No. A163264

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

EDELWEISS FUND LLC, *et al.*,

Appellant,

v.

JPMORGAN CHASE & COMPANY, *et al.*,

Respondents.

Superior Court No. CGC-14-540777
Hon. Anne-Christine Massullo

APPLICATION OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CALIFORNIA CHAMBER OF COMMERCE, AND AMERICAN BANKERS ASSOCIATION FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENTS

ETHAN P. DAVIS
MATTHEW V.H. NOLLER
KING & SPALDING LLP
50 California Street
Suite 3300
San Francisco, CA 94111
(415) 318-1200
edavis@kslaw.com

Counsel for Amici Curiae

May 23, 2022

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to Rule 8.208(e) of the California Rules of Court, *amici* state that they are not aware of any interested entities or persons.

/s/ Ethan P. Davis

Ethan P. Davis
KING & SPALDING LLP
50 California Street
Suite 3300
San Francisco, CA 94111
(415) 318-1200
edavis@kslaw.com

Counsel for Amici Curiae

May 23, 2022

APPLICATION

Pursuant to Rule 8.200(c) of the California Rules of Court, the Chamber of Commerce of the United States of America ("Chamber"), California Chamber of Commerce, ("CalChamber"), and the American Bankers Association ("ABA") respectfully apply for permission to file the attached brief of *amici curiae* in support of Respondents and affirmance.

The presiding justice should allow *amici* to participate as *amici* in this appeal. Under the governing rules, applications for permission to file amicus briefs "must state the applicant's interest and explain how the proposed amicus brief will assist the court in deciding the matter." Cal. R. Ct. 8.200(c)(2). The Court should grant this motion because the Chamber and the ABA have a keen interest in False Claims Act *qui tam* cases like this one and because the proposed *amicus* brief would assist the Court in its consideration of the important issues raised by this appeal.

I. *Amici* Have an Interest in This Case.

The 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.

CalChamber is a non-profit business association with over 13,000 members, both individual and corporate, representing

virtually every economic interest in the state of California. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory and legal issues. CalChamber often advocates before federal and state courts by filing *amicus curiae* briefs and letters in cases, like this one, involving issues of paramount concern to the business community.

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 $13 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.

This appeal is important to *amici* and their members because meritless *qui tam* lawsuits pose serious and sometimes devastating risks to American 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 contract with the federal

and state governments. It is thus critically important to *amici*'s members that courts correctly enforce applicable pleading requirements and public disclosure bar provisions in statutes such as the California FCA, including by dismissing *qui tam* actions that are inadequately pled and that are subject to public disclosure bars.

II. *Amici*'s Brief Will Assist the Court.

The proposed *amicus* brief will assist the Court because *amici* have particular expertise in the issues on appeal, and concerning related factual and policy considerations, and will bring that expertise to bear on arguments outside the scope of the parties' briefs.

First, *amici* have expertise concerning the importance of the FCA's public disclosure bar and the pleading requirements at issue in this appeal. Due to their broad and diverse memberships, *amici* can offer valuable context as to whether a particular holding would significantly affect cases and business practices not directly before the Court. In their brief, *amici* provide additional background and analysis that will aid the Court's consideration of the issues on appeal.

Second, *amici*'s arguments expand on the parties' arguments. Although the parties rightly focus on the facts of this case, *amici*'s brief makes more general points about the FCA's public disclosure bar and pleading requirements. The brief likewise explains the broader, and increasingly more common, phenomenon of *qui tam* suits brought by professional relators with no inside knowledge of the defendant's practices. The brief explains the inherent difficulty that such relators face in avoiding

public disclosure bar provisions and in satisfying pleading standards in *qui tam* suits.

All other preconditions to *amici*'s participation in this appeal are satisfied. No party or counsel for a party in the pending case authored this *amici* brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this *amici* brief. Cal. R. Ct. 8.200(c)(3). The brief is timely because it is filed within fourteen days of the filing of Edelweiss's reply brief. *Id.* R. 8.200(c)(1). Finally, the brief complies with Rule of Court 8.204(c)(1), because it has no more than 14,000 words.

CONCLUSION

The presiding justice should grant the application for permission to file the proposed *amicus* brief.

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ETHAN P. DAVIS
MATTHEW V.H. NOLLER
KING & SPALDING LLP
50 California Street
Suite 3300
San Francisco, CA 94111
(415) 318-1200
edavis@kslaw.com

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*

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This appeal is important to *amici* and their members because meritless *qui tam* lawsuits pose serious and sometimes devastating risks to 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 contract 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 California False Claims Act's *qui tam* provisions are designed to "encourage private whistleblowers, uniquely armed with information about false claims, to come forward." *California ex rel. McCann v. Bank of Am., N.A.*, 191 Cal. App. 4th 897, 907 (2011); *see California v. Pac. Bell Tel. Co.*, 142 Cal. App. 4th 741, 746 (2006). *Qui tam* suits like this one by Edelweiss Fund LLC flip that purpose on its head in at least two respects.

First, Edelweiss is not a quintessential whistleblower bringing forward nonpublic information. Edelweiss has never worked for or provided services to any of the Respondents.

Edelweiss has no firsthand knowledge of the Respondents' operations or practices, and no knowledge or actual evidence of fraud committed by any Respondent. Far from being "uniquely armed with information," all Edelweiss has is an internet connection and access to public websites that disclose interest rates for VRDOs and other debt instruments. But the FCA's public disclosure bar prohibits Edelweiss from relying on such websites. Public websites, which disseminate information to the public in much the same way their non-digital equivalents (such as stock price sections in newspapers) do, qualify as "news media" under the FCA's public disclosure bar and thus cannot support *qui tam* claims.

For good reason, California barred *qui tam* actions that add nothing to the information already available to the public. The government does not need Edelweiss's help to know what is posted on a public website. Indeed, if the government believed Respondents had defrauded it, it likely would have intervened to pursue this action—but it did not. Edelweiss "merely echoes what the government already knew and chose not to prosecute. Thus, the public disclosure bar applies." *Pac. Bell*, 142 Cal. App. 4th at 752.

Second, Edelweiss's inability to point to any inside information prevents Edelweiss from satisfying the FCA's heightened standard for pleading fraud with particularity. By analyzing public interest-rate data, Edelweiss claims that Respondents changed interest rates for some VRDOs in some weeks by the same absolute amount. But Edelweiss has alleged no

actual fraud and has alleged no actual false statements to the government. Edelweiss can only speculate that any Respondent committed fraud by improperly setting the interest rate for any particular California VRDO, then billing the government for that conduct. As the trial court held on four occasions, Edelweiss has never alleged sufficient facts to support the most basic element of FCA liability: that any claim submitted by Respondents to the government was *false*.

That crucial hole in Edelweiss's complaint should come as no surprise, given Edelweiss's status as a profit-seeking outsider to Respondents' businesses. Lacking any inside information, Edelweiss can only analyze publicly available data. But it takes more than analytics and speculative inferences to plead a viable fraud claim. Without something more—such as allegations identifying a specific VRDO whose interest rate was "different from what it should have been," 2AA681—Edelweiss cannot plead a fraud claim with particularity.

ARGUMENT

Respondents' brief ably explains the numerous reasons why the trial court was correct to dismiss Edelweiss's complaint. This *amicus* brief focuses on two reasons: (1) the FCA's public disclosure bar requires dismissal of Edelweiss's complaint, which depends entirely on public data available on public websites, and (2) the statistical analysis Edelweiss performed on that public data cannot satisfy the FCA's heightened standard for pleading fraud with particularity.

I. The Complaint Should Have Been Dismissed Under the Public Disclosure Bar.

This Court should affirm the trial court's decision on the alternative ground that the public disclosure bar applies to Edelweiss's complaint. Although the government has filed in this Court a last-second objection to dismissal under the public-disclosure bar, the objection comes far too late. The government forfeited its objection by not raising it in response to Respondents' motion to dismiss invoking the public disclosure bar in the trial court. Instead, the government waited to object until after briefing, argument, and a decision in the trial court, and until after completion of the parties' briefing in this Court.

The government, just like private litigants, cannot raise for the first time on appeal arguments that it did not raise in the trial court. *E.g.*, *People v. Thomas*, 29 Cal. App. 5th 1107, 1113-14 (2018); *Holmes v. Cal. Nat'l Guard*, 90 Cal. App. 4th 297, 319 n.13 (2001). That rule applies with full force here, and to hold otherwise would be to allow the government to obstruct the ordinary course of litigation—not only as in cases like this one, but also by opposing dismissal for the first time during appellate proceedings after a trial court or this Court has already held that the public-disclosure bar requires dismissal. That would waste precious judicial resources and encourage the government to sandbag defendants by withholding its objections for months or even years, as in this case. It would also violate the separation of powers by authorizing the executive branch to overrule judicial decisions. *See People v. Tenorio*, 3 Cal. 3d 89, 94-95 (1970).

The Court should therefore disregard the government's untimely objection to dismissal and hold that the public disclosure bar applies to Edelweiss's complaint.

A. The Public Disclosure Bar Serves the FCA's Purposes of Encouraging Whistleblower Suits While Preventing Parasitic Suits by Professional Relators.

Because the FCA is meant to "ferret[] out fraud on the government by offering an incentive to persons with evidence of such fraud to come forward and disclose that evidence to the government," its *qui tam* provisions are designed for "typical whistleblower[s]" who "happen across evidence of fraud during the course of employment." *Pac. Bell*, 142 Cal. App. 4th at 746 (cleaned up). "But *qui tam* actions also present the danger of parasitic exploitation of the public coffers by opportunistic plaintiffs who have no significant information to contribute of their own. Providing cash bounties to freeloaders does not serve the purpose of the FCA to protect that public fisc." *Id.* at 746-47 (cleaned up).

Hence the public disclosure bar. Gov. Code § 12652(d)(3)(A). It "erects a jurisdictional bar to *qui tam* actions that do not assist the government in ferreting out fraud because the fraudulent allegations or transactions are already in the public domain." *Pac. Bell*, 142 Cal. App. 4th at 748. When a relator's lawsuit is based on publicly available information, "the governmental authority is already in a position to vindicate society's interests, and a *qui tam* action would serve no purpose." *Id.* The public disclosure bar thus "limits *qui tam* jurisdiction to those cases in which the relator played a role in exposing a fraud of which the public was previously unaware." *Id.* at 749 (cleaned up).

At the same time, the FCA contains an exception for precisely those relators whose efforts might be helpful to the government notwithstanding a public disclosure: "original sources," defined as relators who voluntarily disclosed the information before it was made public or who have independent knowledge of the information and can materially add to the public disclosure. Gov. Code § 12652(d)(3)(C). The "original source" exception "was enacted to prevent parasitic lawsuits." *Pac. Bell*, 142 Cal. App. 4th at 755. If a relator voluntarily disclosed the information to the government before it was made public, then the relator's action will not be parasitic. And relators who have independent knowledge of the publicly disclosed information and can add materially to it may be able to aid the State's investigation of fraud even when certain information underlying a suit has been publicly disclosed. But where an action is "based on information that would have been equally available to strangers to the fraud transaction," then the action has no value and may not proceed. *Id.* at 755-56 (cleaned up).[1]

[1] Respondents demonstrate why Edelweiss is not an "original source" for any of the information on which it relies. Resp. Br. 80-82. At most, Edelweiss "merely use[d] [its] unique experience or training to conclude that the material elements already in the public domain constitute a false claim," which is not sufficient. *A-1 Ambulance Serv., Inc. v. California*, 202 F.3d 1238, 1245 (9th Cir. 2000).

B. 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 depends on public data that it pulled from three publicly accessible websites: EMMA, which reports the interest rates for Respondents' VRDOs; Bloomberg's SIFMA index, which reports average rates for a selection of VRDOs; and FRED, a Federal Reserve website that reports rates for commercial paper. Such websites designed to publicly disseminate information are "news media" within the meaning of the FCA, so information from such websites cannot support a relator's claim. Gov. Code § 12652(d)(3)(A)(iii).[2] Edelweiss's complaint should have been dismissed for that reason alone.

1. As with the entirety of California's FCA, its public disclosure bar is "patterned on" the equivalent bar in the federal FCA. *Pac. Bell*, 142 Cal. App. at 746 n.3, 748 (cleaned up). And Congress designed the federal bar to have a "broad scope."

[2] As Respondents explain, this Court should not follow the Second District's decision in *State ex rel. Bartlett v. Miller*, 243 Cal. App. 4th 1398, 1414 (2016), which held that the EDGAR database of SEC filings is not "news media." Resp. Br. 70-71. This Court is not bound by and owes no deference to *Bartlett*. *People v. Osotonu*, 35 Cal. App. 5th 992, 998 (2019). And *Bartlett* is under-reasoned and unpersuasive because it does not engage with the FCA's purposes, the ordinary meaning of "news media," the role of the internet in modern news reporting, or the overwhelming consensus of cases holding that public websites qualify as "news media." *See Rosenberg*, 487 Mass. at 461 n.23 (criticizing *Bartlett*).

Schindler Elevator Corp. v. United States ex rel. Kirk, 563 U.S. 401, 408 (2011). That breadth extends to the category of sources that can trigger the bar, which encompasses the entire "public domain." *Pac. Bell*, 142 Cal. App. 4th at 748. 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." *Schindler Elevator Corp.*, 563 U.S. at 408 (cleaned up) (emphasis added).

The ordinary meaning of "news media" demands this broad reading. *See Pac. Bell*, 142 Cal. App. 4th at 754 (rejecting a "too narrow[]" interpretation of "news media"). Pre-internet, 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*, The 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 707, 708.

That definition undoubtedly includes the internet for "people in the modern world," for whom the internet is a, and often the, primary news source. *Rosenberg v. JPMorgan Chase & Co.*, 487 Mass. 403, 460 (2021); *see News*, The 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"). Today, even the largest print newspapers—the paragons of "traditional media"—have more internet subscribers than print subscribers.[3] Their websites obviously are "news media," and so are other publicly accessible websites that perform the same function of "disseminat[ing]" information. *Rosenberg*, 487 Mass. at 461; *cf. Pac. Bell*, 142 Cal. App. 4th at 754-55 ("'No principle of statutory construction or public policy would compel a cramped reading of the term "news media" or the imposition of a judicially created limit of "news media" to encompass only the newspaper context.'").

2. 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." *United States ex rel. Repko v. Guthrie Clinic, P.C.*, 2011 WL 3875987, at *7 (M.D. Pa. Sept. 1, 2011), *aff'd*, 490 F. App'x 502 (3d Cir. 2012); *see United States ex rel. Beauchamp v. Academi Training Ctr., LLC*, 816 F.3d 37, 43 n.6 (4th Cir. 2016)

[3] *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 the New York Times, Wall Street Journal, and Washington Post have more internet subscribers than print subscribers).

("Courts have unanimously construed the term 'public disclosure' to include websites and online articles."); *United States 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."); *United States 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"); *United States ex rel. Hagerty v. Cyberonics, Inc.*, 95 F. Supp. 3d 240, 257 n.7 (D. Mass. 2015) (news media includes "readily accessible websites" (quoting *United States ex rel. Green v. Serv. Contract Educ. & Training Tr. Fund*, 843 F. Supp. 2d 20, 32 (D.D.C. 2012))).

Courts have included a wide array of websites in that category, including government websites, college websites, blog posts, and even comment sections. *United States ex rel. Zafirov v. Fla. Med. Assocs. LLC*, 2021 WL 4443119, at *7 (M.D. Fla. Sept. 28, 2021) (federal government agency website); *United States ex rel. Hong v. Newport Sensors, Inc.*, 2016 WL 8929246, at *4 (C.D. Cal. May 19, 2016) (government and university websites); *United States 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"); *United States 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 websites, such as EMMA, the SIFMA index, and FRED, that provide the public with compiled

information that can be searched. *See, e.g., United States 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); *United States 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 502, 504 (3d Cir. 2012) ("We agree with the District Court's . . . conclusion that the websites and prior litigation it referenced constitute public disclosure of information."). Indeed, the Massachusetts Supreme Court recently held, when dismissing another lawsuit brought by Edelweiss's principal, that EMMA qualifies as "news media" for purposes of the public disclosure bar. *Rosenberg*, 487 Mass. at 460-61.

It makes no difference that only a subset of the public would likely be interested in accessing such websites. *Pac. Bell*, 142 Cal. App. 4th at 754-55. "[N]ews media" includes sources that "are as generally accessible to any other strangers to the fraud as would be a newspaper article," including publications of potentially limited interest such as "scholarly or scientific periodicals." *United States 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). A much larger percentage of the public has ready access to EMMA, the SIFMA index, and FRED than to niche trade journals, which may similarly enjoy limited interest

and which this court has held are "news media." *Pac. Bell*, 142 Cal. App. 4th at 754 ("'News media' encompasses 'publication of information in scholarly or scientific periodicals.'"). And the information available to the public on those websites plays an important public notice function because it "increase[s] the transparency of the municipal securities market by providing free public access to municipal securities disclosures and data." *Rosenberg*, 487 Mass. at 461.

Given that limited-distribution trade or professional journals are "news media" because they distribute information to even small slices of the public, publicly accessible websites that more broadly "provide the general public with access to information" must also be considered "news media." *Repko*, 2011 WL 3875987, at *7. EMMA, the SIFMA index, and FRED, with their general availability and important public-notice function, fall comfortably within the FCA's "news media" category. *Rosenberg*, 487 Mass. at 461.

II. Edelweiss's Statistical Analyses Cannot Satisfy the Requirement to Plead Fraud with Particularity.

An FCA complaint is a proper vehicle to seek redress for a wrong, not to merely go prospecting in an effort to find one. *McCann*, 191 Cal. App. 4th at 906-07, 909. That is why every FCA "complaint must be pleaded with particularity" by identifying "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what

he obtained thereby." *Id.* at 906 (cleaned up).[4] The "insiders" for whom the FCA is designed "should have adequate knowledge of the fraudulent acts to comply with the pleading requirement." *Id.* at 907.

Edelweiss has no such knowledge—and cannot "comply with the pleading requirement"—because it is not an "insider." *Id.* Far from being "uniquely armed with information about false claims," *id.*, Edelweiss has no information that is not equally available to the government and every other member of the public. Edelweiss tries to fill this gap with statistical analyses of publicly available information, but even if its analyses were rigorous or reliable—and they are not, due to the numerous flaws identified by the trial court and Respondents, AA677-81; Resp. Br. 59-67—they cannot on their own provide the "particular details" necessary to plead fraud with particularity. *Integra Med Analytics LLC v. Providence Health & Servs.*, 854 F. App'x 840, 845 n.5 (9th Cir. 2021); *United States ex rel. Integra Med Analytics, L.L.C. v. Baylor Scott & White Health*, 816 F. App'x 892, 898, 900 (5th Cir. 2020).

By their nature, Edelweiss's alleged statistics cannot provide the necessary factual details about any particular California VRDO for which Respondents reset interest rates or submitted a claim for payment to the government. At best, Edelweiss's analyses aggregate information about interest rates for a collection of VRDOs and commercial paper instruments, then

[4] This is equivalent to the federal standard for pleading fraud under Rule 9(b) of the Federal Rules of Civil Procedure. *McCann*, 191 Cal. App. 4th at 907.

derive purported high-level trends in how those rates changed. *See* AA675-76, 680-82. If Edelweiss performed these analyses correctly—a big "if"—they could theoretically show, or at least suggest, that Respondents changed rates for some VRDOs by the same absolute amount or could shed light on how rates for VRDOs and commercial paper differed over time. But no matter how reliable those generalized showings might be, they are incapable of establishing with particularity that any Respondent *committed fraud* when resetting any VRDO's interest rate. Among other defects, they do not and cannot show "how Defendants conducted rate resets"; reveal "the individualized characteristics of particular VRDOs or the market conditions" at the time of any reset; or establish "that two VRDOs with different characteristics had the same rate reset in absolute terms but, due to some real-world conditions that existed at that particular point in time, the rates should not have moved together." AA679-80. But those are the exact details Edelweiss must allege to plead with particularity that any claim Respondents submitted to the government falsely implied "[]compliance with an express contractual term." AA682.

To be sure, statistical data might be "consistent with" the existence of an FCA violation in some cases. AA682 n.18. Perhaps trends or apparent discrepancies revealed by the data could lead the government to *investigate* whether there is a factual basis to bring an FCA claim. But such data cannot by themselves be an adequate basis to *bring* an FCA claim because they cannot reveal particularized information about any specific "false representation." *McCann*, 191 Cal. App. 4th at 906; *see Baylor*

Scott & White, 816 F. App'x at 900 ("Even when plaintiffs in an FCA case use statistics . . . they must still plead particular details of a fraudulent scheme for each claim."); *Providence Health*, 854 F. App'x at 845 n.5 (holding federal Rule 9(b) requires "statistical data . . . paired with particular details of a false claim"); *United States ex rel. Tessler v. City of New York*, 712 F. App'x 27, 29-30 (2d Cir. 2017) (holding "statistics from a database" insufficient to plead "with particularity" that defendant "submitted false or fraudulent claims for payment").

This conclusion follows naturally from the purpose of the FCA's "heightened pleading requirement for fraud allegations." *McCann*, 191 Cal. App. 4th at 909. That requirement "serves not only to give notice to defendants of the specific fraudulent conduct against which they must defend, but also to deter the filing of complaints as a pretext for the discovery of unknown wrongs." *Id.* (cleaned up). That purpose demands that professional relators with no inside "knowledge of [any] fraudulent acts," *id.* at 907, not be allowed to plead fraud claims based solely on inferences from generalized statistics. The "particularity requirement . . . is a nullity if a Plaintiff gets a ticket to the discovery process without identifying a single [false] claim." *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1359 (11th Cir. 2006) (internal quotation marks omitted).

III. Edelweiss's Complaint Exemplifies the Problems with Professional Relators.

It is no accident that Edelweiss's complaint violates the public disclosure bar and fails to plead fraud with particularity: Edelweiss is a "professional relator" without the kind of inside

information that defines the "typical whistleblower" for whom FCA's *qui tam* provisions are designed. *Pac. Bell*, 142 Cal. App. 4th at 746. An "insider[] with genuinely valuable information" does not need to base his action on publicly disclosed information. *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 294 (2010). Conversely, an "opportunist" like Edelweiss, which views the FCA solely as a business opportunity, must rely on public information because it has "no significant information to contribute of [its] own." *Id.*

That places Edelweiss squarely within the cottage industry of professional relators on the hunt for enormous FCA bounties. Despite their increasing prevalence, such relators do nothing to aid governments' anti-fraud efforts. By relying on publicly available data, professional relators disregard the distinction between the valuable whistleblower actions that the FCA seeks to encourage and the unhelpful parasitic actions that the statute prohibits. *Pac. Bell*, 142 Cal. App. 4th at 746-47. And by claiming to infer the possible existence of fraud from statistical analyses of public data, professional relators disregard, and seek to evade, the pleading requirement to describe specific instances of actual fraud with particularity. In some cases, statistical analysis may show trends *consistent with* fraud, but only people with "inside information" of a defendant's operations can provide the details necessary "to 'sound the alarm' about undetected fraud on the State of California." *Id.* at 747.

Speculative *qui tam* suits based on public data, therefore, do not serve the purposes of the FCA. *Id.* at 746-47. They in no way

help the government uncover "genuinely valuable information" regarding actual fraud. *Graham Cty.*, 559 U.S. at 294. In this case, for example, the government already has access to all of the information on which Edelweiss relies, and it could have brought a suit if it had believed there was a basis to do so. Yet it declined to intervene. Edelweiss thus "merely echoes what the government already knew and chose not to prosecute." *Pac. Bell*, 142 Cal. App. 4th at 752.

Professional relators' bounty-hunting efforts are not just unhelpful—they can lead to affirmatively harmful conduct. To get the inside knowledge they need to go beyond mere statistical analysis, professional relators must enlist insiders. But insiders with firsthand knowledge of fraud can go directly to the government; they have no apparent incentive to provide information to professional relators, enabling those relators to poach the bounties that the insiders might be able to claim themselves. According to the federal government, some professional relators have dealt with this problem by resorting to false pretenses to elicit information from insiders. *See* U.S. Mot. to Dismiss Relator's Second Am. Compl. 5, *United States ex rel. Health Choice Grp., LLC v. Bayer Corp.*, No. 5:17-cv-126-RWS-CMC (E.D. Tex. Dec. 17, 2018), ECF No. 116 (describing one professional relator's surreptitious efforts to gather information from hospital insiders under the guise of a "research study"); *see also United States ex rel. Health Choice Alliance LLC v. Eli Lilly Co.*, 2019 WL 4727422, at *7-8 (E.D. Tex. Sept. 27, 2019) (granting government's motion to dismiss), *aff'd*, 4 F.4th 255 (5th Cir. 2021).

Professional relators' speculative *qui tam* actions also "impose upon the court, the parties and society enormous social and economic costs." *McCann*, 191 Cal. App. 4th at 909. Many of *amici*'s members already are subject to significant scrutiny under FCAs, and they invest substantial resources to ensure compliance with applicable fraud and abuse laws. Vexatious litigation only adds to those costs, which inevitably get passed on to the members' customers (including the government) in the form of higher prices. As the Chamber has noted, of the 2,086 federal *qui tam* cases in which the government declined to intervene between 2004 and 2013 and that ended with zero recovery, 278 of them nonetheless lasted for more than three years after the government declined intervention, and 110 of those extended for more than five years after declination. Br. of Chamber of Commerce of the United States of America et al. as *Amici Curiae* at 13, *Gilead Scis., Inc. v. United States ex rel. Campie*, No. 17-936 (U.S. Feb. 1, 2018), 2018 WL 739739.

Even if a professional relator does nothing more than put public information in a complaint, therefore, defendants face tremendous pressures to settle. The costs of litigating are too high and the potential downside too great—treble damages, plus per-claim penalties, plus litigation costs, Gov. Code § 12651(a)—to justify defending against even meritless claims. Courts should thus rigorously enforce "[t]he heightened pleading requirement for fraud allegations" to "protect defendants from the harm that comes from being subject to fraud charges." *McCann*, 191 Cal. App. 4th at 909 (cleaned up); *accord Atkins*, 470 F.3d at 1359-60.

Nor are defendants the only ones who pay the price when professional relators bring *qui tam* suits based on purely public information. Government resources are finite too. In cases that should be dismissed under the public disclosure bar, the government was already in the position of being able to file suit based on the public information before the would-be relator copied that information and placed it in a complaint. All *qui tam* actions, even declined suits, require government monitoring and, if they get past the pleading stage, involvement in discovery. This is no small burden. The more resources that the government must devote to monitor parasitic suits, the fewer resources are available to investigate potentially meritorious *qui tam* actions—and the backlog will keep growing.

Finally, the simple reality is that most declined *qui tam* actions, like this one, are meritless. At the federal level, the government intervenes in a small minority of *qui tam* actions—about 20 percent over the last several years.[5] Yet the vast majority of the over $70 billion recovered under the federal FCA since 1986 has come from that small subset of intervened cases. Civil Division, U.S. DOJ, Fraud Statistics - Overview (Feb. 1, 2022), https://bit.ly/3yAzx41. The much larger universe of declined cases accounts for less than five percent of the total recoveries. *Id.*

[5] Press Release, U.S. DOJ, Deputy Associate Attorney General Stephen Cox Provides Keynote Remarks at the 2020 Advanced Forum on False Claims and Qui Tam Enforcement (Jan. 27, 2020), https://bit.ly/38srprT.

For all these reasons, it is critical that the Court rigorously enforce the FCA's public disclosure bar and pleading requirements. If a professional relator like Edelweiss could get past a motion to dismiss armed only with statistics and vague innuendo, profit-seeking FCA litigation that undermines the statute's purposes and California's pleading standards will explode even more than it already has.

CONCLUSION

The Court should affirm the trial court's dismissal of Edelweiss's complaint.

CERTIFICATE OF COMPLIANCE

This brief complies with the length requirement of Rule of Court 8.204(c)(1) because it contains 5,218 words, not including the sections exempted by Rule 8.204(c)(3).

Respectfully submitted,

/s/ Ethan P. Davis

Ethan P. Davis
KING & SPALDING LLP
50 California Street
Suite 3300
San Francisco, CA 94111
(415) 318-1200
edavis@kslaw.com

Counsel for Amici Curiae

May 23, 2022

PROOF OF SERVICE

I am a citizen of the United States, over 18 years of age, and not a party to the within action. I am employed by King & Spalding LLP; my business address is 50 California Street, Suite 3300, San Francisco, CA 94111.

On May 23, 2022, I served the within APPLICATION and BRIEF on the parties to this proceeding, addressed below, by causing true copies thereof to be distributed as follows:

To counsel for Appellants and State of California:

James A. Bloom
Matthew Sinclair Weiler
Todd M. Schneider
Jason H Kim
Schneider Wallace Cottrell Konecky LLP
2000 Powell St, Suite 1400
Emeryville, CA 94608-1863
jbloom@schneiderwallace.com
tschneider@schneiderwallace.com
kbates@schneiderwallace.com

Jeffrey William Lawrence
Lawrence Law Firm
101 California Street, Suite 2710
San Francisco, CA 94111
jeffreyl@jlawrencelaw.com

Ari Yampolsky
Constantine Cannon LLP
150 California St., Suite 1600
San Francisco, CA 94111
ayampolsky@constantinecannon.com

Allan Steyer
Jill Michelle Manning
Donald Scott Macrae
Jill K. Cohoe
Steyer Lowenthal Boodrookas Alvarez & Smith
235 Pine Street, 15th Floor
San Francisco, CA 94104
asteyer@steyerlaw.com
jmanning@steyerlaw.com
smacrae@steyerlaw.com
jcohoe@steyerlaw.com

Jeffrey L. Simpton
Office of the Attorney General
1300 I Street, Suite 125
Sacramento, CA 94244
Jeffrey.Simpton@doj.ca.gov

To counsel for Respondents:

Holly Harrison
David Jorgensen
Harrison Law LLC
One North LaSalle Street, Suite 2001
Chicago, IL 60602
hollyharrison@hlawllc.com
davidjorgensen@hlawllc.com

William J. Goines
Greenberg Traurig, LLP
1900 University Avenue, 5th Floor
East Palo Alto, CA 94303
goinesw@gtlaw.com

Peter R. Boutin
Christopher A. Stecher
Keesal, Young & Logan
450 Pacific Avenue
San Francisco, CA 94133
peter.boutin@kyl.com
christoper.stecher@kyl.com

Matthew D. Benedetto
Wilmer Cutler Pickering Hale and Dorr LLP
350 S Grand Avenue, Suite 2100
Los Angeles, CA 90071
matthew.benedetto@wilmerhale.com

Matthew James Dolan
Sidley Austin LLP
1001 Page Mill Road, Building 1
Palo Alto, CA 94304
mdolan@sidley.com

Matthew J. Silveira
Margaret Adema Maloy
Jones Day
555 California Street, 26th Floor
San Francisco, CA 94104
msilveira@jonesday.com
mmaloy@jonesday.com

Michael Conway
Jones Day
77 W. Wacker Drive
Chicago, IL 60601
mconway@jonesday.com

Bernard Reynold Suter
Keesal Young & Logan
450 Pacific Avenue
San Francisco, CA 94133
ben.suter@kyl.com

Jack Patrick DiCanio
Kasonni Marie Scales
Skadden, Arps, Slate, Meagher & Flom LLP
525 University Ave
Palo Alto, CA 94301
jack.dicanio@skadden.com
kasonni.scales@skadden.com

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To the Superior Court:

Hon. Anne-Christine Massullo
San Francisco Superior Court
Dept. 304
400 McAllister St, San Francisco, CA 94102

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 23, 2022, in San Francisco County, California.

/s/ Michelle Sankey
MICHELLE SANKEY