FILED, Clerk of the Supreme Court, 28 Mar 2025, **090285**

Supreme Court of New Jersey

Docket No. 090285

STATE OF NEW JERSEY, ex rel., EDELWEISS FUND, LLC,

Petitioner-Respondent,

v.

JPMORGAN CHASE & CO., JPMORGAN CHASE BANK, NA, J.P. MORGAN SECURITIES LLC (F/K/A JPMORGAN SECURITIES, INC.), CITIGROUP, INC., CITIGROUP GLOBAL MARKETS INC., CITIBANK NA, CITIGROUP FINANCIAL PRODUCTS INC.,

(For Continuation of Caption, See Inside Cover)

CIVIL ACTION

ON PETITION FOR CERTIFICATION FROM AN ORDER OF THE SUPERIOR COURT, APPELLATE DIVISION, DISPOSITIVE OF THE ACTION PURSUANT TO R. 2:2-5(a)

DOCKET NO. A-1340-23

Sat Below:

HON. GRETA GOODEN BROWN, P.J., PART D

HON. MORRIS G. SMITH

REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR CERTIFICATION

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CITIGROUP GLOBAL MARKETS HOLDINGS INC., AND CITIGROUP GLOBAL MARKETS LIMITED, WELLS FARGO & COMPANY, WELLS FARGO BANK, N.A., WELLS FARGO SECURITIES LLC, AND WACHOVIA BANK, N.A., its predecessor by merger, BANK OF AMERICA CORPORATION, BANK OF AMERICA NA, BANK OF AMERICA SECURITIES LLC, MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, BANK OF AMERICA CAPITAL CORPORATION, BOFA MERRILL LYNCH ASSET HOLDINGS, INC., AND BANK OF AMERICA MERRILL LYNCH, and MORGAN STANLEY, MORGAN STANLEY SMITH BARNEY LLC, MORGAN STANLEY & CO. LLC, and MORGAN STANLEY CAPITAL GROUP INC.,

Defendants.

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I. The Appellate Division's Holding Regarding the Temporal Reach of the 2023 Veto Amendment Should Be Reviewed

Even if it were true, Defendants' repeated incantation that New Jersey law regarding the temporal application of a statute is "settled" does not change a simple fact: the Appellate Division interpreted a never-before considered statutory amendment to strip the Attorney General of authority that the Legislature specifically provided would be exercisable "immediately." The Court should review this novel and unprecedented decision because, contrary to the Legislature's intent, it constrains the State's ability to combat fraud.

A. False Claims Made *Before* the 2023 Veto Amendment

The 2023 Amendments provide that they "shall take effect immediately." Pa31. The Legislature intended to empower the Attorney General to exercise the veto authority immediately. The Legislature did not use language that it typically employs to indicate a new statute will take effect later on or should not apply to pending cases. See, e.g., State v. Scudieri, 469 N.J. Super. 507, 515 (App. Div. 2021); Rock Work, Inc. v. Pulaski Const. Co., 396 N.J. Super. 344, 352 (App. Div. 2007). The Legislature's intent is clear.

The questions raised below are whether the newly granted authority applies: (1) to false claims submitted before the effective date of the 2023 Amendments; and (2) in a case that was pending when the statute became effective. The Appellate Division answered in the negative. If this Court does

not review the decision, the Attorney General will have to wait years to exercise this authority, in direct contravention of the Legislature's directive that the new authority be exercisable "immediately."

Contrary to Defendants' efforts to frame this case, applying the 2023 Veto Amendment to claims made before the statute's effective date and in a case pending when the statute became effective is not, by itself, retroactive application. "Both federal law and state law determine whether a statute's application is retroactive by focusing on any changes to the legal consequences created by a statute or statutory amendment." Maia v. IEW Constr. Grp., 257 N.J. 330, 342 (2024). The Maia court continued:

> The Supreme Court clarified that "[a] statute does not operate [retroactively] merely because it is applied in a case arising from conduct antedating the statute's enactment." Instead, the Court observed, the relevant inquiry is "whether the new provision attaches new legal consequences to events completed before its enactment." The Court noted that the "application of new statutes passed after the events in suit is unquestionably proper in many situations," such as statutes that affect the "propriety of prospective relief"; "statutes conferring or ousting jurisdiction"; and "[c]hanges in procedural rules." The Court distinguished such situations from statutes that "would operate retroactively" -- i.e., statutes that "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."

Id. at 343 (quoting Landgraf v. USI Film Prods., 511 U.S. 244 (1994)).

Maia goes on to hold that a statute creating a new damages claim, cause of action, and fee-shifting mechanism imposed new legal consequences to pre-

enactment events. Id. at 347. That is impermissible retroactivity.

Here, by contrast, Defendants do not point to any new legal consequences for past conduct, impaired expectations, or harm to any legitimate interest. Nor do Defendants explain how the Legislature's intent to strengthen the Attorney General's authority can be squared with the conclusion that, as a practical matter, the Attorney General will be unable to exercise his authority until he happens upon a fraud that begins entirely after June 30, 2023. To be clear, what the decision below means is that, if a relator filed an NJFCA action today alleging a fraud dating back three years and continuing through the present, the Attorney General would not be able to exercise the veto authority. The Legislature did not provide that the 2023 Amendments would only apply to conduct occurring after the effective date. But that is the transformation that the Appellate Division's holding wrongly enacts.

B. False Claims Made *After* the 2023 Veto Amendment

Defendants devote one mistake-packed paragraph to justifying the Appellate Division's holding that the 2023 Veto Amendment cannot even apply to claims made *after* the effective date of the statute. Db11-12.

They first suggest that review is not warranted because post-effective date claims are an "insignificant portion of [Relator's] case." That is obviously irrelevant: If the Appellate Division erred as to ten false claims or ten thousand, review is necessary. If the holding stands, it will deprive the

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Attorney General of the ability to exercise his authority in any case in which any part of the fraud occurred before the effective date of the 2023 Amendments, be it most or little of the fraud.

Defendants also urge that Relator waived this argument. Db11-12 & n4. They gravely misread the trial court record. It was more than sufficiently preserved. See Jra18; Ja3999-4003; Pb11, 21-22.

Finally, Defendants assert that federal courts "uniformly apply the pre-amendment version of a law when a single continuous course of conduct is at issue." Db12. This is off the mark. First, the cases cited by Defendants consider the 2010 amendments to the federal FCA, which changed public disclosure from a question of subject matter jurisdiction to an affirmative defense. They do not bear on the temporal reach of the 2023 Amendments to the NJFCA. Under the NJFCA, public disclosure was never jurisdictional and the 2023 Amendments are fundamentally unlike 2010 amendments to the federal FCA. Compare Pa29 with Pa38.

More importantly, Defendants are just wrong. Many cases apply both the pre- and post-amendments versions of the federal FCA where the conduct and resultant false claims straddled the effective date of the amendments. See, e.g., Bellevue v. Universal Health Servs. of Hartgrove, Inc., 867 F.3d 712, 718 (7th Cir. 2017). For the same reason, the Appellate Division's identification of an "anti-retroactivity rule," Opinion at 26 n.11, is likewise mistaken.

II. The Court Should Review the Appellate Division's Holding on the Affirmative Defense of Public Disclosure

Defendants again repeat their contention that "settled" law weighs against certification of the Appellate Division's public disclosure holding. After extensive briefing and on a very large record, Defendants have cited not one case that remotely resembles the combination of conditions present here and that might provide the rule of decision for the public disclosure issue.

A. Rate Data Was Not Publicly Disclosed

The Appellate Division erred in at least two fundamental ways in holding that the rate data was publicly disclosed. Each merits certification on its own. Without review, the statute's public disclosure bar will become irreconcilably inconsistent with the NJFCA's broad remedial purposes.

The first error relates to use and access limitations. The summary judgment record established that every source of information to which Defendants pointed imposed extensive legal and technical restrictions on both access and use. These restrictions were far beyond the mere "technical difficulties" cited by the Appellate Division. Opinion at 33. The limitations precluded such things as making any list of information, copying information, using information for anything other than internal business purposes, or disclosing information. Ja2164-69, 2178-80. The Appellate Division failed to consider how legal restrictions rendered the rate data not readily or generally

available for community-wide use. See, e.g., United States ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp., 540 F.3d 1180, 1185 (10th Cir. 2008) (public disclosure require that information be free of confidentiality obligations).

The second error relates to costs. The Appellate Division announced a broad rule that fees cannot render information non-public and relied on two cases that considered very modest costs (unlike the hundreds of thousands of dollars required to be spent by Relator) and that set out no such rule. Opinion at 28, 33; Ja2161-62. Whether information is so expensive that it is, in effect, non-public is a classic question of fact. The Appellate Division's rule runs headlong into the principle that disclosure to the public means "accessible to or shared by all members of the community." United States ex rel. Feingold v. AdminaStar Fed., Inc., 324 F.3d 492, 495 (7th Cir. 2003).

Defendants suggest that Relator seeks the opposite rule, that "payment of market costs for widely used products renders that information nonpublic." Db15. Incorrect. Relator's point is that a question of fact -- whether a source of information is so expensive that it cannot be characterized as being readily available to the community -- remains a question of fact. The Court should grant review to align NJFCA jurisprudence with the common-sense principle that cost is an access restriction that, like others, may be considered by a trial court in determining whether information is readily or generally available.

B. Rate Data Was Not Publicly Disclosed *by the News Media*

Defendants assert that the term "news media" "includes any source whose aim is to distribute information to the public, no matter how small the audience and whether or not it resembles a traditional news organization." Db17-18. By their lights, any website is "news media." Defendants' view cannot be squared with the NJFCA's text, a New Jersey law definition of the same term, or common sense. This case is an ideal vehicle for this Court to tether the term "news media" to sound principles of statutory interpretation.

For example, New Jersey law already defines "news media" in a commonsense manner that renders the term far narrower than the overbroad definition that Defendants press. See N.J. R. Evid. 508; Dow Jones & Co. v. Dir., Div. of Tax'n, 5 N.J. Tax 181, 190-91 (1983), aff'd, 193 N.J. Super. 80 (App. Div. 1984). The Appellate Division said nothing about this. Nor do Defendants. They hardly could because the rule that they seek is inconsistent with existing New Jersey law.

The principal source of rate data on which Defendants base their public disclosure argument is the EMMA Portal operated by the MSRB. Courts in related cases in Illinois and California squarely hold that the EMMA Portal is not the news media and both reject a Massachusetts court opinion to the contrary. State ex rel. Edelweiss Fund, LLC v. JPMorgan Chase & Co., 90 Cal. App. 5th 1119, 1148-50 (1st Dist. 2023), reh'g den'd (May 30, 2023),

review denied (Aug. 9, 2023); Ja3874-77 (Illinois trial court); but see Rosenberg v. JPMorgan Chase & Co., 169 N.E.3d 445, 461, 465-66 (Mass. 2021). This Court should grant certification to ensure that the Appellate Division's overbroad definition does not curtail legitimate NJFCA claims.

There was a second source of public disclosure to which Defendants pointed. In supporting the notion that what Defendants call "Bloomberg Professional" is the news media, Defendants cite one case that concerned a news website available to "any user with a computer and access to a web browser." See Db15 (citing United States ex rel. Repko v. Guthrie Clinic, P.C., 2011 WL 3875987, at *8 (M.D. Pa. Sept. 1, 2011), aff'd, 490 F. App'x 502 (3d Cir. 2012)). But this is not what was at issue on summary judgment. What was at issue was data licensed from Bloomberg Finance L.P. That company is a data licensing business that acts nothing like the news media (e.g., it cuts off data licensees that are deemed competitors). Ja2178-2204. And, tellingly, Bloomberg Finance L.P. has suffered consequences that are inconsistent with its being the news media. It paid a $5 million fine for violating the federal securities laws in connection with its data products. Ja2206-12. No court has ever found a business like this to be the news media.

C. Rate Data Was Not Substantially Similar to the Allegations

Defendants contend that Relator is "asking for a new, expansive rule that analyzing a 'massive amount of VRDO rate data' defeats the public disclosure

bar." Db17. This is not at all what Relator seeks. Relator asks this Court to clarify how the "based upon" or "substantially similar" elements apply when the difference between what is disclosed and a relator's allegations is so vast that, to use the language of the sole case that the Appellate Division cited, the data do not "reveal[]" the alleged fraud. Opinion at 11-12 (citing Springfield Terminal Railway Co. v. Quinn, 14 F.3d 645, 654 (D.C. Cir. 1994)).

This is the perfect vehicle for the Court to clarify how complaints heavily dependent on analysis of data regarding a large number of industry participants should be evaluated under the NJFCA. Ja2280-83, 2290-92. When a sea of data contains a few drops from which the government may learn of a fraud, and when the government would only learn of the fraud if it combed through millions of transactions, a relator's complaint is not based upon or substantially similar to the disclosed information.

There is a considerable body of decisional law applying the based upon/substantially similar test in a case, like this, where the fraud consists of misconduct by multiple actors within an industry with many participants. In re Natural Gas Royalties teaches that whether an action is based upon or substantially similar to the claimed public disclosures depends on whether the disclosures remove the case "from a situation where the government would need to comb through myriad transactions" to find the fraud. 562 F.3d 1032, 1042-43 (10th Cir. 2009). There is a reason why: generalized information

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does not help the government isolate perpetrators of fraud in a large industry.

Defendants would have this Court believe that Relator relies on one obscure, infrequently cited case. Db16. Not so. There are many cases applying Natural Gas or a similar analysis. See, e.g., United States ex rel. Reed v. KeyPoint Gov't Sols., 923 F.3d 729, 748-52 (10th Cir. 2019) (applying Natural Gas test); United States ex rel. Lager v. CSL Behring, L.L.C., 855 F.3d 935, 941-45 (8th Cir. 2017) (public disclosure of industry-wide fraud without enough information to identify participants insufficient to trigger public disclosure bar); Cooper v. Blue Cross and Blue Shield of Fla., Inc., 19 F.3d 562, 566 (11th Cir. 1994) (where fraud consists of industry-wide misconduct, courts require information "specific to a particular defendant" to trigger bar); United States ex rel. Ellsworth Assoc., LLP v. CVS Health Corp., 2023 WL 2467170, at *7 (E.D. Pa. Mar. 10, 2023) (same); United States ex rel. Osheroff v. Tenet Healthcare Corp., 2012 WL 2871264, at *3 (S.D. Fla. July 12, 2012) ("innocuous financial data that do not on the surface suggest fraud cannot be equated with 'allegations or transactions' that do"); United States v. Sodexho, Inc., 2009 WL 579380, at *11 (E.D. Pa. Mar. 6, 2009), aff'd, 364 F. App'x 787 (3d Cir. 2010) (no public disclosure if "fraud occurs on a transactional level and individual perpetrators are difficult to discern").

CONCLUSION

The Court should grant the Petition for Certification.

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Respectfully submitted,

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