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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THE ERISA INDUSTRY COMMITTEE, **Plaintiff,** **v.** **ROBERT ASARO-ANGELO, in his official capacity as THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT,** **Defendant.**	**Civil Action No. 3:20-cv-10094** **Judge Zahid N. Quraishi** **Motion Day: July 19, 2021**

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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Plaintiff The ERISA Industry Committee ("ERIC") respectfully submits this reply brief in support of its Motion for Summary Judgment (Dkt. 16) against Defendant Robert Asaro-Angelo, Commissioner of the New Jersey Department of Labor and Workforce Development (the "Commissioner" or "Defendant").

I. PRELIMINARY STATEMENT

ERIC established in its opening brief that summary judgment is warranted because S.B. 3170's amendments to the NJ WARN Act are preempted by ERISA as a matter of law.[1] The Commissioner's response does not address the substance of ERIC's Motion and thereby concedes that S.B. 3170 is preempted by ERISA. Instead, his only grounds for opposing judgment against him is a request for discovery that he claims is needed to determine ERIC's constitutional standing to bring this action. The Commissioner is wrong.

This action has been pending for eleven months. Yet the Commissioner never asked ERIC for discovery on its constitutional standing. Nor did he mention the need for discovery in the multiple requests to ERIC's counsel and this Court to extend the deadline to oppose ERIC's Motion. *See* Dkt. Nos. 19, 23, and 24. If he needed an extension of time to obtain discovery he believed was necessary to respond to ERIC's Motion, he should have identified the discovery he needed *at*

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[1] This reply brief uses the same defined terms referenced in the Memorandum of Law in Support of the Motion for Summary Judgment (Dkt. 16-2).

that time and made that part of his requested extension. He chose not to. The Commissioner's lack of diligence in identifying or requesting discovery and explaining the reasons for the requested extensions alone are grounds for denying their Rule 56(d) request and granting ERIC's Motion for Summary Judgment.

Substantively, moreover, the discovery the Commissioner seeks is improper and not necessary to resolve ERIC's Motion. Specifically, he claims that discovery is needed on (1) whether ERIC's member companies have implemented administrative schemes under the current NJ WARN Act or in an effort to comply with S.B. 3170, and (2) whether ERIC has suffered an injury in fact to confer standing.

First, the Commissioner seeks discovery that would reveal the identities of ERIC's members, and such information is protected by the associational privilege established by the First Amendment of the Constitution. But even if it were not protected from disclosure, the identity of ERIC's members, and what particular members have or have not done to comply with the NJ WARN Act or S.B. 3170, is wholly irrelevant to whether S.B. 3170 is preempted by ERISA. As the Honorable Brian Martinotti recognized in his Order denying the Commissioner's motion to dismiss, questions concerning federal preemption are purely legal ones. *See* Dkt. 17 at 13 ("[P]reemption questions like Plaintiff's Complaint are purely

legal, and thus further factual development is not required[.]" (citations and quotations omitted)).

Second, discovery is not needed to determine whether ERIC has suffered an "injury-in-fact" sufficient to confer standing to challenge the enforcement of S.B. 3170. Again, the Commissioner could have raised this issue in his motion to dismiss (Dkt. 10), but instead only lodged a *facial* challenge to ERIC's standing. To the extent there was any doubt, ERIC has attached a declaration from Aliya Robinson (ERIC's Senior Vice President, Retirement & Compensation Policy) attesting to all of the facts alleged in the Complaint that Judge Martinotti already held establish ERIC's injury for purposes of standing. Dkt. 17 at 10-11.

For these reasons, ERIC respectfully requests that the Court deny Defendant's Rule 56(d) request and grant ERIC's Motion for Summary Judgment.

II. RELEVANT PROCEDURAL BACKGROUND

ERIC filed its Complaint on August 6, 2020, seeking declaratory and injunctive relief because S.B. 3170's amendments to the NJ WARN Act are preempted by ERISA. On October 26, 2020, the Commissioner moved to dismiss the Complaint on the grounds that: (1) he is not a proper defendant, (2) ERIC lacks Article III standing on the face of the Complaint, and (3) the dispute is not ripe. Dkt. 10. Judge Martinotti soundly rejected each of those arguments in his opinion denying the Commissioner's motion to dismiss. Dkt. 17. Notably, Judge

Martinotti found that ERIC's complaint presents a preemption question that is "purely legal." *Id.* at 13 (internal quotations omitted). ERIC also filed its Motion for Summary Judgment on May 19, 2021, so that the Court could decide the purely legal preemption question raised in the Complaint. Dkt. 16.

The original deadline for the Commissioner to respond to ERIC's Motion was June 7, but he moved to adjourn the motion date and extend that deadline to June 22. Dkt. 19. Subsequently, Defendant's counsel requested another two-week extension, to which ERIC consented. Dkt. 23, 24. At no point did Defendant's counsel ever suggest to ERIC or the Court that the Commissioner needed more time to respond to ERIC's Motion because he needed any discovery.

III. <u>ARGUMENT</u>

A. ERIC Presents A Purely Legal Question That Is Ripe For Summary Judgment, And The Commissioner Waived His Right To Oppose The Legal Arguments In ERIC's Motion.

ERIC's opening brief in support of summary judgment established that the amendments to the NJ WARN Act are preempted by ERISA as a matter of law. Specifically, ERIC proffered numerous citations to opinions from the Supreme Court, the Third Circuit, and other jurisdictions all supporting the position that S.B. 3170 improperly requires employers to establish or modify severance plans that require an ongoing administrative scheme in violation of ERISA's broad preemption clause. *See generally* ERIC's Memorandum of Law in Support of

Summary Judgment, Dkt. 16-2; *see also Simas v. Quaker Fabric Corp. of Fall River*, 6 F.3d 849 (1st Cir. 1993) (finding Massachusetts severance pay law preempted by ERISA).

Despite receiving multiple extension and having over 45 days to respond to ERIC's Motion for Summary Judgment, the Commissioner's opposition fails to address any of ERIC's legal arguments. As such, the Commissioner has waived any opposition to the legal questions presented by ERIC. *See, e.g., O'Neal v. Middletown Twp.*, No. 18-5269, 2019 WL 77066, at *4 (D.N.J. Jan. 2, 2019) (holding that "Plaintiffs fail to present any substantive argument in opposition to this argument, and therefore, also conceded this point" for purposes of summary judgment); *Sportscare of Am., P.C v. Multiplan, Inc.*, No. 10-4414, 2011 WL 589955, at *1 (D.N.J. Feb. 10, 2011) ("failure to respond in an opposition brief to an argument put forward in an opening brief constitutes waiver").

The only contested issue left for the Court to consider is whether the Commissioner needs the discovery he requested. He does not. Judge Martinotti already recognized that this action concerns an ERISA preemption question that is "'purely legal,' and thus further factual development is not required[.]" Dkt. 16 at 13 (quoting *New Jersey Civ. Just. Inst. v. Grewal*, No. 19-17518, 2020 WL 4188129, at *7 (D.N.J. July 21, 2020) ("[T]he question before the Court—whether Section 12.7 is preempted by the FAA—is purely legal, and thus further factual

development is not required.”)).

Judge Martinotti’s holding is consistent with other precedent recognizing that ERISA preemption questions are legal questions. *See Nat’l Sec. Sys., Inc. v. Iola*, 700 F.3d 65, 82 n.14 (3d Cir. 2012) (“We exercise plenary review over the legal question of ERISA preemption.”). Indeed, the Supreme Court in *Fort Halifax Packing Co. v. Coyne* and the First Circuit in *Simas* addressed ERISA preemption of state severance pay laws without any factual record. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (Maine law not preempted by ERISA); *Simas*, 6 F.3d at 849 (Massachusetts law preempted by ERISA, distinguishing *Fort Halifax*); *see also Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523, n.20 (1981) (holding that New Jersey law was preempted by ERISA and rejecting argument that would “wreak[] havoc on ERISA’s plain language, which preempts not plans, but ‘State laws.’ 29 U.S.C. § 1144(a)”).[2]

Here, the terms of S.B. 3170 are preempted by ERISA because of the text of the statutes and ERISA’s preemption provision. These are legal questions that do

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[2] The Commissioner’s response to ERIC’s Statement of Material Facts also reflects how this action concerns purely legal questions. Indeed, the Commissioner only disputes two of the factual statements ERIC asserts, and those disputes are based on his interpretation of the laws described by ERIC. *See* Dkt. 26-1. Furthermore, the Commissioner’s Supplemental Material Facts consist of paragraphs describing the procedural history and S.B. 3170’s amendments, none of which are genuine *factual* disputes precluding summary judgment. *Id.*

not turn on any of the discovery the Commissioner seeks. ERIC's Motion for Summary Judgment should be granted.

B. The Court Should Also Deny Defendant's Request For Discovery Because He Has Failed To Meet The Requirements Of Rule 56(d).

Under Rule 56(d), a party opposing summary judgment may request more time to seek discovery to oppose the motion, only if the party specifically describes: (1) "what particular information is sought," (2) "how, if covered, it would preclude summary judgment," and (3) "why it has not previously been obtained." *Pa, Dep't of Pub. Welfare v. Sebelius*, 674 F.3d 139, 157 (3d Cir. 2012) (internal citation and quotations omitted). Importantly, a Rule 56(d) declaration must state "with specificity" not just the discovery sought but also how that discovery will enable him to meet his burden in opposing summary judgment under the applicable legal framework. *Fenter v. Kraft Foods Global, Inc.*, No. 11-4916, 2012 WL 5586327, at *3 (E.D. Pa. Nov. 14, 2012). In doing so, a party cannot merely assert "[v]ague or general statements of what [he] hopes to gain through a delay for discovery under . . . Rule 56(d)[.]" *Atl. Deli & Grocery v. United States*, No. 10-4363, 2011 WL 2038758, at *3 (D.N.J. May 23, 2011). Moreover, "in the case where relevant material was not timely pursued, the party seeking additional discovery must adequately explain the lack of diligence." *Fenter*, 2012 WL 5586327, at *4.

Here, the Commissioner's Rule 56(d) application asserts that discovery is needed on (1) "what efforts Plaintiff was required to make to educate member companies on S.B. 3170 allegedly evidencing an injury-in-fact," and (2)"what administrative schemes ERIC's member companies have in place, if at all, to comply with the current version of the NJ WARN Act," as well as how they may plan to comply with S.B. 3170. Declaration from Ryan J. Silver ("Silver Decl."), Dkt. 26-2, ¶ 13. The Commissioner's request should be denied and has no bearing on the legal issues presented in ERIC's Motion for Summary Judgment.

1. Defendant's failure to mention any need for discovery in the months this case has been pending, and despite seeking and receiving multiple extensions to respond to this Motion, should preclude his request for discovery.

As an initial matter, if the Commissioner genuinely believed that discovery was necessary for his defenses to ERIC's preemption argument, he could and should have initiated discovery pursuant to Rule 26(f) at any point during the past *eleven months* this case has been pending, including in the several weeks since the Court denied his motion to dismiss. *See Scott v. Graphic Commc'ns Int'l Union, Loc. 97-B*, 92 F. App'x 896, 901–02 (3d Cir. 2004) (denying Rule 56(f)[3] application and holding that "Rule 26(f) does not require the parties to delay

[3] Rule 56(f) is the predecessor to the current Rule 56(d) before the 2010 amendments to the Federal Civil Rules of Procedure. *See* Fed. R. Civ. P. 56., Notes of Advisory Committee Rules – 2010 Amendment.

conferring until after a scheduling conference has been held or a scheduling order has been issued. The responsibility for arranging this conference and initiating discovery is placed squarely on the shoulders of the attorneys of record and not on the district court."). He did not do so, and to this day (even after filing his Rule 56 declaration) has not asked to meet and confer regarding discovery. Nor has he served *any* discovery requests seeking this allegedly critical information. That alone is grounds for denying his request. *Fenter*, 2012 WL 5586327, at *4-5 (denying Rule 56(d) application because plaintiff could not explain why the discovery sought was not pursued before the summary judgment motion). Moreover, Defendant's counsel exchanged numerous communications with ERIC's counsel and Judge Martinotti to extend the briefing schedule for summary judgment, without ever saying that he needed discovery to respond to ERIC's motion. The Commissioner's efforts to further delay this case should be rejected.

2. Discovery on whether ERIC has standing is not necessary.

With regard to the Commissioner's request to take discovery on whether ERIC has standing, that is a separate issue distinct from the merits of ERIC's preemption claim, and can be directly resolved without additional delay. Again, this discovery could have been sought months ago, including in connection with the Commissioner's (now denied) motion to dismiss on standing grounds. In any event, Judge Martinotti held that ERIC established direct organizational standing at

the motion to dismiss stage because it sufficiently alleged that it had to divert resources to educate its members and prepare for S.B. 3170. Thus, to establish organizational standing going forward, ERIC must, at most, proffer evidence that it did in fact divert resources as alleged in the Complaint.[4] To that end, the Supreme Court has held that an injury of "a dollar or two" could be enough to have standing. *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 289 (2008).

To avoid any further delay, ERIC attaches to this brief the declaration of Aliya Robinson, ERIC's Senior Vice President, Retirement & Compensation. Ms. Robinson testifies that ERIC's core mission (to advocate for large employer plan sponsors in support of nationally uniform laws regarding employee benefits governed by ERISA) has been impeded by the imminent enforcement of S.B. 3170. *See* Declaration of Aliya Robinson ("Robinson Decl."), attached as Exhibit A, ¶¶ 3-5. Ms. Robinson further testifies that she and her colleagues at ERIC have spent a significant amount of time (at ERIC's expense) and resources speaking with ERIC's member companies in New Jersey to educate them on the law and its ramifications; preparing multiple presentations and written alerts on S.B. 3170; lobbying to delay the effective date of S.B. 3170 and otherwise amend the law;

[4] The Commissioner's Rule 56(d) application only seeks discovery on whether ERIC suffered an "injury-in-fact" and what efforts ERIC took to educate its members on S.B. 3170. Silver Decl. ¶ 13. Thus, the Commissioner is not disputing the other elements of organizational standing.

reaching out to numerous media outlines and other trade associations to relay ERIC's position on S.B. 3170; and several other tasks. *Id.* ¶¶ 7-8. Ms. Robinson also confirms that all of the time and resources diverted to these efforts could have been directed towards other projects and advocacy efforts that have been ongoing at ERIC, such as meeting with ERIC member companies to understand how ERIC can support their ability to provide and expand their benefits offerings to address challenges relating to the COVID-19 pandemic. *Id.* ¶ 8. Nothing more is required, and the Commissioner's belated fishing expedition should be rejected.[5]

3. The information Defendant seeks regarding ERIC's members is irrelevant and privileged.

Like the arguments in the motion to dismiss, the Commissioner's request for discovery on ERIC's members is another red herring solely meant to delay the resolution of this action. Even if the Commissioner had requested discovery concerning ERIC's members, it would have no bearing on the preemption issues raised in ERIC's Motion for Summary Judgment.

First, the discovery the Commissioner seeks is irrelevant and unnecessary to decide ERIC's Motion. *See, e.g.*, *Rodriguez v. United States,* No. 14-1149, 2016 WL 1211380, at *4 (M.D. Pa. Mar. 28, 2016) (denying Rule 56(d) motion where

[5] ERIC will make Ms. Robinson available for a limited deposition as to ERIC's "injury in fact" in the next two weeks to avoid further delay.

"the court finds the declaration to be inadequate for the purpose of Rule 56(d) because the information sought is irrelevant to and would not preclude summary judgment."). Information regarding how ERIC's members comply with the current NJ WARN Act or how they plan to comply with the amendments to the Act (if the amendments are not preempted) is not necessary to determine the purely legal question of whether the amendments are preempted by ERISA.[6]

When a court determines that ERISA (or any federal law) preempts a state law, that state law becomes invalid for all, not just particular parties. Thus, to determine questions of preemption, courts need only examine the applicable laws and precedent from similar cases. For example, in *Simas*, the First Circuit determined that ERISA preempted a Massachusetts law requiring the payment of severance benefits based on a legal analysis of that law in comparison to the Maine severance pay law examined by the Supreme Court in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). *See* Dkt. 16-2 at 15-17. The First Circuit's analysis in *Simas* did not turn on any fact applicable only to the parties in the case. Indeed, the docket from the district court action preceding the First Circuit appeal reflects that the defendants in *Simas* filed a motion for summary judgment asserting

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[6] ERIC is not challenging the current NJ WARN Act in any event, so whether and how employers comply with the current law has no bearing on whether the amendments are preempted.

ERISA preemption near the outset of the case before any scheduling order setting a discovery deadline, like ERIC did in this case. *See Gray v. Quaker Fabric Corp. of Fall River*, Civ. A. No. 91-12624, 809 F. Supp. 163 (D. Mass. 1992); *see also Alessi*, 451 U.S. at 523 (New Jersey law prohibiting certain pension offsets is preempted by ERISA, not just for the particular parties at issue).

Second, the identities of ERIC's members are protected from disclosure by the First Amendment. In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Supreme Court held that the First Amendment protects the freedom of association and that demands for an association's membership list place a substantial restraint on that freedom. This is because "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action." *Id*. at 462.

The First Amendment associational privilege has been applied in various contexts, including contexts other than membership lists (*see, e.g.*, *DeGregory v. Attorney Gen. of New Hampshire*, 383 U.S. 825 (1966) (involving the right of a private individual to refuse to answer questions from state attorney general on his affiliation with communist groups), as well as in litigation involving only private parties (*see, e.g.*, *Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987)). "Regardless of the type of association, compelled disclosure requirements are

reviewed under exacting scrutiny." *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021).

To assert the associational privilege, the party asserting the privilege "must make a prima facie showing that enforcement of the discovery request will result in consequences which objectively suggest a 'chilling' impact on associational rights. *Knaupf v. Unite Here Loc. 100*, No. 14-6915, 2015 WL 7451190, at *5 (D.N.J. Nov. 23, 2015) (citing *Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir. 2009)); *see also In re First Nat'l Bank, Englewood, Colo*., 701 F.2d 115, 118 (10th Cir. 1983) (collecting cases on the disclosure of information chilling associational rights, noting that "[t]he Supreme Court has acknowledged that an organization and its members have standing to protect the members from unwarranted governmental invasion of their First Amendment right of association").

In the present case, ERIC is a non-profit trade association that represents the interest of large employers who sponsor benefit plans governed by ERISA. Like the associations and organizations mentioned above and many others, ERIC does not openly disclose its membership directory. Thus, the discovery sought by the Commissioner would certainly have a "chilling" impact on the associational rights of ERIC's members because it would reveal their participation in the association. Such public disclosure will discourage and deter speech, petitioning, and expressive association.

Simply put, discovery on ERIC's members is protected from disclosure and irrelevant. The Commissioner's request for discovery should be denied.

IV. CONCLUSION

For these reasons, ERIC respectfully requests that the Court deny Defendant's Rule 56(d) application and grant ERIC's Motion for Summary Judgment.

Dated: July 13, 2021

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THE ERISA INDUSTRY COMMITTEE, **Plaintiff,** **v.** **ROBERT ASARO-ANGELO, in his official capacity as THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT,** **Defendant.**	**Civil Action No. 3:20-cv-10094** **Judge Zahid N. Quraishi** **Motion Day: July 19, 2021**

PLAINTIFF'S RESPONSES TO DEFENDANT'S STATEMENT OF MATERIAL FACTS

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, and Rule 56.1 of the Local Civil Rules of the United States District Court of the District of New Jersey ("Local Rules"), Plaintiff The ERISA Industry Committee ("ERIC")

respectfully submits the following responses to Defendant's Statement of Material Facts.

I. ERIC'S REPLY TO THE FACTS DEFENDANT DISPUTED

Statement of Material Fact No. 9: The amendments remove the distinction between "full-time" and "part-time" employees, making it even more likely that "mass layoff" triggering of the Act will occur. *Id* [citing N.J. Rev. Stat. § 34:21-1 (pre-2020 Amendment)]. Indeed, now all employee (regardless of their hours or the length of their employment) count to ward NJ WARN trigger thresholds, and if the Act is triggered, all employees must receive notice and severance. N.J. Rev. Stat. § 34:21-2.

Defendant's Response: Disputed in part. It is undisputed that the amendments to the Millville Dallas Airmotive Plant Job Loss Notification Act ("NJ WARN ACT") remove the distinction between full-time and part-time employees. It is also undisputed that under the amendments to the NJ WARN Act covered employers must include part-time employees in determining the 100-employee and 50-employee thresholds. N.J.S.A. § 34:21-2. It is disputed that this amendment will make it more likely that a "mass layoff" triggering event will occur. This allegation finds no support in the record and calls for a legal conclusion.

ERIC's Reply: This dispute is not genuine because Defendant is merely disagreeing with ERIC's interpretation of how the amendments to the NJ WARN Act make it more likely that an even triggering severance payment obligation occurs.

Statement of Material Fact No. 18: The current effective date of S.B. 3170 is September 11, 2021.

Defendant's Response: Disputed. On June 4, 2021, Governor Murphy signed Executive Order 244 which terminated the public health emergency declared in Executive Order 103 pursuant to the Emergency Health Powers Act, N.J.S.A. § 26:13-1, et seq., but continued the state of emergency declared in Executive Order 103 pursuant to N.J.S.A. App.A.:9-33 et seq. Thus, Executive Order 103 remains in effect and the 90-day period for the effective date of Senate Bill No. 3170 ("S.B. 3170") has not yet been triggered.

ERIC's Reply: This dispute is not genuine. ERIC made this statement before June 4, 2021, and before Governor Murphy's office confirmed that the effective date of S.B. 3170 is still pending during the duration of the state of emergency. In any event, this does not preclude summary judgment because there is no dispute that S.B. 3170 will become effective at some point in time.

II. ERIC'S RESPONSE TO DEFENDANT'S SUPPLEMENT STATEMENTS OF FACT

Defendant's Supplemental Statement No. 19: Plaintiff, the ERISA Industry Committee ("Plaintiff"), is a non-profit trade association that represents the interests of large employers who sponsor benefit plans governed by the federal Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq. ("ERISA").

Response: Undisputed.

Defendant's Supplemental Statement No. 20: Defendant Robert Asaro-Angelo is the Commissioner of the New Jersey Department of Labor and Workforce Development.

Response: Undisputed.

Defendant's Supplemental Statement No. 21: On August 6, 2020, Plaintiff filed a lawsuit in the United States District Court for the District of New Jersey against Defendant, seeking a declaration that ERISA preempts S.B. 3170, which amends the NJ WARN Act.

Response: Undisputed.

Defendant's Supplemental Statement No. 22: While S.B. 3170 amends the NJ WARN Act in certain respects, it leaves certain key provisions untouched.

Specifically, S.B. 3170 does not alter the definition of "termination of employment," N.J.S.A. § 34:21-1; it does not alter the statutorily prescribed rate of severance, N.J.S.A. § 34:21¬2(b); and it does not alter the 30-day period of time used to determine whether a qualifying "mass layoff" event will occur or has occurred, N.J.S.A. § 34:21-2.

Response: Disputed in part. This is a legal statement reflecting the Commissioner's interpretation of S.B. 3170's amendments to the NJ WARN Act, and ERIC disputes whether "certain key provisions" of the law remained untouched, as that is a legal conclusion. In any event, this statement does not preclude ERIC's Motion for Summary Judgment.

Defendant's Supplemental Statement No. 23: The NJ WARN Act provides only for private causes of actions by aggrieved employees or former employees, who may initiate an action in the Superior Court of New Jersey. N.J.S.A. § 34:21-6. The NJ WARN Act does not provide for causes of action to be brought or adjudicated by Defendant for any alleged violations of the statute, nor does it provide for the Defendant to assess any penalties for alleged violations. Id.

Response: Disputed in part. This statement is disputed to the extent the Commissioner is claiming that he is not responsible for enforcing the NJ WARN Act. As noted by the Court in the order denying the motion to dismiss, the

Commissioner is expressly responsible for enforcing NJ WARN Act for purposes of the *Ex Parte Young* doctrine. *See* Dkt. No. 17 (denying the Commissioner's motion to dismiss and finding that he is responsible for enforcing the NJ WARN Act for purposes of the *Ex Parte Young* doctrine; *see also* N.J. Stat. Ann. § 34:1-6. In any event, this fact does not preclude ERIC's Motion for Summary Judgment because the Commissioner does not oppose summary judgment on the grounds that he does not enforce the NJ WARN Act.

Defendant's Supplemental Statement No. 24: On October 26, 2020, Defendant filed a motion to dismiss in lieu of an answer.

Response: Undisputed.

Defendant's Supplemental Statement No. 25: On May 19, 2021, while Defendant's motion to dismiss was still pending, Plaintiff filed the instant motion for summary judgment.

Response: Undisputed.

Defendant's Supplemental Statement No. 26: On May 20, 2021, the court issued an order and opinion denying Defendant's motion to dismiss.

Response: Undisputed.

<u>Defendant's Supplemental Statement No. 27:</u> On June 3, 2021, Defendant filed an answer to Plaintiff's complaint.

<u>Response:</u> Undisputed.

<u>Defendant's Supplemental Statement No. 28:</u> To date, no discovery has taken place.

<u>Response:</u> Undisputed. However, ERIC notes that even though this action has been pending for nearly a year, Defendant never requested discovery nor raised the issue of discovery in any of his communications with ERIC or the Court when seeking extensions for his opposition to summary judgment.

Dated: July 13, 2021

Respectfully submitted,

/s/ Richard G. Rosenblatt

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THE ERISA INDUSTRY COMMITTEE, **Plaintiff,** **v.** **ROBERT ASARO-ANGELO, in his official capacity as THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT,** **Defendant.**	**Civil Action No. 3:20-cv-10094** **Judge Zahid N. Quraishi** **DECLARATION OF ALIYA ROBINSON IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

I, Aliya Robinson, the undersigned, declare as follows:

1. I am the Senior Vice President ("SVP"), Retirement & Compensation Policy for The ERISA Industry Committee ("ERIC"). In that capacity, I have personal knowledge of all of the facts set forth in this declaration.

2. ERIC is a nonprofit trade association that represents the interests of large employers with 10,000 or more employees that sponsor health, retirement, and other benefit plans governed by ERISA in their capacity of as sponsors of those benefit plans. ERIC's member companies voluntarily provide benefits through such plans that cover workers and their families across the country, including in New Jersey. In fact, ERIC's membership includes large employers with headquarters and/or a significant number of employees in New Jersey.

3. ERIC's core mission is to advocate for health, retirement, and compensation public policies that support the ability of large employer plan sponsors to administer their benefit plans uniformly and consistently across federal, state, and local levels. This includes lobbying and litigation advocacy for nationally uniform laws regarding employee benefits governed by ERISA, so that ERIC's member companies may lawfully operate under ERISA's protection from a patchwork of different and conflicting state and local laws in addition to federal law.

4. In that regard, New Jersey Senate Bill 3170 ("S.B. 3170"), directly conflicts with ERIC's core mission. Specifically, S.B. 3170 amends the Millville Dallas Airmotive Plant Job Loss Notification Act ("NJ WARN Act") to impose a series of requirements that collectively force employers (like ERIC's member companies) to create or modify severance benefit plans. If each state passed its

own laws requiring an administrative scheme to provide severance benefits, large employers like ERIC member companies would be governed by different laws for different employees depending on the state and could not have a uniform severance benefit plan structured in the way the employer deemed best for its business and its workforce. S.B. 3170 therefore impedes ERIC's ability to ensure that its member companies are protected under the federal ERISA law from various state and local laws governing employee benefits.

5. To address the harms posed by S.B. 3170 and educate our member companies about the ramifications of this law, ERIC has had to expend and divert time, money and other resources from other critical lobbying and advocacy efforts.

6. For example, in my capacity as and SVP for ERIC, I personally spent dozens of hours in the months after S.B. 3170's enactment (but before ERIC initiated this action) studying S.B. 3170, consulting with outside legal counsel on the potential impact and legality of S.B. 3170, and speaking with ERIC's member companies, especially those with workers in New Jersey, to educate them on the law and its ramifications.

7. I have also supervised other ERIC employees who have spent a significant amount of time, money and resources to address the harm arising from the enforcement of S.B. 3170 by performing task such as:

a. Reaching out to over 25 other trade associations to discuss S.B. 3170 and how those associations plan to respond to the law;

b. Organizing and conducting conference calls with other business groups, ERIC member companies in New Jersey, and federal and state policymakers to discuss S.B. 3170;

c. Preparing and hosting presentations, including on March 25, 2020, June 24, 2020, and August 11, 2020, to educate ERIC's member companies on S.B. 3170, and provide updates on any new information ERIC has learned about the law and when it could potentially be effective;

d. Reaching out to several national, New Jersey state, and employer trade media outlets, including Reuters, Bloomberg Law, Law 360, New Jersey Business Magazine, and several others, to discuss ERIC's position on the impact and legality of S.B. 3170;

e. Working with other organizations to lobby to delay the effective date of S.B. 3170 and otherwise amend the law; and

f. Preparing periodic alerts to send to ERIC's member companies about S.B. 3170.

8. In all, I would estimate that ERIC has incurred thousands in costs through the time, effort, and other resources that my colleagues and I have spent on educating ERIC member companies, the press, and others about S.B. 3170 and its potential impact, as well as the other activities described above.

9. All of those resources could have been directed towards other projects and advocacy efforts that have been ongoing at ERIC, such as:

a. Meeting with ERIC member companies to understand how ERIC can support their ability to provide and expand their benefits offerings, especially to address challenges relating to the COVID-19 pandemic;

b. Working on federal and state paid leave initiatives that impact ERIC member companies in every state;

c. Advocating for federal retirement legislation, including to allow employers to provide emergency funds, student loan assistance to their workforce, and addressing multi-employer pension plan reform;

d. Participating in retirement plan litigation at the federal level through amicus briefs;

e. Advocating to ensure that state retirement plans do not impose burdens on ERIC member companies that are inconsistent with the federal ERISA law.

10. If allowed to stand, the enforcement of S.B. 3170's amendments to the NJ WARN Act will adversely impact ERIC member companies in ways that go to the heart of ERIC's core mission and make it more difficult for ERIC to successfully advocate for nationally uniform laws regarding severance pay and other employee benefits.

11. Thus, S.B. 3170 impedes ERIC's ability to carry out its mission of promoting nationally uniform laws concerning employee benefit plans covered by ERISA

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 13th day of July, 2021, in Washington, D.C.

Aliya Robinson

CERTIFICATE OF SERVICE

I hereby certify that, on the date indicated herein, Plaintiff's Reply Brief in Support of its Motion for Summary Judgment, Responses to Defendant's Statement of Material Facts and Declaration of Aliya Robinson were electronically filed on the CM/ECF system and therefore served on all counsel of record.

Dated: July 13, 2021

/s/ Richard G. Rosenblatt
Richard G. Rosenblatt