asian/Pacific Islander, Native American/American Indian, mixed race, or other

h. Percentage of students that are eligible for free or reduced price lunch

i. Mean Achievement

j. State Accountability Rating

7. All documents from the Relevant Time Period and relating to annual district budget changes NPS faced for each respective school year including, but not limited to:

a. Individual school budgets and expenditures for teachers, non-teaching personnel, other operating expenses, and capital expenses for each school year.

b. Projected estimates of the number of teachers that would have been laid off under a performance-based layoff policy in each school year.

8. All documents relating to actions taken to avoid layoffs in NPS during the Relevant Time Period.

9. All documents and data relating to individuals who applied for teaching positions in the NPS, including but not limited to, the following qualifications for each job applicant, including but not limited to, the following:

a. Prior experience;

b. Undergraduate institution attended;

c. Undergraduate GPA;

d. Licensure exam scores;

e. Internal ratings given to candidates;

f. NPS school(s) applicant applied to;

g. Subject applicant applied to teach;

h. Grade-level applicant applied to teach;

i. NPS' final employment decision.

10. All documents relating to the Educators Without Placement Sites pool within the NPS, including but not limited to, reports regarding the EWPS pool and documents identifying the teachers placed in the pool each year throughout the Relevant Time Period.

11. All documents relating to teachers terminated as a result of "Last in, First out" layoffs during the Relevant Time Period. In response to this request, please provide the "Teacher ID" for each teacher laid off.

Dated: November 30, 2016

By: WT

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CERTIFICATION

I hereby certify that I have reviewed the document production request and that I have made or caused to be made a good faith search for documents responsive to the request. I further certify that as of this date, to the best of my knowledge and information, the production is complete and accurate based on ( ) my personal knowledge and/or ( ) information provided by others.

I acknowledge my continuing obligation to make a good faith effort to identify additional documents that are responsive to the request and to promptly serve a supplemental written response and production of such documents, as appropriate, as I become aware of them. The following is a list of the identity and source of knowledge of those who provided information to me:

_____

Dated:

EXHIBIT C

2006 WL 851930
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Chancery Division,
Somerset, Hunterdon and Warren Counties.

MARKETRX INC, a corporation, Plaintiff,
v.
Michael TURNER, Defendants.

Decided March 31, 2006.

Attorneys and Law Firms

Douglas S. Zucker (Schenck, Price, Smith & King, LLP) for Campbell.

Stephen H. Roth for Defendant.

Charles A. Reid, III (Drinker, Biddle & Reath) for Plaintiff.

WILLIAMS, J.

Motion to Intervene; Motion for a Confidentiality Order; Motion to Compel Discovery; Motion to Quash Subpoena

Background

*1 Michael Turner (hereinafter "Defendant") is an employee of Campbell Alliance Group, Inc. (hereinafter "Campbell"). Campbell is a management consulting firm specializing in the pharmaceutical and biotech industries. MarketRx (hereinafter "Plaintiff") was Defendant's most recent employer prior to his employment with Campbell. Plaintiff is a competitor of Campbell in that it is also a management consultant to the pharmaceutical and biotechnology industries.

Starting November 15, 2005, before Defendant began working for Campbell, Plaintiff wrote to Campbell and tried to limit Defendant's work for the company, based upon the terms of a non-compete agreement he signed with marketRx. Thereafter followed an exchange of correspondence between marketRx, Campbell, Mr. Turner, and their respective counsel.

On or about January 19, 2006, marketRx filed an Order to Show Cause and Verified Complaint against Defendant, seeking a declaration that he is in violation of his agreement with Plaintiff and seeking damages. Plaintiff also sought an order which preliminarily and permanently enjoined and restrained him from working for Campbell in the areas of sales force planning and analysis and promotion planning and optimization or in any other capacity that would construe competitive activity under his non-compete agreement with marketRx. Plaintiff was also seeking an Order which preliminarily and permanently enjoined and restrained him from using, disclosing, conveying or disposing of in any manner marketRx's confidential, proprietary and trade secret information for his own benefit, to the benefit of Campbell or any others, and to the detriment of marketRx. The Court denied Plaintiff's request but did order Defendant to appear and answer the Order to Show Cause on March 10, 2006.

Plaintiff also served Defendant simultaneously with the pleadings twenty-six (26) separate document demands and a notice for deposition on March 3, 2006. Plaintiff again filed a Motion with the Court on February 1, 2006 to order expedited discovery. Further, on February 15, 2006, marketRx's counsel served a subpoena on Campbell, through its counsel, with thirty-five (35) separate categories of documents that Plaintiff is seeking. Campbell is now seeking to intervene as a discovery defendant and to Quash Plaintiff's subpoena. MarketRx then filed a Motion to Compel Defendant to comply with its discovery requests.

A. *Motion to Intervene; Motion for a Confidentiality Order*

I. *Campbell-Movant-Contends*

Campbell argues that the discovery sought by marketRx is an attempt for the company to gain protected information about Campbell. It contends these demands are directed at it, rather than at Mr. Turner or at protecting marketRx's proprietary information. An example of one of the requests is "any and all documents provided to [Mr. Turner] by Campbell Alliance from January 1, 2005 to the present." Therefore, Campbell is seeking to intervene in this matter as a matter of right in order to protect

its interests in its employee, in its documents, and in its confidential and proprietary information.

*2 Intervention of right is set forth in *R.* 4:33-1 which states:

> Upon timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Campbell argues it can prove all four elements of this rule and therefore the Court must approve its application for intervention as of right. *ACLU of New Jersey, Inc. v. County of Hudson,* 352 N.J.Super. 44, 67 (App.Div.2002).

Firstly, Campbell claims it has an interest relating to the property or transaction which is the subject of the action. The focus of the present action is that after leaving Plaintiff, Defendant began working for Campbell in violation of the non-compete agreement he had signed. Furthermore, Plaintiff is seeking to have Defendant enjoined from working for Campbell in a number of areas. Also, Campbell was directly subpoenaed for thirty-five of its business documents for this action. Thus, Campbell contends it is clear that it has an interest in this action.

In addition, this action may impair Campbell's interest in Mr. Turner and its own confidential and proprietary information. Here, disclosure of Campbell's confidential and proprietary information to Plaintiff "will have a direct and immediate impact" on Campbell's business operations by eliminating its competitive advantage and, once disclosed, there would be no way that Campbell "might remedy the effect of disclosure once it has taken place." *ACLU,* 352 N.J.Super. at 69-70. This would thus clearly satisfy the second prong of *R.* 4:33-1 test.

Thirdly, Campbell's interest cannot adequately be represented by the present parties. Mr. Turner is a recently hired employee who is not in a position to represent Campbell's interest as those interests may not always be congruent.

Moreover, Campbell's application is timely. On the issue of timeliness, courts have been quite flexible, allowing a motion for intervention to be granted as late as after entry of judgment. *See Warner Co. v. Sutton,* 270 N.J.Super. 658 (App.Div.1994). Plaintiff's verified complaint is dated January 17, 2006 and all parties have met together as recently as February 2, 2006. Furthermore, Mr. Turner was required to appear to answer the Order to Show Cause on March 10, 2006. Campbell argues that clearly the filing here is timely and therefore contends the Court must grant its request.

If the Court does not grant its request, Campbell argues its Motion should be granted as a permissive intervention. Permissive intervention is found under *R.* 4:33-2 and is a more lax standard than that of intervention as a right. This rule provides:

> Upon timely application anyone may be permitted to intervene in an action if the claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any state or executive order administered by a state or federal governmental agency or officer, or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the agency or officer upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

*3 The rule on "permissive intervention, *R.* 4:33-2, is to be liberally construed by trial courts ... with a view to whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties ... and whether intervention will eliminate the need for subsequent litigation." *Zirger v. Gen. Accident Ins. Co.,* 144 N.J. 327, 341 (1996). Since there are common questions of law and fact in the case at hand, Campbell

argues that it is should be permitted to intervene under this rule.

II. *Plaintiff's-Cross-Movant's-Position*

Plaintiff partially opposes Campbell's Motion to Intervene as a Matter of Right; Plaintiff is not opposed to Campbell's intervention to the extent that it seeks to participate in discovery of its employee but it does oppose Campbell's motion to the extent that it seeks unrestricted intervention as of right. Plaintiff asks the Court to limit Campbell's intervention to attending and raising objections at Mr. Turner's deposition or in participating in and objecting to discovery requests served upon Mr. Turner or anyone else who may have knowledge of Campbell's trade secrets or confidential information. Thus, the Court should limit Campbell's intervention to participation in discovery matters which implicate its own trade secrets. Campbell should not be permitted to attend the depositions of marketRx's witnesses or obtain documents provided to Defendant or his counsel that may contain any of Plaintiff's trade secrets and confidential and proprietary interests.

MarketRx argues Campbell does not have a right to intervene under *R.* 4:33-1. It contends that Mr. Turner is in violation of a non-compete agreement by engaging in competitive activity. Therefore the "property or transaction which is the subject of the action" is the agreement between Plaintiff and Defendant, to which Campbell is a stranger to and under which it has no rights. While Campbell may be financially impacted if Mr. Turner is no longer permitted to remain its employee in certain areas, Plaintiff argues Campbell has no "direct, substantial, legally protectable interest" in the "subject of this action" as it has no standing to contest the validity or reasonableness of the agreement at issue. *See Washington Elec. Coop., Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir.1990) ("An interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule.").

Second, Plaintiff contends Campbell is not so situated that the disposition of this action may, as a practical matter, impair or impede its ability to protect whatever confidentiality interest it seeks to protect. This action does not impede Campbell from bringing a separate action against Defendant nor would it be estopped from any findings of the factual and legal issues in this case, nor would res judicata apply against it. Moreover, Campbell's interest in protecting its trade secrets can be adequately protected under the confidentiality order Plaintiff is seeking. Therefore, the Court should deny Campbell's application to intervene as a right to all discovery.

***4** Plaintiff is also seeking a confidentiality order of this Court. *R.* 4:10-3 permits the Court to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including but not limited to ... [t]hat a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." MarketRx recognizes Campbell's concern in protecting its trade secret and other confidential information from its competitors and the public at large as it too shares the same concern. Plaintiff believes both parties' fears can be assuaged by the entry of a confidentiality order which would, among other things, allow Campbell to exclude disclosure of certain documents to marketRx and its employees and limit such disclosure solely to Plaintiff's attorneys and experts. Courts have approved protective orders limiting a party's disclosure to the adverse party's attorney and experts under instructions not to communicate its contents to any other person including the client and its employees in the past. *See Alk Associates, Inc. v. Multimodal Applied Systems, Inc.*, 276 N.J.Super. 310 (App.Div.1994). Plaintiff requests the Court enter a Confidentiality Order which would allow it to direct that certain documents be viewed only by Mr. Turner and Campbell's attorneys and experts and that would also allow Campbell to direct that certain documents only be viewed by marketRx's attorneys and experts.

In response to marketRx's Cross-Motion for a Confidentiality Order, Campbell argues that such an order will not adequately protect it and its clients. It contends that even with a confidentiality order in place, it would still be required to disclose confidential, proprietary and trade secret information belonging not only to it, but also to its clients. Campbell therefore requests the Court deny Plaintiff's Cross-Motion and grant its Motion to Quash (discussed below).

III. *Discussion*

Motion to Intervene:

Rule 4:33-1 states:

> Upon timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Moreover, applications to intervene should be treated liberally. *See Civ. Liberties v. County of Hudson,* 352 *N.J.Super.* 44, 67 (App.Div.), *certif den.* 174 *N.J.* 191 (2002). The Court believes that Campbell is entitled to intervene in this matter, as it has an undeniable interest in its employee. However, marketRx correctly points out that its proprietary and confidential interests may be jeopardized by Campbell's presence. Therefore, this Court will allow Campbell to intervene in the deposition of Mr. Turner only.

Motion for a Confidentiality Order:

***5** When a party has good cause to believe they should be protected from certain requests for a number of reasons the proper procedure is to apply to the court for a protective order pursuant to *Rule* 4:10-3 which states in relevant part:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, but not limited to, one or more of the following:
>
> (a) That the discovery not be had;
>
> (b) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;
>
> ...
>
> (d) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
>
> ...
>
> (g) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
>
> ...

Here, Campbell is seeking to intervene, arguing that its confidential and proprietary interests are at issue in Plaintiff's action against Mr. Turner. Plaintiff argues that if Campbell is permitted to intervene without any restriction, its interests are jeopardized. In order to assuage the parties' concerns over the dissemination of their personal business information, Plaintiff seeks to have this Court impose a confidentiality order on all parties. The Court believes this request would help to protect both parties' interests in this matter and therefore grants Plaintiff's request. Thus, whenever material is confidential to either side (marketRx or Campbell), said material is to be viewed by opposing counsel and Mr. Turner (if appropriate) only. Both parties are ordered to abide by this confidentiality order in good faith. However, all parties should realize that this confidentiality order pertains to discovery only. Any documents which are made part of the Court's file must be made available to the public.

IV. *Decision*

Accordingly, for the reasons stated herein, Campbell's Motion to Intervene is hereby Granted in Part and Denied in Part. Plaintiff's Motion for a Confidentiality Order is also hereby Granted.

B. *Motion to Quash Plaintiff's Subpoena*

I. *Campbell's-Movant's-Position*

Campbell argues that this Court should quash marketRx's subpoena to protect its trade secrets and proprietary information. The company brings its Motion pursuant to *R.* 1:9-2 and seeks protection of the Court under *R.* 4:10-3. *R.* 1:9-2 states "[a] subpoena ... may require production of books, papers, documents or other objects designated therein. The court on motion may promptly quash or modify the subpoena on notice if compliance would be unreasonable or oppressive ..." *R.* 4:10-3 states, in part:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect

a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, but not limited to, one or more of the following:

***6** (a) That discovery not be had; ...

(d) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; ...

(g) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way

Campbell argues that *R.* 4:10-3(g) is specifically appropriate here because it is seeking an Order from this Court to protect its "trade secret[s] and other confidential research, development, or commercial information not to be disclosed" to marketRx. It contends that it is well established that our courts can and will use this Rule to protect trade secrets and proprietary information from discovery. *Hammock v. Hoffmann-La Roche, Inc.*, 142 N.J. 356 (1995) (Rule 4:10-3 can be paraphrased to be read that for "good cause shown, the court may make an order which justice requires to protect a party" from whom discovery is sought, by ordering that "a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.").

Initially, Campbell avers its consulting methodologies and compensation programs constitute trade secrets. It reminds the Court that there is a legitimate protectable interest of an employer regarding "trade secrets and other proprietary information ... and customer relations," recognized by the Supreme Court of New Jersey. *Ingersoll-Rand v. Ciavatta*, 110 N.J. 609 (1988). The Restatement provides that a trade secret:

> [M]ay consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.

Restatement of Torts § 757 Comment b (1939). Furthermore, the Court in *Ciavatta* listed six factors that the Restatement uses to determine whether a given idea for information constitutes a trade secret. Those factors are:

(1) the extent to which the information is known outside the business;

(2) the extent to which it is known by employees and others involved in the business;

(3) the extent of measures taken by the owner to guard the secrecy of the information;

(4) the value of the information to the business and to its competitors;

(5) the amount of effort or money expended in developing the information; and

(6) the ease or difficulty with which the information could be properly acquired or duplicated by others

Id. at 637.

Campbell contends its proprietary practices plainly satisfy the definition of a trade secret set forth in the Restatement and in *Ciavatta.* It states it goes to extraordinary lengths to protect the confidentiality of its consulting methodologies, including its documents, information, and proposals, and its performance management process. Campbell requires all of its applicants to sign a non-disclosure agreement and an employee confidentiality, proprietary rights and intellectual property agreement to protect its interests in its confidentiality. While it does publicize its employee compensation program, it imposes internal and external safeguards to limit the access to its confidential documents and information. Security is essential to the business to maintain its competitive position in its field. Thus it argues that its business methodologies, proposals, client projects, compensation system, and performance management process, all satisfy both the definition and the six part standard established in the Restatement and adopted by the New Jersey Supreme Court. *Ciavatta,* 110 N.J. at 636, 637.

***7** Campbell further argues that the Court's protective order should preclude marketRx from seeking or obtaining discovery of any of Campbell's trade secrets and proprietary information. Since it is clear that that its

information constitutes a trade secret, Campbell contends that the Court should grant a protective order prohibiting marketRx from gaining access to many of the documents it seeks. *Hammock v. Hoffmann-La Roche*, 142 N.J. at 376. ("Documents containing trade secrets, confidential business information and privileged information may be protected from disclosure.").

It claims the following requests of the subpoena seek documents and information that constitute trade secrets and should be included in a protective order prohibiting marketRx from gaining any access to them:

(a) requests seeking documents and information describing Campbell's compensation and performance management system (requests 1, 2, 12);

(b) requests seeking documents and information describing any type of work that Turner performed for Campbell, including solicitations, proposals, and all documents and communications (including e-mails) he sent or received, and all computers and electronic equipment he touched (request numbers 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 15, 16, 20, 21, 28, 30, 31);

(c) requests seeking documents and information containing confidential client information, including RFPs and solicitations or proposals (request numbers 4, 5, 6, 7, 10, 11, 13, 14, 15, 16), as well as all communications, including all e-mails, he sent or received, and every computer or electronic equipment and he touched, including all backups (request numbers 3, 10, 28, 30, and 31).

Campbell also argues that marketRx's subpoena is overly broad and is not reasonably calculated to lead to the discovery of admissible evidence, and is aimed at limiting competition, not protecting its legitimate interest. It claims the subpoena is extremely broad in its application and that it does not seek information that is subject to discovery as defined in our Rules of Court. *R.* 4:10-2(a), which defines the scope of permissible discovery, states:

> any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; nor is it ground for objection that the examining party has knowledge of the matters as to which discovery is sought.

Campbell argues that marketRx is alleging in its action that Michael Turner is in breach of the proprietary information and inventions agreement he signed during his employment with marketRx. Its Complaint does not allege that Campbell did anything improper or that he or Campbell actually used any of marketRx's proprietary information since Turner began working for Campbell. MarketRx seeks all the information that Turner received, prepared, reviewed, created, read, or to which he was "privy" if it falls within the bounds of any type of work that marketRx performs. It also seeks extensive information about Campbell's practices and policies regarding document retention and computer back-up, when it has not established any basis on which such information either is relevant or reasonably may lead to the discovery of admissible evidence. Because marketRx did not cite any evidence to indicate that Turner used its proprietary information or conveyed it to Campbell, Campbell argues that marketRx has no basis for its assertion that Turner will violate his agreement with them, except that he learned the proprietary information while working there. Campbell argues that New Jersey law would not support marketRx's position because "a former employee is not required 'to search his mind for all thoughts relating to the employer's business and thereafter be precluded from employing such thoughts when they are not trade secrets'." *Ciavatta*, 110 N.J. at 631 (*citing GTI Corp. v. Calhoon*, 309 F.Supp. 762, 767 (S.D.Ohio 1969)).

***8** Campbell contends that some of marketRx's requests make it patently clear that the intention behind the subpoena is to obtain confidential, proprietary and competitive information about Campbell. Some of its requests are intended to force Campbell to disclose its

competitive position in the market place and where it may be directing its resources in the future. Therefore Campbell argues that marketRx is not trying to protect its own proprietary information, but rather, is trying to uncover as much of Campbell's confidential information as it can. It claims these efforts to thwart competition, rather than protect legitimate interests, will not receive judicial support and must be rejected. It points to *Maw v. Advanced Clinical Communications, Inc.*, 359 N.J.Super. 420, 434 (App.Div.2003), which states:

> When an employer's interests are strong, as seen in cases involving trade secrets or confidential information, a court will enforce a restrictive covenant; however, when the employer's interests "do not rise to the level of a proprietary interest deserving of judicial protection, a court will conclude that a restrictive agreement merely stifles competition and therefore is unenforceable." ... A court will not enforce restrictive covenants "principally directed at lessening competition."

Id. at 434 (*citing Ciavatti*, 110 N.J. at 634-635; *Raven v. A. Klein & Co., Inc.*, 195 N.J.Super. 209, 213 (App.Div.1994)). Campbell argues this Court must not allow marketRx to use this litigation in an anti-competitive manner, as is its clear intention. Therefore, Campbell contends the Court should quash marketRx's subpoena.

II. *Plaintiff's-marketRx's-Position*

MarketRx contends its document requests are relevant to the claims against Mr. Turner as they are aimed at protecting its legitimate interests. In its brief, Campbell argues that marketRx is not entitled to "many of the documents sought in" its subpoena because marketRx has not demonstrated that Turner actually used its proprietary information or conveyed it to Campbell. However, Plaintiff claims regardless of whether the standard is "actual use" or the sufficient likelihood of use, it is entitled to discovery to determine whether he has used or is likely to use its trade secret information.

Plaintiff contends Mr. Turner and Campbell have refused to produce any discovery related to his duties and responsibilities at Campbell and it should not be forced to rely on Mr. Turner's word that he is not violating the agreement he signed with them. Instead, it argues it has the right to conduct discovery on "all relevant, unprivileged information which may lead to the discovery of relevant evidence concerning the respective positions of both plaintiff and defendant." *Huie v. Newcomb Hosp.*, 112 N.J.Super. 429, 432 (App.Div.1970); *cf. Pressler*, Current Rules of Court N.J. Court Rules, comment 2 on *R.* 4:10-2 (2006) ("Relevancy for purposes of [*R.* 4:10-2] has been defined as congruent with relevancy under N.J.R.E. 401, namely, a 'tendency in reason to prove or disprove any fact of consequence to the determination of the action.' ") (*citing Payton v. New Jersey Turnpike Auth.*, 148 N.J. 524 (1997) and *K.S. v. ABC Professional Corp.*, 330 N.J.Super. 288, 291 (App.Div.2000)).

***9** *R.* 4:10-2 provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any party, including the existence, description, nature, custody, condition and locations of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." It further provides that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; nor is it ground for objection that the examining party has knowledge of the matters as to which discovery is sought." *R.* 4:10-2.

New Jersey's discovery rules are designed to "eliminate, as far as possible, concealment and surprise in the trial of lawsuits to the end that judgments rest upon real merits of the causes and not upon the skill and maneuvering of counsel." *Abtrax Pharm., Inc. v. Elkins-Sinn, Inc.*, 139 N.J. 499, 512 (1995) (*quoting Oliviero v. Porter Hayden Co.*, 241 N.J.Super. 381, 387 (App.Div.1990)). MarketRx argues that Campbell's goal in filing the instant motion and its related Motion to Intervene is to limit the information that marketRx can present to the Court for purposes of the preliminary injunction against Mr. Turner. It claims that to argue that marketRx is not entitled to any discovery related to the nature of Turner's duties and responsibilities at Campbell is, at best, a transparent attempt to preclude marketRx from obtaining the information which would allow it to establish Turner's breach of his agreement and, in turn, its right to preliminary injunctive relief.

Plaintiff contends it has a strong interest in its confidential and proprietary matters and that Mr. Turner is in possession of its trade secrets. If such information was disseminated to its competition, it would greatly affect marketRx. "The employer's legitimate interests in protecting his trade secrets and the like have been long recognized even in cases without noncompetitive agreements though reasonably confined noncompetitive agreements may properly serve to avoid difficulties of definition and proof." *Whitmyer Bros., Inc. v. Doyle,* 58 N.J. 25, 33 (1971) (internal citation omitted). It is well settled that "an employee's covenant [not to compete] will be given effect if it is reasonable under all the circumstances of his particular case [, and] it will generally be found to be reasonable if it 'simply protects the legitimate interests of the employer, imposes no undue hardship on the employee, and is not injurious to the public." ' *Whitmyer,* 58 N.J. at 33.

Here, marketRx claims it has it a legitimate interest in protecting its proprietary methodologies and software and other sensitive business information through the enforcement of a reasonable non-compete agreement, and its discovery requests are directly related to these issues and Mr. Turner's defense that he is not violating the agreement. Both Campbell and marketRx offer similar services and Plaintiff contends Mr. Turner may be assigned to an area in Campbell which he has first hand knowledge of its secrets which puts him in a position where he could produce great harm to marketRx.

***10** MarketRx argues its discovery requests are narrowly tailored and are directly relevant to the claims and defenses in this case. Thus, it argues its requests easily fall within the New Jersey Court Rule's broad relevancy standard for discovery requests which should cause the Court to deny Campbell's request to quash the subpoena.

Furthermore, Plaintiff claims many of the documents it seeks do not implicate Campbell's trade secrets. It contends that it requested numerous documents, such as "any and all documents referring to, relating to or reflecting your recruitment, solicitation or hiring by Campbell Alliance," (to Mr. Turner) which clearly do not implicate any of Campbell's confidential information. It argues that Campbell's, and Turner's, refusal to produce any discovery materials, even when confidentiality is not implicated, evidences their motive to prevent marketRx from obtaining any discovery prior to the preliminary injunction hearing.

Lastly, marketRx contends that even if some of the documents requested contain trade secrets, the parties' concerns about disclosure of trade secrets information can be protected by the entry of an appropriate confidentiality order.

III. *Defendant's-Turner's-Position*

Turner contends that is not in violation of the non-compete agreement he signed and that he will not violate said agreement. Furthermore, he argues that New Jersey has long refused to enforce any part of a restrictive covenant which is designed principally to suppress competition and to deny a former employee the opportunity to use his education and experience in his chosen career to support his family. *Solari Industries, Inc. v. Malady,* 55 N.J. 571, 576, 581 and 586 (1970); *Whitmyer Bros. Inc. v. Doyle,* 58 N.J. 25, 31-33 (1971) ("The doubtful nature of the employer's claimed trade secrets or confidential information and the comprehensiveness of the verified denials by the former employees clearly point to the inappropriateness of any preliminary relief grounded on the suggested legitimate interests of the employer in trade secrets or confidential information." *Id.* at 37).

Thus he argues, in the context of the established case law, that it is irrelevant, as a matter of law, whether, as marketRx claims, it is in competition with Campbell or whether the different tools and approaches used by Campbell in its worldwide consulting business are qualitatively different form the formula-based approach of the upstart, would-be competitor, marketRx. He contends that unless and until Plaintiff makes any prima facie showing of his alleged breach of any enforceable restrictive covenant, marketRx's blizzard of paper will amount to nothing more than a "snow job." Accordingly, he claims Plaintiff's demands are nothing more than an ice-fishing expedition. *Berrie v. Berrie,* 188 Super. 274, 286 (Ch. Div.1983) ("Justice Holmes recognized a right to confidentiality of business records in prohibiting '... a fishing expedition into private papers on the possibility that they may disclose evidence ... The interruption of business, the possible revelation of trade secrets, and the expense of compliance ... are the least considerations. It is contrary to the first principles of justice to allow a search through all of the respondents' records, relevant,

or irrelevant, in the hope that something will turn up." *FTC v. American Tobacco Co.*, 264 U.S. 298, 306, (1921)). Therefore he requests that the Court grant Campbell's Motion.

IV. *Discussion*

***11** Here, Campbell and Turner argue the anti-compete agreement is too restrictive and therefore unenforceable. In order for an anti-competition agreement to be enforceable it must be reasonable under the circumstances. See *Solari*, 55 N.J. at 585. The court in *Solari* established a three part test to determine if an agreement is reasonable under the circumstances. The test set forth in *Solari* was recently reaffirmed by the New Jersey Supreme Court in *The Community Hospital Group, Inc. v. More, M.D.*, 183 N .J. 36 (2005) and requires that: "(1) it must be necessary to protect the parties' legitimate interests; (2) it must cause no undue hardship on the former employee, and (3) it must not impair the public interest." *A.T. Hudson & Co., Inc. v. Donovan*, 216 N .J.Super. 426, 432 (App.Div.1987) (*citing Rova Farms Resort v. Investors Ins. Co.*, 65 N.J. 474, 484 (1974)).

Applying the test established by the New Jersey Supreme Court to the agreement between Plaintiff and Defendant the Court concludes that it is not clear the agreement will ultimately be found valid. The agreement prevents Defendant from performing a multitude of activities for another company without any geographic limitation. The protection of customer relationships and confidential information is a legitimate interest. *See Ciavatta*, 110 N.J. at 626; *A.T.Hudson & Co. v. Donovan*, 216 N.J.Super. 426, 432-33 (App.Div.1987); *Platinum Management, Inc. v. Dahms*, 285 N.J.Super. 274, 294 (Law Div.1995). Here, the covenant restricts Turner from working with marketRx's clients who: (a) had an established relationship with marketRx during the year before his resignation; and (b) who have a relationship with Plaintiff within the year of his resignation. This requirement does not seem unreasonable.

Furthermore, the Supreme Court of New Jersey stated that one should look to "the likelihood of the employee finding work in his field elsewhere" and the reason for the termination of employment between the parties. *Karlin v. Weinberg*, 77 N.J. 408, 423 (App.Div.1977). When an employer is the one who caused the parties to separate and the employee did not contribute to the separation enforcement of the covenant may be characterized as an undue hardship. *The Community Hospital Group, Inc. v. More, M.D., supra*, 183 N.J. at 58 *citing Karlin v. Weinberg, supra*, 77 N.J. at 423. Moreover, *Karlin* held that "a court should be hesitant to find undue hardship on the employee" when the employee voluntarily left the employment and in effect brought the hardship upon himself. *Karlin v. Weinberg, supra*, 77 N.J. at 424. Here, Mr. Turner is only affected by this agreement for one year. He has the ability to perform many services with Campbell so long as they do not implicate the confidentiality agreement he had signed with his former employer. Therefore, the Court finds the agreement will probably satisfy the first and second factors of the *Solari* test.

***12** Moreover, the agreement appears to satisfy the third factor of the *Solari* test. Again the court in *Karlin* promulgated certain factors which a court can take into consideration when determining what effect the agreement would have on the public. These factors include: (1) "the demand for services rendered by the employee" and the likelihood that those services could be provided by others in the geographic area; (2) the extent to which clients will be unable to seek out the services of the departing employee. Here it is clear that several companies provide the same type of services provided by Campbell. For instance marketRx competes with Campbell. The agreement here is similar to the agreements in *Karlin* and *Schuhalter*. In those cases the public could still choose to go to the former employee for services. In *Schuhalter* the employee had to make payments to the former employer for any customer who chooses to seek the employee's services, while in *Karlin* the public simply had to travel a further distance to obtain the services of the former employee. *See Karlin*, 77 N .J. 408; *Schuhalter v. Salerno*, 279 N.J.Super. 504 (App.Div.1995). Here, the public can still seek out Defendant's services. Defendant is simply prevented from soliciting Plaintiff's clients. Therefore, the agreement at hand does not seem detrimental to the public and is likely to be enforceable.

In order to quash a subpoena a party must satisfy *R.* 4:10-3 which states in relevant part:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, but not limited to, one or more of the following:

(a) That the discovery not be had;

(b) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(c) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(d) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

...

(g) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

...

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of *R.* 4:23-1(c) apply to the award of expenses incurred in relation to the motion.

Furthermore, *R.* 1:9-2 states in relevant part:

> A subpoena or, in a civil action, a notice in lieu of subpoena as authorized by *R.* 1:9-1 may require production of books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena or notice if compliance would be unreasonable or oppressive and, in a civil action, may condition denial of the motion upon the advancement by the person in whose behalf the subpoena or notice is issued of the reasonable cost of producing the objects subpoenaed.

***13** In *State v. Cooper*, 2 N.J. 540, 556-57 (1949) it was determined that a subpoena duces tecum could be quashed if it is unreasonable or oppressive. Under either *R.* 1:9-2 or *R.* 4:10-3 the determination of whether to quash and or modify a subpoena is based upon reasonableness and oppression. Here, Campbell and Turner argue that the information sought is confidential and the reasons why Plaintiff is seeking them is not substantiated by sufficient evidence. *R.* 4:10-2 governs what may be had by discovery and states in relevant part:

> Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (a) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; nor is it ground for objection that the examining party has knowledge of the matters as to which discovery is sought.

Here, Plaintiff argues the information sought is for purposes of showing Turner has in fact violated his non-compete agreement. In fact, the Court believes that Defendant's violation of said agreement may be implicated by the nature of his employment with Campbell. This therefore would appear to be relevant to the litigation. Since the information sought appears "reasonably calculated to lead to the discovery of admissible evidence," this Court finds that Campbell should comply with the discovery requests. However, since this matter involves highly confidential information, the Court believes that the confidentiality order originally requested by marketRx should extend to this issue. In other words, Campbell and Turner are required to comply with Plaintiff's discovery requests. However, when the requested information/documentation is confidential, it should be so marked and may then only be viewed by Plaintiff's counsel.

IV. *Decision*

Accordingly, for the reasons stated herein, Campbell's Motion to Quash marketRx's Subpoena is hereby Denied.

C. *Motion to Compel Written Responses and Production of Documents*

I. *MarketRx's-Movant's-Position*

Plaintiff argues that it is entitled to an Order, pursuant to *R.* 4:18-1(b), requiring Mr. Turner to provide written responses to its document requests and to produce all responsive documents, or in the alternative, an Order, pursuant to *R.* 4:23-5(c), suppressing Mr. Turner's Answer.

R. 4:18-1(b) provides, in pertinent part:

> ***14** ... The party upon whom the request is served shall serve a written response within 35 days after the service of the request, except that a defendant may serve a response within 50 days after service of the summons and complaint upon that defendant. The written response, without documentation annexed but which shall be made available to all parties on request, shall be served by the party to whom the request was made upon all parties to the action. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated.

Rule 4:18-1(b). The Rule further provides that "[t]he party submitting the request may move for an order of dismissal or suppression or an order to compel pursuant to *R.* 4:23-5 with respect to any objection to or other failure to respond to the request or any part thereof or any failure to permit inspection as requested." *Id.; see also R.* 4:23-5(c) ("Prior to moving to dismiss ... a party may move for an order compelling discovery demanded pursuant to *R.* 4:18-1 ...").

The New Jersey Court Rules provide broad authority for a court to resolve discovery disputes in a fair and expeditious manner. *R.* 4:23-5(a)(1) allows a court to enter an order suppressing the pleading of a party who has failed to comply with a discovery demand pursuant to *R.* 4:18. The imposition of sanctions to enforce the rules of discovery is both explicit and "inherent in the judicial power." *Seacoast Builders Corp. v. Rutgers,* 358 N.J.Super. 524, 542 (App.Div.2003). Furthermore, the imposition of sanctions is "peculiarly necessary in matters of discovery." *Lang v. Morgan's Home Equip. Corp.,* 6 N.J. 333, 338 (1951). Discovery rules are meant to eliminate "concealment and surprise in the trial of lawsuits to the end that judgments rest upon real merits of the causes and not upon the skill and maneuvering of counsel." *Abtrax Pharms., Inc. v. Elkins-Sinn, Inc.,* 139 N.J. 499, 512 (1995) (*quoting Oliviero v. Porter Hayden Co.,* 241 N.J.Super. 381, 387 (App.Div.1990)). A party's failure to comply with discovery demands would afford it an unfair advantage, and "[p]revention of unfair advantage is a basic premise of our discovery rules." *Id.* at 521-522.

Here, marketRx served Mr. Turner with its First Request for the Production of Documents on January 20, 2006. His responses were therefore due on March 13, 2006. *R.* 4:10-2(a) authorizes discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action ... It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence ..." Plaintiff contends its requests are narrowly tailored and directly related to its claims against Mr. Turner. While Mr. Turner claims he cannot produce any documentation due to Campbell's Motion to Quash marketRx's subpoena, Plaintiff contends he should produce information that does not implicate Campbell's trade secret information since it did not seek confidential information only.

***15** Plaintiff argues that at the very least Mr. Turner should provide written responses to its requests so that it can assess the nature of any objection. This, it claims, is a basic requirement under *R.* 4:18-1 that Defendant has failed to meet. Moreover, it argues there is no reason why it should have to wait to receive documents that are either unrelated to Defendant's relationship with Campbell or related to his relationship with marketRx or unrelated to Campbell's trade secrets. As such, Plaintiff requests that the Court grant its Motion to Compel Turner to provide written responses to its First Request for the Production of Documents and to produce all responsive documents by Monday, April 3, 2006 or, in the alternative, that it grant marketRx's Motion to Suppress Turner's Answer.