Superior Court of New Jersey

Appellate Division

Docket No. A-001340-23

STATE OF NEW JERSEY, ex rel., EDELWEISS FUND, LLC, *Plaintiff-Respondent,* vs. 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 *(For Continuation of Caption See Inside Cover)*	CIVIL ACTION ON GRANT OF MOTION FOR LEAVE TO APPEAL FROM AN INTERLOCUTORY ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MERCER COUNTY Docket No. MER-L-000885-15 Sat Below: HON. DOUGLAS H. HURD, P.J. Cv.

JOINT BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

TABLE OF TRANSCRIPTS

Page

PRELIMINARY STATEMENT

Relator Edelweiss Fund, LLC ("Relator") filed this suit in 2015, alleging that Defendants violated the New Jersey False Claims Act ("NJFCA") when they reset interest rates for municipal bonds known as Variable Rate Demand Obligations ("VRDOs"). Relator's claims are based on publicly disclosed information, and New Jersey law prohibits relator-led NJFCA suits based on such public information. This "public disclosure bar" is a longstanding affirmative defense available to defendants in relator-led NJFCA suits. Because Relator's action falls squarely within this defense, Defendants moved for summary judgment.

Just eight months ago, while Defendants' motion was pending, New Jersey amended the NJFCA's public disclosure bar to align it with decade-old amendments to the federal and other state false claims acts. The New Jersey amendment for the first time permitted the Attorney General ("AG") to authorize a relator-led NJFCA suit based on publicly disclosed information to proceed. The AG's new ability to override the otherwise applicable public disclosure bar reflected a fundamental, substantive change in NJFCA policy. If given effect in this case, the amendment would eliminate a substantive defense that has long been available, including since this case began. Federal courts assessing the

identical change to the federal False Claims Act ("FCA") have appropriately barred its retroactive application.

Here, however, the trial court inexplicably ignored both controlling New Jersey retroactivity law and the uniform federal caselaw addressing the retroactivity of the federal FCA amendment. This court should align New Jersey's rule with the federal rule, reverse the trial court's retroactivity ruling, and give the defense its full effect in this case.

The trial court also summarily indicated that it would deny the parties' cross-motions for summary judgment concerning the public disclosure bar, notwithstanding the retroactivity ruling. But this alternative ruling misstated both the law and the facts. The court acknowledged that the defense bars actions based upon publicly disclosed information. The trial court, however, wrongly labeled the various legal disputes among the parties as disputed factual issues precluding summary judgment, most notably whether a purported "analysis" of publicly disclosed information—made available through subscription services and posted on a free, publicly available website—can evade the public disclosure bar. In truth, under well-established law, the public disclosure bar is a complete defense to Relator's claims in light of the undisputed facts. This court should remand this case to the trial court with instructions to enter summary judgment in favor of Defendants.

PROCEDURAL HISTORY

NJFCA actions instituted by private relators are filed and maintained under seal until the AG either intervenes to prosecute the action or declines to intervene, in which case the private relator conducts the qui tam action on its own. N.J.S.A. § 2A:32C-5(c), (g). After Relator filed this action under seal in 2015 and amended its complaint twice, the AG declined to intervene on July 17, 2019. Ja2085–87 (7/17/19 Notice of Election to Decline Intervention).[1] The trial court then lifted the seal, see 2T at 3:21–24,[2] which allowed Relator to prosecute the action on its own in the name of the State, see N.J.S.A. § 2A:32C-5(c), (g)(2).

The difference between relator-led and government-led NJFCA actions is substantial; relators receive a statutory recovery of between 15% and 25% of the proceeds of any judgment or settlement if the AG intervenes, and between 25% and 30% of the proceeds if the AG does not intervene. See N.J.S.A. § 2A:32C-7(a), (d). After the State declined to intervene, Relator continued to pursue the claim and, in that capacity, has made all litigation-related strategy judgments. See N.J.S.A. § 2A:32C-6(f).

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[1] Ja refers to the Joint Appendix of Defendants and Plaintiff-Relator.

[2] "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.

The trial court first considered the public disclosure bar when it granted Defendants' motion to dismiss Relator's Third Amended Complaint ("3AC"). The trial court concluded that Relator's alleged fraud claims were based upon data that was publicly disclosed through sources that qualified as "news media" under the NJFCA, including the Electronic Municipal Market Access system ("EMMA") and Bloomberg. See 1T at 4:6–8, 13:23–14:3, 14:10–25. The court also ruled that Relator did not establish that it was an "original source," which is a statutory exception to the public disclosure bar requiring a relator to demonstrate that its claims are "independent of" the publicly disclosed information that would otherwise bar the claim. Id. at 16:2–17:2. The dismissal was without prejudice, and Relator then filed the Fourth Amended Complaint ("4AC"). In response to Defendants' renewed motion to dismiss, the trial court, without substantive explanation, allowed the claim to proceed to discovery notwithstanding the public disclosure bar. See 2T at 11:17–12:5.

Following discovery devoted solely to the public disclosure bar, both sides filed cross-motions for summary judgment with respect to the defense. After Defendants' motion for summary judgment was fully briefed and more than a month after the deadline for the submission of an opposition to Defendants' motion, the Legislature amended the NJFCA on June 30, 2023. The amendment empowered the AG, without taking over the litigation, to block dismissal of a

relator-initiated NJFCA action even if the defendant had established that the public disclosure bar applied (the "2023 Amendment"). See Ja4019 (amendment to N.J.S.A. § 2A:32C-9(c)). The federal FCA was identically amended in 2010, and other state FCAs have since followed suit. But this was the first time New Jersey allowed a relator-led NJFCA claim to proceed when the elements of the public disclosure bar were met—that is, when the claim was based upon publicly disclosed information and the relator was not an "original source" of the information.

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 take over the action—the New Jersey AG filed a Notice Opposing Dismissal of Relator's Action based on the 2023 Amendment. See Ja3995–98 (8/16/23 Notice Opposing Dismissal). The parties then briefed whether the 2023 Amendment applied retroactively. Relator did not dispute that the AG's Notice is effective in this case only if the court applies the 2023 Amendment retroactively.

On October 24, 2023, the trial court ruled that the 2023 Amendment should be given retroactive effect, 4T at 6:10–13, and that therefore the AG's Notice precludes judgment in favor of Defendants on public disclosure grounds, id. at 35:14–17. According to the trial court, the 2023 Amendment reflects a mere "procedural" change in how the State, the real party in interest in a qui tam

case, can block the public disclosure bar from applying. See id. at 17:13–22, 18:6–9, 23:8–20, 28:1–6. Under the old law, the court reasoned, the State had to intervene to block the defense (and thus litigate the case), while under the new law, the State could simply file a notice to block the defense even when it does not intervene.

The trial court cited no authority from any jurisdiction that has agreed with that view. It also failed to discuss, much less reconcile its ruling with, the authority from the U.S. Supreme Court which has declared that a relator-led FCA case is "different in kind" than one directed by the government because a relator's private interest drives a relator-led claim while the public interest alone drives a government-led claim. Hughes Aircraft Co. v. U.S. ex rel. Schumer, 520 U.S. 939, 949 (1997). The trial court's view that the 2023 Amendment reflects a purely procedural change was not based on any expressed legislative intent that it apply retroactively, and lacked any support in the caselaw.

The trial court also indicated that if the 2023 Amendment does not apply retroactively, it would nonetheless deny both motions based on unspecified disputes of material fact. See 4T at 34:16–21, 35:2–13. In doing so, it did not identify any material disputes of fact in the record, any non-public information used in Relator's analysis, or any reason to believe that Relator's claims are independent of publicly disclosed information.

STATEMENT OF FACTS

The interest rates of VRDOs issued by state and municipal entities in New Jersey are reset frequently, usually weekly. The VRDO issuers here contracted with Defendants, called "remarketing agents," to use their "judgment" to set the appropriate interest rates at each reset period. Ja2095–96 (¶¶ 1–2); Ja1989 (Compl. ¶ 26). In its complaint, Relator alleged that its analysis of historical VRDO transactional data showed that Defendants failed to meet their "remarketing agent" obligations to VRDO issuers, thereby violating the NJFCA. See Ja1984 (Compl. ¶ 2), Ja1989 (¶ 26), Ja1991 (¶ 36), Ja1996–98 (¶¶ 62, 68); Ja9 (4AC ¶ 2), Ja15–16 (¶ 30), Ja62 (¶ 164), Ja90 (¶ 231), Ja93 (¶ 239). Relator claims that the analysis shows that Defendants engaged in a "Robo-Resetting"[3] scheme in which Defendants "mechanically set [VRDO] rates en masse" by "bucketing" dissimilar bonds "without any consideration of the individual characteristics of the bonds or the associated market conditions or investor demand." Ja1984 (Compl. ¶ 2), Ja1991 (¶ 36); see also Ja9 (4AC ¶ 2), Ja62 (¶ 164).

[3] "Robo-Resetting" is not a term used in the securities industry; but is, instead, a term that Relator invented for the purpose of this litigation. Commonwealth ex rel. Rosenberg v. JPMorgan Chase & Co., No. SUCV2014-03323-BLS1, 2019 WL 3643035, at *2 n.4, *4 (Mass. Super. Ct. July 23, 2019), aff'd sub nom. Rosenberg v. JPMorgan Chase & Co., 169 N.E.3d 445 (Mass. 2021).

Relator's expert who conducted the analysis used raw data obtained from the Short-term Obligation Subscription Service ("MSRB SHORT") offered by the Municipal Securities Rulemaking Board.[4] See Ja2173 (¶¶ 194–97). Anyone can subscribe to MSRB SHORT; subscribers receive data about VRDOs in real time, for a fee (the subscription Relator used cost $10,000, annually). See Ja3896 (¶¶ 131–32). The same historical VRDO rate-reset data available through MSRB SHORT is also available on a free, well-known and publicly available website run by the MSRB, called EMMA. Ja2098–100 (¶¶ 9, 11), Ja2103–05 (¶¶ 18–19); Ja4272–73 (Eiholzer Cert. ¶¶ 17, 19–20); see also Ja1548–49 (MSRB R. G-34(c)(ii)(A)(1)–(2)). In addition, there is no dispute that anyone can obtain the same information through subscription services offered by Bloomberg, a global provider of financial news and information. Ja2108–10 (¶¶ 25, 27); see also Ja1559–62 (Olander Cert. ¶¶ 3–4, 10, 12).

There is no factual dispute about the terms of service that govern the use of data from MSRB SHORT, EMMA, or Bloomberg (together, the "VRDO Data Sources"). See Ja2104–05 (¶ 19); Ja2191–201 (Rosenberg Cert., Exs. 2–3);

[4] The MSRB is the principal regulator for municipal securities (including VRDOs). Ja2097 (¶ 5). Part of the MSRB's mission is to "provide transparency for issuers, institutions, and the investing public." Ja2097–98 (¶ 7) (quotation marks omitted); see also Ja1393 (MSRB Glossary of Municipal Securities Terms, About the MSRB). Consistent with this mission, the MSRB has implemented mandatory reporting requirements for municipal securities, including VRDOs. Ja2098 (¶ 8).

Ja2986–3004 (Eiholzer Cert., Ex. J); Ja3906–08 (¶¶ 151–55). Nor are there any factual disputes about the subscription costs for MSRB SHORT or Bloomberg, or the amounts companies related to Relator paid for these services. See Ja3896 (¶ 131), Ja3902–03 (¶ 144).

ARGUMENT

I. STANDARD OF REVIEW.

This court "review[s] a ruling on summary judgment de novo, applying the same standard governing the trial court." Brennan ex rel. State v. Lonegan, 454 N.J. Super. 613, 618 (App. Div. 2018); see also F.K. v. Integrity House, Inc., 460 N.J. Super. 105, 114 (App. Div. 2019). In particular, whether a statutory amendment applies retroactively is a question of law reviewed de novo. See Maia v. IEW Constr. Grp., 475 N.J. Super. 44, 48 (App. Div. 2023); In re G.H., 455 N.J. Super. 515, 526 (App. Div. 2018), aff'd, 240 N.J. 113 (2019).

Accordingly, on review of a summary judgment ruling, "[t]he trial court's conclusions of law and application of the law to the facts warrant no deference from a reviewing court." F.K., 460 N.J. Super. at 114 (quoting W.J.A. v. D.A., 210 N.J. 229, 238 (2012)). The court's "interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference," and issues of law are "subject to de novo plenary appellate review."

Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 382–83 (2010) (quotation marks omitted).

II. THE TRIAL COURT FAILED TO APPLY NEW JERSEY RETROACTIVITY LAW AND IGNORED OVERWHELMING FEDERAL FCA PRECEDENT FAVORING PROSPECTIVE APPLICATION. (Ja1–3; 4T)

The trial court's ruling fails to address—and is directly contradicted by—well-established New Jersey precedent governing the retroactivity of statutory amendments. Moreover, the trial court's ruling does not even mention the substantial federal FCA precedent rejecting retroactive application of an identical amendment to the federal FCA, upon which the NJFCA is modeled. The Legislature intended the NJFCA to "track[] the federal law," and thus New Jersey courts look to federal FCA precedent to interpret the New Jersey statute as well. Brennan, 454 N.J. Super. at 620 (quotation marks omitted). Matching the interpretation of the federal FCA is unquestionably required when the applicable language of the two statutes is the same. Ibid.

A. Governing New Jersey and Federal FCA Precedents Require Prospective Application. (Ja1–3; 4T)

The framework to assess the retroactivity of a statutory amendment is well-established and longstanding. There is a presumption in favor of "prospective rather than retroactive application of new legislation," consistent with New Jersey's "long-held notions of fairness and due process." Ardan v. Bd.

of Rev., 231 N.J. 589, 609–10 (2018) (quoting James v. N.J. Mfrs. Ins. Co., 216 N.J. 552, 563 (2014)). This "deeply rooted" presumption is grounded in "[t]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place." Hughes Aircraft, 520 U.S. at 946 (quotation marks omitted).

"This presumption against retroactivity is even stronger where an amendment eliminates a defense to a qui tam suit." U.S. ex rel. Judd v. Quest Diagnostics Inc., 638 F. App'x 162, 165 (3d Cir. 2015) (emphasis added). The default presumption against retroactivity can be rebutted only where "supervening considerations clearly compel a contrary determination." Twiss v. State, Dep't of Treasury, Off. of Fin. Mgmt., 124 N.J. 461, 467 (1991) (quotation marks omitted); see also Landgraf v. USI Film Prods., 511 U.S. 244, 272–73 (1994) ("[P]rospectivity remains the appropriate default rule," overcome only by "clear intent" from Congress.).

Notably, "[t]he first question is whether the Legislature intended to give the statute retroactive application." Johnson v. Roselle EZ Quick LLC, 226 N.J. 370, 387 (2016) (quotation marks omitted). Retroactive intent is absent unless: (1) "the Legislature expresses its intent that the law apply retroactively, either expressly or implicitly"; (2) "an amendment is curative"; or (3) "the expectations of the parties so warrant." Ibid. (quotation marks omitted). None

of these factors are present here. To the contrary, by every indication the Legislature intended the 2023 Amendment to have exclusively prospective effect.

1. The Legislature Explicitly and Implicitly Expressed Its Intent to Apply the Amendment Prospectively. (Ja1–3; 4T)

The trial court's analysis of New Jersey retroactivity law, 4T at 16:13–28:23, failed to consider the most direct indication of legislative intent: the language of the statute itself. The Legislature expressly prescribed that "[t]his act shall take effect immediately."[5] The New Jersey Supreme Court has held that "[s]uch language 'bespeak[s] an intent contrary to, and not supportive of, retroactive application'"; "[i]ndeed, we have understood it to mean that newly enacted provisions 'will apply to claims that arise immediately after the effective date of the amendment to the Act.'" Johnson, 226 N.J. at 389 (second alteration in original) (quoting Cruz v. Cent. Jersey Landscaping, Inc., 195 N.J. 33, 48–49 (2008)); see also Maeker v. Ross, 219 N.J. 565, 577–78 (2014) ("take effect immediately" did not indicate retroactive intent (quotation marks omitted)). This should have ended the analysis.

Nor did the trial court point to any implicit expression of intent by the Legislature to apply the 2023 Amendment retroactively. Courts have found such

[5] Ja4021 (2023 NJ Sess. Law Serv. Ch. 73 (ASSEMBLY 5584) (WEST)).

implicit intent if retroactive application is "necessary to make the statute workable or to give it the most sensible interpretation." Johnson, 226 N.J. at 388 (quotation marks and alteration omitted). That is decidedly not the case here, however. To the contrary, the public disclosure bar was "workable" for decades without the AG's veto for relator-led claims. This is true not just in New Jersey but also under the federal FCA and state false claims acts across the country.

The court also ignored the unanimous federal FCA caselaw concluding that the same amendment to the federal FCA, passed in 2010, does not apply retroactively. This precedent powerfully supports the conclusion that the Legislature intended prospective only application. In enacting the 2023 Amendment, the Legislature expressly stated its intent to align the NJFCA with the federal FCA. See Ja4021–22 ("The bill revises the New Jersey False Claims Act in order to comply with certain provisions in federal law" to make it "at least as effective as the" federal FCA "in facilitating these whistleblower actions." (Assembly Budget Committee Report) (quotation marks omitted)); see also Brennan, 454 N.J. Super. at 620 (citing legislative history that the NJFCA "tracks" the federal FCA). Before the Legislature adopted its 2023 Amendment, every single federal court to interpret the analogous federal FCA amendment had held that it should apply only prospectively—including those in the Third

Circuit[6] and elsewhere.[7] There is no reason to believe the Legislature intended to align New Jersey and federal FCA law except with respect to the already settled question of retroactivity. If the Legislature had intended to do so, it certainly would have said so. Instead, it stated the opposite: that the 2023 Amendment would take effect "immediately." Ja4021.

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[6] See U.S. ex rel. Zizic v. Q2Administrators, LLC, 728 F.3d 228, 232 n.3 (3d Cir. 2013) (holding that the public disclosure bar amendment "is not retroactively applicable to pending cases like" plaintiff's asserting federal FCA claims from 2005 to present); see also Judd, 638 F. App'x at 165 ("There is no indication . . . that Congress intended to make the amendments to the public disclosure bar retroactive."); United States v. Express Scripts, Inc., 602 F. App'x 880, 881–82 & n.3 (3d Cir. 2015) (applying pre-2010 federal FCA to action predating the amendments, which were "without retroactive effect"); United States v. Premier Educ. Grp., L.P., No. 11-3523 (RBK/AMD), 2016 WL 2747195, at *7 (D.N.J. May 11, 2016) (applying pre-amendment public disclosure bar to conduct occurring before amendment); In re Plavix Mktg., Sales Pracs. & Prods. Liab. Litig., 123 F. Supp. 3d 584, 595 (D.N.J. 2015) ("[W]ith regard to false claims which occurred prior to 2010, I find that the pre-amendment statute applies" concerning the public disclosure bar.).

[7] See 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); 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., No. 22-18, 2023 WL 2661579, at *1 n.1 (2d Cir. Mar. 28, 2023). Only the Tenth Circuit has not yet addressed this issue.

The trial court's ruling also ignores a key question for retroactivity, which is whether the 2023 Amendment affected the "substantive rights of parties." Prather, 847 F.3d at 1103. Federal courts have held that federal FCA amendments that change the availability of an affirmative defense are substantive and not retroactive. See, e.g., Judd, 638 F. App'x at 165 (noting that "it is clear that the public disclosure bar as amended [in 2010] would eliminate a full defense that Quest would otherwise have to Judd's qui tam action"); U.S. ex rel. Bogina v. Medline Indus., Inc., 809 F.3d 365, 369 (7th Cir. 2016); May, 737 F.3d at 917–18; Schweizer, 677 F.3d at 1231 n.3. Where an FCA amendment "eliminates a defense to a qui tam suit"—just as the 2023 Amendment does here—the U.S. Supreme Court has made clear that it should not be applied retroactively. Hughes Aircraft, 520 U.S. at 948.[8]

Moreover, following the Legislature's prospective intent means the 2023 Amendment cannot apply in this case *at all*. Where alleged misconduct continues after the 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. See Zizic, 728 F.3d at 232 nn.3–4 (applying only the pre-

[8] Defendants are unaware of any opinion holding that the 2010 federal amendments are not retroactive solely because they changed the public disclosure bar from a jurisdictional to an affirmative defense.

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); 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"). Under settled retroactivity law, the AG's letter has no impact on this case.

2. The 2023 Amendment Cannot Be Considered "Curative." (Ja1–3; 4T)

There are no reasons to refuse to give effect to the expressed legislative intent to apply the 2023 Amendment prospectively only. Statutory amendments may be applied retroactively if they are "curative," meaning "designed to 'remedy a perceived imperfection in or misapplication of a statute.'" Ardan, 231 N.J. at 611 (quoting James, 216 N.J. at 564). Amendments are not "curative" simply because they seek "to expand and improve the law" or "better serve[] public policy objectives." Id. at 612–13. Curative amendments must "not alter the act in any substantial way, but merely clarif[y] the legislative intent behind the [previous] act." Ibid. (second alteration in original). "Generally, curative acts are made necessary by inadvertence or error in the original enactment of a statute or in its administration." Ibid.

The trial court did not conclude, and could not reasonably have concluded, that the 2023 Amendment is curative. To the contrary, it is clear that the trial

court understood that prior to the 2023 Amendment, the AG did not have any power to withdraw the public disclosure bar in a relator-led litigation. See 1T at 13:23–14:3; 4T at 20:4–10, 20:20–21:12, 23:8–20, 28:1–6. Defendants could always assert the public disclosure bar as an affirmative defense in relator-led actions—regardless of the AG's view—but could never assert it where the AG intervened and assumed control of the case. The 2023 Amendment was undeniably designed to give the AG new authority not included in or contemplated by the previous statute. The 2023 Amendment was accordingly not "designed to reaffirm and clarify the existing standards" under the NJFCA, but rather to "establish different or new standards" for the availability of the public disclosure bar defense in relator-litigated actions. See Pisack v. B&C Towing, Inc., 240 N.J. 360, 372 (2020) (quoting In re D.C., 146 N.J. 31, 51 (1996)) (statutory amendments were not curative because they empowered municipalities to levy previously prohibited fees).

Nonetheless, the trial court reasoned that limiting the 2023 Amendment to a solely prospective application "would impair the entire statutory framework and render it impracticable" because it would "in essence . . . preclude the fact that the Attorney General maintains as the party-in-interest for the life of the action" and would "curtail the State's ongoing opportunity to intervene when

circumstances warrant." 4T at 22:10–19; see generally id. at 16–28. But this reasoning suffers from two fundamental misunderstandings of the NJFCA.

First, this explanation does not have anything to do with whether the amendment is "curative"; otherwise, by this rationale, the NJFCA has, throughout its statutory life, always been "impracticable" by not allowing the AG to block this affirmative defense in relator-led cases. That is clearly incorrect. Second, the trial court's explanation confused the undisputed status of the State as the real party in interest with the AG's authority to preclude application of the public disclosure bar. The State remained the real party in interest throughout the life of an NJFCA action even before the Legislature adopted the 2023 Amendment. See N.J.S.A. § 2A:32C-5(b) (actions are brought in the State's name); N.J.S.A. § 2A:32C-5(c) (dismissal of action requires State's consent). The State also maintained the right to intervene when circumstances warranted before the 2023 Amendment. See N.J.S.A. § 2A:32C-5(d) (intervention at outset of case); N.J.S.A. § 2A:32C-6(b), (f) (dismissal and intervention for good cause); N.J.S.A. § 2A:32C-6(c) (State retains the right to settle). Those legal realities have not changed.

Indeed, the 2023 Amendment has no impact at all on the State's status as the real party in interest or its power to intervene at any point during the "life of the action." If the State so chose, it could intervene in this case. See N.J.S.A.

§ 2A:32C-6(f). If it did, the public disclosure bar defense would not apply because the defense applies only to relator-litigated actions. Thus, the trial court's conclusion that prospective-only application of the 2023 Amendment would impede the State's authority is simply incorrect. Instead, the 2023 Amendment expands the State's authority; it allows the State, without intervening and thus without bearing the costs of prosecution, to empower private relators motivated by substantial financial reward to litigate actions that would otherwise be blocked. That is precisely the novelty introduced by the 2023 Amendment. It does not "cure" any defect in the operation of the NJFCA. The statute now operates differently.

3. The Expectations of the Parties Favor Prospective Application. (Ja1–3; 4T)

Finally, the trial court did not analyze the third potential exception to the presumption against retroactive application—whether the expectations of the parties warrant applying the 2023 Amendment retroactively. If it had, it would have been compelled to conclude that "all parties expected the matter to be governed by the version of [N.J.S.A. § 2A:32C-9(c)] in effect at th[e] time," before the 2023 Amendment's enactment, a factor that strongly favors prospective application. Ardan, 231 N.J. at 613 (applying principle to amended unemployment benefits statute); see also James, 216 N.J. at 573 (expectation of

retroactive effect must be "strongly apparent . . . to override the lack of any explicit or implicit expression of intent for retroactive application").

Before the 2023 Amendment, no party expected that Defendants' ability to assert the public disclosure bar defense would be taken away based on an as-yet uncodified veto power. If Relator had believed that the AG's veto power applied before the 2023 Amendment, it would have argued that point during briefing on the motion to dismiss the 3AC. It did not. Nor did the trial court address the nonexistent veto power when dismissing the 3AC on public disclosure bar grounds. See 1T at 4:6–8, 13:23–14:3, 14:10–25, 16:2–17:2. Indeed, all of the "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, 240 N.J. at 373. For all the reasons discussed above, this is as the Legislature intended.

B. The Trial Court's Reasoning Did Not Support Its Ruling. (Ja1–3; 4T)

The trial court applied the 2023 Amendment retroactively because it believed the change was merely procedural and not substantive. See 4T at 17:14–22, 18:6–9, 23:8–20, 28:1–6. That is incorrect.

The 2023 Amendment reflects a new substantive policy judgment. In an NJFCA action prosecuted by the State, the public disclosure bar never applied because it is a defense only to relator-litigated NJFCA actions. See N.J.S.A.

§ 2A:32C-9(c). The defense exists in relator-led cases because long experience with false claims acts throughout the nation led Congress and state legislatures to conclude that relator-led actions have the potential for abuse, requiring a legal defense that can act as a gatekeeper in light of the competing public policy concerns. The federal FCA's public disclosure bar "demonstrates repeated congressional efforts 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). 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).

False claims acts offer great financial reward to relators in order to encourage those with non-public information demonstrating fraud to come forward. The company-insider whistleblower is the paradigm. Such insiders help governments ferret out fraud based on information the public cannot access. Yet the prospect of such rewards also encourages private citizens to bring false claims act cases by merely repackaging publicly available information as fraud. Such claims by "self-serving opportunists, who do not possess their own insider information" impose wasteful and burdensome costs on public contractors that

are ultimately passed on to the public. Glaser v. Wound Care Consultants, Inc., 570 F.3d 907, 915 (7th Cir. 2009) (quotation marks omitted); Springfield Terminal, 14 F.3d at 655 (relator-led suits barred as parasitic "if the elements of the fraudulent transaction . . . are already public"). This is why courts have long understood the public disclosure bar "as designed to preclude qui tam suits based on information that would have been equally available to strangers to the fraud transaction[,] had they chosen to look for it[,] as it was to the relator." U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1155–56 (3d Cir. 1991); see also U.S. ex rel. Paranich v. Sorgnard, 396 F.3d 326, 332 (3d Cir. 2005) (same); U.S. ex rel. Kreindler & Kreindler v. United Techs. Corp., 985 F.2d 1148, 1158 (2d Cir. 1993) (same).

The U.S. Supreme Court has observed that, "[a]s a class of plaintiffs, qui tam relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good." Hughes Aircraft, 520 U.S. at 949. This clear distinction between actions led by a relator (a private individual motived by financial reward) versus the State (motivated by the public good) tracked the availability of the public disclosure bar defense: available in relator-led actions, unavailable in actions in which the State had intervened and taken over the prosecution of the case. The State's decision to intervene and expend resources litigating against a public contractor has always

functioned to ensure that the public interest warrants prosecution of the claim. The tension between the costs to the public of litigating against a government contractor and the private interest of profit-seeking relators that motivates the public disclosure bar is simply not present when the State prosecutes the claim.

Empowering the AG to allow a relator-led action to proceed even when the relator brings no new, nonpublic information to light alters the substantive policy choice reflected in the public disclosure bar. The trial court therefore erred in concluding that the 2023 Amendment "does not confer any new right" on the State and that the 2023 Amendment is merely procedural and should be given retroactive effect. See 4T at 17:14–22.

Finally, the retroactivity question does not turn on whether the 2023 Amendment reflects good or bad policy in the eyes of the court. It turns, rather, on the fact that it reflects a different policy choice. Even amendments that seek "to expand and improve the law" or "better serve[] public policy objectives," Ardan, 231 N.J. at 612–13, should not be applied retroactively when they are policy changes, as this one is. It is not a court's job to determine whether an amendment's new policy choice advances the "essence" and "proper spirit" of a longstanding statute like the NJFCA. See 4T at 21:4, 21:8–9. All a court need determine is whether the 2023 Amendment is substantive and must therefore be applied prospectively only.

III. THE TRIAL COURT'S ALTERNATIVE RULING ON THE MERITS OF THE PUBLIC DISCLOSURE BAR IS CONTRARY TO WELL-ESTABLISHED FCA PRECEDENT. (4T)

The trial court's order rested solely on retroactive application of the State's veto. See Ja2 (10/24/23 Order ¶¶ 1–2). Nevertheless, anticipating review of its retroactivity decision, the court stated in its oral decision that, in the "alternative," the public disclosure bar issue would require a trial "in the event a higher Court would disagree with this Court on the retroactivity ruling." 4T at 6:13–21, 28:24–29:4. The trial court concluded that it would deny the cross-motions because the NJFCA legal standards require a fact-intensive analysis that precludes summary judgment, see id. at 35:9–13, and "because there are disputed issues of material fact that must go to a fact finder," id. at 6:17–18.

As discussed below, this alternative reasoning was in error because the public disclosure bar is often decided on a dispositive motion, as evidenced by the very FCA authorities cited by the trial court, and each of the purported factual issues identified by the trial court are actually legal disputes about how the public disclosure bar applies to Relator's action. Given that all of the facts germane to the public disclosure bar defense are undisputed, the trial court should have dismissed the case. Relator's action is based upon VRDO transactional data that was publicly disclosed through three qualifying FCA "news media" sources, and Relator is not an original source of that data.

A. **The NJFCA Legal Standards Do Not Automatically Preclude Summary Judgment.** (4T)

First, the trial court suggested that the NJFCA legal framework requires a fact-intensive analysis that prevents a ruling as a matter of law. See 4T at 33:10–14, 35:9–13. This was a simple misstatement of the law: the public disclosure bar issue is often decided on a dispositive motion.

In fact, the trial court's review of the caselaw cited several decisions from the U.S. Court of Appeals for the Third Circuit, each of which affirmed dismissal of a federal FCA case before trial, either on a motion to dismiss or at summary judgment. Id. at 32:11–33:9; see United States v. Medco Health Sols. Inc., 777 F. App'x 30, 31, 34 (3d Cir. 2019) (motion to dismiss); U.S. ex rel. Schumann v. AstraZeneca Pharms. L.P., 769 F.3d 837, 840 (3d Cir. 2014) (same); Paranich, 396 F.3d at 328 (summary judgment); U.S. ex rel. Mistick PBT v. Hous. Auth., 186 F.3d 376, 378–79 (3d Cir. 1999) (motion to dismiss). And this court itself has agreed that an NJFCA case can be dismissed on public disclosure bar grounds before trial. See Brennan, 454 N.J. Super. at 620–21. Indeed, the trial court reached the same conclusion when it dismissed the 3AC on public disclosure bar grounds. See 1T at 4:6–8, 13:23–14:3, 14:10–25, 16:2–17:2.

B. The Trial Court Mistook Legal Arguments for Factual Disputes. (4T)

The trial court identified two issues that it believed created disputes of material fact: "Whether the alleged fraud in question was within the public domain and whether it was only revealed through extensive efforts and financial investment by the relator . . . ." 4T at 34:21–35:1.[9] But neither of these issues implicated any disputes of fact.

The parties do not dispute the historical fact of the amount of effort and financial investment expended by Relator. Likewise, the parties do not dispute what information was available from which sources,[10] nor the terms of service that govern each of these sources,[11] nor even the subscription costs for MSRB SHORT or Bloomberg.[12] Indeed, there is no dispute that Relator's principal, Johan Rosenberg, paid what many other individuals or companies interested in the municipal bond market paid to obtain the data from the MSRB and Bloomberg subscription services.

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[9] By "within the public domain," Defendants presume the trial court was referring to information that is substantially similar to "public disclosure[s]" within the meaning of the NJFCA. See N.J.S.A. § 2A:32C-9(c). False claims act precedent does not require that public disclosures be unencumbered by intellectual property protections.

[10] Ja2098–100 (¶¶ 9, 11), Ja2103–05 (¶¶ 18–19), Ja2108–10 (¶¶ 25, 27); Ja1559–62 (Olander Cert. ¶¶ 3–4, 10, 12); Ja4272–73 (Eiholzer Cert. ¶¶ 17, 19–20).

[11] Ja2104–05 (¶ 19); Ja2191–201 (Rosenberg Cert., Exs. 2–3); Ja2986–3004 (Eiholzer Cert., Ex. J); Ja3906–08 (¶¶ 151–55).

[12] Ja3896 (¶ 131), Ja3902–03 (¶ 144).

The only question is what follows, as a matter of law, from these undisputed facts. The NJFCA public disclosure bar precludes actions that are "based upon the public disclosure of . . . transactions" through a statutory "news media" source, and where the relator is not "an original source" of that information. N.J.S.A. § 2A:32C-9(c) (2023). Under bedrock FCA precedent applied to the undisputed facts, Relator's action is barred because it is based upon an analysis of VRDO rate reset transactional data that Relator obtained from a subscription service qualifying as an FCA "news media" source. Finally, it is undisputed that Relator is not an "original source" of the VRDO data.

C. Relator's Action Is Based Upon the Publicly Disclosed VRDO Transactional Data. (4T)

A relator's action is subject to the public disclosure bar where it is "based upon the public disclosure of . . . transactions" through a source identified in the statute. N.J.S.A. § 2A:32C-9(c) (2023). Under the seminal "X + Y = Z" formula set out in Springfield Terminal, a public disclosure through transactions happens where both the allegedly "misrepresented state of facts" and the allegedly "true state of facts" are publicly disclosed such that an analysis of the true state of facts (the "Y") shows the defendants' statements to be false (the "X"), thereby allowing the inference of fraud (the "Z"). Springfield Terminal, 14 F.3d at 653–55. Even though no one has published the allegations of fraud, the "essential

elements" of the fraud are publicly disclosed from which an analysis could generate the inference of fraud, thereby triggering the bar. Id. at 654.

This is exactly what Relator purports to have done here, as shown by Relator's own allegations and admissions. Relator alleges that its analysis of VRDO rate reset data obtained from MSRB SHORT reveals that Defendants have failed to properly reset rates on New Jersey VRDOs, pursuant to their remarketing agent obligations.[13] Relator admits that it used data from MSRB SHORT to conduct its analysis.[14] It is undisputed that this information was also posted on EMMA, and available to Bloomberg subscribers.[15] Such disclosure is all Springfield Terminal and the unbroken line of decisions following it require for Relator's action to be "based upon" the public disclosures.

To avoid the conclusion that its analysis of publicly disclosed transactions is not "based upon" those transactions, Relator has attempted to confuse the legal standards, largely by focusing on cases dealing with the public disclosure of allegations, rather than of transactions. None of the misleading arguments Relator has previously advanced create a dispute of material fact that warrants

[13] See Ja1984 (Compl. ¶ 2), Ja1989 (¶ 26), Ja1991 (¶ 36), Ja1996–98 (¶¶ 62, 68); Ja9 (4AC ¶ 2), Ja15–16 (¶ 30), Ja62 (¶ 164), Ja90 (¶ 231), Ja93 (¶ 239).
[14] See Ja2173 (¶¶ 194–97).
[15] Ja1559–62 (¶¶ 3–4, 10, 12); Ja2098–100 (¶¶ 9, 11), Ja2104 (¶ 19), Ja2108–10 (¶¶ 25, 27); Ja4272–73 (Eiholzer Cert. ¶¶ 17, 19–20).

denying summary judgment for Defendants. Even if Relator's asserted facts are true, they cannot overcome the public disclosure bar as a matter of law.

A public disclosure of transactions does not depend on whether someone prior to the relator actually analyzed the transactions and reached a conclusion that fraud had occurred. The law is clear and uniform: The publicly available sources need not declare that fraud has occurred for the public disclosure bar to apply. See 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"); U.S. ex rel. Poteet v. Medtronic, Inc., 552 F.3d 503, 512 (6th Cir. 2009) ("To qualify as a public disclosure of fraud, the disclosure is not required to use the word 'fraud' or provide a specific allegation of fraud."), abrogated on other grounds by U.S. ex rel. Rahimi v. Rite Aid Corp., 3 F.4th 813, 829 (6th Cir. 2021). Indeed, the statute clearly applies the defense whenever the transactions upon which the claims are based have been publicly disclosed. N.J.S.A. § 2A:32C-9(c).

The Massachusetts Supreme Judicial Court explicitly addressed and rejected Relator's argument to the contrary in affirming dismissal of a parallel action brought by Relator in that state: "Contrary to the relator's contention, neither the need to perform analysis on the publicly available information nor the benefit of his expertise renders the true state of affairs hidden." Rosenberg,

169 N.E.3d at 457–58. Relator's action was based upon public disclosures because "the critical elements of the purported fraudulent transactions"—the documents reflecting the remarketing agents' obligations and the VRDO rate reset data—were publicly disclosed. Id. at 456–58. "[I]t suffices that other members of the public . . . could have identified the true state of affairs by conducting the same data-crunching exercise as did the relator," using the publicly disclosed data. Id. at 458.

Relator has also suggested that the analysis it conducted was so sophisticated, burdensome, and costly that no government entity would be capable of identifying the alleged fraud simply by analyzing the "raw data," i.e., the publicly disclosed transactions. Even assuming that were true, federal FCA precedent holds that Relator's action is still based upon the publicly disclosed transactions. As the court in Springfield Terminal explained, an alleged fraud is publicly disclosed even when it could be uncovered only by applying specialized expertise to analyze data available from an obscure source:

> [T]here may be situations in which all of the critical elements of fraud have been publicly disclosed, but in a form not accessible to most people, i.e., engineering blueprints on file with a public agency. Expertise in the field of engineering would not in itself give a qui tam plaintiff the basis for suit when all the material elements of fraud are publicly available, though not readily comprehensible to nonexperts.

14 F.3d at 655. Numerous other courts have agreed,[16] including where the inference of fraud requires reviewing publicly available "raw" data. 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., No. 3:04-cv-1556, 2011 WL 3875987, at *8 (M.D. Pa. Sept. 1, 2011) (databases of non-profits, financial data and analysis websites, including Bloomberg Professional), aff'd, 490 F. App'x 502 (3d Cir. 2012).

It is irrelevant whether fraudulent transactions could be found only with great difficulty after an investigation or whether it is unlikely that the government would have discovered the relevant documents. See U.S. ex rel. Solomon v. Lockheed Martin Corp., 878 F.3d 139, 146 (5th Cir. 2017) (rejecting argument that no one "would ever think to search for [a] model contract" for fighter aircraft posted on a government website); U.S. ex rel. Oliver v. Philip

[16] See A-1 Ambulance Serv., Inc. v. California, 202 F.3d 1238, 1245 (9th Cir. 2000) (use of "expertise" to develop theory of fraud is "irrelevant" to whether "material transactions giving rise to the alleged fraud were already disclosed"), superseded by statute as recognized in Silbersher v. Valeant Pharms. Int'l, Inc., 89 F.4th 1154 (9th Cir. 2024); Mistick, 186 F.3d at 383 n.3 (distinguishing "the statutory concept of 'public disclosure' with the different concept of 'public accessibility,'" where information "may appear buried in an exhibit that is filed in court without fanfare in an obscure case" and yet be publicly disclosed); 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." (citation omitted)), aff'd in relevant part, 473 F.3d 506.

Morris USA Inc., 826 F.3d 466, 475 (D.C. Cir. 2016) (memorandum publicly disclosed by being posted in online database containing nearly 4.5 million documents from over 400 litigations); United States v. Alcan Elec. & Eng'g, Inc., 197 F.3d 1014, 1019–20 (9th Cir. 1999) (public disclosure is not "limit[ed] . . . to information the government is likely to learn").

Relator has similarly argued that its action is not "based upon" the publicly disclosed transactions because the raw data did not identify alleged wrongdoers without needing to "comb through myriad transactions." In re Nat. Gas Royalties, 562 F.3d 1032, 1042 (10th Cir. 2009). This dicta from Natural Gas Royalties (which actually affirmed dismissal on public disclosure bar grounds, id. at 1037), does not mean that the public disclosure bar cannot apply whenever "myriad transactions" are involved—which would contradict the overwhelming weight of federal precedent, including Springfield Terminal. Instead, this opinion and others like it dealt with the entirely different situation in which publicly disclosed allegations, not transactions, suggest industry-wide fraudulent conduct, but do not tie the fraud to any particular defendant.[17]

[17] What's more, courts referring to the burden of combing through "myriad transactions" have done so with respect to non-public transactions (e.g., Medicare claims), not publicly disclosed transactions (like the VRDO transactional data at issue here). See, e.g., In re Nat. Gas, 562 F.3d at 1042.

Here, there is no dispute that each of the VRDO Data Sources directly and publicly ties every VRDO and every single rate change to a particular remarketing agent. Indeed, Relator does not contend that its analysis of the MSRB SHORT data leaves any doubt about who the Defendants are in this action. Natural Gas Royalties and its progeny do not apply here.

Applying the proper legal standards, there is no dispute of fact over whether "the alleged fraud in question was within the public domain" because Relator's action was based upon VRDO transactional data disclosed through MSRB SHORT, regardless of whether Relator expended "extensive efforts and financial investment" in analyzing that data. 4T at 34:21–24.

D. The VRDO Transactional Data Used By Relator Was Publicly Disclosed Through Three Qualifying "News Media" Sources. (4T)

The VRDO transactional data that Relator analyzed was available through three separate NJFCA "news media" sources. Relator has admitted that its expert used VRDO transactional data from MSRB SHORT to conduct the analyses on which Relator bases its fraud allegations, as reflected in the various complaints filed in this action. Ja2173 (¶¶ 194–97). As a member of the public who obtained the data through a subscription service available to anyone, and not through a non-public source, Relator concedes that this VRDO transactional data—including information specifying the VRDO and issuer, the identity of the

remarketing agent, and the rate reset for that week—was publicly disclosed by MSRB SHORT. See Ja2101-02 (¶ 14), Ja2104–05 (¶ 19), Ja2173 (¶¶ 194–97); Ja4275–81 (Eiholzer Cert. ¶¶ 28–32, 36–38); see also U.S. ex rel. Customs Fraud Investigations, LLC v. Victaulic Co., No. 13-2983, 2014 WL 4375638, at *10 (E.D. Pa. Sept. 4, 2014) (database containing all data relator "relied upon in formulating" its analysis was publicly disclosed in a "news media" source).

It is undisputed that the same data available from MSRB SHORT was also posted on the MSRB's free online portal, EMMA, with the exception of data fields that are not relevant here (like the date and time that a rate is published and transaction type). See Ja2099–2105 (¶¶ 11–14, 17–19). And the same data was also available through a subscription to Bloomberg's "Municipal Securities Master Database." See Ja2108–10 (¶¶ 25, 27 and responses). Thus, the data that Relator used to conduct the VRDO analysis that allegedly revealed the alleged fraud was publicly disclosed through all three VRDO Data Sources, each of which qualifies as an NJFCA "news media" source.

1. The Undisputed Terms of Use and Subscription Costs Do Not Mean the VRDO Transactional Data Was Not Publicly Disclosed. (4T)

The information available through the VRDO Data Sources is publicly disclosed, notwithstanding the terms of use and subscription costs. Relator's own reliance on the VRDO transactional data confirms this conclusion.

Relator's principal, Johan Rosenberg, is not an insider whistleblower; he never worked at any of the banks that are Defendants in this action. Ja2121 (¶ 41). Rosenberg is simply a member of the public whose company subscribed to MSRB SHORT to conduct what was, at the time, a business unrelated to asserting a false claims act claim against Defendants. See Ja2152–53 (¶¶ 93–97), Ja2156–60 (¶¶ 116–33). And based on an analysis of the data obtained from MSRB SHORT, Rosenberg's litigation company, the Relator here, has alleged fraud and brought this action. Neither the MSRB's subscription fees nor its terms of use prevented Rosenberg or Relator—not insiders but members of the public like the numerous others in the industry who subscribe to these services—from alleging fraud and bringing this action.[18]

No false claims act authority (state or federal) supports Relator's novel view that terms-of-use restrictions mean that data that can be viewed on a database is not publicly disclosed. There is no evidence that the VRDO Data Sources impose a "duty of confidentiality with respect to [their] information," like in United States ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp., 540 F.3d 1180, 1184–85 (10th Cir. 2008). Nor must the government or any member of the

[18] Certainly, Relator has not taken the position that it violated the MSRB SHORT terms of use by conducting its analysis and filing its complaint. Nor has it asserted that Johan Rosenberg violated EMMA's terms of use by collecting and analyzing data on roughly 50 VRDOs and their rate changes. See Ja2122 (¶ 44).

public be likely to find the information, so long as the information is posted and available to those who would care to look. See Solomon, 878 F.3d at 146; Oliver, 826 F.3d at 475; and Alcan, 197 F.3d at 1019–20.[19]

While the cost of MSRB SHORT ($10,000 per year, Ja2159 (¶ 131)) and Bloomberg Terminal (roughly $26,000 per year, Ja3901–03 (¶ 144)) are undisputed, nothing in the text of the statute limits "public" disclosures through "news media" to those available for free. N.J.S.A. § 2A:32C-9(c). Nor did the Legislature include a price limit in the statutory definition of "news media" or "public disclosures." Courts have also consistently rejected the argument that subscription fees somehow disqualify a source as a public disclosure. See, e.g., U.S. ex rel. Patriarca v. Siemens Healthcare Diagnostics, Inc., 295 F. Supp. 3d 186, 200 (E.D.N.Y. 2018) (finding the subscription-cost "argument has no traction"). Indeed, courts have held that subscription databases qualify as federal FCA "news media" sources. Customs Fraud Investigations, 2014 WL 4375638, at *8, *10 (rejecting argument that "the Zepol database is not 'news media,' and is not generally available to the public because subscribers pay a substantial fee

[19] Also inapposite are cases where confidential government information was not publicly disclosed, even though it theoretically could have been disclosed through a Freedom of Information Act request. See, e.g., U.S. ex rel. Wilson v. Graham Cnty. Soil & Water Conservation Dist., 777 F.3d 691, 696–97 (4th Cir. 2015) (two confidential government reports never distributed to public).

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.

Courts in the Third Circuit have explicitly held that Bloomberg Professional, despite its subscription costs, is news media through which information could be publicly disclosed. See Repko, 2011 WL 3875987, at *7–8, aff'd, 490 F. App'x 502. The same analysis equally applies to MSRB SHORT (not to mention that the MSRB also offers a free outlet of the same information relevant here: EMMA). And no court has held that an information provider that was available to all did not qualify as "news media" simply because it had a price tag.[20] Requiring a public disclosure through "news media" to be free (or setting an arbitrary limit to how much "news media" can charge) would wrongly "confuse[] the statutory concept of 'public disclosure' with the different concept of 'public accessibility.'" Mistick, 186 F.3d at 383 n.3.

There is no evidence that Relator paid any more than the standard, industry price to obtain the VRDO transactional data it used to conduct its analysis. That Relator—a member of the public and not an insider—simply paid the going rate necessarily means that the data was publicly disclosed to those

[20] Of course, well-recognized sources for public disclosure—like major newspapers—charge subscriptions, up to tens of thousands of dollars annually. Ja2120 (¶ 38) (citing Ex. 20, Group Subscriptions Pricing & Plans, Financial Times at 5). Subscription costs do not alter their status as "news media."

who might make some profitable use of the information, precisely the members of the public to which the public disclosure bar applies. If anyone who follows an industry could obtain the data through the ordinary means available in the industry, then the data is publicly disclosed. Relator has pointed to no legal authority holding that information is publicly disclosed only if it is the kind of information any "person on the street" would know. And the VRDO Data Sources at issue here are neither niche nor obscure, as they are regularly accessed by numerous industry participants. See Ja2098–99 (¶¶ 9–10), Ja2103–04 (¶ 18), Ja2106–07 (¶ 22), Ja2108–09 (¶ 26); Ja4301–02 (Eiholzer Cert. ¶ 84); Ja4199–200 (Lesser Cert. ¶¶ 9–11).

2. The MSRB SHORT Subscription Service, EMMA, and Bloomberg Subscription Service All Qualify As Statutory "News Media" Sources. (4T)

All three VRDO Data Sources also qualify as "news media" sources under the NJFCA, a term that "the [U.S.] Supreme Court has acknowledged . . . has a 'broad sweep.'" U.S. ex rel. Kraxberger v. Kan. City Power & Light Co., 756 F.3d 1075, 1079 (8th Cir. 2014) (quoting Schindler Elevator Corp. v. U.S. ex rel. Kirk, 563 U.S. 401, 408 (2011)). Under the federal FCA public disclosure bar, "news media" include any sources whose aim is to distribute information to the public, no matter how small the audience and whether or not the source resembles a traditional news organization. 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.") (collecting cases); see also, e.g., 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); 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" were news media), aff'd, 826 F.3d 466. "[T]he ordinary meaning of the words 'news media' is quite broad and includes information shared through means of communication that reach or influence people widely." Rosenberg, 169 N.E.3d at 459.

Just like other "news media" sources, the VRDO Data Sources are designed to collect information and then distribute it to the public. Other courts have already held that the Bloomberg subscription service qualifies as a false claims act "news media" source. See 1T at 14:14–25; Repko, 2011 WL 3875987, at *8, aff'd, 490 F. App'x 502; Rosenberg, 2019 WL 3643035, at *11, aff'd sub nom. Rosenberg, 169 N.E.3d 445. So too should this court, and for good reason. 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 (Olander Cert. ¶¶ 3, 6); see also Ja2108–09 (¶ 26). In every year since 2011, Bloomberg Terminal has had more than 300,000 subscribers. Ja1560 (Olander Cert. ¶ 7); see also Ja2108–09 (¶ 26).

Likewise, the Massachusetts Supreme Judicial Court has specifically held that EMMA is "news media," noting the term's "broad sweep" and given that EMMA is the "official repository for information on all municipal bonds[,] . . . provides updates to bond market information by means of the Internet," and "is publicly available and widely disseminated." Rosenberg, 169 N.E.3d at 461 (quotation marks omitted). Indeed, the trial court in this action has itself held that EMMA is "news media" under the NJFCA, a conclusion from which it has not retreated. See 1T at 14:21–25.

No court has addressed whether MSRB SHORT is an FCA "news media" source, but it would plainly qualify under all the precedents discussed above. The MSRB collects information concerning municipal securities, including VRDOs, pursuant to mandatory reporting requirements. Ja2098 (¶ 8). This information, including disclosure documents, current and historical VRDO interest rates, the identity of remarketing agents, and other information is posted to the EMMA portal and made available through MSRB SHORT. Ja2099–2102 (¶¶ 11–14), Ja2104–05 (¶ 19). The free EMMA portal is the "official repository

for information on all municipal bonds" and has been accessed by over 16 million users since 2013. Ja2098–99 (¶¶ 9–10), Ja2103–04 (¶ 18). Both EMMA and MSRB SHORT are designed to provide "market participants [with] the MSRB's market-wide collection of information and documents for . . . municipal Variable Rate Demand Obligations (VRDOs)." See Ja2105 (¶ 20) (quotation marks omitted) (alterations in original); Ja2097–98 (¶ 7 response) (The MSRB "build[s] technology systems that power [its] market and provide transparency for issuers, institutions, and the investing public." (quotation marks omitted) (second alteration in original)).

A small minority of authorities, two of which are unpublished trial court decisions, have diverged from widely recognized false claims act legal standards, and concluded, for differing reasons, that false claims act "news media" sources are limited to traditional news outlets like newspapers, broadcast or cable news, or sources that resemble those organizations. See U.S. ex rel. Integra Med Analytics LLC v. Providence Health & Servs., No. CV 17-1694 PSG (SSx), 2019 WL 3282619 (C.D. Cal. July 16, 2019), rev'd on other grounds, 854 F. App'x 840 (9th Cir. 2021). Two have applied that erroneous legal standard to EMMA (but not MSRB SHORT or Bloomberg, either one of which is sufficient to trigger the bar). See Ja3873–77 (State ex rel. Edelweiss Fund, LLC v. JPMorgan Chase & Co., No. 2017 L 000289 (Ill. Cir. Ct. June 13,

2023)); State ex rel. Edelweiss Fund, LLC v. JPMorgan Chase & Co., 307 Cal. Rptr. 3d 750, 776 (Ct. App. 2023). No Illinois appellate court has reviewed the trial court ruling in that state. And the California decision was controlled by California precedent "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, 307 Cal. Rptr. 3d at 776 (quoting State ex rel. Bartlett v. Miller, 197 Cal. Rptr. 3d 673, 685 (Ct. App. 2016)). No other court has adopted that view, and in fact, the Supreme Judicial Court of Massachusetts has explicitly rejected it. See Rosenberg, 169 N.E.3d at 461 n.23.

Moreover, there is simply no way to square the rationale of these rulings with either the U.S. Supreme Court's clear command that "news media" under the federal FCA public disclosure bar must have a "broa[d] sweep," Schindler Elevator, 563 U.S. at 408 (quotation marks omitted) (alteration in original), or the numerous authorities broadly applying "news media" to nontraditional sources of technical information and data that target niche audiences. See 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."); see also U.S. ex rel. Alcohol Found., Inc. v. Kalmanovitz Charitable Found.,

Inc., 186 F. Supp. 2d 458, 463 (S.D.N.Y. 2002) ("scientific and scholarly works" that are "too technical" for the average reader are "news media"), aff'd, 53 F. App'x 153 (2d Cir.); Green, 843 F. Supp. 2d at 33 (webpage promoting union training was "directed to a select audience" and was news media (quotation marks omitted)); Staples, 932 F. Supp. 2d at 40 (website that "compiles manifest information submitted to Customs by all shippers" qualifies as news media (quotation marks omitted)), aff'd, 773 F.3d 83.

Indeed, under the federal FCA, "news media" includes not just sources providing news articles and commentary, but also information and data sources like searchable online databases, journals publishing scholarly studies, government websites, a crowd-sourced online encyclopedia, and a union website promoting a fund for training and educational opportunities. See Kraxberger, 756 F.3d at 1079 (state public service commission's "'media center' hosting press releases, webcasts of public meetings, and . . . news and promotions related to public utilities"); Patriarca, 295 F. Supp. 3d at 197–202 (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" (quotation marks omitted)), aff'd, 490 F. App'x 502; U.S. ex rel. Brown v. Walt Disney World Co., No. 6:06-cv-1943-ORL-22KRS, 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.

E. Relator Is Not an Original Source of the VRDO Transactional Data. (4T)

Because its claims are based on publicly disclosed information, Relator can avoid summary judgment only if it can meet its burden to demonstrate that it is an "original source." To be an "original source," Relator must show three things: (1) its "knowledge of the information on which the allegations are based" is "direct"; (2) its knowledge of this information is also "independent" of public disclosures; and (3) it "voluntarily provided the information to the State before filing an action under [the NJFCA]." N.J.S.A. § 2A:32C-9(c) (2023).[21] Relator cannot satisfy any of these requirements, much less all of them. And under well-settled federal FCA precedent, a relator's "extensive efforts and financial

[21] An original source'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 (relator with only indirect knowledge was not an original source).

investment," 4T at 34:22–24, cannot transform it into an original source. Accordingly, Relator's claims are barred.

Direct Knowledge. "Direct knowledge is knowledge obtained without any intervening agency, instrumentality, or influence: immediate." Schumann, 769 F.3d at 845 (quoting Atkinson, 473 F.3d at 520). "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) (quotation marks omitted). Requiring direct and independent knowledge serves to "encourage persons with first-hand knowledge of fraudulent misconduct . . . to come forward." Glaser, 570 F.3d at 919 (quotation marks omitted).

Relator is not an insider whistleblower and has no "direct" knowledge regarding how Defendants reset rates. Neither Relator nor its principal, Rosenberg, has ever worked for any Defendant, much less as a remarketing agent. Ja2121 (¶ 41). Relator's action instead is based upon inferences it has drawn from publicly disclosed bond transaction data. Any "knowledge" Relator has must therefore be indirect, a point Relator has not contested.

Relator has pointed to information it obtained from Defendants' former employees and added to the 3AC and 4AC. See Ja3062 (3AC ¶ 72); Ja41–52 (4AC ¶¶ 121–27). But this information cannot make Relator an original source. First, consistent with New Jersey precedent, this court has held that knowledge

gained from interviews with others is not direct. Brennan, 454 N.J. Super. at 619 (concluding relator was 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").

Second, these former-employee statements did not surface until after several amendments to Relator's complaint; they were not part of the "information" on which Relator based the operative complaint that is subject to the public disclosure bar analysis, and so cannot be considered in determining whether Relator is an original source.[22]

Independent Knowledge. "Independent" knowledge is knowledge that is not "merely dependent on a public disclosure." Schumann, 769 F.3d at 845 (quotation marks omitted). A relator "who would not have learned of the information absent public disclosure" does not have "independent" knowledge.

[22] For the public disclosure bar, the appropriate complaint to consider is "the first [complaint] to particularly allege the relevant fraud," U.S. ex rel. Beauchamp v. Academi Training Ctr., 816 F.3d 37, 46 (4th Cir. 2016), but not to assess jurisdiction, as the Relator has previously contended. The fraud alleged by Relator has not changed since Relator filed its original complaint. Compare Ja1984 (Compl. ¶ 2), and Ja1989 (¶ 26), with Ja9 (4AC ¶ 2), and Ja15–16 (¶ 30). Supplementary information introduced in subsequent complaints is not relevant to the public disclosure bar. See Staples, 932 F. Supp. 2d at 41.

Ibid. (quotation marks omitted); see also Atkinson, 473 F.3d at 522 ("[R]eliance solely on 'public disclosures' . . . is always insufficient . . . to confer original source status.").

Relator admits that its knowledge is not independent—it came directly from MSRB SHORT. See Ja2173 (¶¶ 194–97). Relator's manipulation of the publicly disclosed MSRB SHORT data—from which it infers the fraud and Defendants' scienter—necessarily was not independent of the public data.

Indeed, for this reason, and contrary to what the trial court may have suggested by referring to "extensive efforts and financial investment," 4T at 34:22–24, numerous courts have recognized that a relator does not become an original source by using expertise or efforts to understand and analyze publicly disclosed data.[23] "Just as combining publicly available information with

[23] See, e.g., Express Scripts, 602 F. App'x at 882 (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); 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, 169 N.E.3d 445; Patriarca, 295 F. Supp. 3d at 202–03 (same); Alcohol Found., 186 F. Supp. 2d at 463–64 & 464 n.4 (extensive compilation of publicly available facts creating "the 'mosaic' of information that shows a fraud" insufficient), aff'd, 53 F. App'x 153; Stinson, Lyons, Gerlin & Bustamante, 944 F.2d at 1160 (explaining that, if the 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)

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, No. 15-cv-5427 (PKC), 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 market data, obtained from MSRB SHORT.

Neither do Relator's efforts in conducting the analysis make a difference. "Independent" means not dependent; it does not mean "work hard with." Inferences drawn from analyzing publicly disclosed facts, no matter how hard one worked to draw the inferences, remain dependent on the underlying facts.[24]

Providing Analysis to the AG. Finally, to qualify as an original source, the NJFCA requires that a relator "voluntarily provided the information [on which the allegations are based] to the State before filing an action." N.J.S.A. § 2A:32C-9(c). To the extent that Relator takes the position that its analysis (rather than the underlying bond transactional data) is the "information on which

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("Although interpreting the raw data required analysis, applying expertise to publicly disclosed data does not produce independent information.").

[24] Original-source cases involving non-public facts are therefore 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); U.S. ex rel. Absher v. Momence Meadows Nursing Ctr., Inc., 764 F.3d 699, 708 (7th Cir. 2014) (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").

the allegations are based," Relator was then required by statute to provide that analysis—the actual code and data constituting the purported analysis, not just conclusions or a description of the purported analysis—to the New Jersey government before filing this action as a necessary precondition to being an original source.

Relator has produced no evidence suggesting that it did so. Ja2148 (¶ 84). Nor did Relator, before filing its first complaint, provide the former employee statements included in the 3AC and 4AC, which Relator did not possess until years after filing this action in April 2015. Ja2150–51 (¶¶ 86–87). 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

To correct the trial court's erroneous application of both New Jersey retroactivity law and summary judgment standards, this court should reverse the trial court's orders on the parties' cross-motions for summary judgment and remand with instructions to enter judgment in favor of Defendants under N.J.S.A. § 2A:32C-9(c).

Dated: February 22, 2024

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Superior Court of New Jersey
Appellate Division

Docket No. A-001340-23

STATE OF NEW JERSEY, ex rel., EDELWEISS FUND, LLC, *Plaintiff-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 GRANT OF MOTION FOR LEAVE TO APPEAL FROM AN INTERLOCUTORY ORDER OF THE SUPERIOR COURT, LAW DIVISION, MERCER COUNTY DOCKET NO. MER-L-000885-15 Sat Below: HON. DOUGLAS H. HURD, P.J. Cv.

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TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS (cont'd)

Page(s)

TABLE OF CONTENTS (cont'd)

Page(s)

TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES (cont'd)

Page(s)

CASES

TABLE OF AUTHORITIES (cont'd)

Page(s)

CASES

TABLE OF AUTHORITIES (cont'd)

Page(s)

CASES

TABLE OF AUTHORITIES (cont'd)

Page(s)

CASES

TABLE OF AUTHORITIES (cont'd)

Page(s)

CASES

TABLE OF AUTHORITIES (cont'd)

Page(s)

CASES

STATUTES

TABLE OF AUTHORITIES (cont'd)

Page(s)

STATUTES

RULES & OTHER AUTHORITIES

TABLE OF TRANSCRIPTS

Note: Defendants filed these transcripts in November 2023 when they moved for leave to take an interlocutory appeal and provided paper copies to the Court in February 2024.

PRELIMINARY STATEMENT

Plaintiff-Relator Edelweiss Fund, LLC ("Relator") brings this New Jersey False Claims Act ("NJFCA") case to redress a fraud by five large banks ("Defendants"). The fraud relates to the way they reset rates on bonds issued by state and local governments to fund projects in the public interest.

Relator and Defendants cross-moved for summary judgment on the public disclosure bar, an affirmative defense available in NJFCA cases. The bar protects the State from parasitism, actions brought by relators who base a claim on public information and then seek a portion of the State's recovery. The bar is not intended to protect wrongdoers who have defrauded the State. The trial court granted summary judgment to Relator because the State opposed dismissal on public disclosure grounds. In the alternative, the court below denied the cross-motions on the bar's substantive elements.

Defendants appeal both aspects of the trial court's order. First, they appeal the decision to apply a procedural amendment passed while this case was pending that gives the State, the intended beneficiary of the public disclosure bar, the authority to veto dismissal of a case on that ground, forgoing a defense it does not need or want. Defendants contend the State's opposition should have no effect and that the amendment cannot apply "retroactively." Under settled New Jersey law, the amendment can apply to a case pending when it became effective without offending retroactivity

principles. The harms of retroactive legislation are entirely absent here. Application of the amendment does not harm Defendants' legitimate interests, impact their vested rights, upset their reasonable settled expectations, or impose new liability, or create new duties, for past acts. Instead, the amendment gives the State a procedural mechanism to do something it always could have done. A recent Appellate Division decision concerning a different portion of the amendments to the NJFCA does not compel a different result.

Second, Defendants appeal the trial court's alternative ruling that factual disputes regarding "all the essential elements" of the bar gave it "no choice" but to deny summary judgment for either Relator or Defendant.

Relator's operative complaint was based, in part, on analyses of data regarding the movement of VRDO interest rates. The parties disputed, among other things: (1) whether the rate data Relator used was publicly disclosed in light of legal limitations on the use of the data, the technical inaccessibility of the data, and the practical unavailability of the data associated with the massive expense to acquire it; (2) whether the government-created and regulated organization from which Relator obtained the rate data was the "news media"; (3) whether Relator's action was based upon the rate data, given the vast gap between the data and the conclusion that Defendants defrauded the State; and (4) whether Relator was an original source.

Defendants suggest the trial court mistook legal disputes for factual disputes. In reality, significant factual disputes about the public disclosure bar properly resulted in denial of summary judgment. This Court should affirm.

STATEMENT OF FACTS

I. The New Jersey False Claims Act

This is an action under the NJFCA, N.J.S.A. § 2A:32C-1 et seq., which permits private parties, or "relators," to sue to redress frauds on the State, the primary beneficiary of any recovery. NJFCA causes of action, like those brought under the federal False Claims Act (the "federal FCA"), 31 U.S.C. § 3730 et seq., "belong to the Government, not to relators." United States ex rel. Charte v. American Tutor, Inc., 934 F.3d 346, 535 (3d Cir. 2019).

Because the State is the alleged fraud victim, it has an overwhelming interest in an NJFCA matter. Its interests are protected by several statutory mechanisms. For example, when a relator files an NJFCA complaint, it remains under seal for at least 60 days to permit the State to investigate, N.J.S.A. § 2A:32C-5, a period the Attorney General may seek to extend, N.J.S.A. § 2A:32C-5(f). At the end of the seal period, the Attorney General may proceed with the action or decline to do so, in which case, the relator conducts the action. N.J.S.A. § 2A:32C-5(g).

Even when the State declines to intervene, it maintains significant

authority over an NJFCA case. It may intervene and take over the action at a later date. N.J.S.A. 2A:32C-6(f); see Matter of Enforcement of New Jersey False Claims Act Subpoenas, 229 N.J. 285, 289 (2017). And it may dismiss or settle the case, even over the relator's objections. N.J.S.A. 2A:32C-6(b-c). A relator that seeks to dismiss an unintervened action may do so only after the State consents. N.J.S.A. 2A:32C-5(c); see also id. § 6(g) (State may seek stay of discovery if it would interfere with State investigation or enforcement).

As set forth below, a 2023 amendment to the NJFCA provided the State with yet another procedural mechanism to safeguard its interests.

II. Defendants' Fraud on New Jersey

As alleged in the Fourth Amended Complaint (the "4AC") (Ja4-1312), Defendants defrauded New Jersey in connection with a type of municipal bond known as a Variable Rate Demand Obligation ("VRDO"). VRDOs are variable-rate, tax-exempt bonds that state and local governments issue to finance long-term projects for local communities. VRDOs allow the State to borrow money for long periods while paying lower, short-term interest rates. VRDOs are attractive to investors because they are low-risk, high-liquidity, and tax-free. Ja9-10, 13-15, 17 (¶¶ 1-6, 23-28, 32).

The role of Defendants in setting rates on VRDOs is what led to this action. VRDO issuers hired Defendants to act as remarketing agents

("RMAs"). As RMAs, Defendants were contractually required to reset the interest rate for a VRDO at the lowest rate that, in their judgment, would enable the bond to be sold at par, i.e., face value. Every time they reset rates, Defendants had to consider "prevailing market conditions." VRDO issuers also hired Defendants to buy back an issuer's bond if investors redeemed the bond and new investors could not be found by the RMA. Ja9-10, 13-18, 40, 102-07 (¶¶ 2, 4-6, 23-33, 119, 162 n.2, 255-70).

Relator's central allegation is that Defendants intentionally failed to set the lowest possible rate for each VRDO in light of prevailing market conditions. Instead, Defendants mechanically reset rates with no consideration of a bond's individual characteristics or prevailing market conditions. Defendants also ignored the very investors that Defendants knew would accept the lowest interest rates, thus failing to discover what the lowest rate might be. Relator also identified pricing patterns that, but for Defendants' fraud, should not have occurred. Ja2, 9, 32-41, 49-50, 107-12 (¶¶ 2, 87-119, 126(d), 271-84). Relator alleged a pervasive and consistent pattern of rate inflation. Ja106-18 (¶¶ 268-306). Defendants' conduct defrauded the State of more than $100 million via inflated interest rates, fees for RMA services that Defendants did not provide, fees for letters of credit that issuers needlessly incurred. Ja10 (¶ 6), 41 (¶ 120), 118-22 (¶¶ 307-20).

III. Discovery of Defendants' Fraud

Relator's principal, B. Johan Rosenberg ("Rosenberg"), has more than twenty years of municipal advisory experience. In the regular course of his business, he noticed that two VRDOs that were very different had the same rates and rate change for 50 of 52 weeks in one year. Ja11-12, 53-55 (¶¶ 10-12, 131-37). This was "anomalous," "really weird," and "odd." Ja1684; Ja2123; Ja2154-55, 2171 (¶¶ 107-08, 188). At the time, there was no known way to analyze and compare rates for groups of VRDOs. Rosenberg developed a commercial product to fill that market need. Ja2155 (¶¶ 109-110).

Developing a commercially viable software product, obtaining massive amounts of data to analyze, and inventing a patented methodology to analyze demanded thousands of hours and hundreds of thousands of dollars. The results led Rosenberg to suspect Defendants' misconduct. See, e.g., Ja2156-62, 2171-72 (¶¶ 111-43, 185-88).

IV. Litigation Concerning VRDO Rate-Resetting Fraud

In October 2012, Rosenberg put software development on hold to pursue litigation relating to VRDO rate-resetting. Ja2172 (¶¶ 189-90). This action and parallel cases have exposed a massive fraud that was undetectable until Relator

and its principal assembled the knowledge, expertise, and data to discover it.[1]

A key feature of the operative complaint, like its predecessors, is Relator's analysis of a massive amount of VRDO rate data. See Ja47-58, 61-118 (¶¶ 135-49, 161-306). The data was purchased or licensed from the Municipal Securities Rulemaking Board (the "MSRB"), a self-regulatory organization created by statute and overseen by the Securities and Exchange Commission (the "SEC"). Ja2366. MSRB sells or licenses VRDO rate data at great cost via two means. Ja2215, 2248. The MSRB also operates a website, the Electronic Municipal Market Access portal (the "EMMA Portal") from which users can obtain information about VRDOs. Each source imposes strict legal limitations on the use of data. Also, the EMMA Portal is, by design, configured to limit searching and obtaining data. Ja2104, 2164-69.

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 the case was under seal, Relator amended it twice in light of the continuing investigation into Defendants' misconduct. Ja1984-2083. Relator

[1] Relator has pursued litigation in other states. In Illinois, several Defendants, along with three other banks, agreed to pay $48 million to resolve the case there, the largest recovery in history under that State's False Claims Act. Expert discovery in New York is nearing completion. Discovery is proceeding in California. Pa5, 41-43; 3T 57:21-22; Ja3103-110, 3414-59.

newly alleged that Defendants colluded in resetting rates by communicating about rates in advance of setting them, aggravating the rate inflation that failure to consider prevailing market conditions already caused. See, e.g., Ja2050-59 (¶¶ 87-109); Ja103 (¶ 257-58). In July 2019, the Attorney General determined not to intervene and the complaint was unsealed. Ja2086-87.

In early 2020, Relator filed the Third Amended Complaint. Defendants moved to dismiss and, after extensive briefing and oral argument, the trial court granted the motion to dismiss in November 2020. 1T 3:21-17:2. The trial court permitted Relator to amend the complaint. 1T 17:3-5.

II. The Fourth Amended Complaint

Relator filed the 4AC on March 1, 2021, adding hundreds of new allegations and exhibits. See Ja4-128; see, e.g., 556-1309. On September 13, 2021, the trial court denied Defendants' motion to dismiss. 2T 6:4-20, 7:9-18. The trial court rejected Defendants' arguments that the 4AC insufficiently plead fraud, 2T 7:19-11:16, and that the public disclosure bar applied, 2T 11:17-12:5. This Court and the Supreme Court denied Defendants' subsequent motions for leave to take an interlocutory appeal. See Pa13-17, 19-23.

III. Discovery and Summary Judgment Proceedings

Over Relator's objection, the trial court granted Defendants' motion to limit discovery to the public disclosure bar. Ja4011-12. The parties developed

a voluminous summary judgment record relevant to this defense, see Ja1313-30, leading the parties to submit extraordinarily detailed statements of facts and responses. Just those reflect many disputes of material fact. Reviewing this record, the trial court found factual disputes that prevented it from granting summary judgment to either side. Ja1337-62, 2094-176, 3878-933; 4T 35:2-8.

IV. 2023 Amendments to the NJFCA

As the parties briefed summary judgment motions, the Legislature amended the NJFCA, effective June 30, 2023. See Pa24-31. Many of the changes, including the one at issue here, are procedural mechanisms that safeguard the State's ongoing authority over an NJFCA action. They include:

(1) allowing the Attorney General, upon intervention, to file its own complaint or amend or supplement a relator's complaint, Pa26;

(2) providing that, upon intervention, any pleading the Attorney General files would relate back to the filing date of the original complaint for statute of limitations purposes, Pa26;

(3) giving the Attorney General authority to issue civil investigative demands, subpoena out-of-state witnesses, and take sworn testimony, Pa30-31; and

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

Similarly, the Legislature 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 amending N.J.S.A. § 2A:32C-9(c) to add the phrase "unless opposed by the Attorney General" to the sentence of the

public disclosure bar that requires dismissal if the criteria for its application are met. Pa29. As a result, to bar dismissal on public disclosure grounds, the State need not initiate the case in the first instance or intervene in a relator-filed action, as it had to before the amendment. It can now achieve precisely the same result by exercising the veto authority. 4T 19:8-20:19.

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

The 2023 Veto Amendment merely gives the State the option to indicate it does not need or want the protection the public disclosure bar affords without fully intervening. 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). Providing the State a less resource-intensive way to achieve the same result -- avoiding dismissal on public disclosure grounds -- vindicates the State's interests in NJFCA matters.

The trial court properly held this was the Legislature's intent. 4T 26:14-27:25.

The amendments to the NJFCA, including the 2023 Veto Amendment, "take effect immediately." Pa31.

V. The State Vetoes Dismissal on Public Disclosure Grounds

In August 2023, the State opposed dismissal of the action on public disclosure grounds. Ja3995-98. Attorneys General in three other states where Relator was prosecuting similar actions had already done the same. Ja3103-20.

The veto is an expression of the State's view that it not regard this case as parasitic and 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) (veto means that dismissal would be "illogical"). As the beneficiary of the public disclosure bar, Bryant, 24 F.4th at 1030-31, the State's view deserves considerable deference.

The trial court permitted supplemental briefing on the impact of the 2023 Veto Amendment. As part of that briefing, Relator submitted unrebutted evidence that Defendants' conduct was ongoing and continued after June 30, 2023, the effective date of the 2023 amendments. Ja3999-4003.

VI. The Trial Court's Decision on Summary Judgment

On the summary judgment, he trial court held that the State's notice applied to the case pending before it. Because a case could not be dismissed on

public disclosure grounds if the Attorney General opposed such dismissal, the trial court granted Relator's motion for summary judgment. 4T 6:10-13.

The trial court also considered whether application of the 2023 Veto Amendment to a case that was pending before its passage raised retroactivity concerns. 4T 6:22-28:23. Its thorough analysis was supported by applicable law and established interpretive canons. The trial court held:

(1) The 2023 Veto Amendment is procedural in nature and "serves as a tool that bolsters the State's ability to protect its existing interest," 4T 16:13-17:2, 28:1-10.

(2) The 2023 Veto Amendment "does not confer any new right" to the State and does not "destroy any of the defendants' [rights]," which remain "inviolate," 4T 17:13-18:14; see also 4T 20:1-3, 28:12-19.

(3) Whether the relator leads the action or the State has intervened and bears the prosecutorial burden "is of no practical effect on the rights of the defendant here," 4T 19:13-20:3.

(4) Prior to the 2023 Veto Amendment, the State had to "formally had to intervene to prevent dismissal," but "it can now simply notify the Court to achieve the same result," 4T 15:22-16:1; 4T 26:4-12.

(5) The procedural changes introduced by the amendment and the authority to contest dismissal "fortifies the State's procedural toolkit to safeguard it with enduring interest." 4T 20:22-21:2.

(6) Viewing the 2023 Veto Amendment as substantive rather than procedural "would impair the entire statutory framework and render it impracticable" because it would "curtail the State's ongoing opportunity to intervene when circumstances warrant." 4T 22:10-23; see also 4T 23:8-25:10, 26:7-27:25.

(7) Applying the 2023 Veto Amendment to the pending case was informed by "the imperative of maintaining fidelity to [l]egislative intent." 4T 22:24-23:7.

As an alternative ruling, the trial court denied the cross-motions for summary judgment on the substance of the public disclosure affirmative defense. It did so in the event of appellate review of its decision regarding application of the 2023 Veto Amendment. 4T 6:13-21, 28:24-29:4, 35:18-20.

Applying the familiar summary judgment standard of Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), see 4T 29:5-21, the trial court held that "this isn't even close to being considered so one-sided for either side which is why there are disputes of material fact" 4T 29:21-30:3 (emphasis added). The trial court located disputes of material fact on "all the essential elements of this affirmative defense" and found that "the factual predicate set forth by the defendants and relators as to each and every prong of the analysis clearly creates disputed issues of material fact." 4T 35:2-13 (emphasis added).

The Court granted Defendants leave to take an interlocutory appeal on January 4, 2024. Defendants have not sought a stay of discovery, which will be completed by November 2024. Pa51.

ARGUMENT

I. The 2023 Veto Amendment Should Apply To This Case (Ja1-3; 4T)

A. Legislative Intent Supports The Trial Court's Holding (Ja1-3; 4T)

This Court reviews de novo the trial court's statutory interpretation. State v. J.V., 242 N.J. 432, 442 (2020).

In passing the 2023 amendments, including the 2023 Veto Amendment, the Legislature spoke plainly: the 2023 amendments "shall take effect immediately." Pa31. Thus, upon passage of the statute, a New Jersey court was required to dismiss an NJFCA "action or claim" if the requirements for application of the public disclosure bar were satisfied, "unless opposed by the Attorney General." Pa29 (emphasis added). Here, the State expressed such opposition. Ja3995-98. Faced with a statute that had already taken effect, the trial court lacked authority to dismiss the case on public disclosure grounds. United States v. Doyle, 2022 WL 1186182, at *4 n.1 (S.D. Ohio Apr. 21, 2022) (where government exercised statutory veto power, court does not consider public disclosure bar as basis for dismissal).

The Legislature did not, as it regularly does, provide that the 2023 amendments would take effect at a later date. See, e.g., State v. Scudieri, 469 N.J. Super. 507, 515 (App. Div. 2021) (legislation became effective more than four months after it was signed into law and only to offenses committed on or after a certain date); R.A. v. W. Essex Reg'l Sch. Dist. Bd. of Educ., 2021 WL 3854203, at *10-12 (App. Div. Aug. 30, 2021) (6- month delay in effectiveness). Nor did the Legislature specify that the 2023 amendments would not apply to pending cases. See, e.g., Rock Work, Inc. v. Pulaski Const. Co., 396 N.J. Super. 344, 352, 933 A.2d 988, 992 (App. Div. 2007) (legislation

specified that it did not apply to pending proceedings or vested rights; Matter of Avery's Estate, 176 N.J. Super. 469, 475 (App. Div. 1980) (same).

The meaning of "immediately" in this context is tied to the nature of the 2023 Veto Amendment. See Cruz v. Central Jersey Landscaping, Inc., 195 N.J. 33, 46 (2008) (intent in using similar statutory language "must be understood in light of [court's] pre-existing interpretation" of relevant statute). In this case, the 2023 Veto Amendment did not change the nature of any of Relator's claims for relief. Rather, it gave the Attorney General, as the intended beneficiary of the protections of the public disclosure bar, a new procedural mechanism to indicate that it did not need or want such protections. Berntsen, 2014 WL 12480026, at *3. As the trial court found -- and Defendants do not meaningfully rebut -- the 2023 Veto Amendment does not alter the rights of either the State or Defendants. 4T 17:13-18:14. Its sole impact is to amend the procedure the Attorney General must follow to prevent dismissal of a case on public disclosure grounds. 4T 15:22-16:1; 4T 26:4-12. Now, the State can simply veto dismissal on public disclosure grounds and need not intervene.

The 2023 Veto Amendment is thus a change in the "course of practice or procedure for the enforcement of a right" and, as a result, the case "sh[ould] be conducted as near as may be in accordance with such altered practice or procedure." N.J.S.A. § 1:1-14 (emphasis added); Regent Care Ctr., Inc. v.

Hackensack City, 20 N.J. Tax 181, 193 (2001) (discussing N.J.S.A. § 1:1-14). The only interpretation faithful to this statutory directive is to apply the 2023 Veto Amendment to this pending case. See generally Roik v. Roik, 477 N.J. Super. 556, 573-74 (App. Div. 2024) (new statutory provision amending equitable distribution statute was to be "effective immediately" applied to "to pending cases that were not dismissed prior to effective date consistent with "pipeline retroactivity" jurisprudence). The State should be able to achieve in this case a result that it could always have achieved.

B. The Harms of Retroactive Legislation Are Absent (Ja1-3; 4T)

Courts faced with whether legislative enactments may be given retroactive effect consider to whether doing so would sweep away settled expectations, impair rights a party possessed when it acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed, Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994). Here, Defendants are not subject to new legal consequences for past events.

New Jersey courts have identified "three circumstances that will justify giving a statute retroactive effect: (1) when the Legislature expresses its intent that the law apply retroactively, either expressly or implicitly; (2) when an amendment is curative; or (3) when the expectations of the parties so warrant." James v. N.J. Mfrs. Ins. Co., 216 N.J. 552, 563 (2014) (citing Twiss v. State,

124 N.J. 461, 467 (1991)). "Once it has been determined that a statute is subject to retroactive application, a separate inquiry requires examination for manifest injustice to the party adversely affected." Id. at 565 (retroactivity analysis involves determination of whether there has been an unconstitutional interference with vested rights or manifest injustice).

The trial court's thorough analysis of each aspect of New Jersey law, considered with an eye towards avoiding the harms of retroactive legislation, was correct. Three elements of the 2023 Veto Amendment compel this result.

First, the trial court properly viewed the 2023 Veto Amendment as procedural in nature. 4T 18:6-19:7. This was plainly correct, as the amendment merely modifies the manner in which the Attorney General can achieve a result that it could always have achieved. Defendants engage in a lengthy disquisition about how the 2023 Veto Amendment is not procedural because it "reflects a new substantive policy judgment." Db20-23. Defendants do not cite a single case suggesting that "new substantive policy judgment[s]" are what drive retroactivity analysis, id., or supporting the notion that retroactivity relates to whether legislation "reflects a different policy choice," Db23. See, e.g., James, 216 N.J. at 563.

Second, the trial court correctly held that the 2023 Veto Amendment did not alter the rights of either the State or Defendants. 4T 19:13-21:3. The

Attorney General could always disable a defense of public disclosure by initiating an action or intervening in one a relator brought; in neither case could a defendant assert the public disclosure bar. The 2023 Veto Amendment leaves that situation unchanged. No defendant in an NJFCA action could have reasonably expected to be free of NJFCA liability on public disclosure grounds if the State wanted otherwise. 4T 25:22-26:13. The 2023 Veto Amendment does not upend Defendant's legitimate expectations. The "expectations" to which Defendants point are meritless. Db19-20. No bank could expect to not be liable for defrauding the State, for example, in an action initiated by the Attorney General, if the fraud were previously disclosed in public.

In arguing to the contrary, Defendants go astray. They point to federal cases that concerned what they call the "same amendment to the federal FCA, passed in 2010," which they contend the trial court ignored. Db13. But the 2010 amendments to the federal FCA are not the "same" as the NJFCA's 2023 amendments. Compare Pa29 with Pa38. Before 2010, the federal public disclosure bar provided that "[n]o court shall have jurisdiction" where a qualifying public disclosure occurred. Pa38. The 2010 amendments made public disclosure an affirmative defense. That is, before 2010, a defendant had a substantive right not to be subjected to a federal FCA claim if the public disclosure bar applied. The 2010 amendments to the FCA changed that and

could not apply retroactively. See, e.g., Prather v. AT&T, Inc., 847 F.3d 1097, 1103 (9th Cir. 2017). In contrast, the NJFCA's public disclosure bar was never jurisdictional; thus, the 2023 amendments do not alter a defendant's rights. See Pa29. The court below understood that the federal precedents on which Defendants rely should not apply. 4T 14:15-15:11. Nor did the 2010 federal FCA amendments contain the many procedural safeguards made by the Legislature to the NJFCA. Compare Pa26, 27, 29 with Pa38.

Finally, the trial court properly held that applying the 2023 Veto Amendment to the pending case was necessary to remain loyal to the Legislature's intent to preserve the Attorney General's ongoing interests in and control over NJFCA litigation. 4T 22:10-23:16. Indeed, many aspects of the 2023 amendments -- including the State's expanded investigative authority and relaxed relation-back provisions -- are consistent with the intent of the 2023 Veto Amendment: to ensure the Attorney General can more effectively investigate and prosecute alleged frauds on the State. The 2023 Veto Amendment simply helps ensure that meritorious cases are not dismissed on public disclosure grounds when the State determines they should be adjudicated on the merits. 4T 23:8-25:10, 26:7-27:25. Defendant say nothing about this. For this reason, too, the 2023 Veto Amendment is properly seen as curative. 4T 12:10-13:5; Ardan v. Bd. of Review, 231 N.J. 589, 611 (2018)

(curative statute does not alter law in substantial way, but merely clarifies legislative intent behind pre-existing law and may be applied retroactively).

C. *Bayer Corp.* Does Not Compel A Different Result (Ja1-3; 4T)

A recent Appellate Division panel considered the application of a different amendment to the NJFCA under different circumstances. Specifically, State ex rel. Health Choice Group, LLC v. Bayer Corp., 2024 WL 875633 (App. Div. Mar. 1, 2024), considered whether a substantive change to the definition of "original source" should apply to a case where the trial court dismissed the complaint more than two years prior to the 2023 amendments.

Bayer Corp. does not apply to this case because it did not consider the 2023 Veto Amendment. The only question before the court was whether the definition of original source should apply retroactively. Because that amendment modified the substance of an exception to the public disclosure bar by making it easier for relators to satisfy, see Pa29, it exposed defendants to a greater scope of liability than they faced prior to the amendment. In contrast, the 2023 Veto Amendment does not alter Defendants' substantive exposure at all, nor does it change the availability of the public disclosure defense.[2]

[2] The closest that Defendants come is Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939 (1997), which compares government-led and relator-led qui tam actions. Db6. The problem for Defendants is that the 1986 amendments to the public disclosure bar at issue in Hughes Aircraft created the original source exception to the public disclosure bar and,

Second, the lawsuits in Bayer Corp. had been dismissed years before the amendments took effect. The question Bayer Corp. answered affirmatively is whether a legislative amendment can have retroactive effect to revive a long-dismissed lawsuit. That is not the question in this case, which instead asks whether the 2023 Veto Amendment should apply retroactively to a "pending case[] that [was] not dismissed prior to the effective date of the new statute[]." Roik, 477 N.J. Super. at 573-74. Applying the 2023 Veto Amendment to "cases in the pipeline advances the purpose of the law and does not frustrate the administration, but instead provide trial courts grappling with this issue a means to resolve cases in accordance with the law." Id.

* * *

Finally, even if the Court agrees with Defendants that the 2023 Veto Amendment does not give the Attorney General power to veto application of the public disclosure bar as to claims submitted before the amendment was enacted on June 30, 2023, Relator's allegations concerning Defendants' ongoing false claims submitted after June 30, 2023, must still survive. Ja3999-

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therefore, were found to have created a new cause of action and attached new liability to past conduct. Id. at 948-50. The 2023 Veto Amendment does neither. The addition of the veto authority in 2023 "does not alter [the Attorney General's] substantive power" or Defendants' exposure to liability. 4T 15:16-16:1. "[W]hether the relator or the State bears the prosecutorial burden is of no practical effect on the rights of the defendant." 4T 19:13-18.

4003; Ja11, 121, 125 (¶¶ 11, 319, 332). In no event can the Court grant Defendants judgment in the manner that they seek. Db49.

II. The Trial Court's Alternative Ruling Was Correct (Ja1-3; 4T)

A. Standard of Review (Ja1-3; 4T)

In reviewing the grant or denial of summary judgment, this Court should apply a de novo standard of review and utilize the standard employed by the trial court. Crisitello v. St. Theresa Sch., 255 N.J. 200, 218 (2023). Brill teaches that, if "the court finds the evidence, even viewed in the light most favorable to the non-moving party with all reasonable inferences, is so one-sided that there are no genuine issues of disputed material facts, the court may decide the issue without a jury." Pantano v. New York Shipping Ass'n, 254 N.J. 101 (2023) (citing Brill). Applying Brill, the trial court regarded the decision to deny summary judgment as not "even close." 4T 29:18-30:3.[3]

B. Factual Disputes Preclude Summary Judgment (Ja1-3; 4T)

Courts typically apply a four-part inquiry to the NJFCA's public disclosure bar codified in N.J.S.A. § 2A:32C-9(c). First, courts ask whether the operative pleading's allegations or transactions have been publicly disclosed.

[3] Defendants' persistence in asserting that the trial court "[m]istook [l]egal [a]rguments for [f]actual [d]isputes," Db26, is belied what the trial court did. The trial court proceeded in standard fashion by determining the legal requirements for application of the bar, 4T 30:4-33:9, and then determining whether there were disputes of material fact, id. 33:10-35:14.

Second, they ask whether the disclosure occurred in one of the channels enumerated in the statute, here "by the news media." Third, they consider whether the action is "based upon" or "substantially similar to" the publicly disclosed allegations or transactions. Fourth, if all three questions are answered in the affirmative, the court determines whether the relator can demonstrate that it is as an "original source." See, e.g., United States v. Omnicare, Inc., 903 F.3d 78, 81-83 (3d Cir. 2018).

1. Rate Data Was Not Publicly Disclosed (Ja1-3; 4T)

a. Applicable Law (Ja1-3; 4T)

Whether a disclosure is "public" for NJFCA purposes turns on whether the relevant information has been placed in the public domain or made available for public use. See, e.g., Cause of Action v. Chicago Transit Auth., 815 F.3d 267, 274 (7th Cir. 2016); United States ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp., 540 F.3d 1180, 1185 (10th Cir. 2008) (public disclosure requires that information be "generally available and not subject to obligations of confidentiality"). The "disclosure" component focuses on actual disclosure and requires more than "mere theoretical or potential availability of information." United States ex rel. Holmes v. Consumer Ins. Grp., 318 F.3d 1199, 1204-05 (10th Cir. 2003). Affirmative disclosure is the "talisman" public disclosure bar. United States ex rel. Wilson v. Graham Cnty. Soil &

Water Conservation Dist., 777 F.3d 691, 698-99 (4th Cir. 2015).

b. Discussion (Ja1-3; 4T)

Defendants claim that there are three mechanisms by which a public disclosure occurred: (1) licensing or purchasing rate data in bulk from the MSRB; (2) obtaining data from the EMMA Portal; and (3) obtaining rate data from what they refer to as "Bloomberg," via an annual subscription costing $250,000 or more or via a subscription to a terminal for $10,000 per year.

Defendants do not point to any actual disclosure of the VRDO rate data Relator used in its complaints. The ability to look up a massive amount of data does not mean that anyone did. There is no evidence that anyone could reasonably access a Bloomberg database to look up 2.5 million rate resets on more than 15,000 VRDOs for a 4.5-year period. Nor do they point to actual disclosure of the rate resets that occurred in the full period the 4AC covers. See Ja112-116, Ja2276, 2290-91. And they do not point to a single subscriber to the MSRB subscription services for the period Relator's initial analysis covered, or a single purchaser of all the historical data. Ja 2168, 2175-76, 2276. Theoretical availability is insufficient. Actual disclosure is required.

Beyond the lack of actual disclosure, the information that Defendants contend was publicly disclosed was never in the public domain or made available for public use. These mechanisms of claimed disclosure cannot

trigger the bar. See, e.g., Kennard v. Comstock Res., Inc., 363 F.3d 1039, 1043 (10th Cir. 2004). Every source to which Defendants point comes with extreme limitations that, in combination, render the data not in the public domain and not available for public use. See Ja2164-66 (legal restrictions associated with EMMA Portal and SHORT Historical Data Product and the SHORT Subscription Service), 2166-69 (technical restrictions associated with EMMA Portal), 2104-05, 2161, 2165-68 (legal unavailability on EMMA Portal of crucial data identifying each VRDO), 2179-81, 2192-95, 2197-2201 (limitations on data licensed from Bloomberg Finance L.P.).

Data cannot be, and is not, "accessible to or shared by all members of the community," United States ex rel. Feingold v. AdminaStar Fed., Inc., 324 F.3d 492, 495 (7th Cir. 2003), if it cannot lawfully be copied, assembled into a database, analyzed, or used for anything other than "internal business purposes" or by a user that does not compete with the data's source. See, e.g., Ja2986-3019 (MSRB licensing agreement), Ja2179-80.

The requirements that users of these services -- the EMMA Portal, the MSRB subscription service, Bloomberg terminals, and Bloomberg data licenses -- not further disseminate the information, use it for only limited purposes, or any of a host of other restrictions imposed render it not publicly disclosed. Maxwell, 540 F.3d at 1185 (data not publicly disclosed if subject to

obligation to keep confidential). Defendants misstate the evidentiary record when they claim that there is no evidence that the VRDO data sources impose a "duty of confidentiality with respect to [their] information." Db35. The restrictions imposed by the MSRB and Bloomberg plainly require that data be kept confidential and not disseminated. They also restrict even the manner in which the data may be used. Ja2101-02, 2104-05, 2164-65, 2267-73. As just one example of that, the EMMA Portal imposed as a condition that users not engage in data mining. Ja2268. This combination of limitations rendered the data from each source not publicly disclosed or, at the very least, created factual questions as to whether it was publicly disclosed.

Finally, there is the matter of the extreme expense associated with obtaining the rate data cited in the complaints. See Ja2108-09, 2144-45, 2159-62. Defendants again entirely miss the point about cost. Db36-38; 3T 52:4-53:24. Cost is a practical access restriction like any other restriction and is plainly relevant to whether data is "generally accessible" or readily available to the public. See, e.g., United States ex rel. Repko v. Guthrie Clinic, P.C., 2011 WL 3875987 (M.D. Pa. Sept. 1, 2011), aff'd, 490 F. App'x 502, 504 (3d Cir. 2012). The Court need not hold that cost on its own makes a data source not publicly disclosed or what cost renders something not public. It need only consider whether the extreme costs to obtain data here in combination with

legal limitations on the use of the data and the technical inaccessibility of data from the EMMA Portal created a material factual dispute. The question cannot be so one-sided under Brill that it must be decided in Defendants' favor.

Cases where modest expenses were not an impediment to finding a public disclosure do not help Defendants. Db36. The costs in this case -- amounting to hundreds of thousands of dollars -- are unlike any prior case. It defies logic to urge that something that costs a user a few dollars to access and something that costs hundreds of thousands of dollars are equally accessible to the public. Ja2215, 2294, 2300, 2450-52. And Defendants' effort to claim that something is publicly disclosed if a standard industry price was paid fares no better. Db37-38. Paying a massive price is a practical limitation on access, whether the prices is the "going rate" or not.

2. There Was No Disclosure By The News Media (Ja1-3; 4T)

a. Applicable Law (Ja1-3; 4T)

While there is no definition of "news media" in the NJFCA or federal FCA, the touchstone of the "news media" is whether any member of the public can generally or readily access the information. See, e.g., United States ex rel. Sedona Partners LLC v. Able Moving & Storage, Inc., 2022 WL 3154811, at *6 (S.D. Fla. July 7, 2022); Repko, 2011 WL 3875987, at *6-7 ("generally accessible websites" have unrestricted access and are available to general

public); United States ex rel. Green v. Serv. Contract Educ. and Training Trust Fund, 843 F. Supp. 2d 20, 32 (D.D.C. 2012) (website was "news media" because access was not limited or restricted); United States ex rel. Liotine v. CDW Gov't Inc., 2009 WL 3156704, *6 n.5 (S.D. Ill. Sept. 29, 2009) (website not "news media" because page not readily accessible). Courts also look for an intention to widely disseminate information. See, e.g., Mark ex rel. United States v. Shamir USA, Inc., 2022 WL 327475, at *1 (9th Cir. Feb. 3, 2022).

The Court should interpret the term in a commonsense manner consistent with the purpose of the NJFCA. One frequently cited opinion, United States ex rel. Integra Med Analytics L.L.C. v. Providence Health & Servs., 2019 WL 3282619, *4, 16 (C.D. Cal. July 16, 2019), rev'd on other grounds, 2021 WL 1233378 (9th Cir. Mar. 31, 2021), identifies factors to determine what is, and is not, the "news media," including:

(1) The extent to which the information typically conveyed by a source would be considered newsworthy;

(2) Whether the source exhibits some editorial independence or some separation between the source of information and the medium that conveys it;

(3) The "source's intent to disseminate information widely";

(4) Whether the source could reasonably be described as "news media" under everyday usage of the term.

The Court's interpretation of the phrase "news media" in N.J.S.A. § 2A:32C-9(c) should be informed by a definition of that term in New Jersey's

Rules of Evidence. See generally State v. Goodwin, 224 N.J. 102, 113 (2016) (interpreting term used in one code section to inform meaning of another section). Like Integra Med, N.J. R. Evid. 508(a) defines "news media" in commonsense terms. N.J. R. Evid. 508(a) (defining news media to include newspapers, magazines, and other "means of disseminating news to the general public"); see also id. 508(b)(b) (defining related terms); Too Much Media, LLC v. Hale, 206 N.J. 209, 233-34 (2011). New Jersey courts have used N.J. R. Evid. 508(a)'s definition to interpret the same term in another statute. See, e.g., Dow Jones & Co. v. Dir., Div. of Tax'n, 5 N.J. Tax 181, 190-91 (1983), aff'd, 193 N.J. Super. 80 (App. Div. 1984). A court in Illinois did the same, holding that the EMMA Portal is not the news media. State of Illinois ex rel. Edelweiss Fund LLC v. JPMorgan Chase & Co., No. 2017 L 289 (Cir. Ct. Cook Cty. June 13, 2023) (reproduced at Ja3874 et seq.).

b. Discussion (Ja1-3; 4T)

At the very least, disputed issues of material fact exist as to whether: (i) the EMMA Portal; (ii) the MSRB in licensing data; and (iii) Bloomberg's data-licensing component, are "news media."

i. The EMMA Portal (Ja1-3; 4T)

An appellate court in California considering a parallel matter initiated by Relator there has held that the EMMA Portal is not the news media. State ex

rel. Edelweiss Fund, LLC v. JPMorgan Chase & Co., 90 Cal. App. 5th 1119, 1147-51 (1st Dist. 2023), rev. denied, Aug. 9, 2023 ("Edelweiss CA"). So too has a trial court in Illinois. See Ja3875-77.

Edelweiss CA likened the EMMA Portal to an SEC database to which reporting companies were required by regulation to submit information that had been held by another California court to not be the news media. Id. at 1148 (quoting State ex rel. Bartlett v. Miller, 197 Cal. Rptr. 3d 673 (Cal. Ct. App. 2016)). Edelweiss CA turned to dictionary definitions of "news" and "media" and held that one touchstone of "news media" is whether information conveyed "would be considered newsworthy." Edelweiss CA saw "no basis to conclude that an online repository containing defendants' daily or weekly submission of interest rate reset data would be considered . . . newsworthy." Id. at 1149 (quoting Silbersher v. Allergan Inc., 506 F. Supp. 3d 772, 806 (N.D. Cal. 2020), rev'd on other grounds, 46 F.4th 991 (9th Cir. 2022)).

Edelweiss CA then considered the structure of the public disclosure bar and, in particular, the fact that the statute limits disclosure to particular channels, just like the NJFCA. Edelweiss CA concluded that, "[i]f the interest rate data here were considered a disclosure by 'news media' simply because EMMA is a publicly available website, it would effectively swallow the fora limitations of [the California False Claims Act]." Id. at 1149.

Edelweiss CA also consulted federal FCA cases interpreting the term "news media." In doing so, it squarely rejected the notion that "all publicly available websites are news media." Id. at 1150-51 (cleaned-up). Edelweiss CA held that "while the Internet has certainly expanded the meaning of 'news media' to include certain information publicly available online, it does not include the [EMMA Portal]." Id. This Court should reach the same result here.

Edelweiss CA conclusively rejected the decision of a court in Massachusetts before which Relator had initiated a parallel matter. Rosenberg v. JPMorgan Chase & Co., 169 N.E.3d 445 (Mass. 2021) ("Edelweiss MA"). Edelweiss MA concluded that, based on facts cognizable on a motion to dismiss, the EMMA Portal was the news media and, for that reason, Defendants heavily rely on it. See Db39, 40, 42. But Edelweiss MA was an appeal of a motion to dismiss decision and, as a result, did not consider the detailed summary judgment record before this Court.

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

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

Second, the EMMA Portal does nothing to determine the accuracy of rate reset or other information submitted by RMAs. Indeed, unlike what would normally be considered the news media, which want to be trusted, it disclaims any accuracy and completeness. Ja2115, 2169-70. Nothing that is the "news media" would entirely disclaim any responsibility to be accurate, truthful, or reliable. That is, after all, the very purpose of the news media.[4]

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

There is also no evidence that anyone has ever referred to the EMMA Portal as the "news media." And no case cited by Defendants involves a source of information that imposed the severe limitations on obtaining and using information that the EMMA Portal does. Ja2164-70, 2098-105, 2284-92.

[4] Neither the EMMA Portal nor the MSRB has any editorial function. Nor does Bloomberg Finance L.P. in selling data. Ja1561. A lack of editorial function tends to show that a source is not the news media. See, e.g., United States ex rel. Moore & Co. v. Majestic Blue Fisheries, LLC, 69 F. Supp. 3d 416, 425 (D. Del. 2014) (unedited, unverified information posted to website not "news media"), rev'd on other grounds, 812 F.3d 294 (3d Cir. 2016).

The EMMA Portal also engages in none of the First Amendment-type behavior that the news media in this country do. Most importantly, the EMMA Portal is heavily regulated by the SEC, which supervises virtually every aspect of the operation of the EMMA Portal and even determined whether it could exist at all. Ja2899-900. Defendants have not and cannot point to any channel that any court has ever considered "news media" that must ask the government for permission to exist and permission to change how it does business. The drafters of the NJFCA and the federal FCA could not have intended that a website that was government-created and -controlled website would be the "news media." If it and the MSRB were, it would entirely eviscerate the limits in the NJFCA as to what government reports can be considered an enumerated channel for public disclosure. See N.J.S.A. 2A:32C-9(c).

ii. The MSRB (Ja1-3; 4T)

Defendants strain even more when they argue that the ability to subscribe to real-time data from the MSRB and to license data in 12-month sets makes the MSRB itself the news media. Db8, 33-34, 38-43.

First, the MSRB is the product of an act of Congress and it is directed to the making of rules within statutory constraints for the municipal securities business. 15 U.S.C. § 78o-4(b)(2). It has none of the First Amendment freedoms that the news media does. No one has called it the "news media."

Second, while the MSRB licenses data, it sets extraordinary restrictions and terms of use that push the MSRB far beyond what "news media":

(a) The data may only be used for "internal business purposes."

(b) The subscriber may re-distribute data to its end user clients, but only for their internal business purposes and only if the end user is a "professional entity that utilizes" the data in its regular business.

(c) The subscriber's re-dissemination of data is limited to situations where the end user "would not reasonably be expected to serve as a substitute" for obtaining the data directly from the MSRB.

(d) Subscribers must inform clients of the limitations on the further re-dissemination of data except as permitted by the MSRB.

(e) Subscribers must obtain a separate license to CUSIP numbers from a separate private company, CUSIP Global Services ("CGS") at additional cost, a requirement that the MSRB will police.

(f) Subscribers must agree to indemnify the MSRB.

Ja2306, 2385-87, 2986-3004, 3006-19, 4309-10. No news media does this.

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

Finally, the MSRB does not have anything like First Amendment-type freedom that are the hallmark of the "news media." The MSRB had to seek the permission of the SEC to even permit it to license data in the first place and must seek the SEC's permission to change virtually any aspect of its subscription services. See, e.g., SEC Release No. 34-66522, dated Mar. 6, 2012; SEC Release No. 34-59881, dated May 7, 2009.[5] Even the information that the MSRB can even offer is chosen by the SEC, which supervises every aspect of the operation of the SHORT Subscription Service and the SHORT Historical Data Product. See Ja2891, 2894 (history of MSRB's seeking SEC's approval for changes to data product offerings). There is no known news media that must ask the government for permission to change how it operates.

Finally, even the fees charged by the MSRB for its subscription services are subject to review and approval by the SEC. See, e.g., 15 U.S.C. §§ 78o-4(b)(2)(J), 78o-4(b)(3)(B)(ii); MSRB Notice 2011-25, Fee Change for Historical Transaction Data Product (Apr. 27, 2011) (available here).[6] There is no news media that must ask the government for permission to raise prices.

[5] Available here: https://www.sec.gov/rules/sro/msrb/2012/34-66522.pdf; https://www.sec.gov/rules/sro/msrb/2009/34-59881.pdf

[6] https://msrb.org/Fee-Change-Historical-Transaction-Data-Product?n=1

iii. Bloomberg (Ja1-3; 4T)

The last claimed source of data that Defendants contend is the news media is what they call "Bloomberg." Their reference here is made with such imprecision that it generates great confusion. For sure, "Bloomberg" has a component of its business that engages in news gathering and reporting and acts like the news media. But the news gathering and reporting component, Bloomberg News, is not the means by which Defendants contend that the disclosure occurred here. Rather, they contend that the disclosure occurred via a data product that can only be licensed on strict terms and at great cost from Bloomberg Finance L.P. See Ja2192, 2197. And, in this data-licensing, it acts nothing like, and is treated nothing like, the news media.

As one example of its strict terms, Bloomberg terminal subscribers may use the services "solely for its internal business purposes." Ja2200 (§ 10(b)). A terminal subscriber cannot recirculate any analysis or visible material "except for internal purposes without the prior written consent of" Bloomberg Finance L.P. Id. And Bloomberg Finance L.P. requires subscribers to:

> use the [data] solely for its internal use and benefit and not for resale or other transfer or disposition to, or use by or for the benefit of, any other person or entity

Ja2192 (§ 4(a)). As for re-dissemination of data, this is permissible, but only in a "limited amount" and only to the subscriber's customer and only data "directly related to the type and extent of the" relationship between the

subscriber and its customer. Id. No known news media restrict their readers in any similar manner. Defendants surely identify none.

Indeed, Bloomberg Finance L.P. invoked these one of these provisions against one of Rosenberg's companies when they believed that it might be a competitor. Bloomberg Finance L.P. ultimately forced Rosenberg's company to transition to another service provider. See Ja2178-82; see also Ja2162-63 (¶¶ 145-56). There is simply no known news media that cuts off access to information to a perceived competitor. It is inconceivable that the New York Times would cut off the Washington Post's subscription to the Times because the Post competes for subscribers, stories, and reporters.

Beyond not acting like the news media, Bloomberg Finance L.P. is not even treated like the news media. Bloomberg Finance L.P. has been subjected to enforcement action by the SEC because it violated the securities laws for failure to make disclosures about one of its valuation products, indeed, the very same one with which it contended Rosenberg's business competed. Ja2163-64 (¶ 147), 2206-12. The New York Times could not be subject to an SEC enforcement action -- and forced to pay a $5 million fine -- because the SEC disapproved of the manner in which it described certain methodologies for evaluating factual material. Such activity would be plainly antithetical to the First Amendment. But that is precisely what happened to the very

component of Bloomberg that Defendants contend is the "news media." See Ja2192, 2197, 2206-12. It simply is not.

3. There Is No Substantial Similarity (Ja1-3; 4T)

a. Applicable Law (Ja1-3; 4T)

By statute, the NJFCA precludes an action if it is "based upon the public disclosure of allegations or transactions" in certain enumerated channels. N.J.S.A. § 2A:32C-9(c). Courts have equated the term "based upon" to mean whether 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). Whether a relator's allegations are substantially similar to the public disclosure turns on whether "public disclosures exposed all the essential elements of the alleged fraud." Id. (cleaned-up). One such is scienter. N.J.S.A. § 2A:32C-3; id. § 2A:32C-2.

There is a considerable body of decisional law applying the based upon/substantially similar test in a case, like this, where the fraud consists of misconduct by multiple actors within an industry with many participants. Ja2280-81. In such cases, whether an action is based on/substantial similar to the claimed public disclosures depends on whether the claimed public disclosures remove the case "from a situation where the government would

need to comb through myriad transactions" to find the fraud. In re Natural Gas Royalties, 562 F.3d 1032, 1042-43 (10th Cir. 2009). The public disclosure bar applies only where disclosures "enabled the government to readily identify wrongdoers through an investigation," id. at 1039 (emphasis added), and permitted the government to determine how the industry's bad actors are engaged in wrongdoing, Omnicare, 903 F.3d at 89-92.

There are many cases applying this test and holding, in general, that, where the government needs to comb through myriad transactions to find the fraud or identify the participants in it, the public disclosure bar does not apply. This is because the gulf between the allegations in a complaint and what is disclosed is simply too great such that it cannot be said that there is a substantial similarity. United States ex rel. Lager v. CSL Behring, L.L.C., 855 F.3d 935, 941-45 (8th Cir. 2017) (to bar claim, public disclosure must explicitly identify participants in fraud or provide enough information to identify participants); Cooper v. Blue Cross and Blue Shield of Florida, Inc., 19 F.3d 562, 566 (11th Cir. 1994) (where fraud consists of industry-wide misconduct, public disclosure bar requires "allegations specific to a particular defendant" because government has difficulty identifying all parties engaging in it and needs help to catch misbehaving parties); United States v. Sodexho, Inc., 2009 WL 579380, at *11 (E.D. Pa. Mar. 6, 2009), aff'd, 364 F. App'x 787

(3d Cir. 2010) (public disclosure bar did not apply when "fraud occurs on a transactional level and individual perpetrators are difficult to discern").

Defendants seek to have the Court reject this long line of cases as "dicta" from one case, Natural Gas. Db32. Given the sheer number of cases using this interpretive lens to determine whether a complaint is "based upon" or "substantially similar to" disclosed transactions, this is hardly "dicta."

Indeed, it is no more dicta than the analytic rubric of United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 657 (D.C. Cir. 1994), on which Defendants rely. Db27. In fact, it is consistent with Springfield Terminal. In that case, the court devised a formula for the "based upon" test:

> If X + Y = Z, Z represents the allegation of fraud and X and Y represent its essential elements [a misrepresented state of facts and a true state of facts]. In order to disclose the fraudulent transaction publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, i.e., the conclusion that fraud has been committed.

Id. at 654 (emphasis added). What Natural Gas and its (many) progeny recognize is a truly massive amount of data do not reveal the combination of X and Y (the misrepresented state of facts and a true state of facts) and that the government may not be in a position to infer that a fraud has occurred when there is a massive gulf between the X and Y. Natural Gas, 562 F.3d at 1042-43; see, e.g., United States ex rel. Mitchell v. CIT Bank, N.A., 2022 WL 135438, at *4 (E.D. Tex. Jan. 13, 2022) (public disclosures must disclose

specific details about fraudulent scheme and the actors involved in it).[7]

b. Discussion (Ja1-3; 4T)

In this case, the raw data -- thousands, if not millions of rate resets -- are not sufficient put any New Jersey government official "squarely upon the trail of the alleged fraud," such that it the data "was sufficient to enable [a New Jersey government official] adequately to investigate the case and to make a decision whether to prosecute." CKD Project, 551 F. Supp. 3d at 39. The raw data to which Defendants point was "innocuous financial data that do[es] not on the surface suggest fraud" and "cannot be equated with allegations or transactions that do." United States ex rel. Osheroff v. Tenet Healthcare Corp., 2012 WL 2871264, at *3 (S.D. Fla. July 12, 2012) (cleaned-up). At the very least, there is a factual dispute about this question.[8]

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[7] Defendants also assert that the Natural Gas line of cases only applies in cases involving non-public transactions. Db32n.17. This is wrong. If these cases only involved non-public transactions (they do not), then there would be no reason to analyze whether a complaint was based upon them for the purposes of public disclosure because the transactions would be non-public and, by definition, the public disclosure bar would not, and could not, apply.

[8] One of the interpretive tools that courts use to determine whether a complaint is "based upon" or "substantially similar" to publicly disclosed information is to ask whether what was disclosed was sufficient to set the government squarely on the trail of the fraud without the relator's assistance. Reed, 923 F.3d at 744-47. In proceedings before the lower court, Defendants expended massive efforts attempting to show when, what, and how Relator was set on the trial of the fraud, the idea being that whatever set Relator on the trail of the fraud could also have set the government on the same trail. And there were intense factual disputes about that issue. Ja3886-88 (¶ 107); 3T

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

And, even if some New Jersey government official could obtain all the data necessary from the EMMA Portal, it would have to devise a methodology to analyze that data to locate any fraud, like Rosenberg himself and an expert that was retained by Rosenberg's counsel did. See Ja3238-350 (patent obtained by Rosenberg), 4317-22 (setting out expert's initial mode of analyzing VRDO rate data); Natural Gas, 562 F.3d at 1042-43. Indeed, Rosenberg was awarded a patent on his methodology because the system that it discloses was novel and non-obvious in light of all prior literature. See 35 U.S.C. §§ 101, 102(a), 103. Some New Jersey government official could not readily have done the same and would inevitably have had to "comb through myriad transactions" to find

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8:14-21, 11:12-13:8, 25:25-26:24, 61:10-18, 65:17-66:4. Defendants mention neither this factual issue nor the concept of "trail of the fraud" at all in their brief. With good reason, what would have set the government on the trail of the fraud is, on the facts of this unique case, a quintessential factual issue that would preclude summary judgment in their favor.

the fraud. Natural Gas, 562 F.3d at 1042-43.

And, even if New Jersey could have obtained the data, it would need to look, first, at the nationwide conduct of the RMAs to find the fraud and then isolate the New Jersey-specific conduct, which is how Relator identified the fraud because Defendants' rate-setting practices was largely uniform across the country. Ja2272, 2275-76l; Ja105-06 (¶ 267). There is little reason to believe -- and Defendants surely have proffered none -- that the fraud could have been identified in the first instance solely by looking at the much smaller data set applicable to New Jersey-specific VRDOs. This would have been a rather backward way of conducting a reliable analysis. See JA2276-78. And, of course, Relator did not proceed, and no New Jersey government official would proceed, on the assumption that all RMAs had engaged in fraud. See, e.g., Ja2276-84 (universe of VRDOs, RMAs, and rate resets).

* * *

In this case, any data set that a New Jersey government official could have obtained would be a virtual sea of data. There is no reason to believe that, floating in a sea of data, a New Jersey government official would "know[] on a general level that fraud is taking place and that it, and the taxpayers, are losing money." Cooper, 19 F.3d at 942. This is especially the case where, as Defendants must concede, there has never been a public allegation of fraud.

But, even if a New Jersey government official knew where to go in the sea of data (and they would not), they would "have difficulty identifying all of the individual actors engaged in the fraudulent activity." Id.; see United States ex rel. Dig. Healthcare, Inc. v. Affiliated Comp. Servs., Inc., 778 F. Supp. 2d 37, 49-51 (D.D.C. 2011). Given the sheer number of RMAs and the difficulties associated with obtaining and analyzing the data, a New Jersey government official would need Relator's help "to catch all the misbehaving parties" and identify individual wrongdoers. Cooper, 19 F.3d at 566; see, e.g., Thayer v. Planned Parenthood of the Heartland, 2019 WL 13039126, at *7-10 (S.D. Iowa Apr. 1, 2019), aff'd, 11 F.4th 934 (8th Cir. 2021) (public disclosure bar did not apply where audit related to isolated incident and did not identify defendant). Relator's complaint is not based upon or substantially similar to any rate reset data that was publicly disclosed in the news media.

4. Relator Is An Original Source (Ja1-3; 4T)

a. Applicable Law (Ja1-3; 4T)

If Defendants are able to satisfy their burden of showing an absence of genuine disputed issues of fact on the first three elements of public disclosure, the action may still continue if Relator "is an original source of the information." N.J.S.A. § 2A:32C-9(c). On this part of the public disclosure, Relator bears the burden, United States v. Lozano, 2023 WL 6065161, *5

(D.D.C. Sept. 18, 2023). On summary judgment, Defendants must still show an absence of material factual disputes.

Prior to the 2023 amendments, an original source was defined under the NJFCA as "an individual who has [1] direct and [2] independent knowledge of the information on which the allegations are based and [3] has voluntarily provided the information to the State before filing an action under this act based on the information." N.J.S.A § 2A:32C-9(c).[9]

"Direct" means that "marked by an absence of an intervening agency," Springfield Terminal, 14 F.3d at 657, "personally-gathered," or "gained through [relator's] own efforts," United States ex rel. Harman v. Trinity Indus., Inc., 2014 WL 47258, at *5 (E.D. Tex. Jan. 6, 2014). The requirement of "direct" knowledge does not require that a relator be an insider or have firsthand knowledge. United States ex rel. Rahimi v. Rite Aid Corp., 3 F.4th 813, 829 (6th Cir. 2021). Defendants' suggestion that Relator's not being an insider disqualifies it from having direct knowledge, Db 45, is legal error.

The requirement that an original source have knowledge that is "independent" of the information on which the allegations are based" is typically a function of the manner in which the relator obtained the

[9] Relator does not seek to apply the 2023 amendment to the definition of original source to this case. See Bayer, 2024 WL 875633, *6.

information. See Kennard, 363 F.3d at 1046 (relators were original source because they were "responsible for ferreting [out fraud] in the first place"); Harman, 2014 WL 47258, at *6 (knowledge is "independent" when the "crux of [relator's] cause of action" "was made plain only through his own efforts.").

Springfield Terminal teaches how a relator's knowledge must be direct and independent. To qualify as an original source "does not require that the qui tam relator possess direct and independent knowledge of all of the vital ingredients to a fraudulent transaction." Springfield Terminal, 14 F.3d at 656-57. Rather, "direct and independent knowledge" may be knowledge of any essential element of the underlying fraud transaction. Id.; see also Rockwell Int'l Corp. v. United States, 549 U.S. 457, 470-71 ("information on which the allegations are based" must mean "facts underlying the relator's alleged fraud"); Kennard, 363 F.3d at 1044 (to be original source, knowledge underlying or supporting fraud allegation is sufficient); see, e.g., Cooper, 19 F.3d at 568 (relator acquired independent knowledge of fraud through years of communications with government and research).

b. Discussion (Ja1-3; 4T)

Relator satisfies all three of these criteria. First, Relator is substantially like the original source in Springfield Terminal. In that seminal case, the relator analyzed documents obtained in discovery that "did not themselves

suffice to indicate fraud." Springfield Terminal, 14 F.3d at 657. The relator was an original source because it "bridged the gap by its own efforts and experience." Id. The relator in Springfield Terminal "started with innocuous public information; it completed the [X + Y = Z] equation with information independent of any preexisting public disclosure." Id.

This aptly describes Relator's activity. Prior to Relator's activities, there was not a single allegation anywhere of fraudulent conduct by RMAs. Relator started with innocuous data about transactions -- millions of rate resets for more than 15,000 VRDOs, see Ja2283, 2291 -- and bridged the gap between the data and the fraud by its own efforts and experience. This included Relator's years of experience in the municipal bond industry, the development of software to analyze rate data, the methodology that Rosenberg invented, and the many analyses in the 4AC. See Ja2155-59, 2173-75.

Relator was able to discover the fraud, in part, by inventing a methodology and applying it to the data. See Ja2157-59 (¶¶ 122-26). A patent means that Relator's principal had invented a useful process that was novel and not obvious as against prior art. Uniloc USA, Inc. v. Apple Inc., 25 F.4th 1018, 1023-24 (Fed. Cir. 2022). The patent is itself new knowledge and independent of the data on which it acts. See Ja2158 (¶ 125).

Application of a patented methodology to data can render a relator an

original source. For example, in United States ex rel. Kuriyan v. HCSC Ins. Servs. Co., 2021 WL 5238332 (D.N.M. Jan. 29, 2021), a relator used a patented model to analyze raw data that had been provided to him by the State of New Mexico, that is, data that the government already had. In doing so, he discovered anomalies. Application of the relator's patented model resulted in identification of the misconduct and that defendants had acted with scienter. Id. The court held that the relator was an original source. Id. (citing United States ex rel. Reed v. KeyPoint Gov't Sols., 923 F.3d 729, 751 (10th Cir. 2019) (asking whether disclosed information obviated need for government to comb through transactions to find wrongdoers)).

The Court should reach the same result here. Relator has "direct and independent knowledge" of Defendants' collusion in rate-setting and their acting with scienter in failing to reset interest rates at the lowest rate. The raw data -- the only disqualifying public disclosure to which Defendants point -- indicate nothing about scienter or collusion. Because the government is never in a good position to have direct evidence of guilty knowledge or collusion, evidence of them obtained by Relator renders Relator an original source. See Reed, 923 F.3d at 761-63; see United States ex rel. Absher v. Momence Meadows Nursing Ctr., Inc., 764 F.3d 699, 708-09 n.10 (7th Cir. 2014).

The raw data also do not indicate whether Defendants considered

prevailing market conditions in resetting rates. Nor do they reveal whether Defendants exercised professional judgment in resetting rates or whether they engaged in efforts to determine what the lowest rate was, crucial components of the fraud. See Ja9, 27, 29, 40 (¶¶ 2, 63, 70, 116-17). That independent knowledge was ferreted out by Relator and its doing so was unprompted by any public disclosure or third party. Kennard, 363 F.3d at 1046; United States ex rel. Reagan v. E. Texas Med. Ctr. Reg'l H'care Sys., 384 F.3d 168, 179 (5th Cir. 2004) (original source revealed "new and undisclosed relationship between disclosed facts"); United States ex rel. Hagerty v. Cyberonics, Inc., 95 F. Supp. 3d 240, 260 (D. Mass. 2015), aff'd, 844 F.3d 26 (1st Cir. 2016).

Relator was also able to determine that the fraud was ongoing by interviewing several former employees of Defendants and others and, thereby, learning news ways by which the fraud occurred. See, e.g., Ja41-52, 103. Those further investigative efforts do not, contrary to what Defendants might suggest, Db45-46, make his knowledge direct or dependent. See United States ex rel. Oliver v. Philip Morris USA Inc., 826 F.3d 466, 478 (D.C. Cir. 2016) (relator was original source by "bridg[ing] the gap" through interviews).[10]

[10] Defendants cite a one-line reference to "newspaper articles, publicly available forms, and statements from third parties" from Brennan on behalf of State v. Lonegan, 454 N.J. Super. 613 (App. Div. 2018), to reject Relator's interviews as direct knowledge. Db44-45. This is hardly reliable. Interviews by

Finally, Relator satisfied the third requirement by voluntarily providing information on which the allegations are based prior to filing the action. N.J.S.A. § 2A:32C-9(c). Defendants' convoluted argument here, Db48, is supported by not a single solitary case in which any court anywhere has ever found that a relator failed to satisfy this requirement. Prior to filing the action, Relator disclosed to the State: (a) how Defendants failed to comply with their obligations as RMAs and acted with scienter; (b) the nature of the data and the analysis by which it identified the fraud; (c) why Defendants' conduct was fraudulent; and (d) the extent of the harm. Ja1975-76; Ja1982. This disclosure was more than sufficient. See also Ja2175-76 (¶¶ 206, 209), Ja3039-40 (¶ 19).

CONCLUSION

The Court should affirm the trial court's holding Relator was entitled to summary judgment based on the State's veto and, in the alternative, affirm the denial of Defendants' summary judgment motion on public disclosure grounds.

Dated: April 3, 2024

a relator can be "direct." See, e.g., United States ex rel. Ervin & Assocs., Inc. v. Hamilton Sec. Grp., Inc., 370 F. Supp. 2d 18, 38 (D.D.C. 2005).

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Superior Court of New Jersey

Appellate Division

Docket No. A-001340-23

STATE OF NEW JERSEY, ex rel., EDELWEISS FUND, LLC, *Plaintiff-Respondent,* vs. 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 *(For Continuation of Caption See Inside Cover)*	CIVIL ACTION ON GRANT OF MOTION FOR LEAVE TO APPEAL FROM AN INTERLOCUTORY ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MERCER COUNTY Docket No. MER-L-000885-15 Sat Below: HON. DOUGLAS H. HURD, P.J. Cv.

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(For Continuation of Appearances See Inside Cover)

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TABLE OF CONTENTS

Page

APPENDIX TABLE OF CONTENTS

* Memorandum is included because it falls under an exception to Rule 2:6-1(a)(2).

TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

PRELIMINARY STATEMENT

This court's recent opinion in Bayer definitively holds that the 2023 Amendment is not retroactive to pending cases. Therefore, the Attorney General's veto has no application to this case and the trial court's ruling to the contrary must be reversed.

As to the trial court's ruling that factual disputes prevent summary judgment, Relator points to no material dispute of fact impacting the public disclosure bar as a matter of law. Relator, a member of the public and not an insider, admits that it has alleged fraud by analyzing data from a subscription source that exists to widely disseminate financial data and that is generally available to the public. Relator's action is therefore subject to the public disclosure bar and summary judgment must be granted for Defendants.

ARGUMENT

I. THIS COURT'S RECENT PRECEDENTIAL DECISION IN BAYER CONTROLS AND REQUIRES REVERSAL OF THE TRIAL COURT'S RETROACTIVITY RULING. (Ja1–3; 4T)

State ex rel. Health Choice Group, LLC v. Bayer Corp., Nos. A-2731-20 & A-2733-20, 2024 WL 875633 (N.J. Super. Ct. App. Div. Mar. 1, 2024) (approved for publication), controls the retroactivity question here. Relator's effort to distinguish Bayer only confirms that the authority the Attorney General

was recently granted to eliminate an affirmative defense in a relator-led NJFCA case cannot be given effect in this case.

Bayer's reasoning closely tracks the arguments Defendants presented in their opening brief, filed a week before Bayer was decided. Defendants began with the expression of legislative intent that the 2023 Amendment applies prospectively only. Ab10–11.[1] Bayer likewise began by observing that the statutory language is clear: "[t]he 2023 amendments to the [NJFCA] used language clearly indicating that the Legislature intended the amendments to apply prospectively. In that regard, the Legislature stated that the amendments 'shall take effect immediately.'" Bayer, 2024 WL 875633, at *6 (quoting L. 2023, c. 73 § 11). "Those words bespeak an intent contrary to, and not supportive of, retroactive application." Ibid. (quoting Pisack v. B&C Towing, Inc., 240 N.J. 360, 371 (2020)).

Defendants also explained that the language of the 2023 Amendment tracks the federal FCA amendments adopted in 2010, which have been uniformly recognized to apply prospectively only. Ab12–13. Bayer ruled that because the NJFCA amendment tracks the federal amendment, and federal precedent has "consistently construed the 2010 amendment to the FCA to apply

[1] "Ab" refers to Appellants' opening appeal brief. "Rb" refers to Respondent's opposition appeal brief.

prospectively," it follows that the Legislature "meant to likewise apply the [NJFCA] amendments prospectively." 2024 WL 875633, at *6.

Defendants explained that the 2023 Amendment cannot be considered "curative" (and hence retroactive) because the statute had been functioning for decades without the substantive legal change reflected by the Amendment. Again, Bayer also held the "amendments to the [NJFCA] were . . . not curative," but instead sought "to enhance recoveries in Medicaid fraud cases." Ibid.

Relator asserts that Bayer is limited to amendment of the original source definition because, Relator argues, the amendments "modified the substance of an exception to the public disclosure bar by making it easier for relators to satisfy" and "exposed defendants to a greater scope of liability than they faced prior to the amendment." Rb20. That is wrong; Bayer said no such thing. But even if it were true, it would not help Relator. By the same logic, granting the State a new veto power to completely eliminate that defense in a relator-led NJFCA action only increases the "presumption against retroactivity." See U.S. ex rel. Judd v. Quest Diagnostics Inc., 638 F. App'x 162, 165 (3d Cir. 2015).

Relator also suggests that the new law should apply here because this case was pending when the 2023 Amendment was adopted, appearing to argue that applying the new law to this case would not be retroactive at all. Rb21. That argument is waived because Relator admitted below that it needed retroactive

application of the new rule in this case. See Jra1–17[2]; Jra25; In re Est. of Byung-Tae Oh, 445 N.J. Super. 402, 408 (App. Div. 2016) (appellate court "need not consider . . . belated argument" that "was not raised in the trial court"). Regardless, Relator has no authority for its view. In the sole case Relator cites, the statutory amendment expressly "applie[d] to pending complaints, which have not been dismissed." See Roik v. Roik, 477 N.J. Super. 556, 574 (App. Div. 2024). No such language appears in the 2023 Amendment.

Finally, contrary to Relator's suggestion, the 2023 Amendment cannot apply in this case at all, including to alleged false claims submitted after the 2023 Amendment's effective date. Rb21–22. Federal anti-retroactivity rules—which this court expressly relied on in Bayer—require courts to apply the pre-amendment version of the statute to the entire continuous course of conduct. See, e.g., U.S. ex rel. Zizic v. Q2Administrators, LLC, 728 F.3d 228, 232 nn.3–4 (3d Cir. 2013) (applying only the pre-amendment public disclosure bar to an action alleging conduct both pre- and post-dating the 2010 federal amendment). Thus, granting summary judgment for Defendants will end the case entirely.[3]

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[2] "Jra" refers to Appellants' appendix submitted with this reply brief. Trial briefs are included as an exception to show waiver under N.J.S.A. § 2:6-1(a)(2).

[3] Defendants have not yet sought a stay of merits discovery in the trial court solely to reap efficiencies gained by initially conducting discovery in tandem with a parallel litigation in California. Defendants reserve their right to move for a stay as merits discovery proceeds.

II. THE UNDISPUTED FACTS AND LAW REQUIRE REVERSAL OF THE TRIAL COURT'S ALTERNATIVE RULING ON THE MERITS OF THE PUBLIC DISCLOSURE BAR. (4T)

Relator repeatedly declares that disputes of fact with respect to the elements of the public disclosure bar preclude summary judgment. See Rb3, Rb22, Rb41. But as with the trial court's ruling, a reader will search in vain for any material disputes of fact in Relator's brief.

Here are the facts that matter, which Relator does not and cannot dispute. Relator is not an insider and all the data it obtained and analyzed came from sources available to anyone, and especially those who follow the municipal bond industry. Those sources exist to facilitate public monitoring of the VRDO market. The undisputed facts make clear, therefore, that Relator's allegations of fraud are "based upon" information regarding VRDO "transactions" that are "publicly disclosed" through sources that those following the industry use ("news media"), triggering the public disclosure bar. And none of Relator's allegations are based upon any information "independent" of what has been publicly disclosed, so Relator is not an "original source."

Rather than dispute any material facts, Relator distracts by emphasizing that it paid for the subscriptions from Bloomberg and MSRB SHORT (undisputed), that the licenses for the information restricted redistribution of that information (undisputed), and that Relator had to "analyze" the data because the

data themselves did not expressly allege fraud (undisputed). Relator obfuscates further by noting that none of the sources edited the VRDO data they obtained (undisputed), as if it follows that the publishers are not "news media."

Relator's arguments raise disputed issues of law, not fact, and cannot save Relator from summary judgment because they either mischaracterize the caselaw or ignore long-settled contrary authority. Indeed, Relator acknowledges that courts in other jurisdictions have resolved this issue as a matter of law. Rb29–31 (citing state court opinions in parallel litigations). This court should vacate the trial court's ruling and grant summary judgment for Defendants.

The VRDO Transactional Data Was Publicly Disclosed. Relator does not deny that the data it obtained was available for anyone to review. Relator instead argues that the public "availability" of the information is "insufficient." Rb24–27. To Relator, the "[t]heoretical" ability to obtain the data is not "[a]ctual" disclosure. Rb24. That statement is a legal argument and it is accompanied by no citation. Because it is absurd. Information that is publicly available for review is not somehow "nonpublic" until some sufficient number of people decide to read it. Numerous cases are to the contrary. See Ab31–32.

Relator goes on to emphasize that the terms of service agreements in connection with the VRDO Data Sources place supposedly "extreme limitations" on use of the data. Rb25. But the "restrictions" cannot be a dispute

of fact; nobody disputes what the agreements say.[4] The terms make clear, as Relator concedes, that any licensee may use the information for "internal business purposes." Rb25, Rb34, Rb36. Yet Relator asserts, without any citation, that the data may not be "analyzed." Rb25, Rb35. Relator never explains why analysis would not be encompassed by "internal business purposes," and cannot explain away the undisputed fact that Relator itself did analyze the data obtained from these sources. See Ja2173 (¶¶ 194–97).

Relator also points out that the terms of service prevent the data from being copied and re-disseminated to the public. Rb25–26, Rb34, Rb36–37. Once again, Relator is advancing a legal argument: information that is available to the public becomes not publicly available whenever restrictions are placed on republishing the information. Nothing in United States ex rel. Feingold v. AdminaStar Federal, Inc., 324 F.3d 492, 495 (7th Cir. 2003)—which affirmed dismissal on public disclosure bar grounds—supports Relator's counterintuitive proposition, or says anything at all about restrictions on republication. Id. at 496.

Lastly, Relator urges its cost for the subscriptions as an additional reason to deem the information not publicly disclosed. Again, that Relator paid for the Bloomberg and MSRB SHORT subscriptions is an undisputed fact. See Ja3896

[4] See Ja2104–05 (¶ 19 and response); Ja2191–201 (Rosenberg Cert., Exs. 2–3); Ja2986–3004 (Eiholzer Cert., Ex. J); Ja3906–08 (¶¶ 151–55).

(¶ 131), Ja3902–03 (¶ 144). (Relator does not dispute that EMMA is free. Rb27.) And Relator cannot dispute that it paid no more or less than anyone in the business of monitoring and investing in or otherwise tracking the VRDO market would pay. Relator is, yet again, proposing a legal rule: when the publisher of the information can charge the interested public a fee for the information, the information should be deemed nonpublic. No case so holds or has ever suggested such a rule, which would make no sense: information commonly becomes publicly available because the public is willing to pay for it. Relator does not try to distinguish the numerous FCA authorities holding that information with a price tag is nevertheless publicly disclosed. Rb27 (citing Ab36).

The VRDO Data Sources Are FCA News Media Sources. Relator defines the phrase "news media" as including sources that are "generally [and] readily" accessible and intend to "widely disseminate information" to the public. Rb27–28 (citations omitted). It is undisputed that the VRDO Data Sources provide VRDO transactional data to any member of the public who pays the subscription fee (and in the case of EMMA, for free).[5] And Relator raises no genuine dispute that the purpose of the VRDO Data Sources is to disseminate information to the public. The Massachusetts Supreme Court held that EMMA

[5] See Ja2098–100 (¶¶ 9–11), Ja2103–05 (¶¶ 18–19), Ja2108–10 (¶¶ 25, 27); Ja3896 (¶¶ 131–32); Ja4272–73, 4301 (Eiholzer Cert. ¶¶ 17–20, 81); Ja1548–49 (MSRB R. G-34(c)(ii)(A)); Ja1559–62 (Olander Cert. ¶¶ 3–4, 10, 12).

is "news media" because its express purpose is "to increase the transparency of the municipal securities market by providing free public access to municipal securities disclosures and data." Rosenberg v. JPMorgan Chase & Co., 169 N.E.3d 445, 461 (Mass. 2021) (quoting overview of EMMA).

Relator resists the obvious conclusion that these sources qualify as "news media" primarily by relying on an unpublished federal district court opinion. Rb28 (citing U.S. ex rel. Integra Med Analytics LLC v. Providence Health & Servs., No. CV 17-1694 PSG (SSx), 2019 WL 3282619, at *4, *16 (C.D. Cal. July 16, 2019)). Once again, Relator is making a legal argument about the standards for determining what counts as "news media," and that argument fails in light of the great weight of federal authority broadly construing news media without regard to the Integra Med factors. Integra Med, 2019 WL 3282619, at *11. Relator says nothing about the wide array of federal authority, cited in Defendants' brief, recognizing that "news media" includes sources whose primary purpose is to widely disseminate information to the public, including online searchable databases, an online crowd-sourced encyclopedia, and government websites. See Ab38–39, Ab42–44; see also U.S. ex rel. Berkley v. Ocean State, LLC, C.A. No. 20-538-JJM-PAS, 2023 WL 3203641, at *4 (D.R.I. May 2, 2023) (rejecting the "multilayered analysis of what constitutes 'news media' in the Integra case [as] unconvincing").

It is true that, in reliance on state-specific authority, two state decisions have departed from the approach of the Massachusetts Supreme Court and the weight of federal authority and concluded that EMMA is not "news media." See State ex rel. Edelweiss Fund, LLC v. JPMorgan Chase & Co., 307 Cal. Rptr. 3d 750, 776–78 (Ct. App. 2023) (citing State ex rel. Bartlett v. Miller, 197 Cal. Rptr. 3d 673 (Ct. App. 2016)); Ja3877 (State ex rel. Edelweiss Fund, LLC v. JPMorgan Chase & Co., No. 2017 L 000289 (Ill. Cir. Ct. June 13, 2023) (citing Illinois authorities concerning "Illinois's narrow and traditional definition of news media")). But these cases do not discuss MSRB SHORT or Bloomberg, and no federal court interpreting the federal FCA has held that EMMA is not a "news media" source. This court gives greater weight to federal court guidance than non-New Jersey state court rulings, given that the NJFCA was expressly modeled on the federal FCA. See Bayer, 2024 WL 875633, at *6.

Following Bayer's directive to follow federal precedent, this court should likewise reject Relator's legal argument that "news media" in the NJFCA should be informed by the meaning of that term in the New Jersey Rules of Evidence. Rb29. Limiting news media to outlets like newspapers and magazines would go against the overwhelming weight of federal authority interpreting news media under the federal FCA, in contravention of Bayer. See Ab38–39, Ab42–44.

Relator's remaining arguments are all legal and unsupported by caselaw. Relator cites no authority holding that FCA news media sources must exercise First Amendment rights. See Rb33, Rb35, Rb37. Nor does Relator cite any case holding that news media sources cannot restrict redistribution of their content. See Rb27–28, Rb32, Rb34, Rb36–37. These propositions make no sense and are not supported by precedent. "News media" sources can make information public without First Amendment protections and without allowing redistribution.[6]

Relator's Action Was Based Upon VRDO Transactional Data. Relator cannot deny that its claims are based upon an analysis of VRDO transactional data that, according to Relator's own allegations, identify every defendant remarketing agent responsible for every rate reset on every VRDO at issue in this case. Ab33. Defendants, in their brief, explained the longstanding and uniform view of courts that an "analysis" of publicly available information does not save a relator from the public disclosure bar. Ab29–32 (collecting cases). Relator says nothing about any of these cases and offers no contrary authority.

Instead, Relator suggests that Natural Gas Royalties adopted a legal rule that when an analysis of a large volume of public information is required, the public disclosure bar does not apply. Rb38–40. But that is not what the decision

[6] Many traditional newspapers restrict redistribution of their content. See, e.g., New York Times Terms of Service, §§ 2.1–2.2, available at https://help.nytimes.com/hc/en-us/articles/115014893428-Terms-of-Service.

says. Natural Gas Royalties discussed a different question entirely: whether prior public allegations of fraud within an industry as a whole are sufficient to publicly disclose the fraud as to particular industry participants who were never named in the prior public disclosure. In re Nat. Gas Royalties, 562 F.3d 1032, 1042 (10th Cir. 2009). That question has nothing to do with this case, in which Relator alleges that the VRDO data identifies the defendants individually. Neither Natural Gas Royalties nor any of the other cases cited by Relator address public data sets that revealed fraud upon analysis by a sophisticated relator.[7] Relator cites no case holding that an analysis of publicly disclosed data is not based upon public disclosures simply because an expert analyzed the public data supposedly with the aid of patented software.[8] To the contrary, overwhelming

[7] See 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., No. CIV.A. 03-6003, 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); U.S. ex rel. Mitchell v. CIT Bank, N.A., No. 4:14-CV-00833, 2022 WL 135438, at *4–6 (E.D. Tex. Jan. 13, 2022) (alleged fraud was publicly disclosed). Relator denies that the "myriad transactions" language refers to non-public transactions, but cites no cases in support. Rb41 n.7.

[8] Rosenberg's patented commercial software product, see Rb6, Rb42, Rb47–48, is a red herring. Relator's own expert stated that he developed the VRDO analyses reflected in the complaints using manual calculations, run in Microsoft Excel, and using raw data from MSRB SHORT. Ja4320 (Wesson Aff. ¶ 21) ("Initially, I performed these analyses . . . using Excel, which was largely a manual process."); Ja2173 (¶ 194); Rb42 (citing Wesson Aff.). Rosenberg's

precedent establishes that analysis and special expertise do not defeat the public disclosure bar. Ab29–32.

Relator Is Not an Original Source. Relator's knowledge of the alleged fraud—including scienter—is neither direct nor independent because it is based entirely on an analysis of public data, and the application of analysis or specialized expertise to public data can never make a relator an original source. Ab44–49.[9] Relator does not dispute this bedrock principle of FCA precedent, which holds true even if a relator uses a patented or unique process to assist the analysis.[10] Relator's analogy to Springfield Terminal falls flat because the

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patent on a commercial software product is irrelevant to whether the Excel analysis of public data at issue here is subject to the public disclosure bar.

[9] As to scienter, Relator identifies no non-public facts that are the basis of those allegations, which merely infer fraud based on Relator's VRDO analysis. See Rb48–49 (citing Ja9, 27, 29, 40 (¶¶ 2, 63, 70, 116–17)). Relator's scienter cases considered allegations based on non-public data. See, e.g., U.S. ex rel. Reed v. KeyPoint Gov't Servs., 923 F.3d 729, 760 (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). Original source cases involving non-public facts are likewise inapposite. See Kennard v. Comstock Res., Inc., 363 F.3d 1039, 1046 (10th Cir. 2004) ("personal, private royalty records and statements"); U.S. ex rel. Hagerty v. Cyberonics, Inc., 95 F. Supp. 3d 240, 260 (D. Mass. 2015) (relator's knowledge formed the basis for a publicly available report), aff'd on other grounds, 844 F.3d 26 (1st Cir. 2016). So are cases where the relator was not an original source. U.S. ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys., 384 F.3d 168, 179–80 (5th Cir. 2004).

[10] Relator cites no authority holding that the use of a patent confers original source status when it is used to analyze public information. Kuriyan does not support this proposition; to the contrary, the relator in that case analyzed "raw non-public data" to infer fraud. U.S. ex rel. Kuriyan v. HCSC Ins. Servs. Co.,

relator in that case collected non-public facts essential to uncovering the alleged fraud. U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 657 (D.C. Cir. 1994). Here, Relator admits using public MSRB SHORT data.

Finally, Relator is wrong that there is "not a single solitary case in which any court anywhere has ever found that a relator failed to satisfy th[e] requirement" of "voluntarily providing [the] information on which the allegations are based [to the State] prior to filing the action." See Rb50. As Defendants already noted, Ab49, the Sixth Circuit has so held. U.S. ex rel. Rahimi v. Rite Aid Corp., 3 F.4th 813, 830 (6th Cir. 2021) (declining to consider non-public evidence of alleged fraud because it "was not part of [the relator's] disclosures to the government . . . at the time he filed suit"). Before filing suit, Relator gave the State neither the former employee statements[11] nor the analysis of VRDO transactions that purportedly supports its allegations. Ja2148 (¶ 84), Ja2150–51 (¶¶ 86–87). Therefore, the court cannot consider either with respect to the original source analysis. N.J.S.A. § 2A:32C-9(c); Rahimi, 3 F.4th at 830.

No. CV 16-1148 JAP/KK, 2021 WL 5238332, at *2 (D.N.M. Jan. 29, 2021) (emphasis added). Regardless, Rosenberg's patent is irrelevant because Relator developed its VRDO analyses by running manual calculations in Excel on public MSRB SHORT data. Ja4320 (Wesson Aff. ¶ 21); Ja2173 (¶ 194).

[11] Moreover, Relator scoffs at this court's statement that such "statements from third parties" constitute "indirect knowledge" that cannot make a relator an original source, Brennan ex rel. State v. Lonegan, 454 N.J. Super. 613, 619 (App. Div. 2018), but Relator offers no other way to read Brennan. Rb49 n.10.

CONCLUSION

This court should reverse and remand with instructions to enter judgment in favor of Defendants under N.J.S.A. § 2A:32C-9(c).

Dated: April 24, 2024

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