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May 10, 2017

Honorable Kay Walcott-Henderson, J.S.C.
Superior Court of New Jersey
Law Division, Mercer County
175 South Broad Street
Trenton, New Jersey 08608

Re: Securus Technologies, Inc. v. Christopher
Christie, Governor of New Jersey, et al.
Docket No.: MER-L-143-17

Dear Judge Walcott-Henderson:

This Office represents Defendants Christopher Christie, Governor of New Jersey, Christopher S. Porrino, Attorney General of New Jersey, Gary M. Lanigan, Commissioner of the New Jersey Department of Corrections, and Elizabeth Connolly, Commissioner of the New Jersey Department of Human Services in the above-referenced matter. Please accept this letter brief in lieu of a formal brief in support of Defendants' Motion to Dismiss Plaintiff Securus' Complaint in this matter.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

New Jersey's Rate Control Law ("RCL"), found at N.J.S.A. 30:4-8.12, enacted on August 31, 2016, operates to ensure

affordable telephone service for inmates in State and County correctional institutions. Subsection (a) of the RCL provides:

[T]he State Treasurer or appropriate person on behalf of the county or private correctional facility shall contract with the qualified vendor whose rate shall not exceed 11 cents per minute for domestic debit, pre-paid, and collect calls and who does not bill to any party any service charge or additional fee exceeding the per minute rate, including, but not limited to, any per call surcharge, account set up fee, bill statement fee, monthly account maintenance charge, or refund fee.

[N.J.S.A. 30:4-8.12(a)].

As set forth above, the RCL prohibits State and county entities from contracting with any telephone service provider that bills in excess of eleven cents per minute for domestic calls. Ibid.

Subsection (a) of the RCL also provides that contracts for inmate calling services ("ICS") are subject to public bidding - specifically, "the procurement provisions set forth in [...] chapter 11 of Title 40A of the New Jersey Statutes". N.J.S.A. 30:4-8.12(a). Title 40A, in turn, limits contracts subject to public bidding to terms not exceeding five years. N.J.S.A. 40A:11-4.2; N.J.S.A. 40A:11-15(8) (limiting the maximum duration of public contracts for telecommunications services to five years).

To further ensure affordable telephone service for inmates, subsection (b) of the law provides in pertinent part: "[a]

State, county, or private correctional facility shall not accept or receive a commission or impose a surcharge for telephone usage by inmates in addition to the charges imposed by the telephone service provider." N.J.S.A. 30:4-8.12(b). Thus, subsection (b) prohibits correctional facilities from requiring their providers to pay site commissions. Subsection (b) thereby acts to offset any financial detriment caused to providers by the rate ceiling in subsection (a). N.J.S.A. 30:4-8.12(b).

Importantly, the RCL also provides that: "section 2 shall apply to any new or renewal contract for inmate telephone services in effect on or after the date of enactment." N.J. P.L. 2016, c. 37, S1880 3R, as codified at C. 30:4-8.11 to - 8.14. Because the RCL was enacted on August 31, 2016, ICS contracts entered into on or after that date must comply with Section 2's eleven cent rate cap. Existing contracts remain exempt, allowing the providers to continue to charge the rates agreed upon at the contract's inception.

Plaintiff Securus, an ICS provider, filed the Complaint in this matter on January 18, 2017. Securus seeks a declaration that the RCL violates the Takings and Due Process Clauses of the United States Constitution and the Takings Clause of the New Jersey Constitution, as well as an injunction to enjoin the State from enforcing the RCL. Compl. ¶¶ A-C. In its Complaint, Securus explains that it incurs significant costs to install and

operate telecommunications systems in jails and that it must charge, on average, at least thirty-three cents per minute - three times the RCL cap - only to break even. Id. at ¶ 18. Securus also claims that the RCL prohibits similarly-situated vendors from providing ICS in New Jersey prisons without operating at a loss. Id. at ¶ 22.

Securus also represents that it currently holds two contracts for the provision of ICS in the State of New Jersey: the first with Cape May County, to provide ICS to the Cape May County Correctional Center; and the second with Passaic County, to provide ICS to the Passaic County Jail. Id. at ¶ 17.¹

A. The Cape May County Contract

On March 26, 2013, Cape May's Board of Chosen Freeholders ("Cape May Board") adopted Resolution No. 235-13 awarding a competitive contract to Securus "to furnish, deliver, install and maintain one (1) new inmate telephone system and jail

¹ It is proper for this Court to consider the documents referred to in the Complaint as well as public documents, including Passaic County's Notice to Bidders and Bid Tally Sheet (both available on Passaic County's public website at <http://www.passaiccountynj.org/bids.aspx?bidID=1382&PRINT=YES>), in the context of this Motion to Dismiss without converting it to a summary judgment motion. Banco Popular N. Am. V. Gandi, 184 N.J. 161, 183 (2005); Myska v. New Jersey Mfrs. Ins., 440 N.J. Super. 458, 482 (App. Div.), app. dismissed 224 N.J. 523 (2015); NJ Sports v. Bostick Promotions, 405 N.J. Super. 173, 178 (Ch. Div. 2007); Teamsters Local 97 v. New Jersey, 434 N.J. Super. 393, 412 (App. Div. 2014).

management system at the Cape May County Correctional Center" ("Cape May Contract"). Ex. A.² The Cape May Contract provides for a five-year term from March 2013 to March 2018. Ibid. Because the Cape May Contract commenced its five-year term prior to August 31, 2016, the RCL does not impact it.

The Cape May Contract has been amended twice to comply with federal law. Ibid. On March 11, 2014, the Cape May Board adopted Resolution 168-14 to comply with new rate caps and the elimination of surcharges for interstate calls mandated by the Federal Communications Commission ("FCC"). Ibid. Then, on February 23, 2016, the Cape May Board adopted Resolution 173-16 to comply with another FCC order regulating "call rates of 22 cents per minute for all call types" and prohibiting the payment of site commissions on revenues earned. Ibid.

B. The Passaic County Contract

On April 24, 2010, the Passaic County Board of Chosen Freeholders ("Passaic County Board") adopted Resolution R-10-270 awarding Securus a contract with Passaic County following a competitive bidding process. Ex. B. The original contract is dated May 25, 2010. ("Passaic County Contract") Ibid. The original term of the Passaic County Contract ran from April 1, 2010 to March 31, 2013 with a one-year option to renew at the

² "Ex. A" refers to Exhibit A to the Certification of Patricia A. Krogman filed in support of this Motion.

option of the County. Ibid. The Passaic County Contract has been amended several times, most recently on December 13, 2016, when the Passaic County Board adopted Resolution R-16-1024 authorizing an additional extension, on a month-to-month basis, capping Securus' per minute rate at eleven cents and eliminating site commissions to comply with the RCL until such time as Passaic County issues a new Request for Proposals ("RFP") and recommends a new award of contract. Ibid.

On February 15, 2017, the Passaic County Board issued RFP-17-005 soliciting bidders on its renewal ICS contract for the Passaic County Jail. Ex. C. In response, Securus submitted one of the five bids that Passaic County received prior to April 5, 2017. Ex. D. However, the Passaic County Procurement Center rejected Securus' bid based on its failure to submit a proper stockholder disclosure statement. Ibid.; see also N.J.S.A. 40A:11-23.2(c). Passaic County is still reviewing the bid submissions and has not yet awarded a new contract. Ibid.

LEGAL ARGUMENT

Standard of Review

To determine whether a complaint should be dismissed for failure to state a claim upon which relief can be granted pursuant to Rule 4:6-2(e), a court's "inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Printing Mart-Morristown v. Sharp Elecs.

Corp., 116 N.J. 739, 746 (1989). The court should "search[] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Ibid. The court must give plaintiffs every reasonable inference of fact and "accept as true the facts alleged in the complaint." Darakjian v. Hanna, 366 N.J. Super. 238, 242 (App. Div. 2004); see Printing Mart, supra, 116 N.J. at 746.

Nevertheless, "the essential facts supporting plaintiff's cause of action must be presented in order for the claim to survive; conclusory allegations are insufficient in that regard." Scheidt v. DRS Tech., Inc., 424 N.J. Super. 188, 193 (App. Div. 2012) (emphasis added). "The motion may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for plaintiffs' claim must be apparent from the complaint itself." Edwards v. Prudential Prop. & Cas. Co., 357 N.J. Super. 196, 202 (App. Div. 2003).

Although state courts in New Jersey are not beholden to the jurisdictional limits placed on federal courts by virtue of Article III's case and controversy requirement, New Jersey courts have nonetheless preserved the requirement that plaintiffs must sufficiently establish the existence of a

"justiciable controversy" even outside the declaratory context. O'Shea v. N.J. Schools Construction Corp., 388 N.J. Super. 312, 317-18. (App. Div. 2006). Thus, for a complaint to state a claim for relief, a plaintiff must include factual allegations giving rise to a justiciable claim. Ibid. More specifically, the factual allegations, taken together, must establish that plaintiff holds a "claim of right" predicated on plaintiff's "legal rights," which have been affirmatively denied by defendant. Id. at 317. Justiciability connotes self-imposed, judicially-constructed jurisdictional limitations on matters appropriate for judicial review. See N.J. Citizen Action v. Riviera Motel Corp., 296 N.J. Super. 402, 411 (App. Div. 1997). It requires courts to inquire into whether the duty, breach, and right asserted can be judicially identified, determined, and molded. See Gilbert v. Gladden, 87 N.J. 275, 281 (1981).

Mootness and ripeness are aspects of justiciability concerned with ensuring that judicial review is only granted to those plaintiffs threatened with immediate harm. See N.J. Tpke Auth. v. Parsons, 3 N.J. 235, 241 (1949); Betancourt v. Trinitas Hosp., 415 N.J. Super. 301, 311 (App. Div. 2010); Jackson v. Dept. of Corrections, 335 N.J. Super. 227, 231 (App. Div. 2000). Both a mootness defense and a ripeness defense may be treated as a "failure to state a claim" defense under Rule 4:6-2(e). Teamsters Local 97, supra, 434 N.J. Super. at 393; Rezem Family

Associates, LP v. Borough of Millstone, 423 N.J. Super. 103
(App. Div. 2011).

POINT I

THE COMPLAINT MUST BE DISMISSED BECAUSE
SECURUS FAILS TO PRESENT AN "ACTUAL
CONTROVERSY" AS REQUIRED UNDER THE
DECLARATORY JUDGMENT ACT.

In its Complaint, Securus seeks a declaration that the RCL violates the United States Constitution's Takings and Due Process Clauses, as well as the New Jersey Constitution's Takings Clause, both on its face and as applied to Securus. Compl. ¶¶ A, B. As such, the relief sought by Securus implicates the New Jersey Declaratory Judgment Act ("DJA"). N.J.S.A. 2A:16-50 to -62.

To state a claim for declaratory relief under the DJA, a plaintiff must plead factual allegations sufficient to establish the existence of an "actual controversy." N.J.S.A. 2A:16-61. "The court may refuse to render or enter a declaratory judgment, when, if rendered or entered, it would not terminate the uncertainty or controversy giving rise to the proceeding." Ibid.; see also Parsons, supra, 3 N.J. 235 (circumscribing remedies provided by the DJA based on "the salutary qualification that the jurisdiction of the courts may not be invoked in the absence of an actual controversy"). Our Supreme Court has clarified that the "actual controversy" requirement

precludes courts from rendering advisory opinions, functioning in the abstract, deciding moot cases, or deciding issues other than "concrete contested issues conclusively affecting adversary parties in interest." Id. at 240. As a consequence, where a plaintiff fails to plead facts establishing the existence of an "actual controversy," the plaintiff is not entitled to declaratory relief, and the complaint must be dismissed. The DJA is designed to provide a remedy for the adjudication of the legal rights of the parties. Likewise, "where there has been no . . . invasion of the claimed right," the DJA is not available. Ibid.

Here, Securus is invoking the DJA to secure judicial adjudication regarding its purported interests in the Cape May and Passaic County Contracts. But Securus does not have a legal right to a continued contract with Passaic County - the contract is subject to public bidding, and that process has commenced. The current contract is only in effect until a new provider is secured, and that process is underway. To the extent Securus claims it has been harmed because its extended contract is subject to the RCL, Securus itself chose to continue to provide the services at the eleven cent rate. Securus is free to bid for the new Passaic County contract or to pass, but is not legally entitled to continue to provide ICS to Passaic County after the expiration of its current contract.

Moreover, Securus' contract with Cape May County continues in effect until 2018, and will remain unaffected by the RCL. By its terms, the RCL only applies to new or renewal contracts. As a result, Securus is legally entitled to continue to charge the original rate for ICS in Cape May County. The RCL is not retroactive.

Because Securus has failed to plead factual allegations establishing any legal right with respect to the Passaic County Contract or establishing an invasion of its claimed right with respect to the Cape May County Contract, the DJA is not available and the Complaint must be dismissed.

POINT II

THE COMPLAINT MUST BE DISMISSED BECAUSE SECURUS' CLAIM IS NOT RIPE FOR ADJUDICATION.

A. Ripeness Generally

This Court should dismiss the Complaint until such time as Securus can and has pled issues that have ripened into causes of action.

Ripeness is a justiciability doctrine that requires the court to make the threshold determination of whether a case is ripe for judicial review and thereby avoid rendering a premature decision. Nat'l Park Hospitality Ass'n v. Department of Interior, 538 U.S. 803, 808, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003). New Jersey courts analyze ripeness pursuant to a two-

pronged analysis: (1) the fitness prong; and (2) the hardship prong. Comm. to Recall Robert Menendez From the Office of U.S. Senator v. Wells, 204 N.J. 79, 99 (2010); Empire Trust Co. v. Board of Commerce and Navigation, 124 N.J.L. 406, 411 (1940); Hovnanian Companies of North Cent. Jersey, Inc. v. New Jersey Dept. of Environmental Protection, 379 N.J. Super. 1, 9-10 (App. Div. 2005).

In Menendez, supra, 204 N.J. at 99, the New Jersey Supreme Court analyzed the fitness prong of the ripeness test by drawing a distinction between legal and factual issues. The Court framed the issue in Menendez as: whether, under the Uniform Recall Election Law ("UREL"), N.J.S.A. 19:27A-1 to 19:27A-18, the notice of intention that the recall committee had submitted with the Secretary in support of its recall petition complied with the provisions of N.J.S.A. 19:27A-6. Menendez, supra, 204 N.J. at 88; N.J.S.A. 19:27A-7(a). The Court characterized this issue as "purely legal" and reversed the Appellate Division's decision to dismiss the complaint on ripeness grounds pending further factual development of the record. Menendez, supra, 204 N.J. at 94. The Court explained that legal issues of statutory or regulatory interpretation, as opposed to fact-based issues, are generally fit for judicial review because they are unlikely to benefit from the development of additional facts. Menendez, supra, 204 N.J. at 99.

In contrast to the "purely legal" issue in Menendez, the issue here is fact-based: whether the RCL constitutes an unconstitutional taking that deprives Securus and other ICS providers of their property without due process of law by imposing rate caps below what providers must charge to recoup a reasonable return. For this issue to be ripe for review, the Complaint would have to allege facts sufficient to allow a court to determine whether the RCL precludes Securus and similarly-situated ICS providers from recouping their initial investments and from recovering their operating costs plus a reasonable return. In contrast to the "purely legal" issue in Menendez, this is an issue that would benefit from the development of additional facts. Accordingly, this Court should dismiss the Complaint.

Menendez is also distinguishable with respect to the hardship prong of its ripeness analysis. Here, Securus has made no "sufficient showing of harm" analogous to the showing made in Menendez. Menendez, supra, 204 N.J. at 100. In Menendez, the New Jersey Supreme Court observed that by invoking the ripeness doctrine as a means to abstain from declaring the UREL "manifestly unconstitutional," albeit acknowledging the possibility of such a declaration in the future, the Appellate Division's decision incidentally allowed the recall process to move forward. The Court observed that absent its decision to

reverse this incidental effect, Senator Menendez would be statutorily obligated to oversee the establishment of a recall defense committee, which would consequentially detract from his congressional responsibilities and harm the public. Menendez, supra, 204 N.J. at 100. Further, a subsequent decision by the Court that the process was "manifestly unconstitutional" after having allowed that very same process to proceed would undermine public confidence in the electoral process. Ibid. Thus, the Court found that Senator Menendez had demonstrated harm sufficient to satisfy the hardship prong. Ibid.

Here, Securus has failed to show that the RCL has forced it to redirect resources away from its provision of ICS in New Jersey to the detriment of Passaic and Cape May Counties. Also, Securus has failed to allege facts showing that a substantial public interest will be threatened in the event that this Court declines to immediately invalidate the RCL. Rather, the public interest favors upholding the constitutionality of the RCL: the RCL benefits New Jersey taxpayers by requiring lower prices on public contracts for ICS, both through the rate cap and elimination of site commissions, and strengthens the ties between inmate populations and their families and local communities by ensuring affordable means of communication.

Therefore, because the Complaint omits factual allegations sufficient to satisfy either the fitness prong or the hardship

prong, the facts alleged on the face of the Complaint have yet to ripen into a claim upon which relief can be granted.

B. Ripeness With Respect to the Cape May County Contract

Securus' Complaint should be dismissed because it fails to allege facts satisfying either the fitness or the hardship prong of New Jersey's two-pronged ripeness test specifically with respect to its Cape May County Contract.

Securus is contractually entitled to set the same rates as it set prior to the RCL's effective date under its contract with Cape May County. Regardless of whether this Court does or does not enjoin operation of the RCL, any threat posed to Plaintiff would not even arise until the Cape May County Contract expires on March 26, 2018. See Ex. A. Even then, the threat would remain too premature for judicial adjudication. Upon the expiration of the Cape May Contract in 2018, Plaintiff will have provided ICS to Cape May County for the maximum duration allowed by N.J.S.A. 40A:11-4.2 and -15(8) before the County must re-bid the contract pursuant to the public bidding requirement. The RCL in no way limits the ability of Securus to participate in that process by submitting a bid proposal. If, as Securus contends, the net effect of the rate ceiling set under the RCL is to impair the ability of Securus and similarly-situated telecommunication providers from recovering a reasonable return on their investments, then Securus would be able to present a

court with factual allegations tending to establish the real and immediate harm threatened by enforcement of the RCL at that time. In contrast, the Complaint here fails to plead factual allegations sufficient to establish the existence of a justiciable controversy ripe for judicial adjudication. Even if this Court were to permit Plaintiff leave to amend the Complaint, the facts Securus would need to plead in its amended Complaint to survive a motion to dismiss have yet to come to fruition.

Therefore, this Court should dismiss the Complaint because the factual allegations therein rest on purported rights that can only be characterized as "future, contingent, and uncertain" and purported claims that are not ripe for judicial review. See Indep. Realty Co. v. Twp. of N. Bergen, 376 N.J. Super. 295, 302 (App. Div. 2005); see also Nat'l Park Hospitality Ass'n v. DOI, 538 U.S. 803, 808, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003).

POINT III

PLAINTIFF'S CLAIMS BASED ON THE PASSAIC COUNTY CONTRACT SHOULD BE DISMISSED AS MOOT BECAUSE SECURUS HAS RE-BID ON THE CONTRACT BUT ITS BID WAS REJECTED FOR REASONS UNRELATED TO THE RCL.

A court should decline to exercise judicial power on mootness grounds where plaintiff fails to sufficiently allege an immediate threat of harm. Comando v. Nugiel, 436 N.J. Super. 203, 219 (App. Div. 2014). An issue is moot where the original

issue has been resolved, and as a result, the decision sought, when rendered, can have no practical effect on the existing controversy. Ibid.

In its Complaint, Securus contends that the RCL operates to effectively confiscate its initial and ongoing investments under its existing contracts with Cape May and Passaic County and that Securus "may even be unable to renew" these contracts because "[t]he [RCL] forbids paying the rates that Securus must charge to break even on its upfront and ongoing investments." Compl. ¶

25. Securus raises several allegations directed at the inability of vendors similarly situated to Securus to provide ICS within the confines of the RCL's rate structure without operating at a loss. Id. at ¶ 22

A decision enjoining the RCL can have no practical effect on Securus' current contract with Passaic County because Securus has agreed to charge a rate consistent with the RCL on a temporary basis, until the public bidding process in Passaic County concludes, which is imminent. Regardless of whether the RCL operates to prevent Securus from recovering a reasonable return on its upfront investments, Passaic County already issued its RFP, Securus already submitted one of the five proposals responding thereto, and Passaic County already rejected Securus's bid for reasons unrelated to rate considerations. Ex. D (rejecting Securus' bid based on Securus' failure to submit a

proper stockholder disclosure statement as required by N.J.S.A. 40A:11-23.2(c)). Therefore, insofar as the Complaint alleges that the RCL impairs both Securus' existing contract with Passaic County, as well as Securus' ability to renew that contract, the issue is moot. As applied to Securus, "the part[y] who initiated the litigation," judicial interference to enjoin the RCL's application to the Passaic County Contract "can have no practical effect on the existing controversy." See Comando, supra, 436 N.J. Super. at 219 (quoting DeVesa v. Dorsey, 134 N.J. 420, 428 (1993) (Pollock, J., concurring)). Passaic County's RFP results reveal that the threatened harm underlying Securus' request for declaratory relief has already materialized at the hands of a statute wholly unrelated to the RCL, the allegedly unconstitutional statute giving rise to the allegations in Plaintiff's Complaint.

Although the lack of finality to RFP 17-005 renders this matter unfit for judicial review, Passaic County's rejection of Securus' bid warrants dismissal of the Complaint not for its premature assertion of claims but for its assertion of moot claims. By rejecting Securus' bid on grounds other than rate considerations, Passaic County eliminated the one set of facts on which Securus may have eventually relied to state a claim upon which relief could have been granted: Passaic County awarded the renewal contract pursuant to RFP-17-005 to Securus

as the successful bidder. Thus, there is no remaining set of facts that would warrant further proceedings in this matter either now or in the foreseeable future.

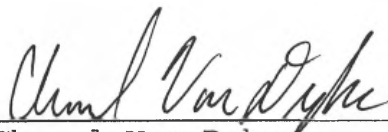
Therefore, the Complaint should be dismissed as moot because Securus can neither establish an immediate threat of harm to its interests under its Cape May County Contract nor an immediate threat of harm to any purported interest under its Passaic County Contract.

CONCLUSION

For the foregoing reasons, Defendants respectfully request dismissal of the Complaint.

Respectfully submitted,

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Dated: 5/9/17