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GURBIR S. GREWAL, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, ON BEHALF OF AMY G. KOPLETON, DEPUTY CHIEF OF THE NEW JERSEY BUREAU OF SECURITIES, **Plaintiff,** **v.** **CREDIT SUISSE SECURITIES (USA) LLC, CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., AND DLJ MORTGAGE CAPITAL, INC.** **Defendants.**	**SUPERIOR COURT OF NEW JERSEY** **GENERAL EQUITY DIVISION –** **MERCER COUNTY** DOCKET NO. MER-C-137-13 CIVIL ACTION **OPINION DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT FILED BY CREDIT SUISSE**

Decided: June 17, 2021

Thomas E. Redburn, Jr., Esq., argued the cause for Plaintiff, Gurbir S. Grewal, Attorney General of the State of New Jersey, on Behalf of Amy G. Kopleton, Deputy Chief of the New Jersey Bureau of Securities (Lowenstein Sandler LLP, attorneys; Christopher S. Porrino, Esq., of counsel and on the briefs, Thomas E. Redburn, Jr., Esq., Zachary D. Rosenbaum, Esq., Jennifer Florica Delgado, Esq., Ryan M. Wilson, Esq., Peter Slocum, Esq., Kent D. Anderson, Esq., Rachel K. Warren, Esq., Jarrett R. Schindler, Esq., Brian F. McDonough, Esq., Assistant Attorney General, Toral M. Joshi, Esq., Brian De Vito, Esq., Nicholas Dolinsky, Esq., Deputy Attorney Generals, on the briefs).

Richard A. Jacobsen, Esq. (*pro hac vice*), argued the cause for Defendants, Credit Suisse Securities (USA) LLC, DLJ Mortgage Capital, Inc., and Credit Suisse First Boston Mortgage Securities Corp. (Orrick, Herrington, & Sutcliffe LLP, Dughi, Hewit & Domalewski, P.C., attorneys; Elyse Echtman, Esq. (*pro hac vice*), of counsel, Richard A. Jacobsen, Esq., John Ansbro, Esq. (*pro hac vice*), Paul F. Rugani, Esq. (*pro hac vice*), Daniel A. Rubens, Esq. (*pro hac vice*), Barry S. Levin, Esq. (*pro hac vice*), and Craig A. Domalewski, Esq., on the briefs).

Vincente Martinez, Esq., argued the cause for the North American Securities Administrators Association, Inc. (*amicus curiae*) (Patterson Belknap Webb & Tyler LLP, attorney; Peter C. Harvey, Esq., of counsel and on the briefs).

Daniel P. D'Alessandro, Esq. argued the cause for the New Jersey Chamber of Commerce (*amicus curiae)* (McCarter & English, LLP, attorney; David R. Kott, Esq., of counsel and on the briefs).

Jacobson, A.J.S.C.

I. Introduction

This case involves a civil enforcement action brought by the Attorney General of the State of New Jersey on behalf of the New Jersey Bureau of Securities ("Bureau") against Defendants, DLJ Mortgage Capital, Inc. ("DLJ"), Credit Suisse First Boston Mortgage Securities Corp. ("First Boston"), and Credit Suisse Securities (USA) LLC ("Credit Suisse USA") for violations of the New Jersey Uniform Securities Law ("NJUSL") in connection with the offer and sale of certificates ("Certificates") from thirteen different residential mortgage-backed securities ("RMBS") trusts: the Home Equity Asset Trusts ("HEAT") 2006-4, 2006-5, 2006-7, 2006-8, 2007-1, 2007-2, and 2007-3, as well as the Home Equity Mortgage Trusts ("HEMT") 2006-4, 2006-5, 2006-6, 2007-1, and 2007-2. (Defs.' Statement of Facts [DSF] ¶ 1 n.1; Pl.'s Counterstatement of Facts [PCSF] ¶¶ 3-4). Certificates in these HEAT and HEMT trusts were sold between May 1, 2006 and April 30, 2007. (DSF ¶ 1; PCSF ¶ 4).

The Bureau brings two causes of action under the New Jersey Uniform Securities Act, N.J.S.A. 49:3-47 et seq. ("NJUSL"), against the defendants. In Count One, the Bureau alleges that Credit Suisse engaged in various offers and sales of "toxic RMBS" to investors in violation of N.J.S.A. 49:3-52(b), which prohibits regulated parties from making "any untrue statement of a material fact or [] omit[ting] to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading." (Am. Compl. ¶¶ 146-51). In Count Two, the Bureau alleges that these same transactions violated N.J.S.A. 49:3-52(c), which prohibits persons from "engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." (Am. Compl. ¶¶ 152-53). The Bureau seeks various forms of relief, including: (i) enjoining Credit Suisse from future violations of the NJUSL; (ii) rescission; (iii) restitution; (iv) disgorgement; and (v) civil monetary penalties under N.J.S.A. 49:3-70.1. (Am. Compl. 56-57).

The Bureau has brought a motion for partial summary judgment to strike various defenses raised by Credit Suisse. That motion for partial summary judgment is addressed in a separate opinion, although both motions were argued together on the same date. In addition to opposing the Bureau's motion, Credit Suisse brings its own motion for partial summary judgment seeking to dismiss certain securities transactions involving seven investors from this enforcement action: (i) AB Global Bond Fund, Inc. and Alliance Capital Management Corp. ("AllianceBernstein"); (ii) Barclays Capital, Inc. ("Barclays"), (iii) Blackrock Strategic Global Bond Fund, Inc. ("Blackrock"); (iv) Goldman Sachs & Co. ("Goldman"), (v) Harding Advisory LLC ("Harding"), (vi) Merrill Lynch & Co., Inc. ("Merrill Lynch"), and (vii) Mizuho Securities USA ("Mizuho")(collectively, "Seven Investors"). (Defs.' Supp. & Opp'n Br. 13-15).

Essentially, Credit Suisse is seeking to dismiss with prejudice the Bureau's claims to the extent that they are based on offers or sales of residential mortgage-backed securities that took place outside of New Jersey. The Bureau opposes the motion, claiming not only that there are disputed facts of record preventing the court from granting the relief sought by Defendants, but also that the legal underpinnings of Credit Suisse's arguments misconstrue the applicable statutes and constitutional law. Once again, the parties bring a motion that requires the court to closely examine the language, purpose, and scope of the NJUSL, this time joined to a claim that the Bureau's efforts to reach the disputed transactions violate the extraterritorial principle of the Dormant Commerce Clause. While Credit Suisse admits that the NJUSL applies to offers of securities directed to and received in New Jersey, Defendants seek partial summary judgment dismissing the claims involving the designated investors whose purchases exceed $700 million, a substantial percentage of the investments that the Bureau has included in this enforcement action. Credit Suisse asserts that the Bureau's efforts to reach the transactions involving these investors fall outside of its jurisdiction under the NJUSL. Despite the Bureau's opposition to the motion based on disputed facts, Credit Suisse claims that its motion for partial summary judgment addresses matters of statutory construction and constitutional law based on undisputed facts, and that its arguments on the law require the court to drastically limit the scope of the Bureau's complaint.

II. Facts

A. The Defendants and Their Roles

Defendant Credit Suisse Securities is a Delaware limited-liability company with its principal place of business at 11 Madison Avenue, New York, New York 10010. (DSF ¶ 2; Pl.'s Resp. ¶ 2). Defendant DLJ is a Delaware corporation with its principal place of business at 11 Madison Avenue, New York, New York 10010. (DSF ¶ 4; Pl.'s Resp. ¶ 4). As the "sponsor," DLJ was tasked with acquiring loans subsequently sold to First Boston. (DSF ¶ 4; Pl.'s Resp. ¶ 4). DLJ primarily acted as the "sponsor" of HEAT and HEMT, which meant that it acquired the loans underlying the RMBS. (PCSF ¶ 84; McDonough Certification ("Cert.") ¶¶ 33, 35, Ex. 32 [CSNJAG003406818], Ex. 34; Domalewski Cert. ¶¶ 8, 32, Ex. 7 [Grice R. & R. ¶¶ 31-32, 36], Ex. 31 [24-30]). The sponsor would later sell the loans to the "depositor." (McDonough Cert. ¶ 34, Ex. 33 [CSNJAG003403132]). Defendant Credit Suisse First Boston is a Delaware corporation with its principal place of business at 11 Madison Avenue, New York, New York 10010. (DSF ¶ 5; Pl.'s Resp. ¶ 2). With regard to the relevant RMBS, First Boston acted as the "depositor," which meant that it would establish trusts, such as HEAT and HEMT, place loans in those trusts, and sell Certificates in those trusts. (McDonough Cert. ¶ 33, 156, Ex. 32 [CSNJAG003406818], Ex. 155 [S-36]). Defendants Credit Securities USA, First Boston, DLJ and non-party Credit Suisse Financial Corporation (CSFC) all had "activities or operations" in an office in Princeton, New Jersey. (Domalewski Cert. ¶ 14, Ex. 13 [R&O No. 13]). All three defendants are subsidiaries of Credit Suisse (USA), Inc., which is itself a wholly owned subsidiary of Credit Suisse Group AG.

B. Background: The RMBS Group and the Loan-Acquisition to Sale Process

The Credit Suisse RMBS Group created and sold residential mortgage-backed securities ("RMBS") through a "unitary process" that utilized DLJ, First Boston, and Credit Suisse USA (collectively, "Credit Suisse"). (Domalewski Cert. ¶ 8, Ex. 7 [Grice R. & R. ¶¶ 35-37, 99], Ex. 13; McDonough Cert. ¶ 20, Ex. 19 [Shev R. & R. ¶¶ 49-56]). First, Credit Suisse would acquire residential mortgage loans (PCSF ¶ 84; McDonough Cert. ¶ 35, Ex. 34; Domalewski Cert. ¶¶ 8, 32, Ex. 7 [Grice R. & R. ¶¶ 31-32, 36]; Ex. 31 [24-30]), through four different "channels," including its (i) bulk channel;[1] (ii) mini-bulk channel;[2] (iii) loan-by-loan

[1] The bulk channel generally refers to pools of closed loans that are collectively worth more than $5 million. (Domalewski Cert. ¶ 10, Ex. 9 [CSNJAG000000251]).
[2] The mini-bulk channel referred to pools of closed loans generally worth less than $5 million in total. (Domalewski Cert. ¶ 10, Ex. 9 [CSNJAG000000251]).

(LBL) channel;[3] and (iv) wholesale channel.[4] (Domalewski Cert. ¶¶ 8, 14, Ex. 7 [Grice R. & R. ¶ 99], Ex. 13 [R&O No. 1]). Prior to closing any purchase of loans, Credit Suisse performed pre-acquisition due diligence to determine whether a given loan, or pool of loans,[5] was eligible for purchase based on Credit Suisse's underwriting criteria, which varied based on the channel through which the loan was acquired. (Domalewski Cert. ¶¶ 7, 14, 29, Ex. 8 [Grice R. & R. ¶¶ 32, 36-39, 116-117], Ex. 13 [R&O No. 1], Ex. 28 [Tr. 10:2-25]; McDonough Cert. ¶¶ 34, 45, 48, 100, Ex. 33 [CSNJAG003403260], Ex. 44 [Sacco Tr. 30:16-32:10], Ex. 47 [CSNJAG000001750], Ex. 99 [Shev R. & R. 32-35]). Nonetheless, not all pre-acquisition due diligence was done by Credit Suisse. Some due diligence was performed by third-party vendors located in Florida and Illinois and overseen by Credit Suisse. (DSF ¶ 35, PCSF ¶ 129; Domalewski Cert. ¶¶ 14, 32, Ex. 13 [R&O No. 1], Ex. 31 [pg. 10]). After completing due diligence, Credit Suisse would determine whether to acquire a loan or pool of loans. (PCSF ¶ 84; McDonough Cert. ¶ 35, Ex. 34; Domalewski Cert. ¶¶ 8, 32, Ex. 7 [Grice R. & R. ¶¶ 31-32, 36]; Ex. 31 [24-30]).

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[3] The LBL channel involved the acquisition of individual loans from originators. (Domalewski Cert. ¶ 19, Ex. 9 [CSNJAG000000251]; McDonough Cert. ¶ 35, Ex. 34 [CSNJAG000038435]).

[4] The wholesale channel involved residential loans that independent mortgage brokers brought to Credit Suisse and Credit Suisse originated. (Domalewski Cert. ¶¶ 10, 29, Ex. 9, Ex. 28 [Tr. 6:14-17]; McDonough Cert. ¶ 29, Ex. 28 [Kempf R. & R. ¶ 33]).

[5] Credit Suisse generally sampled bulk and mini-bulk pools rather than testing every loan included in the pools. (Domalewski Cert. ¶ 8, Ex. 7).

After acquiring the loans, Credit Suisse uploaded the due diligence results from the selected mortgages into its "Residential Pipeline Management" ("RPM") database. (PCSF ¶ 85; Grice R. & R. ¶¶ 35-37; McDonough Cert. ¶ 35, Ex. 34 [CSNJAG000038436]; Domalewski Cert. ¶ 10, Ex. 9 [CSNJAG000000651-55, 670-80]). Relying on the validity of the uploaded results, Credit Suisse's traders, collateral analysts, and Transaction Managers selected loans from RPM to be included in a securitization. (Domalewski Cert. ¶ 10, Ex. 9 [CSNJAG000000674]; McDonough Cert. ¶¶ 59, 82, Ex. 58 [Savage Tr. 43:7-9]; Ex. 81 [Kuo Tr. 60:20-61:15]). The preliminary pool of loans to be securitized was selected based on several variables, such as the transaction at issue, loan characteristics, and servicing transfer dates. (Domalewski Cert. ¶ 10, Ex. 9 [CSNJAG000000674]). However, not all loans acquired by Credit Suisse would be securitized; some loans would be sold to other financial institutions or government-sponsored entities ("GSEs"). (DSF ¶¶ 30-32; Domalewski Cert. ¶¶ 10, 27, 29, Ex. 9 [Ch. 15.1, CSNJAG000000670-73], Ex. 26 [Tr. 13:8-13], Ex. 28 [Tr. 7:6-8, 73:23-74:4]).

Following the selection of an initial set of loans, loan data was sent to credit rating agencies to determine credit enhancement levels. (Domalewski Cert. ¶ 10, Ex. 9 [CSNJAG000000675-76]). Credit Suisse then determined the preliminary structure of the RMBS Offerings, including the characteristics of the securities.

(Domalewski Cert. ¶ 10, Ex. 9 [CSNJAG000000676-78]). One or two weeks before closing, Credit Suisse determined the final composition of the loan pools being transferred into the trust. (PCSF ¶ 90; Domalewski Cert. ¶ 10, Ex. 9 [CSNJAG000000678-79]). After the final loan composition was determined, the final loan tapes would be sent to the rating agencies to obtain credit ratings for the RMBS Certificates. (Domalewski Cert. ¶ 10, Ex. 9 [CSNJAG000000678]).

Credit Suisse then finalized the structure and prepared the Offering Materials and any other necessary closing agreements for settlement and execution. (PCSF ¶ 92; Domalewski Cert. ¶ 10, Ex. 9 [CSNJAG000000678-79]). After the final Offering Materials were executed, Credit Suisse released a wire indicating that the RMBS Certificates were free to trade and that the loans had been transferred to the trusts. (PCSF ¶ 93; Domalewski Cert. ¶ 10, Ex. 9 [CSNJAG000000679-80]).

C. The RMBS Group

As stated, the RMBS Group handled, among other trusts, the various HEAT and HEMT trusts from acquisition of loans to the initial offer and sale of HEAT and HEMT Certificates. (Domalewski Cert. ¶¶ 8, 14 Ex. 7 [Grice R. & R. ¶ 99], Ex. 13 [pg. 4]). The RMBS Group primarily operated out of two Credit Suisse offices: New York and Princeton. (McDonough Cert. ¶ 35, Ex. 34).

D. The Roles of the Offices

i. Credit Suisse's New York Office[6]

Located in New York City, Credit Suisse's Transaction Management Group ("TMG") was responsible for overseeing the process of creating Credit Suisse's RMBS. (DSF ¶ 10; Domalewski Cert. ¶¶ 10-11, Ex. 9 [CSNJAG000000669-70]). The TMG coordinated with members of several other groups, such as collateral analysts, structurers, traders, internal and outside counsel, and accountants to "facilitate securitization transactions." (Domalewski Cert. ¶¶ 11, 13, Ex. 10 [R&O No. 4], Ex. 12 [Kaiserman Tr. 19:10-23]; McDonough Cert. ¶ 59, Ex. 58 [Savage Tr. 58:18-59:17]). Credit Suisse's traders, collateral analysts, structurers, and in-house attorneys were located in New York. (DSF ¶ 12; Domalewski Cert. ¶¶ 12-15, Ex. 11 [CSNJAG000169613], Ex. 12 [Kaiserman Tr. 19:10-23], Ex. 13 [App. B], Ex. 14 [CSNJAG-TR000158010]; McDonough Cert. ¶¶ 59, 61, Ex. 58 [Savage Tr. 47:7-20]; Ex. 60). Credit Suisse's New York office also purchased loans through the bulk channel. (McDonough Cert. ¶ 35, Ex. 34 [CSNJAG000038436]).

The New York office was central to Credit Suisse's securitization process. It was responsible for: (i) selecting initial sets of loans for securitization; (ii) sending an initial pool of loans to the rating agencies; (iii) structuring the securitization to determine different classes (or "tranches") of

[6] While the court acknowledges that differentiating between loan-level and securities-level activity does affect the likelihood of an office's involvement in securitization, the court does not mean to suggest any formalized line between loan-level and securities-level activity with regard to the offer and sale of RMBS.

loan pools and associated cash flows; and (iv) finalizing the loan pools to be included in a given trust. (DSF ¶ 18; Domalewski Cert. ¶¶ 10, 13, 15, Ex. 9 [CSNJAG000000674-80], Ex. 12 [Kaiserman Tr. 18:22-19:23], Ex. 14). The final HEAT and HEMT offering documents were drafted in New York and were filed from there. (Domalewski Cert. ¶¶ 10, 12, 15, Ex. 9 [CSNJAG000000678-79], Ex. 11 [CSNJAG000169613-14], Ex. 14).

Credit Suisse's sales force responsible for completing the sale of HEAT and HEMT Certificates was spread among locations in New York, Boston, Chicago, Hong Kong, San Francisco, Singapore, and Washington, D.C. (Domalewski Cert. ¶ 14, Ex. 13 [R&O No. 36]). The sales representatives in these offices, such as in Chicago, would send out the announcements of new offerings along with a link to Credit Suisse's base prospectus, prospectus supplement, and other documents available on the SEC website. (DSF ¶¶ 23-25; Domalewski Cert. ¶¶ 8, 14, 17-23, Ex. 7 [Grice R. & R. 85-88], Ex. 13 [R&O No. 36], Ex. 16 [CSNJAG002405548], Ex. 17 [CSNJAG002405576], Ex. 18, Ex. 19, Ex. 20 [Seed Tr. 72:22-73:1, 73:9-22], Ex. 21 [Connors Tr. 81:1-82:5], Ex. 22 [Kaiserman Tr. 179:25-180-13]; McDonough Cert. ¶ 157, Ex. 156). Potential investors were encouraged to contact Credit Suisse's New York office with any questions. (DSF ¶ 26; Ex. 16 [CSNJAG002405548]).

ii. Credit Suisse's Princeton office

During the period relevant to the Bureau's claims, Credit Suisse had an office, with over 100 employees, located at 302 Carnegie Center in Princeton, New Jersey. (PCSF ¶ 106; McDonough Cert. ¶¶ 33, 37, Ex. 32 [CSNJAG003406818], Ex. 36 [CSSU-DOJ 27431924]; Domalewski Cert. ¶ 14, Ex. 13 [R&O No. 11]). Along with New York, Princeton was one of the "main centers of operation" for Credit Suisse's residential mortgage conduit ("RMBS Conduit").[7] (PCSF ¶ 107; McDonough Cert. ¶ 38, Ex. 37 [CSSU-DOJ 27436094]). Director of Underwriting and Compliance Robert Sacco ("Sacco") was the most senior member at the Princeton office and oversaw several groups. (Domalewski Cert. ¶ 30, Ex. 29).

The Princeton office had several different responsibilities related to Credit Suisse's RMBS Group. To begin with, requisition staff had responsibility for selecting the loans for the RMBS Group to securitize. (Domalewski Cert. ¶¶ 14, 29, Ex. 13 [R&O No. 13]; Ex. 28 [T. 72:20-73:15]). In particular, the Princeton office acquired or originated loans for Credit Suisse through the RMBS Conduit (see, e.g., Domalewski Cert. ¶¶ 8, 27, Ex. 7 [Grice R. & R. ¶ 103]; McDonough Cert. ¶ 35, 39, Ex. 34 [CSNJAG000038435-36], Ex. 38 [CSSU-DOJ21329883]), and did due diligence for the bulk channel (Domalewski Cert. ¶ 8, 14-15, Ex. 7 [Grice R. & R. ¶ 101]; Ex. 13 [R&O No. 1], Ex. 14 [CSNJAG_TR000158012]). In connection

[7] The "RMBS conduit" was a shorthand way to refer to three loan acquisition channels used by Credit Suisse: (i) mini-bulk; (ii) loan-by-loan ("LBL"); and (iii) wholesale. (Domlewski Cert. ¶ 8, Ex. 7 [Grice R. &. R. ¶ 99]). The other channel was the bulk channel. (Domalewski Cert. ¶ 10, Ex. 9).

with its due diligence efforts, the Princeton office was responsible for creating and publishing the underwriting guidelines that Credit Suisse used in evaluating the acquisition of residential mortgage loans through the RMBS Conduit and bulk channel. (McDonough Cert. ¶ 44, Ex. 43 [Sacco Tr. 69:23-70:12]; Domalewski Cert. ¶ 29, Ex. 28 [Tr. 10:2-25]).[8] The Princeton office also characterized mortgages as eligible or ineligible for purchase and securitization. (McDonough Cert. ¶ 25, Ex. 24 [Tr. 83:8-18]).

In addition, the Princeton office housed several groups whose work had an impact on the acquisition and origination of the loans that would eventually be securitized and sold in HEAT and HEMT. (Domalewski Cert. ¶¶ 14-15, Ex. 13 [R&O No. 13]; Ex. 14 [CSNJAG_TR000158010-11]). In addition to performing due diligence, the Princeton office was responsible for quality control, regulatory compliance, and credit policy. (Domalewski Cert. ¶¶ 14-15, Ex. 13 [R&O No. 13], Ex. 14; McDonough Cert. ¶ 47, Ex. 46 [Sacco Tr. 72:25-73:3]). These responsibilities involved monthly reviews of a sample of all loans acquired by Credit Suisse through the RMBS Conduit and bulk channel, (Domalewski Cert. ¶ 8, Ex. 7 [Grice R. & R.; McDonough Cert. ¶¶ 53-54, Ex. 52 [CSSU-DOJ

[8] Sacco, Cindy Baird ("Baird"), and Henry Salomon ("Salomon") were primarily responsible for creating the underwriting guidelines. (McDonough Cert. ¶ 44, Ex. 43 [Sacco Tr. 70:13-21]). Baird and Salomon worked exclusively at the Princeton office. (Domalewski Cert. ¶ 15, Ex. 14). Sacco had a presence in both Princeton and New York.

8442861], Ex. 53 [Nordyk Tr. 38:14-15]; Ex. 55 [Sacco Tr. 26:20-22]), and answering "questions about anything including underwriting guidelines, specific loans, general questions about things." (McDonough Cert. ¶ Ex. 44, Ex. 43 [Sacco Tr. 67:19-69:22]). A substantial portion of the servicing oversight team, which acted as the "liaison" between "Servicing Partners" and Credit Suisse, was located in Princeton as well, although part of the team was located in New York. (Domalewski Cert. ¶¶ 14-15, Ex. 13 [R&O No. 13]; Ex. 14; McDonough Cert. ¶ 35, Ex. 34 [CSNJAG000038438]). Indeed, Credit Suisse concedes that the Princeton office played a significant role in monitoring the servicing of loans that Credit Suisse had purchased. (Domalewski Cert. ¶¶ 14-15, 33, Ex. 13 [App. B], Ex. 14, Ex. 32).

In addition to having significant loan acquisition and servicing responsibilities, the Princeton office made decisions that affected securitization. For purposes of due diligence, the Princeton office was responsible for determining whether any particular loan or pool of loans was eligible for securitization. (McDonough Cert. ¶ 25, Ex. 24 [Nordyk Tr. 83:8-18]). The Princeton office also made decisions about whether otherwise ineligible loans should nonetheless be purchased by Credit Suisse. (McDonough Cert. ¶ 51, Ex. 50 [Othman Tr. 97:21-98:6]).

E. Office Collaboration and Overlap

The Princeton office was also responsible for a substantial amount of loan acquisition-related activity in connection with HEAT and HEMT. The knowledge of Credit Suisse's Princeton staff about the loans included in the various HEAT and HEMT trusts as well as the fact that the loans made up most of the RMBS value, repeatedly brought members of the Princeton office into contact with investors, the New York office, and credit rating agencies. (See, e.g., Domalewski Cert. ¶¶ 37, 40-41, Ex. 36 [Tr. 135:5-10], Ex. 39, Ex. 40; McDonough Cert. ¶¶ 37, 60, Ex. 36 [CSSU-DOJ 27431924], Ex. 59 [CSSU-DOJ 4671718]). In particular, Princeton office employees frequently assisted New York traders in deciding whether to securitize both individual loans as well as pools of loans worth millions of dollars (see, e.g., McDonough Cert. ¶¶ 60-61, Ex. 59 [CSSU-DOJ 4671718-21], Ex. 60 [CSSU-DOJ 18344172-73]); had their underwriting guidelines reprinted in the New York office's prospectus supplements, (see, e.g., McDonough Cert. ¶¶ 148, 156, Ex. 147 [HEAT 2006-4, CSNJAG003400316-18], Ex. 155 [HEMT 2007-1, CSNJAG003410539-41]), and created presentations for both credit rating agencies and monoline insurers, (see, e.g., McDonough Cert. ¶¶ 56, 91-92, 95, 98, 102, 119, Ex. 55 [Sacco Tr. 29:13-21], Ex. 90 [CS 12718202-3], Ex. 91 [pg. 1] Ex. 94 [CSSU-DOJ 16474746], Ex. 97, Ex. 101, Ex. 118 [CSSU-DOJ 2656458]).

Moreover, Sacco and members of his team were involved in giving general investor presentations, often acting as "discussion leaders" for areas within their expertise. (Domalewski Cert. ¶¶ 32, 37, Ex. 31, Ex. 36 [CSNJAG002833665]). Further, several top Princeton employees, especially Sacco, spent time in both Credit Suisse's Princeton and New York offices. (Domalewski Cert. ¶ 15, Ex. 14). Finally, the Princeton office hosted investors, such as Chase, that were particularly interested in learning about loan-level activities firsthand from the experts. Sacco often would be involved in these discussions. (McDonough Cert. ¶¶ 103, 125, 127, 130, 133, 135, Ex. 102 [CSSU-DOJ 11529700], Ex. 124 [CSSU-DOJ 1039903-05], Ex. 126 [Sacco Tr. 94:10-13], Ex. 129 [CSSU-DOJ 2865333], Ex. 132 [CSSU-DOJ 15535555], Ex. 134).

F. The Investors Involved in the Disputed Transactions

As stated above, at issue in this motion are disputed securities transactions ("Disputed Transactions") involving Seven Investors: (i) AllianceBernstein; (ii) Barclays; (iii) BlackRock; (iv) Goldman; (v) Harding; (vi) Merrill Lynch; and (vii) Mizuho. With the exception of Harding, all Seven Investors had offices in New Jersey during the relevant period. (Domalewski Cert. ¶¶ 42, 43, Ex. 41 [AllianceBernstein Tr. 10:20-11:6], Ex. 42 [Barclays Tr. 10:23-11:4], Ex. 43 [Blackrock Tr. 14:24-15:5], Ex. 44 [Goldman Tr. 14:4-15:3], Ex. 45 [Harding Tr.11:25-12:4], Ex. 46 [Merrill

Tr. 10:4-11:8], Ex. 47 [Mizuho Tr. 14:4-10]).[9] While the exact functions of each investor's New Jersey offices differed, these activities were generally "back office" activities related to RMBS, such as "trade processing, settlements, asset servicing, and IT[,]" (Domalewski Cert. ¶ 43, Ex. 42 [Barclays Tr. 11:14-23]), assisting to "move cash to settle trades, to help manage monthly payments on securities, and to do reconciliations to make sure that [Goldman had] proper controls around . . . [its] business[,]" (Domalewski Cert. ¶ 45, Ex. 44 [Goldman Tr. 14:4-15:3]), and "trade confirmations and settlements" (Domalewski Cert. ¶ 44, Ex. 43 [Blackrock Tr. 32:12-21].).[9] Limited to a support role, the investors with New Jersey offices did not make "front-office" decisions about whether to enter into a securities transaction and would not act on any prospectus, or other offer, that may have arrived at its New Jersey office. (Domalewski Cert. ¶¶ 42-48, Ex. 41 [AllianceBernstein Tr. 16:17-23]; Ex. 42 [Barclays Tr. 14:21-15:2], Ex. 43 [Blackrock Tr. 16:19-17:5, 17:20-25, 20:10-18], Ex. 44 [Goldman Tr. 10:2-10; 11:1-9, 15:17-20, 18:11-5; 19:6-9], Ex. 46 [Merrill Tr. 13:18-16:25], Ex. 47 [Mizuho Tr. 35:2-36:22]). Those decisions were exclusively made in New York and elsewhere.

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[9] In the opposition brief at 46, the Bureau concluded that offers were not directed to, or received by, Harding in New Jersey under N.J.S.A. 49:3-52(c)(2).

[10] Notably, AllianceBernstein's Secaucus, N.J. office mostly handled mutual fund administration, which meant that the office handled "actual accounting functions" for Alliance Bernstein's "mutual funds and other pooled vehicles[,]" provided oversight for that activity, and coordinated with various service providers, "spot[-]checking the work of . . . third parties that performed the services and . . . running the . . . operations of the mutual funds from a business rather than investment standpoint." (Domalewski Cert. ¶ 42, Ex. 41 [AllianceBernstein Tr.11:7-12:7]).

(See, e.g., Domalewski Cert. ¶ 46, Ex. 45 [Harding Tr. 13:19-14:11, 17:10-18:4]).

III. Standard of Review

The standard for summary judgment in New Jersey is well settled. A motion for summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). A genuine issue of material fact must be a disputed issue of fact that is of a substantial nature, having substance and real existence. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 520-30 (1995). Bare conclusions without factual support cannot defeat summary judgment. Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999) (quoting United States Pipe & Foundry Co. v. Am. Arb. Ass'n, 67 N.J. Super. 384 399-400 (App. Div. 1961)). Instead, evidence submitted in support of the motion must be admissible, competent, and non-hearsay evidence. Jeter v. Stevenson, 284 N.J. Super. 229, 233 (App. Div. 1995). The moving party must sustain the burden of showing that there is no genuine issue of material fact, and that the movant is entitled to judgment as a matter of law. R. 4:46-2; Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954). In determining whether a dispute is genuine, the court must accept all legitimate inferences in favor of the non-moving party and deny the motion if there is the slightest doubt about the existence of a material issue of fact. Saldana v. DiMedio, 275 N.J. Super. 488, 494 (App. Div. 1998). The court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of applicable evidentiary standards, are sufficient to permit a rational factfinder to resolve the alleged disputed issues in favor of the non-moving party." Brill, 142 N.J. at 523. Use of the summary judgment technique to determine legal issues in advance of trial is favored. See Euster v. Eagle Downs Racing Ass'n, 677 F.2d 992, 997 (3rd Cir.), cert. denied 459 U.S. 1022 (1982); Bd. of Educ. of Passaic v. Bd. of Educ. of Wayne, 120 N.J. Super. 155, 159 (Law Div. 1972).

IV. Legal Analysis

A. Introduction

Credit Suisse claims that it is entitled to partial summary judgment dismissing the transactions it completed with the designated investors because the Bureau's authority to regulate securities does not extend to transactions that occur outside of New Jersey. The Bureau challenges this argument, asserting that its regulatory authority reaches the activities of Credit Suisse's Princeton office, requiring that the motion brought by Credit

Suisse be denied and that the Bureau be given the opportunity to prove its claims against Defendants. All parties rely on the NJUSL to support their arguments.

Originally passed in 1967, the NJUSL "was intended to supersede, with a single exception, all earlier legislation dealing with [securities]." Data Access Sys., Inc. v. State, Bureau of Sec., 63 N.J. 158, 162 (1973). Securities involve a "sensitive . . . [area], open to great abuses[,]" Mayflower Sec. Co. v. Bureau of Sec. in Div. of Consumer Affairs of Dep't of Law & Public Safety, 64 N.J. 85, 93 (1973), because "the investing public is exposed [to substantial losses] and . . . the public is generally not well versed" in securities, State v. Russell, 119 N.J. Super. 344, 351 (App. Div. 1972). In New Jersey, securities are "therefore subject to careful governmental regulation to assure that those who engage in the business meet high standards in the interest of protection of the public." Mayflower Sec. Co., 64 N.J. at 93. See also SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186-87 (1963) (quoting Silver v. New York Stock Exch., 373 U.S. 341, 366 (1963)) ("It requires but little appreciation . . . of what happened in this country during the 1920's and 1930's to realize how essential it is that the highest ethical standards prevail' in every facet of the securities industry.").

Given the "potential for serious financial injury to the buying public," Russell, 119 N.J. Super. at 351, the New Jersey Legislature, through the NJUSL, has vested the Bureau with "broad powers . . . as it may deem necessary or useful in fulfilling its responsibility to protect the investing public against fraud or misrepresentation." Data Access Sys., Inc., 63 N.J. at 167-68. The Bureau's "arsenal of flexible enforcement powers," necessary for the effective regulation of securities, Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976) (citations omitted), is expansive, see, e.g., N.J.S.A. 49:3-52, N.J.S.A. 49:3-68, N.J.S.A. 49:3-68.1, N.J.S.A. 49:3-69.

B. Interpreting N.J.S.A. 49:3-51(a) and (c)

The statutory provisions at issue in Credit Suisse's motion for partial summary judgment are N.J.S.A. 49:3-51(a) and (c), which apply to N.J.S.A. 49:3-52(b)-(c). N.J.S.A. 49:3-51(a) defines the scope of the Bureau's jurisdiction to regulate under N.J.S.A. 49:3-52, applying to persons who sell or offer to sell when "(1) an offer to sell is made in this State, or (2) an offer to buy is made or accepted in this State[.]"). However, N.J.S.A. 49:3-51(c) modifies N.J.S.A. 49:3-51(a), stating:

> (c) For the purpose of this section, except to the extent the bureau chief may by rule or order determine, an offer to sell or to buy is made in this State, whether or not either party is then present in this State, when the offer (1) originates from this State or (2) is directed by the offeror to this State and received at the place to which it is directed (or at any post office in this State in the case of a mailed offer).

[N.J.S.A. 49:3-51(c)]

Notably, however, the language "whether or not either party is then present in this State" is limited to situations "when the offer (1) originates from this State or (2) is directed by the offeror to this State and received at the place to which it is directed." Ibid. The court starts its analysis with the plain language of the statute. See, e.g., Nicholas v. Mynster, 213 N.J. 463, 480 (2013) (quoting DiProspero, 183 N.J. at 492) ("We begin by giving the words of the statute their ordinary meaning and significance.").

The parties differ over when, exactly, an offer, as that term is defined in N.J.S.A. 49:3-49(j)(2), "originates from" New Jersey. (Defs.' Supp. & Opp'n. Br. 2; Pl's. Opp'n. Br. 18-25; Defs.' Reply Br. 8-11.) N.J.S.A. 49:3-51(c). Since the term "originates" is not defined in the statute, the court turns to the dictionary meaning of the term "originate." N.J.S.A. 1:1-1. See also State v. Hoffman, 149 N.J. 564, 578 (1997) (collecting cases). Webster's Dictionary defines the term "originate" as a transitive verb meaning "to bring into being; esp. to create (something original); invent," or as an intransitive verb meaning "to come into being; begin; start." Webster's New World College Dictionary (5th ed. 2016). The Oxford English Dictionary defines "originate" similarly to mean "[t]o give origin to, cause to begin; to initiate, bring into existence. Also used intransitively" [t]o take its origin; to arise, come into existence, start; to spring, be derived. Usually with from, in, with." Oxford English Dictionary, https://www.oed.com/view/Entry/132571?isAdvanced=false&result=2&rskey=CliSKp&. The plain language thus supports the conclusion that an offer to sell or to buy is made in this State, whether or not either party is present in this State, when the offer arises, comes into existence, starts, springs from, or is derived from this state.

Notably, however, the dictionary definition of "originate" does not solve the inherent ambiguity as to whether an "offer" can "be derived" from New Jersey "whether or not either party is then present in this State." N.J.S.A. 49:3-51(c). Therefore, even the dictionary definition of "originate" as used in N.J.S.A.49:3-51(c) remains susceptible to either a broad or narrow reading, precisely the dispute that separates the parties in this case. <u>See</u> <u>Lozano v. Frank DeLuca Constr.</u>, 178 N.J. 513, 522 (2004) (quoting <u>Burns v. Belafsky</u>, 166 N.J. 466, 473 (2001)) ("[I]f two interpretations of the language are plausible, a reviewing court must interpret the statute to effectuate the legislative intent, utilizing extrinsic evidence when it is helpful.").

Both readings are possible. On the one hand, N.J.S.A. 49:3-51(c) can be read narrowly to clarify that <u>either</u> the offeror or offeree must be located in New Jersey at the time of making an offer, a reading urged by Credit Suisse (<u>see, e.g.</u>, Defs.' Supp.

Br. 17; Defs.' Reply Br. 9-11), and at least one state court decision, see, e.g., State v. Lundberg, 445 P.3d 1113, 1120 (Kan. 2019). On the other hand, N.J.S.A. 49:3-51(c) can be understood to confer jurisdiction over "offers" that occur entirely in other states but include sufficient offer-related activity *in* New Jersey, which is both the Bureau's understanding and one espoused in several court decisions, see, e.g., Barnebey v. E.F. Hutton & Co., 715 F. Supp. 1512, 1533-36 (M.D. Fla. 1989); Nuveen Premium Income Mun. Fund 4, Inc. v. Morgan Keegan & Co., 200 F. Supp. 2d 1313, 1318 (W.D. Okla. 2002); Simms Inv. Co. v. E.F. Hutton & Co., 699 F. Supp. 543, 545 (M.D.N.C. 1988); Lintz v. Carey Manor, Ltd., 613 F. Supp. 543, 550 (D. W.Va. 1985). Since N.J.S.A. 49:3-51(c) is subject to two plausible interpretations, this court "must interpret the statute to effectuate the legislative intent, utilizing extrinsic evidence when it is helpful." Lozano, 178 N.J. at 522 (quoting Burns, 166 N.J. at 473).

New Jersey originally adopted verbatim Section 414 of the Uniform Securities Act in 1967,[1011] see N.J.S.A. 49:3-51; UNIF. SEC. ACT § 414 (1956), making it a portion of the Uniform Securities Act adopted by this State. Data Access Sys., Inc., 63 N.J. at 163. The intent behind Section 414 was explained in the Official Comment regarding the provision. See generally Unif. Sec. Act, 26 U.S.C.

[11] However, later in 1997, New Jersey deleted N.J.S.A. 49:3-51(e). That provision, however, is an independent provision that has no bearing on the interpretive issues before the court.

§ 414(a)-(f), Official Code Cmt.[12] The Comment noted that Section 414 "defines and delimits the application of the Act in interstate or international transactions with only some of their elements in the state." Ibid. The drafters of the Uniform Securities Law went on to state that, "[i]t is quite clear that a person may violate the law of a given state, even criminally, without ever being within the state or performing within the state every act necessary to complete the offense." Ibid. (citing Strassheim v. Daly, 221 U.S. 280 (1911)). Indeed, referencing the original intent of the 1956 drafters, a leading commentator, relied on by both sides in this case (Pl's. Opp'n. Br. 19, 29; Defs.' Reply Br. 13), explained that the clause, "whether or not either party is then present in this State," UNIF. SEC. ACT § 414(c), is "intended to cover the situation of an offeror or offeree who is absent from the state at the time the offer is made[,]" Robert N. Rapp, 1 Blue Sky Regulation § 4.04 (2020). Further clarification is provided by way of example:

> For example: A is the offeror residing in State X. B is the offeree residing in State Y. If A placed an interstate phone call to B, there would be little doubt that the law of State X would be applicable since the offer originated from that State, and one state should not be used as a base of operations to defraud persons in other states. However, suppose that A travels to see B in State Y. Would the law of State X still be applicable? Under Section 414(c), the offer may still be deemed to have originated from State X. Under Section 414(c), the law of State Y would also apply since the

[12] Can be found at Robert N. Rapp, 2 Blue Sky Regulation 125 (A.A. Sommer, Jr., ed. 2021).

> offer originating in one state and directed to another is made in both states.
>
> [Robert N. Rapp, 1 Blue Sky Regulation § 4.04 (2020)(citing Official Code Comment to UNIF. SEC. ACT § 414(a)-(f)).]

Clearly, then, N.J.S.A. 49:3-51(c) was intended to apply more broadly than to the actual locus of the offer. Courts that have addressed sister state equivalents of N.J.S.A. 49:3-51(c) have identified two public policy reasons supporting a broad reading of Section 414. First, "the laws protect resident purchasers of securities, without regard to the origin of the security." Simms Inv. Co. v. E.F. Hutton & Co., 699 F. Supp. 543, 546 (M.D.N.C. 1988). See also Barnebey, 715 F. Supp. at 1536. Second, "the laws protect legitimate resident issuers by exposing illegitimate resident issuers to liability, without regard to the markets of the issuer." Id. at 546. The court thus concludes that N.J.S.A. 49:3-51(c) was intended to broaden the Bureau's regulatory reach beyond the location of the final offer, as argued by the Bureau.

Credit Suisse also disputes the Bureau's reliance on a line of cases that stand for the proposition that "originates from" equates to "some nexus" or a "territorial nexus" or a "transactional nexus" (Pl.'s Opp'n. Br. 23-25). The so-called territorial nexus doctrine arose from attempts by federal courts to resolve conflicts of law issues that arose in blue-sky securities cases involving several states. Starting in the 1970's and 1980's, federal courts began eschewing application of traditional conflict of laws analyses to securities transactions, recognizing that such approaches were inappropriate for securities transactions that touched and implicated the laws of multiple states. See, e.g., Simms Inv. Co., 699 F. Supp. at 546 (reversing Simms Inv. Co. v. E.F. Hutton & Co., 688 F. Supp. 193 (M.D.N.C. 1988) on reconsideration). In rejecting traditional conflict-of-laws analysis, the courts needed to find an alternative analytic approach. See, e.g., Lintz, 613 F. Supp. at 550 (stating, "Section 414 of the Uniform Securities Act is thus helpful as a guide to when a transaction occurs within this state so that the statute is applicable."). These courts turned to Section 414(c) of the Uniform Securities Act, which was intended in part to solve pervasive questions regarding the state that could regulate a given securities transaction because increasingly complex transactions were touching many states. See generally Louis Loss, The Conflict of Laws and Blue-Sky Laws, 71 Harv. L. Rev. 209 (1957).

Notably, many state scope statutes contain a provision like N.J.S.A. 49:2-51(c), which is modeled on, and substantially similar to, Section 414(c) of the Uniform Securities Act. Other states, however, have materially different scope provisions or none whatsoever. See, e.g., In re Nat'l Century Fin. Enters., Inc., 755 F. Supp. 2d 857, 874, 880 (S.D. Ohio 2010)(noting that Ohio lacks a scope statute and its equivalent to N.J.S.A. 49:3-52 lacks any limit on scope); Simms Inv. Co., 699 F. Supp. at 546 n.3 (describing Colorado's lack of an equivalent to Section 414(c) as a "deficiency," but noting that courts address such provisions liberally; Rosenthal v. Dean Witter Reynolds [Rosenthal II], 908 P.2d 1095, 1105 (Colo. 1995)(applying 1981 Colorado territoriality provision that lacked an equivalent to Section 414(c)). The use of a "territorial nexus" approach thus can mean different things depending upon the nature of state securities laws jurisdictional provisions. Compare Nuveen Premium Income Mun. Fund 4, Inc., 200 F. Supp. 2d at 1318-19 (referring to application of a "territorial nexus" test for Oklahoma scope provision, patterned on Section 414(c), turning on whether the offer or sale "originate[d] from" Oklahoma), with In re Nat'l Century Fin. Enters., Inc., 755 F. Supp. 2d at 874 (applying constitutional extraterritoriality principle as the "territorial nexus" test governing the scope of Ohio's securities law).

The main cases addressing jurisdiction relevant to the present case are thus those involving statutes similar to N.J.S.A. 49:3-51(a) and (c). See Genesee Cty. Emples. Ret. Sys. v. Thornburg Mortg. Secs. Trust 2006-3, 825 F. Supp. 2d 1082, 1224 (D.N.M. 2011) (involving statute substantially similar to N.J.S.A. 49:3-51(a) and (c)); see also Barnebey, 715 F. Supp. at 1536; Nuveen Premium Income Mun. Fund 4, Inc., 200 F. Supp. 2d at 1318-19; Rosenthal II, 908 P.2d at 1105 (applying 1981 Colorado territoriality provision that included state equivalent to N.J.S.A. 49:3-51(a)); Cf. Cromeans v. Morgan Keegan & Co., 303 F.R.D. 543, 556-57 (W.D. Mo. 2014)(applying minimum contacts test despite having substantial equivalent to N.J.S.A. 49:3-51(a) and (c)). Other cases cited by the parties are of limited persuasiveness because, even though they have relied upon the same underlying intent of Section 414(c), they interpret materially different territoriality scope provisions. See In re Nat'l Century Fin. Enters., Inc., 755 F. Supp. 2d at 874 (applying constitutional extraterritoriality principle); Lintz, 613 F. Supp. at 543 (relying on rationale behind Section 414 of Uniform Securities Act to resolve conflict of law issue despite Virginia securities law lacking a scope provision).

Oklahoma has a very similar scope statute to N.J.S.A. 49:3-51(c). In Nuveen Premium Income Mun. Fund 4, Inc., 200 F. Supp. 2d at 1318-19, the court denied a motion to dismiss the complaint, finding that the plaintiff had alleged sufficient facts to show that defendant's securities offers "originate[d] from" Oklahoma because (i) the Oklahoma-based employee was involved in drafting "some or all" of the offering materials in Oklahoma; (ii) the employee's "research and other activities" occurred in Oklahoma; (iii) and the timing and circumstances of the offer, among other factors, established jurisdiction. In its analysis, the court found that the securities might "originate[] from" Oklahoma and, therefore, found that a "sufficient territorial nexus" existed between Oklahoma and the transactions at issue to deny Defendants' motion for summary judgment based on lack of jurisdiction. Id. at 1318-19. The court's analysis strongly supports the Bureau's position here.

In Barnebey, 715 F. Supp. at 1536-37, defendant Viking Energy Management Company, Inc. ("Viking"), was the sole partner in the VEMCO 1981 Private Drilling Program ("VEMCO 1981") and sought to sell limited partnership interests in the company through an offering. Making an agreement with Viking, E. F. Hutton & Company ("Hutton"), a New York company, contracted for "the exclusive right to solicit purchasers for the VEMCO 1981 offering." Id. at 1537. In analyzing the question of whether "offers" and sales that occurred wholly outside of Oklahoma nonetheless "originated from" that state, the court found it relevant that, (i) Viking was headquartered in Oklahoma; (ii) Viking prepared a private offering memorandum describing the venture to potential investors in significant detail, including "an offeree questionnaire, an offeree representative questionnaire, a subscription agreement, and an assumption agreement, [etc.,]" in Oklahoma, (iii) the memorandum informed potential investors that they should contact VEMCO in Oklahoma with any questions; (iv) transmitted these documents from Oklahoma to Hutton in New York, which distributed the documents to potential investors; (v) potential investors would return the Subscription Agreement to Hutton, which would discard some and send the rest to VEMCO; and (vi) VEMCO would decide whether to accept the remainder in Oklahoma. Id. at 1537-38. Granting summary judgment in the plaintiffs' favor on the issue, the court found that the transactions "originate[d] from" Oklahoma and that Oklahoma securities law applied. Id. at 1538. This decision also lends support to the Bureau's position that at the very least it be afforded the opportunity to prove its case based on the activities of Credit Suisse's Princeton office.

In Rosenthal II, 908 P.2d at 1098, Castle Pines North Metropolitan District ("Castle Pines"), a quasi- municipal corporation and a political subdivision of Colorado, issued bonds in order to refund earlier issued bonds ahead of their maturity date as well as to fund a construction project. Castle Pines prepared in Colorado an Official Statement in connection with the bond offering, which "contained, among other things, approximately six pages of risk factors associated with issuance of the bonds, information concerning the sources and uses of funds, and the prospects for development within the District." Rosenthal v. Dean Witter Reynolds [Rosenthal I], 883 P.2d 522, 525 (Colo. Ct. App. 1994), rev'd on other grounds, 908 P.2d 1095 (Colo. 1995). Castle Pines hired Dean Witter Reynolds, Inc. ("Dean Witter"), a national brokerage firm, to underwrite the bond offering through its Colorado and other offices. Id. at 524. From its Pennsylvania office, Dean Witter sold bonds to Howard Rosenthal, a Pennsylvania resident. Id. at 525. Dean Witter challenged Rosenthal's standing to bring a cause of action under the Colorado Securities Act. Rosenthal II, 908 P.2d at 1004-5. Addressing whether Rosenthal had standing under the Colorado securities law, the Colorado Supreme Court reasoned that Rosenthal had a cause of action against Dean Witter because (i) the Official Statement was prepared in Colorado, (ii) the issuer of the purchased bonds was located in Colorado; and (iii) the alleged fraud arose from the Official Statement itself. See also id. at 1105. Again, similarities in the facts of this case to those alleged by the Bureau support its position regarding the interpretation of New Jersey's scope provision.

In Newsome v. Diamond Oil Producers, Blue Sky L. Rptr. (CCH) ¶ 71,869 (Dist. Ct. 14th Jud. Dist. Okla. 1983), the defendants conceded that they made offers and sales of fractional gas and oil interests, treated as securities under Oklahoma law, to purchasers located outside of Oklahoma. They attempted to argue that they did not comply with Oklahoma's securities laws because they were complying with other states' requirements. The court flatly rejected this argument, finding as a matter of law, at the motion to dismiss stage, that the relevant offers and sales "originate[d] from" Oklahoma and that Oklahoma law was applicable. Ibid.

While Credit Suisse relies heavily on State v.Lundberg, 445 P. 3d at 1115-1121, this court is not persuaded to follow the holding in that case. First, while the decision there interpreted the jurisdictional reach of offers "originating" in Kansas, that case involved a criminal prosecution for securities fraud. Each of the three opinions rendered there mentioned that criminal laws are penal in both nature and application and thus must be construed strictly against the government, unlike civil enforcement actions traditionally based on liberal readings of remedial statutes to protect the public. In fact, the concurring opinion drew a sharp distinction between civil and criminal enforcement of the Kansas securities laws, noting that a broad interpretation of the "originates" language in the Kansas Act is consistent with the remedial purpose of the Act as a whole. Id. at 1124. That opinion concluded that, "to hold that the promotion of information—which eventually results in the purchase of a security in another state—is an "offer" which originated in Kansas, would not be inconsistent with the purpose of the Act *in the civil enforcement context.*" Id. at 1127 (emphasis in original). This court finds that observation persuasive here. Moreover, the facts in Lundberg are distinguishable from those in this case. In Lundberg, the majority opinion noted that, "No act comprising the sales offer process that underlies these charges ... occurred in Kansas." 445 P.3d at 1120. By contrast, the Bureau relies on numerous activities performed by Credit Suisse's Princeton office in New Jersey that the Bureau claims are related to the sales offer process, including due diligence reviews used to select the mortgages incorporated into the RMBS. Given the facts underlying the Bureau's civil enforcement action, this court finds the analysis in the concurring opinion in Lundberg to be more compelling than the majority ruling and more consistent with the weight of authority discussed above.

Precedents thus demonstrate that the question of whether an offer "originates from" a given state is a fact-sensitive question that is addressed on a case-by-case basis. Moreover, jurisdiction depends on a direct link between offer-related activities in the originating state and the transactions at issue. See, e.g., Nuveen Premium Income Mun. Fund 4, Inc., 200 F. Supp. 2d at 1318-19. However, this direct link has been interpreted liberally to protect the investing public by reaching the preparation of materials generally distributed to investors interested in a given securities offering. See, e.g., Rosenthal II, 908 P.2d at 1105. In addition, the offers sought to be regulated need not actually be made in the "originating" state. See, e.g., Nuveen Premium Income Mun. Fund 4, Inc., 200 F. Supp. 2d at 1318-19; Barnebey, 715 F. Supp. at 1537-38; Rosenthal II, 908 P.2d at 1105. However, merely conducting unspecified business in a state is legally insufficient to conclude that an offer originated from that state. Genesee Cty., 825 F. Supp. 2d at 1224. Finally, courts have not hesitated to consider other factors such as (i) whether the issued securities arose from a state-centric subject matter or projects from the originating state; (ii) whether the business was headquartered in the alleged originating state; and (iii) whether "research and other activities" related to preparation of the offering materials occurred in the alleged originating state. Nuveen Premium Income Mun. Fund 4, Inc., 200 F. Supp. 2d at 1318-19. This court is persuaded that these precedents support the Bureau's arguments to defeat the partial summary judgment motion brought by Credit Suisse. It will thus be up to the Bureau to prove at trial that Credit Suisse's activities at its Princeton office are sufficient to justify exercising jurisdiction over Defendants and justifying entry of a judgment in favor of the Bureau. For completeness, however, the court analyzes additional arguments made by the parties.

C. Additional Arguments Made by the Parties

Credit Suisse relies on two New Jersey cases, In re Information Resources Corp., 126 N.J. Super. 42 (App. Div. 1972), and Bramblewood Investors, Ltd. v. C & G Associates, 262 N.J. Super. 96 (Law Div. 1992), to support its argument that the Bureau of Securities lacks jurisdiction to assert the claims involving the Disputed Investors set forth in Plaintiff's Amended Complaint. Neither case is determinative of the legal issues raised in this motion, however. Both focused on registration requirements for the sale of securities and involved fact patterns far removed from the high stakes bundling into trusts of millions of dollars of mortgages selected with input from Credit Suisse's Princeton office that lies at the heart of this case.

Starting with Information Resources, 126 N.J. Super. at 45, the court there reviewed an administrative decision by the Chief of the Bureau of Securities finding that the company had sold securities without registering with the Bureau. At issue was whether the company's activities exempted it from registration under N.J.S.A. 49:3-50(b)(9). Ibid. The facts revealed that the company was formed to engage in the development of a "data acquisition and recorder terminal."[13] In order to fund this venture, the Board of Directors authorized the issuance of one class of unregistered stock, which resulted in seventeen transactions between August 17, 1970 and November 22, 1971. In 1972, by way of an order to show cause, the Bureau Chief initiated administrative enforcement proceedings against the company for allegedly failing to register its securities with the Bureau in violation of the NJUSL. Id. at 46. After a hearing, the Bureau Chief concluded that, in the Appellate Division's words, the eleven "sales of securities by a New Jersey corporation to non-Jersey residents constituted the sale of securities 'in this State' and could be considered by the Bureau in determining whether . . . [the company] was exempt from the provisions of the Uniform

[13] Incorporated with offices originally in New Jersey, the company moved to New York in 1971. Ibid.

Securities Law under the 'private offering' exemption provisions of N.J.S.A. 49:3-50(b)(9)." Information Resources, 126 N.J. Super. at 47.[14] The company appealed this ruling.

The Appellate Division began its decision by citing the registration exemption provision codified at N.J.S.A. 49:3-50(b)(9), which refers to "[a]ny transaction . . . which results in sales to not more than 10 persons . . . in this State." Relying on a plain reading of that provision, the Appellate Division concluded, "using the language of the statute," that "transactions pursuant to an offer were directed by the offeror to only eight persons in this State," ibid., and reversed the Bureau Chief's determination finding the company in violation of the NJUSL for failing to register before making the sales in question.

Nonetheless, the panel went on to address another argument made by the Bureau--that the "legislative intent" of N.J.S.A. 49:3-51 dictated a broad reading of N.J.S.A. 49:3-50(b)(9). While the

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[14] The relevant statutory language, an earlier version of N.J.S.A. 49:3-50(b)(9), states:

> (b) The following transactions are exempted from the provisions of [N.J.S.A. 49:3-60, "Registration of Securities," and N.J.S.A. 49:3-63, "Filing of Sales Literature"] of this act:
>
> * * *
>
> (9) any transaction pursuant to an offer directed by the offeror to not more than 10 persons * * * in this State during any period of 12 consecutive months, whether or not the offeror or any of the offerees is then present in this State, if (i) the seller reasonably believes that all buyers are purchasing for investment, and (ii) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective buyer in this State; but the bureau chief may by rule or order, as to any transaction, withdraw or further condition this exemption, or increase or decrease the number of offerees permitted, or waive the conditions in subdivision (i) and (ii) * * *.
>
> [Id. at 46-47 (quoting N.J.S.A. 49:3-50(b)(9)).]

Appellate Division agreed that N.J.S.A. 49:3-51 *itself* "demonstrates the Legislature's concern 'to subject to regulation as broad a spectrum of offers and sales of securities as possible in order to insure the investing public a full measure of protection,'" the panel found that the provision had no bearing on its interpretation of the registration requirements" at least in the application of N.J.S.A. 49:3-50(b)(9) to the facts of this case." Id. at 48-49. This conclusion also supported the panel's decision to reverse the Bureau's findings, holding that the company's sales to less than ten people in the State prevented the Bureau from exercising jurisdiction over the company for a violation of the registration requirement. Id. at 50.

The present case is distinguishable from Information Resources for several significant reasons. First, as noted above, the facts of the two cases and the causes of action brought here by the Bureau are very different than what was at issue there. The provisions in N.J.S.A. 49:3-50 explicitly exempt securities and transactions from the provisions of N.J.S.A. 49:3-60 and 63, and not from the provisions of the statute relied on by the Bureau for its enforcement action in this case. N.J.S.A. 49:3-60 makes it unlawful for any security to be offered or sold in New Jersey unless it is registered in the State, or exempt from registration under the NJUSL, or is a federal covered security. N.J.S.A. 49:3-63 authorizes the Bureau Chief to require that sales literature for distribution to prospective investors be filed with the Bureau unless the security is exempt from registration in New Jersey. Those provisions have no bearing on the case before the court. The exemption of transactions in N.J.S.A. 49:3-50(b)(9) simply does not apply to limit the conduct addressed in N.J.S.A. 49:3-51(a) or (c) and N.J.S.A. 49:3-52. Additionally, N.J.S.A. 49:3-50(b)(9) contains very different scope language from that found in N.J.S.A. 49:3-51, making it inappropriate to apply by analogy. Compare N.J.S.A. 49:3-51(a) and (c), which address sales or offers to sell as well as offers that originate from New Jersey, with N.J.S.A. 49:3-50(b)(9), which addresses only sales. For these reasons, Information Resources is not controlling here and Credit Suisse's reliance on it is misplaced.

Next, Credit Suisse relies on Bramblewood, 262 N.J. Super at 99, another registration case. There plaintiff offered for sale limited partnership interests pursuant to a Confidential Private Offering Memorandum ("Private Offering Memo") to raise money for the construction of a building in High Point, North Carolina. Ibid. During the offering period, defendant C&G Associates ("C&G"), a general partnership, purchased three limited partnership interests using promissory notes executed in favor of Bramblewood. Ibid. C&G defaulted on the promissory notes and Bramblewood sued to collect the funds that remained outstanding on the notes. C&G brought a counterclaim against Bramblewood and a third-party complaint against other parties for alleged misrepresentations and breach of fiduciary duties. Id. at 99-100. Critical to the present case, C&G also alleged that Bramblewood did not register the limited partnership offerings with the New Jersey Bureau of Securities and that an affiliate of Bramblewood's general partner did not register as an "agent" under the NJUSL. Before the court for decision was a motion for summary judgment on C&G's securities law-related claims. Bramblewood, 262 N.J. Super. at 99-100.

In analyzing the issues, the court began with the statute of limitations, an earlier version of N.J.S.A. 49:3-71(e), which stated that, "[n]o person may sue under this section more than two years after the contract of sale, or within two years of the time when the person aggrieved knew or should have known of the existence of his cause of action, whichever is later." Id. at 101 (quoting N.J.S.A. 49:3-71(e)).[15] Under the "discovery rule," the

[15] The current version of N.J.S.A. 49:3-71(e) is very different after subsequent reconfiguration of the relevant statute. The provision addressing the same issue is now found in N.J.S.A. 49:3-71(g), which states in full:

> No person may bring an action under this section more than two years after the contract of sale or the rendering of the investment advice, or more than two years after the time when the person aggrieved knew or should have known of the existence of his cause of action, whichever is later. No person may bring an action under this section (1) if the buyer received a written offer, before suit and at a time when he owned the security, to refund the consideration paid, together with interest at the rate established for interest on judgments for the same period by the Rules Governing the Courts of the State of New Jersey at the time the offer was made, from the date of payment, less the amount of any income received on the security, and he failed to accept the offer within 30 days of its receipt, or (2) if the buyer received such an offer before suit and at a time when he did not own the security, unless he rejected the offer in writing within 30 days of its receipt[.]

[N.J.S.A. 49:3-71(g).]

"time to file suit is triggered when the plaintiff 'learns, or reasonably should learn, the existence of a state of facts that may equate in law with a cause of action.'" Id. at 100 (quoting Vispisiano v. Ashland Chemical Co., 107 N.J. 416, 426 (1987)). On that point, the trial court found that C&G became aware of Bramblewood's lack of registration upon receiving the Private Offering Memorandum in the spring of 1985 because the notice had a cover page that stated in plain terms that the securities had not been registered with the SEC or any state securities agency. Bramblewood, 262 N.J. Super. at 101. Additionally, the court found that a C&G partner, who was designated to act as the representative and signatory for C&G, signed an "Investment and Inducement" letter stating that, "'[t]he undersigned acknowledges being informed by the Issuer that the securities being purchased . . . are unregistered.'" Ibid. Since C&G did not file the counterclaim until October 4, 1990, the court concluded that the counterclaim was time-barred under N.J.S.A. 49:3-71(e) and dismissed it on this ground. Id. at 102-3. While the trial court unambiguously rested its dismissal of the counterclaim on the failure to satisfy the statute of limitations, the court also addressed other grounds for ruling in favor of Bramblewood, noting that, "Even if defendants' counterclaim was not in all respects barred by the statute of limitations, defendants' claims and defenses based on alleged violations of the Uniform Securities Law are without merit." Ibid.

In section III of the decision, the trial court addressed the argument that Bramblewood's general partner affiliate, United Capital Securities, Inc. ("United Capital"), was an unregistered agent. Bramblewood, 262 N.J. Super. at 105. For purposes of its analysis, the court accepted as true that United Capital was an "agent" of Bramblewood and "even" assumed that the claim was not time-barred. Thereafter, the court explained that the only action C&G claimed the agent took in New Jersey was a short meeting between United Capital and one New Jersey investor. Id. at 105 n.2. The court also noted that the witnesses agreed that that investor did not actually invest until receiving the "full pitch" in North Carolina and touring the construction site there. Ibid.

After setting forth these facts, the court turned to the relevant statutory provisions, quoting N.J.S.A. 49:3-56(a) and N.J.S.A. 49:3-51(a). Bramblewood, 262 N.J. Super. at 106. The court did not, however, address N.J.S.A. 49:3-51(c), which modifies the scope of N.J.S.A. 49:3-51(a). Considering only N.J.S.A. 49:3-56(a), the court found that, "the only activities at all relevant to a determination of the provisions' applicability are those activities engaged in by a person selling or offering to sell securities in the State of New Jersey." Ibid. Applying this understanding to the above facts, the trial court concluded that the relevant activities occurred in North Carolina, not New Jersey, and that C&G's counterclaim failed on this ground as well. Ibid.

Bramblewood is not binding on this court because it comes from a court of equal authority. However, even if it were binding on this court, Credit Suisse's reliance on Bramblewood is not dispositive of the dispute between the parties here. First, the decision had already relied on two different grounds to dismiss the counterclaim before reaching the ruling relied on by Credit Suisse in this case, making the holding relied on by Credit Suisse *dicta* at best. Second, the Bramblewood court simply omitted any discussion of N.J.S.A. 49:3-51(c), which was part of the original enactment of the NJUSL in 1967 and remained in effect when Bramblewood was decided. This omission is significant because N.J.S.A. 49:3-51(a) makes N.J.S.A. 49:3-51(c) expressly applicable to N.J.S.A. 49:3-56(a). The fact that the relevant discussion in Bramblewood was – as the Bureau puts it – "double dicta" and that N.J.S.A. 49:3-51(c) was not considered by the court undermines the persuasiveness of the decision in the present case.

Credit Suisse also relies on Bramblewood to suggest that New Jersey has a narrow definition of "offer" under N.J.S.A. 49:3-49(j)(2). (Defs.' Reply Br. 4). According to Credit Suisse, Bramblewood rejected a broad definition of "offer" in favor of one based on the location of the "full pitch" by finding one meeting with investors insufficient to bring the transaction within the definition of "offer." Ibid. Notably, however, the trial court in Bramblewood rejected "a short meeting with a United Capital representative in New Jersey" as sufficient to bring the transaction within the scope of the NJUSL because the buyer made his decision "[o]nly after meeting with the representative in North Carolina, visiting the subject property, and meeting an on-site manager" Id. at 105-6 n.2. While this court agrees that the trial court in Bramblewood appeared to limit its understanding of an "offer" to the place where the offeree made his decision, the court here rejects this view of "offer," set forth in un-binding *dicta*, as improperly narrowing the definition of "offer" under N.J.S.A. 49:3-49(j)(2). Moreover, Credit Suisse's activities at its Princeton office stand in vivid contrast in their scope and effect when compared to the facts in Bramblewood. Thus, Credit Suisse's arguments based on these two cases do not persuade the court to adopt Defendants' narrow reading of NJUSL's scope provision.

Moreover, in addition to the out-of-state precedents cited above, other decisions from federal and state courts provide useful guidance in interpreting the NJUSL on this issue. See Mayflower Sec. Co., 64 N.J. at 88-91; Fed. Ins. Co. v. Campbell Soup Co., 381 N.J. Super. 190, 196 (App. Div. 2005); Greer, 288 N.J. Super. at 77-79; AMR Realty Co. v. State, Bureau of Sec., 149 N.J. Super. 329, 334 (App. Div. 1977); Russell, 119 N.J. Super. at 359. Under the NJUSL, the term "offer" is defined to "include[] every attempt or offer to dispose of, or solicitation of any offer to buy, a security or interest in a security or investment advisory services for value[.]" N.J.S.A. 49:3-49(j)(2). The federal definition is substantially similar to this NJUSL provision. See 15 U.S.C. § 77b(a)(3) ("The term 'offer to sell,' 'offer for sale,' or "offer" shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value."). Despite these similarities, the Bramblewood court did not even consider the interpretation of the term "offer" by either federal or sister state courts, Bramblewood, 262 N.J. Super. at 105-6, yet another reason for this court not to follow that trial court decision.

Notably, federal courts have interpreted the term "offer" broadly, finding that it "goes well beyond the common law contract concept of an offer[.]" See, e.g., Diskin v. Lomasney & Co., 452 F.2d 871, 875 (2d Cir. 1971)(citing Matter of Carl M. Loeb, Rhoades, & Co., 38 S.E.C. 843, 850 (Feb. 9, 1959)).[16] With near uniformity, an "offer" has been understood by the federal government, federal courts, and our sister states to "prohibit[] issuers, underwriters and dealers from initiating a public sales campaign prior to the filing of a registration statement by means of publicity efforts which, even though not couched in terms of an express offer, condition the public mind or arouse public interest

[16] See also United States v. Naftalin, 441 U.S. 768, 773 (1979) (citations omitted); SEC v. Cavanagh, 155 F.3d 129, 135 (2d Cir. 1998); Hocking v. Dubois, 885 F.2d 1449, 1457-58 (9th Cir. 1989); SEC v. Commercial Inv. & Dev. Corp. of Florida, 373 F. Supp. 1153, 1164 (S.D. Fla. 1974); Moses v. Carnahan, 186 S.W.3d 889, 901-2 (Mo. App. 2006).

in the particular securities." Matter of Carl M. Loeb, Rhoades, & Co., 38 S.E.C. at 850. The Second Circuit has succinctly explained the purpose for this broad understanding:

> One of the evils of a premature offer is its tendency to encourage the formation by the offeree of an opinion of the value of the securities before a registration statement and prospectus are filed.
>
> There is then no information on file at the SEC by which the Commission can check the accuracy of the information which forms the basis of the offeror's estimate of value, and any offeree, such as the reader of a press release, is encouraged to form a premature opinion of value without benefit of the full set of facts contained in a prospectus.
>
> [Chris-Craft Industries, Inc. v. Bangor Punta Corp., 426 F.2d 569, 574-75 (2d Cir. 1970).]

In short, under the great weight of state and federal authority, offers "are not limited to communications which constitute an offer in the common law contract sense, or that on their face purport to offer a security. Rather, . . . they include 'any document which is designed to procure orders for a security." Matter of Carl M. Loeb, Rhoades & Co., 38 S.E.C. at 850. The court finds this approach more persuasive than the one endorsed in Bramblewood, and more consistent with the underlying purpose of the NJUSL to protect the investing public. Consequently, these precedents further support the court's decision to deny Credit Suisse's motion for partial summary judgment.

Finally, although the Bureau argues that the court should endorse its interpretation of the NJUSL because it is entitled to deference as within the Bureau's expertise (Pl.'s Opp'n. Br. 23), see, e.g., Richardson v. Bd. of Trs., 192 N.J. 189, 196 (2007)(citing R & R Mktg., L.L.C. v. Brown-Forman Corp., 158 N.J. 170, 175 (1999))("Generally, courts afford substantial deference to an agency's interpretation of a statute that the agency is charged with enforcing."), the court declines this invitation.[17] Since the court is "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue," Mayflower Sec. Co., 64 N.J. at 93, reliance on the Bureau's interpretation is not required. That the court agrees with the Bureau's interpretation on independent grounds, however, makes deference to the Bureau's construction unnecessary.

D. Analysis of the Facts

Finally, as to the jurisdictional issue, the court examines more closely the facts of the case in light of the legal principles analyzed above. As noted previously, Credit Suisse relies on the law in its effort to limit the Bureau's jurisdiction while the agency contends that there are disputes of fact that require the court to deny Credit Suisse's motion.

i. The Final Securities Transactions Occurred Outside of New Jersey

[17] See also In re Election Law Enf't Comm'n Advisory Op. No. 01-2008, 201 N.J. 254, 260-61 (2010); New Jersey State Chamber of Com. v. New Jersey Election Law Enf't Comm'n, 82 N.J. 57, 82-83 (1980) (discussing the standard of substantial deference in rulemaking); Tasca v. Bd. of Trustees, Police and Firemen's Retirement Sys., 458 N.J. Super. 47, 55-56 (App. Div. 2019).

Credit Suisse has provided substantial evidence to show that the initial loan selection, drafting of the final prospectus supplements, and structuring of the RMBS trusts occurred in New York. Similarly, Credit Suisse showed that the individuals involved in these activities worked in New York. Credit Suisse also demonstrated that the Designated Investors did not receive offers that resulted in securities transactions in New Jersey, although most of these Investors had offices in this State. (Domalewski Cert. ¶¶ 42-48, Ex. 41, Ex. 42, Ex. 43, Ex. 44, Ex. 45, Ex. 46, Ex. 47). Finally, Credit Suisse's sales force was located outside of New Jersey in New York, Boston, Chicago, Hong Kong, San Francisco, Singapore, and Washington, D.C. (Domalewski Cert. ¶ 14, Ex. 13 [R&O No. 36]).

ii. The Direct Link to HEAT and HEMT

Nonetheless, however, the Bureau has provided sufficient evidence to credibly argue at trial that the Princeton office was materially involved in the creation of the prospectus supplements for the Disputed Transactions involving the Designated Investors. First, Princeton office employees were responsible for the creation and publication[18] of the underwriting guidelines that Credit Suisse used in its pre-acquisition due diligence for all of the loans it later acquired (or rejected) through the RMBS Conduit

[18] The published underwriting guidelines were often distributed to originators that wanted to sell loans to Credit Suisse. (McDonough Cert. ¶ 45, Ex. 44 [Sacco Tr. 30:24-32:18]).

and bulk channel. (See McDonough Cert. ¶¶ 44-46, 82, Ex. 43 [Sacco Tr. 69:23-70:12], Ex. 44 [Sacco Tr. 30:24-32:18], Ex. 45, Ex. 81 [Kuo Tr. 59:14-60:18]; Domalewski Cert. ¶¶ 14-15, 29, 32, Ex. 13 [R&O No. 13], Ex. 14, Ex. 28 [Tr. 10:2-25], Ex. 31 [pg. 34]). Credit Suisse's underwriting guidelines included a significant number of considerations that, in Credit Suisse's own words, reflected its dedication to acquiring "sound and prudent" loans for investors that corresponded to the loan's associated risk. (McDonough Cert. ¶ 42, Ex. 41 [CSSU-DOJ 1393938, CSSU-DOJ 1393941]). Indeed, these guidelines were not a mere reflection of government guidelines (see, e.g., McDonough Cert. ¶ 156, Ex. 155 [S-11]), although compliance with those guidelines was also a part of the Princeton office's due diligence responsibilities (Domalewski Cert. ¶ 15, Ex. 14]). Finally, Credit Suisse published its underwriting guidelines and often distributed them to mortgage originators exploring the sale of loans to Credit Suisse. (McDonough Cert. ¶ 45, Ex. 44 [Sacco Tr. 30:24-32:18]).

Second, the record contains evidence upon which the Bureau can rely in an effort to show that the Princeton office's underwriting due diligence was not merely a peripheral or insignificant factor in Credit Suisse's decision-making and marketing. Indeed, there are facts in the record that the Bureau could employ to argue that the underwriting guidelines developed and used in Princeton were a relevant component of Credit Suisse's acquisition of loans from originators. (See, e.g., McDonough Cert. ¶ 47, Ex. 46 [Sacco Tr. 142:16-145:10]). Beyond taking their own underwriting guidelines into account when deciding whether to acquire loans, Credit Suisse pitchbooks, manuals, and other documents were replete with detailed descriptions about Credit Suisse's underwriting guidelines and other due diligence practices. (Domalewski Cert. ¶¶ 10, 32, Ex. 9 [CSNJAG000000], Ex. 31; McDonough Cert. ¶¶ 35, 42, 92, Ex. 34, Ex. 41, Ex. 91). Credit Suisse also had Princeton employees, like Sacco, make important presentations to credit rating agencies and monoline insurers about Credit Suisse's underwriting guidelines in its pursuit of a good credit rating and insurance for certain HEAT and HEMT tranches. (See, e.g., McDonough Cert. ¶¶ 56, 92, 95, Ex. 55 [Sacco Tr. 29:13-21], Ex. 91, Ex. 94 [CSSU-DOJ 16474746]). The existence and significance of these facts are available to the Bureau to support its case against Credit Suisse under the many precedents analyzed above.

Finally, the Bureau asserts that the due diligence done by the Princeton office, and by third-party vendors overseen by the Princeton office, was typically the only due diligence done on the loans. (Domalewski Cert. ¶ 8, Ex. 7 [Grice R. & R. ¶ 199]). The Bureau can thus argue that functionally the Princeton office's underwriting guidelines were included in every HEAT and HEMT prospectus supplement at issue in this motion. (Domalewski Cert. ¶ 8, Ex. 7 [Grice R. & R. ¶ 52]). On this point, the court rejects

Credit Suisse's suggestion that the drafting of offering documents occurs only where the lawyers and other staff working with them are located, excluding the work provided by personnel in the Princeton office--work that was incorporated into the offering documents. The court also rejects Credit Suisse's efforts to minimize the significance of the work done in the Princeton office by labeling it as merely "general business activities" far removed from the securities offerings. (Defs.' Supp. & Opp'n Br. 22-23). Indeed, it is axiomatic that substance trumps form in securities law. See, e.g., United States v. Leonard, 529 F.3d 83, 90 (2d Cir. 2008). The record here thus could be construed to show that much of the substance of the offering materials dealing with underwriting guidelines emanated from Credit Suisse's Princeton office and not from a lawyer's pen in New York.

The Bureau has thus pointed to facts in this case from which it could argue at trial that the underwriting guidelines placed in the prospectus supplements relating to the Disputed Transactions were (i) substantively created by the Princeton office and (ii) a material part of Credit Suisse's prospectus supplements. Each of the prospectus supplements included in the offering materials of the Disputed Transactions included descriptive sections created in New Jersey. (Domalewski Cert. ¶ 9, Ex. 8 [HEMT 2007-2]; McDonough Cert. ¶¶ 33-34, 73, 148-156, Ex. 32 [HEMT 2006-5], Ex. 33 [HEAT 2006-8], Ex. 72 [HEMT 2006-6], Ex. 147 [HEAT 2006-4], Ex. 148 [HEAT

2006-54], Ex. 149 [HEAT 2006-6,], Ex. 150 [HEAT 2006-7], Ex. 151 [HEAT 2007-1], Ex. 152 [HEAT 2007-2], Ex. 153 [HEAT 2007-3], Ex. 154 [HEMT 2006-4], Ex. 155 [HEMT 2007-1]). This evidence is sufficient to show the Princeton office's direct involvement in creating the prospectus supplements involved in the Disputed Transactions, and thus could be relied upon by the Bureau in advocating for relief against Credit Suisse. Under these circumstances, the motion for partial summary judgment dismissing the transactions involving the Designated Investors must be denied.

iii. Other Relevant Considerations

Other significant RMBS-related considerations contribute to the court's finding that there is sufficient evidence of record from which the Bureau can argue that the Disputed Transactions "originate[d] from" New Jersey for purposes of N.J.S.A. 49:3-51(a) and (c). See, e.g., Nuveen Premium Income Mun. Fund 4, Inc., 200 F. Supp. 2d at 1318-19 (finding "research and other activities" in originating state relevant). First, there are facts the Bureau can use to assert that Credit Suisse's Princeton office, with more than 100 employees, substantially contributed to Credit Suisse's RMBS-related activities, including its acquisition of loans through the RMBS Conduit,[19] (Domalewski Cert. ¶ 14, Ex. 13 [R&O No. 1]; McDonough Cert. ¶¶ 48, 51, Ex. 47 [CSNJAG000001755, 77-78], Ex. 50 [Tr. 97:21-98:9]), all due diligence on loans to be acquired, all credit policy, and quality control on loans, (Domalewski Cert. ¶ 8, Ex. 7 [McDonough Cert. ¶¶ 53-54, Ex. 52 [CSSU-DOJ 8442861], Ex. 53 [Nordyk Tr. 38:14-15]; Ex. 55 [Sacco Tr. 26:20-22], (Domalewski Cert., Ex. 13 at R&O Nos. 1 & 13). Second, and relatedly, the record contains evidence that Princeton office employees were involved in Credit Suisse's marketing campaigns, at times acting as "discussion leaders" in their areas of expertise. (See, e.g., Domalewski Cert. ¶¶ 32, 37, Ex. 31, Ex. 36 [CSNJAG002833665]). Indeed, Credit Suisse relied on experienced senior-level Princeton employees, like Sacco, to give presentations to the credit rating agencies (see, e.g., McDonough Cert. ¶¶ 56, 91-92, Ex. 55 [Sacco Tr. 29:13-21], Ex. 90 [CS 12718202-3], Ex. 91 [pg. 1]), and to create presentations for monoline insurers (McDonough Cert. ¶¶ 95, 98, 102, 119, Ex. 94 [CSSU-DOJ 16474746], Ex. 97, Ex. 101, Ex. 118 [CSSU-DOJ 2656458]), as noted above. Third, the Princeton office was also directly involved with investors by hosting potential investors interested in important loan-level activities and in soliciting investors. (McDonough Cert. ¶¶ 103, 125, 127, 130, 133, 135, Ex. 102 [CSSU-

[19] Indeed, Credit Suisse's wholesale loan company, dissolved nonparty CSFC, had listed Princeton as its principal place of business. (See, e.g., McDonough Cert. ¶ 156, Ex. 155 [S-36].)

DOJ 11529700], Ex. 124 [CSSU-DOJ 1039903-05], Ex. 126 [Sacco Tr. 94:10-13], Ex. 129 [CSSU-DOJ 2865333], Ex. 132 [CSSU-DOJ 15535555], Ex. 134). Fourth, the New York office relied heavily on the due diligence results and loan data generated by the Princeton office, and the third-party vendors that it oversaw, when selecting loans for securitization. Indeed, when determining the final loan pools of the relevant HEAT and HEMT trusts, the New York office would often turn to Princeton office employees to determine whether millions of dollars in loans were eligible for securitization. (McDonough Cert. ¶¶ 37, 60-68, Ex. 36 [CSSU-DOJ 27431924], Ex. 59 at CSSU-DOJ 4671718-21], Ex. 60 [CSSU-DOJ 18344172-73], Ex. 61 [CSSU-DOJ 1036885], Ex. 62 [CSSU-DOJ 1063841], Ex. 63 [CSSU-DOJ 11879471], Ex. 64 [CSSU-DOJ 23143126], Ex. 65 [CSSU-DOJ 1167557-58], Ex. 66 [CS 0182763-64], Ex. 67 [CSSU-DOJ 1543905]; Domalewski Cert. ¶¶ 14-15, Ex. 13 [App. B], Ex. 14). Fifth, the fraud alleged in the Amended Complaint arises at least partially from the loan-level activities occurring at Credit Suisse's Princeton office. (Am. Compl. ¶¶ 146-51, 152-54). Consequently, the Bureau should be offered the opportunity to prove its case at trial and not have it severely truncated by the unpersuasive legal and factual arguments of Credit Suisse.

Finally, Credit Suisse did not fall into a trap for the unwary. It strains credulity to suggest that Credit Suisse did not intend to maintain over 100 employees in Princeton and to rely on their work in purchasing of billions of dollars in residential mortgages used to create the trusts at issue here. Credit Suisse chose to house a significant portion of its RMBS group in Princeton, New Jersey, and its efforts to diminish the role of the Princeton office in the securitization process are unavailing at this point in the case. The parties should be left to their proofs at trial.

In summary, the Bureau cited facts of record showing that the Princeton office was responsible for creating the underwriting guidelines that were placed in each of the HEMT and HEAT prospectus supplements received by the Designated Investors in the Disputed Transactions. The Bureau also showed evidence of the Princeton office's substantial involvement in the acquisition of the mortgages that were essential to the RMBS process. Collectively, these facts provide sufficient support for the Bureau to argue that the Disputed Transactions "originate[d] from" New Jersey. N.J.S.A. 49:3-51(c). The court thus rejects Credit Suisse's arguments to the contrary, finding that its motion for partial summary judgment must be denied as to its jurisdictional arguments.

E. Extraterritoriality

i. Legal Precedents on Extraterritoriality

The final question implicated in Credit Suisse's motion is whether the Bureau's regulation of the Disputed Transactions under N.J.S.A. 49:3-51(a) and (c) nonetheless violates the "extraterritoriality principle" of the Dormant Commerce Clause, requiring dismissal of those transactions as an unconstitutional application of N.J.S.A. 49:3-51(a) and (c). (Defs.' Supp. & Opp'n. Br. 26-27). Although Section 28(a) of the 1934 Act, 15 U.S.C. § 78bb(a), expressly saved state securities laws from preemption under the Commerce Clause, see, e.g., Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 383-84 (1996); Leroy v. Great W. United Corp., 443 U.S. 173, 182 n.13 (1979) (stating that, "In particular, the provision was designed to save state blue-sky laws from preemption."), the state's securities laws may be constrained by the Dormant Commerce Clause. Glassboro v. Gloucester Cty. Bd. of Chosen Freeholders, 100 N.J. 134, 142 (1985) (citing Wilson v. Black Bird Creek Marsh Co., 27 U.S. 412 (1829)) ("states remain constrained, . . . by the 'dormant' character of the Commerce Clause.").

The part of Dormant Commerce Clause doctrine at issue in this case is the extraterritoriality principle, which stands for the proposition that no state has the power or sufficient interest to regulate commerce that occurs entirely beyond its borders. Instructional Sys. v. Comput. Curriculum Corp., 130 N.J. 324, 367 (1992) (citing Healy v. Beer Inst., Inc., 491 U.S. 324 (1989)). The doctrine surrounding this principle is well-settled: under the extraterritoriality principle, states are prohibited from regulating conduct occurring wholly outside of their borders. But states are permitted to "regulate in-state components of interstate transactions so long as the regulation furthers legitimate in-state interests." A.S. Goldmen & Co. v. New Jersey Bureau of Sec., 163 F.3d 780, 785 (3d Cir. 1997) (citing Hall v. Geiger-Jones Co., 242 U.S. 539 (1917), Caldwell v. Sioux Falls Stock Yards Co., 242 U.S. 559 (1917), and Merrick v. N.W. Halsey & Co., 242 U.S. 568 (1917)).

The leading case addressing the extraterritoriality principle is Edgar v. MITE Corp., 457 U.S. 624, 643-46 (1982) (plurality opinion). In Edgar, an Illinois statute authorized the Illinois Secretary of State to effectively block a tender offer if a target company had two of three of the following characteristics: (i) 10% of its shareholders resided in Illinois; (ii) its principal place of business was in Illinois; and (iii) it was organized under Illinois law. Id. at 627-28. A plurality of the Supreme Court invalidated the statute on the grounds that it could be applied to "regulate a tender offer which would not affect a single Illinois shareholder." Id. at 642.

After Edgar, the Supreme Court has only applied the extraterritoriality principle twice, in Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 581-84 (1986), and Healy, 491 U.S. at 335-40. In Brown-Forman, the Supreme Court invalidated a New York law that required New York-licensed distillers to set their New York prices no higher than their lowest price in any other state because "[i]t is undisputed that once a distiller's posted price is in effect in New York, it must seek the approval of the New York State Liquor Authority before it may lower its price for the same item in other States." Id. at 476 U.S. at 583. Next, in Healy, 491 U.S. at 326-28, the Supreme Court struck down a substantially similar Connecticut statute that required those selling beer in Connecticut to do so at a charge no greater than that charged in other states. The Court struck down the law because the "practical effect" of Connecticut's law, "in conjunction with the many other beer-pricing and affirmation laws that have been or might be enacted throughout the country, is to create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." Id. at 337.

Finally, in In re Nat'l Century Fin. Enters., Inc., 755 F. Supp. 2d 857 (S.D. Ohio 2010), a case that Credit Suisse relies heavily upon, the federal district court was faced with the question of whether private parties could sue Credit Suisse under the Ohio securities law. National Century Financial Enterprises, Inc. ("National Century") committed a multibillion-dollar fraud on investors. National Century issued "notes" that were allegedly backed by accounts receivable that it had purchased from healthcare companies. Id. at 861. The accounts receivable backing the notes turned out to be mostly worthless. Ibid.

Credit Suisse entered into a series of "Purchase and Agency Agreements" with National Century whereby Credit Suisse agreed to act as the "initial purchaser" of National Century note issuances. Ibid. Credit Suisse would directly purchase the notes from National Century, NPF VI and NPF XII (wholly owned subsidiary note-issuing entities of National Century), and the receivables servicer, National Premier Financial Services, Inc. Ibid. Credit Suisse executed and closed the note purchases and had the notes delivered to their office in New York. Ibid. Thereafter, Credit Suisse worked with an agent to place the notes with qualified institutional buyers. In re Nat'l Century Fin. Enters., Inc., 755 F. Supp. 2d at 861. Nonetheless, Credit Suisse was not actually required to sell the notes and ended up losing $130 million. Ibid.

The relevant plaintiff noteholders suing under the Ohio securities law included Metropolitan Life Insurance Co. ("Metlife"), Lloyds TSB Bank plc ("Lloyd's"), and the "Arizona Noteholders," which included "numerous governmental entities from Arizona and other states, as well as investment funds, banks, insurance companies, trusts and other entities from various states and foreign countries." Id. at 862. Neither Metlife nor Lloyd's had any connection to Ohio regarding the securities at issue. Ibid. Of the Arizona Noteholders, only FirstEnergy Health Benefits Trust ("FirstEnergy") had its principal place of business in Ohio.

However, it purchased securities from Credit Suisse through its investment adviser, Lincoln Capital, in Illinois. Id. at 862-63.

The noteholders sought to hold Credit Suisse liable under the Ohio securities law because Credit Suisse "participated in or aided the seller in any way in making . . . [a] sale" of the National Century notes. In re Nat'l Century Fin. Enters., Inc., 755 F. Supp. 2d at 863, 873-74. In regard to territoriality, the noteholders argued that the "fraud" by National Century brought their causes of action against Credit Suisse within the scope of the Ohio securities law. Id. at 882.

The court rejected this argument. Id. at 886-87. After an extensive discussion of the extraterritoriality principle as it relates to blue-sky laws, the court concluded that the securities transactions at issue, not the alleged fraud, must be connected to Ohio under the Dormant Commerce Clause. Id. at 882-85. Since the plaintiff noteholders could not show a nexus between the securities transactions at issue and Ohio, their claims were barred by the extraterritoriality principle of the Dormant Commerce Clause. Ibid.

ii. Analysis of the Facts in this Case

Credit Suisse's constitutional argument is patently without merit. Even assuming that the district court's "transactional" nexus principle is correct, a proposition questioned by leading scholars on the subject, see, e.g., Robert N. Rapp, 1 Blue Sky

Regulation, Ch. 4, § 4.05[5], the NJUSL confers even narrower jurisdiction to the Bureau than the United States Constitution allows. While the NJUSL limits the Bureau's jurisdiction to the occurrence of the "offer" or "sale" in New Jersey, the extraterritoriality principle does not--it only requires a connection to the securities transactions *generally*. Compare, N.J.S.A. 49:3-51(a), with the discussion in In re Nat'l Century Fin. Enters., Inc., 755 F. Supp. at 873-74. Indeed, even when the NJUSL broadens this jurisdiction to situations where the "offer" "originates from" New Jersey, the transaction's connection to New Jersey still must be directly related to the "offer" of securities. N.J.S.A. 49:3-51(c). There is no such requirement under the extraterritoriality principle since only a connection to the securities transaction is needed. For the same reasons mentioned above in finding likely jurisdiction over the Disputed Transactions under N.J.S.A. 49:3-51(a) and (c), then, the court finds that the Bureau has not exceeded its regulatory power under the Dormant Commerce Clause of the United States Constitution. Credit Suisse's argument on this issue thus also fails.

CONCLUSION

For the reasons set forth above, the court denies the motion for partial summary judgment brought by Credit Suisse.

GURBIR S. GREWAL, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, ON BEHALF OF AMY G. KOPLETON, DEPUTY CHIEF OF THE NEW JERSEY BUREAU OF SECURITIES, **Plaintiff,** **v.** **CREDIT SUISSE SECURITIES (USA) LLC, CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., AND DLJ MORTGAGE CAPITAL, INC.,** **Defendants.**	**SUPERIOR COURT OF NEW JERSEY** **CHANCERY DIVISION-GENERAL EQUITY PART** **MERCER COUNTY** DOCKET NO. MER-C-137-13 CIVIL ACTION **OPINION GRANTING PLAINTIFF'S MOTION TO DISMISS CERTAIN DEFENSES**

Decided: June 17, 2021

Brian F. McDonough, Assistant Attorney General argued the cause for Plaintiff, Gurbir S. Grewal, Attorney General of the State of New Jersey, on Behalf of Amy G. Kopleton, Deputy Chief of the New Jersey Bureau of Securities (Lowenstein Sandler LLP, attorneys; Christopher S. Porrino, Esq., of counsel and on the briefs, Zachary D. Rosenbaum, Esq., Jennifer Florica Delgado, Esq., Ryan M. Wilson, Esq., Peter Slocum, Esq., Kent D. Anderson, Esq., Rachel K. Warren, Esq., Jarrett R. Schindler, Esq., Brian F. McDonough, Assistant Attorney General, Toral M. Joshi, Brian De Vito, Nicholas

Dolinsky, Evan A. Showell, and Benjamin R. Zakarin, Deputy Attorneys General, on the briefs).

Daniel A. Rubens, Esq. (*pro hac vice*), argued the cause for Defendants Credit Suisse Securities (USA) LLC, DLJ Mortgage Capital, Inc., and Credit Suisse First Boston Mortgage Securities Corp. (Orrick, Herrington, & Sutcliffe LLP, Dughi, Hewit & Domalewski, P.C., attorneys; Elyse Echtman, Esq. (*pro hac vice*), of counsel, Daniel A. Rubens, Esq., Richard A. Jacobsen, Esq. (*pro hac vice*), John Ansbro, Esq. (*pro hac vice*), Paul F. Rugani, Esq. (*pro hac vice*), Barry S. Levin, Esq. (*pro hac vice*); Craig A. Domalewski, Esq., on the briefs).

Vincente Martinez, Esq. argued the cause for the North American Securities Administrators Association, Inc. (*amicus curiae*) (Patterson Belknap Webb & Tyler LLP, attorney; Peter C. Harvey, Esq., of counsel and on the briefs).

Daniel P. D'Alessandro, Esq. argued the cause for the New Jersey Chamber of Commerce (*amicus curiae)* (McCarter & English, LLP, attorney David R. Kott, Esq., of counsel and on the briefs).

Jacobson, A.J.S.C.

I. Introduction

This case involves a civil enforcement action brought by the Attorney General of the State of New Jersey on behalf of the New Jersey Bureau of Securities ("Bureau") against Defendants, DLJ Mortgage Capital, Inc. ("DLJ"), Credit Suisse First Boston Mortgage Securities Corp. ("First Boston"), and Credit Suisse Securities (USA) LLC ("Credit Suisse USA") for violations of the New Jersey Uniform Securities Law ("NJUSL") in connection with the offer and sale of certificates ("Certificates") from thirteen different residential mortgage-backed securities ("RMBS") trusts: the Home Equity Asset Trusts ("HEAT") 2006-4, 2006-5, 2006-7, 2006-8, 2007-1, 2007-2, and 2007-3, as well as the Home Equity Mortgage Trusts ("HEMT") 2006-4, 2006-5, 2006-6, 2007-1, and 2007-2. (Defs.' Statement of Facts [DSF] ¶ 1 n.1; Pl.'s Counterstatement of Facts [PCSF] ¶¶ 3-4). Certificates in these HEAT and HEMT trusts were sold between May 1, 2006 and April 30, 2007. (DSF ¶ 1; PCSF ¶ 4).

The Bureau has brought two causes of action against the Defendants (collectively, "Credit Suisse"). In Count One, the Bureau alleges that Credit Suisse engaged in various offers and sales of "toxic RMBS" to investors in violation of N.J.S.A. 49:3-52(b), which prohibits regulated parties from making "any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading." (Am. Compl. ¶¶ 146-51). In Count Two, the Bureau alleges that these same transactions violated N.J.S.A. 49:3-52(c), which prohibits persons from "engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." (Am. Compl. ¶¶ 152-53). See also N.J.S.A. 49:3-52(c). The Bureau seeks various forms of relief available in chancery, including: (i) enjoining Credit Suisse from future violations of the NJUSL; (ii) rescission; (iii) restitution; (iv) disgorgement; and (v) civil monetary penalties under N.J.S.A. 49:3-70.1. (Am. Compl. 56-57).

The Bureau brings a motion for partial summary judgment, seeking to strike several of thirty-five defenses asserted by Credit Suisse, raising three discrete topics: scienter, loss causation, and reasonable care, also known as due diligence. Credit Suisse opposes this motion, with support from amicus curiae New Jersey Chamber of Commerce. This motion implicates the breadth of enforcement authority of the Bureau of Securities and requires the court to closely analyze the statutory language of the NJUSL and apply it to the circumstances of this case.

Both sides rely on the plain language of the NJUSL, including the terms of the disputed section, N.J.S.A. 49:3-49(e), underscoring the complexity of the court's task. The Bureau also claims that a careful review of the entire statute supports its interpretation and furthers the underlying public policy of the NJUSL to protect the investing public. On the other hand, Credit Suisse relies primarily on the language of N.J.S.A. 49:3-49(e) itself, which defines fraud and related terms, to assert that its challenged defenses are viable. Under Credit Suisse's interpretation, the Bureau would need to prove scienter, loss causation, and at least negligent conduct in order to prevail. Credit Suisse also urges the court to reject the Bureau's contention that the statute imposes strict liability upon Defendants for the causes of action it has pled against Defendants.

The Bureau asserts that Credit Suisse's construction of N.J.S.A. 49:3-49(e) impermissibly limits the Bureau's enforcement authority by imposing requirements allegedly inconsistent with other provisions of the statutory scheme and well-established case law throughout the country concerning prerequisites for securities regulation. Credit Suisse relies not only on the plain meaning of the definition section, but upon the fact that neither the federal government nor any other state has adopted the qualifying language contained in N.J.S.A. 49:3-49(e), making precedents based on other securities statutes irrelevant. As is evident from this summary, the motion presents the court with challenging issues of statutory interpretation implicating the public interest in securities regulation in New Jersey.

II. Standard of Review

The standards governing motions for summary judgment in New Jersey are well settled. A motion for summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2 (c). The moving party must thus show that there is no genuine issue of material fact and that the movant is entitled to judgment. Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954). A genuine issue of material fact must be a disputed issue of fact that is substantial in nature. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 529-30 (1995). Bare conclusions in the pleadings without factual support cannot defeat summary judgment. Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999). In determining whether a dispute is genuine, the court must accept all legitimate inferences in favor of the non-moving party and deny the motion if there is doubt about the existence of a material issue of fact. Saldana v. DiMedio, 275 N.J. Super. 488, 494 (App. Div. 1998). The court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of applicable evidentiary standards, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 523.

The parties in this case have engaged in a lengthy discovery process spanning many years. While there are many disputes of fact between the parties concerning Credit Suisse's actions that the Bureau claims have violated the NJUSL, the Bureau's motion raises essentially legal issues about the viability of several defenses raised by Credit Suisse. Use of the summary judgment technique to determine legal issues in advance of trial is favored. See Euster v. Eagle Downs Racing Ass'n, 677 F.2d 992, 997 (3rd Cir.), cert. denied 459 U.S. 1022 (1982); Bd. of Educ. of Passaic v. Bd. of Educ. of Wayne, 120 N.J. Super. 155, 159 (Law Div. 1972). Since Credit Suisse opposes the Bureau's motion based on its markedly different reading of the NJUSL and has not argued that any dispute of fact prevents the court from considering the merits of the motion, the court finds that the controversy implicated in the Bureau's motion is ripe for consideration at this time.

III. Legal Analysis

A. Background

Originally passed in 1967, the NJUSL "was intended to supersede, with a single exception, all earlier legislation dealing with the same subject matter." Data Access Sys., Inc. v. State, Bureau of Sec., 63 N.J. 158, 162 (1973). Securities regulation is a sensitive matter, "open to great abuses and therefore subject to careful governmental regulation to assure that those who engage in the business meet high standards in the interest of protection of the public." Greer v. New Jersey Bureau of Sec., 288 N.J. Super. 69, 77 (App. Div. 1996) (quoting Mayflower Sec. Co. v. State, Bureau of Sec., 64 N.J. 85, 93 (1973)). Moreover, as noted in State v. Russell, 119 N.J. Super. 344, 347-49 (App. Div. 1972), "The public sale of corporate securities is a sensitive, highly and peculiarly specialized field of activity to which the investing public is exposed and one in which the public is generally not well versed. The potential for serious financial injury to the buying public mandates that all sellers of securities be charged with knowledge of and compliance with all rules and regulations governing such sales." Additionally, "The Bureau has broad powers in order to fulfil 'its responsibility to protect the investing public against fraud or misrepresentation." Greer, 288 N.J. Super. at 77 (quoting Data Access Sys., Inc., 63 N.J. at 168).[1]

The NJUSL is "generally modeled upon the Uniform Securities Act approved in 1956 by the National Conference of Commissioners on Uniform State Laws," but "with differences in a number of respects." Mayflower Sec. Co., 64 N.J. at 88 (citing Data Access Sys., Inc., 63 N.J. at 162). Despite these differences, N.J.S.A.

[1] In a concurring opinion in Data Access Sys., Inc., 63 N.J. at 170, n.1, Chief Justice Weintraub quoted the governor who signed the measure into law and who stated that, "the new rules would be of great assistance in protecting the public, particularly the unsophisticated buyer of securities, so that he may be fully alerted to any risks involved in such purchases."

49:3-75 mandates that the NJUSL "shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact similar laws and to co-ordinate the interpretation and administration of this act with related federal regulations." N.J.S.A. 49:3-75. New Jersey courts have reconciled these competing concerns by relying on federal and state judicial and administrative decisions as persuasive when a given NJUSL statutory provision is substantially similar to a federal or state statute that was previously interpreted, see, e.g., Russell, 119 at 347-49 (relying on federal case law, federal administrative decisions, and Official Comment to the Uniform Securities Law to interpret whether N.J.S.A. 49:3-70(a) requires a showing of intent in criminal cases), and departing from these aids where the NJUSL is unique, see, e.g., Data Access Sys., Inc., 63 N.J. at 162.

Credit Suisse's opposition to the Bureau's motion rests primarily on the definition of "fraud," "deceit" and "defraud" in N.J.S.A. 49:3-49(e). How those terms are interpreted and the relationship of the definition to the balance of the statute materially affects the parties' different understandings of the Bureau's enforcement authority under N.J.S.A. 49:3-52(b) and (c), and the elements that must be proven by the Bureau to impose liability on Defendants. Consequently, the court will focus on the impact of the definition section on the statutory causes of action brought and equitable remedies sought by the Bureau against Credit Suisse.

While Credit Suisse argues that every statutory cause of action that uses the term "fraud," or language similar to that contained in the definition section, requires showings of scienter and loss causation, the Bureau asserts that the statutory causes of action it has pled against Credit Suisse are not subject to those prerequisites. The court turns first to the language in question. DiProspero v. Penn, 183 N.J. 477, 492 (2005). N.J.S.A. 49:3-49(e) provides that:

> (e) "Fraud," "deceit," and "defraud" are not limited to common-law fraud or deceit. "Fraud," "deceit" and "defraud" in addition to the usual construction placed on these terms and accepted in courts of law and equity, shall include the following, provided, however, that any promise, representation, misrepresentation or omission be made with knowledge and with intent to deceive or with reckless disregard for the truth and results in a detriment to the purchaser or client of an investment adviser:
>
> (1) Any misrepresentation by word, conduct or in any manner of any material fact, either present or past, and any omission to disclose any such fact;
>
> (2) Any promise or representation as to the future which is beyond reasonable expectation or is unwarranted by existing circumstances;
>
> (3) The gaining of, or attempt to gain, directly or indirectly, through a trade in any security, a commission, fee or gross profit so large and exorbitant as to be unconscionable, unreasonable or in violation of any law, regulation, rule, order or decision of the Securities and Exchange Commission, or the bureau chief; or to the extent that such law, regulation, rule or order directly applies to the person involved, the gaining of,

> or attempt to gain, directly or indirectly, through a trade in any security, a commission, fee or gross profit so large and exorbitant as to be in violation of any law, regulation, rule, order or decision of any other state or Canadian securities administrator, or any self-regulatory organization established pursuant to the laws of the United States;
>
> (4) Generally any course of conduct or business which is calculated or put forward with intent to deceive the public or the purchaser of any security or investment advisory services as to the nature of any transaction or the value of such security;
>
> (5) Any artifice, agreement, device or scheme to obtain money, profit or property by any of the means herein set forth or otherwise prohibited by this act…
>
> [N.J.S.A. 49:3-49(e).]

This language, most of which was adopted in 1967, goes beyond the terms found in federal law and the laws of other states. Indeed, federal and several sister-state securities statutes omit any definition of "fraud" altogether. See, e.g., 15 U.S.C. § 77b; Ariz. Rev. Stat. Ann. § 44-1801 (Arizona securities law).[2] Other states that *do* include a definition simply define "[f]raud," "deceit" and "defraud" as "not limited to common-law fraud or deceit." See, e.g., Cal. Corp. Code § 25006 (California securities law).[3]

[2] See also Fla. Stat. § 517.021 (Florida securities law); 815 Ill. Comp. Stat. § 5/2.1-2.25 (Illinois securities law); N.D. Cent. Code § 10-04-02 (North Dakota securities law); Va. Code Ann. § 13.1-501 (Virginia securities law); Wash. Rev. Code § 21.20.005 (Washington state securities law).

[3] See also Del. Code Ann. Commerce and Trade 6, § 73-103(a)(9) (Delaware securities law); Ga. Code. Ann. § 10-5-2(11) (Georgia securities law); Haw. Rev. Stat. § 485A-102 (Hawaii securities law); Idaho Code § 30-14-102 (Idaho securities law); Kan. Stat. Ann. § 17-12a102(9) (Kansas securities law); Miss. Code Ann. § 75-71-102(9) (Mississippi securities law); Nev. Rev. Stat. Ann. § 90.245 (Nevada securities law); N.H. Rev. Stat. Ann. § 421-B:1-102(17) (New Hampshire securities law); N.M. Stat. Ann. § 58-13C-102(J) (New Mexico securities law); 70 Pa. Cons. Stat. § 1-102(h) (Pennsylvania securities law); Or. Rev. Stat. § 59.015 (Oregon securities law); Utah Code Ann. § 61-1-13(1)(o) (Utah securities law); Vt. Stat. Ann. 9, § 5102 (Vermont securities law).

N.J.S.A. 49:3-49(e) begins with the exact same language as the states choosing to define fraud, stating "'[f]raud,' 'deceit,' and 'defraud' are not limited to common-law fraud or deceit." N.J.S.A. 49:3-49(e).[4] That language suggests an expansive reach to the terms going beyond the common law definitions. Nonetheless, while other state statutes end there, see, e.g., 70 Pa. Cons. Stat. § 1-102 (h), N.J.S.A. 49:3-49(e) continues that, "in addition to" the "usual construction placed on these terms and accepted in courts of law and equity," "the following," which, the parties agree, at least includes N.J.S.A. 49:4-49(e)(1)-(5), are included within the definition of "[f]raud," "deceit," and "defraud." Ibid. So on its face this section of the statute acknowledges other definitions of fraud that exist independently of the five subsections in N.J.S.A. 49:3-49e, including traditional understandings accepted in courts of equity, such as this one, in which the Bureau chose to file its enforcement action against Credit Suisse. That is extremely important here because equitable fraud does not require proof of scienter. Equitable Life Assurance Soc'y v. New Horizons, Inc., 28 N.J. 307, 314 (1958); Foont-Freedenfeld v. Electro-Protective Corp., 126 N.J. Super. 254, 257 (App. Div. 1973), aff'd 64 N.J. 197 (1974). And what the Bureau is seeking here are

[4] The language "'deceit,' and 'defraud' are not limited to common-law fraud or deceit" was only added in 1997.

various forms of equitable relief, including disgorgement, rescission, and restitution. (Defs.' Supp. & Opp'n Br. 38).

Notably, the New Jersey Supreme Court has recognized that the equitable remedy of disgorgement is available even without a showing of economic loss. Kaye v. Rosefielde, 223 N.J. 218, 235 (2015); Cty. Of Essex. v. First Union Nat. Bank, 186 N.J. 46, 49 (2006)). As the Court in First Union stated, "unjust enrichment/disgorgement is an equitable claim . . . grounded in the theory that a wrongdoer should not profit from its wrongdoing regardless of whether the innocent party suffered any damages." 186 N.J. at 61; accord Kaye, 223 N.J. at 235-36. The same is true for the equitable remedy of rescission. See, e.g., Jewish Ctr. of Sussex Cty. V. Whale, 86 N.J. 619, 626 (1981) (holding that "Actual loss in the financial sense is not required before equity may act; equity looks not to the loss suffered by the victim but rather to the unfairness of allowing the perpetrator to retain a benefit unjustly conferred . . . [t]hus, in awarding an equitable remedy like rescission, the claimant's actual damage is only one factor to be considered."). So while the five specified expansions of the definition that extend the statute's sweep beyond prior common understandings of fraud established in court precedents are subject to proof that the offending actions "be made with knowledge and with intent to deceive or with reckless disregard for the truth[,]" i.e. scienter, and must "result[] in a detriment to the purchaser or client of an investment adviser[,]" or loss causation,[5] N.J.S.A. 49:3-49(e)(1) to (5), those limitations do not apply beyond the five specified forms of conduct. In short, the definition of "[f]raud," "deceit," and "defraud[,]" for purposes of the NJUSL, includes, *at least*, (i) common-law fraud or deceit, including equitable fraud, and (ii) N.J.S.A. 49:3-49(e)(1)-(5), which can only be proven if scienter and loss causation are demonstrated. The court thus agrees with the Bureau that the intent of the definition section was to expand the definition of fraud beyond the usual meanings of common law fraud to encompass the five specific descriptions of conduct that require scienter and loss causation as elements of proof. Notably, however, the five categories did not replace common law definitions of fraud employed by New Jersey, federal, and sister state courts that have interpreted and applied securities laws.

This interpretation finds support not only in the language of N.J.S.A. 49:3-49(e), but in an analysis of the statute as a whole. As noted by the Supreme Court of New Jersey, "[a]n enactment that is part of a larger statutory framework should not be read in isolation, but in relation to other constituent parts so that a sensible meaning may be given to the whole of the legislative scheme." Wilson ex rel. Manzano v. City of Jersey City, 209 N.J.

[5] Loss causation is "causation in the traditional 'proximate cause' sense -- the allegedly unlawful conduct caused the economic harm." AUSA Life Ins. Co. v. Ernst & Young, 206 F.3d 202, 209 (2d Cir. 2000) (citing Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 380 (2d Cir. 1974)).

558, 572 (2012) (citing Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123, 129 (1987)). Notably, the court "must be guided by the legislative objectives sought to be achieved by enacting the statute." Wilson, 209 N.J. at 572 (citing LaFage v. Jani, 166 N.J. 412, 431 (2001)). Consequently, a closer look at how the NJUSL operates within the broader statutory scheme is warranted.

The Bureau relies on N.J.S.A. 49:3-71(a), which creates various causes of action for private plaintiffs, including for "fraud." N.J.S.A. 49:3-71(a). Under N.J.S.A. 49:3-71(a)(4), for example, a private party can sue "[a]ny person who . . . (4) offers, sells or purchases a security by engaging in any act, practice or course of business which operates or would operate as a *fraud or deceit* upon any person[.]" (emphasis added). Under Credit Suisse's construction of N.J.S.A. 49:3-49(e), the mere presence of the term "fraud" would require the plaintiff to show scienter and loss causation to prove a violation of N.J.S.A. 49:3-71(a)(4). However, assuming for the moment that the term "fraud" *always* requires proof of scienter and loss causation when mentioned in the statute, then N.J.S.A. 49:3-71(b)(1), which requires proof of scienter and loss causation in all cases brought by private parties under N.J.S.A. 49:3-71(a)(4), would be rendered mere surplusage, a result that is disfavored when construing statutes.[6] See, e.g., In re Sussex Cty.

[6] Credit Suisse attempts to argues that N.J.S.A. 49:3-49(e) requires a" different" level of scienter than N.J.S.A. 49:3-71(b)(1). There are several flaws with this argument. One example suffices. Under Credit Suisse's understanding,

Mun. Utils. Auth., 198 N.J. Super. 214, 217 (App. Div. 1985) (stating that, "[L]egislative language must not, if reasonably avoidable, be found to be inoperative, superfluous or meaningless."). By contrast, the Bureau's definition of "fraud" under N.J.S.A. 49:3-49(e), encompassing *all* frauds recognized at common law, would be consistent with N.J.S.A. 49:3-71(b)(1). For example, as the Bureau notes and as mentioned above, equitable fraud does not require proof of scienter or loss causation. See, e.g., Com. Cas. Ins. Co. v. Southern Sur. Co., 100 N.J. Eq. 92, 96 (Ch. 1926), aff'd, 101 N.J. Eq. 738 (E. & A. 1927); See also Jewish Ctr. of Sussex Cty., 86 N.J. at 625-26 (collecting cases). If a private plaintiff attempted to bring a claim for equitable fraud under N.J.S.A. 49:3-71(a)(4), N.J.S.A. 49:3-71(b)(1) clarifies that all private plaintiffs must prove scienter and loss causation. N.J.S.A. 49:3-71(b)(1). Thus, N.J.S.A. 49:3-71(b)(1) would not be rendered superfluous.[7]

Perhaps even more persuasively, Credit Suisse's reading of N.J.S.A. 49:3-49(e) would prevent the Bureau from pursuing pre-sale cases under certain NJUSL provisions, directly contradicting express authority enabling it to do so under the statute. See N.J.S.A. 49:3-69(a)(2), which provides that, "If it appears to the bureau chief that any person . . . is *about to* engage in *any* act

both statutory provisions would still require proving the exact same loss causation element. N.J.S.A. 49:3-49(e), N.J.S.A. 49:3-71(b)(1). This construction would still render N.J.S.A. 49:3-71(b)(1), in part, to be surplusage.

[7] This same reasoning applies to N.J.S.A. 49:3-71(b)(2).

or practice constituting a violation of *any* provision of this act," the Bureau may take enforcement action on its own, or by requesting the Attorney General to seek injunctive relief in court against the offending party. For example, N.J.S.A. 49:3-52(c) makes it "unlawful for any person, in connection with the *offer* . . . directly or indirectly . . . [t]o engage in any act, practice, or course of business which operates or would operate as a *fraud* or deceit upon any person[.]" N.J.S.A. 49:3-52(c) (emphasis added). Under Credit Suisse's view of N.J.S.A. 49:3-49(e), if the Bureau attempted to stop an "offer"[8] before it resulted in a transaction, then the Bureau would be unable to bring its action under N.J.S.A. 49:3-52(c) because "fraud" *always* requires proof of loss causation and, if there is no sale, then there is no investor loss and no provable loss causation. As such, Credit Suisse's reading of N.J.S.A. 49:3-49(e) would render the term "offer" surplusage in N.J.S.A. 49:3-52(c), a result to be avoided. See, e.g., State v. Regis, 208 N.J. 439, 449-50 (2011) (quoting Franklin Tower One, L.L.C. v. N.M., 157 N.J. 602, 613 (1999)). In addition, Credit Suisse's reading would prohibit the Bureau from bringing an enforcement action under N.J.S.A. 49:3-69(a)(2) when a person is "about to" violate N.J.S.A. 49:3-52(c) in connection with an "offer" *or* "sale" because there has not been any investor loss at

[8] An "offer" or "offer to sell" is defined to include "every attempt or offer to dispose of, or solicitation of any offer to buy, a security or interest in a security or investment advisory services for value[.]" N.J.S.A. 49:3-49(j)(2).

that time. N.J.S.A. 49:3-69(a)(2). Since the Bureau's more flexible definition of "fraud" enables it to bring a cause of action based on equitable fraud, which does not require showing loss causation, Jewish Ctr. of Sussex Cty., 86 N.J. at 625-26, the Bureau's reading is fully consistent with both statutory provisions and promotes the public policy of protecting investors.[9]

There are other provisions in the NJUSL that also utilize the terms contained in N.J.S.A. 49:3-49(e). See, e.g., N.J.S.A. 49:3-53(a)(1)-(2). Although Credit Suisse's reading of N.J.S.A. 49:3-49(e) fits within several of these provisions, the Bureau's reading of N.J.S.A. 49:3-49(e) *also* fits comfortably within these provisions as well. See N.J.S.A. 49:3-53(a)(1)-(2), N.J.S.A. 49:3-70(d). Additionally, certain provisions give the N.J.S.A. 49:3-49(e) terms a different meaning in context, see N.J.S.A. 49:3-49 ("When used in this act, *unless the context requires otherwise* . . . ."), including in N.J.S.A. 49:3-58(a)(vi)(referencing U.S. Postal Service fraud), N.J.S.A. 49:3-64(a)(2)(viii)(same), and N.J.S.A. 49:3-70(d) (addressing criminal penalties).

Finally, the court "must be guided by the legislative objectives sought to be achieved by enacting the statute." Wilson, 209 N.J. at 572 (citing LaFage, 166 N.J. at 431). As noted above, it is

[9] Finally, this very same issue is found when looking at N.J.S.A. 49:3-52(a), which includes a N.J.S.A. 49:3-49(e) term but allows for regulation of "offers." See N.J.S.A. 49:3-52(a) ("It shall be unlawful for any person, in connection with the *offer* . . . of any security, directly or indirectly . . . (a) [t]o employ any device, scheme, or artifice to *defraud*[.]").

well-established that the primary objective of the NJUSL is to protect the investing public. See, e.g., Data Access Sys., Inc., 63 N.J. at 168 (noting that the NJUSL tasks the Bureau with "protect[ing] the investing public against fraud or misrepresentation."). See also Fed. Ins. Co. v. Campbell Soup Co., 381 N.J. Super. 190, 197 (App. Div. 2005) (citing Russell, 119 N.J. Super. at 351, and stating that, "Our interpretation of the insurance policy is consistent with the federal courts' interpretation of the federal securities act and is further informed by the overarching purpose of the securities laws, which is to protect the 'investing public.'"). As illustrated above, Credit Suisse's reading of N.J.S.A. 49:3-49(e) would prevent the Bureau from bringing a pre-sale cause of action under N.J.S.A. 49:3-52(a) and (c). Obviously, if the Bureau is prevented from pursuing enforcement actions under N.J.S.A. 49:3-52(a) and (c) before completion of a transaction, such a result could prevent it from protecting the "investing public" from "any person" who "engage[s] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person[.]" Fed. Ins. Co., 381 N.J. Super. at 197; See also N.J.S.A. 49:3-52(c). Thus, Credit Suisse's reading of N.J.S.A. 49:3-49(e) to limit the Bureau's enforcement authority would undermine the legislative objectives of the NJUSL, prompting the court to favor the reading espoused by the Bureau.

B. Scienter

i. N.J.S.A. 49:3-52(b)

In construing N.J.S.A. 49:3-52(b), the court notes that neither the introductory language nor the terms of the provision itself contain the term "fraud," largely obviating the need for discussing the relationship between N.J.S.A. 49:3-52(b) and N.J.S.A. 49:3-49(e). To the extent that Credit Suisse argues otherwise (see Defs.' Supp. & Opp'n Br. 35), it fails to persuade because N.J.S.A. 49-3-52(b) simply does not contain the terms in dispute. That N.J.S.A. 49:3-49(e)(1) extends the definition of "fraud" to misrepresentations of any material fact and any omission to disclose any such material fact does not control the interpretation of the somewhat different language in N.J.S.A. 49:3-52(b) given the plain meaning of that section and how the same language has been interpreted by federal and state courts to support the Bureau's position. N.J.S.A. 49:3-52(b).

New Jersey's uniformity principle, embodied in the NJUSL, N.J.S.A. 49:3-75, also supports the Bureau's interpretation of N.J.S.A. 49:3-52(b) where proof of scienter is concerned. Indeed, when reviewing this section in comparison to the federal securities laws, the court finds that N.J.S.A. 49:3-52(b) is modeled on Section 17(a)(2) of the Securities Act of 1933. And the leading case to interpret Section 17(a)(2) held that it did not require proof of scienter. Aaron v. SEC, 446 U.S. 680, 701-02 (1980).

The Court’s decision in Aaron addressed the need to prove scienter under various provisions of the Securities Act of 1933 (Sections 17(a)(1), 17(a)(2), and 17(a)(3)), which served as models for N.J.S.A. 49:3-52 (a) through(c), as well as Section 10b of the Securities Exchange Act of 1934. The Court rejected a uniform culpability requirement for those four provisions, requiring proof of scienter to demonstrate violations of 17(a)(1) and 10b, but not for 17 (a)(2) and 17 (a)(3). In eschewing proof of scienter for Section 17(a)(2), which contains almost identical text to the language used in N.J.S.A. 49:3-52(b), the Court reasoned that:

> [T]he language of § 17 (a)(2), which prohibits any person from obtaining money or property "by means of any untrue statement of a material fact or any omission to state a material fact," is devoid of any suggestion whatsoever of a scienter requirement. As a well-known commentator has noted, "[there] is nothing on the face of Clause (2) itself which smacks of scienter or intent to defraud."
>
> [Id. at 669 (citations omitted).]

While the New Jersey courts have not yet interpreted N.J.S.A. 49:3-52(b) in a published opinion,[10] the Legislature has promoted

[10] As the parties point out, New Jersey courts have come out on both sides of the issue of whether N.J.S.A. 49:3-52(b) requires proof of scienter in a series of unpublished opinions. These cases have split over whether N.J.S.A. 49:3-52(b) requires proof of scienter, some finding that scienter is an element, others not. Most recently, the Appellate Division addressed the issue and found that N.J.S.A. 49:3-52(b) did not require the Bureau to prove scienter. However, considering these are all unpublished decisions, the court has no obligation to consider them and can disregard them. Sauter v. Colts Neck Volunteer Fire Co. No. 2, 451 N.J. Super. 581, 600 n. 9 (App. Div. 2017) (citing Sciarotta v. Glob. Spectrum, 194 N.J. 345, 353 n. 5 (2008), and stating that, "By holding the trial court did not err in acknowledging the persuasive logic of an unpublished decision, we do not imply it had any obligation to have considered it. While litigants are free to cite unpublished opinions to the court in accordance with Rule 1:36-3, the court is, of course, free to disregard them.")). As such, the court declines to wade into this thicket of unpublished New Jersey caselaw.

uniformity in N.J.S.A. 49:3-75, prompting the court to follow Aaron. Moreover, it is also appropriate to consider persuasive case law from other states that share identical or similar provisions. See, e.g., AMR Realty Co. v. State, Bureau of Sec., 149 N.J. Super. 329, 333-34 (App. Div. 1977) (turning to federal case law to interpret similar provisions in NJUSL). Other states that have adopted their own versions of N.J.S.A. 49:3-52(b) have found those provisions to be based on Section 17(a)(2) and have not required proof of scienter. See, e.g., Trivectra v. Ushijima, 144 P.3d 1, 15-16 (Haw. 2006).[11] Indeed, the Supreme Court of Hawaii in Trivectra surveyed state court decisions on this issue and cited an impressive array of precedents following Aaron in this regard (Ibid.), as did the Supreme Court of Mississippi in Harrington v. Office of the Mississippi Secretary of State, 129 So. 3d 153, 162-165 (2013). This court thus adopts the plain reading of N.J.S.A. 49:3-52(b) consistent with the Supreme Court's reasoning in Aaron, and the rulings by other state courts addressing similar or identical statutory provisions derived from the federal securities laws and the Uniform Securities Law that has been adopted by many states.

ii. N.J.S.A. 49:3-52(c)

[11] See also State v. Shama Res. L.P., 899 P.2d 977, 982 (Idaho 1995); State v. Mehling, 115 P.3d 771, 774-75 (Kan. Ct. App. 2005); Sec'y of State v. Tretiak, 22 P.3d 1134, 1141-42 (Nev. 2001); State v. Larsen, 865 P.2d 1355, 1359-60 (Utah 1993).

In interpreting N.J.S.A. 49:3-52(c), the court also turns to federal law as persuasive authority.[12] While New Jersey diverges from other states with its unique definition of "fraud," New Jersey does not diverge in other parts of the law. In fact, in N.J.S.A. 49:3-52, New Jersey has adopted a near mirror image[13] of Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a). Since New Jersey endorses uniformity where appropriate, N.J.S.A. 49:3-75, and since N.J.S.A. 49:3-52(c) is substantially similar to Section 17(a)(3) and there is no New Jersey caselaw on point, the court turns to the interpretation of Section 17(a)(3) by federal and other state courts. Russell, 119 N.J. Super. at 347-48; see also, AMR Realty Co., 149 N.J. Super. at 334.

In Aaron, the Supreme Court interpreted the language of Section 17(a)(3), providing that:[14] "It shall be unlawful for any person

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[12] Other states that have also adopted a definition of "'[f]raud,' 'deceit,' and 'defraud[,]'" have adopted language substantially similar to Section 17(a)(2)-(3), and thus have found federal interpretation of Section 17(a)(3) to be highly persuasive—not 15 U.S.C. § 78j (cited as 17 C.F.R. 240.10b-5). See, e.g., Trivectra, 144 P.3d at 15-16 (collecting cases); Shama Res. L.P., 899 P.2d at 982; Mehling, 115 P.3d 771, 774-75; Harrington v. Office of the Miss. Secy. of State, 129 So. 3d 153, 164 (Miss. 2013) (collecting cases); Tretiak, 22 P.3d 1134; This court follows their lead. N.J.S.A. 49:3-75.

[13] Credit Suisse attempts to argue that N.J.S.A. 49:3-52 is also similar to Rule 10b-5 (15 U.S.C. § 78j (cited as, 17 C.F.R. 240.10b-5)).

[14] In full, Section 17(a) states:

> **(a) Use of interstate commerce for purpose of fraud or deceit.**
> It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section 3(a)(78) of the Securities Exchange Act [15 USCS § 78c(a)(78)]) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—
> (1) to employ any device, scheme, or artifice to defraud, or
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

in the offer or sale of any securities . . . directly or indirectly ...3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." [codified at 15 U.S.C. § 77q(a)(3)]. Interpreting the statutory text, the Supreme Court focused on the phrase "operate or would operate." Aaron, 446 U.S. at 697. Emphasizing this language, the Court concluded that Section 17 (a) (3) "quite plainly focuses upon the *effect of particular conduct* on members of the investing public, *rather than* upon the culpability of the person responsible." Id. at 696-97 (emphasis added). Since Section 17(a)(3) focused on conduct, the Court reasoned that it did not require proof of scienter. Id. at 697. Other states addressing the issue have come to the same conclusion. See, e.g., Harrington, 129 So. 3d at 164.[15] Since N.J.S.A. 49:3-4e acknowledges that the terms "fraud," "deceit" and "defraud" can be interpreted using "the usual construction placed on these terms and accepted in courts of law and equity," and the overwhelming weight of authority interpreting provisions similar to N.J.S.A. 49:3-52(c) is that scienter is not required to prove a violation of analogous provisions, the court thus concludes that N.J.S.A.

[15 U.S.C. § 77q(a).]

[15] See also Trivectra, 144 P.3d at 15-16; Shama Res. L.P., 899 P.2d at 982; People v. Whitlow, 433 N.E.2d 629, 634 (Ill. 1982).

49:3-52(c) does not require the Bureau to prove scienter in civil enforcement actions brought under that statutory section.

iii. Strict Liability

The parties also dispute whether N.J.S.A. 49:3-52(b) and (c) are strict liability provisions, even if these statutory sections do not require proof of scienter. Relying on federal case law, Credit Suisse argues that N.J.S.A. 49:3-52(b) and (c) have at the very least a negligence culpability requirement. (Defs.' Supp. & Opp'n Br. 36-37 (citing SEC v. Shanahan, 646 F.3d 536, 545 (8th Cir. 2011); SEC v. Glt Dain Rauscher, Inc., 254 F.3d 852, 856 (9th Cir. 2001)).

New Jersey courts have not addressed this question and there is a state-federal split on the issue. Both federal courts and state courts look to Aaron v. SEC, but ultimately diverge. Federal courts have held that a showing of negligence is necessary under Section 17(a)(2)-(3). See, e.g., SEC v. Ginder, 752 F.3d 569, 574 (2d Cir. 2014).[16] State courts, however, have largely interpreted their analogues to N.J.S.A. 49:3-52(b) and (c) as strict liability provisions. Some state courts have tacitly upheld findings that were based on strict liability. See, e.g., Trivectra, 144 P.3d at 17-18; Fin. Solutions & Assocs. v. Carnahan, 316 S.W.3d 518, 525-28 (Mo. 2010); Tretiak, 22 P.3d at 1137, 1141-42. Other states

[16] See also Glt Dain Rauscher, Inc., 254 F.3d at 856; SEC v. Hughes Cap. Corp., 124 F.3d 449, 453 (3d Cir. 1997); SEC v. Steadman, 967 F.2d 636, 643 (D.C. Cir. 1992); SEC v. Ahmed, 308 F. Supp. 3d 628, 657 (S.D.N.Y. 2018).

have expressly stated that simply proving that the defendant did the acts complained of establishes liability. Shama Res. L.P., 899 P.2d at 982 (citing Aaron, 446 U.S. at 680, and stating that, "Under I.C. §§ 30-1403(2), (3), it is sufficient that the person engage in those enumerated activities, in connection with the offer, sale, or purchase of a security, to commit securities fraud under the relevant portions of the Idaho Securities Act."); Harrington, 129 So. 3d at 161 (stating that, "Accordingly, there exists no applicable statutory requirement that fraud be proven at all; it is enough to satisfy the statute to show the existence of an act, practice, or course of business that would operate as a deceit."). Other state courts do not make the elements clear. State v. Gunnison, 618 P.2d 604, 607 (Ariz. 1980); Whitlow, 433 N.E.2d at 634; Mehling, 115 P.3d at 774-75.

Notably, Aaron can be read to be consistent with a negligence requirement. That decision arose from a Second Circuit decision finding that, in the Court's words, "when the Commission is seeking injunctive relief, '*proof of negligence alone* will suffice' to establish a violation of § 17 (a), § 10 (b), and Rule 10b-5." Aaron, 446 U.S. at 685 (emphasis added). In Aaron, defendant argued that the SEC was required to prove a higher level of culpability – scienter, not negligence – to prove a violation of, among other sections, Section 17(a)(2) and (3). Aaron, 446 U.S. at 686. (emphasis added). As noted above, the Supreme Court rejected the existence of a scienter requirement in Section 17(a)(2) and (3), but found that scienter culpability was required to prove a violation of Section 17(a)(1), § 10 (b) of the 1934 Act, and SEC Rule 10b-5. Id. at 699-700. While the Court vacated the Second Circuit's decision in its entirety because it "misapprehen[ded] that it was not necessary to find scienter in order to support an injunction under any of the provisions in question," the Supreme Court did not overtly reject the Second Circuit's negligence culpability requirement as applied to Section 17(a)(2) and (3). Id. at 702. Furthermore, both the concurrence and dissent presupposed that the majority had established a negligence culpability requirement in Section 17(a)(2) and (3). Id. at 702-18. Based on the posture of the case on appeal and discussions in the concurrence and dissent, Aaron seemed to approve of the Second Circuit's negligence culpability requirement.

This court, however, declines Credit Suisse's invitation to imply a negligence culpability requirement into N.J.S.A. 49:3-52(b) and (c). Federal case law interpreting federal statutes is, in the end, only persuasive authority, even though it often provides guidance to New Jersey courts. Russell, 119 N.J. Super. at 347-48. Upon careful review, the court finds that the Second Circuit's negligence culpability requirement is neither persuasive nor compatible with the NJUSL. Consequently, the court rejects the arguments of Credit Suisse on this point.

The Second Circuit adopted the negligence culpability requirement in SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 854-55, 868 (2d Cir. 1968) (en banc), cert. denied sub nom., Coates v. SEC, 394 U.S. 976 (1969). See, e.g., SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 101 (2d Cir. 1978). In Texas Gulf, the court was faced with the question of whether there was a scienter requirement in SEC Rule 10b-5. Texas Gulf Sulphur Co., 401 F.2d at 854. The court rested its decision on several grounds. First, the court primarily relied on decisions considering the reasonableness of a defendant's conduct, while nonetheless applying a strict liability approach. Id. at 854-55 (first citing Berko v. SEC, 316 F.2d 137, 141-142 (2d Cir. 1963), and then citing Stevens v. Vowell, 343 F.2d 374 (10th Cir. 1965); Ellis v. Carter, 291 F.2d 270 (9th Cir. 1961); Royal Air Properties, Inc. v. Smith, 312 F.2d 210 (9th Cir. 1962); Dack v. Shanman, 227 F. Supp. 26 (S.D.N.Y. 1964)). The court also rested its decision on public policy considerations. Ibid. Next, it relied on older Second Circuit case law, which simply assumed that there was at least a residual scienter element in the Securities Act of 1933. Id. at 855 (citing Barnes v. Osofsky, 373 F.2d 269, 272 (2d Cir. 1967); Fischman v. Raytheon Mfg. Co., 9 F.R.D. 707 (S.D.N.Y. 1949), rev'd on other grounds, 188 F.2d 783, 786 (2d Cir. 1951)). Finally, since the court was interpreting an agency rule, it reasoned that the relevant Rule 10b-5 language at issue was nearly identical to

§ 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l (2), a source of SEC Rule 10b-5, which included an express reasonable care affirmative defense. Id. at 855 n.22. Relying on the reasoning in Texas Gulf and especially its public policy considerations, the Second Circuit later adopted the same doctrine for Section 17(a) violations. See Hanly v. SEC, 415 F.2d 589, 596-97, n.10 (2d Cir. 1969) (quoting SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 854-55 (2 Cir. 1968) (en banc), cert. denied, sub nom., Kline v. SEC, 394 U.S. 976 (1969)); See also SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1096 (2d Cir. 1972) (understanding Hanley to extend negligence culpability requirement to Section 17(a)). While these reasons may have been persuasive in the federal context, this court concludes that the fact that the negligence culpability requirement has no connection to the text of Section 17(a) and is inconsistent with the New Jersey Legislature's intent to impose strict liability for civil enforcement actions brought by the Bureau under N.J.S.A. 49:3-52(b) and (c), convinces the court to accept the Bureau's argument.

The plain text of the statute, the "best indicator" of the Legislature's intent, is clear. See, e.g., Finkelman v. Nat. Football League, 236 N.J. 280, 290 (2019) ("We begin with the 'best indicator' of that intent, the statute's plain language."). On its face, N.J.S.A. 49:3-52(b) and (c) are devoid of any requirement that the Bureau show negligence to establish liability. See

N.J.S.A. 49:3-52(b) and (c); McClain v. Bd. of Rev., Dep't. of Labor, 237 N.J. 445, 456 (2019) (citing Shelton v. Restaurant.com, Inc., 214 N.J. 419, 429 (2013) (stating that, "When the clear language of the statute expresses the Legislature's intent, our analysis need go no further.")). The same result follows when the provisions are analyzed in conjunction with related sections of the statute. See, e.g., Shelton, 214 N.J. at 429 (citing Lozano v. Frank DeLuca Constr., 178 N.J. 513, 522 (2004)).

To fully contextualize N.J.S.A. 49:3-49(e), it is necessary — as noted above – to examine the provision's relationship to other parts of the statutory scheme. Shelton, 214 N.J. at 429 (citing Lozano, 178 N.J. at 522). Throughout the NJUSL, the Legislature expressly placed culpability requirements in some sections and omitted them from others. Compare N.J.S.A. 49:3-52(b) with N.J.S.A. 49:3-70(b). In N.J.S.A. 49:3-70, the Legislature established criminal liability for violations of N.J.S.A. 49:3-52(b) and (c) and the applicable *mens rea* for various degrees of related crimes. See, e.g., N.J.S.A. 49:3-70(b) ("Any person who recklessly violates subsection (a), (b) or (c) of section 5 or paragraph (1) or (2) of subsection (a) or subsection (f) of section 6 of P.L.1967, c.93 (C.49:3-52 or 49:3-53) or section 6 of this act, shall be guilty of a crime of the fourth degree."). Under N.J.S.A. 49:3-64, the Legislature only required the Bureau to prove a culpable mental state when pursuing a stop order in some situations, see, e.g., N.J.S.A. 49:3-64(a)(2)(ii) ("Any provision of this act or any rule, order, or condition lawfully imposed thereunder has been willfully violated, in connection with the offering . . . ."), but not others. See, e.g., N.J.S.A. 49:3-64(a)(2)(vii) "The applicant or registrant has failed to pay the proper filing fee, as set by rule of the bureau chief[.]"). Finally, in N.J.S.A. 49:3-71, the Legislature created an express cause of action for private plaintiffs, specifying that such plaintiffs "sustain the burden of proof that the seller or giver of investment advice knew of the untruth or omission and intended to deceive the buyer[.]" N.J.S.A. 49:3-70(b)(1).

Finally, public policy concerns support this interpretation. Since the public sale of corporate securities exposes the public to a highly specialized field of activity with which they may not be familiar, New Jersey courts have recognized the importance of regulation by the Bureau. See Russell, 119 N.J. Super. at 351. Indeed, the Bureau "has broad powers in order to fulfill 'its responsibility to protect the investing public against fraud or misrepresentation.'" Greer, 288 N.J. Super. at 77 (quoting Data Access Sys., Inc., 63 N.J. at 168). In addition to consistency with the statutory text, these policies are also served by interpreting N.J.S.A. 49:3-52(b) and (c) as strict liability provisions.

Consequently, the Second Circuit's negligence culpability requirement does not comport with the New Jersey Legislature's intent to make N.J.S.A. 49:3-52(b) and (c) strict liability provisions for civil enforcement actions brought by the Bureau. "It is not the function of th[e] [c]ourt to 'rewrite a plainly-written enactment of the Legislature []or presume that the Legislature intended something other than that expressed by way of the plain language.'" DiProspero, 183 N.J. at 477 (quoting O'Connell v. State, 171 N.J. 484, 492 (2002)). In addition, as concerns the important interest of uniformity of application among the states that have adopted versions of the Uniform Securities Law, New Jersey remains in accord with other states that have imposed strict liability under their versions of N.J.S.A. 49:3-52(b) and (c). See, e.g., Shama Res. L.P., 899 P.2d at 982; Harrington, 129 So. 3d at 161.

Since the Bureau is bringing the present cause of action as a civil enforcement action, the Bureau does not need to prove either scienter or negligence under N.J.S.A. 49:3-52(b) and (c). Credit Suisse's Thirteenth Defense must be stricken with prejudice.

C. Loss Causation Defenses

i. The Defenses

Credit Suisse included three defenses in its Amended Answer that rely on the Bureau's needing to prove loss causation to prevail. In its Nineteenth Defense, Credit Suisse asserted that the Bureau's claims were barred, "in whole or in part, because any damage, loss, or injury sustained by investors was proximately caused or contributed to, in whole or in part, by market conditions and/or the conduct of others, rather than any conduct of Credit Suisse." (Am. Ans. 28). In its Twentieth Defense, Credit Suisse asserted that the Bureau's claims are barred, "in whole or in part, because, to the extent investors have suffered any legally cognizable injury or damages, which Credit Suisse denies, any injury or damages were caused by intervening or superseding events, factors, occurrences, conditions or acts of others and/or other factors over which Credit Suisse had no control, and not the alleged wrongful conduct on the part of Credit Suisse." (Am. Ans. 28-29). "Credit Suisse is not liable in law or fact, for any alleged misstatements or omissions by those persons or entities." (Am. Ans. 29). Finally, in its Twenty-First Defense, Credit Suisse asserts that the Bureau's claims are barred, "in whole or in part, because, to the extent investors incurred injury or damages, which Credit Suisse denies, any such injury or damages were caused and brought about by the acts, conduct or omissions of individuals and/or entities other than Credit Suisse and, as such, any recovery herein should be precluded or diminished in proportion to the amount of fault attributable to such other individuals and/or entities, under the principles of equitable allocation, recoupment, set-off, proportionate responsibility, and/or comparative fault." (Am.

Ans. 29.). Each of these defenses raises the concept of loss causation as an element of proof required of the Bureau to prevail.

ii. Addressing N.J.S.A. 49:3-49(e)

As noted above, N.J.S.A. 49:3-49(e) does not graft a loss causation element onto statutory provisions when the Bureau is bringing a civil enforcement action based on equitable fraud. Like the language that Credit Suisse alleged to confer a scienter requirement (Defs.' Supp. & Opp'n Br. 37-41), the N.J.S.A. 49:3-49(e) language at issue here, "results in a detriment to the purchaser or client of an investment adviser[,]" simply describes required elements of conduct set forth in N.J.S.A. 49:3-49(e)(1)-(5) that fall within the definition of "'[f]raud,' 'deceit,' and 'defraud.'" N.J.S.A. 49:3-49(e). When the Bureau pursues causes of action based on other provisions of the statute and relies on the usual constructions of the language used in those other provisions, loss causation is not required, especially when supported by precedents interpreting similar language. Additionally, as stated above, the operative language in N.J.S.A. 49:3-52(c) is, in any event, "operates or would operate," not "fraud." Aaron, 446 U.S. at 696-97. For these reasons, N.J.S.A. 49:3-49(e) does not engraft a loss causation element onto N.J.S.A. 49:3-52(b) and (c) in the present context.

iii. Addressing N.J.S.A. 49:3-52(b) and (c)

The next question is whether N.J.S.A. 49:3-52(b) and (c) themselves require proof of loss causation. Loss causation is "causation in the traditional 'proximate cause' sense -- the allegedly unlawful conduct caused the economic harm." AUSA Life Ins. Co. v. Ernst & Young, 206 F.3d 202, 209 (2d Cir. 2000) (citing Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 380 (2d Cir. 1974)).

N.J.S.A. 49:3-52(b) makes it unlawful for "any person, in connection with the offer, sale, or purchase of any security, directly or indirectly . . . (b) [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading[.]" N.J.S.A. 49:3-52(b). N.J.S.A. 49:3-52(c) makes it unlawful for "any person, in connection with the offer, sale, or purchase of any security, directly or indirectly . . . (c) [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person[.]" N.J.S.A. 49:3-52(c).

Standing alone, both statutory provisions are devoid of any language requiring that the Bureau prove that a loss occurred. J.H. v. R&M Tagliareni, LLC, 239 N.J. 198, 214 (2019) (quoting U.S. Bank, N.A. v. Hough, 210 N.J. 187, 199 (2012), and stating that, "Whether construing a statute or a regulation, it is not our function to 'rewrite a plainly-written enactment,' or to presume that the drafter intended a meaning other than the one 'expressed by way of the plain language.'").

In addition to the absence of any language suggesting loss causation in N.J.S.A. 49:3-52(b) and (c), the proposition that there is no loss causation defense is supported by the surrounding text. To begin with, the introductory language of N.J.S.A. 49:3-52 states, among other propositions, that the Bureau can seek to enjoin conduct under N.J.S.A. 49:3-52 "in connection with the *offer* . . . of any security[.]" N.J.S.A. 49:3-52. Under the NJUSL, an "offer" includes "*every attempt* or offer to dispose of, or solicitation of any offer to buy, a security or interest in a security or investment advisory services for value[.]" N.J.S.A. 49:3-49(j)(2) (emphasis added). By engrafting a loss causation element or defense onto N.J.S.A. 49:3-52(b) and (c), the Bureau would simply be unable to regulate "attempt[s] to dispose of . . . a security" that do <u>not</u> result in sales under N.J.S.A. 49:3-52(b) and (c) because there has not yet been a "loss." (Emphasis added). As noted in the discussion of N.J.S.A. 49:3-49(e) above, this construction would result in rendering the term "offer" as surplusage in N.J.S.A. 49:3-52. This result is to be avoided absent circumstances not present here. <u>See, e.g.,</u> <u>In re Atty General's "Directive on Exit Polling: Media & Non-Partisan Pub. Interest Groups"</u>, 200 N.J. 283, 297-98 (2009) (citing <u>DKM</u>

Residential Props. Corp. v. Twp. of Montgomery, 182 N.J. 296, 307 (2005), which states that, "We must presume that every word in a statute has meaning and is not mere surplusage, and therefore we must give those words effect and not render them a nullity."). Additionally, engrafting a loss causation element or defense would contradict other provisions, such as N.J.S.A. 49:3-69, which enables the Bureau to bring enforcement actions under N.J.S.A. 49:3-52 in order to enjoin conduct before it occurs, N.J.S.A. 49:3-69(a)("If it appears to the bureau chief that any person has, or directly or indirectly controls another person who has engaged in, is engaging in*, or is about to engage in any act or practice constituting a violation of any provision of this act* . . . the bureau chief may take . . . the following actions . . . ."). (Emphasis added).

Finally, the court's understanding of N.J.S.A. 49:3-52(b) and (c) is in accord with federal interpretations of analogous provisions in Section 17(a)(2)-(3). See, e.g., Berko, 316 F.2d at 143 (holding that "The Commission's duty is to enforce the remedial and preventive terms of the statute in the public interest, and *not merely to police those whose plain violations have already caused demonstrable loss or injury*.").[17] It is also in accord with

[17] See also SEC v. Pirate Inv'r LLC, 580 F.3d 233, 239 n.10 (4th Cir. 2009); SEC v. Ahmed, 308 F. Supp. 3d 628, 657 n.22 (D. Conn. 2018); SEC v. Lek Secs. Corp., 276 F. Supp. 3d 49, 59 (S.D.N.Y, 2017); SEC v. K.W. Brown & Co., 555 F. Supp. 2d 1275 (S.D. Fla. 2007); SEC v. Credit Bancorp, Ltd., 195 F. Supp. 2d 475, 490-91 (S.D.N.Y. 2002).

state court decisions that have addressed the issue. See, e.g., Hirsch v. Ariz. Corp. Comm'n, 352 P.3d 925, 931-32 (Ariz. Ct. App. 2015).

For these reasons, the court finds that loss causation is "legally irrelevant" to the Bureau's enforcement action, brought under N.J.S.A. 49:3-52(b) and (c). Consequently, Credit Suisse cannot rely on any form of loss causation as a defense or affirmative defense. Ahmed, 308 F. Supp. 3d at 657 n.22. The court will thus grant the Bureau's motion striking the loss causation defenses from the pleadings filed by Credit Suisse.

iv. Relevance of Relief Sought by the Bureau (Restitution, Rescission, and Disgorgement)

Next, aside from N.J.S.A. 49:3-52, Credit Suisse argues that it has a loss causation defense available because the Bureau is seeking, among other forms of relief,[18] rescission, restitution, and disgorgement. (Defs.' Supp. & Opp'n Br. 38). To begin with, N.J.S.A. 49:3-69(a)(2) enables the Bureau to "[h]ave an action brought by the Attorney General in the Superior Court on the bureau chief's behalf to enjoin the acts or practices to enforce compliance with this act or any rule or order hereunder." N.J.S.A.

[18] Since civil monetary penalties arise in a different part of the statutory scheme, that form of relief is addressed separately below. Compare N.J.S.A. 49:3-69(a)(2), with N.J.S.A. 49:4-70.1.

49:3-69(a)(2). Moreover, "[u]pon a proper showing," the court "shall . . . grant[]" a "permanent or temporary injunction, restraining order, or writ of mandamus . . . and . . . in addition . . . the court may enter an order of rescission, restitution or disgorgement or any other order within the court's power, directed to any person who has engaged in any act constituting a violation of any provision of this act or any rule or order hereunder." Ibid. To be clear, Credit Suisse has not disputed whether the Bureau can seek these remedies. Rather, Credit Suisse argues that since the Bureau is seeking these equitable remedies, it needs to prove loss causation.

The New Jersey courts have not had occasion to address the question of whether N.J.S.A. 49:3-69(a)(2) requires proof of loss causation when the Bureau seeks the equitable remedies of "rescission, restitution or disgorgement or any other order" in court. N.J.S.A. 49:3-69(a)(2). Nonetheless, N.J.S.A. 49:3-69(a)(2) is substantially similar to 15 U.S.C. § 78u(d)(1) of the 1934 Act. See 15 U.S.C. § 78u(d)(1)("Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this title [15 U.S.C. §§ 78a et seq.], the rules or regulations thereunder, . . . it may in its discretion bring an action in the proper district court of the United States . . . to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond."). While undefined in 15 U.S.C. § 77t(b),[19] equitable relief in federal cases, such as disgorgement,[20] arises as ancillary to the broad equitable powers conferred upon the federal courts. See, e.g., SEC v. First City Fin. Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989). See also SEC v. Lorin, 869 F. Supp. 1117, 1121 (S.D.N.Y. 1994). This conclusion flows from the United States Supreme Court's recognition that "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that [statutory] jurisdiction." First City Fin. Corp., 890 F.2d at 1230 (quoting Porter v. Warner Holding Co., 328 U.S. 395, 402 (1946)). Thus, as codified in 1997, what the New Jersey Legislature recognized in statute, namely, that the equitable remedies of "rescission, restitution or disgorgement" as well as "any other order within the court's power" "upon a proper showing," the federal courts have also recognized as incident to their broad powers to fashion equitable remedies. Thus, this court finds it appropriate to turn to federal case law for guidance.

[19] In passing, the court notes that the federal circuit courts disagree over the source of authority in the 1933 Act and 1934 Act to confer broad equitable powers upon the district courts. See United States v. Bank, 378 F. Supp. 3d 451, 458 (E.D. Va. 2019) (explaining that the circuits have split over whether broad equitable power comes from 15 U.S.C. § 77v(a) and 15 U.S.C. § 78aa or 15 U.S.C. § 77t(b) and 15 U.S.C. 78u(d)(1)).

[20] The court disagrees with the parties' assessment that the SEC lacks the power to seek restitution as "equitable relief" following the Supreme Court's recent decision in Liu v. SEC, 140 S. Ct. 1936 (2020).

Reviewing the applicable case law, N.J.S.A. 49:3-69(a)(2) simply sets forth a nonexclusive list of equitable remedies, N.J.S.A. 49:3-69(a)(2) ("[T]he court may enter an order of rescission, restitution or disgorgement *or any other order within the court's power*. . . ."), available to the court, "upon a proper showing" by the Bureau, after a violation of the NJUSL is proved, SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1475 (2d Cir. 1996) (citing SEC v. Lorin, 76 F.3d 458, 461-62 (2d Cir. 1996) (per curiam)). Consequently, whether different forms of equitable relief are available in a given case is a separate inquiry from whether violations of N.J.S.A. 49:3-52(b) and (c) have been proven. See, e.g., SEC v. Desai, 145 F. Supp. 3d 329, 337-38 (D.N.J. 2015). This dipartite analysis is well-established in the federal courts. See, e.g., First Jersey Sec., Inc., 101 F.3d at 1474, cert. denied, 522 U.S. 812 (1997).[21] Since the question of whether disgorgement, rescission, restitution, and any similar remedy is not relevant to proving violations of N.J.S.A. 49:3-52(b) or (c), the fact that the Bureau is seeking these equitable remedies does not engraft a loss causation element onto N.J.S.A. 49:3-52(b) or (c). Credit Suisse's argument therefore fails.

v. Civil Monetary Penalties

[21] See also SEC v. Johnston, 368 F. Supp. 3d 247, 254 (D. Mass. 2019); SEC v. Miller, 744 F. Supp. 2d 1325 (N.D. Ga. 2010).

Civil monetary penalties are specifically addressed in a separate statutory provision, making independent discussion appropriate. See N.J.S.A. 49:3-70.1. However, this issue only requires brief discussion. Again, the narrow question is whether the Bureau must prove loss causation to obtain civil monetary penalties under N.J.S.A. 49:3-70.1. (Defs.' Supp. & Opp'n Br. 39-40.) Under N.J.S.A. 49:3-70.1:

> Any person who violates any of the provisions of this act or who violates any rule or order under this act, shall be liable for the first violation to a penalty of not more than $10,000; for a second violation to a penalty of not more than $20,000; and for each subsequent violation to a penalty of not more than $20,000 per violation. One or more violations may occur at the same time or be part of the same conduct or pattern of conduct. The penalty shall be entered, with the requisite notice, sued for and recovered by and in the name of the bureau chief and shall be collected and enforced by summary proceeding pursuant to "the penalty enforcement law," N.J.S.2A:58-1 et seq., or administratively.
>
> [N.J.S.A. 49:3-70.1.]

New Jersey courts have not addressed N.J.S.A. 49:3-70.1 previously. Here precedents from federal and other state courts are not helpful because the federal securities law, 15 U.S.C. § 77t(d), is distinct from N.J.S.A. 49:3-70.1, and the civil monetary penalties provisions in the Uniform Securities Act of 1956 and 2002 are also distinct from N.J.S.A. 49:3-70.1. Unif. Sec. Act § 602(a)(4) (1956); Unif. Sec. Act § 603(b)(2)(C). Finally, our sister states have also adopted different penalty provisions than

New Jersey. See, e.g., Ariz. Rev. Stat. § 44-2037.[22] So the court does not look to precedents from outside the jurisdiction to guide its interpretation of the New Jersey penalty provision. See, e.g., Data Access Sys., Inc., 63 N.J. at 162 (declining to turn to the Uniform Securities Act where it differs from NJUSL).

Turning next to the text of N.J.S.A. 49:3-70.1, there is no language in that provision requiring proof of loss causation. Compare N.J.S.A. 49:30-70.1 with N.J.S.A. 49:3-71(b)(1) (requiring private plaintiff to show he or she has "suffered a financial detriment . . . ."). Under the plain language of N.J.S.A. 49:3-70.1, the Bureau needs only to prove that the defendant committed a violation of "any of the provisions of this act or order under this act[.]" Ibid. Once the Bureau shows that it has proved a violation of the NJUSL by the defendant, the Bureau then can seek up to $10,000 for that violation. Ibid. A subsequent violation, which "may occur at the same time or be part of the same conduct or pattern of conduct[,]" results in imposition of a penalty "not more than $20,000." Ibid. Finally, any further violation, which "may occur at the same time or be part of the same conduct or pattern of conduct[,]" is similarly subject to a penalty of "not more than $20,000." Ibid.

[22] See also Del. Code Ann. Commerce and Trade 6, § 73-601(b); Fla. Stat. § 517.191(4); 815 Ill. Comp. Stat. § 5/11(I)(4)(r); Kan. Stat. Ann. § 17-12a603(b)(2)(C); Miss. Code Ann. § 75-71-613(c); Nev. Rev. Stat. Ann. § 90.630(2)(d); N.H. Rev. Stat. Ann. § 421-B:6-603(b)(2)(C) (New Hampshire); N.M. Stat. Ann. § 58-13C-603(B)(2)(c); N.D. Cent. Code, § 10-04-16(2); 70 Pa. Cons. Stat. § 1-509(c); Utah Code Ann. § 61-1-20(2)(b); Vt. Stat. Ann. 9, § 5603(b)(2)(C) (Vermont securities law); Va. Code Ann. § 13.1-521(A) (Virginia securities law).

Under the plain terms of N.J.S.A. 49:3-70.1, therefore, seeking civil monetary penalties has no bearing on proving a violation of the NJUSL. To the contrary, N.J.S.A. 49:3-70.1 requires that the Bureau establish one or more violations of the NJUSL before penalties are triggered. This construction is consistent with the court's interpretation of the equitable remedies sought by the Bureau. NJUSL remedies exist separate and apart from the elements needed to establish a violation under N.J.S.A. 49:3-52(b) and (c).[23] As a result, the Bureau does not need to prove loss causation to demonstrate violations of N.J.S.A. 49:3-52(b) and (c).

D. Reasonable Care/Due Diligence

The final question is whether there is a reasonable care or due diligence defense available under N.J.S.A. 49:3-52(b) or (c). As established above, N.J.S.A. 49:3-52(b) and (c) are strict liability provisions. See, e.g., Harrington, 129 So. 3d at 161 (concluding that, "Accordingly, there exists no applicable statutory requirement that fraud be proven at all; it is enough to satisfy the statute to show the existence of an act, practice, or

[23] In passing, Credit Suisse argues that, in Hirsch v. Ariz. Corp. Comm'n, 352 P.3d 925 (Ariz. Ct. App. 2015), an Arizona appellate court found that the Arizona securities regulator could not seek civil monetary penalties without proving loss causation. (Defs.' Supp. & Opp'n Br. 40.). However, this argument fails for two reasons. To begin with, the civil monetary penalties statute, Ariz. Rev. Stat. Ann. § 44-2037, is distinct from N.J.S.A. 49:3-70.1. Second, even assuming that Hirsch was persuasive authority, the appellate panel found that the Arizona securities regulator did not need to prove loss causation in a civil enforcement action—consistent with federal law. Hirsch, 352 P.3d at 931-32 (emphasis added) (citations omitted) (holding that, "Additionally, Arizona's loss causation requirement with respect to its anti-fraud provisions closely mirrors that of its federal counterpart, rendering federal interpretations instructive[] . . . *[a]nd federal courts have consistently held that the loss causation requirement does not apply in a federal enforcement action*.").

course of business that *would operate* as a deceit.”). Neither statutory cause of action expressly includes a reasonable care or due diligence defense. N.J.S.A. 49:3-52(b)-(c). Compare N.J.S.A. 49:3-52(b)-(c) with 15 U. S. C. § 77k(b).

In regard to strict liability, culpability is legally irrelevant. See, e.g., Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 204 (1982); see also Landrigan v. Celotex Corp., 127 N.J. 404, 425 (1992); Leeds v. Chase Manhattan Bank, N.A., 331 N.J. Super. 416, 422-23 (App. Div. 2000). As Credit Suisse notes, (Defs.’ Supp. & Opp’n Br. 36), the defenses of reasonable care and due diligence are both defenses to claims of negligence, which is a form of culpability. See, e.g., Ernst & Ernst v. Hochfelder, 425 U.S. 185, 208 (1976) (finding the question of whether defendant showed due diligence to be guided by a “negligence standard”); Robinson v. Vivirito, 217 N.J. 199, 208 (2014) (understanding negligence to require showing breach of a duty of care); Mahoney v. Carus Chem. Co., 102 N.J. 564, 577 (1986) (understanding negligence to be a form of culpability). Since culpability is legally irrelevant to finding a violation of N.J.S.A. 49:3-52(b) and (c), and reasonable care and due diligence are negligence culpability defenses, they are also legally irrelevant to Bureau-initiated civil enforcement actions brought pursuant to N.J.S.A. 49:3-52(b) and (c). Credit Suisse’s reasonable care and due diligence defenses must thus be stricken.

IV. Conclusion

For the above reasons, Credit Suisse's Eighth, Thirteenth, Nineteenth, Twentieth, and Twenty-First Defenses will be dismissed with prejudice.