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**Supreme Court of New Jersey**

Docket No. 090285

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

*Plaintiff-Appellant,*

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 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

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**BRIEF OF PLAINTIFF-APPELLANT  
EDELWEISS FUND, LLC**

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Date Submitted: October 6, 2025

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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-Respondents.

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**Note:** Defendants submitted these transcripts on November 28, 2023, in connection with their motion in the Appellate Division for leave to take an interlocutory appeal. The transcripts were filed in this Court on February 4, 2025

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## **PRELIMINARY STATEMENT**

Plaintiff-Appellant Edelweiss Fund, LLC (“Plaintiff”) brings this New Jersey False Claims Act (“NJFCA”) case to redress a fraud by five large banks and various of their subsidiaries (collectively, “Defendants”). The fraud relates to the way that Defendants reset rates on bonds that state and local governments issued to fund projects in the public interest.

There is an affirmative defense to an NJFCA claim brought by a relator that is based on allegations of fraud or the fraudulent transactions that have been publicly disclosed in specified channels. The “public disclosure bar” protects the State from parasitic actions, actions brought by relators based on publicly disclosed information seeking part of the recovery. The bar is not intended to protect those who defraud the State. The Legislature has always recognized that the State should be able to control when the defense applies.

While this action was before the trial court, the Legislature amended the NJFCA. Before amendment, the Attorney General could only preclude dismissal on public disclosure grounds of a relator-initiated action by intervening. After amendment, the Attorney General can preclude dismissal by notice of its opposition alone. The amendment does not provide new authority. Its effect is to make it easier for the State to exercise authority it already had. The amendment facilitates the State’s deciding whether the protection of the bar is necessary by eliminating the need for the State to intervene and take

over litigation that another party is statutorily permitted to pursue.

The Legislature provided that the 2023 package of changes “shall take effect immediately.” The plain import of the language selected by the Legislature is that the Attorney General should be able to utilize the new mechanism immediately, including in cases pending at the time of amendment.

The central issue before the Court is whether the Legislature’s decision to allow the Attorney General to use the veto procedure “immediately” means that the veto can be exercised in a case that was filed prior to the effective date of the amendments and involves false claims submitted to the State both before and after the amendment’s effective date.

The Appellate Division viewed this as a question of retroactivity. Under this Court’s precedent, a statute does not operate retroactively merely because it applies in a case arising from conduct predating enactment. Rather, the relevant inquiry is whether the new provision attaches new legal consequences to events completed before its enactment. The 2023 amendment does not. Giving the Attorney General a new procedural mechanism to achieve a result that it could always have achieved does not offend retroactivity concerns.

To resolve this case, the Court need go no further than hold that the Attorney General’s opposition dismissal on public disclosure grounds should be given effect. It should reverse the order of the Appellate Division and remand for the entry of summary judgment in favor of Plaintiff on the

affirmative defense of public disclosure and for further proceedings.

If the Court disagrees and holds that the Attorney General's veto has no effect, then it should reverse the Appellate Division's decision granting summary judgment to Defendants on the affirmative defense of public disclosure bar and the original source exception to it.

On summary judgment, the parties advanced many competing inferences about the meaning and weight of evidence in the record. The Appellate Division took the question of public disclosure from the factfinder by ignoring inferences required to be made in Plaintiff's favor and weighing the evidence. This was error. If the Court reaches this issue, it should reverse.

Plaintiff's complaint analyzed, among other things, VRDO interest rate data. The parties disputed: (1) whether the rate data were publicly disclosed in light of legal limitations on the use of the data, the technical inaccessibility of the data, and the massive costs to obtain the data; (2) whether the government-controlled organization that collected the data or the data broker that licensed it was the news media; (3) whether Plaintiff's action was based upon the rate data, given the vast gap between the rate data and the who, where, and how of Defendants' fraud on the State; and (4) whether Plaintiff was an original source where only Plaintiff supplied the allegations of scienter and collusion. The Appellate Division weighed the evidence and drew inferences in Defendants' favor in granting summary judgment. This was reversible error.

## **STATEMENT OF FACTS**

### **I. The New Jersey False Claims Act**

The NJFCA, N.J.S.A. 2A:32C-1 et seq., permits a private party, or “relator,” to sue to redress frauds on the State, the main beneficiary of any recovery. NJFCA causes of action, as under the federal False Claims Act (the “federal FCA”), 31 U.S.C. § 3730 et seq., belong exclusively to the Government, not to relators. Vanderlan v. United States, 135 F.4th 257, 262-63 (5th Cir. 2025) (describing statutory mechanisms by which government, the real party in interest, controls FCA litigation).

Because the State is the victim, it has an overwhelming interest in an NJFCA matter. The NJFCA protects those interests. When a relator files the complaint, it remains under seal so that the State may investigate. The Attorney General may seek extensions of the seal. Upon expiration of the seal, the Attorney General may proceed with the action itself or decline to do so, in which case, the relator prosecutes the action. N.J.S.A. 2A:32C-5(a, d, f, g).

Even when it declines to intervene, the State maintains considerable control over the case. It may intervene at a later date. And it may dismiss or settle an unintervened case, even over a relator’s objections. A relator can only dismiss an unintervened action upon written consent of the State. The State may also limit discovery in an unintervened case to prevent interference with State enforcement activities. N.J.S.A. 2A:32C-5(c), 2A:32C-6(b-c, f, g).

As set forth below, a package of 2023 amendments to the NJFCA would further strengthen the mechanisms by which the State maintains authority over NJFCA actions.

## II. Defendants' Fraud on New Jersey

Plaintiff's Fourth Amended Complaint (the "4AC"), Ja4-1312, alleges that Defendants, several large banks and various affiliates, Ja8, 12, defrauded New Jersey in connection with a type of municipal bond known as a Variable Rate Demand Obligation ("VRDO"). VRDOs are variable-rate, tax-exempt bonds that state and local governments issue to finance long-term projects in the public interest. Issuers include the Economic Development Authority and the Turnpike Authority. VRDOs allow the State to borrow money for long periods while paying lower, short-term interest rates. VRDOs are attractive because they are low-risk, high-liquidity, and tax-free. Ja9-17, 23, 133.

The State hired Defendants to act as remarketing agents ("RMAs"). As RMAs, Defendants were required to reset the interest rate for a VRDO at the lowest rate that, in their judgment, would enable the bond to be sold at par, i.e., face value. Every time that they reset rates, be it weekly or daily, Defendants had to consider prevailing market conditions to determine the lowest rate. Ja9-18, 40, 102-07; see N.J.S.A. 2A:32C-2 (defining "State").

Plaintiff's central allegation is that Defendants intentionally failed to set the lowest possible rate for each VRDO. Instead, Defendants mechanically

reset rates without considering a bond's individual characteristics or prevailing market conditions. Defendants ignored the retail investors who they knew would accept the lowest interest rates, such that they could not even discover the lowest rate. The fraud turned the market upside down. Rates on non-taxable VRDOs were often higher than a comparable taxable security, a result for which there is no known market explanation. Ja2, 9, 32-41, 49-50, 107-12.

Plaintiff alleged a pervasive and consistent pattern of rate inflation over a period of more than 10 years. Ja114-15. Defendants defrauded the State of more than \$100 million over a 4 1/2 period and of considerably more for the entire period of the fraud. Ja10, 41, 118-22.

### **III. Discovery of Defendants' Fraud**

Plaintiff's principal, B. Johan Rosenberg ("Rosenberg"), has more than twenty years of municipal advisory experience. Municipal advisors are fiduciaries who act in the best interest of their clients. In the regular course of Rosenberg's business, he noticed that two very different VRDOs had the same rates and rate changes for almost an entire year. Based on his experience, this was "anomalous." At the time, there was no known way to compare rates for groups of VRDOs. Rosenberg developed a commercial product to fill that market need. Ja11-12, 53-55, 1684, 2123, 2154-55, 2171.

Developing a viable software product and obtaining massive amounts of data to analyze demanded thousands of hours of time and many thousands of

dollars of investment by Rosenberg. Rosenberg invented a methodology to analyze rates for which he received a patent. The software's initial results led Rosenberg to suspect misconduct by RMAs. Ja1900-48, 2155-62, 2171-72.

#### **IV. Litigation Concerning VRDO Rate-Resetting Fraud**

Rosenberg put software development on hold to pursue litigation in 2012. Ja2172. This action and parallel cases have exposed a massive fraud that was undetected and, indeed, undetectable until Plaintiff and its principal assembled the knowledge, expertise, and information to identify the means and method of the fraud, the wrongdoers, and their state of mind.

Beyond New Jersey, Relator has pursued litigation elsewhere. In Illinois, four Defendants and three other banks paid \$48 million in settlement, the largest-ever recovery under the Illinois False Claims Act. Summary judgment motions are pending in California. A case in Massachusetts was dismissed on public disclosure grounds, but before discovery and without the benefit of the record created here. See State ex rel. Edelweiss Fund, LLC v. JPMorgan Chase & Co., 2024 WL 5231309, \*3 n.4 (App. Div. Dec. 27, 2024) ("Edelweiss NJ").

In New York, the trial court held on cross-motions for summary judgment filed by Plaintiff and the New York defendants, including four Defendants here, that Plaintiff had come forward with "copious persuasive contemporaneous evidence" on each element of its New York FCA claims. State ex rel. Edelweiss Fund, LLC v. JPMorgan Chase & Co., 2025 WL

1075257, \*6 (Sup. Ct. N.Y. Cty. Apr. 4, 2025).

## **RELEVANT PROCEDURAL HISTORY**

### **I. The Initial Complaints and The Motion to Dismiss**

Plaintiff filed its initial complaint in 2015. While this case was under seal, Plaintiff continued its investigation into Defendants' misconduct.

Plaintiff uncovered that Defendants aggravated the rate inflation that their knowing failure to consider prevailing market conditions caused by colluding in resetting rates. Independently of the rate data, Plaintiff also identified specific collusion mechanisms, including the secret index that Defendants used to communicate about rates in advance of publishing them -- and the specific bank employees who colluded. Plaintiff -- not the rate data -- also provided the required allegations about of how Defendants acted with scienter, in part, by interviewing market participants. N.J.S.A. 2A:32C-3; Ja41-52, 85-90, 96, 102-06, 2011, 2050-59.

In July 2019, the Attorney General determined not to intervene and the case was unsealed. Ja2086-87. In early 2020, Plaintiff filed the Third Amended Complaint. The trial court dismissed it upon Defendants' motion in November 2020. The trial court permitted Plaintiff to amend. 1T 3:21-17:3-5.

### **II. The Fourth Amended Complaint**

Plaintiff filed the 4AC in March 2021. See Ja4-128, 556-1309. On September 13, 2021, the trial court denied Defendants' motion to dismiss,

holding that: (1) the 4AC more than sufficiently plead fraud; and (2) the public disclosure grounds was not a basis for dismissal. 2T 6:4-20, 7:9-12:5.

The parties developed a voluminous summary judgment record in discovery limited to the public disclosure bar over Plaintiff's objection. Ja1313-30, 4011-12. The parties' statements of facts and responses pursuant to R. 4:46-2 set out many disputes of material fact and sought to have the trial court make many competing inferences and weigh the evidence in starkly contrasting ways. Ja2094-51, 3878-929.

### **III. 2023 Amendments to the NJFCA**

While the parties briefed summary judgment, the Legislature amended the NJFCA. See Pa24-31. Many changes are to the procedural mechanisms that safeguard the State's authority in NJFCA actions, such as:

- (1) allowing the Attorney General, upon intervention, to file its own complaint or amend or supplement a relator's complaint;
- (2) providing that, upon intervention, any pleading filed by the Attorney General would relate back to the relator's original complaint for statute of limitations purposes;
- (3) permitting the Attorney General to make civil investigative demands, subpoena out-of-state witnesses, and take sworn testimony in NJFCA investigations; and
- (4) strengthening the Attorney General's authority to pursue remedies through alternative means, including administrative proceedings.

Pa26-28, 30-31 (amending N.J.S.A. 2A:32C-5(d), 2A:32C-6(h), 2A:32C-14)).

The Legislature also gave State the authority to veto dismissal of a case

on public disclosure grounds (the “2023 Veto Amendment”). The Legislature amended N.J.S.A. 2A:32C-9(c) to add the phrase “unless opposed by the Attorney General” to the sentence of the public disclosure bar that requires dismissal if the criteria for its application are met. Pa29. As a result, to bar dismissal on public disclosure grounds, the State need not intervene in a relator-filed action, as it had to before the amendment. Now, it can achieve precisely the same result by exercising the veto mechanism. 4T 19:8-20:19.

It is logical that the Legislature would tweak the public disclosure bar in this fashion. The bar protects the State from “private opportunism,” actions brought by relators who allege a fraud based on publicly disclosed facts and seek a portion of the State’s recovery. See United States ex rel. Bryant v. Cmty. Health Sys., Inc., 24 F.4th 1024, 1030-31 (6th Cir. 2022). The bar is not intended to protect defendants. After all, whether a fraud occurred and whether the State should be compensated for the harm are unrelated to whether the fraud was publicly disclosed in the manner specified in N.J.S.A. 2A:32C-9(c).

The State’s intervention in NJFCA litigation entails a significant commitment of public resources. United States ex rel. Totten v. Bombardier Corp., 286 F.3d 542, 546 (D.C. Cir. 2002). Providing a less resource-intensive way to achieve the same result vindicates the State’s interests. 4T 26:14-27:25.

The entire package of amendments to the NJFCA was to “take effect immediately.” The statute was effective as of June 30, 2023. Pa31.

#### **IV. The State Vetoes Dismissal on Public Disclosure Grounds**

In August 2023, the State opposed dismissal of the action on public disclosure grounds. Ja3995-98. Attorneys General in three other states where Plaintiff was prosecuting related actions had done the same. Ja3103-20. This was the first-ever and, to date, only exercise of the new procedure in this State.

The Attorney General's opposition to dismissal on public disclosure grounds is itself an expression that the State does not view Plaintiff's action as parasitic. See United States ex rel. Berntsen v. Prime Healthcare Servs., Inc., 2014 WL 12480026, \*3 (C.D. Cal. Nov. 20, 2014). As beneficiary of the bar, Bryant, 24 F.4th at 1030-31, the State's view deserves deference.

The trial court permitted supplemental briefing on the impact of the 2023 Veto Amendment. As part of that briefing, Plaintiff submitted unrebutted evidence that Defendants' conduct continued after the effective date of the amendments. Ja3999-4003. This was in support of Plaintiff's alternative argument that, at the very least, the Attorney General's veto had to apply to claims made after the amendments' June 30, 2023, effective date. See Plaintiff-Relator's Supp. Mem. of Law, dated Aug. 18, 2023, at 14; Ja1327.

#### **V. The Trial Court's Decision on Summary Judgment**

On summary judgment, the trial court held that the State's veto applied. Because the State's veto precluded dismissal on public disclosure grounds, the trial court granted Plaintiff's motion for summary judgment. 4T 6:10-13. The

trial court thoroughly considered the entire NJFCA scheme to hold that:

- (1) The 2023 Veto Amendment is procedural, not substantive, in nature and “serves as a tool that bolsters the State’s ability to protect its existing interest,” 4T 16:13-17:2, 28:1-10.
- (2) The 2023 Veto Amendment “does not confer any new right” to the State and does not “destroy any of the defendants’ [rights],” which remain “inviolable,” 4T 17:13-18:14; see also 4T 20:1-3, 28:12-19.
- (3) Whether the relator leads the action or the State has intervened and bears the prosecutorial burden “is of no practical effect on the rights of the defendant here,” 4T 19:13-20:3.
- (4) Prior to the 2023 Veto Amendment, the State “formally had to intervene to prevent dismissal,” but “it can now simply notify the Court to achieve the same result,” 4T 15:22-16:1, 26:4-12.
- (5) The procedural changes introduced by the amendment and the authority to contest dismissal “fortifies the State’s procedural toolkit to safeguard it with enduring interest.” 4T 20:22-21:2.
- (6) Applying the 2023 Veto Amendment to a pending case was appropriate because of “the imperative of maintaining fidelity to [l]egislative intent.” 4T 22:24-23:7.

Anticipating appellate review of the application of the 2023 Veto Amendment, the trial court held, in the alternative, that neither Plaintiff nor Defendants were entitled to summary judgment on the substance of the public disclosure affirmative defense because of disputes of material fact on all its essential elements. 4T 6:13-21, 28:24-29:4, 35:2-20. Applying Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995), the trial court found it not “even close to being considered so one-sided for either side.” 4T 29:5-30:3.

## **VI. Proceedings in the Appellate Division**

On interlocutory appeal, the Appellate Division reversed the decision of the trial court. Edelweiss NJ, 2024 WL 5231309, \*1, 12. The Appellate Division concluded that, although the 2023 amendments were to take effect “immediately,” the 2023 Veto Amendment could not apply in a pending case. Its view was that elimination of the requirement that the State intervene in the action to preclude application of the public disclosure bar “was a significant change” and that “[h]ad the Legislature viewed this change as suitable for retroactive application, it could have said so.” It went so far as to hold that the amendments could not apply even prospectively. Id. at \*9 & n.11.

The Appellate Division also reversed the trial court’s alternative holding that questions of fact precluded granting Defendants’ summary judgment motion on the affirmative defense of public disclosure. Id. at \*10-12.

Plaintiff timely petitioned this Court for certification pursuant to R. 2:12-3 and R. 2:2-5(a). Certification was granted on May 13, 2025.

## **ARGUMENT**

### **I. The 2023 Veto Amendment Should Apply To This Case (Annex 4-36)**

#### **A. Applicable Law (Annex 4-36)**

This Court reviews questions of statutory interpretation de novo. Est. of Spill ex rel. Spill v. Markovitz, 260 N.J. 146, 155 (2025).

The starting point for determining legislative intent is the statute itself. If

the language is clear and unambiguous, that is the end of the inquiry. Matter of Enforcement of N.J. False Claims Act Subpoenas, 229 N.J. 285, 291 (2017). In interpreting a statute, “primary regard must be given to the fundamental purpose for which the legislation was enacted.” Id. at 295-96.

This Court derives legislative intent “from a view of the entire statute” and reads all provisions “together in light of the general intent of the act.” Matter of T.B., 236 N.J. 262, 274 (2019). The Court draws “inferences based on the statute’s overall structure and composition” and considers “the entire legislative scheme.” State v. Twiggs, 233 N.J. 513, 532-33 (2018) (cleaned-up). Each part or section should be construed to provide a harmonious whole. Too Much Media, LLC v. Hale, 206 N.J. 209, 229 (2011).

The NJFCA expressly commands that it is to be “liberally construed to effectuate its remedial and deterrent purposes.” N.J.S.A. 2A:32C-17; see Smith v. Millville Rescue Squad, 225 N.J. 373, 390 (2016) (remedial statutes construed broadly to effectuate intended purpose).

**B. Legislative Intent Supports Applying the State’s Public Disclosure Veto In This Case (Annex 4-36)**

In passing the 2023 amendments, including the 2023 Veto Amendment, the Legislature spoke plainly: the 2023 amendments “shall take effect immediately.” Pa31. What this means is simple. Upon passage of the statute, a New Jersey court was precluded from dismissing on public disclosure grounds

if such dismissal was “opposed by the Attorney General.” Pa29. Once the State expressed such opposition, Ja3995-98, the trial court lacked authority to dismiss on public disclosure grounds. See, e.g., United States v. Doyle, 2022 WL 1186182, \*4 n.1 (S.D. Ohio Apr. 21, 2022).

The Legislature did not, as it regularly does, provide that the 2023 amendments would take effect at a later date. See, e.g., State v. Scudieri, 469 N.J. Super. 507, 515 (App. Div. 2021) (legislation became effective months after it was signed into law and only to offenses committed on or after a certain date); R.A. v. W. Essex Reg’l Sch. Dist. Bd. of Educ., 2021 WL 3854203, \*10-12 (App. Div. Aug. 30, 2021) (6-month delay in effectiveness). Nor did the Legislature specify that the 2023 Veto Amendment would not apply to pending cases or to claims that arose before the effective date. See, e.g., Rock Work, Inc. v. Pulaski Const. Co., 396 N.J. Super. 344, 352-54 (App. Div. 2007). Nor did the Legislature limit the application of the 2023 Veto Amendment to “to causes of action which occur on or after the effective date of” the amendment. See, e.g., Christie v. Jeney, 167 N.J. 509, 513 (2001).

The meaning of “take effect immediately” in this context should be interpreted by reference to the nature of the 2023 Veto Amendment. See Cruz v. Central Jersey Landscaping, Inc., 195 N.J. 33, 46 (2008). In this case, the 2023 Veto Amendment did not change the nature of any of Plaintiff’s claims against Defendants. Berntsen, 2014 WL 12480026, \*3. As the trial court found

-- and Defendants cannot meaningfully rebut -- the 2023 Veto Amendment does not alter any vested rights of Defendants. 4T 17:13-18:14; see generally Nobrega v. Edison Glen Assocs., 167 N.J. 520, 540 (2001).

The sole impact of the 2023 Veto Amendment is to amend the procedure the Attorney General must follow to prevent dismissal of a case on public disclosure grounds. 4T 15:22-16:1; 18:6-19:7, 26:4-12. The State can now simply veto dismissal on public disclosure grounds whereas, before the 2023 Veto Amendment, it either had to initiate the action or intervene in a relator-initiated action to achieve that result. N.J.S.A 2A:32C-9(c) (public disclosure bar does not apply if “the action is brought by the Attorney General”).

The 2023 Veto Amendment is properly viewed as no more than a change in the “course of practice or procedure for the enforcement of a right, or the prosecution of a suit” and, as a result, this case -- an “action[] now pending” -- “sh[ould] be conducted as near as may be in accordance with such altered practice or procedure.” N.J.S.A. 1:1-14; Regent Care Ctr., Inc. v. Hackensack City, 20 N.J. Tax 181, 193 (2001) (discussing N.J.S.A. 1:1-14). The only interpretation faithful to the statutory directive of this savings clause is to apply the 2023 Veto Amendment to a pending case. The State should be able to achieve here a result that it could always have achieved and should be permitted to use the streamlined procedure that the Legislature intended.

The 2023 Veto Amendment does not change the substance or scope of

any cause of action against Defendants. As such, this Court's cases considering the meaning of "take effect immediately" in the context of claims-altering statutes do not shed light on what this phrase means when applied to an amendment that is procedural in nature. See, e.g., Johnson v. Roselle EZ Quick LLC, 226 N.J. 370, 389 (2016) (considering application of "take effect immediately" to statute that altered substantive claims).

Holding, as the Appellate Division did, that the 2023 Veto Amendment could not apply to the entirety of this case -- which concerned false claims made before and after the effective date of the 2023 Veto Amendment -- does serious violence to the command that the NJFCA be "liberally construed to effectuate its remedial and deterrent purposes." N.J.S.A. 2A:32C-17.

The practical effect of the Appellate Division's holding is to preclude the Attorney General from exercising the veto in any case that alleges that a defendant submitted even a single false claim before June 30, 2023, no matter how many were submitted after. The Appellate Division's interpretation transformed the language that the Legislature actually chose ("This act shall take effect immediately") into "This act shall only apply to conduct that occurs, or a course of conduct that begins, after the effective date of this Act."

This cannot be right because it is inconsistent with "the entire legislative scheme of which the statute is a part." Twiggs, 233 N.J. 513, 532-33. If the Appellate Division's holding stands, it will significantly limit the scope of the

Attorney General's ability to recover for the State. Frauds on the State go undetected for years and are then frequently investigated for long period of time. The decision means that it could be many years before the State will be able to exercise its veto mechanism.

The Appellate Division's reasoning could also prevent the Attorney General from exercising other authority provided to it in the 2023 amendments in a case alleging a fraud that straddles June 30, 2023. For example, the Attorney General could not in such a case intervene and file its own complaint or amend or supplement a relator's complaint. Pa26. Nor could the Attorney General even investigate pre-amendment conduct through civil investigative demands or subpoena out-of-state witnesses. Pa30-31. The Court should interpret the 2023 amendments to avoid such nonsensical results.

Applying the 2023 Veto Amendment to a case pending on June 30, 2023, is necessary to remain loyal to the Legislature's intent to preserve the Attorney General's ongoing interests in and control over NJFCA litigation. 4T 22:10-23:16. The 2023 Veto Amendment simply helps ensure that cases are not dismissed on public disclosure grounds when the State determines they should be adjudicated on the merits. 4T 23:8-25:10, 26:7-27:25. Permitting the exercise of the veto in a case pending on the effective date of the statute and that involved claims made both before and after the effective date is consistent with the many other changes in the 2023 amendments that safeguard the

Attorney General's authority over NJFCA cases. Pa26, 27-29, 30-31.

**C. Retroactivity Concerns Are Absent Here (Annex 4-36)**

The Appellate Division regarded this case as presenting a question of retroactivity. Edelweiss NJ, 2024 WL 5231309 at \*7. This was error. Applying the 2023 Veto Amendment to claims made before the statute's effective date and to a case pending on the effective date is not 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). Maia teaches that a “statute does not operate [retroactively] merely because it is applied in a case arising from conduct antedating the statute's enactment.” Id. at 343. Instead:

the relevant inquiry is “whether the new provision attaches new legal consequences to events completed before its enactment.” The [U.S. Supreme Court in Landgraf v. USI Film Prods., 511 U.S. 244 (1994)] 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 [Landgraf] 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).

The 2023 Veto Amendment does none of the things that this Court has

found to create retroactivity. The 2023 Veto Amendment does not change the legal consequences of Defendants' past conduct. It does not increase their substantive liability for past conduct and does not create new obligations for past conduct. Id. at 348. Nor does it change what Defendants must demonstrate to support the affirmative defense of public disclosure. Nor does the 2023 Veto Amendment alter the rights of the State. 4T 19:13-21:3. The Attorney General could always disable a defense of public disclosure. The 2023 Veto Amendment only streamlines the procedure for doing so.

Nor does the 2023 Veto Amendment unsettle reasonable expectations. No defendant in an NJFCA action could ever have reasonably expected to be free of NJFCA liability on public disclosure grounds if the State wanted otherwise. The State could always have intervened in a relator-filed action to ensure that the public disclosure bar did not apply. 4T 25:22-26:13; Pa29. Or the Attorney General could have initiated an NJFCA action on its own.

The Appellate Division did not hold that the 2023 Veto Amendment bore on the rights of Defendants. Instead, it characterized "elimination of the requirement that the State intervene in the action and assume the cost of the litigation" as "a significant change," such that "[h]ad the Legislature viewed this change as suitable for retroactive application, it could have said so." Edelweiss NJ, 2024 WL 5231309 at \*9 (emphasis added).

This cannot be right. The "significance" of a statutory change (whatever

that might mean) bears no relationship to whether the change alters the consequences of past legal conduct or impairs a party's substantive rights. Maia, 257 N.J. at 343. Nor does the "significance" of an amendment create for the Legislature a greater obligation to speak in order to effectuate its intent. The Appellate Division's invention of a requirement that, for "significant" statutory changes, the Legislature must speak explicitly would entirely eliminate a path to retroactive application of a statute that has been repeatedly approved: implicit intent. Maia, 257 N.J. at 350-51 (legislative intent to apply statute retroactively may be expressed "impliedly, by rendering it necessary to make the statute workable or to give it the most sensible interpretation").

In finding the 2023 Veto Amendment impermissibly retroactive, the Appellate Division relied, in part, on State ex rel. Health Choice Group, LLC v. Bayer Corp., 478 N.J. Super. 184 (App. Div. 2024). That case concerned a different provision of the 2023 amendments, a substantive change in the definition of the "original source" exception to the public disclosure bar that would, if applied to a pending case, expose an NJFCA defendant to liability in broader circumstances by narrowing the substantive scope of a defense. Pa29.

Health Choice does not provide the rule of decision here. First, as the U.S. Supreme Court has said, "there is no special reason to think that all the diverse provisions" of a statute containing multiple provisions "must be treated uniformly" for retroactivity purposes. Landgraf, 511 U.S. at 280.

Not only does Health Choice concern a different amendment, Health Choice itself wrongly held that the 2023 NJFCA amendments were just like the 2010 amendments to the federal FCA. 478 N.J. Super. at 198-99. This analogy is incorrect. The 2010 amendments to the federal FCA are not the same as the NJFCA's 2023 amendments. Compare Pa29 with Pa38.

Before 2010, the federal public disclosure bar provided that “[n]o court shall have jurisdiction” where a qualifying public disclosure occurred. Pa38. The 2010 amendments to the federal FCA turned public disclosure from a question of subject matter jurisdiction (a plaintiff's burden) into an affirmative defense (a defendant's burden). Before 2010, a defendant had a substantive right not to be subjected to a federal FCA claim if the public disclosure bar applied. The 2010 amendments to the federal FCA changed that and, as a result, could not apply retroactively. See, e.g., Prather v. AT&T, Inc., 847 F.3d 1097, 1103 (9th Cir. 2017). In stark contrast, the NJFCA's public disclosure bar was never jurisdictional and the 2023 Veto Amendment does not alter Defendants' rights, reallocate burdens, or change the bounds of the defense.

**D. At the Very Least, the Attorney General's Veto Must Apply *Prospectively* (Annex 4-36)**

Finally, even if the Court agrees with Defendants that the 2023 Veto Amendment does not give the Attorney General power to veto application of the public disclosure bar as to claims submitted before the amendment was

effective, the State's veto should, at the very least, bar application of the public disclosure defense to claims made after June 30, 2023. That is, the 2023 Veto Amendment must be given prospective effect. To hold otherwise would do extreme violence to the command that the NJFCA be "liberally construed to effectuate its remedial and deterrent purposes." N.J.S.A. 2A:32C-17.

The Appellate Division held that this argument was not presented to the trial court or supported on appeal. Edelweiss NJ, 2024 WL 5231309 at \*9 n.11. This was incorrect. When the trial court permitted supplemental briefing on the impact of the 2023 Veto Amendment, Plaintiff submitted unrebutted evidence that Defendants' conduct continued after the effective date of the 2023 amendments and argued that the Attorney General's veto had to apply at least to claims made after that date. Ja3999-4003; Ja11, 121, 12; Plaintiff-Relator's Supp. Mem. of Law, dated Aug. 18, 2023, at 14 (arguing that Attorney General's filed opposition applied at least to claims made on or after June 30, 2023); Ja1327. And it argued just that on appeal. Pb21-22.

The basis for the Appellate Division's no prospectivity holding was, oddly enough, an "anti-retroactivity rule." Edelweiss NJ, 2024 WL 5231309 at \*9 n.11. This internally inconsistent rule makes little sense. Beyond that, the precedent on which the Appellate Division relied, United States ex rel. Zizic v. Q2Admin., LLC, held nothing of the sort. 728 F.3d 228, 733 nn.3-4 (3d Cir. 2013). Plus, many federal cases apply the pre-2010 version of the public

disclosure bar to pre-amendment conduct and the post-2010 version to post-amendment conduct. See United States ex rel. Patriarca v. Siemens Healthcare Diagnostics, Inc., 295 F. Supp. 3d 186, 195 (E.D.N.Y. 2018).

Finally, when one New Jersey court concluded that the NJFCA could not apply to conduct pre-dating passage of the original NJFCA in 2008, it still permitted the relator to pursue claims based on the same course of conduct that continued after the original effective date. See, e.g., State ex rel. Hayling v. Corr. Med. Servs., Inc., 422 N.J. Super. 363, 376-77 (App. Div. 2011).

At the very least, the Court should permit Plaintiff's post-amendment claims to survive based on the State's utilization of the veto mechanism.

## **II. Factual Disputes Preclude Summary Judgment (Annex 4-36)**

### **A. Standard of Review (Annex 4-36)**

This Court reviews decisions on summary judgment de novo. Crisitello v. St. Theresa Sch., 255 N.J. 200, 218 (2023).

Brill teaches that, if the court finds that “the evidence, even viewed in the light most favorable to the non-moving party with all reasonable inferences, is so one-sided that there are no genuine issues of disputed material facts, the court may decide the issue without a jury.” Pantano v. New York Shipping Ass'n, 254 N.J. 101 (2023). The court's function is not “to weigh the evidence and determine the truth of the matter,” but rather “to determine whether there is a genuine issue for trial,” drawing “all legitimate inferences

from the facts in favor of the non-moving party.” Brill, 142 N.J. at 540.

**B. The Public Disclosure Bar (Annex 4-36)**

Courts apply a four-part inquiry to the NJFCA’s public disclosure bar codified in N.J.S.A. 2A:32C-9(c). First, courts ask whether the pleading’s allegations or transactions have been publicly disclosed. Second, they ask whether the disclosure occurred in one of the channels enumerated in the statute, here “by the news media.” Third, they consider whether the action is “based upon” or “substantially similar to” the publicly disclosed allegations or transactions. Fourth, if all three questions are answered in the affirmative, the court determines whether the relator can demonstrate that it is as an “original source.” United States v. Omnicare, Inc., 903 F.3d 78, 81-83 (3d Cir. 2018).<sup>1</sup>

Public disclosure is not a matter of standing that Plaintiff must support; it is an affirmative defense on which Defendants bear the burden. See United

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<sup>1</sup> This was precisely the test that the trial court applied throughout the case. Compare 1T 12:16-17:2 with 4T 28:24-35:13. In reversing, the Appellate Division strongly criticized the trial court because it has dismissed an earlier-filed complaint on public disclosure grounds. Edelweiss NJ, 2024 WL 5231309 at \*6 n.10, \*12 (criticizing trial court for “wholly depart[ing] from” November 2020 decision to dismiss earlier complaint “without expla[nation]”).

This was error. What changed after November 2020 was that the March 2021 4AC added many new allegations directed to the public disclosure bar. See, e.g., Ja54-61. The parties also developed a voluminous record on summary judgment and identified many competing inferences regarding the public disclosure bar. See Ja2094-176, 3878-933. And the trial court acquired in the interim what it “frankly” recognized was a “better understanding of [the] allegations.” 2T 7:9-18. The Appellate Division criticism was misdirected.

States ex rel. O'Connor v. USCC Wireless Inv., Inc., 128 F.4th 276, 284 (D.C. Cir. 2025). The Appellate Division was wrong to hold otherwise. Edelweiss NJ, 2024 WL 5231309 at \*10.

**C. Discussion (Annex 4-36)**

One component of the 4AC is Plaintiff's analysis of a massive amount of VRDO rate data. See Ja47-58, 61-118. The data were licensed from the Municipal Securities Rulemaking Board (the "MSRB"), a self-regulatory organization created by statute and overseen by the Securities and Exchange Commission (the "SEC"). The MSRB licenses VRDO rate data at great cost and on strict terms. The MSRB also operates a website, the Electronic Municipal Market Access portal (the "EMMA Portal"), at which users can view data about VRDOs. The MSRB and the EMMA Portal both impose strict legal limitations on the use and copying of data. Ja2104-05, 2161-69, 2179-81, 2192-2201, 2215, 2248, 2366.

Defendants also pointed to a third means by which VRDO rate data were publicly disclosed. Defendants referred to this source as "Bloomberg," but they could not, and did not, mean the widely available website at which some financial information is available. What they meant by "Bloomberg" was Bloomberg Finance L.P. ("Bloomberg Finance"), a data broker. That entity licenses VRDO rate data for \$250,000 or more for an annual subscription or via a specialized computer terminal for \$10,000 or more per year. It does so

under strict terms. Ja1560-61, 2101-115, 2162-65, 2178-2204, 2267-73.

**1. Rate Data Were Not Publicly Disclosed (Annex 4-36)**

**a. Applicable Law (Annex 4-36)**

Whether a disclosure is “public” for NJFCA purposes turns on whether the relevant information has been placed in the public domain or made generally available for public use. See, e.g., Cause of Action v. Chicago Transit Auth., 815 F.3d 267, 274 (7th Cir. 2016). The “disclosure” component focuses on actual disclosure and requires “more than mere theoretical or potential availability of information.” United States ex rel. Holmes v. Consumer Ins. Grp., 318 F.3d 1199, 1204-05 (10th Cir. 2003) (mere possession of information without disclosure to the public does not result in public disclosure); see also United States v. Chattanooga-Hamilton Cnty. Hosp. Auth., 782 F.3d 260, 268 & n.8 (6th Cir. 2015) (same); United States v. A.D. Roe Co., 186 F.3d 717, 723-24 (6th Cir. 1999) (same).

**b. Discussion (Annex 4-36)**

Below, Defendants pointed to three mechanisms by which they claimed that a public disclosure occurred: (1) licensing rate data in bulk from the MSRB; (2) obtaining data from the EMMA Portal; and (3) licensing rate data from Bloomberg Finance.

Defendants never pointed to any actual disclosure of the VRDO rate data. The ability to look up or license a massive amount of data does not mean

that anyone actually did so. There is no evidence that anyone accessed a Bloomberg Finance database to look up 2.5 million rate resets on more than 15,000 VRDOs for a 4.5-year period, let alone for full period that the 4AC covers. See Ja112-116, Ja2276, 2290-91. And they do not point to a single person who paid the MSRB or Bloomberg Finance to license VRDO rate data for the initial 4 1/2 year period of Plaintiff's initial analysis or the full ten-year period of later analyses. Ja 2168, 2175-76, 2276. Theoretical availability is insufficient. Holmes, 318 F.3d at 1204; A.D. Roe, 186 F.3d at 723-24.

Beyond the lack of actual disclosure, the information that Defendants contend was publicly disclosed was never in the public domain or made available for public use. As such, the channels of claimed disclosure to which Defendants point cannot trigger the bar. See, e.g., Kennard v. Comstock Res., Inc., 363 F.3d 1039, 1043 (10th Cir. 2004). Each source to which Defendants pointed come with extreme limitations that, in combination, render the data not in the public domain and not available for public use. These included:

- (1) legal restrictions that precluded bulk copying, assembly of a database of VRDO rate data, further disclosure of VRDO rate data, and use except for internal business purposes;
- (2) technical restrictions that required copying and pasting of thousands of separate screens to obtain data from EMMA Portal and required manual entry of VRDO-identifying information;
- (3) legal restrictions that precluded copying or the creation of a database of crucial VRDO-identifying information; and
- (4) legal restrictions on use and disclosure of data licensed from

Bloomberg Finance that precluded further disclosure of data, permitted “internal use and benefit” only, and precluded use “for any development purposes” or in a way that might compete with Bloomberg Finance.

Ja2104-05, 2161, 2164-70, 2178-82, 2192-201, 2986-3019.

Data is not “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), if it cannot lawfully be copied, assembled into a database, analyzed, or used for anything other than “internal business purposes” or by a user in a way that does not compete with the data’s source. See, e.g., Ja2101-02, 2104-05, 2164-65, 2179-80. 2267-73, 2986-3019.

Just the requirement that anyone licensing data from the MSRB and Bloomberg Finance not further disseminate the information and keep it confidential renders it not publicly disclosed. United States ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp., 540 F.3d 1180, 1185 (10th Cir. 2008).

This unique combination of limitations, at the very least, created factual questions as to whether it was publicly disclosed. The Appellate Division did not address this issue in any respect and, if it had, it could not have found the rate data to have been publicly disclosed, given the requirements that it not weigh the evidence and that it draw reasonable inferences in Plaintiffs’ favor.

There is also the matter of the extreme expense associated with obtaining the rate data cited in the 4AC. See Ja2108-09, 2144-45, 2159-62.

Cost is a practical access restriction like any other restriction and is plainly relevant to whether data is “generally accessible” or readily available to the public. See, e.g., United States ex rel. Repko v. Guthrie Clinic, P.C., 2011 WL 3875987, \*7 (M.D. Pa. Sept. 1, 2011), aff’d, 490 F. App’x 502 (3d Cir. 2012).

The Court should not hold that cost alone makes a data source not publicly disclosed and need not decide what cost renders something not public. It need only consider whether the extreme costs to obtain data here -- in combination with legal limitations on the use of the data and the technical inaccessibility of data from the EMMA Portal -- created a material factual dispute. Weighing all the evidence here, the question cannot be so one-sided under Brill that it could only have been decided in Defendants’ favor.

The Appellate Division relied on two cases to hold that “[s]ubscription fees to a particular news source do not render its disseminated information non-public.” Edelweiss NJ, 2024 WL 5231309 at \*10 (citing Patriarca, 295 F. Supp. 3d at 200 (E.D.N.Y. 2018), and United States ex rel. Doe v. Staples, Inc., 932 F. Supp. 2d 34, 40 (D.D.C. 2013)). But neither of those cases, which involved a website that compiled government-compiled data and a scholarly journal, specified the costs associated with the sources at issue. More importantly, these cases do not hold, as a matter of law, that costs are not relevant to the question of whether a course is publicly disclosed. It defies logic and commonsense to hold that something that costs a user a few dollars

to access, such as news articles, United States v. Allstate Ins. Co., 620 F. Supp. 3d 674, 684 (E.D. Mich. 2022), and a database that costs hundreds of thousands of dollars a year to license are equally accessible to the public for the purposes of the NJFCA. Ja2215, 2294, 2300, 2450-52.

Plaintiff does not seek a rule that the mere existence of any cost renders information non-public. Rather, Plaintiff seeks to have the Court adopt the commonsense holding that costs can, in combination with other circumstances, render a source of information not publicly disclosed. Stated another way, there must be some price at which some theoretically available information subject to some set of use limitations and some set of licensing conditions is, a practical matter, not “accessible to or shared by all members of the community,” Feingold, 324 F.3d at 495. Despite numerous rounds of briefing, Defendants have not identified a single case -- state or federal -- remotely approaching the combination of circumstances present here. Nor have amici who have filed briefs supporting Defendants.

Viewing this set of legal, practical, and financial limitations in the light most favorable to Plaintiff, the issue of public disclosure cannot be so one-sided that summary judgment is appropriate.

**2. There Was No Disclosure By  
The News Media (Annex 4-36)**

**a. Applicable Law (Annex 4-36)**

While there is no definition of “news media” in the NJFCA or federal FCA, the touchstone of the “news media” is whether any member of the public can generally or readily access the information. See, e.g., United States ex rel. Sedona Partners LLC v. Able Moving & Storage, Inc., 2022 WL 3154811, \*6 (S.D. Fla. July 7, 2022); Repko, 2011 WL 3875987, \*6-7 (“generally accessible websites” have unrestricted access and are available to general public); United States ex rel. Green v. Serv. Contract Educ. and Training Trust Fund, 843 F. Supp. 2d 20, 32 (D.D.C. 2012) (website was “news media” because access was not limited or restricted); United States ex rel. Liotine v. CDW Gov’t Inc., 2009 WL 3156704, \*6 n.5 (S.D. Ill. Sept. 29, 2009) (website not “news media” because page not readily accessible). Courts also look for an intention to widely disseminate information. See, e.g., Mark ex rel. United States v. Shamir USA, Inc., 2022 WL 327475, \*1 (9th Cir. Feb. 3, 2022).

The Court should interpret the term in a commonsense manner consistent with the purpose of the NJFCA and other New Jersey law. One frequently cited federal FCA opinion, United States ex rel. Integra Med Analytics L.L.C. v. Providence Health & Servs., 2019 WL 3282619, \*4, 16 (C.D. Cal. July 16, 2019), rev’d on other grounds, 2021 WL 1233378 (9th Cir. Mar. 31, 2021),

identifies factors to determine what is, and is not, the news media, including:

- (1) The extent to which the information typically conveyed by a source would be considered newsworthy;
- (2) Whether the source exhibits any editorial independence or separation between the source and the medium that conveys it;
- (3) The “source’s intent to disseminate information widely”;
- (4) Whether the source could reasonably be described as “news media” in everyday usage of the term.

The Court’s interpretation of the phrase “news media” in N.J.S.A. 2A:32C-9(c) should also be informed by a definition of that term in existing law. See generally State v. Goodwin, 224 N.J. 102, 113 (2016) (interpreting term used in one code section to inform meaning of another section). Like Integra Med, Rule 508(a) of the New Jersey Rules of Evidence defines “news media” in commonsense terms. See N.J. R. Evid. 508 (defining news media to include newspapers, magazines, and other “means of disseminating news to the general public”; defining related terms); Too Much Media, 206 N.J. at 231-34 (describing legislative history of privilege for news media and requiring nexus to news media as enumerated by statute). New Jersey courts have used N.J. R. Evid. 508(a)’s definition to interpret the same term in other statutes. See, e.g., 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). A court interpreting Illinois law in parallel litigation did the same in holding that the EMMA Portal is not the news media. State of Illinois ex rel. Edelweiss Fund LLC v. JPMorgan Chase

& Co., No. 2017 L 289 (Cir. Ct. Cook Cty. June 13, 2023) (Ja3874 et seq.).

**b. Discussion (Annex 4-36)**

On the summary judgment record before the Court, there does not exist “a single, unavoidable resolution” Brill, 142 N.J. at 540, of the issue of whether the three channels of disclosure to which Defendants pointed were the news media such that summary judgment is appropriate. Tellingly, Defendants proffered not a single piece of evidence that either the MSRB, the EMMA Portal, or Bloomberg Finance’s data-licensing arm has ever been referred to in common parlance or industry literature as the news media.

**i. The EMMA Portal (Annex 4-36)**

An appellate court in California considering a parallel matter initiated by Plaintiff there has held that the EMMA Portal is not the news media. State ex rel. Edelweiss Fund, LLC v. JPMorgan Chase & Co., 90 Cal. App. 5th 1119, 1147-51 (1st Dist. 2023), rev. denied, Aug. 9, 2023 (“Edelweiss CA”). So too has a trial court in Illinois. See Ja3875-77.

Edelweiss CA likened the EMMA Portal to an SEC database that had been held by another California court to not be the news media. Id. at 1148 (quoting State ex rel. Bartlett v. Miller, 197 Cal. Rptr. 3d 673 (Cal. Ct. App. 2016)). Edelweiss CA turned to dictionary definitions of “news” and “media” and held that one touchstone of “news media” is whether information conveyed “would be considered newsworthy.” Edelweiss CA saw “no basis to

conclude that an online repository containing “daily or weekly submission of interest rate reset data would be considered” newsworthy.” Id. at 1149.

Edelweiss CA then considered the structure of the public disclosure bar and the fact that the statute limits public disclosure to particular channels, like the NJFCA. N.J.S.A. 2A:32C-9(a). Edelweiss CA concluded that, “[i]f the interest rate data here were considered a disclosure by ‘news media’ simply because EMMA is a publicly available website, it would effectively swallow the fora limitations of [the California False Claims Act].” Id. at 1149.

Edelweiss CA also consulted federal FCA cases interpreting the term “news media.” In doing so, it squarely rejected the notion that “all publicly available websites are news media.” Id. at 1150-51 (cleaned-up). This Court should reach the same result here. Edelweiss CA conclusively rejected the decision of a court in Massachusetts before which Plaintiff had initiated a parallel matter. Rosenberg v. JPMorgan Chase & Co., 169 N.E.3d 445 (Mass. 2021) (“Edelweiss MA”). Edelweiss MA concluded that, based on facts cognizable on a motion to dismiss, the EMMA Portal was the news media. But Edelweiss MA was an appeal of a motion to dismiss decision and, as a result, did not consider the summary judgment record before this Court.

Factors that courts use to determine whether a source is the news media should lead the Court to hold that either the EMMA Portal is not the news media or, at the very least, there is a factual dispute about that question.

First, Defendants offered no evidence that any of the more than 2 million weekly rate resets used by Plaintiff to conduct its original analysis or the many more used for later analyses, Ja2291, would be considered newsworthy.

Second, the EMMA Portal does nothing to determine the accuracy of rate reset or other information submitted by RMAs. Indeed, unlike what would normally be considered the news media, which want to be trusted, the EMMA Portal disclaims accuracy and completeness. Ja2115, 2169-70. Nothing that is the “news media” would entirely disclaim any responsibility to be accurate, truthful, or reliable. That is, after all, the very purpose of the news media.

In licensing data, neither the EMMA Portal, the MSRB, nor Bloomberg Finance has any editorial function. Ja1561, 2115, 2169-70. A lack of editorial function tends to show that a source is not the news media. See, e.g., United States ex rel. Moore & Co. v. Majestic Blue Fisheries, LLC, 69 F. Supp. 3d 416, 425 (D. Del. 2014) (unedited, unverified information posted to website not “news media”), rev’d on other grounds, 812 F.3d 294 (3d Cir. 2016).

Third, the EMMA Portal does not act like the news media. For example, the EMMA Portal precludes a user from creating or maintaining a file of CUSIP numbers, the key identifying datum for VRDOs. Ja2161, 2165, 2270-72. Thus, a user of the EMMA Portal cannot even make a list of crucial facts that can be viewed on the EMMA Portal. No known news media acts similarly.

There is also no evidence that anyone has ever referred to the EMMA

Portal as the “news media.” And no case finding a source to be the news media involves anything like the severe limitations on obtaining and using information that the EMMA Portal imposes. Ja2164-70, 2098-105, 2284-92.

The EMMA Portal also engages in none of the First Amendment-type behavior that the news media in this country do. Most importantly, the EMMA Portal is heavily regulated by the SEC, which supervises virtually every aspect of the operation of the EMMA Portal and even determined whether it could exist at all. Ja2899-900. Under any commonsense interpretation, the “news media” need not ask the government for permission to exist or to alter its business practices. The drafters of the NJFCA could not have intended that a government-created and controlled website would be the “news media.” If it and the MSRB more generally were, the limits in the NJFCA as to what types of government reports can be considered an enumerated channel for public disclosure would be eviscerated. See N.J.S.A. 2A:32C-9(c).

**ii. The MSRB (Annex 4-36)**

The ability to license data from the MSRB, separate from what may be viewed on, but not copied from, the EMMA Portal, does not so one-sidedly render the MSRB the news media such that summary judgment is possible.

The MSRB is the product of an act of Congress and it acts within statutory constraints to regulate the municipal securities business. 15 U.S.C. § 78o-4(b)(2). It has none of the First Amendment freedoms that the news media

does. No one has ever called it the “news media.”

And, while the MSRB licenses data, it sets extraordinary restrictions that push the MSRB far beyond what could be the “news media”:

- (1) The data may only be used for “internal business purposes.”
- (2) The subscriber may redistribute data to its end user clients, but only for their internal business purposes and only if the end user is a “professional entity that utilizes” the data in its regular business.
- (3) The subscriber’s redissemination of data is limited to situations where the end user “would not reasonably be expected to serve as a substitute” for obtaining the data directly from the MSRB.
- (4) Subscribers must inform clients of the limitations on the further redissemination of data except as permitted by the MSRB.
- (5) Subscribers must obtain a separate license to the key identifying number for VRDOs (“CUSIP numbers”) from a separate private company at additional cost, a requirement that the MSRB polices.
- (6) Subscribers must agree to indemnify the MSRB.

Ja2306, 2385-3019, 4309-10. No known news media acts in this fashion.

This is not a matter of whether the news media may enforce its copyright. Rather, this is a question of whether the MSRB can impose the extraordinary restrictions set out above and be the news media under the NJFCA. The answer is an emphatic no. These restrictions demonstrate that the information, even after a person has entered into a license agreement, is still not freely useable, Repko, 2011 WL 3875987 at \*7, and that the MSRB does not intend “to widely disseminate information,” United States ex rel. Osheroff v. Humana Inc., 776 F.3d 805, 813 (11th Cir. 2015). Quite to the contrary.

Finally, the MSRB does not have anything like First Amendment-type freedoms that are the hallmark of the “news media” in the United States. The MSRB had to seek the permission of the SEC to even permit it to license data in the first place and must seek the SEC’s permission to change virtually any aspect of its data licensing services. See, e.g., SEC Release No. 34-66522, dated Mar. 6, 2012; SEC Release No. 34-59881, dated May 7, 2009.<sup>2</sup> Even the information that the MSRB can license is chosen by the SEC. See Ja2891, 2894. There is no known news media that must ask the government for permission to change how it operates.

Even the fees charged by the MSRB for its subscription services are subject to review and approval by the SEC. See, e.g., 15 U.S.C. §§ 78o-4(b)(2)(J), 78o-4(b)(3)(B)(ii); MSRB Notice 2011-25, Fee Change for Historical Transaction Data Product, dated Apr. 27, 2011.<sup>3</sup> There are no news media that must ask the government for permission to change its prices.

**iii. Bloomberg Finance L.P. (Annex 4-36)**

The last source of data that Defendants contended is the news media is Bloomberg Finance. This is not the news gathering and news reporting

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<sup>2</sup> Available here: <https://www.sec.gov/rules/sro/msrb/2012/34-66522.pdf>; <https://www.sec.gov/rules/sro/msrb/2009/34-59881.pdf>

<sup>3</sup> Available here: <https://msrb.org/Fee-Change-Historical-Transaction-Data-Product?n=1>

component of Bloomberg L.P. Rather, what Defendants pointed to as a public disclosure by the news media occurred via a data product that can only be licensed on strict terms and at great cost from Bloomberg Finance. See Ja2192, 2197. In this data-licensing, it acts, and is treated, nothing like the news media.

As one example of its strict terms, Bloomberg terminal subscribers may use the services “solely for its internal business purposes.” Ja2200. A terminal subscriber cannot recirculate any analysis or material that is visible “except for internal purposes without the prior written consent of” Bloomberg Finance. Ja2200; see also Ja2192. As for dissemination of data, this is permissible, but only in a “limited amount” and only to the subscriber’s customer and only data “directly related to the type and extent of the” customer relationship. Ja2200. No known news media restricts readers from using factual material similarly.

Indeed, Bloomberg Finance invoked these restrictions against one of Rosenberg’s companies when Bloomberg Finance believed that it might be a competitor. Threatening to cut off its access to data, Bloomberg Finance ultimately forced Rosenberg’s company to transition to another service provider. See Ja2178-82; see also Ja2162-63. There is simply no known news media that cuts off access to information to a perceived competitor.

Beyond not acting like the news media, Bloomberg Finance is not treated like the news media. Bloomberg Finance has been subjected to enforcement action by the SEC because it violated the securities laws for

failure to make disclosures about one of its valuation products. Ja2163-64, 2206-12. Bloomberg Finance paid a \$5 million fine. See Ja2192, 2197, 2206-12. The question of Bloomberg Finance is the news media is not so one-sided that summary judgment as to this channel is appropriate.

**3. There Is No Substantial Similarity (Annex 4-36)**

**a. Applicable Law (Annex 4-36)**

The NJFCA precludes an action if it is “based upon the public disclosure of allegations or transactions” in certain enumerated channels. N.J.S.A. 2A:32C-9(c). Courts have interpreted “based upon” to mean that the allegations are “substantially similar” to what has been publicly disclosed. United States ex rel. CKD Project, LLC v. Fresenius Med. Care Holdings, Inc., 551 F. Supp. 3d 27, 40 (E.D.N.Y. 2021), aff’d, 2022 WL 17818587 (2d Cir. Dec. 20, 2022). Whether a relator’s allegations are based upon or substantially similar to the public disclosed facts turns on whether the public disclosures exposed all essential elements of the alleged fraud, including scienter. Id.

Many courts have applied the based upon/substantial similarity test in a case, like this one, that alleges that multiple actors in an industry with many participants defrauded the government. Ja2280-83. In such cases, whether an action is based on/substantially similar to the claimed public disclosures depends on whether the claimed public disclosures eliminate the need for the government “to comb through myriad transactions” to find the fraud. In re

Natural Gas Royalties, 562 F.3d 1032, 1042-43 (10th Cir. 2009). The public disclosure bar applies only where the disclosures “enabled the government to readily identify wrongdoers through an investigation,” id. at 1039, and permitted the government to determine how the industry’s bad actors engaged in fraud, Omnicare, 903 F.3d at 89-92.

When the government needs to comb through myriad transactions to find the fraud or identify the wrongdoers, the public disclosure bar does not apply. The gulf between the allegations in a complaint and what is disclosed is simply too great, such that it cannot be said that the based upon/substantial similarity test is satisfied. United States ex rel. Lager v. CSL Behring, L.L.C., 855 F.3d 935, 941-45 (8th Cir. 2017) (public disclosure must explicitly identify participants in fraud or provide enough information to identify participants); Cooper v. Blue Cross and Blue Shield of Florida, Inc., 19 F.3d 562, 566 (11th Cir. 1994) (where fraud consists of industry-wide misconduct, public disclosure bar requires “allegations specific to a particular defendant” because government has difficulty identifying all parties engaging in fraud and needs help to catch misbehaving parties); United States v. Sodexho, Inc., 2009 WL 579380, \*11 (E.D. Pa. Mar. 6, 2009), aff’d, 364 F. App’x 787 (3d Cir. 2010) (public disclosure bar did not apply when “fraud occurs on a transactional level and individual perpetrators are difficult to discern”).

What Natural Gas and its many progeny recognize is that mere

disclosure of a massive amount of information does not, by itself, satisfy the “X + Y = Z” test set out in United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 657 (D.C. Cir. 1994) (where X is the misrepresented state of facts; Y is the true state of facts; and Z is the allegation of fraud).

That is, “the combination of X and Y must be revealed, from which readers or listeners may infer Z.” Id. at 653-54 (emphasis added); Edelweiss NJ, 2024 WL 5231309 at \*3-4. Where, as here, there is a considerable gulf between the misrepresented and the true state of facts, the government is not in a position to infer that a fraud has occurred and the fraud is not “revealed.” Natural Gas, 562 F.3d at 1042-43.

**b. Discussion (Annex 4-36)**

In this case, the raw data to which Defendants point -- millions of rate resets -- were not sufficient to put any New Jersey government official “squarely upon the trail of the alleged fraud,” such that the data itself were “sufficient to enable [a New Jersey government official] adequately to investigate the case and to make a decision whether to prosecute.” CKD Project, 551 F. Supp. 3d at 39. “Innocuous financial data that does not on the surface suggest fraud” “cannot be equated with allegations or transactions that do.” United States ex rel. Osheroff v. Tenet Healthcare Corp., 2012 WL 2871264, \*3 (S.D. Fla. July 12, 2012) (cleaned-up) (noting lack of precedent for proposition that “action alleging a fraud that is hidden in plain sight should

be barred simply because it is hidden in public disclosure”).

The very essence of what Plaintiff did was comb through millions of transactions to, first, identify rate-setting practices of Defendants and, once it had done so, assess whether they were fraudulent and, ultimately, figure out how the fraud was perpetrated, where, and by which RMAs. See Ja2284-90. Crucially, a State official would have had to do the exact same thing to find the fraud. No factual material suggests that this could have happened.

And, even if some New Jersey government official could obtain all the data necessary to conduct such analysis, it would have to devise a methodology to analyze that data to locate any fraud, like Rosenberg himself did. See Ja3238-350; Natural Gas, 562 F.3d at 1042-43. Indeed, Rosenberg was awarded a patent on his methodology because the system that it discloses was novel and non-obvious in light of all prior literature. See 35 U.S.C. §§ 101, 102(a), 103. Some New Jersey government official could not readily have done the same and would inevitably have had to “comb through myriad transactions” to find the fraud. Natural Gas, 562 F.3d at 1042-43.

And, even if New Jersey could have obtained the data, it would need to look, first, at the nationwide conduct of the RMAs to find the fraud and then isolate the New Jersey-specific conduct, which is how Plaintiff first analyzed the data. Ja2272, 2275-76l; Ja105-06. There is little reason to infer on summary judgment -- where all inferences must be drawn in Plaintiff’s favor --

that Defendants' VRDO rate-resetting fraud could have been identified in the first instance solely by looking at the much smaller dataset applicable to New Jersey-specific VRDOs. This would have been a rather backward way of conducting a reliable analysis. See Ja2276-78. And, of course, Plaintiff did not proceed, and no New Jersey government official would proceed, on the assumption that all RMAs had engaged in fraud. The wrongdoers had to be identified from among many RMAs. See Ja2276-84.

On summary judgment and where inferences must be drawn in Plaintiff's favor, it is not so one-sided that, floating in a sea of data, a State official would "know[] on a general level that fraud is taking place and that [the State was] losing money." Cooper, 19 F.3d at 942. This is particularly true where, like here, there has never been a public allegation of fraud. And, even if a State official knew where to look in the sea of data, such person would "have difficulty identifying all of the individual actors engaged in the fraudulent activity." Id. That too renders the based upon/substantially similar test unsatisfied. United States ex rel. Dig. Healthcare, Inc. v. Affiliated Comp. Servs., Inc., 778 F. Supp. 2d 37, 49-51 (D.D.C. 2011) (public disclosures did not suggest where fraud was occurring, which industry participants were engaged in it, or nature of scheme).

Given the sheer number of RMAs and the difficulties associated with obtaining and analyzing the data, a New Jersey government official would

need Plaintiff's help "to catch all the misbehaving parties" and identify individual wrongdoers. Cooper, 19 F.3d at 566; *see, e.g., Thayer v. Planned Parenthood of the Heartland*, 2019 WL 13039126, \*7-10 (S.D. Iowa Apr. 1, 2019), aff'd, 11 F.4th 934 (8th Cir. 2021) (public disclosure bar did not apply where audit related to isolated incident and did not identify defendant). It was not so one-sided that the 4AC was based upon or substantially similar to the rate reset data that summary judgment on this prong is appropriate.

**4. Plaintiff Is An Original Source (Annex 4-36)**

**a. Applicable Law (Annex 4-36)**

If Defendants satisfy their burden to show an absence of genuine disputed issues of fact on the first three elements of public disclosure, the action may still continue if Plaintiff shows that it "is an original source of the information." N.J.S.A. 2A:32C-9(c); United States v. Lozano, 2023 WL 6065161, \*5 (D.D.C. Sept. 18, 2023). Defendants must show an entitlement to summary judgment on this exception to the public disclosure bar.

Prior to the 2023 amendments, the NJFCA defined original source as a person who has (1) direct and (2) independent knowledge of the information on which the allegations are based and (3) has voluntarily provided the information to the State before filing the action. N.J.S.A 2A:32C-9(c).<sup>4</sup>

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<sup>4</sup> Plaintiff does not seek to apply the amended definition of original source to this case. See Health Choice, 478 N.J. Super. at 198-99.

“Direct” means “marked by an absence of an intervening agency,” Springfield Terminal, 14 F.3d at 657, “personally-gathered,” or “gained through [relator’s] own efforts,” United States ex rel. Harman v. Trinity Indus., Inc., 2014 WL 47258, \*5 (E.D. Tex. Jan. 6, 2014). The requirement of “direct” knowledge does not require that a relator be an insider or have firsthand knowledge. United States ex rel. Rahimi v. Rite Aid Corp., 3 F.4th 813, 829 (6th Cir. 2021). Amici suggests that the requirement of direct knowledge means that a relator must be a “true insider.” NJBIA Br. 15; see also USCC Br. 3-4. This is plainly incorrect. Kennard, 363 F.3d at 1044-45.

The requirement of knowledge that is “independent” of the information on which the allegations are based” is typically a function of the manner in which the relator obtained the information. Id. at 1046 (original source was “responsible for ferreting [out fraud] in the first place”); Harman, 2014 WL 47258, \*6 (knowledge is “independent” when “crux” of claim “was made plain only through his own efforts.”).

To qualify as an original source “does not require that the qui tam relator possess direct and independent knowledge of all of the vital ingredients to a fraudulent transaction.” Springfield Terminal, 14 F.3d at 656-57 (emphasis added). Rather, “direct and independent knowledge” may be knowledge of any essential element of the underlying fraud transaction. Id.; United States ex rel. Oliver v. Philip Morris USA Inc., 826 F.3d 466, 478 (D.C. Cir. 2016) (relator

“need not have first-hand knowledge of all of the information supporting his allegations”); Kennard, 363 F.3d at 1044 (knowledge supporting fraud allegation is sufficient to be original source).<sup>5</sup>

**b. Discussion (Annex 4-36)**

Plaintiff is an original source. Like the relator in Springfield Terminal, Plaintiff analyzed information and data that “did not themselves suffice to indicate fraud.” Springfield Terminal, 14 F.3d at 657. Plaintiff here “started with innocuous public information,” “completed the [X + Y = Z] equation with information independent of any preexisting public disclosure,” and “bridged the gap by its own efforts and experience.” Id.

Prior to Plaintiff’s activities, there was no allegation anywhere of Defendants’ fraudulent conduct. Plaintiff started with “innocuous” data -- millions of rate resets for more than 15,000 VRDOs, see Ja2283, 2291 -- and bridged the gap between the data and the fraud by its own efforts. This included Plaintiff’s years of experience in the municipal bond industry, the development of software to analyze rate data, and, as in Springfield Terminal, interviews of market participants. See Ja2155-59, 2173-75.

Plaintiff was able to discover the fraud, in part, through its principal’s invention of a methodology. See Ja2157-59. The patent on it means that the

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<sup>5</sup> The third requirement, voluntary provision of the information to the State before filing the action, was plainly satisfied. Ja2175-76, 3039-40; see Ja1974-76.

invention was a useful process that was novel and not obvious as against prior art. Uniloc USA, Inc. v. Apple Inc., 25 F.4th 1018, 1023-24 (Fed. Cir. 2022). The patent is itself independent of the data on which it operates. See Ja2158.

Application of a patented methodology to data can render a relator an original source. For example, in United States ex rel. Kuriyan v. HCSC Ins. Servs. Co., 2021 WL 5238332 (D.N.M. Jan. 29, 2021), a relator who used a patented model to discover anomalies in raw data obtained from the government and that he then analyzed was an original source. This was because he used the model to identify the misconduct and adduce facts to allege that defendants acted with scienter. Id. at \*2.

Plaintiff's knowledge of Defendants' collusion in rate-setting and their acting with scienter in failing to reset interest rates at the lowest rate are also direct and independent of the rate data. The raw data indicate nothing about scienter or collusion. Obtaining evidence of both renders Plaintiff an original source. United States ex rel. Reed v. KeyPoint Gov't Sols., 923 F.3d 729, 761-63 (10th Cir. 2019); United States ex rel. Absher v. Momence Meadows Nursing Ctr., Inc., 764 F.3d 699, 708-09 n.10 (7th Cir. 2014).

For example, the raw data also do not indicate whether Defendants considered prevailing market conditions in resetting rates, a key allegation of the 4AC. Nor do they reveal whether Defendants exercised professional judgment in resetting rates or whether they engaged in efforts that they knew

would allow them to determine the lowest rate, all crucial components of the fraud. Nor do the rate data indicate precisely which employees of Defendants engaged in the collusive behavior or the specific mechanism of collusion. And no rate data disclosed that Defendants were using a third-party “indexing” service to collude in resetting rates. See Ja9, 27-29, 41-52, 85-90, Ja102-06.

Plaintiff ferreted out all of that knowledge independently of the data. Kennard, 363 F.3d at 1046; Oliver, 826 F.3d at 478 (D.C. Cir. 2016) (original source bridged gap through interviews).

### **CONCLUSION**

The Court should reverse the order of the Appellate Division directing that summary judgment be entered in favor of Defendants and remand the case for the entry of summary judgment in favor of Plaintiff on the affirmative defense of public disclosure and for further proceedings.

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