FILED, Clerk of the Supreme Court, 05 Nov 2025, **090285**

Supreme Court of New Jersey

Docket No. 090285

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

Plaintiff-Petitioner,

vs.

JPMORGAN CHASE & CO., JPMORGAN CHASE BANK, NA, AND 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

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PRELIMINARY STATEMENT

The public disclosure bar of the New Jersey False Claims Act (NJFCA) is designed to prevent opportunistic lawsuits brought by non-insiders based on public information. That fits Relator's lawsuit perfectly, as the Appellate Division recognized. Relator's principal, Johan Rosenberg, never worked at any of the Defendant banks and never reset the interest rate on the type of municipal bond that he has made the centerpiece of his sweeping fraud case. He has no direct knowledge of the policies or practices of the banks he accuses of perpetrating a decade-long fraud against New Jersey state and local governments. Instead, after creating Edelweiss LLC for the sole purpose of bringing qui tam litigation in New Jersey and other states, he brought this action based on his "analysis" of the interest rates reset by Defendants on the variable-rate municipal bonds at issue here, VRDOs. These rates, which are reset daily or weekly, were and are publicly disclosed to VRDO investors, issuers, and other market participants and observers almost immediately after Defendants set them. The Appellate Division thus correctly held that the public disclosure bar squarely applies to this case and mandates that summary judgment be granted to Defendants based on undisputed facts. Indeed, the Massachusetts Supreme Judicial Court (MA SJC) arrived at the same conclusion under identical facts in a parallel case brought by Relator.

The Appellate Division also correctly held that a recent NJFCA amendment applied prospectively only and could not be used to block Defendants from asserting the public-disclosure-bar defense. Specifically, in June 2023, eight years after this case was filed, and with the parties' summary judgment motions already pending, the Legislature amended the NJFCA, giving the Attorney General (AG) a new power to eliminate a defendant's public-disclosure-bar defense in the only situation in which it applies—a qui tam suit. The Legislature explicitly expressed its intent to apply the 2023 amendment prospectively, noting that it should "take effect immediately"—a phrase that this Court has recognized as a synonym for prospective application. But Relator's disagreement with the Appellate Division on this issue is based on misguided policy arguments that are foreclosed by this Court's precedents and the Legislature's clearly expressed intent.

The Appellate Division was also correct on the merits that this lawsuit is precluded by the public disclosure bar. Relator admits that it based its allegations on bond and interest-rate data maintained and published by numerous well-known public outlets that are commonly used by VRDO market participants and observers, including Bloomberg and websites published by the Municipal Securities Rulemaking Board (MSRB). Not surprisingly, extensive federal case law holds that Bloomberg and similar publicly available websites

qualify as "news media" under the identical language of the federal False Claims Act's public disclosure bar, case law which Relator ignores. Federal courts have long construed "news media" broadly to advance the animating purpose of the public disclosure bar—to prevent potential abuse of the False Claims Act by financially-motivated qui tam relators who bring lawsuits based not on their own inside information but on information already in the public domain, i.e., "parasitic lawsuits." Neither Congress nor New Jersey has taken any legislative action that casts doubt on this established interpretation of "news media" or the broad underlying purpose of the public disclosure bar. Indeed, when amending the NJFCA in 2023, the Legislature adopted a specific set of recommendations from the federal government, none of which included a change to the long-standing definition of "news media." Relator's request that this Court circumvent the legislative process and adopt Relator's preferred definition of "news media" should be rejected, and the Appellate Division should be affirmed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Relator alleges that Defendants violated the NJFCA based on the way in which they reset interest rates for municipal bonds known as Variable Rate Demand Obligations (VRDOs). VRDO rates are reset either daily or weekly and provide investors the option to sell back the bonds within the same short time frame. Municipal bond issuers use VRDOs to secure long-term financing at

short-term rates, while investors use VRDOs as a highly liquid investment. Defendants acted as "remarketing agents" that were contractually obligated to use their "judgment" to set interest rates on VRDOs. Ja2095-96; Ja1989.[1]

There is no dispute that VRDO rates (and thus rate changes) are publicly available. These rates are posted as a matter of course in a free public database called EMMA, by the MSRB through a service called MSRB SHORT, and by media companies such as Bloomberg.[2] As any member of the public is entitled to do, Rosenberg analyzed the publicly available data he received from the MSRB SHORT service, Ja2173, to develop a theory that Defendants violated their contractual obligations to municipal issuers, speculating that Defendants "mechanically set [VRDO] rates en masse," Ja1984; see also Ja9.

Relator's claim is based on Rosenberg's analysis of that MSRB SHORT data. There are no disputed issues of fact concerning the data that Rosenberg used or the nature of his analysis. There is no dispute that MSRB SHORT data is available on a subscription basis to anyone, including Rosenberg. Ja3896 ($10,000 per year for MSRB SHORT). There is likewise no dispute that anyone

[1] Ja refers to the Joint Appendix of the parties. Jra refers to the appendix Defendants submitted with their reply brief in the Appellate Division.

[2] See Ja2098-100 (acknowledging that EMMA makes VRDO rates and disclosure documents available to the public), Ja2103-05 (same); Ja4272-73; Ja1548-49 (MSRB R. G-34(c)(ii)(A)(1)-(2)); Ja3896; Ja2108-10 (acknowledging that Bloomberg subscribers have access to the same VRDO rate data that is available on EMMA); Ja1559-62.

monitoring the VRDO market could, and often did, pay for both the MSRB SHORT and Bloomberg services with the same data, which was also available for free through EMMA. See Ja1559-62; Ja2098-100, Ja2103-05, Ja2108-10; Ja4272-73; Ja3896; Ja1548-49.

Like other False Claims Acts, the NJFCA includes a "public disclosure bar" that precludes a relator like Edelweiss from bringing a suit based on publicly disclosed information, unless the relator is an "original source" of the information. See generally N.J.S.A. 2A:32C-9(c). If the State intervenes and assumes full control over the litigation, the defense is not available. The AG declined to intervene in this case, even after Relator amended its complaint twice. Ja2085-87. Thus, this case is a relator-led action, and Defendants have the right to assert the public disclosure bar as an affirmative defense.

The trial court granted Defendants' motion to dismiss Relator's Third Amended Complaint based on the public disclosure bar with leave to amend. See 1T4:6-8, 1T13:23-14:3, 1T14:10-25, 1T17:3-5.[3] After Relator filed a Fourth Amended Complaint, the trial court denied Defendants' motion to dismiss on public disclosure bar grounds, but the court did not identify what new allegations

[3] "1T" refers to the transcript of decision dated November 30, 2020. "2T" refers to the transcript of decision dated September 13, 2021. "3T" refers to the transcript of oral argument dated October 13, 2023. "4T" refers to the transcript of decision dated October 24, 2023.

caused it to reverse its prior dismissal. The case then proceeded to discovery and summary judgment motion practice, which was limited to the applicability of the public disclosure bar. See 2T11:17-12:5.

On June 30, 2023, while the parties' cross-motions for summary judgment were pending, the Legislature amended the NJFCA. The amendment—which mirrored an identical amendment to the federal statute enacted in 2010—empowered the AG to block dismissal of a relator-led NJFCA action on public disclosure bar grounds without first having to intervene (the 2023 amendment). See Ja4019. Based on this amendment, on August 16, 2023, more than eight years after Relator's original complaint was filed and more than four years after the AG had declined to intervene, the AG filed a notice opposing dismissal of Relator's action. See Ja3995-98.

The trial court ruled that the 2023 amendment should be given retroactive effect and therefore granted summary judgment for Relator and denied it for Defendants. 4T6:10-13, 4T35:14-17. The trial court also stated that, if the 2023 amendment did not apply retroactively, it would have denied both motions based on disputes of material fact. However, the court did not identify any specific factual disputes. See 4T34:16-21, 4T35:2-13.

The Appellate Division reversed, applying this Court's settled retroactivity framework to conclude that the 2023 amendment could not be

applied retroactively. Recognizing there were no disputed issues of fact, the Appellate Division applied uniform federal FCA authority to hold that Relator's analysis was based on transactions that had been publicly disclosed in the news media, thus triggering the public disclosure bar, and remanded to the trial court to enter summary judgment for Defendants. Annex 4-36 (Op. at 2-33).

ARGUMENT

I. Standard of Review

On appeal from a grant of summary judgment where the parties "contest the interpretation of [New Jersey] laws, not the facts of the case," Zabilowicz v. Kelsey, 200 N.J. 507, 512 (2009), this Court reviews "issues of law de novo," though it may be "persuaded by the reasoning of" the Appellate Division. State v. Quaker Valley Farms, LLC, 235 N.J. 37, 55 (2018).

II. The 2023 Amendment To The NJFCA Does Not Apply Retroactively.

The Appellate Division correctly held that the 2023 amendment to the NJFCA does not apply retroactively.

Under longstanding due-process principles, there is a strong presumption in favor of "prospective rather than retroactive application of new legislation." Ardan v. Bd. of Rev., 231 N.J. 589, 609-10 (2018) (quoting James v. New Jersey Mfrs. Ins. Co., 216 N.J. 552, 563 (2014)). "[W]ords in a statute ought not to have a [retroactive] operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intent of the Legislature

cannot otherwise be satisfied." Maia v. IEW Constr. Grp., 257 N.J. 330, 349 (2024) (quoting Kopczynski v. Camden Cnty., 2 N.J. 419, 424 (1949)). This Court applies a two-part test to determine whether the strong presumption in favor of prospective application has been overcome and a law should be applied retroactively. See ibid.[4]

Thus, the Court must first determine "whether the Legislature intended to give the statute retroactive application; and second, whether retroactive application of that statute will result in either an unconstitutional interference with vested rights or a manifest injustice." Ibid. (quotation omitted). The Legislature's intent as to prospective application is dispositive. There are only three scenarios that justify retroactive application: "(1) the Legislature explicitly or implicitly expresses an intent that a law be retroactive; (2) an amendment is ameliorative or curative; or (3) the parties' expectations warrant retroactive

[4] Relator argues that "retroactivity concerns" are not implicated in this case at all. See Relator's Brief (Rb) at 19. This defies reason. There is no dispute that the Legislature amended the NJFCA in the middle of this litigation. The outcome of this case depends on which version of the NJFCA applies. In a similar case, the Appellate Division in State ex rel. Health Choice Grp., LLC v. Bayer Corp., 478 N.J. Super. 184, 196 (App. Div. 2024), addressed the Legislature's amendment of the NJFCA's public disclosure bar's definition of "original source" in the middle of that litigation. Thus, the "initial question" the Appellate Division needed to "decide [was] which definition applied to plaintiffs' actions." Ibid. Then, applying settled retroactivity principles, the Appellate Division concluded that the 2023 amendment to the definition of "original source" did not apply retroactively. Id. at 196-199. The result is the same here regarding the AG's ability to block dismissal based on the public disclosure bar.

application." Id. at 350. None is present here.

A. The Legislature Explicitly Expressed Its Intent To Apply The 2023 Amendment Prospectively Only.

Because legislation is presumed to be applied prospectively only, the Legislature must "'clearly express[] a contrary intent'" for a statute to apply retroactively. Maia, 257 N.J. at 350 (quoting In re Registrant J.D-F., 248 N.J. 11, 22 (2021)). This contrary intent may be expressed either "explicitly in the language of the statute or in the pertinent legislative history, or impliedly, by rendering it necessary to make the statute workable or to give it the most sensible interpretation." Id. at 350-51 (quotation marks omitted).

Here, the Legislature explicitly intended to apply the 2023 amendment only prospectively because the Legislature specified that the "act shall take effect immediately." Ja4021. This "language 'bespeaks an intent contrary to, and not supportive of, retroactive application.'" Johnson v. Roselle EZ Quick LLC, 226 N.J. 370, 389 (2016) (quoting Cruz v. Cent. Jersey Landscaping, Inc., 195 N.J. 33, 48-49 (2008)) (alteration omitted). That is, this language means that "newly enacted provisions 'will apply to claims that arise immediately after the effective date of the amendment to the Act.'" Ibid. Relator's assertion that this language means that "the [AG] should be able to utilize the new mechanism immediately," see Rb2, misses the point: the AG can use the new mechanism immediately, just not retroactively on claims that were already filed. Any

interpretation to the contrary ignores this Court's longstanding interpretation of that language.

Nor did the Legislature express, either implicitly or explicitly, the contrary intent that the amendment be applied retroactively. The 2023 amendment is not "necessary to make the statute workable or to give it the most sensible interpretation," Maia, 257 N.J. at 351 (cleaned up); rather, the NJFCA and the federal FCA's public disclosure bar were completely "workable" for more than a decade before the amendments. Since the NJFCA's enactment in 2008, defendants have had a right to assert the public disclosure bar defense in a relator-litigated action, but no right to assert that defense in an action litigated by the AG. It was only in 2023 that the Legislature retooled the statute to allow the AG to block the defense in a relator-led action without intervening and bearing the costs of prosecution.[5] Indeed, Relator brought suit and litigated under the pre-amendment NJFCA, never arguing it was somehow "unworkable."

Relator makes much of the fact that the 2023 amendment does not provide that it "would take effect at a later date." Rb15. This, however, is unsurprising because the Legislature chose other commonly used language ("take effect immediately") that this Court has consistently interpreted to signal prospective

[5] The federal FCA worked the same way until its amendment in 2010. See U.S. ex rel. Conroy v. Select Med. Corp., 211 F. Supp. 3d 1132, 1141-42, 1150 (S.D. Ind. 2016).

application. At most, Relator's citations show that the Legislature can express its intent for prospective-only application in multiple ways, e.g., by specifying a particular effective date or by generally specifying that an amendment shall "take effect immediately." See Christie v. Jeney, 167 N.J. 509, 513 (2001) (amendment specifying both that it "shall take effect immediately" and that it "shall apply to causes of action which occur on or after the effective date").[6]

Relator's argument would turn on its head the usual presumption against retroactive legislation. See Ardan, 231 N.J. at 609-10. If the absence of the phrase "take effect at a later date" means that legislation applies retroactively, as Relator insists, then all legislation would be rendered retroactive, unless the Legislature says differently. See Rb15. That, of course, is the precise opposite

[6] For example, the Legislature may use more specific language to provide an administrative agency "time to 'take any anticipatory administrative action in advance of'" the effective date of an act. See State v. Scudieri, 469 N.J. Super. 507, 522 (App. Div. 2021) (citation omitted). Here, the Legislature did not need to specify a particular effective date because the 2023 amendment, unlike the legislation in Scudieri, does not make specific provision for "anticipatory administrative action." See ibid. Similarly, as Relator's own cited case explains, the Legislature may also use specific language where it intends for only *some* provisions of an amendment to apply retroactively. See R.A. v. W. Essex Reg'l Sch. Dist. Bd. of Educ., 2021 WL 3854203, at *12 (App. Div. Aug. 30, 2021) (Legislature carefully "parsed through the legislation" to make "detailed and precise legislative determinations as to which provisions are retroactive" and which are not). The Legislature's decision not to make similar careful determinations here—opting instead to use the general "take effect immediately" language—can only be "interpreted . . . as a determination retroactivity was not intended" for the entirety of the amendment. Ibid.

of the strong presumption in favor of prospective application that New Jersey applies. See, e.g., Ardan, 231 N.J. at 609-10; Scudieri, 469 N.J. Super. at 515 (holding that "the common law exceptions to the presumption of prospective application do not apply").[7]

Relator argues that prospective-only application of the 2023 amendment would preclude the AG from exercising its new power to block the public-disclosure-bar defense in relator-litigated in all cases filed before June 2023. Rb17-18. But this does not warrant or justify ignoring the plain language of the amendment or deviating from the default presumption of prospective-only application. It is simply how prospective-only application works. And even if this approach were somehow unwise, policy arguments are—as this Court has often recognized—"better addressed to the Legislature." See, e.g., Velez v. City of Jersey City, 180 N.J. 284, 296 (2004).

In any event, even as a matter of policy, the result Relator decries is not "nonsensical" or unforeseeable. See Rb18. As discussed above, the NJFCA did not contain the new provision between 2008 and 2023. Had the Legislature

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[7] Regardless, there is no need to rely on this presumption here because, at most, "a statute's express grant of prospectivity renders unnecessary an analysis of the exceptions" to the presumption against retroactive application. Scudieri, 469 N.J. Super. at 522-23 (refusing to "consider whether any of the exceptions [to the presumption against retroactivity], such as whether the amended [] statute is ameliorative or curative, apply").

thought prospective-only application would hinder the effectiveness of the amendment, it easily could have specified that a departure from the presumption of prospective application was warranted, rendering the amendment applicable retroactively—but it did not. See Annex 28 (Op. at 25); see also, e.g., Johnson, 226 N.J. at 389-90 ("[H]ad the Legislature intended an earlier date for the law to take effect, that intention could have been made plain in the very section directing when the law would become effective." (quoting James, 216 N.J. at 568)). And again, it is simply not the case, as Relator suggests, that the Appellate Division's holding would limit the AG's authority to prosecute NJFCA actions. See Rb17. As was always the case, the AG can intervene to prosecute an action, in which case the public disclosure bar does not apply.

Finally, Relator's strained interpretation of the Legislature's clear directive for prospective-only application, see Rb15, would bring the NJFCA out of alignment with its federal counterpart, even though the Legislature designed the NJFCA to "track[]" the federal FCA. Brennan ex rel. State v. Lonegan, 454 N.J. Super. 613, 620 (App. Div. 2018); see Health Choice, 478 N.J. Super. at 195 ("The NJFC Act is modeled on the FCA[.]"). Prospective application, rather than being "nonsensical," see Rb18, exactly matches the interpretation of every federal court—including the Third Circuit—that the analogous 2010 amendments to the federal public disclosure bar apply

prospectively only.[8] Under the federal FCA, the 2010 amendments to the public disclosure bar were not retroactive, as the United States Supreme Court has made clear, because the "legislation makes no mention of retroactivity, which would be necessary for its application to pending cases given that it eliminates [a] claimed defense to a qui tam suit." Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson, 559 U.S. 280, 283 n.1 (2010).

The same is true here: by using language this Court has regularly construed to signal prospective application, the Legislature aligned the NJFCA with the federal FCA. Relator's reading would thus frustrate the design of the NJFCA and undermine the "presump[tion] that the New Jersey Legislature was aware of the federal law concerning the prospective application of the [2010 amendments to the federal FCA] and meant to likewise apply the NJFC Act

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[8] E.g., U.S. ex rel. Zizic v. Q2Administrators, LLC, 728 F.3d 228, 232 n.3 (3d Cir. 2013) (public disclosure bar amendment "is not retroactively applicable to pending cases like" plaintiff's asserting 2005 to present federal FCA claims); U.S. ex rel. Poteet v. Bahler Med., Inc., 619 F.3d 104, 107 n.2 (1st Cir. 2010); U.S. ex rel. Hixson v. Health Mgmt. Sys., Inc., 613 F.3d 1186, 1188 n.3 (8th Cir. 2010); U.S. ex rel. Jamison v. McKesson Corp., 649 F.3d 322, 326 n.6 (5th Cir. 2011); U.S. ex rel. Schweizer v. Oce N.V., 677 F.3d 1228, 1231 n.3 (D.C. Cir. 2012); U.S. ex rel. May v. Purdue Pharma L.P., 737 F.3d 908, 914-18 (4th Cir. 2013); U.S. ex rel. Antoon v. Cleveland Clinic Found., 788 F.3d 605, 614-15 (6th Cir. 2015), abrogated on other grounds by U.S. ex rel. Rahimi v. Rite Aid Corp., 3 F.4th 813 (6th Cir. 2021); U.S. ex rel. Saldivar v. Fresenius Med. Care Holdings, Inc., 841 F.3d 927, 933 n.1 (11th Cir. 2016); Bellevue v. Universal Health Servs. of Hartgrove, Inc., 867 F.3d 712, 717-18 (7th Cir. 2017); Prather v. AT&T, Inc., 847 F.3d 1097, 1103 (9th Cir. 2017); Piacentile v. U.S. Oncology, Inc., 2023 WL 2661579, *1 n.1 (2d Cir. Mar. 28, 2023).

amendments prospectively." Health Choice, 478 N.J. Super. at 198-99.

B. The 2023 Amendment May Only Be Applied Prospectively Because It Is Not "Curative."

Even if the intent of the Legislature were somehow unclear, a statutory amendment like this one may be applied retroactively only in the limited circumstance where it is "designed to 'remedy a perceived imperfection in or misapplication of a statute.'" Ardan, 231 N.J. at 611. Such curative amendments must "not alter the act in any substantial way, but merely clarif[y] the legislative intent behind the [previous] act." Ibid. These circumstances are rare because "curative acts are made necessary by inadvertence or error in the original enactment of a statute or in its administration." Ibid. Thus, the presumption against retroactivity is not overcome "merely because an amendment is deemed to improve a statutory scheme." D.C. v. F.R., 286 N.J. Super. 589, 606 (App. Div. 1996) ("If this was all that was required, every amendment would be subject to retroactive application, because presumably each time the Legislature amends a statute its intent is to improve the legislation.").

In Ardan, this Court held that a 2015 amendment to an unemployment benefits statute was "not 'curative,' as that term is used in the retroactivity analysis," because there was "no evidence" that "the prior version of the statute contained an error or ambiguity." Ardan, 231 N.J. at 611-12. Rather, "the amendment was intended to expand the law; it made unemployment benefits

available to [claimants] who were excluded under prior law." Id. at 612. As a result, the amendment "significantly altered [the] statute's reach" and was thus "not within the 'curative exception to the general rule favoring the prospective application of statutes.'" Ibid. (quoting James, 216 N.J. at 572).

The same is true here. The 2023 amendment did not correct "an error or ambiguity" in the previous version of the NJFCA. See id. at 611-12. Rather, as discussed above, since the NJFCA's enactment in 2008, the public disclosure bar could apply in an action litigated by a private relator, but could not apply where the AG had intervened and was prosecuting the case. It was no error that the statute operated this way because the federal FCA worked in precisely the same way when the NJFCA was enacted, as the Legislature is presumed to have known.[9] Nor did the Legislature change this scheme in the thirteen years after Congress amended the federal FCA in 2010.

In fact, the Legislature amended the NJFCA not to rectify any perceived "error" in the prior version, see ibid., but instead at the recommendation of the federal government so the State would qualify for enhanced recovery in Medicaid fraud cases. See Health Choice, 478 N.J. Super. at 197 (legislative history shows that a state may obtain enhanced recovery in Medicaid fraud cases

[9] See supra, n.5; Health Choice, 478 N.J. Super. at 195 ("The NJFC Act is modeled on the FCA.").

only if the federal government finds that the state FCA is "at least as effective" as the federal FCA). And eligibility for a new benefit necessarily augments the statute, rather than cures a "perceived imperfection." See Ardan, 231 N.J. at 611; see also Annex 28 (Op. at 25).

Thus, contrary to Relator's assertion, the 2023 amendment is not merely "procedural in nature" or "no more than a change in the 'course of practice or procedure for the enforcement of a right.'" Rb16, 17 (citing N.J.S.A. 1:1-14). The 2023 amendment instead "expand[ed]" and "significantly altered [the] statute's reach." Ardan, 231 N.J. at 612. The new provision allows the State to block dismissal of a relator-litigated case even when defendants have a valid public-disclosure-bar defense—a defense that would have ended such a case under the pre-2023 version of the NJFCA. The 2023 amendment thus empowers private relators to litigate actions that would have been dismissed pre-amendment, unless the AG intervened, in which case the relator would lose all control of the case. See U.S. ex rel. Polansky v. Exec. Health Res., Inc., 599 U.S. 419, 425 (2023) (if the government "elects to intervene, the relator loses control" over the action because it "'shall be conducted by the Government'"); accord N.J.S.A. 2A:32C-5(g)(1), 2A:32C-6(a), (f).

Nor is the question of who litigates a case, as between a private relator and the State, some mere formality: It is an extremely significant feature of this

kind of litigation, with enormous consequences for not only whether a case is brought in the first place,[10] but also whether a case can proceed, see N.J.S.A. 2A:32C-6(b) (allowing the AG to dismiss a case over a relator's objection), N.J.S.A. 2A:32C-9(c), when a case can be settled, see N.J.S.A. 2A:32C-6(c), and how much of any recovery goes to the State.[11] See New Jersey State Bar Ass'n v. State, 387 N.J. Super. 24, 48 (App. Div. 2006) (a substantive rule is one that "can determine in and of itself the outcome of the proceeding"). As the U.S. Supreme Court has stated, extending "an FCA cause of action to private parties in circumstances where the action was previously foreclosed is not insignificant" because "qui tam relators are different in kind than the Government … [and] motivated primarily by prospects of monetary reward rather than the public good." Hughes Aircraft Co. v. U.S. State. ex rel. Schumer, 520 U.S. 939, 949 (1997). In short, the amendment changes the delicate balance

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[10] Between 2010 and 2019, the Attorney General filed only nine cases of its own, a likely reflection of the high costs involved. Attorney General's Report to the Legislature, https://www.falseclaimsact.com/wp-content/uploads/2021/09/2010-2019-NJ-AG-Report-on-FCA.pdf; see also United States v. Land, Winston Cnty., 221 F.3d 1194, 1198 (11th Cir. 2000) ("[T]he qui tam provisions of the FCA provide incentive to government whistleblowers . . . to come forward, helping to relieve the government of expensive investigations and litigation." (cleaned up)).

[11] In a relator-led action, the relator recovers between 25 to 30 percent of the proceeds, see N.J.S.A. 2A:32C-7(d), whereas in an action in which the AG intervenes, the relator may recover only 15 to 25 percent, see N.J.S.A. 2A:32C-7(a). Post-amendment, relators not only retain authority to litigate cases that would otherwise be dismissed but also retain a greater share of the recovery.

embodied in the NJFCA, as in the federal FCA, "to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior." U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 651 (D.C. Cir. 1994).[12]

The amendment also works an additional substantive change in cases like this one where the AG initially declines to intervene. Under the pre-2023 version of the NJFCA, the AG, having initially declined to intervene in this case, would have needed to show "good cause" to later intervene, meaning that the public disclosure defense could not apply. N.J.S.A. 2A:32C-6(f); Ja4017. By allowing the AG to simply submit a notice of opposition to the defense, see N.J.S.A. 2A:32C-9(c); Ja4019-23, the amendment excuses the AG from the substantive requirement to establish "good cause" for intervention after an initial declination. This bolsters the presumption against retroactivity because relief from the "good cause" requirement "change[s] the rights [and] responsibilities" of the AG in NJFCA cases. See Maia, 257 N.J. at 348. And, contrary to Relator's

[12] In enacting the public disclosure bar, "Congress sought a middle-ground between a restrictive approach that essentially eliminated the [federal] FCA's relator provisions and a free-for-all of parasitic suits based on publicly available information." U.S. ex rel. Atkinson v. PA Shipbuilding Co., 473 F.3d 506, 518 n.20 (3d Cir. 2007); see also U.S. ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC, 812 F.3d 294, 297-98 (3d Cir. 2016) (tracing history of the federal FCA's public disclosure bar). The 2023 amendment to the NJFCA, like its 2010 federal counterpart, shifts this "middle[ ]ground," see Atkinson, 473 F.3d at 518 n.20, by expanding the AG's authority in a manner that grants greater control to relators and by relieving the AG of the expense and burden of intervening in and prosecuting cases based on publicly disclosed information.

repeated assertions, divestment of the public disclosure bar defense in this case is not a result that the AG necessarily "could always have achieved." Rb2, 16. Eliminating the "good cause" requirement for intervention eliminates the possibility that the AG might not have been able to establish "a legally sufficient reason" for intervention. See Polansky, 599 U.S. at 429 n.2 (Third Circuit's standard for "good cause"). The 2023 amendment is thus the type of substantive amendment that cannot be applied retroactively. See Ardan, 231 N.J. at 611-12.

To argue that the amendment is merely procedural, Relator attempts to portray the public disclosure bar as a mechanism to protect solely the State from "parasitic actions." See Rb1, 10. But Relator ignores that the public disclosure bar unequivocally protects defendants too, in addition to the State, the courts, and potential witnesses. Relator's argument that the "Attorney General's opposition to" the public disclose bar "is itself an expression that the State does not view Plaintiff's action as parasitic," thus ignores the fact that, in a qui tam action, the State's rights are not the only ones at stake. Rb11. Indeed, reflecting the substantive importance of the defendant's ability to assert the public disclosure bar, Relator consistently refers to it as an "affirmative defense," Rb1, 3, 12, 13, 20, 25, 50. If applied retroactively, the new provision would deprive Defendants of the right to assert this defense in this case entirely. And under both New Jersey and federal law, this elimination of a defense further bolsters

the presumption against retroactivity because substantive amendments "create new damages, change the rights, responsibilities, claims, and defenses that parties can assert, or implicate new legal burdens." See Maia, 257 N.J. at 348 (emphasis added); accord U.S. ex rel. Judd v. Quest Diagnostics Inc., 638 F. App'x 162, 165 (3d Cir. 2015) ("This presumption against retroactivity is even stronger where an amendment eliminates a defense to a qui tam suit.").

This is exactly how the U.S. Supreme Court interpreted the federal FCA: "The [2010 amendments to the federal FCA] make[] no mention of retroactivity, which would be necessary for its application to pending cases given that it eliminates [a] claimed defense to a qui tam suit." Wilson, 559 U.S. at 283 n.1. This is because an "amendment [that] eliminates a defense to a qui tam suit . . . changes the substance of the existing cause of action for qui tam defendants by 'attach[ing] a new disability, in respect to transactions or considerations already past.'" Hughes Aircraft Co., 520 U.S. at 948. Relator thus ignores U.S. Supreme Court precedent when suggesting that retroactivity concerns are implicated only when a statute attaches new legal consequences to past conduct. See Rb19, 21. The elimination of a defense is equally substantive. See Maia, 257 N.J. at 348.

Relator admits as much when it describes the 2023 amendments as "further strengthen[ing]" the NJFCA. Rb5. By Relator's own telling, the 2023 amendments "strengthen[] the Attorney General's authority to pursue remedies

through alternative means" or "make civil investigative demands," Rb9, which show that the amendments were not merely procedural, and certainly did not seek to cure a "perceived imperfection" in the NJFCA. See Ardan, 231 N.J. at 611. These new powers granted to the AG through the 2023 amendments demonstrate that the Legislature "expanded" the NJFCA. Id. at 612.

Nor is Relator correct that retroactive application is warranted because the 2023 amendment, unlike the 2010 amendments to the federal FCA, did not change the public disclosure bar from a jurisdictional question into an affirmative defense. See Rb22. This distinction ignores the U.S. Supreme Court's reasoning. In holding that the 2010 amendments to the federal FCA were not retroactive, the Supreme Court did not rest its conclusion on this aspect of the 2010 federal FCA amendments. Rather, it focused on the practical effect of eliminating a defense in relator-litigated cases. See Wilson, 559 U.S. at 283 n.1. Relator's own cited case, which tellingly held that the 2010 amendments are not retroactive, recognizes as much. See Rb22; Prather, 847 F.3d at 1103 ("[T]he Supreme Court did not differentiate between substantive and jurisdictional provisions."). Because the 2023 amendment would indisputably eliminate a defense, retroactive application is improper.

C. The Expectations Of The Parties Clearly Favor Prospective Application.

The final retroactivity scenario—whether "the parties' expectations

warrant retroactive application"—clearly favors prospective application only. Maia, 257 N.J. at 350. As this Court has stated, the "expectation of retroactive application should be strongly apparent to the parties in order to override the lack of any explicit or implicit expression of intent for retroactive application." James, 216 N.J. at 573. No such "expectation" was "strongly apparent" to the parties here. See ibid. Rather, the parties' "evidence and briefing submitted to the trial court . . . indicated that all parties expected the issues in this appeal to be governed by the prior version of" the NJFCA. Pisack v. B & C Towing, Inc., 240 N.J. 360, 373 (2020). Indeed, the entire history of this case, which included multiple rounds of briefing on the public disclosure bar as well as depositions and third-party discovery, demonstrates beyond any doubt that neither party anticipated that the AG could block assertion of the public disclosure bar defense in this relator-litigated action. The parties' expectations were, quite obviously, set by the legislative regime before the amendment. Fairness dictates, as this Court's jurisprudence makes clear, respect for those expectations. See Gibbons v. Gibbons, 86 N.J. 515, 522 (1981).

D. The 2023 Amendment Does Not Apply In This Case At All

Because the 2023 amendment does not apply retroactively to allegedly fraudulent claims submitted before June 2023, the amendment also cannot apply to allegedly false claims submitted after June 2023. This is because where

alleged misconduct continues after an amendment date (as Relator alleges), federal courts, including the Third Circuit, have held that the anti-retroactivity rule requires courts to apply the pre-amendment version of the statute to the entire continuous course of conduct.[13] See Zizic, 728 F.3d at 232, 234 nn.3-4 (applying only the pre-amendment public disclosure bar to an action alleging conduct both pre- and post-dating the 2010 federal amendment); Cause of Action v. Chi. Transit Auth., 815 F.3d 267, 278 n.14 (7th Cir. 2016) (same); Bellevue, 867 F.3d at 717-18 (noting that Cause of Action applied the pre-amendment public disclosure bar "where the contested conduct spanned both pre- and post-amendment time periods"). This rule makes sense where there is a continuous course of conduct, since the government was already on notice of the alleged fraud under the pre-amendment scheme, and it also avoids the unnecessary complexity and substantial burdens on the courts and the parties that would result from litigating one course of conduct under two different standards. See Cause of Action, 815 F.3d at 278 n.14. Because Relator's allegations of fraud begin well before 2023, the pre-amendment version of the

[13] Relator's assertion that there is "unrebutted evidence" that Defendants submitted claims after June 2023, see Rb11, 23, is irrelevant to whether the NJFCA applies retroactively to claims submitted before June 2023. In any event, post-2023, only 18 VRDOs "remain in the market, with weekly rate resets continuing to occur," as Relator admits. Jra18.

NJFCA applies to all of the claims at issue in this case.[14]

III. The Public Disclosure Bar Precludes Relator's Suit In Its Entirety.

The Court should also affirm the Appellate Division's holding that the public disclosure bar precludes Relator's suit. The Appellate Division appropriately recognized that all of the facts underlying the public disclosure bar are undisputed. And, in any event, the purported factual disputes that Relator points to are legally irrelevant. See Annex 36 (Op. at 33). The Court should apply the public disclosure bar to fulfill its purpose of preventing an "opportunistic relator[]—with nothing new to contribute—[from] exploit[ing] the [NJ]FCA's qui tam provisions for [his] personal benefit." U.S. ex rel. Bibby v. Mortg. Invs. Corp., 987 F.3d 1340, 1353 (11th Cir. 2021).

A. The Public Disclosure Bar Was Designed To Eliminate Suits Premised On Publicly Disclosed Information.

Under the NJFCA's public disclosure bar, "[r]elators lack standing to bring claims . . . when the claims are based on allegations or transactions that have already been publicly disclosed and the relators were not the original source of the information." Health Choice, 478 N.J. Super. at 194; see N.J.S.A.

[14] Relator mischaracterizes the Appellate Division's holding when it says that it "went so far as to hold that the amendments could not apply even prospectively." Rb13. The Appellate Division did no such thing. The court simply applied settled law by looking at a continuous course of conduct that began before 2023.

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2A:32C-9(c).[15] The "mandatory" bar exists "to avoid 'parasitic lawsuits' based on publicly disclosed information." Health Choice, 478 N.J. Super. at 194, 196; see N.J.S.A. 2A:32C-9(c); accord 31 U.S.C. § 3730(e)(4).

The public disclosure bar is a "formidable hurdle" for a relator, Majestic Blue Fisheries, 812 F.3d at 298, because it weeds out "self-serving opportunists, who do not possess their own insider information," Glaser v. Wound Care Consultants, Inc., 570 F.3d 907, 915 (7th Cir. 2009). The legislative scheme, in other words, focuses only on "insider[s]" who can reveal fraud on the government without publicly disclosed information. See ibid.; see also U.S. ex rel. Paranich v. Sorgnard, 396 F.3d 326, 332 (3d Cir. 2005) ("The [public disclosure bar] was 'designed to preclude qui tam suits based on information that would have been equally available to strangers to the fraud[ulent] transaction had they chosen to look for it.'").

In a relator-led action under the NJFCA, a defendant can invoke the public disclosure bar defense "when (1) there has been a prior public disclosure of the alleged fraud" in a statutorily enumerated channel; and (2) "the person's lawsuit

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[15] Because the 2023 amendment to the NJFCA is not retroactive, supra Section II, the pre-2023 version of the public disclosure bar applies. See Health Choice, 478 N.J. Super. at 197, 198-99 (applying the NJFCA's pre-2023 definition of "original source" in a case filed in 2019, before the June 2023 amendments took effect). Accordingly, all citations to the public disclosure bar below are to the pre-2023 version of the NJFCA. See Ja4014-23. Relator concedes that the pre-2023 definition of original source applies in this case. Rb46 n.4.

is based upon 'substantially the same allegations or transactions'" that were publicly disclosed; "unless (3) the person is an original source of the information." Health Choice, 478 N.J. Super. at 199; see N.J.S.A. 2A:32C-9(c).

Applying these principles to facts identical to this case, the MA SJC held in 2021 that the Massachusetts False Claims Act's (MFCA) public disclosure bar entirely precluded a virtually identical suit by this same Relator. Rosenberg v. JPMorgan Chase & Co., 487 Mass. 403, 404 (2021). In so holding, the court observed that Relator's "complaint rested on information that already had been exposed to the light of day." Ibid. The Court should reach the same result here.[16]

B. The Transactions Underlying Relator's Allegations Were Publicly Disclosed.

A qualifying public disclosure under the NJFCA may constitute either (1) a direct allegation of fraud or (2) a transaction from which readers or listeners may infer fraud. See Majestic Blue Fisheries, 812 F.3d at 303; see also U.S. ex rel. Winkelman v. CVS Caremark Corp., 827 F.3d 201, 209 (1st Cir. 2016) (no requirement to use "magic words or specifically label disclosed conduct as fraudulent"). Because the first prong is not at issue here, the following discussion analyzes public disclosure under the second prong.

[16] The MFCA's public disclosure bar is substantially the same as the NJFCA's bar as it existed before the 2023 amendment. Compare Mass. Gen. Laws ch. 12, § 5G(c), with N.J.S.A. 2A:32C-9(c).

Under that prong, a "transaction warranting an inference of fraud is one that is composed of a misrepresented state of facts plus the actual state of facts." Majestic Blue Fisheries, 812 F.3d at 303 (quoting Zizic, 728 F.3d at 235-36). Courts represent this with the formula first set out in Springfield Terminal: "X (misrepresented state of facts) + Y (true state of facts) = Z (fraud)." See ibid.; Springfield Terminal, 14 F.3d at 654. Thus, to prevail under the public disclosure bar, a defendant need only "show that substantially the same . . . 'transaction[]' of fraud (X + Y) was publicly disclosed through the sources enumerated" in the NJFCA. Majestic Blue Fisheries, 812 F.3d at 303.

Here, there is no dispute about the underlying facts establishing that both components of Relator's alleged fraudulent scheme—the "X" and the "Y"—were publicly disclosed before Relator filed suit. See Rosenberg, 487 Mass. at 410-13. Therefore, the public disclosure bar applies, as discussed below.

1. The Allegedly "Misrepresented State of Facts" Were Publicly Disclosed.

First, there is no dispute that the allegedly "misrepresented state of facts"—the "X"—were Defendants' "representations that they would comply with their obligations as remarketing agents, as set forth in their agreements" with the State. Rosenberg, 487 Mass. at 411 (collecting cases). These representations "are set forth in several publicly available sources, including . . . MSRB rules that address remarketing agents' duties to VRDO issuers; Securities

Industry Financial Markets Association (SIFMA) model disclosures; and the remarketing agreements, including remarketing circulars and official statements." Ibid.; see also Ja18-19. The official statements and remarketing agreements were available on EMMA well before Relator filed suit, see Ja4272, 4288-91, and there is no dispute that EMMA is free and publicly available.[17] Without paying or even creating an account, any member of the public was (and is) able to access EMMA's database to view the agreements setting out Defendants' obligations to issuers.[18] Therefore, the allegedly "misrepresented state of facts" was publicly disclosed.

2. The "True State Of Facts" Was Publicly Disclosed.

The second component of Relator's alleged fraudulent scheme—the VRDO rate data underlying Relator's analysis, i.e., the "Y" in the Springfield Terminal formula—was also publicly disclosed, as the undisputed facts including Relator's own admissions and allegations show. Relator alleges that its analysis of VRDO rate data reveals that Defendants failed to properly reset rates on New Jersey VRDOs.[19] In so alleging, Relator admits that it used raw

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[17] See Ja4272-73; Ja2098-100, Ja2103-04.

[18] Ja4272, 4288-91. Relator does not dispute that EMMA is free and publicly available. See supra, n.17. Rather, Relator argues, incorrectly, that EMMA is not "news media." Rb32-41. However, as discussed below, see infra, Section III.C, EMMA is "news media" under the NJFCA, as it is under the MFCA and the federal FCA.

[19] See Ja1984, Ja1989, Ja1991, Ja1996-98; Ja9, Ja15-16, Ja62, Ja90, Ja93.

data from MSRB SHORT to conduct its analysis. See Ja2173. It is also undisputed that the same rate data was posted for free on EMMA and was available to Bloomberg subscribers.[20] See Rosenberg, 487 Mass. at 412 ("[R]elator used the same data as that disclosed on the EMMA website to conclude that the defendants were not setting the lowest interest rates on the VRDOs."). That is the end of the inquiry. Relator's assertion that "Defendants never pointed to any actual disclosure of the VRDO rate data," Rb27, is belied by the fact that Relator accessed and used this very VRDO rate data to bring its cases. As a member of the public who obtained the data through a subscription service available to anyone, Relator concedes that all relevant VRDO transactional data—including information specifying the VRDO and issuer, the remarketing agent, and the interest rate for that week—was publicly disclosed by MSRB SHORT.[21] Such disclosure is all the case law requires to trigger application of the bar.

This also holds true in cases where an inference of fraud requires reviewing and analyzing publicly available "raw" data.[22] Here, the only relevant

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[20] See Ja1559-62; Ja2098-100, Ja2103-05, Ja2108-10; Ja4272-73; Ja3896; Ja1548-49 (MSRB R. G-34(c)(ii)(A)(1)-(2)).

[21] See Ja2099-2105, Ja2173; Ja4275-81.

[22] See U.S. ex rel. Doe v. Staples, Inc., 932 F. Supp. 2d 34, 40 (D.D.C. 2013) (shipping-manifest database), aff'd, 773 F.3d 83 (D.C. Cir. 2014); U.S. ex rel. Repko v. Guthrie Clinic, P.C., 2011 WL 3875987, at *8 (M.D. Pa. Sept. 1, 2011) (databases of non-profits, financial data and analysis websites, including

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inquiry is whether "all the material elements of fraud are publicly available," even if they are "not readily comprehensible to nonexperts" and are disclosed in an obscure source "not accessible to most people." Springfield Terminal, 14 F.3d at 655. Thus, Relator's arguments that its analysis of VRDO data was sophisticated, burdensome, and costly, see Rb3, 26-30, are irrelevant to the legal question of whether the data was publicly available. As a result, that Relator purports to have a patent on his analytical method is irrelevant. See Rb44. And Relator's assertion that his methodology was the only way to discover the alleged fraud, see Rb6, is both irrelevant and inaccurate because it ignores the reality that his methodology simply analyzes publicly available rate data. Accordingly, "neither the need to perform analysis on the publicly available information nor the benefit of [Relator's] expertise renders the true state of affairs hidden." Rosenberg, 487 Mass. at 412.[23]

Bloomberg Professional), aff'd, 490 F. App'x 502 (3d Cir. 2012); U.S. ex rel. Beck v. St. Joseph Health Sys., 2021 WL 7084164, at *3 (N.D. Tex. Nov. 30, 2021) (Centers for Medicare & Medicaid Services Medicare Provider Utilization and Payment Data); U.S. ex rel. Atkinson v. Penn. Shipbuilding Co., 255 F. Supp. 2d 351, 388-89 (E.D.Pa. 2002) ("[R]elator's argument that his knowledge was not generally attainable, as is that of an engineer or a cryptographer, is irrelevant."), aff'd in relevant part, 473 F.3d 506 (3d Cir. 2007), abrogated on other grounds by 559 U.S. 280.

[23] What's more, the MA SJC came to this conclusion without the need for discovery. See Rb7. Because the sophistication or complexity of Relator's analysis is legally irrelevant, and discovery failed to adduce any legally relevant material fact, the "record created here" does not change the fact that the rate data was publicly disclosed. See ibid.

Rather, so long as the information is posted and available to those who are interested, it is publicly available within the meaning of the NJFCA, regardless of whether the government or any member of the public is likely to make the inference at issue. See U.S. ex rel. Solomon v. Lockheed Martin Corp., 878 F.3d 139, 146 (5th Cir. 2017) ("We are not concerned however, with the overall probability of someone inferring fraudulent activity from the public disclosures. The focus is on whether they could have made the inference."); U.S. ex rel. Oliver v. Philip Morris USA Inc., 826 F.3d 466, 475 (D.C. Cir. 2016) (rejecting relator's argument that "public disclosure should turn on whether the documents are reasonably likely to be discovered" and instead looking only to whether the information "was in fact actually available."). As discussed above, there is no dispute that both Defendants' contractual representations to issuers (the "X") and the rate data underlying Relator's analysis (the "Y") were publicly disclosed and available on EMMA, Bloomberg, and MSRB SHORT. These sources are neither niche nor obscure, as they are regularly accessed by industry participants and can be accessed by any member of the public.[24] Therefore, contrary to Relator's assertion, both components of Relator's alleged fraudulent scheme were "actually available" on these sources, see Oliver, 826 F.3d at 475, so the

[24] See Ja2098-99, Ja2103-04, Ja2106-07, Ja2108-09; Ja4301-02; Ja4199-200.

public disclosure bar applies.[25]

Relator has also argued that its action is not "based upon" the publicly disclosed transactions because it had to "comb through myriad transactions" to identify alleged fraud. In re Nat. Gas Royalties, 562 F.3d 1032, 1042 (10th Cir. 2009); see Rb41-42. But Natural Gas Royalties, and Relator's other cited cases, all dealt with an entirely different situation in which publicly disclosed allegations, not publicly available data about transactions, suggested industry-wide fraudulent conduct, but did not tie the fraud to any particular defendant. See 562 F.3d at 1042.[26]

Here, there is no dispute that EMMA, Bloomberg, and MSRB SHORT each directly and publicly tie every VRDO and every single rate to a particular Defendant remarketing agent. See Ja2099-102, Ja2104-05, Ja2109-10. Indeed, Relator does not contend that its analysis of the MSRB SHORT data leaves any

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[25] Accordingly, this case is distinguishable from those where only one of the components of fraud were publicly disclosed. See, e.g., United States v. Janssen Biotech, Inc., 576 F. Supp. 3d 212, 227 (D.N.J. 2021); U.S. ex rel. Shea v. Verizon Commc'ns, Inc., 160 F. Supp. 3d 16, 26 (D.D.C. 2015).

[26] See also Cooper v. Blue Cross & Blue Shield of Fla., Inc., 19 F.3d 562, 566-67 (11th Cir. 1994); United States v. CSL Behring, LLC, 855 F.3d 935, 944-46 (8th Cir. 2017); United States v. Sodexho, Inc., 2009 WL 579380, at *11 (E.D. Pa. Mar. 6, 2009). Other cases cited by Relator are likewise inapt and do not even refer to generalized allegations of fraud. United States v. Omnicare, Inc., 903 F.3d 78, 92 (3d Cir. 2018) ("non-public contract information" necessary to infer fraud). Moreover, neither Natural Gas Royalties nor any of the other cases Relator cites address what Relator purports is the case here: public data sets that allegedly revealed fraud upon analysis by a sophisticated relator.

doubt about who the Defendants are in this action. Thus, Natural Gas Royalties and its progeny do not apply here.

C. The Transactions Underlying Relator's Complaint Were Publicly Disclosed By The "News Media."

Next, the public disclosure bar applies if the disclosure came from at least one statutorily enumerated channel. See Majestic Blue Fisheries, 812 F.3d at 301; N.J.S.A. 2A:32C-9(c). That is, a relator's suit must be dismissed when its case is based on transactions that were "publicly disclosed" (1) "in a criminal, civil, or administrative hearing"; (2) "in an investigation, report, hearing or audit conducted by or at the request of the Legislature"; or (3) "by the news media." N.J.S.A. 2A:32C-9(c). Disclosure in any one of these channels is sufficient to trigger the bar. See Ibid.

Here, both components of Relator's alleged fraud—Defendant's contractual representations and the VRDO rate data—were collectively disclosed in three "news media" sources, though Defendants need only show that one "news media" source disclosed the components. See N.J.S.A. 2A:32C-9(c). EMMA, Bloomberg, and MSRB SHORT each qualify as "news media" under the NJFCA. "News media" is a term that has a "broad sweep," Schindler Elevator Corp. v. U.S. ex rel. Kirk, 563 U.S. 401, 408 (2011), because it includes any source whose aim is to distribute information to the public, no matter how small the audience or whether it resembles a traditional news organization. See

U.S. ex rel. Osheroff v. Humana, Inc., 776 F.3d 805, 813 (11th Cir. 2015) (collecting cases holding that information-distributing websites are news media). Federal courts unequivocally hold that "the term includes publicly available websites" that are "intended to disseminate information." Ibid.; see U.S. ex rel. Green v. Serv. Cont. Educ. & Training Tr. Fund, 843 F. Supp. 2d 20, 32 (D.D.C. 2012) ("[C]ourts that have considered the issue have construed the term [news media] to include readily accessible websites.").[27]

[27] Numerous other cases reach this same result. See, e.g., U.S. ex rel. Jacobs v. JP Morgan Chase Bank, N.A., 2022 WL 573663, at *5 (S.D. Fla. Feb. 25, 2022) ("three publicly available articles on online blogs"), aff'd, 113 F.4th 1294 (11th Cir. 2024); U.S. ex rel. Oliver v. Philip Morris USA, Inc., 101 F. Supp. 3d 111, 125 (D.D.C. 2015) (publicly available and searchable websites designed "to give the public an accurate account of those entities' contracting requirements"), aff'd, 826 F.3d 466; Beck, 2021 WL 7084164, at *3 (Wall Street Journal's searchable database); U.S. ex rel. Cherwenka v. Fastenal Co.,2018 WL 2069026, at *7 (D. Minn. May 3, 2018) (details of a business relationship disclosed on the defendant's website and on the Small Business Administration's Website); U.S. ex rel. Hong v. Newport Sensors, Inc., 2016 WL 8929246, at *4-5 (C.D. Cal. May 19, 2016) (variety of sources including Small Business Innovation Research searchable database and faculty profile on UC Irvine and Columbia University websites); U.S. ex rel. Freedom Unlimited, Inc. v. City of Pittsburgh, 2016 WL 1255294 at *16-17 (W.D. Pa. Mar. 31, 2016) (city reports submitted to Housing and Urban Development and made available to the public on the City's website), vacated on other grounds, 728 F. App'x 101, 104-05 (3d Cir. 2018); Shea, 160 F. Supp. 3d at 25-26 (various websites including online Verizon Federal Contract User Guide, Department of Defense website, and online Verizon GSA Schedule Program), aff'd sub nom. U.S. ex rel. Shea v. Cellco P'ship, 863 F.3d 923 (D.C. Cir. 2017); Repko, 2011 WL 3875987, at *7-8 (databases of non-profits, financial data, and analysis websites, including Bloomberg Professional); Staples, 932 F. Supp. 2d at 40 (shipping-manifest database), aff'd 773 F.3d 83; U.S. ex rel. Carter v. Bridgepoint Educ., Inc., 2015 WL 4892259, at *6 n.4 (S.D. Cal. Aug. 17, 2015) ("Over Relators' objections,

"[T]he key question is whether a website is 'publicly available' and 'intended to disseminate information' to the public." U.S. ex rel. Jacobs v. JP Morgan Chase Bank, N.A., 113 F.4th 1294, 1301 (11th Cir. 2024); see also Rosenberg, 487 Mass. at 416 ("'[N]ews media' is broad enough to encompass the many ways in which people in the modern world obtain financial news, including from publicly available websites on the Internet."); Rb32.

Here, EMMA, Bloomberg, and MSRB SHORT each satisfy both requirements. Just like traditional "news media" outlets, these sources are designed to collect information and distribute it to the public. And publishing the components of alleged fraud on any one of these three sources (or any other source of public information) is sufficient to render them publicly disclosed.

EMMA. "EMMA is much like traditional news sources that report market data," Rosenberg, 487 Mass. at 417, and has been accessed by over 16 million users since 2013.[28] Ja2099. As the "official repository for information on all

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the Court finds that the online comment made on May 14, 2010 qualifies as a public disclosure as news media."); U.S. ex rel. Unite Here v. Cintas Corp., 2007 WL 4557788, at *14 (N.D. Cal. Dec. 21, 2007) ("The 'fact' of the contracts between Cintas and the federal government was publicly disclosed in the news media, as that information was available on the Internet."), abrogated on other grounds by 563 U.S. 401; see also U.S. ex rel. Berkley v. Ocean State, LLC, 2023 WL 3203641, at *3-4 (D.R.I. May 2, 2023) (rejecting "multilayered analysis of what constitutes 'news media'" and holding "that there is no requirement that the website must curate the information or exercise editorial judgment" to be considered "news media").

[28] See also EMMA, Overview, https://emma.msrb.org/AboutEmma/Overview.

municipal bonds," it "provides updates to bond market information by means of the Internet" and "is publicly available and widely disseminated." Ibid. (cleaned up); see Jacobs, 113 F.4th at 1301.

Bloomberg. Like EMMA, Bloomberg's Municipal Securities Master Database "is available to any person or entity that purchases a subscription to Bloomberg Professional Service (a 'Terminal Subscription')" and "is a common tool in the municipal securities market" that is used by "issuers, traders, banks, remarketing agents and financial advisors." Ja1559-60; see also Ja2108-09. In every year since 2011, Bloomberg Terminal has had more than 300,000 subscribers. Ja1560; see also Ja2108-09. As a result, other courts have held that the Bloomberg subscription service qualifies as an FCA "news media" source. See Repko, 2011 WL 3875987, at *8, aff'd, 490 F. App'x 502; Commonwealth ex rel. Rosenberg v. JPMorgan Chase & Co., 2019 WL 3643035, at *11 (Mass. Super. July 23, 2019), aff'd sub nom. Rosenberg, 487 Mass. 403.

MSRB SHORT. MSRB SHORT plainly qualifies as "news media" under all the precedents discussed above. MSRB SHORT is designed to provide "market participants [with] the MSRB's market-wide collection of information and documents for . . . municipal Variable Rate Demand Obligations (VRDOs)." Ja2105 (cleaned up). To "provide transparency for issuers, institutions, and the investing public," Ja2097-98 (quotation marks omitted), the MSRB collects and

publishes information concerning municipal securities, including VRDOs, pursuant to mandatory reporting requirements. Ja2098. This information, including disclosure documents, current and historical VRDO interest rates, and the identity of remarketing agents, is posted to the EMMA portal and made available through MSRB SHORT. Ja2099-2102, Ja2104-05. Therefore, all three sources qualify as "news media" because they are "'publicly available' and 'intended to disseminate information' to the public." Jacobs, 113 F.4th at 1301.

Relator does not challenge these undisputed facts but instead makes the erroneous legal argument that "news media" is confined to traditional newspapers and magazines. See Rb33. This argument cannot be squared with the large body of cases holding that "news media" includes sources of technical information and data that target specific audiences.[29] Indeed, under the federal FCA, "news media" includes not just sources providing news articles and

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[29] See, e.g., U.S. ex rel. Kester v. Novartis Pharms. Corp., 43 F. Supp. 3d 332, 346 (S.D.N.Y. 2014) ("The term 'news media' includes not only news articles, but also disclosures directed to 'smaller' or 'professionally specialized' reader bases."), abrogated on other grounds by Universal Health Servs., Inc. v. United States, 579 U.S. 176 (2016); U.S. ex rel. Alcohol Found., Inc. v. Kalmanovitz Charitable Found., Inc., 186 F. Supp. 2d 458, 463 (S.D.N.Y. 2002) (holding that "scientific and scholarly works" that are "too technical" for the average reader are "news media"), aff'd, 53 F. App'x 153 (2d Cir. 2002); Green, 843 F. Supp. 2d at 32-33 (holding that webpage promoting union training that was "'directed to a select audience'" was news media); Staples, 932 F. Supp. 2d at 40 (holding that website that "'compiles manifest information submitted to Customs by all shippers'" qualifies as news media), aff'd, 773 F.3d 83.

commentary, but also data sources like searchable online databases, journals publishing scholarly studies, government websites, a crowd-sourced online encyclopedia, and a union website.[30] The case law is clear that whether a source is "news media" does not depend upon the exercise of editorial judgment or First Amendment expression, contrary to Relator's unsupported assertions. See Berkley, 2023 WL 3203641, at *3-4 ("[T]here is no requirement that the website must curate the information or exercise editorial judgment" to be considered "news media"); Rb36-37, 39. Indeed, the U.S. Supreme Court has recognized that the language of the public disclosure bar "reflect[s] [an] intent to avoid underinclusiveness even at the risk of redundancy." Schindler Elevator, 563 U.S. at 408 (holding that Freedom of Information Act responses were "report[s]" under the public disclosure bar). EMMA, Bloomberg, and MSRB SHORT easily

[30] See U.S. ex rel. Kraxberger v. Kansas City Power and Light Co., 756 F.3d 1075, 1079 (8th Cir. 2014) (state public service commission's "'media center' hosting press releases, webcasts of public meetings, and . . . news and promotions related to public utilities"); U.S. ex rel. Patriarca v. Siemens Healthcare Diagnostics, Inc., 295 F. Supp. 3d 186, 197-202 (E.D.N.Y. 2018) (studies published in scholarly/scientific journals); Staples, 932 F. Supp. 2d at 40 (subscription source of shipping-manifest data), aff'd, 773 F.3d 83; Green, 843 F. Supp. 2d at 32-33 (promotional webpage on union's external website); Repko, 2011 WL 3875987, at *8 (free and subscription online databases concerning information on non-profits and Standard & Poor's website offering "'credit ratings, indices, investment research and risk evaluations and solutions'"), aff'd, 490 F. App'x 502; U.S. ex rel. Brown v. Walt Disney World Co., 2008 WL 2561975, at *4 & n.7 (M.D. Fla. June 24, 2008) (Wikipedia website), aff'd, 361 F. App'x 66 (11th Cir. 2010); Alcohol Found., 186 F. Supp. 2d at 463 (scientific and scholarly articles), aff'd, 53 F. App'x 153.

qualify given their subscriber bases and widespread use in the industry.

Devoid of any argument that the NJFCA defines "news media" narrowly, Relator instead looks far afield to New Jersey's Shield Law, see N.J.S.A. 2A:84A-21; Rb33. The Shield Law protects journalists from being forced to reveal confidential sources or information in certain circumstances, see N.J.S.A. 2A:84A-21, and defines "news media" as "newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public." N.J.S.A. 2A:84A-21a(a). However, Relator ignores that the "Shield Law statute is among the broadest in the nation" because it "provides broad protection to the news media and is not limited to traditional news outlets like newspapers and magazines." Too Much Media, LLC v. Hale, 206 N.J. 209, 216, 228 (2011). That is, the very statute that Relator cites has already been interpreted broadly and in a manner consistent with the federal FCA case law discussed above.[31]

Moreover, the Shield Law and NJFCA are distinct statutes with different purposes. In the context of the NJFCA, "news media" is a term of art borrowed from the federal FCA; it does not come from the Shield Law.[32] See Brennan,

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[31] See supra, nn. 27, 29-30.

[32] Unlike the NJFCA, the Shield Law is a litigation privilege that shields evidence from the fact finder. Thus, even if the definition of "news media" in

454 N.J. Super. at 620; Health Choice, 478 N.J. Super. at 195. Because the NJFCA is modeled on the federal FCA, the Legislature intended to adopt the federal FCA's meaning of news media, not the Shield Law's definition. See Verizon N.J., Inc. v. Borough of Hopewell, 258 N.J. 255, 257 (2024) ("[T]echnical terms, terms of art, and terms with existing legal meanings . . . are understood to have been used [by the Legislature] in accordance with those meanings.").

When amending the NJFCA in 2023, the Legislature adopted a specific set of reforms recommended by the federal government that would make the NJFCA "at least as effective" as the federal FCA. Health Choice, 478 N.J. Super. at 197 (quoting legislative history). Importantly, a change to the definition of "news media" was not among them.[33] Both the federal government, when recommending specific changes to the NJFCA, and the Legislature, when adopting those recommendations, are presumed to be aware of the large body of case law construing "news media" broadly. See Quaremba v. Allan, 67 N.J. 1,

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the Shield Law could be viewed as narrower than the federal FCA's definition, it is because New Jersey construes litigation privileges narrowly. See, e.g., In re Selser, 15 N.J. 393, 405 (1954) (the attorney-client privilege should be strictly construed because it "rests in the suppression of the truth"); Carchidi v. Iavicoli, 412 N.J. Super. 374, 383 (App. Div. 2010) (courts "strictly construe" privileges because they "inhibit[] the search for the truth").

[33] See N.J. State L. Libr., 2A:32C-12.1 et al. Legislative History Checklist (2023), https://repo.njstatelib.org/server/api/core/bitstreams/81eb9b85-3745-4aa4-93a4-9b7a163cce9b/content.

14 (1975) ("In construing a statute it is to be assumed that the Legislature is thoroughly conversant with its own legislation and the judicial construction placed thereon."). In these circumstances, "the failure of the Legislature" to change the definition "is evidence of legislative acquiescence in the construction given to the statute." Green v. Jersey City Bd. of Educ., 177 N.J. 434, 445 (2003). Judicially narrowing the definition would frustrate the Legislature's adoption of the broad definition of "news media." See Quaremba, 67 N.J. at 14 ("[C]ontinued use of the same language or failure to amend the statute[] is evidence that such construction is in accord with the legislative intent.").

Finally, as a matter of law, subscription costs and terms-of-use restrictions do not negate public disclosure in the news media. Nothing in the text of the NJFCA limits "news media" to free outlets, and courts have consistently rejected the argument that subscription fees somehow disqualify a source as "news media" under the federal FCA. See, e.g., Patriarca, 295 F. Supp. 3d at 200 (subscription-cost "argument has no traction"); U.S. ex rel. Customs Fraud Investigations, LLC v. Victaulic Co., 2014 WL 4375638, at *8, *10 (E.D. Pa. Sept. 4, 2014) (rejecting argument that "the Zepol database is not 'news media,' and is not generally available to the public because subscribers pay a substantial fee to access its information"); Staples, 932 F. Supp. 2d at 40 (subscription to access shipping-manifest data is "news media"), aff'd, 773 F.3d 83.

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Courts in the Third Circuit have explicitly held that subscription-based Bloomberg Professional is "news media." See Repko, 2011 WL 3875987, at *7-8, aff'd, 490 F. App'x 502. The same logic applies to MSRB SHORT and EMMA, which makes sense given that even traditional "news media," like the Washington Post and the New York Times, charge a subscription fee.[34] Requiring a qualifying "news media" source to be free would exclude even these traditional "news media" sources from the definition—a plainly incorrect result even under Relator's narrow interpretation.

Indeed, Relator admits neither the cost of MSRB SHORT nor its terms of service prevented Rosenberg—an ordinary member of the public—from analyzing the data and bringing this action. See Ja2173; U.S. ex rel. Mistick PBT v. Hous. Auth., 186 F.3d 376, 383 n.3 (3d Cir. 1999) (noting the distinction between "the statutory concept of 'public disclosure' with the different concept of 'public accessibility.'"). The litany of use restrictions Relator cites, *e.g.*, Rb28-29, 36, does not change the fact that EMMA, Bloomberg, and MSRB SHORT do not impose a "duty of confidentiality with respect to that information." See U.S. ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp., 540 F.3d 1180, 1184-85 (10th Cir. 2008).

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[34] See, e.g., New York Times, https://www.nytimes.com/subscription/all-access; Washington Post, https://subscribe.washingtonpost.com/.

Relator tries to overcome the weight of authority by pointing to several outlier cases, two of which are unpublished trial court decisions, that have concluded that false claims act "news media" sources are limited to traditional news outlets like newspapers, broadcast or cable news, or similar sources.[35] Two applied a legal standard inconsistent with the federal FCA to EMMA (but did not address MSRB SHORT or Bloomberg).[36] No Illinois appellate court has reviewed the trial court ruling that Relator cites. And the California decision was controlled by precedent unique to California "concluding that disclosures in forms available only on the SEC's online public database are not disclosures by the news media no matter how broadly that term is interpreted." Edelweiss Fund, 90 Cal. App. 5th at 1148 (quoting State ex rel. Bartlett v. Miller, 243 Cal. App. 4th 1398, 1414 (2016)). No other court has adopted Bartlett's view, and other courts have explicitly rejected it when considering the precise facts at issue here. See Rosenberg, 487 Mass. at 417 n.23.

D. The Transactions Underlying Relator's Complaint Are "Based Upon" The Publicly Disclosed Rate Data.

Next, the relator's complaint must be "based upon" the publicly disclosed

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[35] See U.S. ex rel. Integra Med Analytics LLC v. Providence Health & Servs., 2019 WL 3282619, at *14-15 (C.D. Cal. July 16, 2019), rev'd on other grounds, 854 F. App'x 840 (9th Cir. 2021); Ja3873-77 (State ex rel. Edelweiss Fund, LLC v. JPMorgan Chase & Co., No. 2017 L 000289 (Ill. Cir. Ct. June 13, 2023)).

[36] See Ja3873-77; State ex rel. Edelweiss Fund, LLC v. JPMorgan Chase & Co., 90 Cal. App. 5th 1119, 1148 (2023).

transactions. See N.J.S.A. 2A:32C-9(c). That element is easily satisfied here.

Relator's rate-inflation allegations are necessarily "based upon" the rate data disclosed on EMMA, Bloomberg, and MSRB SHORT. Relator admitted that its analysis could not have happened without the MSRB SHORT data. See Ja2173. Relator, having never worked at a Defendant bank, see Ja2121, offers no alternative source of this information. The MA SJC agreed: Relator "relies upon the [D]efendants' obligations, disclosed in the official statements, and the interest rates, which are disclosed on EMMA, and which [] [R]elator analyzed to reveal the asserted failure of the [D]efendants to meet their obligation individually to set interest rates for each VRDO." Rosenberg, 487 Mass. at 419.

It does not matter that Relator purportedly "figure[d] out how the fraud was perpetrated, where, and by which RMAs," Rb44 (emphasis removed), because those inferences were admittedly derived from an analysis of the publicly disclosed rate data. See Springfield Terminal, 14 F.3d at 655 (analysis and expertise irrelevant to "based upon" inquiry where transactions were publicly disclosed). Even assuming Relator's analysis shows fraud—which Defendants vigorously contest—that does not change the fact that none of the components Relator uses in its analysis is nonpublic.

E. Relator Is Not An Original Source

Because the data upon which Relator alleges fraud were publicly

disclosed, Relator's case can survive only if Relator is an "original source" of the publicly disclosed information. See N.J.S.A. 2A:32C-9(c). The independent source exception is a "narrow category," see Winkelman, 827 F.3d at 211, since it applies only if Relator "has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the State before filing an action under this act based on the information." N.J.S.A. 2A:32C-9(c). That is, Relator's "knowledge must be both direct and independent" of public information. Atkinson, 473 F.3d at 520; see also Brennan, 454 N.J. Super. at 619 (holding that relator with "only indirect knowledge" was not an original source). Relator satisfies none of these criteria.

Direct Knowledge. "Direct knowledge is knowledge obtained without any intervening agency, instrumentality, or influence: immediate." U.S. ex rel. Schumann v. AstraZeneca Pharms. L.P., 769 F.3d 837, 845 (3d Cir. 2014) (quoting Atkinson, 473 F.3d at 520) (cleaned up). "A relator is said to have direct knowledge of fraud when he saw [it] with his own eyes." U.S. ex rel. Barth v. Ridgedale Elec., Inc., 44 F.3d 699, 703 (8th Cir. 1995).

Because Rosenberg is not an insider, he never saw how Defendants reset rates "with his own eyes." See ibid. Any "knowledge" Relator has is necessarily indirect because Relator "gained all his knowledge second-hand" from the publicly disclosed rate data. See Oliver, 826 F.3d at 477.

In its amended complaints, Relator pointed to information it obtained from Defendants' former employees and added to the Third and Fourth Amended Complaints. See Ja3062; Ja41-52. However, these former-employee statements did not surface until Relator filed amendments five years (Third Amended Complaint) and nine years (Fourth Amended Complaint) after the initial complaint. They were not part of the "information" upon which Relator based the complaint "that first alleged th[e] fraud" and which is thus subject to the public disclosure bar analysis. U.S. ex rel. Beauchamp v. Academi Training Ctr., 816 F.3d 37, 45-46 (4th Cir. 2016) ("[T]he determination of when a plaintiff's claims arise for purposes of the public-disclosure bar is governed by the date of the first pleading to particularly allege the relevant fraud and not by the timing of any subsequent pleading."). The former-employee statements therefore cannot be considered in determining whether Relator is an original source.

In any event, this information cannot make Relator an original source because knowledge gained from interviews with others is not "direct." See Brennan, 454 N.J. Super. at 619 (relator not an original source because he "presented only indirect knowledge of defendant's alleged false act, including . . . statements from third parties"); see also Schumann, 769 F.3d at 847 (knowledge not direct "when it is gained by reviewing files and discussing the documents therein with individuals who actually participated in the

memorialized events").

Independent Knowledge. "[I]ndependent" knowledge is knowledge that is not "merely dependent on a public disclosure." Schumann, 769 F.3d at 845. A relator "who would not have learned of the information absent public disclosure" does not have "independent" knowledge. Ibid.; see also Atkinson, 473 F.3d at 522 ("[R]eliance solely on 'public disclosures' . . . is always insufficient . . . to confer original source status.").

Relator's purported knowledge of the alleged fraud is derived directly from the rate data publicly disclosed on MSRB SHORT. See Ja2173. Numerous courts have recognized that a relator does not become an original source by using expertise to analyze publicly disclosed data.[37] "Just as combining publicly

[37] See, e.g., United States v. Express Scripts, Inc., 602 F. App'x 880, 882 (3d Cir. 2015) (relator's "assessment of publicly available information" insufficient, even if informed by years of experience); Oliver, 826 F.3d at 477 (knowledge of industry practice insufficient because "it is not [relator's] investigation but his lack of firsthand knowledge prompting his investigation that precludes his original source status"); Rosenberg, 2019 WL 3643035, at *12 ("[F]orensic analysis of data and transactions that are already publicly disclosed on publicly accessible websites is insufficient to qualify the relator as an original source."), aff'd sub nom. Rosenberg, 487 Mass. 403; Patriarca, 295 F. Supp. 3d at 202-03 (same); Alcohol Found., 186 F. Supp. 2d at 463-64 & n.4 (publicly available facts creating "the 'mosaic' of information that shows a fraud" insufficient), aff'd, 53 F. App'x 153; U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1160 (3d Cir. 1991) (if reverse were true, "then a cryptographer who translated a ciphered document in a public court record would be an 'original source,' an unlikely interpretation of the phrase"); U.S. ex rel. Sirls v. Kindred Healthcare, Inc., 536 F. Supp. 3d 1, 7 (E.D. Pa. 2021) ("Although interpreting the raw data required analysis, applying expertise

available information with specialized expertise is not sufficient to overcome the first step of the public disclosure bar, neither does conducting an analysis based on such expertise qualify a relator as an original source." U.S. ex rel. JDJ & Assocs. LLP v. Natixis, 2017 WL 4357797, at *11 (S.D.N.Y. Sept. 29, 2017). Relator has not added any nonpublic information through its analysis of public bond data. In fact, Relator does not base its allegations—including its scienter allegations—on any non-public facts. See Ja9, 27, 29, 40. This is contrary to the cases where scienter allegations were based on non-public data. See, e.g., U.S. ex rel. Reed v. KeyPoint Gov't Sols., 923 F.3d 729, 760 n.12 (10th Cir. 2019) (scienter allegations not "available via the public disclosures"); U.S. ex rel. Absher v. Momence Meadows Nursing Ctr., Inc., 764 F.3d 699, 708-09 (7th Cir. 2014) (public data "did not disclose facts establishing" misrepresentation).

Nor do Relator's efforts in conducting its analysis salvage its claim. Inferences drawn from analyzing publicly disclosed facts, no matter the effort, are necessarily dependent on the underlying public facts as a matter of law.[38] Relator cites no authority holding, for example, that the use of a patent confers

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to publicly disclosed data does not produce independent information.").

[38] Original-source cases involving non-public facts are thus inapposite. See, e.g., U.S. ex rel. Banigan v. PharMerica, Inc., 950 F.3d 134, 144-47 (1st Cir. 2020) (non-public corporate documents); Absher, 764 F.3d at 708 (evidence not disclosed by government survey reports); Kennard v. Comstock Res., Inc., 363 F.3d 1039, 1046 (10th Cir. 2004) ("personal, private royalty records and statements").

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original source status when it is used to analyze public information. See Rb49. U.S. ex rel. Kuriyan v. HCSC Ins. Servs. Co., 2021 WL 5238332, at *2 (D.N.M. Jan. 29, 2021) does not support this proposition; to the contrary, the relator in that case analyzed "raw non-public data" to infer fraud (emphasis added).

Providing Analysis to the AG. Finally, a relator must "voluntarily provide[] the information [on which the allegations are based] to the State before filing an action." N.J.S.A. 2A:32C-9(c). If Relator says that its analysis (rather than the underlying data) is the "information on which the allegations are based," Relator was then required to provide that analysis—not just conclusions or a description of the purported analysis—to the AG before filing this action.

Relator has produced no evidence that it did so. Ja2148. Nor did Relator provide the former employee statements included in the Third and Fourth Amended Complaints, which Relator did not possess until April 2015. Ja2150-51. Thus, Relator's analysis and the former employee statements must be disregarded for purposes of the original source analysis. See Rahimi, 3 F.4th at 830 (for original source inquiry, declining to consider material that was not submitted to attorney general, including material added in later complaints).

CONCLUSION

For these reasons, the Court should affirm the Appellate Division's grant of summary judgment to Defendants.

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