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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

PETITION FOR CERTIFICATION OF PETITIONER-RESPONDENT EDELWEISS FUND, LLC

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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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PRELIMINARY STATEMENT

Petitioner-Respondent Edelweiss Fund, LLC ("Relator"), respectfully submits this Petition for Certification to seek review of the decision of the Appellate Division in a New Jersey False Claims Act ("NJFCA") case.

The appeal presents questions of first impression concerning the scope of authority that the Legislature provided to the Attorney General under amendments to the NJFCA effective June 30, 2023. The Legislature intended the amendments to bolster the Attorney General's ability to protect the State's fisc. But the Appellate Division interpreted the amendments in a manner that narrows the Attorney General's authority and delays, likely for years, its ability to exercise authority that the Legislature intended be effective immediately. No court interpreting the NJFCA or the federal False Claims Act has ever done what the Appellate Division did here. The general public importance of the questions presented, their unsettled nature, and the interests of justice in a matter in which the State has been defrauded of more than $100 million call for review under R. 2:12-4.

Relator brought this case to redress a fraud on the State by five large banks ("Defendants"). The fraud relates to the way Defendants reset rates on bonds issued by state and local governments. The fraud began in at least 2009 and continued beyond the June 2023 effective date of the amendments.

Under the NJFCA, an affirmative defense is available where the

allegations or transactions on which a relator's action is based have been publicly disclosed in specifically enumerated channels, such as "by the news media." By statute, however, the public disclosure defense never applies in an NJFCA action brought by the Attorney General or in an action brought by a relator in which the Attorney General later intervenes. This is consistent with the remedial purpose of the NJFCA and the purpose of the public disclosure defense. The defense exists to protect the State from actions brought by parasitic relators who bring a case based on publicly disclosed facts and seek a portion of the State's recovery. It does not exist to protect wrongdoers.

Effective June 2023, the Legislature modified the NJFCA. It added a series of provisions to protect and broaden the authority of the Attorney General to investigate and prosecute NJFCA actions in cases brought both on its own and by relators. One amendment modified the public disclosure bar to render it inapplicable if the Attorney General simply opposes dismissal on public disclosure grounds. The Attorney General has always had the authority to obviate the defense by bringing the action itself or by intervening in a relator-filed action. The amendment's sole effect is to permit the Attorney General to preclude dismissal on this ground by notice of its opposition alone.

The trial court properly held that the Attorney General could exercise this authority in a case that was filed prior to the effective date of the amendments and involved claims submitted to the State both before and after.

The Appellate Division reversed. It interpreted the temporal reach of the 2023 amendments to render it impossible for the Attorney General to exercise its enhanced authority in a case where a fraud began before the effective date of the 2023 amendments, even where the false claims continued after the amendments. The Appellate Division stripped the Attorney General of authority granted by the Legislature. The Appellate Division premised its holding on retroactivity grounds. But here, retroactivity concerns are absent. The amendment does not harm legitimate interests, upset settled expectations, impact vested rights, or impose new liability or new duties for past acts. All it does is give the State a procedure to achieve a result that it always could have achieved in a manner sensitive to governmental resource constraints.

The Appellate Division also reversed the trial court's alternative ruling on the substantive elements of public disclosure. The experienced trial court denied summary judgment, finding that it was not "even close." The Appellate Division rejected this holding, but it erred in shifting the burden to Relator, misinterpreting two of three elements of the defense, and ignoring the third. The Court should grant certification to clarify key aspects of the defense.

STATEMENT OF THE CASE

I. Defendants' Fraud on the State

Defendants defrauded the State 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. Ja9-11, 14.

VRDO issuers 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 and considering "prevailing market conditions," would enable the bond to be sold at par, i.e., face value. Ja9-18.

Relator's central allegation is that Defendants intentionally failed to set the lowest rate for each VRDO in light of prevailing market conditions. Instead, Defendants mechanically reset rates en masse with no consideration of a bond's individual characteristics or prevailing market conditions. Ja2, 9, 32-41, 49-50, 107-12. Relator alleged a pervasive and consistent pattern of rate inflation. Ja106-18. Defendants' conduct defrauded the State of more than $100 million. Ja10, 41, 118-22. The fraud began in at least April 2009 and has continued through the present. Ja9-10, 13-15, 17, 62-63, 3999-4003.

II. Litigation Concerning Defendants' Rate-Resetting Fraud

The principal of Edelweiss, B. Johan Rosenberg ("Rosenberg"), has more than twenty years of experience as a municipal advisor. In the regular course of his business, he noticed anomalous pricing patterns for two VRDOs. Because there was no known way to compare rates for groups of VRDOs, Rosenberg developed a commercial software product to do so. Ja2155. Deployment of the software led to discovery of the fraud in New Jersey and

elsewhere. Ja2172. This action and parallel cases filed elsewhere have exposed a massive fraud that was undetectable until Relator and its principal assembled the knowledge, expertise, and data to discover it.

RELEVANT PROCEDURAL HISTORY

I. The Initial Complaints and the Motion to Dismiss

Relator filed its initial complaint on behalf of the State in 2015. Ja2011. While it was under seal, Relator amended it twice to reflect newly learned facts about ongoing misconduct. Ja1984-2083. Among other things, Relator's continuing investigation revealed that Defendants collusively inflated rates by exchanging non-public information in advance of resetting rates. See, e.g., Ja2050-59, 103. In July 2019, the Attorney General declined to intervene and the case was unsealed. Ja2086-87. Relator amended again and the trial court granted Defendants' motion to dismiss the Third Amended Complaint (the "3AC") with leave to amend in November 2020. 1T 3:21-17:5.

II. The Fourth Amended Complaint

Relator filed the Fourth Amended Complaint ("4AC") in March 2021. It added hundreds of new allegations. See Ja4-128, 556-1309. In September 2021, the trial court denied Defendants' motion to dismiss, holding that the 4AC sufficiently plead fraud, 2T 7:19-11:16, and that the public disclosure defense could not be resolved on a motion to dismiss, 2T 11:17-12:5. Leave to appeal was denied by the Appellate Division and by this Court. See Pa13-23.

III. Discovery on Public Disclosure

In discovery that the trial court limited to the issue of public disclosure, the parties developed a voluminous summary judgment record over the course of about a year. See Ja1313-30, 4011-12. The parties' responses to each side's statements of material fact under R. 4:46-2 reflect disputes on every prong of the public disclosure defense. Ja2094-176, 3878-933; 4T 35:2-8.

IV. 2023 Amendments to the NJFCA

Effective June 30, 2023, the Legislature amended the NJFCA. See Pa24-31. Many of the changes (collectively, the "2023 Amendments"), including the one at issue here, are procedural modifications that expand or safeguard the State's authority in NJFCA actions. They include:

(1) allowing the Attorney General, upon intervention, to file its own complaint or amend or supplement a relator's complaint, which would relate back to the date of the original complaint, Pa26;

(2) authorizing the Attorney General to issue investigative demands, subpoena out-of-state witnesses, and take testimony, Pa30-31; and

(3) allowing the Attorney General to pursue remedies through alternate means, including administrative proceedings, Pa27-28.

The Legislature also modified the public disclosure bar to allow the State to veto dismissal of a case on public disclosure grounds (the "2023 Veto Amendment"). The Legislature did so by adding the phrase "unless opposed by the Attorney General" to the provision requiring dismissal if the criteria for application of the public disclosure bar are met. Pa29. As a result, to obviate

a public disclosure defense, the State no longer needs to initiate the case in the first instance or intervene in a relator-filed action. It can now achieve the exact same result by exercising the veto authority. 4T 19:8-20:19. The 2023 amendments "t[ook] effect immediately." Pa31.

V. The State Vetoes Dismissal on Public Disclosure Grounds

In August 2023, the State opposed dismissal on public disclosure grounds. Ja3995-98. This was the first-ever exercise of this authority in the State. The veto means that the State does not need or want the protection of the public disclosure bar. See United States ex rel. Berntsen v. Prime Healthcare Servs., Inc., 2014 WL 12480026, at *3 (C.D. Cal. Nov. 20, 2014).

VI. The Trial Court's Decision on Summary Judgment

The trial court granted summary judgment to Relator on the defense, 4T at passim, holding that the State's veto applied in the pending case because:

(1) The 2023 Veto Amendment is procedural and "serves as a tool that bolsters the State's ability to protect its existing interest."

(2) The amendment "does not confer any new right" and does not destroy any Defendants' rights, which remain "inviolate."

(3) The changes in the amendment "fortif[y] the State's procedural toolkit to safeguard it with enduring interest."

(4) Viewing the amendment as substantive rather than procedural "would impair the entire statutory framework and render it impracticable" by "curtail[ing] the State's ongoing opportunity to intervene when circumstances warrant."

(5) Applying the amendment to the pending case was informed by "the imperative of maintaining fidelity to [l]egislative intent."

The trial court also denied the cross-motions for summary judgment on substantive public disclosure grounds. The trial court held that "this isn't even close to being considered so one-sided for either side" and found disputes of material fact on "all the essential elements." 4T 6:13-21, 28:24-30:3, 35:2-20.

VII. Proceedings in the Appellate Division and this Petition

On January 4, 2024, the Appellate Division granted Defendants leave to appeal. On December 27, 2024, the Appellate Division reversed and remanded for entry of summary judgment in Defendants' favor. The Appellate Division's order is dispositive of the action and reviewable on certification. See R. 2:2-5(a). Relator timely filed a Notice of Petition and timely files this Petition. See R. 2:12-3(a), 2:12-7(b).[1]

QUESTIONS PRESENTED

I. Did the Appellate Division err in holding that the Attorney General's veto could not apply in a case alleging false claims that was pending before the effective date of the 2023 Amendments?

II. Did the Appellate Division err in holding that the Attorney General's veto could not apply to false claims that Defendants made after the effective date of the 2023 Amendments?

III. Did the Appellate Division err in granting Defendants summary judgment on the affirmative defense of public disclosure?

[1] If the Court finds that Relator should have proceeded by motion for leave to appeal rather than by petition for certification, it can readily correct any such error by treating this Petition as a motion for leave. See O Builders & Assocs., Inc. v. Yuna Corp. of NJ, 206 N.J. 109, 119 & n.3 (2011).

ARGUMENT

I. The Appellate Division Erred in Holding that the Veto Could Not Apply to a Case Pending *Before* the 2023 Amendments

The Court should grant certification to remedy the unduly narrow interpretation of the 2023 Amendments that deprives the Attorney General of authority granted by the Legislature and is contrary to its intent. The error bears on a matter of public concern and impacts a large number of cases in which the Attorney General may wish to exercise its authority.

The 2023 Amendments as a whole evince a legislative intent to strengthen, not narrow, the Attorney General's authority. The means by which the Legislature did so cut across many aspects of NJFCA practice and procedure, including pleading, application of the relation back doctrine, pursuit of alternative remedies, and the conduct of investigations. Pa26, 27, 30-31. In providing that "[t]his act shall take effect immediately," Pa31, the Legislature was clear that the Attorney General should be able to exercise the authority newly granted by the 2023 Veto Amendment immediately. Granting authority by legislation that takes effect immediately supports holding that the authority could be exercised in a pending case.

The Appellate Division erred by holding that this newly granted authority could not be applied in a pending case on retroactivity grounds. Opinion at 25. Retroactivity is not the application of a statute "in a case

arising from conduct antedating [a] statute's enactment." Maia v. IEW Constr. Grp., 257 N.J. 330, 343 (2024) (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 247 (1994)). "[A]pplication 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 changes in procedural rules." Id. (cleaned-up).

Rather, retroactivity is a specific series of concerns that bear on a party's vested rights and whether application of a statute will result in manifest injustice. Id. at 349-50. In this case, the 2023 Veto Amendment does not change the legal consequences of Defendants' past conduct. It does not increase their substantive liability or create new obligations for past conduct. Id. at 348 (distinguishing W.S. v. Hildreth, 252 N.J. 506 (2023)). Nor does it change what Defendants must demonstrate to support the defense.

The 2023 Veto Amendment only changes the procedure by which the beneficiary of the defense -- the Attorney General -- permits it to be invoked. It has always been the case that, when the Attorney General initiates the action or decides to intervene in a relator-filed action, public disclosure is not available. Following the amendment, it is still not available if the Attorney General so decides. All that has changed is the mechanism by which the Attorney General can enforce its right to obviate the defense when it has not previously intervened.

The Appellate Division agreed that "the State always retained the power to divest defendants of the public disclosure bar as an affirmative defense." Opinion at 25. However, it went on to hold, without explanation, that "the elimination of the requirement that the State intervene in the action and assume the cost of the litigation in order to [bar assertion of the public disclosure defense] was a significant change." Id. As far as Defendants' rights and obligations go, there is no difference, let alone a significant one.

Modifying the manner in which the Attorney General can achieve a result that it could have always achieved is procedural in nature. And New Jersey law provides that "where the course of practice or procedure for the enforcement of a right, or the prosecution of a suit, shall be changed, actions now pending, or hereafter begun shall be conducted as near as may be in accordance with such altered practice or procedure." N.J.S.A. 1:1-14; see, e.g., Regent Care Ctr., Inc. v. Hackensack City, 20 N.J. Tax 181, 193 (2001). The Appellate Division ignored this.

The Court should review the decision of the Appellate Division to ensure that the Legislature's intent is realized. Intervention and taking over litigation of the action entails a significant commitment of resources. United States ex rel. Totten v. Bombardier Corp., 286 F.3d 542, 546 (D.C. Cir. 2002). The Attorney General simply does not have the resources to intervene and take over litigation of all meritorious NJFCA cases. Providing the State a less

resource-intensive way to avoid dismissal of "meritorious cases . . . on public disclosure grounds," Ja3997, ensures that meritorious NJFCA actions are not dismissed prematurely on grounds, like public disclosure, that have nothing to do with whether there was a fraud or whether the State should have a remedy.

To be sure, the Attorney General was well aware of the merits of Relator's allegations. When the Attorney General opposed dismissal on public disclosure grounds in August 2023, Ja3995-98, it was well aware that Relator was on its way to the largest ever recovery in Illinois in parallel litigation there. See Opinion at 10-11 n.4.

The trial court properly recognized that the Legislature's intent was to preserve the Attorney General's ongoing authority in non-intervened cases. 4T 19:3-27:25. Even when it declines to intervene, the State maintains authority over an NJFCA case. It may later intervene and take over an action. And it may dismiss or settle a non-intervened case, even over a relator's objection. And it must consent for a relator to dismiss a non-intervened action. N.J.S.A. 2A:32C-5(c), 32C-6(b-c), 32C-6(f); see Matter of Enforcement of N.J. False Claims Act Subpoenas, 229 N.J. 285, 289 (2017). The Appellate Division was wrong to rule in a manner that tramples on that ongoing authority.[2]

[2] Defendants relied below upon State ex rel. Health Choice Group, LLC v. Bayer Corp., 478 N.J. Super. 184 (App. Div. 2024), to argue that the 2023 Veto Amendment could not apply to a pending case. That case concerned a different provision of the 2023 Amendments, a substantive change in the

II. The Appellate Division Erred in Holding that the Veto Could Not Apply to False Claims Made *After* the 2023 Amendments

The Appellate Division also erred in holding that the 2023 Veto Amendment could not even apply prospectively and that the pre-amendment version of the NJFCA had to apply "to the entire continuous course of conduct." Opinion at 26 n.11. The Appellate Division was wrong to treat false claims submitted after the effective date of the 2023 Amendments the same as false claims submitted before. Counsel is aware of no New Jersey court interpreting the 2023 Veto Amendment and no federal court interpreting an analogous provision under the federal False Claims Act that has ever held that the veto authority could not apply prospectively.

The practical effect of this holding is that the Attorney General will not be able to veto the application of the public disclosure bar in any case that alleges that a defendant submitted even a single false claim before June 20, 2023, no matter how many were submitted after. This does serious violence to the Legislature's directive that the 2023 Amendments "shall take effect immediately." Pa31. The Appellate Division's interpretation transforms the

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definition of "original source" that would, if applied to a pending case, expose an NJFCA defendant to liability in new circumstances. Health Choice does not provide the rule of decision here. As the U.S. Supreme Court has said, "there is no special reason to think that all the diverse provisions of" of a statute containing multiple provisions "must be treated uniformly" for retroactivity purposes. Landgraf, 511 U.S. at 280. Health Choice need not be overruled to reverse here.

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 and, if it 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 investigated for years. The Appellate Division's decision means that it could be many years before a fraud beginning after June 30, 2023, is discovered and forms the basis of an NJFCA complaint.

Still worse, the Appellate Division's holding would prevent the Attorney General from exercising, in a case alleging a fraud that began prior to June 30, 2023, and continued thereafter, other authority provided to it in the 2023 Amendments. For example, the Attorney General could not, upon intervention, file its own complaint or amend or supplement a relator's complaint. Pa26. Nor could the Attorney General even investigate pre-2023 Amendment conduct through civil investigative demands or subpoenas to out-of-state witnesses. Pa30-31. This too cannot be.

The manner in which Appellate Division concluded that the 2023 Veto Amendment could not apply prospectively is flawed. First, the Appellate Division held that Relator's argument on this point was not made to the trial court or preserved. Not so. Relator included in the summary judgment record a certification identifying more than 225 false claims made after June 30,

2023, and, based on it, argued both to the trial court and the Appellate Division that, even if the 2023 Amendments could not apply to false claims made prior to the effective date of the amendments, the 2023 amendments had to apply, at least, to post-amendment claims. See Jra18; Ja3999-4003; Pb11, 21-22.

Second, the Appellate Division relied on United States ex rel. Zizic v. Q2Administrators, LLC, 728 F.3d 228 (3d Cir. 2013), to find an "anti-retroactivity rule" that "requires courts to apply the pre-amendment version of the statute to the entire continuous course of conduct." Opinion at 26 n.11. Far from supporting an "anti-retroactivity" rule, Zizic makes plain that false claims in both the pre-amendment and post-amendment periods can be governed by pre- and post-amendment provisions. 728 F.3d at 733 n.4. And Zizic concerned a different, substantive amendment to the federal FCA's public disclosure bar that changed public disclosure from a matter of subject matter jurisdiction, which is a plaintiffs' burden to show, to an affirmative defense, which is a defendant's burden to prove. That different amendment has been held not retroactive, but Zizic did not consider the government's authority to veto the public disclosure defense and is inapposite here.

III. The Appellate Division Erred in Granting Defendants Summary Judgment on the Affirmative Defense of Public Disclosure

In reversing the trial court's alternative holding, the Appellate Division strongly criticized the it as "wholly depart[ing] from its November 2020"

decision granting Defendants' motion to dismiss the 3AC. Opinion at 33; see id. at 19 n.10. The implication was that the trial court was somehow required to decide summary judgment just as it had decided the motion to dismiss the 3AC. The criticism underlying the reversal was erroneous.

After November 2020, several important things occurred that easily explain the trial court's October 2023 decision. And none of them is a change in the substantive legal standard that the trial court applied. First, the 4AC had been filed, which added many new allegations specifically directed to the public disclosure bar. See Ja46-54. Second, the parties developed a voluminous summary judgment record and identified many disputes of material fact. See Ja2094-176, 3878-933. Third, the trial court acquired, as it "frankly" indicated in denying the motion to dismiss the 4AC in September 2021, a "better understanding of [the] allegations." 2T 7:9-18.

A. The Appellate Division Engaged in Improper Burden Shifting

In holding that public disclosure "involves a question of standing," Opinion at 27, the Appellate Division improperly shifted to Relator the burden of refuting application of the public disclosure bar. Standing is a doctrine of justiciability and is a matter on which the plaintiff bears the burden. See, e.g., Matter of J.R., 478 N.J. Super. 1, 8 (App. Div. 2024). Public disclosure is not a question of standing under the NJFCA and a relator does not bear the burden of persuasion; it is an affirmative defense on which Defendants bear the

burden. See United States ex rel. Reed v. KeyPoint Gov't Sols., 923 F.3d 729, 737-38 (10th Cir. 2019); Db1 (conceding the same).

B. The Appellate Division Erred In Holding that Rate Data Was Publicly Disclosed

The touchstone of public disclosure is an intent to make information available for public use and accessible to the public. United States ex rel. Feingold v. AdminaStar Fed., Inc., 324 F.3d 492, 495 (7th Cir. 2003).

A key feature of the 4AC is Relator's analysis of a massive amount of VRDO rate data. See Ja47-58, 61-118. Defendants claimed that the data was disclosed by the Municipal Securities Rulemaking Board (the "MSRB"), a self-regulatory organization created by statute and overseen in all aspects by the Securities and Exchange Commission (the "SEC"). The MSRB licenses VRDO rate data at great cost. Ja2215, 2248. The MSRB also operates a website, the Electronic Municipal Market Access portal (the "EMMA Portal") through which users can view information about VRDOs without fee. Each source imposes severe legal limitations on the use and dissemination of data. The EMMA Portal is, by design, configured to limit searching and obtaining data. Ja2104, 2164-69. Defendants also pointed to Bloomberg Finance L.P. as a means by which there was a public disclosure. Obtaining the data from Bloomberg Finance L.P cost more than $250,000 per year and it too can only be obtained under strict limitations on redissemination of data. Pb24-28.

The Court should grant review to clarify how the combination of legal, technical, and financial limitations present here bears on whether information has been made public. For example, there are only a very small number of cases considering whether costs can render information not publicly disclosed and none that considers costs like those present in this case or costs combined with the other restrictions present here. See Opinion at 28.

C. The Appellate Division Erred in Holding that Rate Data Was Publicly Disclosed by the News Media

The second prong of the public disclosure defense is that the transactions or allegations be disclosed in certain enumerated channels. Defendants pointed to disclosure by the MSRB, which they claimed was "the news media." They did so even though every aspect of the MSRB's operation is supervised by the government and the MSRB imposes severe technical and legal restrictions on the use of data that it licenses, pushing it outside of any commonsense definition of news media. Pb29-35.

They also pointed to disclosure through a data product that can only be licensed on strict terms and at great cost from Bloomberg Finance L.P. As was undisputed on summary judgment, Bloomberg Finance L.P. acts nothing like the news media (e.g., it threatens to cut off licensees from receiving data if they are deemed competitors of Bloomberg Finance L.P.) and is treated nothing like the news media (e.g., it was charged by the SEC for violations of

federal securities laws in connection with its data products). Pb36-38.

There is no definition in the NJFCA or the federal False Claims Act of the term "news media." Many federal courts have strayed very far from a commonsense interpretation of what the news media might be. See generally United States ex rel. Integra Med Analytics L.L.C. v. Providence Health & Servs., 2019 WL 3282619, *11-16 (C.D. Cal. July 16, 2019), rev'd on other grounds, 2021 WL 1233378 (9th Cir. Mar. 31, 2021).

The Court should grant certification to return New Jersey law to a straightforward definition of "news media" that is informed, as the Legislature must have intended, by an existing definition in New Jersey law. See N.J. R. Evid. 508(a) (defining news media to include newspapers and magazines); 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) (using N.J. R. Evid. 508(a) to interpret tax provision). The Appellate Division's holding also ignores that two other courts in parallel litigation held that MSRB is not the news media. Ja3874-77 (Illinois trial court); Ja3641-65 (California appellate court).

D. The Appellate Division Erred in Failing to Analyze Whether The Rate Data Was Substantially Similar to the Allegations

To make out the affirmative defense of public disclosure, Defendants were required to show that Relator's action is "based upon" the public disclosure of allegations or transactions. Pa29. Courts have equated the term

"based upon" to require that the allegations in the operative pleading 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). The 2023 Amendments specifically adopted this formulation. Pa29.

The Appellate Division failed to analyze at all whether Defendants met their burden to show that Relator's action was "based upon" the data, even assuming it was publicly disclosed. Opinion at 32. There are several tests that courts outside of New Jersey have used to analyze this prong of the public disclosure defense. See, e.g., Opinion at 11-12. One is well suited to a case, like this one, where the conduct consists of misconduct by multiple actors within an industry with many participants and where the misconduct was discovered only by analyzing a large amount of data. Ja2280-81. Whether an action is based upon/substantially similar to 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. Pb38-41. The Court should grant review to clarify under this State's law the "based upon" or "substantially similar" test.

CONCLUSION

The Court should grant the Petition for Certification and, after further briefing, should reverse the order of the Appellate Division and remand.

Dated: January 27, 2025

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CERTIFICATION OF DANIEL W. LEVY

I, Daniel W. Levy, of full age, hereby certify the following:

1. I am a principal of the law firm of McKool Smith P.C., counsel for Petitioner-Respondent Edelweiss Fund, LLC, in connection with this action. I also represented Edelweiss Fund, LLC, before the trial court and the Appellate Division.

2. Pursuant to R. 2:12-7(a), I hereby certify that the foregoing Petition for Certification represents a substantial question and is filed in good faith and not for purposes of delay.

Pursuant to R. 1:4-4(b), I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: January 27, 2025

/s/ Daniel W. Levy

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