

HELLRING LINDEMAN GOLDSTEIN & SIEGAL LLP
Attorneys for Plaintiffs
One Gateway Center
Newark, New Jersey 07102-5386
(973) 621-9020

-----x
TED MATTOX, et al., : SUPERIOR COURT OF NEW JERSEY
 : LAW DIVISION: ESSEX COUNTY
 Plaintiffs, : DOCKET NO. ESX-L-007425-06

v. : Civil Action

TOWNSHIP OF MONTCLAIR; et al., : PLAINTIFFS' STATEMENT
 : OF MATERIAL FACTS NOT
 Defendants. : IN DISPUTE
-----x

(Rule 4:46-2(a))

Plaintiffs, by their attorneys, Hellring Lindeman Goldstein & Siegal LLP, submit that the following material facts are not in dispute:

THE PARTIES

1. Plaintiff, Ted Mattox ("Mattox") was elected as Councilor-at-large for the Township of Montclair for a four-year term that began on July 1, 2004 and continues until June 30, 2008. The other plaintiffs are taxpayers of the Township of Montclair. See First Amended Complaint, ¶¶ 1-10; defendants' Answers.

2. The defendant Edward Remsen ("Remsen") is the Mayor of Montclair. He was elected for a four-year term that

began on July 1, 2004 and continues until June 30, 2008. See First Amended Complaint, ¶ 12; defendants' Answer.

3. The defendant Alan Trembulak, Esq. ("Trembulak") is the Township Attorney of Montclair. See First Amended Complaint, ¶ 18; Trembulak's Answer.

4. The defendant Joseph Hartnett ("Hartnett") commenced his position as Township Manager on October 27, 2003. He continues to serve in that position. See Hartnett Dep. at 51.

5. In 2004, Mattox was asked by Remsen (who was then on the Township Council) to join his ticket and run as Councilor At Large under a "Leadership Montclair" slate. Six of the seven candidates from the Leadership Montclair were elected for a four-year term, commencing July 1, 2004. See Mattox deposition.

I. THE NO-BID CONTRACTS TO THE MONTCLAIR ECONOMIC DEVELOPMENT CORPORATION ("MEDC") ARE NOT LAWFUL UNDER EITHER THE "PROFESSIONAL SERVICES" OR "EXTRAORDINARY UNSPECIFIED SERVICES" EXCEPTION TO THE PUBLIC CONTRACT LAWS

6. The defendant Montclair Economic Development Corporation ("MEDC") was incorporated on March 7, 1995. Remsen was one of its original directors and Trembulak signed the Certificate of Incorporation. See Amended Complaint, Exhibit G; Appendix to Statement of Material Facts, Exhibit 1.¹

7. On July 23, 1996 Remsen was President of the MEDC. He signed a promissory note ("MEDC Note") for a loan of public

¹References to "Appendix" are to documents referred to in this Statement and submitted herewith.

funds received from the Township of Montclair in the amount of \$40,000. The terms of the loan provided that it was interest-free until January 1, 2001. After January 1, 2001 the MEDC Note required quarterly payments of \$2000 in principal plus interest. All principal, interest and late charges were due and owing on the maturity date of July 1, 2006. See Appendix Exhibit 2.

8. In its early years - after its incorporation in 1995 and the MEDC Note signed in July 1996 -- the avowed purpose of the MEDC was to engage in marketing and public relations activities to promote new business in the center of downtown Montclair which had suffered from the economic downturn of the early 1990's. See Appendix Exhibit 3. See "Attachment to Loan Agreement."

9. From 1997 to 2003 the MEDC had received annual contracts from the Township of Montclair in the sum of \$40,000 per year. These contracts were awarded without public bidding under the "professional services" exception to the public bidding laws and reflected the various services related to the MEDC's original mission to provide economic consulting, public relations and marketing for the downtown or Town Center business district. However, in 2003, the Township of Montclair authorized the creation of a Business Improvement District ("BID"). As a result, the thrust of the mission of the MEDC changed. See Appendix Exhibit 3; Appendix Exhibit 4, Trembulak Dep. at 62.

10. Dale Jacobs ("Jacobs") has been the President of the MEDC since January 1, 2004. See Appendix Exhibit 6, Jacobs Dep. at 3.

11. On November 29, 2005, the Montclair Township council passed two Resolutions awarding the MEDC (a) a no-bid contract for \$45,000 for the year 2005; and (b) a no-bid contract for \$40,000 for the year 2004. Both Resolutions invoked the "professional services" exception to justify the award without public bidding. See Appendix Exhibit 5.

12. The MEDC does not perform "professional services." Jacobs confirmed through his testimony that the MEDC has never employed anyone with any professional license. Moreover, the MEDC has never entered into any contract with any entities employing professionals with licenses. See Appendix Exhibit 6; Jacobs Dep. at 19.

13. Similarly, the MEDC has never engaged in any training of any nature in order to be qualified to perform its activities or projects. Jacobs Dep. at 28.

14. There is only one employee of the MEDC, Eva Marie Santiago. She has a graduate school background in urban policy. See Jacobs Dep. at 32.

15. Town Manager Hartnett has admitted that he did not think it was "appropriate" to use the professional services exception to the competitive bidding law "...because I don't think it [the contract] meets the test for professional services

agreement ...because there is no licensed or professional services involved". Hartnett Dep. at 13-14; Appendix Exhibit 7.

16. In his April 25, 2006 Budget Message, Hartnett stated: "We are calling for the phase-out of Township funding of the MEDC...." The Manager also made public statements at this time that the MEDC contract was "unusual." Appendix Exhibit 8; Hartnett Dep. at pp. 34-35.

17. Notwithstanding his statements regarding MEDC in his Budget Message of April 26, 2006, Hartnett signed a Certification for "extraordinary unspecifiable services" dated July 25, 2006 which approved renewed funding to MEDC for "consultative and collaborative services... within the general framework of economic development, community development, and quality of life...." Hartnett further certified that "In view of the foregoing, it is not practicable to obtain informal solicitation of quotations." See Appendix Exhibit 9.

18. On July 25, 2006, the defendant Remsen and the Town Council (except for Mattox) voted to approve a contract with the MEDC in the amount of \$40,000. See Township Resolution; Appendix Exhibit 10; Contract, Appendix Exhibit 11.

19. The July 25, 2006 Resolution articulates an ostensible basis for the 2006 award of a no-bid contract to be under N.J.S.A. 40A:11-5(1)(a)(ii) of the Local Public Contracts Law, also known as the "Extraordinary Unspecifiable Services" ("EUS") which, when properly invoked, provides an exception to

the requirement to undertake advertisements and competitive, public bidding pursuant to the Local Public Contracts Law of the State of New Jersey to obtain the lowest responsible bidder. See Appendix Exhibit 10.

20. There is/was no qualitative or objective difference in the actual services rendered by MEDC following the contract awarded under the EUS exception in July 2006 as compared to earlier "professional services" rendered by MEDC on earlier contacts prior to July 2006. The scope of services refers to a "farmers market," "holiday shopping" promotion and a "gala" for "community awards." See Appendix Exhibit 12. These were recurring activities. Moreover, a review of the "scope of services" shows that the services are administrative in nature and are no different from earlier years and do not qualify under the EUS exception.

21. The specific activities of the MEDC consist of organizing a "farmers market" which is open on Saturdays from June to December and where eight to ten farmers are invited to come to Montclair to sell their products. See Jacobs Dep. at 28. In addition to the "farmers market", the MEDC has promoted a project called "Celebrate Montclair in 2005." This was an effort to attract people to provide a weekend of entertainment and exposure in Montclair. See Jacobs Dep. at 35. The MEDC participated in addressing "parking issues throughout town" including involvement in an "...interim parking plan to assist

parkers who are not going to have [access to] what was then known as the Crescent Parking Lot...." See Jacobs Dep. at 7.

22. Additionally, MEDC provid(es) "...holiday parking services by coordinating with the business districts." See Jacobs Dep. at 7. Another MEDC project involved a "painting Montclair project which attracts shoppers into stores." See Jacobs Dep. at 8. MEDC has hosted a "community award programs" for the last eight years and participated in the Giro Bike Race "to help attract more people in town in the business climate." See Jacobs Dep. at 8-9.

23. Finally, the MEDC was active in the "...development and support of a Montclair Arts Council." See Jacobs at p.9.

24. None of the activities of the MEDC rise to the level of either "professional services" or "extraordinary unspecified services." Indeed, upon close examination the activities are utterly ongoing, repetitive and mundane. The "holiday parking program" was described by Jacobs as a program where the MEDC coordinates putting "...paper bags over parking meters and shoppers don't have to pay their quarters."

Q. So the holiday parking program involves literally putting bags over parking meters in the hopes of bringing customers into the downtown area where those meters are located?

A. Throughout the Township.

Q. Throughout the Township. Now, in terms of the bagging itself, is that done by MEDC people or by the merchants or by municipal employees?

A. It's done by a combination of the merchants and the MEDC.

See Jacobs Dep. at p.42.

25. The MEDC has admitted that its services do not involve "any kind of advanced type of learning" or any kind of "technical or expertise or extensive training." See Jacobs Dep. at 43-44.

26. Jacobs admitted that the MEDC expends its money, which includes taxpayer funds, to reimburse expenses and to pay a Township employee \$10,000 for her fundraising efforts. See Jacobs Dep. at 40.

II. REMSEN AND TREMBULAK HAD CONFLICTS OF INTEREST AND FAILED TO RECUSE THEMSELVES FROM MATTERS INVOLVING THE MEDC

27. Neither Remsen nor Trembulak ever recused themselves from participating in the Resolutions involving contract decisions funding the MEDC.

28. Even after he became Mayor, Remsen continued to influence the Township's relationship with the MEDC. For example, Appendix Exhibit 13 is an email, dated March 31, 2005, whereby Hartnett told Jacobs (with a copy of the email going to Remsen) that he would recommend to the Council that the MEDC budget "would be increased by \$5,000 at the suggestion of Remsen."

29. Trembulak was the attorney for MEDC from the date of its inception in March 1995 until at least January 31, 2005 when -- according to Trembulak -- he terminated his representation of MEDC. See Trembulak Dep., Appendix Exhibit 4, at 9.

30. Trembulak as attorney for MEDC was well aware of the MEDC Note. He reviewed it when it was prepared. He sent a memo to MEDC in the summer of 2001 advising MEDC of its obligation to begin repaying the promissory note. See Trembulak Dep. at 48-49.

31. The MEDC was late in its payments on many occasions. It never paid any late charges (5%) as required under the MEDC Note. These facts were never publicly disclosed by either Remsen or Trembulak and were only discovered after plaintiffs received a ledger card from the Montclair Finance Department shortly before this litigation pursuant to a Local Public Records Request. See First Amended Complaint, Exhibit I; Appendix Exhibit 14.

32. Trembulak continued to provide legal services to MEDC well after Remsen became Mayor in July 2004 and after Trembulak was formally designated as Township Attorney. For example, on January 18, 2005 Trembulak wrote a letter to Jacobs (in Trembulak's continuing capacity as the attorney for MEDC) offering his legal opinion that the MEDC could do business with the Township of Montclair as a "redeveloper" and could "accept

grants or other forms of government funding." Trembulak approved this prospective business:

...[I]t is my opinion that the MEDC has the requisite legal authority to act, and earn fees, as a redeveloper, to accept grants or other forms of government funding, and to incur debt, including the issuance of notes and mortgages.

See Trembulak letter, Appendix Exhibit 15.

33. The Trembulak opinion of January 18, 2005 was transmitted by Jacobs to Montclair on MEDC letter (showing Trembulak as counsel) dated January 28, 2005. See Appendix Exhibit 16.

34. At the time Trembulak issued his legal opinion to the MEDC (dated January 18, 2005) Trembulak knew that he was the Township Attorney. He had applied for the position in September 2004 and his appointment became effective February 1, 2005. See Trembulak Dep. at 9. Before then, however, Trembulak had been the campaign manager for Remsen when Remsen ran for Mayor in 2004 and has been Remsen's personal attorney. See Trembulak Dep. at 9; Remsen Dep., Appendix Exhibit 17, at 16-19;32.

35. As late as July 30, 2006 (while he was Township Attorney), Trembulak continued to be listed as the attorney for the MEDC on both its stationery and its website. See Appendix Exhibit 18, the MEDC website (MEDC.ORG) printed on July 30, 2006 which lists Trembulak as "Legal Counsel."

36. Trembulak claimed that he was instructed to change the justification for the payment of taxpayer money to MEDC on a no-bid basis in 2006 from "professional services" to "EUS" status "...because he was instructed to do so by the Town Manager." Trembulak concluded that the change to EUS was justified because, among other things, the transition which had occurred in the MEDC mission over the years. Trembulak Dep. at 59-63.

37. Despite their historical involvement with MEDC as President and attorney, respectively, neither Remsen nor Trembulak disclosed in November 2005 that the MEDC was in arrears or default of the MEDC Note. Neither Trembulak nor Remsen disclosed or discussed any conflict of interest issues that may have been appropriate to consider concerning the MEDC's request for public funds and/or whether it would be appropriate to obtain independent attorney review or whether the scope of services fell into the "professional services" exception to the public bidding laws. (There is no reference in the record to any such disclosure.)

38. Trembulak, as Township Attorney, never provided independent advice to Mattox as a result of his attorney-client relationship with MEDC and ensuing conflict of interest. See Mattox Dep.

39. Neither Trembulak nor Mayor Ed Remsen recused themselves from participating in deliberations regarding the MEDC. Remsen did not disqualify himself from voting on the

resolutions awarding no-bid contracts to the MEDC. See Appendix Exhibits 5; 10.

40. Remsen was well aware of his obligation to recuse himself from matters involving the Township and in August, 2002 Remsen abstained from voting in favor of a resolution to benefit Montclair Baseball, a not for profit corporation that Remsen was affiliated with. See Appendix Exhibit 18.

41. Trembulak, as Township Attorney, is a "local government officer" as defined in N.J.S.A. 40A:9-22g(2).

42. Section 3-61 A of the Montclair Code of Ethics states, in pertinent part that "No official...shall grant...any...advantage or favor beyond that which it is the general practice to grant or make available to the public at large." See Appendix Exhibit 26.

43. Section 3-63 A of the Montclair Code of Ethics requires "public disclosure" by public officials of conflicts of interests and "close business associations" and requires the official to "...disqualify himself/herself from participating in public or private deliberations or voting and shall not take any action in his/her capacity as a Township official, advisor or employee relating to such matter." See Appendix Exhibit 26.

44. Notwithstanding the awareness of the filing of this taxpayers' Complaint, Hartnett authorized the payments to MEDC for the period from January 1, 2004 through December 31, 2007.

The No-Bid Contracts to the Montclair Arts Council, Inc., a Not-for-Profit Corporation

45. The Montclair Arts Council, Inc. ("MAC") is a recently formed entity which was not incorporated until October 7, 2005. See Appendix Exhibit 20. Its list of directors, as attached to the Certificate of Incorporation, includes Jacobs (President of the MEDC) and Eva Marie Santiago, the sole paid employee of the MEDC.

46. The only employee of the MAC since it was formed is James Peskin ("Peskin"). Peskin has a Bachelors Degree in Theater and English and a Masters in Fine Arts. He began his employment with MAC in January 2006 after he responded to an advertisement. At the time Peskin was working "...freelancing as an actor and freelance director in Atlanta, Georgia." See Appendix Exhibit 21, Peskin Dep. at 6, 8.

47. Peskin testified regarding the specific activities of the MAC. He describes MAC as a "membership organization" that "sell[s] memberships". See Peskin Dep. at 22. Its mission is to represent "various constituencies within Montclair". See Peskin Dep. at 25.

48. When asked for specifics as to the actual services provided since January 2006 Peskin responded that it was "...largely designing programs and assessing needs to fulfill its purpose 'to advocate for the arts and promote the arts and artists in Montclair'." See Peskin Dep. at 31. Peskin further

testified that one area of activity is called "networking" and MAC formed the "Gallery Association" to "...view a couple, several events to highlight the galleries and invite a 'general public to visit all of the galleries'." For this task Peskin testified that the MAC "...created a map where all the galleries are." He said: "We have a map which has a logo and a brand on it. It has, tells you where the galleries are; it gives you all of the information on when they're open what they produce." See Peskin at 32.²

49. Another program of the MAC was "the Montclair emerging film makers festival." There is also a program in "creative ageing...that really looked at the interests and needs of older Americans and that found that older Americans there [sic] arts program is not focused on them." Similarly there was a "Passports Program" which is a "photo exhibit for the senior citizen photographers and does oral history." Peskin summarized tasks which Peskin said were intended to "create a network so we have arranged meetings." See Peskin at 35.

50. MAC was awarded a "professional services" contract for \$73,000 by Resolution dated December 13, 2005. See Appendix Exhibit 24.

51. MAC was awarded an EUS contract for \$72,000 by Resolution dated July 25, 2006. See Appendix Exhibit 25.

²Peskin testified that two members of its Board of Directors own galleries.

52. The services and activities of the MAC do not qualify for the professional services or EUS exception to the public bidding laws.

THE ADDITIONAL CONFLICTS OF INTEREST OF TREMBULAK

53. Plaintiffs have retained an expert with respect to matters of ethical issues. Robyn Hill, Esq. has provided a Report dated April 6, 2007 and supplemented on January 10, 2008 ("Hill Report"). See Appendix Exhibit 22, 23. Although he was afforded an opportunity to rebut this report with his own expert, Trembulak has never done so.

54. The unrebutted Hill Report specifies the various conflicts of interest of Trembulak arising out of his dual capacity as attorney for the Township of Montclair and as counsel to the MEDC. See Appendix Exhibit 22; 23.

55. The Hill Report points out that Trembulak's dual representation implicates R.P.C. 1.7(a)(2); R.P.C. 1.8 and R.P.C. 1.9 all of which concern conflict of interest. See e.g. Hill Report at page 5.

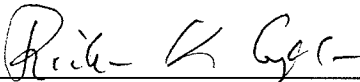
56. Among other things, as pointed out by the Hill Report, the MEDC was an obligee to the Township of Montclair under the MEDC Note. In the present case there was "...financial reliance of MEDC on the Township, and the debt owed by MEDC to the Township, created a current conflict of interest...." Hill Report at page 8. As a result of the conflict of interest Trembulak was unable to appropriately advise the governing body

pursuant to its obligations as Township Attorney and failed to recuse himself from participation of matters in which there was a conflict of interest. See Hill Report.

Further Relief

57. With complete awareness of the pending Amended Complaint, which was filed on October 30, 2006, defendants continued to provide the taxpayers' funds to the MEDC and MAC.

HELLRING LINDEMAN GOLDSTEIN & SIEGAL LLP
Attorneys for Plaintiffs

By: 

RICHARD K. COPLON
A Member of the Firm

Dated: April 9, 2008