MONTCLAIR KIDS FIRST;
JONATHAN BONESTEEL,

Plaintiffs,

vs.

SEAN SPILLER,

Defendant.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: ESSEX COUNTY
DOCKET NO.: C-59-15

A Civil Action

Montclair Parents' Brief in Opposition to Defendant Spiller's Motion to Dismiss

Shavar D. Jeffries
Jewel M. Watson
Kelly A. Jauregui
LOWENSTEIN SANDLER LLP
65 Livingston Avenue
Roseland, New Jersey 07068
973.422.6432 (telephone)
973.422.6433 (fax)
Attorneys for Plaintiffs Montclair Kids First and Jonathan Bonesteel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGES

CASES

STATUTES

RULES

REGULATIONS

PRELIMINARY STATEMENT

Plaintiffs Montclair Kids First ("MKF"), a coalition of parents and Montclair community members seeking to improve public-school outcomes for kids, and Jonathan Bonesteel, a parent, taxpayer, and member of MKF who also brings suit in his own capacity (collectively "Montclair Parents"), challenge under state ethics laws the service on the Montclair Board of School Estimate ("BSE") of Defendant Sean Spiller. Spiller is the third most-senior official of the New Jersey Education Association ("NJEA"), and as a paid officer of the organization, is entrusted with a fiduciary obligation to advocate for the interests of the NJEA's members, overwhelmingly teachers but also other employees of school districts throughout the state, including virtually all school employees in Montclair. Since becoming Secretary-Treasurer in summer 2013, Spiller has worked hard, as one would expect, to fulfill his fiduciary and job-related obligations to his employer. After the NJEA's president declared the organization's opposition to the state's redesigned teacher-evaluation process, Spiller testified for the NJEA before the state board of education, calling for a moratorium on the state's implementation of the new system.[1] After the NJEA made clear that it wanted to eliminate the Partnership for Assessment of Readiness for College and Careers ("PARCC"),[2] a standardized test designed to measure student preparedness for post-secondary life, the results of which would be used to inform teacher evaluations, Spiller testified before the state legislature and spoke in other public venues opposing PARCC, making clear unambiguously that he was frustrated with PARCC "because [the NJEA's]

---

[1] *See, e.g.*, NJEA Secretary-Treasurer Sean Spiller, *Testimony before the State Board of Education* (March 5, 2014), available at http://www.state.nj.us/education/sboe/meetings/pubtest/2014/March/RoomA/Sean%20Spiller.pdf.

[2] *See, e.g.*, Michael Symons, *PARCC, Money at Issue in NJ Budget Talks*, available at http://www.courierpostonline.com/story/news/local/south-jersey/2015/03/30/parcc-money-issue-nj-budget-talks/70656208/ (NJEA president calling for PARCC's elimination).

members were frustrated."[3] After the NJEA began attacking the technological infrastructure required to implement PARCC,[4] Spiller protested that these new investments—determined by the state Department of Education to be in the best interests of kids—diverted resources from other priorities.[5] And after the NJEA decided to lobby the state to increase funding for school districts, Spiller did the same, complaining before the state budget committee that the state did not increase school funding,[6] regardless of budgetary or tax-burden implications.

At the same time that Spiller has been employed as the NJEA's third-in-command, he has also served as a member of the Montclair Board of School Estimate ("BSE"), a public office charged with setting Montclair's annual appropriation to its schools and, in so doing, adopting a school budget reflecting the Township's priorities concerning how taxpayer money ought to be spent. In addition to the conflicts associated with the fact that virtually all of the school employees who work for Montclair Public Schools are represented by the Montclair Education Association, the NJEA's local affiliate, Spiller has used his position on the BSE to pursue in Montclair the agenda he advocates for the NJEA statewide. While opposing the state's teacher-evaluation systems for the NJEA, Spiller likewise, as a BSE member, advocated for less test-based evaluations in Montclair, pushing most recently for Montclair Public Schools to abandon its current evaluation model and to use one that is less rigorous and evidence based.[7] At the

---

[3] *See, e.g.,* Chase Brush, *NJEA Rep Slams Hespe Testimony on PARCC Exams* (March 12, 2015), available at http://politickernj.com/2015/03/njea-rep-slams-hespe-testimony-on-parcc-exams-calls-it-frustrating/; *see also* Spiller Testimony on *The Real Cost of PARCC* (March 10, 2015), *available at* https://www.youtube.com/watch?v=PsdvTuYFlj0.

[4] *See, e.g. The PARCC Test Discussion,* https://www.youtube.com/watch?v=T_y7hBxAKi8&feature=youtu.be (12:10-13:25) (NJEA president attacking technology resources associated with PARCC)

[5] *See, supra* note 3, https://www.youtube.com/watch?v=PsdvTuYFlj0 (1:33-2:10).

[6] *See* Spiller Testimony Before State Budget Committee, available at http://www.njea.org/news/2015-03-10/njea-assails-christie-budget.

[7] *See, e.g.,* Certification of Jewel Watson, Exhibit B (Certification of Shelly Lombard, at ¶¶ 13-14).

same time that Spiller opposed for the NJEA the PARCC exam and the technology required to implement PARCC, Spiller, as a BSE member, questioned the district's use of PARCC, standardized tests, and PARCC-related technological investments repeatedly, even seeking to discontinue technology expenditures associated with PARCC implementation.[8] And while the NJEA sought increased state funding despite the state's deep fiscal crisis, Spiller, as a BSE member, introduced a resolution to the BSE, "implor[ing]" the state to increase funding.[9]

New Jersey law grants the public the right to the disinterested, independent service of public officials. Because the legitimacy of democratic government depends upon the public's confidence in its officials, New Jersey law holds its public officials to a high ethical standard, requiring them to be free not only of actual conflicts-of-interest but also of any business or personal interests that might potentially produce an appearance of a conflict. Here, Spiller quite evidently suffers under an actual conflict, but at the absolute minimum meets the broader appearance standard. As the NJEA's Secretary-Treasurer, he is paid to advance the economic interests of the NJEA's members, which includes the 1100 employees of the Montclair school district represented by the NJEA's Montclair affiliate. Indeed, Spiller's duties to the NJEA are so obvious that his counsel admits, in his motion to dismiss, that Spiller is an "advocate for teachers." Spiller Br. Supporting Motion to Dismiss at 3. Yet, as a BSE member, Spiller has a legal duty to dispassionately and independently represent and advocate for the people of Montclair and the children served by Montclair Public Schools, not teachers or any other particular interest group. It is self-evident that, at minimum, an appearance

---

[8] *See* Lombard Cert. at ¶¶ 13-14; *see also* Video Recording of Montclair Board of School Estimate Meetings, March 30, 2015 (questioning whether a technology consultant's contract ought to be discontinued) & March 31, 2014 (3:08-22:35) (interrogating school district on line-items largely involving technology investments).

[9] *See* Watson Cert., Exhibit A (March 23, 2015 Board of School Estimate Budget Workshop Packet and Hearing: Minutes of April 7, 2014 BSE Meeting).

of a conflict is triggered when a public official is a paid advocate for a particular interest group, and yet at the same time holds responsibilities to the public as a government official in which the interests of the official's employer are involved.

Undoubtedly because of the plain nature of the conflict-of-interest relating to Spiller's fiduciary obligations to the NJEA as an officer and public obligations to the residents and children of Montclair as a BSE member, Spiller's motion to dismiss is rife with bald mischaracterizations of the law and facts, reflecting either a misunderstanding of governing principles or an attempt to create uncertainty in the law where it does not exist.

- Spiller mischaracterizes basic notice-pleading and motion-to-dismiss standards, arguing extensively that MKF's claims should be dismissed because MKF did not identify seven members in its complaint, ignoring rudimentary rules of civil procedure that merely require a party to plead facts, which if true, sustain a claim. MKF pleads at least 65 members, which is more than the 7 required, and its allegations must be accepted as true for purposes of the motion to dismiss. Spiller has every right to uncover facts about MKF's membership in discovery, and MKF has in fact produced the requested information on the identities of at least seven members in response to Spiller's interrogatory request. So this issue—meritless in the first place—is in any case moot.

- Spiller mischaracterizes mandatory-joinder law, arguing that the Montclair Parents' complaint should be dismissed because the complaint does not name the BSE as a party. First, Spiller does not cite, let alone analyze, the applicable mandatory-joinder court rule (R. 4:28-1). That rule does not require joinder of a municipal body here, where plaintiffs challenge the ethical conduct of an individual official, not the conduct of the governmental entity itself. That is not to say that the BSE does not have a cognizable interest and might freely decide to join this matter under permissive-joinder doctrine. Moreover, even if the BSE was an indispensable party, the court rule is explicit that the remedy is not dismissal, but simply adding the BSE to the suit.

- Spiller mischaracterizes beyond recognition common-law ethics doctrine, arguing, without citing one supportive holding and ignoring over 20 years of state jurisprudence applying common-law ethics principles, that the Local Government Ethics Law of 1991 ("LGEL") pre-empts the common-law. The baselessness of this claim is evident not only in the fact that New Jersey courts—from the Supreme Court

to the Law and Chancery divisions—have routinely applied common-law ethics doctrine since the LGEL's passage, but the very case Spiller depends upon itself relies on the common law in holding an official disqualified from service.

- Spiller mischaracterizes the BSE, arguing falsely that it has no influence over the line-items in the school budget, and simply casts a vote either approving or disapproving the tax-levy amount. This argument belies not only the facts of the interactions of the BSE with Montclair Public Schools, where BSE members in fact do influence budget line-items, *see* Lombard Certification at ¶9, but also the explicit language of the state administrative code,[10] which not only permits but requires the BSE to make line-item budget cuts whenever it reduces the levy. In fact, the BSE made precisely such line-item cuts last year, with Spiller himself voting in favor of them.[11]

- Spiller mischaracterizes the Local Government Ethics Law ("LGEL")—shrinking the standards it articulates from general prohibitions on action in which the interests of a public official are involved or where the public might otherwise perceive a conflict-of-interest—into cramped, manufactured quarters that only prohibit public officials from "wrongly confer[ring] a *specific* benefit on a *particular* person or company." Spiller Br. at 14 (emphasis in original). This narrow standard, which is more akin to a criminal-law standard than the broader, aspirational purview of ethics law, has no grounding in state law, and it is thus unsurprising that Spiller cites no caselaw supporting it.

For these reasons, among others discussed more fully below, Spiller's motion to dismiss is meritless, and must be denied.

STANDARD OF REVIEW

The standards governing a motion to dismiss are well-settled. New Jersey is a notice-pleading state, so that a plaintiff is required to plead in her complaint merely a short, concise statement showing the complainant is entitled to relief. *See, e.g., Velop, Inc. v. Kaplan*, 301 N.J. Super. 32, 56 (App. Div. 1997); *see also* R. 4:5-2. In considering a motion to dismiss, courts therefore must accept as true the complaint's allegations, and construe all inferences in favor of the pleader, as the

[10] *See* N.J.A.C. 6a:23a-9.7(c)(1)(i)(2015).
[11] *See* Watson Cert. at Exhibit A (Board of School Estimate Budget Workshop and Hearing: Minutes of April 7, 2014 BSE Meeting, Section XI).

question is not whether the plaintiff can prove the allegations, but simply whether the allegations on their face suggest a cause of action. *See, e.g., Banco Popular N. Am. v. Gandhi*, 184 N.J. 161, 166 (2005); *see also DiCristofaro v. Laurel Grove Memorial Park*, 43 N.J. Super. 244, 252 (App. Div. 1957) (providing that courts, considering a motion to dismiss, must evaluate whether a cause of action "may be gleaned even from an obscure statement of a claim"). The evidentiary sufficiency of pleadings, of course, is a matter to be evaluated after discovery and, if necessary, trial. *See id.* For these reasons, courts must approach dismissal motions "with great caution" and may grant them "in only the rarest of instances." *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 771-72 (1989) (emphasis added).

ARGUMENT

I. Montclair Kids First Pled That it Has More Than Seven Members; That Suffices for Notice Pleading and Dismissal-Motion Standards. This Issue, Furthermore, is Moot as MKF Has Disclosed the Identities of Seven Members in Response to a Discovery Request.

As just discussed, decades-long notice-pleading standards simply require a party to allege facts, which if proven true, suggest a cause of action. *See, e.g., Banco Popular*, 184 N.J. at 16. MKF, in its Second Amended Complaint, alleges that it has at least 65 members, which exceeds the seven-person requirement for voluntary unincorporated associations. *See* Second Amended Complaint, Verification of Jonathan Bonesteel, at ¶1; *see also* Second Amended Complaint at ¶1. For purposes of notice-pleading and the motion to dismiss, which requires the court to assume the facts alleged in the pleading as true and to grant MKF the benefit of all reasonable inferences, MKF's pleading plainly suffices. *See id.*; *see also Printing Mart*, 116 N.J. at 771-72; *cf.* New Jersey Practice and Pleading Forms § 69:17 (2015) (providing, for pleading purposes, a voluntary unincorporated association need only plead its total membership, and need not identify by name individual members). While it is true

that in the preliminary-injunction hearing the court expressed concern about the original complaint's failure to specifically allege the number of MKF's members, MKF corrected that ambiguity by amending its complaint to specify its membership number. In discovery, Spiller has every opportunity to obtain further information about MKF's membership and to challenge the sufficiency of its membership, as appropriate. For pleading purposes, however, MKF is simply required to allege a sufficient number of members that, if true, would establish standing, and it has done so.

Spiller spills substantial ink arguing that MKF seeks anonymously to pursue its claims in court, and based upon this mischaracterization of MKF's position, takes an excursion into arguments of privacy law and due-process considerations relating to open court proceedings. *See* Spiller Br. at 6-8. MKF makes no such claim about anonymously pursuing its claims here, and has never suggested as much. Spiller apparently relies on a reference on MKF's public website that the identities of MKF's members will not be disclosed by MKF unless the members themselves decide to identify themselves. *See* MKF "Frequently Asked Questions, http://www.montclairkidsfirst.org/faqs.html (last visited April 22, 2015). Yet MKF is aware fully of its obligation, for purposes of this lawsuit, to prove that it has at least seven members and never suggested otherwise. Recognizing all along that proof of this allegation is subject to discovery, MKF, in response to an interrogatory, has produced information to Spiller identifying seven of its members and thus this issue—meritless in any case as a matter of notice pleading and liberal standards governing dismissal motions—is moot.

Finally, Spiller, grasping for straws, argues that the "proper course" for associational plaintiffs is to name at least seven members of the organization as individual plaintiffs alongside the association. *See* Spiller Br. at 8. Spiller cites no provision of law even implying this approach is favored, let alone required, for the

simple reason that none exists. Spiller relies upon *Rocky Hill Citizens for Responsible Growth*, yet *Rocky Hill Citizens* does not at all address pleading requirements for unincorporated associations, let alone suggest that the "proper course" is for an association to bring its claims alongside seven or more members as individual plaintiffs. *See* 406 N.J. Super 384 (App. Div. 2009). *Rocky Hill* instead considers whether the approval of a residential development project was appropriate under various legal provisions. *Rocky Hill* is nothing more than an example of where the plaintiffs there decided to name several associational members as individual plaintiffs; just as in myriad other cases corporate or associational entities pursue their claims without seven or more members also pursuing separate, individual claims. Obviously, any number of MKF's members could decide individually to challenge the ethics of Spiller's service on the BSE, but that decision has no bearing on the association's standing.

For these reasons, Spiller's claim that the complaint must be dismissed for failing to identify seven members is unavailing: notice pleading does not require as much, and furthermore the argument is moot as MKF has produced information identifying seven of its members in discovery.

II. Neither the Board of School Estimate nor the Montclair Township Council is Subject to Mandatory Joinder Because Montclair Parents' Complaint Directly Challenges Spiller's Individual Ethical Conduct, not the Actions of Either Body. Even if They Were, the Rules Require Joinder, not Dismissal.

Spiller argues that Montclair Parents' complaint must be dismissed because it fails to join the Board of School Estimate, which Spiller argues is an indispensable party. *See* Spiller Br. at 10. Spiller ignores the governing court rule applicable to mandatory-joinder claims—R. 4:28-1—and instead rests his entire argument on a 75-year old chancery decision that Spiller claims holds categorically that municipalities are always indispensable parties whenever a lawsuit might

invalidate official action. Under the governing court rule, however, the BSE is not subject to mandatory joinder, and the sole case Spiller relies upon does not at all require municipalities to be joined whenever an action might cause a court to invalidate official action. Moreover, the express terms of the civil-practice joinder rule specifically require joinder—not dismissal—even in those instances where joinder is mandatory.

First, Rule 4:28-1 governs mandatory joinder, and requires joinder in three circumstances: 1) when a court cannot provide complete relief to existing parties without the un-joined party; 2) when the un-joined party would be practically impaired from protecting its interests in the absence of joinder; and 3) when non-joinder would leave an existing party subject to inconsistent obligations because of the un-joined party's interest. R. 4:28-1(a). The rule is crystal clear, moreover, that if an un-joined party is necessary under R. 4:28-1(a), "the court shall order the person made a party." The court may consider dismissal under R. 4:28-1(b) only if the un-joined party cannot be served with process.

Here, neither the first nor third provisions of the court rule apply, because the court may grant the relief Montclair Parents seek—principally a judgment declaring that Spiller's BSE service violates ethics laws; an injunction removing Spiller from continued service on the BSE; and the ordinary remedy of nullification for public action involving an ethical infraction by an official—without the BSE's joinder. Likewise, because Montclair Parents' claims concern Spiller's individual ethical obligations, neither the parents nor Spiller have any claims against the BSE generating a risk of multiple, inconsistent obligations.

Finally, concerning the remaining provision, non-joinder of the BSE would not "impair or impede" the BSE's ability to protect any relevant legal interests it has. As a preliminary matter, Spiller fails to describe any protectable interest of the BSE in the outcome of this litigation. Spiller initially argued that the

Township, not the BSE, was an indispensable party because of its interest in its power to appoint its own members. *See, e.g.,* Spiller Brief in Opposition to Order to Show Cause at 7 n. 2. Spiller did not repeat this argument in his motion to dismiss, perhaps realizing that whether Spiller adheres to his ethical obligations has no bearing on the Township council's ability to appoint its members: ethics laws require recusal or disqualification when individuals experience relevant conflicts and operate independently of the powers of any particular body to appoint officials. Similarly, the BSE itself did not appoint Spiller and any interest it has in his service—again Spiller articulates none here—is independent of Spiller's individual obligation to serve consistent with ethics principles. Put simply, win or lose, the BSE retains the power to appoint its members.

Ignoring governing Rule 4:28-1, Spiller makes one argument for mandatory joinder, relying on a 1941 chancery court decision for the proposition that municipalities must be joined whenever municipal action might be invalidated. Spiller Br. at 10. First, there are no categorical, mechanical rules governing compulsory-joinder: mandatory joinder is not an inflexible formula; it is "a rule of convenience" to be applied at the court's discretion. *See Empower our Neighborhoods v. Guadagno*, No. 3148-11, 2012 WL 4844394, *30 (N.J. Law Div. Oct. 3, 2012). Courts, moreover, regularly hear challenges involving official actions taken by municipalities (or municipal officials) without requiring that the municipalities or their agents be joined. *Id.* at *31 (holding that county and municipal clerks were not indispensable parties in a challenge to an election law requiring circulators of recall petitions and local partisan party candidate nominating petitions to be registered voters in the district where the candidate is running for public office); *New Jersey Prot. & Advocacy, Inc. v. New Jersey Dep't of Educ.*, 563 F. Supp. 2d 474, 492 (D.N.J. 2008) (holding under the Federal Rules of Civil Procedure, which R. 4:28-1 is modeled after, that New Jersey school districts

were not necessary parties in litigation by statewide advocacy groups against the New Jersey Department of Education, even though the school districts were responsible for providing the services at issue); *Suburban Trust Co. v. Nat'l Bank of Westfield*, 211 F. Supp. 694, 699 (D.N.J. 1962) (holding a municipal official need not be joined even though the action might lead to the invalidation of municipal action).

Finally, the single case Spiller cites in support of his argument, *Woulfe v. Atl. City Steel Pier Co.*, neither stands for the broad, categorical rule argued by Spiller nor supports a finding of mandatory joinder here. Spiller properly describes the case as dealing with Atlantic City's allegedly unlawful issuance of a mercantile license, and whether it was mandatory for the city to be joined to the original action against the licensee alone. Spiller Br. at 10. But Spiller fails to point out, however, that Atlantic City had a contractual right as a "trustee for the public" in the licensing issues involved. *Id.* at 513. This falls within the contours of traditional mandatory-joinder standards requiring joinder when a non-joined party has a contractual interest inextricably related to the relief sought by a plaintiff. This obviously is not the case here, as Spiller's ethical obligations under the common law, LGEL, and municipal law are personal to him.

For all of these reasons, Spiller's attempt to dismiss Montclair Parents' complaint for failing to join the BSE must be rejected. First, the BSE is not a necessary party, as Montclair Parents' claims concern the ethical conduct of Spiller individually, not the conduct of the BSE. It is true that New Jersey law generally requires nullification of public action involving an official with an ethical conflict, but as discussed above that by itself does not require joinder. Of course, the BSE is free to join as a matter of permissive joinder if it so chooses and the court deems it appropriate. *See* R. 4:29-1. And, finally, even if this Court finds that the BSE is a necessary party, court rules are explicit that the remedy is joinder of that party, and that dismissal may be considered only when the un-joined party cannot be served

with service, which is not the case here. *See* R. 4:28-1(a) ("If the [unjoined person] has not been so joined, the court shall order that the person be made a party."); R. 4:28-1(b) (providing dismissal is appropriate only if process cannot be served on the un-joined party). Accordingly, Spiller's motion to dismiss for failing to join necessary parties must be denied.[12]

III. Montclair Parents' Common Law Ethics Claims are Plainly Not Preempted by Common Law.

Spiller argues that Montclair Parents' common-law ethics claims are preempted by the Local Government Ethics Law ("LGEL") and therefore must be dismissed. This claim is completely baseless. New Jersey courts—from the Supreme Court to the trial courts—have routinely applied common-law ethics principles to the conduct of public officials since the LGEL's passage in 1991. Indeed, the Supreme Court, applying common-law claims in addition to statutory LGEL claims, held in *Thompson v. Atlantic City* that the LGEL supplements the common law, not, as Spiller argues, replaces it. *See* 190 N.J. 359, 375 (2007) (providing that common-law ethics rules are "supplemented" by the Local Government Ethics Law"); *see also Randolph v. City of Brigantine Planning Bd.*, 405 N.J. Super. 215, 226-28 (App. Div. 2009) (providing that courts consider common law and the LGEL in evaluating conflict claims); *Shapiro v. Metz*, 368 N.J. Super. 46, 52 (App. Div. 2004) (holding, when evaluating conflicts regarding municipal officials, courts "look to the Ethics Law as well as to the common law"); *see also Speroni v. Borough of Point Pleasant Beach*, No. 3135-12, 2013 N.J. Super. Unpub. LEXIS 1872, *64-*65 (Law Div. June 17, 2013). (same). New Jersey law is

[12] Spiller claims that the complaint should also be dismissed because of failure to file within the 45-day action concerning prerogative writs. To that extent that rule is applicable to ethics violations of individual public officials, it is inapplicable to Montclair Parents' claims concerning the FY 2016 budget, which was just passed in early April, as well as to Montclair Parents' claims seeking Spiller's removal from the BSE and a declaratory judgment finding him in violation of the ethics laws involved here.

clear that common-law ethics claims exist alongside the LGEL and are not preempted by it. Indeed, the very case Spiller relies upon as supporting his preemption argument—*Wyzykowski v. Rivas*—not only fails to support the proposition that the LGEL preempts the common law, but in fact relies specifically on common law ethics principles in finding disqualified the official at issue. *See* 132 N.J. 509, 526 (1993) (holding, after an extensive analysis of common-law conflict-of-interest rules, the official at issue disqualified under the common law).

Moreover, no New Jersey court has ever found the common-law preempted by the LGEL in light of the absence of evidence that the legislature intended to do so in enacting the LGEL. New Jersey law is plain that common law rights are preempted by statutory rights only if the legislature explicitly says so. *See, e.g., In re: Lead Paint Litigation*, No. 1946-02T3, 2005 WL 1994172 *1, *5 (N.J. App. Div. 2005). ("Unless there is a clear legislative expression to the contrary, a statutory right or remedy does not preempt an existing common law right or remedy; but rather, is deemed to be additional to or cumulative of the latter."); *see also Blackman v. Iles*, 4 N.J. 82, 89 (1950). Nowhere did the Legislature express that the LGEL should supersede common law, and for that reason New Jersey courts for over 20 years have continued to apply common-law standards alongside the LGEL.[13]

In short, New Jersey law, expressed most recently by the Supreme Court just a few years ago, is explicit that the LGEL supplements the common law; it does not replace it. Because binding decisions already dispose of Spiller's common-law

---

[13] Spiller cites a product-liability (*Canty*) and Uniform Commercial Code (*Psak*) case in support of his claim that the LGEL pre-empts common law. Spiller Br. at 11. The product-liability case involved a statute that, according to the court, combined "virtually all common law tort claims in New Jersey ... into a single theory of recovery." 296 N.J. Super. 68, 79 (Ch. 1996). No language in the LGEL even implies an intent to merge the common law with the LGEL in this way. Similarly, the *Psak* case involves the UCC, a national model commercial code intended to facilitate uniform commercial standards across the country. The LGEL self-evidently is not enacted as part of a national effort to foster common interstate standards.

preemption argument, the Court must deny Spiller's attempt to dismiss Montclair Parents' common-law claims.

IV. Montclair Parents Allege Facts That, if True, Plainly Establish an LGEL Violation.

Spiller, again mischaracterizing both law and facts, claims that Montclair Parents fail to allege a LGEL violation 1) because the LGEL only prohibits public officials from conferring "a *specific* benefit on a *particular* person or company," Spiller Br. at 14 (emphasis in original), and 2) because Spiller allegedly has no power to influence specific line-items in the school budget, he has no power to engage in conduct that might benefit his employer, the NJEA. Spiller Br. at 16. Both of these points are unavailing, and Spiller's attempt to dismiss Montclair Parents' LGEL claims must be rejected.

First, ethics standards under the LGEL, like the common law, are designed not to ferret out corruption or criminal activity, but are aspirational, intended to provide a set of standards ensuring that public officials serve public rather than private interests. The Supreme Court has been clear that the public has a "right to the disinterested service" of public officials, and that public officials owe an obligation of "undivided loyalty" to the public good. *See Thompson*, 190 N.J. at 374. Ethics rules are designed not only to ensure public officials fulfill these commitments to serve the public good, but also to promote public confidence in government. *See* LGEL, N.J.S.A. 40A:9-22.2 (2015) (providing that robust conflict rules are required because the "vitality and stability of representative democracy depends upon the public's confidence in the integrity" of its officials). Conflict duties thus prohibit public officials not only from acting while subject to actual conflicts, but also while subject to conflicts that might potentially be perceived by the public. *See Thompson*, 190 N.J. at 374; *see also Randolph*, 405 N.J. Super. at 226 ("[I]t is not simply the existence of a conflict that may be cause to overturn an

action of a public official, but also the appearance of a conflict."); *see also* LGEL, N.J.S.A. 40A:9-22.2(c) (providing that confidence in government is "imperiled" when "the public perceives a conflict between the private interests and the public duties" of officials).

Ethics rules therefore do not require a public official to act in fact on the basis of a private interest; instead, it is sufficient if there is a sufficient potential for conflict, as that potential triggers an appearance problem requiring disqualification. *Thompson*, 190 N.J. at 374 (holding "it is the potential for conflict, rather than proof of actual conflict or of actual dishonesty," that requires disqualification); *Randolph*, 405 N.J. Super. at 226 (providing that an appearance of a conflict requires disqualification even if no actual conflict exists). New Jersey courts, furthermore, interpret ethics standards liberally: as the Law Division recently held in *Speroni*, courts must not engage in "too much refinement" to uphold potentially unethical conduct, given a public official's duty to act in a way that "beget[s] no suspicion of the pureness and integrity of his action,". *See Speroni*, No. 3135-12, 2013 N.J. Super. Unpub. LEXIS 1872, at *69 (quoting *Aldom v. Borough of Roseland*, 42 N.J. Super 495, 502 (App. Div. 1956)).

The LGEL's express terms, moreover, prohibit much more than actions designed to confer specific benefits on particular individuals. Several LGEL provisions pled by Montclair Parents prohibit business or personal involvements that might trigger an appearance of a conflict: these provisions prohibit officials from engaging in any business activity that "is in substantial conflict" with public duties; from acting on matters where the official has a financial or personal interest "that might reasonably be expected to impair his objectivity"; and from undertaking any employment or service, paid or not, that might "prejudice his independence of judgment" in performing public duties. *See N.J.S.A.* 40A:9-22.5 (a, d-e) (2015).

Here, Montclair Parents plead facts that, if true, plainly establish an LGEL violation, and therefore the motion to dismiss the parents LGEL claims must be denied. First, Spiller is a paid officer of the NJEA, entrusted with a fiduciary obligation to fight for the interests of the NJEA's members, which includes 1100 Montclair Public School employees represented by the NJEA's Montclair affiliate. Indeed, Spiller admits in his motion to dismiss that he is an "advocate for teachers," Spiller Br. at 3, which is self-evident given that he is paid by his employer to do just that—advocate for the economic and professional interests of the teachers and other school employees represented by the NJEA. And Montclair Parents allege that such advocacy for the employees he is paid to represent is precisely what he has done. When, for example, the NJEA opposed more rigorous teacher evaluations adopted by the state and implemented in Montclair, Montclair Parents claim Spiller used his position on the BSE to push Montclair Public Schools to discontinue use of these teacher-evaluation models. *See, e.g.,* Lombard Certification. When the NJEA opposed the PARCC assessments, Montclair Parents allege Spiller used his position on the BSE to attempt to undermine investments in Montclair in PARCC readiness. *See supra.* When the NJEA advocated for the state to spend more money on public education (while also demanding full pension payments), even while the state experienced a fiscal crisis, Spiller introduced a resolution before the BSE imploring the state to increase school-district funding. *See supra.* And while Spiller engaged in these activities, he also voted annually to adopt a budget, the overwhelming majority of which was distributed to the 1100 members of his employer's local affiliate—monies distributed based upon a contract that the NJEA itself negotiated. *See, e.g.,* George Wirt, *Montclair BOE Hires Labor Negotiator* (December 6, 2011), available at http://www.northjersey.com/news/montclair-boe-hires-labor-negotiator-management-consultant-1.334972 (quoting vice-president of Montclair school board

describing NJEA as negotiating the labor contract for the district's employees represented by the NJEA's Montclair affiliate)

Spiller seeks to avoid these obvious, self-evident conflicts by claiming, falsely, that the BSE has no power over budget line-items, and instead merely casts a vote on the total levy amount. First, even if that were true, which it is not, the state's liberal ethics rules would still require disqualification because his paid, fiduciary obligations to the NJEA would still trigger an appearance that his vote on the levy amount is influenced by his private business duties to the NJEA.

Even more, this point is in any case immaterial because New Jersey law not only permits but in fact requires the BSE to make line-item cuts to the budget whenever it reduces the levy amount. *See* N.J.A.C. 6a:23a-9.7(c)(1)(i). In fact, just last year, Spiller voted on specific line-item budget cuts after the BSE reduced the levy amount. *See* Watson Cert. at Exh. A. In addition to this formal line-item authority, Montclair Parents allege that BSE members also influence budget line-items as part of the BSE's communications with the school district as part of the budget-approval process. The BSE meets with school-district officials both in public settings and in smaller groups in private in advance of the BSE's public hearings. In these settings, BSE members question school-district officials on particular line items, and often the school district amends the budget based upon the views of BSE members or the questions raised by BSE members. *See* Lombard Cert. at ¶9. In both the formal manner codified by administrative code and in the normal course of the BSE's deliberations on the particular items in the budget, the BSE's members, contrary to Spiller's claims, have the power to influence particular budget line-items.

Spiller, finally, cites two decisions—an Appellate Division case (*Schulman*) and an administrative decision of the Local Finance Board—for the proposition that he is protected from disqualification because the school employees at issue in these

decisions were permitted to vote on school budgets where they voted on the entire budget and were not making decisions related to their specific job. Spiller Br. at 14-15. Spiller argues that these cases provide that as long as he is voting on the whole budget rather than particular line-items, that ethics rules do not require his disqualification from the BSE. Spiller Br. at 16.

First, as discussed above, Spiller mis-states the facts of the BSE's role, as it has formal line-item power as well as the ability to influence line-items through its ongoing communications with district officials. And, in fact, Spiller has used his position on the BSE precisely to influence the budget in ways that reflect the interests of his employer, the NJEA.

Second, the cases do not stand for the proposition Spiller suggests. *Schulman* and the Local Finance Board ("LFB") decision rely not on a general principle finding the absence of ethics violations when a school employee votes on the entire budget as opposed to a particular line-item, but instead on a carve-out statute that specifically exempts school employees from disqualification by virtue of their school-district employment. *See Schulman v. O'Reilly-Lando*, 226 N.J. Super 626, 629 (App Div. 1988) (concluding, because the "situation fits within the literal terms of the statute," the statutory carve-out of N.J.S.A. 18A:6-8.4 exempts a school employee from disqualification for conflicts arising solely from their employment by the district). Indeed, the *Schulman* court expressed its concern with the potential ethical implications of a school employee voting on a school budget, but felt it had no choice because of the express terms of the school-employee carve-out statute. *See id.* ("While we are not insensitive to these imprecations as a matter of policy, we are restrained by the reality that the policy decision has been made by the legislature."). And the administrative Local Finance Board decision—which by its terms applies only to the particular case—emphasizes that, even for school employees, the exemption does not apply to school staff who obtain special benefits

beyond mere employment by the district. *See LFB Advisory Opinion LFB-95,001* (enclosed with Komuves Certification in Support of Spiller's Motion to Dismiss), at pgs. 2-3.

Here, the statutory carve-out by its express terms applies only to school employees and only to conflicts associated with school-district employment in and of itself, not conflicts triggered by other business or personal activities. Montclair Parents' ethics claims are not based on Spiller's employment by a school district, so the school-employee carve-out is thus inapplicable by the statute's express terms. Spiller, moreover, is not an individual nurse or teacher passively receiving a check along with every other employee as part of an omnibus budget; he is the third most-senior official of one of the state's most powerful advocacy organizations, with an express fiduciary mandate to fight broadly for the economic interests of all NJEA members—including the 1100 Montclair Public Schools employees represented by the NJEA's local affiliate—on wide-ranging matters from performance evaluations to standardized assessments to funding increases.

In sum, Spiller's claim that Montclair Parents have failed to allege a claim under the LGEL is simply without merit. The LGEL prohibits even the potential for a conflict, and plainly Spiller's employment as an NJEA officer and admitted "advocate for teachers," Spiller Br. at 3, at minimum establishes an appearance of a conflict when Spiller at the same time is actively participating in BSE business that relates to the same subject matter he is paid to advance as an NJEA officer. The ethical problem here is exacerbated given the BSE's power to formally make line-item appropriations and to informally influence line-item expenditures—authority that Spiller has in fact used to advocate on the BSE for the same policies concerning teacher evaluations, standardized tests, and school funding, among other matters, that he is paid to advance as an NJEA officer. Finally, the statutory carve-out for school employees, which applies only to alleged ethical conflicts triggered by district

employment in and of itself, is inapplicable here, where the conflicts at issue do not arise from district employment. For these reasons, Spiller's attempt to dismiss Montclair Parents' LGEL claims must be rejected.

V. The Primary Jurisdiction Does Not Require Montclair Parents to Bring Their Claims to the Local Finance Board.

Spiller argues that because Montclair Parents fail to name the BSE that it cannot obtain nullification of the BSE's action on the FY 2016 budget, and thus may only seeks Spiller's removal. Spiller then argues further that individual actions seeking the removal of an official from a public position must be brought to the Local Finance Board ("LFB") under the primary-jurisdiction doctrine. First, for the reasons discussed above, Montclair Parents need not name the BSE in order for this Court to nullify BSE action tainted by Spiller's ethical infractions and, even if they did, the mandatory-joinder rule requires the simply remedy of joinder.

In addition, no case law suggests that even in an action only seeking prospective relief—a declaratory judgment and the official's removal—that plaintiffs must exhaust the administrative remedy of the LFB. For over twenty years since the LGEL's enactment, courts have entertained direct actions to enforce the statute, and have never even suggested that exhaustion is required; this court is bound by these decisions. *See, e.g., Shapiro*, 368 N.J. Super. at 46; *Speroni*, No. 3135-12, 2013 N.J. Super. Unpub. LEXIS 1872, at *64-*65. Moreover, the LFB only has jurisdiction over LGEL claims, not common law claims, and resolving the issues involved here, as they affect the expenditure of funds affecting schools and children, require a review more expedient than what the LFB can offer. New Jersey courts, moreover, have applied ethics standards to public officials for several decades, and so this is not an area requiring any special expertise on these matters that the LFB might purport to have. Indeed, even concerning local budget matters—an area plainly within the core expertise of the LFB—the Appellate Division held that the

primary-jurisdiction doctrine does not apply where claims outside of the LFB's jurisdiction are at issue and the matter requires expedient review. *See Rumana v. County of Passaic*, 397 N.J. Super. 157, 174-75 (App. Div. 2007) (rejecting primary-jurisdiction doctrine claims where court has power to issue a "rapid, thorough, complete, and impartial determination").

VI. Montclair Parents Claims under the Municipal Code are not Pre-empted.

Despite twenty years of cases applying the LGEL, Spiller, relying on nothing more than an Attorney General advisory opinion from 1992, contends that Montclair Parents' claims under the Montclair Code of Ethics are pre-empted by the LGEL because they were enacted before the LGEL's passage in 1991. First, as a matter of simple fact, Spiller is wrong: Montclair re-promulgated its conflict-of-interest ordinance requiring the disqualification of local officials on matters "involving" their "financial or personal interest" in October 2012, over twenty years after the LGEL's passage. *See* Watson Cert. Exh. C. In fact, Spiller himself voted in favor of the re-codified ethics ordinance. *Id.* Because Spiller's argument rests on his claim that the ordinance pre-dates the LGEL, Spiller Br. at 18-19, his claim fails for this reason alone.

Moreover, one year after the Attorney General issued the advisory opinion, the New Jersey Supreme Court in *Wyzykowski* recognized, under the LGEL, that "local government bodies have the authority to adopt higher standards of ethics for local officials." 132 N.J. at 530. Indeed, the *Wyzykowski* even suggested that a municipal body could require an official to forego certain protections provided by the LGEL to represent herself on personal matters before public bodies. *Id.* Furthermore, merely a few years ago in *Thompson*, the Supreme Court applied municipal-ethics principles, alongside the common law and LGEL, in finding a municipal official had committed ethical infractions. *See Thompson*, 190 N.J. at

376; *see also Ridgefield v. Ridgefield Zoning Bd. of Adjustment*, No. 1731-07, 2010 WL 2557759 *1, *10 (N.J. App. Div. 2010) (applying municipal-code ethics principles to claim of a conflict of interest). While it is true that the LGEL specifies certain processes if municipalities decide to establish their own ethics board, the law does not suggest that citizens may bring an equitable action to enforce a municipality's own ethics laws only if the municipality promulgated an ethics board under the LGEL, and no New Jersey court has so ruled.

For these reasons, Spiller has not shown that Montclair Parents' municipal-code claims are preempted, and thus his attempt to dismiss them must be rejected.

VII. The Ethics Claims Here at Issue are Protected Rights Under the New Jersey Civil Rights Act.

Without citing relevant case law or making an affirmative argument, Spiller simply declares that the ethics claims here at issue are procedural and not substantive for purposes of the New Jersey Civil Rights Act ("CRA"). On the contrary, the ethics claims here at issue meet the prevailing state Supreme Court standards defining the nature of the "substantive" rights protected by the CRA. Just last year, after highlighting that the CRA does not define the kind of "substantive rights" it encompasses, the state Supreme Court emphasized that the substantive rights contemplated by the CRA are "broad in [their] conception." *See Tumpson v. Farina*, 218 N.J. 450, 473 (2014). The court then announced a three-part test to evaluate whether a right is substantive and thus within the purview of the CRA: 1) whether the right at issue is intended to confer a benefit on plaintiffs; 2) whether the right is too vague to enable judicial enforcement; and 3) whether the right imposes a binding obligation on the defendant. *Id.* at 477 (applying three-part test, derived from the United States Supreme Court analysis in *Blessing v. Firestone*, 520 U.S. 329, 340-41 (1997)).

Here, the state Supreme Court has held that, in the context of the ethics claims here at issue, "[t]he citizens of every municipality have a vested right to the disinterested service" and "undivided loyalty" of public officials. *See, e.g., Thompson*, 190 N.J. at 374. Plainly, a vested right, possessed by the "citizens of every municipality," shows that the ethics laws, at both common law and the LGEL, are intended to confer a benefit on citizens. Second, neither the common-law nor LGEL ethics rules are too vague to permit enforcement, as the former has been enforced by courts for several decades and the latter for two. Finally, ethics laws plainly bind public officials to conduct themselves in ways that comport with their ethical duties.

Additionally, in fleshing out the meaning of "substantive" rights for CRA purposes, the state Supreme Court in *Tumpson* distinguished between rights that give rise to a cause of action, and rights that only concern the manner and means by which those rights are enforced. *Tumpson*, 218 N.J. at 478. Here, the failure of Spiller to meet his ethical duties under common law and the LGEL itself generates the causes of actions here at issue. Finally, as was the case with the referendum statute at issue in *Tumpson*, nothing in the CRA suggests an intent to exclude common-law or LGEL claims. Moreover, as discussed above, the LGEL's administrative remedies do not foreclose common-law actions nor do they require administrative exhaustion; thus application of the CRA to ethics claims is not incompatible with the LGEL. In fact, like the referendum-statute at issue in *Tumpson*, the CRA complements ethics rules by making available attorneys' fees when citizens expend resources to hold accountable public officials for their ethical conduct. *Tumpson*, 218 N.J. at 478-79.

For all of these reasons, the rights at issue here meet the test for "substantive" rights the Supreme Court's *Tumpson* holding requires this court to

apply, and therefore Spiller's motion to dismiss Montclair Parents' CRA claims must also be denied.

CONCLUSION

For all of the reasons discussed above, Spiller's motion to dismiss Montclair Parents' Second Amended complaint must be denied.

Respectfully submitted,

Shavar D. Jeffries
Jewel M. Watson
Kelly A. Jauregui
LOWENSTEIN SANDLER LLP
65 Livingston Avenue
Roseland, New Jersey 07068
973.422.6432 (telephone)
973.422.6433 (fax)

Dated: April 23, 2015