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JOHN R. AMATULLI, **PLAINTIFF,** **VS.** **ROADMASTER TRUCKING, INC., PRESIDENT CONTAINER, INC., STEVE TESTA, JOHN DOES 1-10, AND XYZ CORP. 1-10,** **DEFENDANTS.**	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: PASSAIC COUNTY DOCKET NO.: PAS L - 002648 03 CIVIL ACTION Date: December 5, 2003 Time: 9:00 a.m. Judge: The Honorable Margaret M. McVeigh, J.S.C.

PLAINTIFF=S BRIEF IN SUPPORT OF HIS MOTION FOR RECONSIDERATION

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INTRODUCTION

Plaintiff, John R. Amatulli (Aplaintiff@ or AAmatulli@), submits this Memorandum of Law in support of his motion, pursuant to R. 4:49-2, for reconsideration of the Court=s October 2, 2003 Order (the AOrder@), which granted defendant's motion to dimiss as to Count 1 (a violation of Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980)); Count 2 (a violation of the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 *et seq.)*;and Count 3 (a cause of action under the New Jersey Constitution, Art. I, paragraph 6) of Amatulli=s Complaint and dismissed President Countainer as a defendant on all Counts of the Complaint prior to the taking of any discovery It is with the utmost respect that Amatulli believes that the Court did not consider, or did not appreciate the significance of, the case law and treatises which conclusively warrant that the Court modify its ruling.

PROCEDURAL ISSUES

Plaintiff takes note of some rather strange procedural issues. On September 25, 2003, plaintiff's counsel was informed that there would be a telephonic conference on this very important motion to dismiss the crux of his case as reflected in Hyderally Cert. Ex. "1" (Correspondence of September 26, 2003 to the Honorable Margaret M. McVeigh, J.S.C). Of course, plaintiff's preference was to appear in person to argue against dismissing the essence of his Complaint. During oral argument on September 26, 2003, plaintiff's counsel was disconnected from the telephone conference. This occurred at approximately page 13, line 20 of the transcript. (Hyderally Cert. Ex. "2"; Transcript of 9/26/03 at 13). The undersigned immediately called the Court and was told that the Judge would call his office to resume oral argument. After waiting some time and not hearing from the Court, the undersigned called the Court and spoke to the Judge's law clerk, who advised that the Court had moved on to other matters. I advised that I had been disconnected and was not allowed to finish my presentation as reflected at page 6 of the transcript. (Hyderally Cert. Ex. "2"; Transcript of 9/26/03 at 6, lns. 3-4). Counsel further advised that he would like to be further heard if the Court was inclined to grant summary judgment. The court's law clerk acknowledged counsel's statement and stated that the Court would get back to counsel if necessary.

Counsel than called Randi Kochman, Esq. of Cole, Schotz, Meisel, Forman & Leonard, to ask if she had heard back from the Court. Counsel was advised by her secretary that she was at the Courthouse presenting live oral argument. This was extremely unsettling and shocking as plaintiff's counsel was advised that it was a telephonic appearance only. In fact, I note that the transcript reflects

that plaintiff's counsel was not advised that defense counsel was physically present during oral argument.

To date, counsel has received no response from the Court to his letter of September 26, 2003 or to his conversation with the Court's law clerk.

What is even more unsettling is that on October 2, 2003, unbeknownst to counsel for the plaintiff, the Court went on the record to deliver the opinion of the Court granting the entirety of defendants' motion to dismiss. (Hyderally Cert. Ex. "3"; Tr. of 10/02/03).

On October 9, 2003, Ms. Kochman, Esq., called to advise that the Court had signed her Order -- as she drafted it -- without any modification. This was the first plaintiff heard of the dismissal.

On October 16, 2003, plaintiff's counsel wrote to the Court asking for detailed findings of fact and conclusions of law and for a certification of a final Order so that he could make appropriate application to the appellate Courts. (Hyderally Cert. Ex. "4"; Correspondence of October 16, 2003). To date, counsel has received no response to this letter.

It is with this backdrop, that plaintiff respectfully requests that the Court reconsider its Order of October 2, 2003 or, in the alternative, certify the ruling as a final Order so that an application for appeal can be made to the appellate courts.

ARGUMENT

I. STANDARD OF REVIEW FOR MOTION FOR RECONSIDERATION

The New Jersey Civil Practice Rules establish a mechanism whereby a party can request a Court to alter an interlocutory order. Rule 4:49-2 provides in pertinent part:

> [A] motion for ... reconsideration seeking to alter or amend a[n] ... order shall be served not later than 20 days[1] after service of the ... order upon all parties by the party obtaining it. The motion shall state with specificity the basis upon which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred.

Motions for reconsideration are appropriate where:

> 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence.
>
> Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996).

Furthermore, it is Asensible, economical, and expeditious for [a party] to [seek] an opportunity to be heard on [an >improvidently entered= order] by motion addressed directly to the trial court.@ Calcaterra v. Calcaterra, 206 N.J. Super. 398, 403-404 (App. Div. 1986) (reasoning that a review by the trial court is Apreferable to the immediate filing of a notice of appeal which inevitably triggers the expense and delay attendant upon the appellate process.@).

[1]Courts have interpreted the time limitation contained in Rule 4:49-2 to apply only to final judgments and orders - not to interlocutory orders. *See* Johnson v. Cyklop, 220 N.J. Super. 250, 262 n.8 (App. Div. 1987). A[T]he trial court has the inherent power ... to review, revise, reconsider and modify its interlocutory orders at any time prior to the entry of final judgment.@ Id. at 257.

For the reasons discussed below, Amatulli respectfully requests that the Court reconsider its decision embodied in its Order of October 2, 2003 and modify the Order with respect to the dismissal of Counts 1-3 and the dismissal of President Container as a defendant to this litigation. [2]

Plaintiff references and hereby incorporates his Response to defendants' motion to dismiss and oral arguments made on the record on September 26, 2003.

II. CONVERSION OF MOTION TO DISMISS TO SUMMARY JUDGMENT

Plaintiff objects to the Court's characterization of defendants' motion to dismiss as a motion for summary judgment even though the parties appended documents to their pleadings. (Hyderally Cert. Ex. "3"; Tr. of 1-/02/03 at 9, lns. 1-2). As in Kurdyla v. Pinkerton Sec., 197 F.R.D. 128, 131 (U.S. Dist. , 2000), defendants filed a motion to dismiss before the discovery process had even begun. The plaintiff noted there, as plaintiff notes here, that the plaintiff may "uncover additional and various insurance, tax and health benefit issues" indicating the existence of an employer-employee relationship... (Pl.'s Br. in Opp. at 11.). Kurdyla *infra* at 131. In that case, the court noted that, "[w]hile certain facts do support a conversion of this motion to a motion for summary judgment, this case is at the beginning of the discovery process. Even the parties' use of materials other than the pleadings does not mandate a conversion. *See, e.g.*, Childs, 954 F. Supp. at 997 (refusing to convert motion to dismiss to motion for summary judgment even though both parties submitted affidavits); Morris v. Azzi, 866 F. Supp. 149, 149 (D.N.J. 1994); Brennan, 850 F. Supp. at 335-36. Therefore, the Court will not convert the motion to a motion for summary judgment, and it will not consider the additional materials submitted by the parties."

2 The Court reflected the application as a motion for Summary Judgment in its Order. Plaintiff's objects to this characterization as referenced below.

Even though the defendants refer to their pleadings as a "Motion to Dismiss", the Court treats the application as one for summary judgment. (Hyderally Cert. Ex. "3"; Tr. of 10/02/03 at 9, lns.1-2). Plaintiff respectfully submits that the Court's conversion to a summary judgment motion is inappropriate because here, as in *Kurdyla*, "a court cannot grant summary judgment without providing the opposing party adequate time to discover and present material facts. A conversion to a summary judgment motion would also be inappropriate because a court cannot grant summary judgment without providing the opposing party adequate time to discover and present material facts." Kurdyla v. Pinkerton Sec., 197 F.R.D. 128, 131 (U.S. Dist. , 2000) *citing see, e.g.*, Liberty Lincoln-Mercury v. Ford Motor Co., 134 F.3d 557, 569 (3d Cir. 1998); Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 183 (3d Cir. 1992).

III. NO DISCOVERY ALLOWED

Even though the Court referenced the fact that no discovery has been taken, the Court did reference documents outside the pleadings which were attached to the Motion to Dismiss in making it's decision. (Hyderally Cert. Ex. "3" Tr. 10/2/03 at 5, lns. 9-13).

IV. MATERIAL FACTS IN DISPUTE

Plaintiff respectfully notes his detailed Certification and Statement of Material and Disputed Facts. Plaintiff notes that this statement is in response to what defendant states are the Material Facts in support of their application to dismiss. The fact, that most of what defendants admit are material facts is disputed should alone have led to the denial of defendants' motion to dismiss.

In fact, the Court takes note of the fact that plaintiff submitted a lengthy statement of material facts and certifications without taking note of the implication that it is defendants' *own* assertion of

Material Facts in support of their motion to dismiss that are in dispute. (Hyderally Cert. Ex. "3"; Tr. of 10/02/03 at 3, lns.19-20). The Court further takes note of this fact when it stated that, "[t]here is a dispute between the parties with regard to some material issues that gives this Court some pause in granting summary judgment." (Hyderally Cert. Ex. "3"; Tr. of 10/2/03 at 6, lns. 11-13). However, despite this comment, the Court, goes on to grant summary judgment.

As the Court is no doubt well aware, when deciding a motion for summary judgment under Rule 4:46-2, the Court should deny such a motion if, when viewing the competent evidential materials presented in the light most favorable to the non-moving party, there exists a genuine issue with respect to a material fact. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 524 (1995). Additionally, by its plain language, Rule 4:46-2 dictates that a court should deny a summary judgment motion where the party opposing the motion has come forward with evidence that creates a "genuine issue as to any material fact challenged."

The underlying Statement of Facts adequately display that most if not all material facts giving rise to Plaintiff=s Complaint are hotly contested. The implication of this material dispute was not countered by defendants during the oral argument on September 26, 2003, and it appears that the Court did not take appropriate reflection of this fact in its Order of October 2, 2003. (Hyderally Cert. Exs. "2" and "3").

V. EMPLOYEE/INDEPENDENT CONTRACTOR TEST

A. Choice of Test

The court subscribes to the *Pukowski* [sic] "test". (Hyderally Cert. Ex. "3" Tr. of 10/2/03 at 3, ln. 16- p.5, ln. 7). Pukowsky v. Caruso, 312 N.J. Super. 171 (App. Div. 1988). However, it is far from clear that this "test" is the determinative test to be used in Conscientious Employee Protection Act, N.J.S.A. 34:19-1 *et seq* ("CEPA") matters.

As the Court in Kurdyla v. Pinkerton Sec., 197 F.R.D. 128, 133-134 (U.S. Dist. , 2000) noted, "Though the NJLAD requires a distinction between employees and independent contractors, the proper basis for this distinction is unsettled." The *Kurdyla* court references the variety of tests for the Courts to characterize individuals as employees and independent contractors under a variety of statutes. *See, e.g.*, Pelliccioni v. Schuyler Packing Co., 140 N.J. Super. 190, 196-202, 356 A.2d 4, 7-10 (App. Div. 1976) (Federal Employers' Liability Act); Blessing v. T. Shriver & Co., 94 N.J. Super. 426, 429-434, 228 A.2d 711, 713-15 (App. Div. 1967) (workers' compensation).

B. The Right to Control Test

Plaintiff utilized, to the "Right to Control" test presented in the matter of Tofani v. Lo Biondo Brothers, 83 NJ Super. 480 (App. Div. 1964), wherein the New Jersey appellate court specifically declared that truck drivers were protected under the New Jersey Worker=s Compensation statute. This statute similar to CEPA extends coverage to employees and does not apply to independent contractors.

The facts presented in Tofani are eerily similar to the facts presented here as noted above. Plaintiff owned a tractor trailer. Defendant was a freight carrier and utilized 50 owner operators. Defendant paid plaintiff hourly and leased equipment. The parties entered into a leasing agreement. Defendant testified that they did not have control of the owner, that they did not supervisor owner, that owners were used if work was available, plaintiff could hire help to drive the truck if he wanted help which would be deducted from plaintiff=s check, plaintiff was paid by the tonnage and distance,

defendant could fire plaintiff, plaintiff had no choice what he would carry or where he would deliver it, plaintiff worked for no one else other than defendant. Tofani, *supra*. These are the exact facts that present *sub judice*, and, thus, summary judgment should be denied.

Tellingly, the Court found that, AWhen the employer furnishes valuable equipment, the relationship is almost invariably that of employment.@ Tofani *supra* at 486. Clearly, defendants in this case do not deny that they furnished valuable equipment in the form of the trailer and the goods that were transported. The court also found of import that defendant owned the trailer and had exclusive possession of the tractor (per lease) and found that truck drivers were employees. Tofani *supra* at 487. Defendants do not deny that they have leased possession of the tractor. (Hyderally Cert. Ex. A4@) The court also found that the factors of no withholdings or payment of certain expenses were Amere distractions.@ Tofani *supra* at 488.

The Court here seemingly did not address this case or deny its relevance.

C. The *Pukowsky* Test

Instead, the Court, without explanation, relied upon a test utilized in cases primarily discussing the standard for coverage in federal anti-discrimination statutes in developing a test to be used under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.* (the "LAD"). *See e.g.* Pukowsky, *supra*, 312 N.J. Super. 171, 182-83, 711 A.2d 398, 404-05; Carney v. Dexter Shoe Company, 701 F. Supp. 1093, 1098-1102 (D.N.J. 1988); and E.E.O.C. v. Zippo Mfg. Co., 713 F.2d 32 (3d Cir. 1983)[3]. None of these cases stand for the proposition of what test should be utilized in a CEPA matter. Of course, Plaintiff's complaint includes no reference to discrimination or sexual harassment or the LAD or the ADEA.

3 The Carney court did not expressly hold that the *Zippo* standard applied to claim under the NJLAD. Most of its discussion of this standard occurred in the context of a pendent Age Discrimination in Employment Act ("ADEA") claim. Carney *supra* at 701 F. Supp. at 1098-1102.

Although it is thus far from clear what test the Court should use, even under the Pukowsky test, which was utilized in a Law Against Discrimination vice CEPA matter, plaintiff respectfully submits that the Court should have denied defendants' motion to dismiss. [4]

Further, it is important to take cognizance of an important differentiating feature between Pukowsky and the facts sub judice. In Pukowsky the plaintiff who complained of sexual harassment was a skating instructor who was not paid by the defendant corporation. Rather she was compensated directly from the students in the private lessons that she taught. Pukowsky v. Caruso, 312 N.J. Super. 171, 181-3 (N.J. Super. , 1998)

Further, the Court noted the following relevant considerations, "Payments

> didn't go through the defendant's books. . . . There were no benefits paid to the plaintiff by the defendant. . . . Based upon her tax return, she believed that she was an independent contractor. . . . She completed the Schedule C, which showed that she operated her own business; albeit, she operated it for the most part at the [rink]. She gave her business a name in her tax returns of Free Skate Enterprises. . . . There was no supervision by the defendant over the plaintiff as to how she actually did her job. She had complete control over who she gave lessons to and the method of giving those lessons. She provided her own equipments[.] . . . The defendant had no input at all into what skills she could use to teach the students. The agreement between the two was that she would work at the premises for an indefinite duration. The only reasonable inference to be drawn is that either party could terminate the relationship at any time. . . . She was free to teach at other places. There was no testimony . . . that she had any type of exclusive arrangements with the defendant.
>
> Pukowsky v. Caruso, 312 N.J. Super. 171, 181-182 (N.J. Super. , 1998)

This is completely inapposite to the facts *sub judice* as noted in Amatulli's certification and this motion for reconsideration.

The Court stated a test referenced in Pukowsky including the following: (1) the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation -- supervised or unsupervised; (3) skill; (4) who furnishes the equipment and workplace; (5) the length of

4 This test was actually set forth in Franz v. Raymond Eisenhardt & Sons, Inc., 732 F. Supp. 521, 528 (D.N.J. 1990) and cited to in Pukowsky, *supra*.

time in which the individual has worked; (6) the method of payment; (7) the manner of termination of the work relationship[5]; (8) whether there is annual leave; (9) whether the work is an integral part of the business of the "employer;" (10) whether the worker accrues retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties. Pukowsky v. Caruso, 312 N.J. Super. 171, 182-183 (N.J. Super., 1998) *citing* Franz, *supra*, 732 F. Supp. at 528 (*citing* Zippo, *supra*, 713 F.2d at 37).

Although plaintiff does not adopt the test noted by this Court, even under such a reflection of the test to be utilized, defendants' application should have been denied.

(1) It has been noted that defendants exercise great control and supervision over plaintiff. Defendants exercised control over the means and manner of Amatulli's performance; (2) Amatulli was a truck driver who was supervised by Steve Testa and the dispatchers. Plaintiff is under the supervision and control of defendant at all times through cellular phone and pager/beeper and dispatcher; (3) Amatulli was a blue collar employee who drove a truck rather than a highly skilled and technical employee; (4) Defendants furnished equipment and the workplace. Defendants supply the trailer, the corrugated boxes that are shipped, and has control over the tractor per the lease agreement. Further, defendants supplied the work site in that plaintiff parked his tractor at the back of the President Container warehouse and defendants provided plugs for all the trucks to keep them warm during the winter. (Amatulli Cert. ¶48); (5) Amatulli worked in excess of eight (8) years solely for defendants; (6) Defendants paid Amatulli's toll expenses and part of the insurance on the tractor and trailer according to the representations of defendants. (Amatulli Cert. ¶50). Defendants 1099'd Amatulli and paid his wages weekly; (7) Defendants have a one year work agreement with plaintiff as

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5 The *Carney* court further clarifies that this point pertaining to the manner in which the work relationship is terminated has to do with whether the termination is by one or both parties, with or without notice and explanation

reflected in the Lease Agreement. (Hyderally Cert., Ex. 5; the Lease Agreement). In this Agreement the work agreement existed for one year with an automatic one year renewal period. The agreement could only be terminated with 30 days notice unless cause existed. Thus, defendants had to give notice for the termination or an explanation to the termination; (8) There has been no discovery on the topic of annual leave; (9) The integral business of defendants is to ship corrugated boxes. Plaintiff fulfills defendants= business of shipping corrugated boxes; (10) There has been no discovery on the topic of retirement benefits; (11) there has been no discovery on the topic of whether the "employer" pays social security taxes; and (12) Amatulli and the other drivers were certainly under a reasonable belief that they were Aservants@ to Testa and the other supervisors of the defendant companies.

Based on the above, it is clear that defendants' motion to dismiss should have been denied. However, the Court appeared to ignore all of the above and created a new rule of law in the State of New Jersey – namely, that as long as the defendant company does not provide for paid vacation or benefits (such as health insurance, retirement, and social security) and does not pay income taxes, the person will be denied the constitutional protections to be free from whistleblower retaliation much less discrimination or sexual harassment. Such a dangerous rule of law is completely inequitable and reflects no consideration for the rights of employees in the state of New Jersey and allows companies reckless abandon to retaliate, sexually harass and discriminate. The only entity that controls the provision of benefits and the payment of taxes is the employer. It is self evident that the bargaining powers of the individuals is inequitable and the employer can dictate these decisions. This is why one must go beyond the employer's labels to look at the factual realities of the work relationship Looking at the facts *sub judice*, when one looks at $66^{2/3}$% of the Pukowsky test or points 1, 2, 3, 4, 5, 7, 9, and 12, they all result in the denial of defendants' motion to dismiss.

Carney *supra* at 701 F. Supp. at 1098 (quoting Zippo Mfg., Inc., 713 F.2d at 37).

Yet the Court has ignored this reality, departed from New Jersey case law, and created a new law that never before existed which results in the complete emasculation of CEPA. Such an exception to the coverage of these most important statutes such as CEPA or the LAD does not exist in any case except this one which is why plaintiff respectfully urges the Court to reconsider its ruling.

VI. COURT FAILED TO CONSIDER EVIDENCE AND/ OR COMMITTED PALPABLE ERROR

A. Court failed to consider competent evidence

The Court stated that there was "nothing here to show that Roadmaster controlled when plaintiff worked, how he did his work, required that he take every job that was assigned to him." (Hyderally Cert. Ex. "3" Tr. 10/2/03 at 7, ln.25-p.8, ln. 6).

This statement reflects the Court's failure to consider or appreciate the significance of probative, competent evidence such as Amatulli's certification. As the Court knows, when deciding Defendants= Motion for Summary Judgment, should construe all facts and other evidence in the light most favorable to the parties opposing summary judgment. Dairy Stores, Inc. v. Sentinel Publishing Co., Inc., 104 N.J. 125, 135, 516 A.2d 220 (1986).6 Plaintiff respectfully submits that this does not appear to have occurred.

i. Control over when Amatulli worked

Amatulli certified that he had to work nine (9) hours per day, Monday through Friday, every week for defendants. (Amatulli Cert. &41) This is even referenced in the Policy which was given to

6 Plaintiff does not concede to defendants' motion being converted to a motion for summary judgment.

him by Steve Testa=s assistant John Cappello. (Amatulli Cert. &41); (Hyderally Cert. Ex. A5@) The Policy mandates that all drivers had to report at assigned times. (Amatulli Cert. &42); (Hyderally Cert. Ex. A5@) Further, part of the Roadmaster Trucking, Inc. Company Policy (the APolicy@) required that owner-drivers had to wear a beeper at work. (Amatulli Cert. &28) Thus, it was mandated that Amatulli was accessible to his employer during all hours of the day. This is the reality even though it is completely different from what Mr. Testa=s affidavit states. (Amatulli Cert. &42) Thus, a factual dispute exists.

ii. Defendants supervised how Amatulli did his work

Plaintiff was supervised by defendants= employees, and required to follow the rules, employee policies, and regulations that defendants set for its employees to follow. (Amatulli Cert. &26) Such supervision and control is evidenced by the fact that Testa called Amatulli on the road frequently in a supervisory fashion. (Amatulli Cert. &27) Some of the phone calls were to direct Amatulli where to go, to tell Amatulli of additional pick-ups, to ask the status on making deliveries, to see how he was doing with time, and to tell him of routes to take. Id. Additionally, Amatulli would get frequent phone calls from the dispatcher, Kevin Sullivan, telling him what to do while he was on the road. Id.

Defendants also controlled how Amatulli had to maintain the tractor trailer to comply with the companies= specific rules and regulations. The companies= Policy mandated that Amatulli and other drivers must properly maintain trucks and trailers and notes that they will be inspected periodically. (Amatulli Cert. &30); (Hyderally Cert. Ex. A5@ of the Opposition to Defendants' motion).

Every morning, Amatulli would congregate in the driver=s dispatch room to get his assignment for the day from defendants who would inform him where he would go to carry out his work duties. (Amatulli Cert. &33) Additionally, the drivers had either morning or afternoon meetings with Testa where he would advise them of the companies= policies. (Amatulli Cert. &32) Even if there was no

such afternoon meeting, the driver has to call dispatch from the last stop prior to returning to plant. (Amatulli Cert. &44) Drivers returning to plant were required to check with dispatch for instructions before dropping off the trailer. (Amatulli Cert. &44)

iii. Required to take every job that was assigned to him

For over eight years, from February 1995 until March 28, 2003, Amatulli worked exclusively for defendants as their truck driver who delivered corrugated cardboard. (Amatulli Cert. &23). During the time period of plaintiff=s employment, defendants exclusively maintained and exercised the right to control plaintiff=s work and required that he work solely for the defendant corporations. (Amatulli Cert. &24) Thus, it was completely prohibited for Amatulli to work for any other companies. (Amatulli Cert. &45) When Amatulli was employed, defendants told him that he could work only for President Container full time and for no one else. (Amatulli Cert. &45) One example of this was that at one point, Testa found out that another driver, Luis Rodriguez, was working for another company. (Amatulli Cert. &46) Testa went up to Luis and told him that he was terminated. (Amatulli Cert. &46) Thus, there was no possibility that Amatulli could extend his services to any other entity other than the defendant corporations.

The Policy further requires that if a driver is not available, he must notify dispatcher the day before. (Amatulli Cert. &43); (Hyderally Cert. Ex. A5@ of plaintiff's opposition to defendants' motion) Further, if the driver cannot deliver the load dispatched, he will be terminated for the day. (Amatulli Cert. &44) Thus, the driver has to make the assigned delivery. (Amatulli Cert. &44) Thus, if Amatulli wanted or needed an income, which he did, he had to take work only for defendants and take every job that they assigned him or risk termination.

B. <u>Incorrect or Irrational Basis</u>

The Court notes that, "Plaintiff had the ability to turn down routes, he had the ability to take vacation time, he had the ability to come in on days of his chosing." (Hyderally Cert. Ex. "3" Tr. 10/2/03 at 7, ln.25-p.8, ln. 6).

Any employee in the United States of America has these options. Luckily for Amatulli, this is not the standard to determinating coverage. If any employee failed to do their work, or did not come in to work, they would be terminated. The same was true for plaintiff. As noted in the section above pertaining to the termination procedures, if plaintiff failed to do his work, he would have been terminated. Further, if he failed to come in to work, he would have been terminated as reflected in the section above. In fact, these similarities support plaintiff's request that the Court reconsider and reverse its ruling.

In so far as the Court's statement pertaining to vacation time, it is unclear if the Court is intimating that having the ability to take vacation leads to one being an independent contractor or something else. Of course, the fact that plaintiff "had the ability to take vacation time" makes him more akin to an employee than an independent contractor.

Plaintiff respectfully submits that these statements by the Court reflect that the Court's decision is "based upon a palpably incorrect or irrational basis." Cummings, *supra* at 384.

VII. AMATULLI CAN ESTABLISH A CLAIM UNDER THE NEW JERSEY CONSTITUTION

The Court failed to address this issue in its Order. Yet it signed an Order dismissing this cause of action. Plaintiff notes that the New Jersey Constitution applies to employees and independent contractors.

VIII. PRESIDENT CONTAINER SHOULD REMAIN A DEFENDANT

The Court failed to address this issue in its Order. Further, this was not addressed during oral argument and no discovery on this issue has occurred. Yet it signed an Order dismissing this defendant.

CONCLUSION

For all the foregoing reasons, Plaintiff, respectfully requests that the Court reconsider its ruling to dismiss Counts I, II, and III of his Amended Complaint and to dismiss President Container as a party to this litigation. A proposed form of order is attached.

Dated: September 10, 2013

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