# In the
# Supreme Court of New Jersey

**No. A-60-24 (090285)**

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

*Plaintiff-Petitioner*,

v.

JPMORGAN CHASE & COMPANY, JPMORGAN CHASE BANK, N.A., J.P. MORGAN SECURITIES LLC, F/K/A JPMORGAN SECURITIES, INC., CITIGROUP INC., CITIGROUP GLOBAL MARKETS INC., CITIBANK, N.A., CITIGROUP FINANCIAL PRODUCTS INC., CITIGROUP GLOBAL MARKETS HOLDINGS INC., CITIGROUP GLOBAL MARKETS LIMITED, WELLS FARGO & COMPANY, WELLS FARGO BANK, N.A.,

On Petition for Certification from an Order of the Superior Court

Docket No. Below: A-1340-23

Sat Below:
Hon. Greta A. Gooden Brown, P.J. Hon. Morris G. Smith

*(Caption continued on inside cover)*

**BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND AMERICAN BANKERS ASSOCIATION IN SUPPORT OF DEFENDANTS-RESPONDENTS**

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WELLS FARGO SECURITIES LLC, WACHOVIA BANK, N.A., ITS PREDECESSOR BY MERGER, BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A., BANK OF AMERICA SECURITIES LLC, MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, BANK OF AMERICA CAPITAL CORPORATION, BOFA MERRILL LYNCH ASSET HOLDINGS, INC., BANK OF AMERICA MERRILL LYNCH, MORGAN STANLEY, MORGAN STANLEY SMITH BARNEY LLC, MORGAN STANLEY & CO., LLC, AND MORGAN STANLEY CAPITAL GROUP INC.,

*Defendants-Respondents*.

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## INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, state legislatures, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, ABA is the voice for the nation's $24.1 trillion banking industry and its more than one million employees. ABA members provide banking services in each of the fifty States and the District of Columbia. Among them are financial institutions of all sizes and types. ABA frequently submits *amicus curiae* briefs in state and federal courts in matters that significantly affect its members and the business of banking.

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

This appeal is important to *amici* and their members because meritless *qui tam* lawsuits impose serious and sometimes devastating costs on American banks and other businesses, forcing them to divert scarce resources from their core missions. *Amici*'s members are frequent targets in lawsuits brought by putative whistleblowers under the federal and state FCAs, as many are heavily regulated and operate complex organizations that interact in myriad ways with the federal and state governments. It is thus critically important to *amici*'s members that courts correctly enforce applicable legal requirements and dismiss cases when it is appropriate to do so.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The *qui tam* provisions of the New Jersey False Claims Act ("FCA"), like the equivalent provisions of the federal FCA, are designed to "strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits." *State ex rel. Health Choice Grp. LLC v. Bayer Corp.*, 478 N.J. Super. 184, 195-96 (App. Div. 2024) (cleaned up) (quoting *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 295 (2010)). The FCA thus permits lawsuits by whistleblowers with "direct knowledge of the alleged false claims," while prohibiting "'parasitic lawsuits' based on publicly disclosed information." *Brennan ex rel. State v. Lonegan*, 454 N.J. Super. 613, 619-20 (App. Div. 2018). As the Appellate Division correctly recognized, *qui tam* suits

like this one by Edelweiss Fund LLC are precisely "the kind of 'parasitic' complaint the Legislature sought to avoid" when enacting the FCA. *Id.*

Edelweiss is not a corporate insider exposing nonpublic evidence of fraud. Edelweiss has never worked for or provided services to any of the Respondents. Edelweiss has no firsthand knowledge of Respondents' operations or practices and no knowledge or actual evidence of fraud committed by any Respondent. Far from having direct knowledge of fraud, all Edelweiss has is an internet connection and access to public websites that disclose interest rates for VRDOs and other debt instruments. Specifically, Edelweiss relied on public data available online from Bloomberg's "Municipal Securities Master Database," as well as from two public services offered by the Municipal Securities Rulemaking Board ("MSRB"): the MSRB's Short-Term Obligation Subscription Service ("SHORT") and the MSRB's free Electronic Municipal Market Access portal ("EMMA").

The FCA's public disclosure bar prohibits Edelweiss from basing a *qui tam* action on such websites. The websites on which Edelweiss relied, which disseminate information to the public much like their non-digital equivalents (such as stock price sections in newspapers), qualify as "news media" under the FCA's public disclosure bar and thus cannot support *qui tam* claims.

For good reason, New Jersey barred *qui tam* actions that merely analyze

information already available to the public. The State does not need Edelweiss's help to know what is posted on a public website. *Health Choice*, 478 N.J. Super. at 195. Because Edelweiss relies on information that was already available to the State and any other member of the public, the public disclosure bar applies.

## ARGUMENT

The Appellate Division correctly held that the FCA's public disclosure bar requires dismissal of Edelweiss's complaint, which depends entirely on public data available on public websites.[2] This Court should affirm that decision.

### I. The public disclosure bar serves the FCA's purpose of encouraging genuine whistleblower suits while preventing parasitic suits by professional relators.

The purpose of the FCA is "to encourage persons with first-hand knowledge of fraudulent misconduct to report fraud" by "enlist[ing] the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity." *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3d Cir. 1991) (cleaned up). Accordingly, the FCA's *qui tam* provisions are designed for "whistle-blowing

[2] The Appellate Division correctly held that Edelweiss's claims are subject to the version of the public disclosure bar in effect when Edelweiss filed its complaint because the 2023 amendment to the bar does not apply retroactively. *See Health Choice*, 478 N.J. Super. at 198-99. To avoid burdening the Court, this brief does not address that issue, but citations to the FCA all refer to the pre-2023 version.

has "direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the State before filing an action." N.J.S.A. 2A:32C-9(c) (2008). The "original source" exception was enacted "to avoid 'parasitic lawsuits' based on publicly disclosed information." *Brennan*, 454 N.J. Super. at 620. If a relator has direct and independent knowledge of the publicly disclosed information, then the relator's action will not be parasitic and may be able to aid the State's investigation of fraud even when certain information underlying the action has been publicly disclosed. But where, as here, an action is "based on information that would have been equally available to strangers to the [alleged] fraud transaction had they chosen to look for it," then the action has no value and may not proceed. *Stinson*, 944 F.2d at 1155-56.

## II. Edelweiss relies on information from websites that disseminate information to the public and thus constitute "news media" under the FCA.

Edelweiss's lawsuit is the exact sort of parasitic *qui tam* action that the public disclosure bar was designed to prevent. Edelweiss is not a "whistle-blowing insider[] with genuinely valuable information." *Graham Cnty.*, 559 U.S. at 294. Edelweiss is a professional relator seeking to enrich itself by filing numerous *qui tam* lawsuits based on information that is equally available to any other member of the public.

As a general matter, professional relators like Edelweiss will not and should not be able to overcome the FCA's public disclosure bar. Such "opportunistic" relators must rely on public information because they "have no significant information to contribute of their own." *Id.* (cleaned up). This is a case in point. As the Appellate Division correctly recognized, Edelweiss's complaint is based entirely "on information that would have been equally available to strangers to the [alleged] fraud transaction had they chosen to look for it." *Stinson*, 944 F.2d at 1155-56. Allowing such a complaint to proceed does not serve any of the FCA's purposes.

Edelweiss's complaint depends on public data available online from Bloomberg, MSRB SHORT, and EMMA. These websites were designed to publicly disseminate information, so they are "news media" within the meaning of the FCA. Information from these websites cannot serve as the basis for a relator's claim. N.J.S.A. 2A:32C-9(c).[3]

1. As with the New Jersey FCA as a whole, its public disclosure bar is "essentially the same" as the equivalent bar in the federal FCA. *Brennan*, 454 N.J. Super. at 620. Congress designed the federal bar to be "broad" and "wide-

[3] The Appellate Division correctly held that Edelweiss is not an "original source" for any of the public information on which it relies. At most, Edelweiss "used agents" to "analyze[] publicly available data," which is not sufficient. *Health Choice*, 478 N.J. Super. at 201.

reaching." *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 408 (2011). That breadth extends to the category of sources that can trigger the bar, which "reflect[s an] intent to avoid underinclusiveness even at the risk of redundancy." *Id.* The U.S. Supreme Court has recognized the expansiveness of the "news media" category in particular. The Court observed that "sources of public disclosure . . . *especially 'news media,'* suggest that the public disclosure bar provides a broad sweep." *Id.* (emphasis added) (cleaned up).

The ordinary meaning of "news media" demands this broad reading. In pre-internet times, the term "news" was defined as any "report of recent events" or "material reported in a newspaper or news periodical or on a newscast." *News*, Webster's New Collegiate Dictionary 767 (1980); *see also News*, American Heritage Dictionary 1218 (3d ed. 1992) ("Information about recent events or happenings, especially as reported by newspapers, periodicals, radio, or television."). The definition of "medium" (the singular form of "media") was similarly broad: "a channel of communication." *Media* and *Medium*, Webster's New Collegiate Dictionary at 707, 708. By using these broad terms, the public disclosure bar reflected an intent to encompass much if not all of the "public domain." *Graham Cnty.*, 559 U.S. at 285.

To maintain the public disclosure bar's intended scope for "people in the modern world," the bar must broadly encompass internet sources, which now

serve as the primary news source for much of the public. *Rosenberg v. JPMorgan Chase & Co.*, 169 N.E.3d 445, 460 (Mass. 2021); *see News*, American Heritage Dictionary 1187 (5th ed. 2011) ("Information about recent events or happenings, especially as reported by means of newspapers, *websites*, radio, television, and other forms of media." (emphasis added)); *Media*, Black's Law Dictionary (11th ed. 2019) (including "the Internet" as an example of a "means of mass communication"). Even the largest print newspapers—the paragons of "traditional media"—have more internet subscribers than print subscribers.[4] Their websites obviously are "news media," as are other publicly accessible websites that perform the same function of "disseminat[ing]" information to the public. *Rosenberg*, 169 N.E.3d at 461.

This conclusion accords with the broad consensus reached by dozens of courts that publicly accessible websites intended to disseminate information qualify as "news media" under the FCA. After all, "[g]enerally accessible websites," even those that are "not traditional news sources," "serve the same purpose as newspapers or radio broadcasts, to provide the general public with access to information." *U.S. ex rel. Repko v. Guthrie Clinic, P.C.*, 2011 WL

[4] *See* Keach Hagey et al., *In News Industry, a Stark Divide Between Haves and Have-Nots*, Wall St. J. (May 4, 2019), https://on.wsj.com/3Mdj5KW (noting that the *New York Times*, *Wall Street Journal*, and *Washington Post* have more internet subscribers than print subscribers).

3875987, at *7 (M.D. Pa. Sept. 1, 2011), *aff'd*, 490 F. App'x 502 (3d Cir. 2012); *see U.S. ex rel. Beauchamp v. Academi Training Ctr., LLC*, 816 F.3d 37, 43 n.6 (4th Cir. 2016) ("Courts have unanimously construed the term 'public disclosure' to include websites and online articles."); *U.S. ex rel. Osheroff v. Humana, Inc.*, 776 F.3d 805, 813 (11th Cir. 2015) ("[P]ublicly available websites . . . qualify as news media for purposes of the public disclosure provision."); *U.S. ex rel. Cherwenka v. Fastenal Co.*, 2018 WL 2069026, at *7 (D. Minn. May 3, 2018) (news media includes "information publicly available on a website").

Courts have included a wide array of online sources in that category, including government websites, college websites, blog posts, and even comment sections. *U.S. ex rel. Zafirov v. Fla. Med. Assocs. LLC*, 2021 WL 4443119, at *7 (M.D. Fla. Sept. 28, 2021) (federal government agency website); *U.S. ex rel. Hong v. Newport Sensors, Inc.*, 2016 WL 8929246, at *4 (C.D. Cal. May 19, 2016) (government and university websites); *U.S. ex rel. Jacobs v. JPMorgan Chase Bank, N.A.*, 2022 WL 573663, at *6 (S.D. Fla. Feb. 25, 2022) ("blog articles"); *Green v. AmerisourceBergen Corp.*, 2017 WL 1209909, at *6 (S.D. Tex. Mar. 31, 2017) ("blog posts and newsletters published online"); *U.S. ex rel. Carter v. Bridgepoint Educ., Inc.*, 2015 WL 4892259, at *6 n.4 (S.D. Cal. Aug. 17, 2015) (online comment on newspaper website). The same applies to public, searchable databases of compiled information. *See, e.g., U.S. ex rel. Beck v. St.*

*Joseph Health Sys.*, 2021 WL 7084164, at *3 (N.D. Tex. Nov. 30, 2021) (websites compiling physician compensation surveys and Medicare and Medicaid payment data); *U.S. ex rel. Doe v. Staples, Inc.*, 932 F. Supp. 2d 34, 39-40 (D.D.C. 2013) (website containing searchable compilation of information submitted to U.S. Customs); *Repko*, 2011 WL 3875987, at *8 (websites collecting information on philanthropies, Standard & Poor's website, and Bloomberg Professional website), *aff'd*, 490 F. App'x at 504 ("We agree with the District Court's . . . conclusion that the websites and prior litigation it referenced constitute public disclosure of information.").

Recognizing this broad definition of "news media" is important to maintain clarity and consistency in the application of the public disclosure bar. It is important to the business community, including *amici*'s members, for the federal and state FCAs to be interpreted and applied consistently throughout the country. If this Court were to depart from the consensus interpretation of "news media," it would increase the costs on businesses operating in New Jersey and make the State a less attractive option for businesses nationwide.

2. The sources relied on by Edelweiss easily qualify as "news media" under the above authorities. Bloomberg is a classic source for business news, as other courts have held. *E.g.*, *Repko*, 2011 WL 3875987, at *8; *U.S. ex rel. Winkelman v. CVS Caremark Corp.*, 118 F. Supp. 3d 412, 424 (D. Mass. 2015);

*U.S. ex rel. Hoggett v. Univ. of Phoenix*, 2014 WL 3689764, at *6-7 (E.D. Cal. July 24, 2014); *Commonwealth ex rel. Rosenberg v. JPMorgan Chase & Co.*, 2019 WL 3643035, at *11 (Mass. Super. Ct. July 23, 2019), *aff'd*, 169 N.E.3d 445. EMMA is a free website that widely disseminates financial information to the public, "much like traditional news sources that report market data." *Rosenberg*, 169 N.E.3d at 461. That is why the Massachusetts Supreme Judicial Court held, when dismissing another lawsuit brought by Edelweiss's principal, that EMMA qualifies as "news media" under the public disclosure bar. *Id.* at 460-61.[5] MSRB SHORT, which likewise provides financial information to the public, qualifies as "news media" for the same reasons.

Edelweiss's contrary arguments are unpersuasive. Edelweiss has argued that it had to analyze the data it downloaded, but "publicly available data" triggers the public disclosure bar even if the relator had to "analyze[]" that data before filing suit. *Health Choice*, 478 N.J. Super. at 201; *accord, e.g.*, *Rosenberg*, 169 N.E.3d at 457-58 ("[N]either the need to perform analysis on the publicly available information nor the benefit of [the relator's] expertise

[5] This Court should follow *Rosenberg* over the California Court of Appeal's contrary decision in *State ex rel. Edelweiss Fund, LLC v. JPMorgan Chase & Co.*, 90 Cal. App. 5th 1119, 1148-50 (2023), *as modified on denial of reh'g* (May 30, 2023). That decision, unlike *Rosenberg*, was not issued by the State's highest court, and it is unpersuasive for all the reasons discussed above.

renders the true state of affairs hidden."); *Springfield Terminal*, 14 F.3d at 655 ("Expertise . . . 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.").

Nor is it relevant that Bloomberg and MSRB SHORT charge a fee for access to their data. For one thing, Edelweiss also downloaded and used data from EMMA, which is free. But in any event, the payment of a fee hardly distinguishes news media from non–news media. For example, print newspapers and magazines generally charge, and historically have charged, for individual issues and subscriptions, and online news sources—including classic newspapers such as the *New York Times* and *Wall Street Journal*—paywall their articles behind paid subscriptions. That is why numerous courts have rejected Edelweiss's subscription-cost argument. *E.g.*, *U.S. ex rel. Angelo v. Allstate Ins. Co.*, 620 F. Supp. 3d 674, 685-86 (E.D. Mich. 2022); *Beck*, 2021 WL 7084164, at *3; *U.S. ex rel. Patriarca v. Siemens Healthcare Diagnostics, Inc.*, 295 F. Supp. 3d 186, 200 (E.D.N.Y. 2018); *U.S. ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, 2014 WL 4375638, at *8-10 (E.D. Pa. Sept. 4, 2014); *Staples*, 932 F. Supp. 2d at 40.

Although Bloomberg and MSRB SHORT may charge more for their services than some other media, there is no judicially administrable way to draw

a line at which a subscription fee becomes "too high" for purposes of the public disclosure bar. For example, many scholarly and trade publications charge substantial access fees, but courts still treat those publications as news media. *E.g.*, *U.S. ex rel. Alcohol Found., Inc. v. Kalmanovitz Charitable Found., Inc.*, 186 F. Supp. 2d 458, 463 (S.D.N.Y. 2002), *aff'd*, 53 F. App'x 153 (2d Cir. 2002); *California ex rel. Grayson v. Pac. Bell. Tel. Co.*, 142 Cal. App. 4th 741, 754-55 (2006), *as modified* (Sept. 12, 2006). Subscription journals qualify as "news media" despite their cost, and there is no principled reason why subscription services like Bloomberg and MRSB SHORT do not qualify as well.

Edelweiss's arguments essentially reduce to the assertion that other members of the public would not have had the same economic motive that made paying for and downloading public data worthwhile for Edelweiss. But even if that is true, it would not change the fact that all the same data "would have been equally available to strangers to the [alleged] fraud transaction had they chosen to look for it." *Stinson*, 944 F.2d at 1155-56. Indeed, the fact that Edelweiss—an LLC formed for the purpose of bringing cases like this—believed it could profit from manufacturing *qui tam* lawsuits through analysis of public data only confirms that its "claim represents the kind of 'parasitic complaint' the Legislature sought to avoid." *Brennan*, 454 N.J. Super. at 620.

## CONCLUSION

The Court should affirm the Appellate Division's judgment.

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