RAYMOND ARTHUR ABBOTT, et al., Plaintiffs, v. FRED G. BURKE, et al., Defendants.	SUPREME COURT OF NEW JERSEY Docket No.: 078257 Civil Action

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE

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PRELIMINARY STATEMENT

This Court has long protected the opportunity for New Jersey children to achieve pursuant to the constitutional requirement for a "thorough and efficient system of free public schools for the instruction of all the children in the State." N.J. Const. Art. VIII, Sect. IV, ¶ 1 (the "Education Clause"). To date, the Court has focused on the essential need to ensure adequate funding for 31 at-risk School Development Authority ("SDA") districts, and has not yet addressed the important role that high-quality teachers play in the lives of these students. The State has now placed this issue before the Court, creating a false dichotomy between current funding structures and the need to eliminate an unconstitutional obstacle to the hiring and retention of high-quality teachers.

In order to provide this Court with the perspective of New Jersey parents who earnestly want their children to learn, the parents identified herein seek to intervene to request the elimination of New Jersey's last-in, first-out ("LIFO") statutes in the Newark Public Schools District ("Newark"), and other similarly situated districts, while preserving the essential gains that have flowed from the Abbott decisions.[1] The LIFO

[1] The Movants-Intervenors are Tanisha Garner, on behalf of her children H.G. and F.G.; Noemí Vazquez, on behalf of her children M.P., E.P. and F.D.; Fareeah Harris, on behalf of her children N.H. and J.H.; Shonda Allen, on behalf of her child J.H.; Iris Smith, on behalf of her children O.J. and M.R.; and Wendy Soto,

statutes require that districts facing a reduction-in-force ("RIF") must lay off and re-hire teachers in order of seniority, ignoring quality. These statutes have a substantial, unconstitutional impact on the students in Newark and similarly situated districts. Numerous studies have shown that teacher quality is the most important in-school factor affecting the quality of students' education. Students with low-quality, ineffective teachers, in the long run, are less likely to graduate from high school, attend college, have good jobs and strong earnings, and avoid becoming teenage parents.

The remedy is simple: declare the statutes unconstitutional and allow the SDA districts to factor in teacher quality when making retention and termination decisions. There is no need to eliminate the progress that the Abbott cases have achieved by defunding the SDA districts as well.

Yet the State attempts to do just that. Movants-Intervenors have a unique perspective essential to the just adjudication of this phase of the Abbott case. These Newark parents are raising children who would be directly impacted by a ruling from this Court on the LIFO issue. In order to protect their interests-the elimination of the LIFO statutes without defunding their school district-these parents seek to intervene

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on behalf of her children Z.S. and D.S. All of the children attend schools in Newark.

in connection with the State's motion to modify the mandates of prior Abbott decisions.

PROCEDURAL HISTORY

Since 1985, the Abbott line of cases have established this Court's expectations of a constitutional educational scheme for children in the SDA districts. However, no record has been presented regarding the effect of the LIFO statutes, N.J.S.A. 18A:28-10 and 18A:28-12 (together, the "LIFO Statute"), on students within the SDA districts. Nor has the Court been asked to consider the constitutionality of the LIFO Statute.

In September, the State filed a motion ("2016 Abbott Filing") seeking to modify this Court's prior decisions in Abbott v. Burke, 199 N.J. 140 (2009) (Abbott XX) and Abbott v. Burke, 206 N.J. 332 (2011) (Abbott XXI), which mandated specific funding formulas for the SDA districts. In seeking relief, the State also requested that the Court grant, among other things, the Education Commissioner the authority to waive the LIFO Statute in the SDA districts. The State did not seek a ruling permanently enjoining enforcement of the LIFO Statute in the SDA districts on the basis that it is unconstitutional, but instead sought a flexible remedy exercised at the Commissioner's discretion. See Memorandum of Law on Behalf of Defendants' Motion for Modification of Abbott XX and Abbott XXI (Sept. 25, 2016) at 64, 80 ("Therefore, as applied in certain

circumstances, the Commissioner should be permitted to waive or suspend these provisions in those cases, but otherwise preserve the Act" and requesting ability for Commissioner to decide, in exercising her discretion, as to what statutory or contractual provisions would be waived) (emphasis added).

On November 1, 2016, Movants-Intervenors, on behalf of their children, filed a Complaint in the Superior Court of the State of New Jersey, Law Division: Mercer County, seeking a ruling that the LIFO Statute is unconstitutional and permanently enjoining its enforcement in Newark and other similarly situated districts. See Complaint (attached hereto as Exhibit A). In the trial court, Movants-Intervenors will make a record evidencing the multiple ways in which the LIFO Statute violates the constitutional right to a thorough and efficient education. Given the overlap in issues, Movants-Intervenors seek to intervene to ensure that their voices are heard on the LIFO Statute if this Court considers the issue and to make clear that the harm from the LIFO Statute can only be stopped if it is permanently enjoined, and not left to the State's discretion.

FACTUAL BACKGROUND

Movants-Intervenors

Movants-Intervenors are parents appearing on behalf of their children, all Newark students. They represent the interests of parents of the children affected by the LIFO

Statute, who are primarily located in SDA districts such as Newark. Movants-Intervenors must be vigilant to ensure their children receive the high-quality education and opportunities that all N.J. children are guaranteed under the Constitution.

The Newark School District

Newark is a struggling school district. The long-term harm suffered by students in Newark as a result of their deficient in-school educational experiences is devastating. Only approximately 50% of Newark's eighth-graders meet the State's minimum proficiency for literacy, and approximately 60% of eighth graders in Newark do not meet the minimum proficiency for mathematics.[2] At the high school level, almost one-third of Newark students fail to graduate.[3] Almost half of the high school students in Newark failed the State's high school proficiency assessment in math, and over 20% failed the assessment for language arts.

Only 19% of Newark's students are on track to be ready for college and post-secondary careers. Of those who do graduate

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[2] See N.J. Department of Education, New Jersey Statewide Assessment Reports - Grade 8 - English Language Arts, row 5157, http://www.nj.gov/education/schools/achievement/15/parcc/excel.htm (last visited Oct. 27, 2016); N.J. Department of Education, New Jersey Statewide Assessment Reports - Grade 8 - Mathematics, row 4957, http://www.nj.gov/education/schools/achievement/15/parcc/excel.htm.

[3] See N.J. Department of Education, 2012, 2013, 2014 and 2015 Adjusted Cohort 4 Year Graduation Rates, row 244, http://www.nj.gov/education/data/grate/2015/.

and go on to post-secondary education, virtually all require remedial work before they can obtain credits that count toward a college degree. Movants-Intervenors' struggles in obtaining an effective education at their schools mirror the struggles facing other parents in districts like Newark throughout the State.[4]

H.G., F.G., and F.D. currently attend the Hawkins Street Elementary School ("Hawkins"). In the 2014-2015 school year, 94.3% of the students attending Hawkins were considered to be economically disadvantaged.[5] 82% of Hawkins students did not meet the State's grade-level expectations in language arts, and 90% did not meet the State's grade-level expectations in math.[6]

Similarly shocking statistics exist for the schools that the children of other Movants-Intervenors attend, all of which educate a majority of economically disadvantaged students. W.H. and N.H. attend Luis Muñoz Marín Elementary School ("Marín") in Newark. 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. These results place Marín in the bottom 5% of

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[4] For example, less than 1% of Camden School District ("Camden") graduates are ready for college and careers. Camden City Schools, Annual Report, 23 (Jan. 8, 2014), http://www.state.nj.us/education/sboe/meetings/2014/January/public/Powerpoint_Camden.ppt.

[5] See N.J. Department of Education, N.J. School Performance Report: Hawkins Street School: 2014-2015 School Year, 29, http://www.nj.gov/education/pr/1415/13/133570460.pdf.

[6] Id. at 3.

elementary schools in the State. M.P., O.J., and M.R. attend either the Fourteenth Avenue School or Speedway Avenue School in Newark. At both schools, the vast majority of students fail to meet the minimum grade-level expectations set by the State in either math or language arts.[7] Z.S. and D.S. attend the First Avenue School in Newark, at which less than half of the students met or exceeded the State's grade-level expectations.[8] Further, Z.S. has been diagnosed with dyslexia, and it is a 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.[9]

High school students E.P. and J.H. attend East Side High School and Eagle Academy for Young Men of Newark, respectively.

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[7] See N.J. Department of Education, N.J. School Performance Report: Fourteenth Avenue School: 2014-2015 School Year, 3, http://www.nj.gov/education/pr/1415/13/133570420.pdf (18% and 12% of students at Fourteenth Avenue School meet or exceed grade level expectations in language arts and math, respectively); see N.J. Department of Education, N.J. School Performance Report: Speedway Avenue School: 2014-2015 School Year, 3, http://www.nj.gov/education/pr/1415/13/133570690.pdf (11% and 8% of students at Speedway Avenue meet or exceed grade level expectations in language arts and math, respectively).

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

[9] Id. at 4.

Almost 90% of students at each high school do not meet the State's grade level expectations in language arts or math.[10]

In light of the struggles facing the district, Newark cannot afford to lose even one effective teacher. Yet this is precisely what will occur under the LIFO Statute if the judiciary does not step in.

The LIFO Statute

The LIFO Statute requires that, when there is a RIF within a district, the district must dismiss teachers solely on the basis of seniority. N.J.S.A. 18A:28-10. Quality must not be considered.

If a teacher is laid off due to a RIF, the teacher is placed on a preferred eligibility list set solely on the basis of seniority. N.J.S.A. 18A:28-12. Again, quality must not be considered. With the exception of veterans, seniority is set by the number of years the teacher has spent working within the district where the RIF is occurring. In the event that the district seeks to hire more teachers, teachers on the preferred eligibility list must be offered positions in the order they

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[10] See N.J. Department of Education, N.J. School Performance Report: East Side High School: 2014-2015 School Year, 3, http://www.nj.gov/education/pr/1415/13/133570040.pdf (13% and 6% of students at East Side High School met or exceeded grade-level expectations in language arts and math, respectively); N.J. Department of Education, N.J. School Performance Report: Eagle Academy for Young Men of Newark, 3, http://www.nj.gov/education/pr/1415/13/133570307.pdf (10% and 8% of students at Eagle Academy met or exceeded grade-level expectations in language arts and math, respectively).

appear on the list for a particular job. Quality is not considered, and teachers who are not included on the list cannot be offered the job before those on the list.

New Jersey requires that public school teachers be evaluated based on multiple factors (including student learning and teacher practice) and rated as "ineffective," "partially effective," "effective," and "highly effective." Recently, the N.J. Department of Education provided state- and district-level educator evaluation data, which showed that almost half of the ineffective teachers and 10% of the partially effective teachers in the State worked in Newark at the time the evaluations were completed.[11] Poor teacher quality, without reference to seniority, adversely impacts students in Newark.

Consequently, Newark is faced with a difficult choice, impacting every student in the district: (i) lay off less senior, effective teachers while retaining ineffective, more senior teachers or (ii) avoid RIFs through other measures.

Newark's 2014 Unanswered Effort to Waive the Requirement for Quality-Blind Layoffs

In February 2014, Newark submitted an application to the Commissioner requesting a temporary reprieve from quality-blind layoffs in the form of an equivalency request under N.J.A.C.

[11] See N.J. Department of Education, Staff Evaluation 2013-14, row 1288, www.state.nj.us/education/data/staff (94 of 205 teachers reported as ineffective within New Jersey were working in Newark).

6A:32-5.1 (the "Equivalency Request").[12] The request was driven by declining enrollment in Newark, which resulted in the loss of almost $200 million in education funding.[13] This forced a difficult choice upon the district about what to do with its limited resources, especially given that almost 90% of an individual school's budget is salaries.

In the Equivalency Request, Newark set forth data from a simulation utilizing data from its teaching staff to demonstrate the devastating impact of quality-blind layoffs on the district. Specifically, Newark showed that, under the LIFO Statute, if it were to implement layoffs, 75% of the teachers it would lay off would be considered effective or highly effective, and only 4% of the teachers laid off would be rated ineffective.[14]

The request has gone unanswered by the State, and Newark is left to either engage in quality-blind layoffs or create alternatives to instituting RIFs. Specifically, Newark, in an effort to avoid the automatic operation of the LIFO Statute, has created a pool of teachers that school principals do not want in their classrooms because of performance concerns. This pool of ineffective teachers, which is known as the Educators Without

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

[13] See id. at 1.

[14] See id. at 2.

Placement Sites ("EWPS") pool, is unsustainable. During the 2013-2014 school year, there were 271 teachers in the pool, costing the district approximately $22.5 million dollars to keep those teachers on the district's payroll.[15] 70% of the individuals within the pool were teachers with ten or more years of experience.[16] In 2015, due to budget constraints, Newark could not keep these teachers out of the districts' schools. For the 2016-2017 school year, Newark was forced to place teachers from the pool into classrooms, representing $25 million in teacher salaries, while $10 million in teacher salaries still remained in the pool.[17] Shockingly, these ineffective teachers-if there were to be a RIF-would be protected from layoffs due to their seniority. Less senior, more effective teachers would be pulled from classrooms and laid off instead.

Therefore, either enforcing the LIFO Statute or trying to work around the statute in an effort to retain effective teachers results in severe, irreparable harm to Newark students. Thousands will directly suffer the lifelong impact of ineffective teachers, and all will suffer from budget cuts in

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[15] Newark Public Schools, Assessment of District Progress (2015), 19, http://content.nps.k12.nj.us/wp-content/uploads/2015/03/Newark-Board-of-Education-District-Assessment-2015.pdf.

[16] See Newark Public Schools, Memorandum in Support of Equivalency Application, at 6 (Feb. 21, 2014), http://www.edweek.org/media/waiver_request.pdf.

[17] Cerf Certification, ¶ 15.

other areas that result in the loss of important educational programming and resources.

Denying these children the opportunity to learn from effective teachers has an impact on them not simply during the school year, but for the rest of their lives.

Effective Teachers are Essential for Children to Receive the Rights Conferred by the Education Clause

The effectiveness 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.[18] One study found that replacing an ineffective teacher with a simply 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.[19]

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

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[18] Amy M. Hightower et al., Improving Student Learning By Supporting Quality Teaching: Key Issues, Effective Strategies, Editorial Projects in Educ. Research Center, 2 (2011), http://www.edweek.org/media/eperc_qualityteaching_12.11.pdf.

[19] Raj Chetty, John N. Friedman & Jonah E. Rockoff, The Long-Term Impacts of Teachers: Teacher Value-Added and Student Outcomes in Adulthood, 5(Nat'l Bureau of Econ. Research, Working Paper No. 17699, 2011), http://www.nber.org/papers/w17699.pdf.

students."[20] 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.[21]

The N.J. Department of Education found that, using a measure of effectiveness premised upon a teacher's paper qualifications (i.e. degrees, certifications, demonstrated knowledge in the subject taught), students in districts like Newark were five times more likely to be taught by teachers who did not possess even the minimum paper qualifications required by the No Child Left Behind Act.[22]

Consequently, it is no surprise that one study found that the achievement gap narrows each year a child of color is taught by an effective teacher.[23] This same study shows that, if this positive effect were to accumulate, four consecutive years with a highly effective teacher rather than a highly ineffective

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[20] Frank Adamson & Linda Darling-Hammond, Speaking of Salaries: What It Will Take To Get Qualified, Effective Teachers in All Communities, Center for Am. Progress 1, https://cdn.americanprogress.org/wp-content/uploads/issues/2011/05/pdf/teacher_salary.pdf.

[21] Id.

[22] Christopher D. Cerf, N.J. Department of Education, Division of Educational Programs and Assessment, New Jersey's Plan for Meeting the Highly Qualified Teacher Goal 2 (rev'd 2011), http://www.state.nj.us/education/archive/data/hqt/06/plan.pdf.

[23] Bryan C. Hassel & Emily Ayscue Hassel, Opportunity at the Top: How America's Best Teachers Could Close the Gaps, Raise the Bar, and Keep Our Nation Great, Opportunity Culture 2-4 (2010), http://www.opportunityculture.org/images/stories/opportunity_at_the_top-public_impact.pdf.

teacher would be sufficient alone to close the racial achievement gap between white students and their black counterparts.[24]

Graduation rates in Newark are also low compared to other districts. According to 2015 graduation data published by the N.J. 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%.[25] Moreover, within Newark, 69.39% and 69.61% of Black and Hispanic students, respectively, graduate from a four-year high school.[26] On a statewide basis, 81.51% of Black students and 82.81% of Hispanic students graduate high school,[27] which indicates that students in other districts, who learn from effective teachers, achieve greater educational success.

This sample of studies and metrics confirms what common sense suggests-quality teaching is essential for quality education.

The Interaction of The LIFO Statute and Funding

Even with the court-mandated Abbott funding, Newark faces a crippling budget deficit, prompting the need to either conduct

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[24] Id. at 3-4.

[25] See N.J. Department of Education, 2015 Adjusted Cohort 4 Year Graduation Rates, row 7707, www.state.nj.us/education/data/grate/2015/.

[26] Id. at rows 2655-56.

[27] Id. at rows 7698-99.

damaging RIFs or staff teachers from the EWPS pool of unassigned, poorly performing teachers back into classrooms while the LIFO Statute is in effect.

Moreover, reports have stated that, if the proposed funding scheme of the State referenced in 2016 Abbott Filing were to be enacted, Newark would lose almost 69% of its state aid-equivalent to a $14,502.99 loss per pupil.[28]

The continued effort by the State to cut funding to SDA districts makes it increasingly difficult for Newark to find the balance between ensuring its programs are funded and preventing effective teachers from being laid off pursuant to the LIFO Statute. On this basis, regardless of the outcome of any funding decision by the Court, Movants-Intervenors seek a decision that the LIFO Statute is unconstitutional and that the affected districts are permanently enjoined from enforcing it.

ARGUMENT

POINT ONE

MOVANTS-INTERVENORS SHOULD BE GRANTED LEAVE TO INTERVENE

Movants-Intervenors seek leave to intervene in these proceedings under R. 4:33-1 (Intervention as of Right) or R. 4:33-2 (Permissive Intervention).

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

I. MOVANTS-INTERVENORS SHOULD BE ALLOWED TO INTERVENE AS OF RIGHT

There are four criteria permitting a party to intervene as of right: the movant must (i) claim "an interest relating to the property or transaction which is the subject of the transaction"; (ii) show it is "so situated that the disposition of the action may as a practical matter impair or impede [their] ability to protect that interest"; (iii) demonstrate that the movant's interest is not "adequately represented by existing parties"; and (iv) make a "timely" application to intervene. Meehan v. K.D. Partners, L.P., 317 N.J. Super. 563, 568 (App. Div. 1998) (citation omitted). The rule is construed liberally and the question is whether granting the motion "unduly delay[s] or prejudice[s] the right of the original parties." Id. (citation omitted). Movants-Intervenors meet every criterion with ease.

A. Movants-Intervenors Have a Clear Interest in the Outcome of the Abbott Cases

The Abbott line of cases primarily address the constitutionality of New Jersey's method of funding education, with a focus on the SDA districts, and the ability of those districts to adequately meet the educational needs of their students as required by the State Constitution. Given that the 2016 Abbott Filing raises concerns as to the LIFO Statute, Movants-Intervenors, as plaintiffs in a trial court proceeding,

seek to protect their interests by intervening in this action. They have a clear interest in the LIFO issue now before this Court, as it has a drastic effect on the quality of their children's education and the lower court proceeding.

With the LIFO Statute still on the books, the children of Movants-Intervenors, who attend Newark Public Schools, are being deprived of their constitutional right to a "thorough and efficient" education. The dire situation in Newark led Movants-Intervenors to file a lawsuit two days ago challenging the constitutionality of the LIFO Statute, which will allow Movants-Intervenors to set forth a full evidentiary record on the unconstitutional impact of the LIFO Statute on students in Newark and similarly situated districts.[29]

As long as the LIFO Statute remains the governing law, enforcement of the statute in Newark will lower the number of quality teachers in classrooms, leading to lower test scores, lower graduation rates, lower college attendance rates, and sharply reduced lifetime earnings for Newark students.[30] Thus, as parents of Newark students, Movants-Intervenors have an evident interest in the outcome of the motion to reopen the Abbott case.

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[29] See Exhibit A.

[30] See Raj Chetty, John N. Friedman & Jonah E. Rockoff, supra note 19.

B. Movants-Intervenors' Ability to Challenge the LIFO Statute Will Be Impaired or Impeded if They Are Not Permitted to Intervene

As noted above, Movants-Intervenors have already filed a Complaint at the trial court level seeking a broader ruling than the State seeks in this Court-namely, that the LIFO Statute as applied is unconstitutional. Simultaneously pending cases in this Court and at the trial level may prevent Movants-Intervenors from being heard at either level, particularly if Movants-Intervenors' Motion to Intervene is denied and the lower court action is stayed pending a decision from this Court.

Final disposition of the LIFO issue by this Court could also foreclose all other litigation challenging the LIFO Statute, without consideration of the position of the parents of the children most directly and negatively affected by the LIFO Statute as applied in Newark. Moreover, Movants-Intervenors want the LIFO Statute permanently enjoined and declared unconstitutional as-applied in Newark, not simply waived at the Commissioner's discretion as the State has requested. If the State's request related to the LIFO Statute is granted, Movants-Intervenors face a shifting landscape where-at its sole discretion-the State may decide to let the LIFO Statute apply to some or all SDA districts in the future. This scenario is just as unconstitutional as the current application of the LIFO Statute.

For this reason, Movants-Intervenors believe it would be most appropriate for the LIFO issue to be heard at the trial level, as this Court has not yet had the opportunity to develop a record as it pertains to the LIFO Statute in the Abbott cases. See, e.g., State v. Costello, 59 N.J. 334, 344-45 (1971) (declining to address issue not previously asserted in lower courts).

Given the severity of the negative effects the LIFO Statute has on the quality of the education of their children, Movants-Intervenors want to ensure that their voices will be heard on the LIFO issue if this Court decides to entertain the State's motion. Additionally, Movants-Intervenors would like an opportunity to submit evidence on the unconstitutional impact of the LIFO Statute on students' right to a thorough and efficient education if the Court decides to hear the motion. See Abbott v. Burke, 196 N.J. 544, 565-66 (2008) (Abbott XIX) (remanding matter to Special Master as State's assertions "supported only by affidavits that are challenged by opposing affidavits" left Court "unable to resolve the matter on the present record.").

C. Movants-Intervenors' Interests Are Not Adequately Represented by the Existing Abbott Parties

Notably, the 2016 Abbott Filing was the first instance in which the constitutionality of the LIFO Statute was raised in the Abbott cases. Unlike the original Abbott plaintiffs,

Movants-Intervenors are uniquely situated because their children are directly and disproportionately affected by the application of the LIFO Statute in Newark, given the staggering statistics coupled with the number of ineffective teachers who remain on Newark's payroll by way of the EWPS pool.

Moreover, the Movants-Intervenors are not adequately represented on the LIFO issue by the State. New Jersey public officials and government agencies are generally presumed to exercise their power and discretion appropriately and therefore may adequately represent individual parties in a litigation,[31] but such a presumption should be lost here, when the State has previously exercised its discretion in ways that disadvantage districts like Newark. See Asbury Park v. Asbury Park Towers, 388 N.J. Super. 1, 11-12 (App. Div. 2006) (showing of conduct by public entity that "evinces a derogation of its fiduciary responsibilities" may lead Court to conclude that movant-intervenor not properly represented). In the Abbott cases, the Court has consistently found that the State violated the constitutional right of children within SDA districts to a thorough and efficient education when adjusting funding formulas. See Abbott XXI, 206 N.J. at 369 (after granting State

[31] See, e.g., N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp, 2015 WL 10015127, at *9 (N.J. Sup. Ct. Law Div. July 13, 2015). Pursuant to Rule 1:36-3, a copy of the decision is provided as Exhibit B.

discretion to change funding formula, holding that State cannot deprive full School Funding Reform Act funding); Abbott v. Burke, 149 N.J. 145 (1997) (Abbott IV) (finding Comprehensive Education Improvement and Financing Act unconstitutional) Abbott v. Burke, 136 N.J. 444 (1994) (Abbott III)(finding Quality Education Act unconstitutional); Abbott v. Burke, 119 N.J. 287 (1990) (Abbott II)(finding clause 212 of Public School Education Act of 1975 unconstitutional). There is no reason to believe, on this track record, that the State could adequately represent the interests of Movants-Intervenors on the LIFO Statute.

Moreover, the relief sought by the State is too narrow on the LIFO Statute and too radical on funding. The State wants the discretion to waive, not enjoin, the LIFO Statute in the SDA Districts, including Newark. But to give power to the Commissioner to decide whether to waive on a discretionary basis does not adequately protect those who may be adversely affected by the statute, should the Commissioner decide for whatever reason not to waive. Moreover, the State also intends to cut funding further for the SDA Districts. These districts not only need effective teachers, they also need adequate funding to provide a thorough and efficient education to these students. Cutting funding to the SDA Districts would have a devastating effect on the students of Newark.

D. Movants-Intervenors' Application Is Timely

Movants-Intervenors' instant Motion for Leave to Intervene is timely. The constitutionality of the LIFO Statute has not been before the Court in the Abbott cases previously, and Movants-Intervenors' motion comes before this Court has made any ruling with respect to the State's request as to whether the State's request is appropriate or on the merits. Further, this application was filed two days after Movants-Intervenors filed their Complaint at the trial level.

For the foregoing reasons, no undue delay would occur as a result of granting the application.

II. ALTERNATIVELY, PERMISSION TO INTERVENE SHOULD BE GRANTED

Movants-Intervenors meet the standard under for permissive intervention, which is liberally construed. See ACLU of N.J., Inc. v. Cnty. Of Hudson, 352 N.J. Super. 44, 70 (App. Div. 2002) (four factors for motions to intervene under R. 4:33-2: (i) promptness of application; (ii) whether granting motion would result in further undue delay; (iii) whether granting motion would eliminate probability of subsequent litigation; and (iv) extent to which grant may further complicate litigation that is already complex).

As set forth supra in Section I.D, this application is timely and prompt. Given the timeliness of Movants-Intervenors' application, especially since the Court has not yet made any

ruling on the State's request to modify prior rulings, no undue delay would occur if the application was granted. Movants-Intervenors have already filed a Complaint at the trial court level, seeking a broader ruling than the State does here. A decision in this Court will impact that litigation. Finally, although the Abbott series of cases is complex, adding Movants-Intervenors as parties would not unduly complicate this litigation.

POINT TWO

THE COURT SHOULD NOT EVALUATE THE LIFO STATUTE WITHOUT AN EVIDENTIARY RECORD

There is no evidentiary record before the Court on the unconstitutional impact of the LIFO Statute on the children in Newark and similarly situated districts. On that basis, it would be premature for this Court to consider the State's request regarding the LIFO Statute without such a record. See, e.g., Abbott XIX, 196 N.J. at 565-66 (remanding issue of constitutionality of State's revised school funding scheme for further development of evidentiary record). One appropriate place for the State and Movants-Intervenors to set forth the record on this issue is in the trial court, where a proceeding has just been instituted by the Movants-Intervenors.

In the alternative, there could be an evidentiary hearing on the matter before this Court to establish the

unconstitutional impact of the LIFO Statute upon students in Newark. See id. at 565-66.

Draining districts like Newark of quality teachers, an inevitable result of the quality-blind nature of the LIFO Statute, removes those who are in the best position to help these students achieve their constitutionally mandated thorough and efficient education and thereby violates the N.J. Constitution on numerous fronts.

It is essential for the Court to understand that the quality of teachers in the classroom matters. As set forth in detail above, numerous studies have shown the impact a quality teacher can have on a child's life, stretching beyond that particular school year. Moreover, school superintendents and administrators view the LIFO Statute as a tremendous handicap.

This inherent handicap is especially felt in Newark, the state's largest school district. In the Equivalency Request, Newark showed the devastating impact of quality-blind layoffs: 300 of Newark's effective or highly effective teachers would be laid off, while 72% of Newark's lowest-rated teachers would remain.

As described above, being denied the opportunity to learn from an effective teacher can impact these children not simply during the school year, but for the rest of their lives. Given the number of students each of these effective or highly

effective teachers would otherwise instruct, as many as 8,000 children in Newark would miss out on a high-performing teacher each year.

The alternative to a RIF-the EWPS pool- is just as damaging to the district's children as the LIFO Statute. Almost 90% of any individual school's budget in Newark is tied to salaries, and the EWPS pool drains valuable resources from Newark and saddles the district with ineffective teachers in direct contradiction with the language of the New Jersey Constitution. Eliminating the need for the pool by enjoining the LIFO Statute would free up to $25 million from the Newark budget that could go towards educational programs, the hiring and training of teachers, and other efforts to assist Newark students achieve the opportunities promised in the Constitution.

For this reason, Movants-Intervenors seek to establish the unconstitutional impact of the LIFO Statute through an evidentiary record developed either at the trial court level or in this Court.

CONCLUSION

For the foregoing reasons, Movants respectfully request that the Court grant Movants' Motion to Intervene.

Dated: November 3, 2016

By: WT

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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.: _____

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

2015 WL 10015127 (N.J.Super.L.) (Trial Order)
Superior Court of New Jersey, Law Division.
Union County

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, Plaintiff,
v.
EXXON MOBIL CORPORATION, Defendant.

Nos. UNN-L-3026-04, UNN - L-1650-05.
July 13, 2015.

Decision

John J. Hoffman, Acting Attorney General, Richard F. Engel, Esq., Deputy Attorney General, Allan Kanner, Esq. and Elizabeth B. Petersen, Esq., Special Counsel to the Attorney General, Kanner & Whiteley, L.L.C., For the Plaintiff.

Marc A. Rollo, Esq., Archer & Greiner P.C., Theodore V. Wells, Jr., Esq., Paul, Weiss, Rifkind, Wharton & Garrison LLP, Alice A. Brown, Esq., For the Defendant.

Susan J. Kraham & Selena Kyle, for New York/New Jersey Baykeeper, New Jersey, Sierra Club, Clean Water Action, Delaware Riverkeeper, Delaware Riverkeeper Network, Environmental New Jersey, Natural Resources Defense Council, and New Jersey Audubon.

Richard L. Rudin, for Senator Lesniak.

Michael J. Hogan, Judge.

I. STATEMENT OF FACTS

*1 This decision concerns eight environmental interest groups' and a New Jersey State Senator's attempted intervention to oppose the settlement of a complex, eleven-year-old natural resources damages ("NRD") case. On August 19, 2004, the New Jersey Department of Environmental Protection ("DEP," "State," or "Department"), as the public's statutorily entrusted trustee of natural resources, filed two complaints against ExxonMobil Corporation ("Exxon"). [1] The complaints alleged injuries to the soils, sediments, groundwater, and surface water [2] at Exxon sites known as the Bayway refinery in Linden, New Jersey ("Bayway") and the Bayonne former refinery in Bayonne, New Jersey ("Bayonne"). The DEP alleged that these injuries began when Standard Oil Company, Exxon's predecessor in interest, commenced industrial operations in 1877 at Bayonne and 1909 at Bayway. The DEP sought $8.9 billion in damages for these injuries pursuant to *N.J.S.A.* 58:10-23.11 to -23.24, the Spill Compensation and Control Act ("Spill Act"), and common law theories of public nuisance, trespass, and strict liability. The State also sought to recover its natural resource damage assessment costs and counsel fees. The site remediation cleanup of Bayway and Bayonne was not a part of the State's claims because two 1991 Administrative Consent Orders ("ACOs") govern that issue. [3] The underlying litigation experienced numerous pre-trial motions and two interlocutory appeals before it was assigned to the present judge for trial, which began January 2014 and concluded September 2014. A brief recap of these events is helpful to understanding the current motions.

On October 7, 2004, Exxon attempted to remove the case to the United States District Court for the District of New Jersey. This attempt was unsuccessful, and the matter was remanded back to the Superior Court by order dated March

24, 2005. On January 11, 2006, the DEP moved for partial summary judgment, seeking a determination that Exxon was strictly liable as a matter of law for all cleanup and removal costs under the Spill Act. *N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp.*, 393 *N.J. Super.* 388, 397 (App. Div. 2007). Exxon cross-moved for summary judgment on the ground that the Spill Act does not provide liability for loss of use of natural resources. *Ibid.* Judge Ross Anzaldi, sitting as motion judge, granted both motions in part, holding that Exxon was strictly liable and dismissing the DEP's claims for loss of use damages. *Id.* at 397-98. On appeal, Exxon did not contest Judge Anzaldi's strict liability ruling. *Id.* at 398. The Appellate Division, however, reversed Judge Anzaldi's loss of use ruling and held that loss of use damages "are a component of costs of mitigating damage to public natural resources." *Id.* at 402.

***2** After the first interlocutory appeal, the DEP amended its complaint to include strict liability counts. *N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp.*, 420 *N.J. Super.* 395, 398 (App. Div. 2011). Exxon moved for partial summary judgment on the strict liability count, claiming that it was barred by the statute of limitations. *Ibid.* The trial court agreed with Exxon and granted their motion for summary judgment. On appeal, the Appellate Division reversed and held that the statute of limitations did not bar the common law strict liability count because the common law could be considered part of the State's environmental laws, which have been legislatively granted an extension on their statute of limitations. *Id.* at 411.

After sixty-six days of a complex, contested bench trial, this court began work on its decision. [4] In February 2015, before it rendered a decision, the parties informed the court that they had reached a proposed settlement. Under the terms of the settlement, Exxon agrees to pay the State $225 million. [5] In return, the State (1) releases with prejudice and covenants not to sue Exxon for all claims based on the discharge of contaminants onto the soil and sediments of Bayway and Bayonne; (2) dismisses the surface water claims without prejudice and agrees that the water claims can only be brought in the future in a multi-defendant action if a formal natural resource damage assessment is completed by the applicable trustee through a procedure that allows for Exxon's participation; (3) releases with prejudice and covenants not to sue Exxon for all NRD relating to Exxon Retail Stations located within the state (this excludes any claims involving any Exxon Retail Station where methyl tertiary butyl ether ("MTBE") has been discharged); (4) releases and covenants not to sue Exxon for all NRD relating to sixteen statewide facilities, including the Former Paulsboro Terminal #3045 that has been the subject of litigation in Gloucester County since 2007 ("Gloucester litigation") (Docket No. L-1063-07 consolidated with L-0563-03); and (5) agrees to defer the final remedy determination and remediation of Morses Creek until the cessation of refining operations. [6]

Further, the parties agreed that each party shall bear its own costs and expenses and that the agreement, with the exception of the remediation of Morses Creek, will not alter Exxon's obligations under the ACOs. [7] Finally, the settlement states that [n]othing contained in this Consent Judgment shall be considered an admission by [Exxon]," [8] and it grants Exxon contribution protection "to the fullest extent possible pursuant to Section 113(f)(2) of [the Comprehensive Environmental Response, Compensation, and Liability Act] CERCLA, 42 *U.S.C.A.* §§ 9613(f)(2), the Spill Act, *N.J.S.A.* 58:10-23.11fa. (2)(b) and any other statute, regulation, or common law principle that provides contribution rights against ExxonMobil ...." [9]

In accordance with *N.J.S.A.* 58:10-23.11e2, the State published a copy of the proposed settlement on the DEP's website, published notice of the settlement in the New Jersey Registrar, and arranged for notice in twelve newspapers. [10] Details of the settlement were made public April 6, 2015. The settlement immediately received extensive public backlash and has since been the topic of a number of media sources. [11] Although the DEP usually gives the public thirty days to comment on any proposed settlement, due to the heightened public interest, it extended the time period prescribed in *N.J.S.A.* 58:10-23.11e2 to sixty days. This "Public Comment Period" ended June 5, 2015, by which time the DEP had received around 16,000 public comments, the vast majority of which were opposed to the settlement. The purpose of these comments is twofold. First, in any settlement under the Spill Act, the DEP reviews them before it decides to make

a formal application for approval of a settlement. Second, the court ultimately charged with approving a settlement can review them for assistance in determining if the settlement is fair, reasonable, and in the public interest.

*3 On June 9, 2015, the New York/New Jersey Baykeeper, New Jersey Sierra Club, Clean Water Action, Delaware Riverkeeper, Delaware Riverkeeper Network, Environment New Jersey, Natural Resources Defense Council, and New Jersey Audubon collectively filed a motion to intervene as of right under *N.J. Ct. R.* 4:33-1 or, alternatively, for permissive intervention under *N.J. Ct. R.* 4:33-2. On June 19, 2015, New Jersey State Senator Raymond Lesniak, individually and as a member of the New Jersey State Senate for the 20th Legislative District (Union), filed a motion seeking intervention under the same court rules. The environmental groups allege that "the Department inexplicably abandoned its duty as trustee of the State's natural and financial resources" by settling with Exxon for "less than three cents on the dollar," an amount they consider "suspiciously low." [12] By doing so, they believe "the Department has failed to protect the public." [13] Further, they claim "the Department abruptly changed course" and that the "Settlement amount is woefully short of what the Department is legally entitled to receive and obligated to recover." [14]

For these reasons, they "wish to be heard in opposition, to urge the Court to reject the sweetheart deal the Department and Exxon are poised to receive." [15] Their desired intervention would be limited to "seek[ing] to intervene to participate as plaintiffs in any proceedings relating to the Court's consideration of the Settlement. In addition, should the Court enter a judgment approving the Settlement, Environmental Intervenors seek the right to appeal as a party." [16] They "seek only to challenge the legality and sufficiency of the Settlement, not to reopen trial proceedings or otherwise relitigate the case" [17] and, if permitted to intervene, "will address solely the salient question the Court must decide: Should the Settlement be approved or disapproved." [18] If they are permitted to "simply brief and argue orally that, under prevailing law, the Court should refuse to approve the Settlement," they believe "they will present a legally driven perspective that neither primary party will offer." [19]

Senator Lesniak alleges "the NJDEP is eviscerating the intent and purpose of the [Spill Act]." [20] He believes the DEP is not adequately representing New Jersey citizens and faults the DEP for "not publicly disclosing] any site-specific assessments as to the environmental damages caused by Exxon Mobil's operations at" the non-Bayway/Bayonne facilities. [21] He is also opposed to the settlement because he claims it allows Exxon "to deduct 35% and 9% from its federal and state corporate business taxes" and because it does not specify how the DEP will spend the money on remediation and restoration projects. [22]

On July 9, 2015, the State formally moved for approval of the proposed settlement. The State and Exxon oppose the environmental groups' and Senator Lesniak's (collectively "Intervenors") motions. The court held oral argument on the motions July 10, 2015.

II. INTERVENTION AS OF RIGHT

New Jersey Court 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.

Our courts have interpreted this rule as a four prong test:

*4 The applicant must (1) claim "an interest relating to the property or transaction which is the subject of the action," (2) show he is "so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest," (3) demonstrate that the "applicant's interest" is not "adequately represented by existing parties," and (4) make a "timely" application to intervene.

Chesterbrooke Ltd. P'ship v. Planning Bd. of Twp. of Chester, 237 *N.J. Super.* 118, 124 (App. Div. 1989). "The substance of the rule permitting intervention as of right is also ordinarily construed quite liberally." *ACLU of N.J., Inc. v. Cnty. of Hudson*, 352 *N.J. Super.* 44, 67 (App. Div. 2002) (citing *Meehan v. K.D. Partners, L.P.*, 317 *N.J. Super.* 563, 568 (App. Div. 1998)). "As the rule is not discretionary, a court must approve an application for intervention as of right if the four criteria are satisfied." *Meehan*, 317 *N.J. Super.* at 568 (citing *Chesterbrooke*, 237 *N.J. Super.* at 124).

The court has reviewed not only the binding New Jersey caselaw but also the persuasive authorities from the federal circuit courts of appeals. Because *Rule* 4:33-1 "is taken substantially from *Fed. R. Civ. P.* 24," *Twp. of Hanover v. Town of Morristown*, 118 *N.J. Super.* 136, 140 (Ch. Div. 1972),[23] New Jersey courts "may look to the federal decisions for guidance in construing the rule." *Testut v. Testut*, 32 *N.J. Super.* 95, 99 (App. Div. 1954) (citing *Lang v. Morgan's Home Equip. Corp.*, 6 *N.J.* 333, 338 (1951)); *see also Chesterbrooke*, 237 *N.J. Super.* at 125 (citing cases from the Court of Appeals for the District of Columbia Circuit and United States Supreme Court to aid in its interpretation of *N.J. Ct. R.* 4:33-1). Based on this review, the court finds that the environmental groups satisfy the "interest" and "impair or impede his ability to protect that interest" prongs. Because the environmental groups do not meet the "adequate representation" and "timeliness" prongs, however, the court denies their motion for intervention as of right. The court finds that Senator Lesniak fails all four *Rule* 4:33-1 prongs.

II.A. The Intervenors' Interest Relating to the Property That is the Subject of This Action

The environmental groups have an "interest *relating to* the property or transaction which is the subject of the action." *N.J. Ct. R.* 4:33-1 (emphasis added). Our courts do not require potential intervenors to have an interest "in" a plaintiff's or defendant's property.[24] Rather, it is sufficient that intervenors own property adjacent to the property at issue. *Chesterbrooke*, 237 *N.J. Super.* at 124 (finding that such an interest "relates to" the property which is the subject of the action). Furthermore, the Appellate Division has found that "nonprofit corporations having the declared purpose of protecting open spaces and the environment ... and the preservation of wildlife" meet the interest prong, especially when many members of the intervening groups reside in the township and live adjacent to the site. *Warner Co. v. Sutton*, 270 *N.J. Super.* 658, 660 (App. Div. 1994) (finding that intervenors had an interest because, "Many members of the movant groups reside in Maurice River Township. Some live adjacent to the Warner site.") The environmental groups meet these requirements.

*5 "New York/New Jersey Baykeeper is a nonprofit, membership-based environmental organization that advocates for the preservation, protection, and restoration and the Hudson-Raritan Estuary."[25] "Baykeeper members and supporters, including more than 2,400 members in Northern New Jersey, use New Jersey waters, meadows, and wetlands for swimming, wading, fishing, birding, boating, kayaking, and a variety of other recreational, professional, and aesthetic purposes."[26] The New Jersey Sierra Club is a nonprofit organization dedicated to protecting and restoring the environment."[27] "At the Bayway site, the Club has been involved in worker safety, toxic chemical cleanup, and reporting of air and water pollution violations for over twenty-five years."[28] Clean Water Action "is a 1.2 million-member organization that works to protect the environment, health, economic well-being, and community quality of life."[29] "The Delaware Riverkeeper is a full-time, privately funded ombudsman who is responsible for the protection of the waterways in the Delaware River Watershed."[30] "The Delaware Riverkeeper Network is a nonprofit environmental organization that champions the rights of communities to a Delaware River and tributary streams that are clean and

healthy."[31] The organization "has members who live and recreate in areas directly influenced by Exxon sites included in the Settlement.[32]

"Environment New Jersey is one of the state's largest citizen-based advocacy organizations, and is committed to protecting New Jersey's environment for future generations by protecting the state's land, air, and water, and by promoting a clean energy future."[33] "The organization has over 20,000 dues-paying citizen members, including more than 1,700 members in Union County, 300 members in Hudson County, and 300 members in Gloucester County.[34] Natural Resources Defense Council "is a public interest environmental advocacy organization with approximately 300,000 members in the United States, including more than 8,000 in New Jersey."[35] "Over the last decade, NRDC has litigated cases to prevent air pollution and soil contamination in Bayonne, New Jersey, and Staten Island, New York; remediate dioxin contamination of Newark Bay, New Jersey; and remediate chromium contamination of soil in Jersey City, New Jersey."[36] New Jersey Audubon "is a privately supported, not-for-profit, statewide membership organization incorporated in New Jersey."[37] "NJA fosters environmental awareness and conservation ethic; protects New Jersey's birds, mammals, other animals, and plants, especially endangered and threatened species; and promotes preservation of New Jersey's valuable natural habitats."[38]

The Bayway/Bayonne litigation, Gloucester litigation, and claims at Exxon Retail Stations all involve the State's attempts to recover money for alleged damages to its natural resources. The eight environmental interest groups are interested in the protection, restoration, and recreational use of the State's natural resources. Moreover, many of their members live at or near the sites in question. This is sufficient to satisfy the "interest" prong.

Senator Lesniak alleges that he has "been at the forefront on sponsoring environmental laws in New Jersey since [he has] been in the Legislature" and "was also a proponent of the Spill Act amendments in the early 1990s ...."[39] His "Senate District includes the Bayway neighborhoods of the Cities of Linden and Elizabeth ...."[40] According to his brief and certification, the local public officials of these cities and numerous residents have been nearly uniform in expressing their opposition to the proposed settlement.[41] Indeed, 22,000 New Jersey residents have signed his online petition urging rejection of the settlement.[42]

Despite these facts and allegations, for two reasons, the court finds that Senator Lesniak does not have an interest relating to the property or transaction which is the subject of this action. First, although Senator Lesniak's district includes the Exxon sites and surrounding areas, this cannot serve as an "interest" under *Rule* 4:33-1. There is no limiting principle to his assertion that he has an interest in this litigation because his district is affected. To allow a state legislator to intervene in a matter because it impacts his/her district would set a precedent by which *any* legislator could claim an interest *any time* litigation concerns property or transactions that affect his district.

***6** Second, the court can find no case holding that a legislator has an interest due to the fact that an action impacts his district. The court does not doubt that he cares about natural resources and wants to see them restored. His political and public policy concerns, however, are distinguishable from the environmental groups' concerns because *Warner* specifically stated that "nonprofit corporations having the declared purpose of protecting open spaces and the environment ... and the preservation of wildlife" can have an interest in an action. *Ibid.* There is no binding New Jersey caselaw that holds state legislators who want to preserve open spaces and wildlife have a *Rule* 4:33-1 interest.

II.B. The Disposition of This Action May Impair or Impede the Environmental Groups' Ability to Protect Their Interest

The environmental groups meet the second *Rule* 4:33-1 prong because they are "so situated that the disposition of the action *may* as a practical matter impair or impede [their] ability to protect" their interest in the protection and restoration

of natural resources located in New Jersey. *N.J. Ct. R.* 4:33-1 (emphasis added). The second prong does not present a high hurdle for potential intervenors because of its use of the word "may." An intervenor does not have to show that the disposition of a case "will" impair or impeded his ability to protect his interest. In both the Bayway/Bayonne and Gloucester litigation, the DEP, as the public's trustee of natural resources, seeks money from Exxon that it intends to use to restore injured natural resources. The disposition of these cases "may" impair or impede the environmental groups' interest in these resources because should this court dismiss the State's claims for lack of sufficient evidence, the State will not recover any amount of money for the restoration of natural resources. If this occurs, the environmental groups and their members will not be able to use the resources for aesthetic or recreational purposes. *See Meehan*, 317 *N.J. Super.* at 571 (finding that concerns of diminished "quality and enjoyment of light, air, and quiet" relate to the subject property). The environmental groups, therefore, meet the second prong.

II.C. The DEP Adequately Represents the Intervenors' Interests [43]

A potential intervenor's motion must fail if at least one of the existing parties adequately represents the intervenor's interests. The third *Rule* 4:33-1 prong is a separate inquiry from the interest prong, and "courts must be careful not to blur the interest and representation factors together." *Kleissler v. U.S. Forest Serv.*, 157 *F.*3d 964, 972 (3d Cir. 1998) (citing *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 101 *F.*3d 503, 508 (7th Cir. 1996)). For ten years, the Intervenors considered the DEP to adequately represent their interests. The Intervenors, however, believe that the DEP's settlement for "pennies on the dollar" constitutes an abdication of their fiduciary duty. Due to the difference in opinion on the proper NRD recovery amount, the Intervenors believe the DEP no longer adequately represents their interests and seek to intervene to brief and orally argue against the proposed settlement.

*7 For the reasons elaborated on in the rest of Section II.C, the court finds that the DEP still adequately represents the Intervenors' interest in the protection and restoration of natural resources located in New Jersey. The DEP and Intervenors share the same ultimate goal, and their quarrel is only over the means employed to achieve that goal. Further, the public comment period provided an adequate forum for the Intervenors to provide the court with arguments against the settlement. Because the environmental groups' intervention as of right motion hinges on the "adequate representation" prong, the court will devote a substantial portion of Section II to this issue.

This Section proceeds by first exploring the cases Intervenors cited in their briefs and explaining why these cases are distinguishable from the current matter. [44] The court will then discuss the federal courts of appeals' "ultimate goal" test and how this test works against the Intervenors. Finally, the court will discuss New Jersey courts' preference for finding adequate representation when statutes entrust agencies with certain duties and the deference given to these executive agencies. This deference closely mirrors the federal presumption of adequate representation that arises when parties share the same ultimate goal.

II.C.1. New Jersey Caselaw and the Intervenors' Authorities

The Intervenors rely on a number of cases that granted post-judgment applications for intervention for the sole purpose of appealing the judgment. The Appellate Division has consistently held that "[i]ntervention after final judgment is allowed, if necessary, to preserve some right which cannot otherwise be protected." *Chesterbrooke*, 237 *N.J. Super.* at 123 (citing *Hanover*, 118 *N.J. Super.* at 142). In *Chesterbrooke*, the plaintiff filed a subdivision approval for certain variances with the defendant planning board. *Id.* at 120. The board initially denied the application and the plaintiff filed suit. *Id.* at 121-22. After the matter was argued, the judge granted automatic approval of the subdivision application, a decision that the planning board decided not to appeal. *Id* at 122. The day after the board announced its decision not to appeal, two landowners filed an intervention motion for the sole purpose of appealing the trial court's ruling. *Ibid.* The trial court denied the motion, but the Appellate Division reversed, finding that once the board decided not to appeal, it no longer

adequately represented the objectors' interest because "there was no one available to protect their interest through an appeal." *Id.* at 124-25.

Likewise, in *Warner Co. v. Sutton*, the Appellate Division allowed post-judgment intervention because it was necessary to preserve some right which otherwise could not have been protected. *Warner*, 270 *N.J. Super.* at 667. There, a plaintiff mining company's land was rezoned a "conservation zone," in which mining was prohibited. *Id.* at 660. The company filed an action against the planning board, alleging an unconstitutional taking. *Ibid.* The company and board reached a settlement, under which the company would receive a perpetual nonconforming-use status. *Id.* at 661. Citing environmental concerns, a number of nonprofit corporations filed a post-judgment intervention motion to appeal the settlement. *Id.* at 662. The Appellate Division reversed the trial court and allowed intervention, finding that after the consent order was entered, the board did not represent the intervenors' environmental interests. *Id.* at 665.

***8** Finally, in *Meehan v. K.D. Partners, L.P.*, the Appellate Division also allowed post-judgment intervention because it was necessary to preserve some right which otherwise could not have been protected. *Meehan*, 317 *N.J. Super.* at 571. There, a developer sought use of a variance from a planning board "to allow the conversion of an existing hotel to an eight-unit hotel with kitchen facilities." *Id.* at 564. "The application was successful, but a neighboring property owner, plaintiff James P. Meehan, filed an action in lieu of prerogative writs in the Law Division challenging the settlement." *Id.* at 565. The Law Division voided the approval, but while the appeal was pending, Meehan and the developer entered a settlement that would allow the variance to go through. *Ibid.* Thirty days after the consent order was signed, Thaddeus Barkowski, another adjacent property owner, filed a motion to intervene, claiming that the variance would diminish his property value and lessen the quality of enjoyment of light, air, and quiet. *Id.* at 565, 571. The Appellate Division found that although Meehan adequately represented Barkowski's environmental and property value concerns prior to the settlement, once Meehan agreed to allow the variance to proceed, their "interests were no longer parallel." *Id.* at 571.

The Intervenors believe these three cases aid their cause because they all granted intervention motions concerning environmental matters. A closer inspection of these cases' reasoning and fact patterns compels this court to reach a different result. In three respects, these cases are distinguishable from the present matter. First, these three cases all dealt with intervention motions filed *post-judgment* for the purpose of appealing a judgment that neither original party wanted to appeal. "There is a significant difference between intervening at an appellate level to advance arguments on behalf of uniquely interested parties ... and intervening at the trial level as an interested party." *City of Asbury Park v. Asbury Park Towers*, 388 *N.J. Super.* 1, 12 (App. Div. 2006) (citations omitted). These cases, therefore, are not directly on point because this court has neither approved nor rejected the settlement.

Second, these three cases found lack of adequate representation because intervention was necessary to preserve some right *which could not otherwise be protected.* Here, the environmental groups seek to intervene to "simply brief and argue orally that, under prevailing law, the Court should refuse to approve the Settlement," and they believe "they will present a legally driven perspective that neither primary party will offer."[45] Likewise, Senator Lesniak seeks to intervene "for the purpose of arguing that the proposed Consent Judgment ... should be disapproved by the court."[46] They are correct that at the Settlement Hearing to occur July 21, 2015, neither original party is likely to offer arguments against the settlement. However, the Intervenors, along with *thousands* of other individuals, have already voiced their objections to the settlement through the statutorily mandated public comment process.[47] On June 12, 2015, the DEP provided the court with these comments, and the court has been extensively reviewing the comments for arguments both for and against the settlement. This case, therefore, is unlike *Chesterbrooke* where the intervenors had no avenue to voice their objections. *See Chesterbrooke*, 237 *N.J. Super.* at 124-25.

In essence, the Intervenors have already done that which they seek to do through intervention: argue to the court against the settlement. *Cf. United States v. Metro. Dist. Comm'n*, 865 *F.*2d 2, 5 (1st Cir. 1989) (finding adequate representation where potential intervenors "had other avenues for influencing the decisions"). Furthermore, at all times since the DEP

filed its complaint, the DEP has, on behalf of the public, been the entity that has prosecuted this case, conducted a natural resource damage assessment, retained outside counsel, and hired numerous expert witnesses to further its cause. This is not a case where Intervenors possess "intimate knowledge asto what is going on." *ACLU*, 352 *N.J. Super.* at 65 (agreeing with the trial court that because "the real party in interest here is the United States of America and presumably it has intimate knowledge asto what is going on with regard to the continuing investigation" the County of Hudson did not adequately represent its interests (internal quotation marks omitted)).

***9** The court does not find the Intervenors' contention that neither original party is likely to make arguments against the settlement at the July 21, 2015 hearing to be a reason warranting intervention. Any time the DEP brings a NRD case against an individual defendant and the case settles, it is unlikely either the DEP or the defendant will argue against the settlement if a hearing occurs. Therefore, there is no limiting principle to the Intervenors' contention. If they were allowed to intervene here because neither the DEP nor Exxon will argue against the settlement, then it would set a precedent that allows movants to intervene in *any* NRD case. The court sees the Legislature's adoption of the public comment period as evidence that they did not intend for this result to occur. *Rule* 4:33-1 is to be construed liberally, not limitlessly.

Third, *Chesterbrooke*, *Warner*, and *Meehan* are distinguishable from this case because in those cases, the original party and the potential intervenor started out with the same ultimate goal, but their goals later diverged. In those cases, original parties adequately represented the potential intervenors' aesthetic, environmental, and property value goals, but ceased to further those goals when they settled. The DEP has settled this case, but it still shares the same ultimate goal with the Intervenors: the protection and restoration of natural resources located in New Jersey. As the following Section explains, when parties still share the same ultimate goal and only disagree on the means or strategy employed to achieve that goal, the federal courts have found adequate representation.

II.C.2. The Intervenors and DEP Share the Same Ultimate Goal

In 1977, the year the Spill Act came into effect, the Legislature found and declared "that the State is the trustee, for the benefit of its citizens, of all natural resources within its jurisdiction ...." *N.J.S.A.* 58:10-23.11a. With the passage of the Spill Act, the Legislature intended "to exercise the powers of this State to control the transfer and storage of hazardous substances and to provide liability for damage sustained within this State as a result of any discharge of said substances ...." *Ibid.* Specifically, the Legislature charged the DEP with the duty of "facilitat[ing] and coordinat[ing] activities and functions designed to clean up contaminated sites in this State." *Ibid.*

In 1991, the DEP began to perform its fiduciary duty with regard to the Bayway and Bayonne sites when it convinced Exxon to enter into two ACOs for the remediation of the sites. With the filing of the 2004 complaints, the DEP began its attempt to recover damages from Exxon for Bayway and Bayonne that it intends to use to restore and replace damaged natural resources in New Jersey. Likewise, the DEP began a similar pursuit in 2007 by bringing a NRD claim against Exxon for contamination at its former Paulsboro site. The Intervenors do not want anything that the DEP does not want. Both parties seek the remediation of contaminated sites and the restoration/replacement of injured natural resources. Because these ultimate goals are the same, the court believes a presumption of adequate representation should arise, a presumption the Intervenors have done nothing to rebut.

The First, Second, Third, Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits, along with the United States District Courts for the District of Utah, Eastern District of Missouri, and Southern District of Ohio have all held that where the party seeking to intervene has the same ultimate goal as a party already in the suit, a presumption of adequate representation arises. *Prete v. Bradbury*, 438 *F.*3d 949, 956 (9th Cir. 2006); *Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 *F.*2d 211, 215 (11th Cir. 1993); *Wade v. Goldschmidt*, 673 *F.*2d 182, 186 n.7 (7th Cir. 1982); *Moosehead Sanitary Dist. v. S. G. Phillips Corp.*, 610 *F.*2d 49, 54 (1st Cir. 1979); *U.S. Postal Serv. v. Brennan*, 579 *F.*2d 188, 191 (2d Cir. 1978); *Virginia v. Westinghouse Electric Corp.*, 542 *F.*2d 214, 216 (4th Cir. 1976); *Ordnance Container Corp. v. Sperry Rand Corp.*, 478 *F.*2d 844, 845 (5th Cir. 1973); *Phila. Electric Co. v. Westinghouse Electric Corp.*, 308 *F.*3d

856, 859-60 (3d Cir. 1962); *SEC v. Am. Pension Servs.*, No. 2:14-cv-00309-RJS-DBP, 2015 U.S. Dist. LEXIS 6782, at *14 (D. Utah Jan. 20, 2015); *United States v. Bliss*, 132 *F.R.D.* 58, 61 (E.D. Mo. 1990); *Piedmont Paper Prods., Inc. v. Am. Fin. Corp.*, 89 *F.R.D.* 41, 44 (S.D. Ohio 1980). To overcome this presumption, intervenors "must produce something more than speculation as to the purported inadequacy," and "ordinarily must demonstrate adversity of interest, collusion, or nonfeasance." *Moosehead*, 610 *F.*2d at 54. The inadequacy of representation element "is not met when the applicants present only a difference in strategy." *SEC v. TLC Invs. & Trade Co.*, 147 *F. Supp.* 2d 1031, 1042 (C.D. Cal. 2001) (citing *Nw. Forest Res. Council v. Glickman*, 82 *F.*3d 825, 838 (9th Cir. 1996)). Furthermore, a potential intervenor's concern that the plaintiff recover the full amount to which they are entitled is not a sufficient reason to find inadequacy of representation. *See Moosehead*, 610 *F.*2d at 54 (finding adequate representation even when potential intervenor "Maine wants [plaintiff] Moosehead to collect as much as possible"); *Phila. Electric Co.*, 308 *F.*2d at 859 ("To the extent that the concern of the Commission is that the plaintiff recover the full amount to which it is entitled, the Commission's interest and that of the plaintiff are identical.... We conclude, therefore, that any interest the Commission may have in the adequacy of the plaintiff's prospective recovery cannot be a basis for intervention as of right.").

***10** Here, Intervenors have the same ultimate goal as the DEP: the recovery of money from Exxon to use to replace and restore natural resources in New Jersey. The Intervenors seek to intervene because they take issue with the amount the DEP would receive under the proposed settlement. This case has been ongoing for eleven years, and Exxon has fiercely contested the DEP's claims. All parties have always known that it could conclude in one of three ways: (1) this court could dismiss the DEP's claims and the DEP could recover $0; (2) the DEP could recover the full amount of $8.9 billion; or (3) the amount the DEP recovers, either through litigation or settlement, could be somewhere in between. After last year's lengthy trial, for any number of reasons the DEP could have realized their hand was not as strong as they originally believed. As the public's trustee, they could have believed that the best strategy was to settle the case and take a certain amount of money over the prospect of no money.

At this stage, the court does not pass judgment on the fairness and reasonableness of the proposed settlement. This will be done after the July 21, 2015 hearing. All the court is saying is that the Intervenors' preference for a different strategy, *SEC*, 147 *F. Supp.* 2d at 1042, and concern over the amount recovered, *Phila. Electric Co.*, 308 *F.*2d at 859, is not enough to meet the adequate representation prong. The Intervenors have not demonstrated adversity of interest, collusion, or nonfeasance. *Moosehead*, 610 *F.*2d at 54. They have not even alleged misfeasance, let alone nonfeasance. *Cf. Prete*, 438 *F.*3d at 957 & n.9 (noting that courts find adequate representation when the original party "vigorously defends" that action); *Asbury Park*, 388 *N.J. Super.* at 8-9 (finding that the city "more than adequately represented" the potential intervenors when it "zealously and successfully opposed" a condemnation proceeding). Nor have the Intervenors claimed they did not receive notice of the public comment period so as to allow them to submit feedback on the settlement.

In an attempt to overcome the "ultimate goal" test, the Intervenors rely on *In re Acushnet River & New Bedford Harbor*, 712 *F. Supp.* 1019 (D. Mass 1989). At first blush, this case appears to support the Intervenors' position. There, the United States District Court for the District of Massachusetts granted environmental interest groups' petition for intervention who were challenging the adequacy of a $2 million settlement recovery. *Acushnet River*, 712 *F. Supp.* 2d at 1022.[48] A closer review of the case, however, reveals that it is easily distinguishable from the present matter. Under CERCLA, the trustees argued that "the proper measure of natural resource damages is the *lesser* of the costs of restoring or replacing the injured resources and the resources' lost use value." *Id.* at 1024 (internal quotation marks omitted). The *Acushnet River* intervenors believed the measure of damages should be "the cost of restoration or replacement of the natural resources, or failing that, of the acquisition of equivalent resources, *plus* the lost use value." *Ibid.* Thus, the court found that the ultimate goal divergence did not concern the *recovery amount*, but rather "the *proper measure of damages*." *Ibid.* (emphasis added).

In the present case, because the dispute is only over the recovery amount and not the proper measure of damages, the Intervenors do not satisfy the adequate representation prong. At all relevant times, the DEP has sought to have Exxon pay for the sites' remediation through the ACOs and attempted to recover lost use damages to use to restore and replace

injured natural resources. *Exxon*, 393 *N.J. Super.* at 401-02. This is exactly what the Intervenors want, and this court will not allow intervention when the Intervenors seek no relief other than that which the DEP seeks. *Virginia*, 542 *F.*2d at 216 ("Nonetheless, we find that Virginia has not met its burden. Virginia seeks no relief other than that which VEPCO seeks for itself.").

***11** The environmental groups also do not meet the adequate representation prong because they are public interest groups whose concerns closely parallel those of a public agency. The Third Circuit has held that a "government entity charged by law with representing a national policy is presumed adequate for the task, particularly when the concerns of the proposed intervenor, *e.g.*, a 'public interest' group, closely parallel those of the public agency." *Kleissler*, 157 *F.*3d at 972 (citations omitted). To overcome this presumption, intervenors must make a "strong showing of inadequate representation." *Ibid.* (citing *Mausolf v. Babbitt*, 85 *F.*3d 1295, 1303 (8th Cir. 1996)); *see also Prete*, 438 *F.*3d at 957 (requiring a "very compelling showing to the contrary"). "[I]ntervenors should have an interest that is specific to them." *Kleissler*, 157 *F.*3d at 972. Intervenors have not overcome this presumption of adequate representation because their interests are general, rather than specific, and they have not pled any facts to show why the DEP cannot adequately represent them.

Moreover, during oral argument, the Intervenors admitted that because they are only challenging the settlement, if the underlying litigation had been allowed to proceed to its natural end, they would not have filed these motions before the court rendered a decision.[49] This concession at oral argument that they are "primarily concerned with the outcome of the settlement negotiations, and that [their] interests at trial would be adequately represented by [the DEP], is significant. [This court fails] to see how a party which admittedly is adequately represented at trial by parties to the action, is somehow entitled *as of right* to participate in settlement proceedings." *Virginia*, 542 *F.*2d at 216.

The "ultimate goal" test's reasoning is equally applicable to *Rule* 4:33-1. In New Jersey, when parties share the same ultimate goal, one "who is interested in pending litigation should not be permitted to stand on the sidelines, watch the proceedings and express his disagreement only when the results of the battle are in and he is dissatisfied." *Hanover*, 118 *N.J. Super.* at 143. The Intervenors' quarrel is with the means and strategy employed by the DEP against Exxon. The Intervenors have done nothing to overcome the presumption of adequate representation. Although this presumption comes from federal law, New Jersey courts apply a similar presumption when the case involves an administrative agency that has been statutorily entrusted with certain duties.

II.C.3. New Jersey Presumption Favoring Statutorily Entrusted Agencies

"There is a *prima facie* presumption that the power and discretion of governmental action has been properly exercised." *Miller v. Passaic Valley Water Comm'n*, 259 *N.J. Super.* 1, 14 (App. Div. 1992) (citing *Grundlehner v. Dangler*, 51 *N.J. Super.* 53, 61 (App. Div. 1958)). "The good faith of public officials is to be presumed, their determinations are not to be approached with a general feeling of suspicion." *Ibid.* (citing *Ward v. Scott*, 16 *N.J.* 16, 23 (1954); *N.J. Highway Auth. v. Curry*, 35 *N.J. Super.* 525, 532 (App. Div. 1955)). To overcome this presumption, challengers must "establish[ ] clearly that the [government's] action was unreasonable." *Grundlehner*, 51 *N.J. Super.* at 61. For example, in the field of taxation, it is presumed that the "government will act scrupulously, correctly, efficiently, and honestly." *F.M.C. Stores Co. v. Borough of Morris Plains*, 100 *N.J.* 418, 427 (1985). Applying these principles, the Appellate Division has consistently found adequate representation when the Legislature has entrusted municipalities and agencies with certain duties.

For instance, the Appellate Division has found that a municipality adequately represents a private developer in condemnation proceedings when that private entity is contractually obligated to pay a condemnation amount and seeks to intervene to challenge the valuation. *Asbury Park*, 388 *N.J. Super.* at 3, 8. The Appellate Division, referencing *Miller*, *Grundlehner*, and *F.M.C. Stores*, placed great weight on the fact that the Legislature made the municipality "the sole entity entrusted with the authority to acquire land by condemnation to carry out a redevelopment plan," *id.* at 11-13,

and noted that the potential intervenor had not made "a clear showing, by specifically articulated facts, of conduct by the public entity that palpably evinces a derogation of its fiduciary responsibilities." *Id.* at 12.

***12** Similarly, in *New Jersey Division of Youth & Family Services v. D.P.*, 422 *N.J. Super.* 583 (App. Div. 2011), the Appellate Division denied resource parents' motion to intervene in a child's best interest hearing because the "process, as designed by the Legislature ... precludes their participation as a party in the litigation." *D.P.*, 422 *N.J. Super.* at 586. Because the resource parents had an opportunity to "impart information to the Family Part," just as Intervenors have the same opportunity by way of their public comments, the court found adequate representation. *Ibid.* The Legislature has made the DEP the public's trustee for natural resources, *N.J.S.A.* 58:10-23.11a, just as it has entrusted law guardians with the "object of ensuring [foster children's] well-being." *D.P.*, 422 *N.J. Super.* at 593. Although it is admirable that Intervenors seek to replace and restore the state's natural resources, absent specifically articulated facts as to why the DEP cannot achieve its ultimate goal, the court sees no reason to allow them to intervene as of right.

The resource parents' ability to impart information to the Family Part was key to the court's *D.P.* determination. Likewise, the Appellate Division has also placed importance on the use of "fairness hearings" to approve settlements and has found adequate representation when this occurs. In *Builders League of South Jersey, Inc. v. Gloucester County Utilities Authority*, 386 *N.J. Super.* 462 (App. Div. 2006), when a developer objected "with the amount of the proposed settlement," the court found adequate representation because the trial judge employed a fairness hearing. *Builders League*, 386 *N.J. Super.* at 467-68. At the fairness hearing, which was used to determine if the settlement was reasonable, the developer was allowed to file written comments and objections. *Id.* at 468. Finding adequate representation, the court noted that the "hearing protected the public's interest while balancing the rights and concerns of the parties." *Id.* at 472.

Here, the court affords the DEP's decision to settle the case the same presumption that the municipality and administrative agency were afforded in the above mentioned cases. The Intervenors have done nothing to rebut this presumption. At best, they have stated that the settlement amount is "suspiciously low," [50] and chided the DEP for not explaining why the settlement is fair, reasonable, and in the public interest and how they are to spend the settlement funds. [51] The DEP's decision, however, is "not to be approached with a general feeling of suspicion." *Miller*, 559 *N.J. Super.* at 14. Further, fairness, reasonableness, and public interest are not factors at this stage. The court is currently considering the wealth of public comments, especially Intervenors', and is holding a hearing in less than two weeks to make that determination. Although the court finds that the DEP adequately represents the Intervenors' interests, neither Exxon, the State, nor Intervenors should read this decision as to impact the determination the court will make in the coming weeks.

In conclusion, even under a liberal reading of *Rule* 4:33-1, Intervenors fail the third prong because the DEP adequately represents their interests in the protection and restoration of New Jersey's natural resources. Through their public comments, the Intervenors have a mechanism to protect their interest. They share the same ultimate goal with the DEP and have not rebutted the presumption of adequacy that therefore arises. As the public's statutorily entrusted trustee for public resources, it is the DEP that has been charged with prosecuting the underlying action, and Intervenors have made no showing as to why the DEP cannot properly perform this function.

II.D. The Intervenors' Motions are Not Timely

Intervenors' motions for intervention as of right would fail under *Rule* 4:33-1 even if they were timely because the DEP adequately represents their interest. For this reason, the court need not discuss at length timeliness under *Rule* 4:33-1. Timeliness is a permissive intervention factor under *Rule* 4:33-2, and the court will elaborate on it in that section. The court notes, however, that when discussing intervention as of right, the Appellate Division has stated that "the controlling date" for a timeliness inquiry is when the interests of the original party and intervenor diverge. *See Meehan*, 317 *N.J. Super.* at 570. As discussed above in Section II.C., the DEP and Intervenors' interests have never diverged. For this

reason, "the controlling date" for the timeliness inquiry should be 2004, the date the DEP filed the complaints. As such, the court cannot consider the Intervenors' motions to be timely under *Rule* 4:33-1.

III. PERMISSIVE INTERVENTION

***13** "Where intervention of right is not allowed, one may obtain permissive intervention under *R. 4:33-2*." *Atl. Employers Ins. Co. v. Tots & Toddlers Pre-School Day Care Ctr.*, 239 *N.J. Super.* 276, 280 (App. Div. 1990). New Jersey Court Rule 4:33-2 states:

> 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 statute 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.*

Rule 4:33-2 (emphasis added). Like *Rule* 4:33-1, it is to be liberally construed, but unlike *Rule* 4:33-1, it permits intervention at the trial court's discretion. *ACLU*, 352 *N.J. Super.* at 70.[52] Trial courts are to consider four factors when determining whether to grant permissive intervention: (1) the *promptness* of the application; (2) whether the granting thereof will result in *further undue delay*; (3) whether the granting thereof will *eliminate the probability of subsequent litigation*; and (4) the extent to which the grant thereof *may further complicate litigation which is already complex*. *Ibid.* (quoting Pressler, *Current N.J. Court Rules*, comment on *R.* 4:33-2 (2002)). Based on these factors, the binding New Jersey caselaw, and the relevant persuasive federal authorities, the court denies the Intervenors' motions for permissive intervention.

The Intervenors argue that the motions for permissive intervention are prompt, or timely, because they were filed less than two months after the DEP publically released the details of the proposed settlement. As discussed in the intervention as of right timeliness section, however, the court views the timeliness of their motion in relation to when the DEP filed the suit in 2004. This case is very much like *Sutter v. Horizon Blue Cross Blue Shield of New Jersey*, in which the Appellate Division denied a permissive intervention motion as untimely. 406 *N.J. Super.* 86, 107-08 (App. Div. 2009). There, the intervenors filed a motion to intervene only months after the proposed settlement of a class action lawsuit was announced. *Id.* at 95-96. The trial court denied the motion and the Appellate Division affirmed, noting that "the [intervenors] have moved at a very late date," and that "litigation began over four years ago and has received much attention." *Id.* at 107. Based on this analysis, the Intervenors' motions are even less timely than that in *Sutter* because this litigation began eleven years ago and has likewise received much attention.

***14** As to the second factor, the court finds that granting the Intervenors' motions will result in further undue delay. It is true that the granting of any permissive intervention motion will necessarily delay proceedings somewhat. This second factor, however, works against the Intervenors because the delay they will cause is *undue*. Both the environmental groups and Senator Lesniak initially stated in their briefs that they only seek to intervene to argue against the proposed settlement. Even if this is all the Intervenors seek to do, the delay would be undue because both parties, as well as the public, have submitted numerous public comments opposing the settlement. The delay caused by their intervention, therefore, would be undue because it would give these parties two bites at the apple: they would be able to argue against the proposed settlement in the public comment forum and again at the settlement hearing. *See id.* at 107 (denying permissive intervention motion because, *inter alia*, the potential intervenors were allowed to voice their concerns at the statutorily mandated "fairness hearing"). To give these groups time to write briefs and prepare oral arguments for the hearing, proceedings would unnecessarily have to be further delayed.

The court highlights the Intervenors' original statement of intent because, after reading the environmental groups' reply brief and conducting oral argument, it seems they have changed their intent. In their reply brief, the environmental groups stated, "Once Applicants receive and review [the State's substantive explanation and argument on the terms of the settlement], they will be able *to present a more fully formulated position on the role they wish to play in the settlement-review proceedings.*[53] This position was reiterated at oral argument.[54] This inconsistency and expansion of intent not only weakens their argument as to the undue delay factor, but also as to the third and fourth factors.

The third factor also works against the Intervenors because their intervention would not eliminate the probability of subsequent litigation, it would increase that probability. Finally, the granting of their motions would add to the complexity of an already complicated case that has seen both original parties spend millions of dollars in assessment costs and attorneys fees. "'The courts have recognized that once parties have invested time and effort in settling the case, it would be prejudicial to allow intervention.'" *Ibid.* (quoting trial court). To do so "'would render worthless all of the parties' painstaking negotiations.'" *Ibid.* (quoting trial court).

The factors employed by the Court of Appeals for the First Circuit also work against the Intervenors. That court looks to (1) the length of time the applicants knew, or reasonably should have known, of their interest before they petitioned to intervene; (2) the prejudice to the existing parties due to the applicants' failure to petition for intervention promptly; (3) the prejudice that applicants would suffer if they were not allowed to intervene; and (4) unusual circumstances militating for or against intervention. *Garrity v. Gallen*, 697 *F.*2d 452, 455 (1st Cir. 1983). Here, the Intervenors were aware of the lawsuit's inception in 2004 and have known of their interests in its outcome for eleven years. As *Sutter* instructs, intervention after a settlement has been reached prejudices the original parties because it would render worthless their "painstaking negotiations." *Sutter*, 406 *N.J. Super.* at 107. Furthermore, allowing intervention would prejudice the State because it would be forced to spend scarce public resources opposing the Intervenors. *See Garrity*, 697 *F.*2d at 457 (finding prejudice to the state when allowing intervention would compel them to expend additional public resources). The Intervenors, their members, and the general public have already submitted thousands of comments in opposition to the settlement. The DEP has spent considerable time and money reviewing these comments and still decided to go through with the settlement. To add to that time and money would be unduly prejudicial.

***15** Third, the Intervenors will not suffer any prejudice if they are not allowed to intervene. As repeatedly stated in this opinion, the Intervenors have already extensively argued against the settlement through their public comments. The court has reviewed, and is still reviewing, their comments and nothing will be gained by permitting the Intervenors to submit additional briefs and make additional oral arguments on the subject. Finally, to the extent there are unusual circumstances, the length of this case works against the Intervenors.

To support their motion, Intervenors rely on the previously discussed *In re Acushnet River & New Bedford Harbor*. In that case, applying the *Garrity* factors, the court found that allowing intervention would not cause undue prejudice or delay. *Acushnet River*, 712 *F. Supp.* at 1025. *Acushnet River*, however, is easily distinguishable from the present case. There, the court specifically highlighted the fact that "this one settlement constitutes a relatively small part of this entire litigation," and that viewing "the matter in the context of this entire massive litigation, the possible undue prejudice that may result to the existing parties discounted by the probability that such prejudice will ever occur is insufficient" to defeat the motion. *Id.* at 1025. Far from being "a relatively small part of this entire litigation," the proposed settlement seeks to dispose of *all* aspects of the State's soil and sediment claims. The State and Exxon have fought over these claims for eleven years, and intervention at this stage, unlike that in *Acushnet River*, would be highly prejudicial.

Finally, Senator Lesniak raises one argument that is distinct from the environmental groups' arguments. Citing *Evesham Township Zoning Board of Adjustment v. Evesham Township Council*, 86 *N.J.* 295 (1981), he argues "the courts have generally been solicitous of applications by public officials and agencies who represent a constituency with an interest in the matter."[55] Far from announcing such a general principle, however, the New Jersey Supreme Court in *Evesham*

specifically pointed out that the vice-chairman of the zoning board's intervention motion was filed "to intervene *individually* as a party plaintiff asserting *his status as a taxpayer and resident* of the municipality." *Evesham*, 86 *N.J.* at 298 (emphasis added). Because, contrary to Senator Lesniak's assertion, there is no general principle concerning officials and agencies who represent constituencies, the court gives no weight to his assertion. Because Lesniak is a Senator of the same Legislature that has delegated to the DEP the responsibility of pursuing NRD claims, *N.J.S.A.* 58:10-23.11a, the court is less inclined to allow him to intervene in this matter. Such an intervention would implicate separation of powers issues. Furthermore, as a legislator, he not only has the ability to use his position as a State Senator to urge his colleagues to prospectively change any flaws he currently finds in the NRD settlement process, but to also air concerns about the settlement in the many recognized public forums as part of the political process.

In conclusion, the court denies the Intervenors' motions for permissive intervention. Even under a liberal reading of *Rule* 4:33-2, the motions were not prompt and would unduly prejudice the original parties. To allow intervention at this stage would work against the very purpose of the rule's timeliness requirement, which is "to prevent last minute disruption of painstaking work by the parties and the court." *Metro. Dist.*, 865 *F.*2d at 6.

SUMMARY

***16** The court denies both the environmental groups' and Senator Lesniak's motions for intervention as of right and permissive intervention. The court denies the *Rule* 4:33-1 motion as to the environmental groups because the DEP adequately represents their interests. The court denies the *Rule* 4:33-1 motion as to Senator Lesniak because he lacks an interest or, alternatively, assuming he has an interest, because the DEP adequately represents that interest. The court denies the *Rule* 4:33-2 motions because they are not timely and granting them would unduly delay proceedings and prejudice the original parties.

The court is not saying that potential intervenors can never intervene to oppose a Spill Act settlement. However, the Intervenors here have done nothing to overcome the presumption of adequate representation that arises when they share the same ultimate goal with an original party. They have not demonstrated collusion, nonfeasance, or lack of notice of the opportunity for public comments. Everything they seek to do through their intervention motion has already been accomplished through their public comments. Furthermore, neither Exxon nor the State are opposed to allowing the Intervenors to serve as amici curiae. Intervenors can apply to brief and orally argue as amici so that they can address their concerns without unduly disrupting proceedings. To allow intervention, however, would unduly delay proceedings and prejudice the State and Exxon. For these reasons, the motions are DENIED WITHOUT PREJUDICE.

ORDER

THIS MATTER having come before the Court on the Motion to Intervene filed by New York/New Jersey Baykeeper, the New Jersey Sierra Club, Clean Water Action, Delaware Riverkeeper, Delaware Riverkeeper Network, Environment New Jersey, Natural Resources Defense Council, and New Jersey Audubon (collectively, the "Putative Intervenors"), the Court having considered the papers presented and having heard the oral arguments of counsel, and good cause having been shown;

It is on this *13th* day of *July*, 2015 ORDERED that the Putative Intervenors' motion to intervene is hereby DENIED. for the reason set forth in the attached on & filed written decision

Counsel for Plaintiff shall serve a copy of this Order upon all counsel within five (5) days of receipt of this Order.

IT IS SO ORDERED:

<<signature>>

MICHEL J. HOGAN, J.S.C. Ret. on Recall

ORDER

THIS MATTER having come before the Court on the Motion for Leave to Intervene filed by Raymond J. Lesniak, individually and as a New Jersey State Senator, 20th Legislative District (Union), the Court having considered the papers presented and having heard the oral arguments of counsel, and good cause having been shown;

It is on this *13 th* day of *July*, 2015 ORDERED that Raymond J. Lesniak's motion to intervene is hereby DENIED. for the reasons set forth in the attached & filed written decision

Counsel for Plaintiff shall serve a copy of this Order upon all counsel within five (5) days of receipt of this Order.

IT IS SO ORDERED:

<<signature>>

MICHEL J. HOGAN, J.S.C., Ret. on Recall

Footnotes

1 The complaints have since been amended and consolidated under the current docket number: UNN-L-3026-04 (consolidated with UNN-L-1650-05).

2 Pursuant to a January 11, 2006 case management order, the case was bifurcated between the soil and sediment claims and the groundwater and surface water claims.

3 Exxon and the State voluntarily entered into these ACOs, and their provisions are not at issue in both the underlying litigation and these intervention motions.

4 Both parties filed six pre-trial Rule 104 Motions to bar the testimony of the other sides' expert witnesses. Because this was a bench trial, the parties agreed to allow the experts to testify at trial. After trial, the court was to decide these 104 motions and include them in its opinion. In the interests of judicial economy, the parties agreed to this format because this was a bench trial, and thus, there was less chance of prejudice if the judge heard testimony he ultimately decided not to admit.

5 Proposed Settlement, Pg. 13.

6 *Id.* at 14-20.

7 *Id.* at 20-21.

8 *Id.* at 23.

9 *Id.* at 25.

10 *Id.* at 25-26.

11 Both local newspapers and national outlets such as the Philadelphia Inquirer, the New York Times, and Comedy Central's "The Daily Show" have run stories on the proposed settlement.

12 Brief Supporting Environmental Groups Motion to Intervene [hereinafter Environmental Groups Brief"], Pg. 1.

13 *Ibid.*

14 *Id.* at 7.

15 *Id.* at 9.

16 *Ibid.*

17 *Id.* at 11.

18 *Id.* at 14.

19 *Id.* at 14-15. Although this was their original stated intent, the environmental groups appear to have changed and expanded the reasons they seek to intervene. *See infra* Section III (discussing expansion of purpose in their reply brief and at oral argument).

20 Brief Supporting Senator Lesniak's Motion to Intervene [hereinafter Senator Lesniak's Brief"], Pg. 2.

21 *Id.* at 3.

22 *Id.* at 4.

23 Federal Rule of Civil Procedure 24(a)(2) states, "On timely motion, the court must permit anyone to intervene who claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."

24 Exxon argues that the Intervenors cannot have an interest in this litigation because they lack standing to have brought the suit in the first place. This argument, however, ignores that fact that the Environmental Rights Act gives "access to the courts by *all* persons interested in abating or preventing environmental damage." *Twp. of Howell v. Waste Disposal, Inc.*, 207 *N.J. Super.* 80, 93 (App. Div. 1986). Private persons may also bring common law claims, such as the common law trespass and strict liability claims in this case.

25 Environmental Groups Brief at 2.

26 *Ibid.*

27 *Ibid.*

28 *Id.* at 2-3.

29 *Id.* at 3.

30 *Ibid.*

31 *Id.* at 4.

32 *Ibid.*

33 *Ibid.*

34 *Ibid.*

35 *Id.* at 5.

36 *Ibid.*

37 *Ibid.*

38 *Ibid.*

39 Senator Lesniak's Brief at 2.

40 *Ibid.*

41 *Id.* at 3.

42 *Ibid.*

43 Although the court finds that Senator Lesniak does not have a *Rule* 4:33-1 interest, *see supra* Part II.A., this Section was written with his intervention as of right motion in mind. The legal principles stated in this Section apply to both his and the environmental groups' motions. Even if Senator Lesniak had "an interest relating to the property or transaction which is the subject of the action and [was] so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest," *N.J. Ct. R.* 4:33-1, his intervention as of right motion would still fail because the DEP adequately represents his interests.

44 These cases were all cited by the environmental groups. The section of Senator Lesniak's brief on intervention as of right only cited two cases for general *Rule* 4:33-1 propositions.

45 Environmental Groups' Brief at 14-15.

46 Senator Lesniak's Brief at 1.

47 Environmental Groups' Brief at 2-3, 5, 8-9, 11.

48 Although it was a permissive intervention motion, the court still discussed the adequate representation prong. *Acushnet River*, 712 *F. Supp.* at 1022-23, 1024.

49 Oral Argument Transcript, Lesniak, Pg. 7, Ln. 2-8; Oral Argument Transcript, Kyle, Pg. 44, Ln. 2-5; Oral Argument Transcript, Kyle, Pg. 47, Ln. 23 – Pg. 48, Ln. 15.

50 Environmental Groups' Brief at 1.

51 *Id.* at 7-8; Senator Lesniak's Brief at 3.

52 The federal counterpart to *Rule* 4:33-2 states, "On timely motion, the court may permit anyone to intervene who has a claim or defense that shares with the main action a common question of law or fact." *Fed. R. Civ. P.* 24(b)(1).

53 Environmental Groups' Reply Brief at 9-10.

54 Oral Argument Transcript, Kyle, Pg. 47, Ln. 17-19; *Id.* at Pg. 55, Ln. 10-11; *Id.* at Pg. 82, Ln. 1-12.

55 Senator Lesniak's Brief at 8.

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