GURBIR S. GREWAL, Attorney General of New Jersey on behalf of AMY G. KOPLETON, Deputy Chief of the New Jersey Bureau of Securities, Plaintiff, v. CREDIT SUISSE SECURITIES (USA) LLC, CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., and DLJ MORTGAGE CAPITAL, INC., Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: GENERAL EQUITY DIVISION MERCER COUNTY DOCKET NO.: MER-C-137-13 **CIVIL ACTION**

BRIEF OF THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF NEW JERSEY BUREAU OF SECURITIES

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I. Statement of Interest of *Amicus Curiae*

Formed in 1919, the North American Securities Administrators Association, Inc. ("NASAA") is the non-profit association of state, provincial and territorial securities regulators in the United States, Canada and Mexico. NASAA has 67 members, including the securities regulators in all 50 states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands. The New Jersey Bureau of Securities (the "Bureau"), on whose behalf the New Jersey Attorney General ("NJAG") is the Plaintiff here, is a NASAA member.

NASAA's members are responsible for administering state securities laws, commonly known as "Blue Sky Laws." *See generally* 1 Louis Loss et al., Securities Regulation 55–251 (5th ed. 2014). NASAA supports its members and the investing public by promulgating model rules, providing training opportunities, coordinating multi-state enforcement actions, and commenting on legislative and rulemaking processes. NASAA also offers its legal analysis and policy perspectives to state and federal courts as *amicus curiae* in cases involving the interpretation of state and federal securities laws. The primary mission of NASAA and its members is to protect investors from fraud and abuse. As part of that mission, one of NASAA's goals is to foster greater uniformity among state and federal securities laws.

NASAA has an interest in this case because it involves numerous important questions of state securities law that could impact the ability of the Bureau – and, potentially, other NASAA members – to protect their citizens from fraud and abuse.

II. Statement of Material Facts

To the extent that a statement of material facts is required pursuant to N.J. Ct. R. 1:13-9(b) and N.J. Ct. R. 4:46-2, NASAA adopts the Bureau's statement of the facts in the Memorandum of Law in Support of Plaintiff's Motion for Partial Summary Judgment

Dismissing with Prejudice Defendants' Scienter, Due Diligence, and Loss Causation Defenses at 4-12 (Aug. 21, 2019) and the Bureau's Brief in Opposition to Defendants' Motion for Partial Summary Judgment and in Further Support of Plaintiff's Motion for Partial Summary Judgment at 3-12 (Feb. 7, 2020).

III. Argument

The Bureau initiated the present enforcement action against Credit Suisse and the related entities captioned above (collectively, the "Defendants") for alleged violations of the New Jersey Uniform Securities Law ("NJUSL"). Among other things, the Bureau alleges the Defendants violated Sections 52(b) and 52(c) of the NJUSL in the course of their interconnected offers and sales of residential mortgage backed securities ("RMBS") containing toxic loans in the lead-up to the 2008 financial crisis.[1] NASAA respectfully submits this brief as *amicus curiae* in support of the Bureau's Motion for Partial Summary Decision Dismissing With Prejudice Defendants' Scienter, Due Diligence, and Loss Causation Defenses (the "Bureau's Motion"), and in opposition to Defendants' Motion for Partial Summary Judgment (the "Defendants' Cross-Motion").

First, Defendants' Cross-Motion improperly seeks to confine the scope of the NJUSL in a way that is fundamentally inconsistent with the flexible construction which must be given to that statute. Contrary to the arguments in Defendants' Cross-Motion, whether Defendants' conduct constituted an "offer" of securities in New Jersey is a fact-intensive question unsuited for summary judgment because there are substantial open questions of material fact.

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[1] *See*, *e.g.*, SEC Press Release, "SEC Charges J.P. Morgan and Credit Suisse With Misleading Investors in RMBS Offerings," (Nov. 16, 2012), *available at* https://www.sec.gov/news/press-release/2012-2012-233htm (Credit Suisse agreed to pay $120 Million to settle charges by the SEC in connection with material misrepresentations and omissions in the offer and sale of RMBS).

Second, there is no express or implied requirement in the NJUSL for the Bureau to allege or prove that Defendants acted with scienter in the Bureau's Section 52(b) and 52(c) claims. Such a requirement is not reflected in the text of the NJUSL and would render the NJUSL fundamentally inconsistent with the equivalent provisions in parallel state and federal securities laws. This Court should follow the consensus of other courts that have addressed this question and conclude that scienter is not required here.

Third, there is no express or implied requirement in the NJUSL for the Bureau to allege or prove that Defendants' conduct resulted in any financial losses to investors. As with scienter, loss causation is not an element of a claim by the Bureau for violations of Sections 52(b) and 52(c). This Court should follow other courts on this issue as well to hold that Sections 52(b) and 52(c) of the NJUSL do not require the Bureau to prove loss causation.

A. The Bureau's enforcement action is consistent with the scope and intent of the NJUSL.

The NJUSL is similar in most respects to the Uniform Securities Act of 1956, a model state securities act promulgated by the National Conference of Commissioners on Uniform State Laws.[2] Like the federal securities laws and the securities laws in other states, the NJUSL is remedial and was "intended to . . . prevent frauds on the public at large." *Cola v. Terzano*, 129 N.J. Super. 47, 53 (Law Div. 1974). As with other securities laws designed to prevent and remediate fraud and other abusive practices, the NJUSL should be construed broadly to effectuate its remedial purposes. *See, e.g.*, *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972); *Cox v. Garvin*, 607 S.E.2d 549, 552 (Ga. 2005); *State v. Brewer*, 932

[2] The Uniform Securities Act of 1956 is publicly available at https://www.nasaa.org/wp-content/uploads/2011/08/UniformSecuritesAct1956withcomments.pdf. A more recent, updated version of the model act, The Uniform Securities Act of 2002, is available at https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=af36852d-457e-db56-3fc2-b2485cdc47e9&forceDialog=0.

S.W.2d 1, 10 (Tenn. Crim. App. 1996); *State ex rel. Mays v. Ridenhour*, 811 P.2d 1220, 1230 (Kan. 1991); *State v. Nagel*, 279 N.W.2d 911, 915 (S.D. 1979). *See also Lippman v. Ethicon, Inc.*, 222 N.J. 362, 382 (2015) (stating, "as remedial legislation, [the New Jersey Conscientious Employee Protection Act] should be liberally construed").

Consistent with the broad, remedial scope of the NJUSL and analogous state and federal securities laws, the New Jersey Legislature included expansive and flexible provisions to define the terms "offer" and "offer to sell," and to determine when such conduct comes within the scope of Section 52. The broad scope and flexible application of the NJUSL are intentional features, carefully designed to effectuate the broad, remedial purposes of the statute. This is particularly true where, as here, the statute is being invoked by the Bureau to protect investors in its capacity as the state's securities regulator.

1. Defendants' unduly narrow view of what constitutes an "offer" is inconsistent with the text and policy of the NJUSL.

Defendants' Cross-Motion seeks to restrict the NJUSL's definition of an "offer" to sell securities to something akin to the meaning of that term in the common law of contract. Defendants' proposed reading of the law contradicts the plain text of the NJUSL, as well as decades of case law interpreting parallel provisions in other state and federal securities laws. This Court should adhere to settled law, rather than rewriting it to serve Defendants.

Under the NJUSL, an "offer" to sell a security is "every attempt or offer to dispose of, or solicitation of any offer to buy, a security or interest in a security or investment advisory services for value." N.J.S. § 49:3-49(j)(2). This definition is intentionally broader than the scope of an offer in contract law, which limits this term to communications demonstrating a "manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Fletcher-Harlee Corp. v. Pote*

Concrete Contractors, Inc., 482 F.3d 247, 250 (3d Cir. 2007) (quoting Restatement (Second) of Contracts § 24 (Am. Law. Inst. 1981)).

What constitutes an offer under the securities laws is "not limited to communications which constitute an offer in the common law contract sense, or which on their face purport to offer a security." *Matter of Carl M. Loeb, Rhoades & Co.*, 38 S.E.C. 843, 848, Exch. Act Rel. No. 5870 at 4 (Sec. & Exch. Comm'n, Feb. 9, 1959). An "offer," under the NJUSL and similar state and federal securities laws may be "any document which is designed to procure orders for a security," *Bulldog Investors General P'ship v. Secretary of the Commonwealth*, 953 N.E.2d 691, 698 (Mass. 2011) (internal quotes omitted), as well as "publicity efforts which, even though not couched in terms of an express offer, condition the public mind or arouse public interest in the particular securities," *Matter of Carl M. Loeb, Rhoades & Co.*, Exch. Act Rel. No. 5870 at 5. *See also SEC v. Thomas D. Kienlen Corp.*, 755 F. Supp. 936, 940 (D. Or. 1991) (stating, "[w]hat is dispositive . . . is whether defendants' conduct conditioned the public mind."); Brief in Opposition to Defendants' Motion for Partial Summary Judgment and in Further Support of Plaintiff's Motion for Partial Summary Judgment (the "Bureau Br. Opp.") at 13-18 (Feb. 7, 2020) (collecting cases). The U.S. Supreme Court has explained that the terms "offer" and "sale" under the federal securities laws are "expansive enough to encompass *the entire selling process*." *U.S. v. Naftalin*, 441 U.S. 768, 773 (1979) (emphasis added).

2. Whether Defendants offered the RMBS at issue in New Jersey is a fact-intensive inquiry that is not appropriate for summary judgment.

Whether the conduct alleged to have occurred in New Jersey constitutes an "offer" to sell the RMBS is a fact-intensive issue. This question cannot be answered using a "technical[] and restrictive[]" formula. *See*, *e.g.*, *Affiliated Ute Citizens*, 406 U.S. at 151. It requires a thorough inquiry into the "surrounding circumstances including the nature, source, distribution, timing,

and apparent purpose and effect" of Defendants' conduct. *Bulldog*, 953 N.E.2d at 698 (quoting *Matter of Loeb*, 38 S.E.C. at 853 and n.20) (internal quotes omitted). Such an inquiry is unsuited to summary judgment, as there are genuine questions of material fact regarding Defendants' actions. For example, were the activities of Credit Suisse's Princeton, New Jersey office (the "Princeton Office") "designed to procure orders for" Credit Suisse RMBS?[3] Also, did the activities of the Princeton Office serve to "condition the . . . mind" of potential investors[4] or "arouse interest in" Credit Suisse RMBS?[5] The parties' briefs identify substantial and fundamental disputes of fact about these issues.

Defendants contend that none of the offers or sales at issue originated from New Jersey because, *inter alia*, the Princeton Office only acquired loans for Credit Suisse's general inventory, performed wholesale mortgage origination business and warehouse lending business, assisted with due diligence or acquired mortgages. *See generally*, Defendants' Memorandum of Law in Support of Motion for Partial Summary Judgment and Opposition to Plaintiff's Motion for Partial Summary Judgment ("Defs. Mem.") at 6-15. The Bureau, in contrast, alleges facts suggesting that the Princeton Office played a far more critical role in every step of the marketing process. Among other things, the Bureau has alleged facts demonstrating that: (i) the Princeton Office participated in the preparation PitchBooks that were provided to potential investors describing important aspects of Credit Suisse RMBS; (ii) the Princeton Office was the essential source for all of the information provided in the offering and marketing materials about the characteristics of the securitized loans, a critical factor driving investor interest and evaluation of the risks associated with the securities; (iii) high-level Princeton personnel participated in several calls and presentations that appear closely related to, and possibly even a direct cause of,

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3 *See Bulldog*, 953 N.E.2d at 698.
4 *See*, *e.g.*, *Kienlen*, 755 F. Supp. at 940.
5 *See*, *e.g.*, *In re Blue Flame Energy Corp.*, 871 N.E.2d 1227, 1246 (Ohio Ct. App. 2006).

subsequent RMBS purchases; (iv) the Princeton Office was in charge of quality control and due diligence, and therefore responsible for the inclusion of toxic loans in the RMBS that constitute the subject matter of many of the alleged material misrepresentations and omissions; and (v) the Princeton Office personnel closed at least one RMBS sale. *See generally* Bureau Br. Opp. at 3-12. In short, whether "offers" originated from New Jersey requires a thorough, fact-intensive inquiry by a trier of fact, not dispositive resolution on the papers via a motion for summary judgment.

3. State securities regulators can, and often do, seek to include out-of-state investors in the relief obtained through their enforcement actions.

When this issue is put to a trier of fact, this Court should consider that state securities regulators serve unique and important roles in policing the securities markets, deterring misconduct, preventing investor harm, and redressing harms that have occurred. While serving those roles, state securities regulators like the Bureau can, and often do, seek remedies that may include restitution on behalf of out-of-state investors in addition to investors in their state. There is nothing unusual about the Bureau's intention to do so here.

It is a longstanding principle of state securities laws that the reach of these laws can exceed the physical borders of a state where this is necessary to protect the public interest. Two public interests underlie this intention for Blue Sky Laws to have expansive reach: first, states are interested in protecting their citizens from being victimized by frauds and other abusive practices originating from or directed from another state; second, states want to ensure that their territories are not used as bases of operations for wrongdoers to victimize citizens in other states. *See* Jack E. McClard, *The Applicability of Local Securities Acts to Multi-State Securities Transactions*, 20 U. Rich. L. Rev. 139, 141-42 (1985). *See also* Louis Loss, *The Conflict of*

Laws and the Blue Sky Laws, 71 Harv. L. Rev. 209 (1957). These principles have been recognized in the NJUSL as well. *See A.S. Goldmen & Co. v. New Jersey Bureau of Sec.*, 163 F.3d 780, 788 (3d Cir. 1999). These principles are embodied in Section 51 of the NJUSL, which provides that the statute applies to securities offers made from or accepted in New Jersey *including offers deemed to have occurred in New Jersey notwithstanding that neither party was then present in the state*. *See* N.J.S. § 49:3-51(c) (stating, ". . . an offer to sell or to buy is made in this State, *whether or not either party is then present in this State*, when the offer (1) originates from this State or (2) is directed by the offeror to this State and received at the place to which it is directed . . .") (emphasis added). The Defendants' contention that the Bureau cannot seek justice on behalf of out-of-state investors runs counter to these longstanding principles and is a further reflection of the inappropriateness of resolving these questions at the summary judgment stage.

B. Scienter is not an element of a violation of Sections 52(b) and 52(c) of the NJUSL.

As the primary governmental agency responsible for enforcing the NJUSL, it is critical for the Bureau to be able to bring non-scienter based civil charges for misrepresentation and other conduct that operates to obscure or withhold information from investors. If New Jersey courts were to require the Bureau to prove scienter in NJUSL Section 52(b) or 52(c) claims, the Bureau would be denied an important enforcement tool that is widely available to other federal and state securities regulators. Such a holding also would be flatly contrary to the admonition from courts to interpret securities laws broadly given their remedial purpose.[6]

[6] *See supra* Section II.A.

1. The plain text of Sections 52(b) and 52(c) does not support a scienter requirement.

Sections 52(b) and 52(c) proscribe certain conduct in connection with the offer, sale, or purchase of any security. Specifically, under Sections 52(b) and 52(c):

> It shall be unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly . . . (b) [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; [or] (c) [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

N.J.S. § 49:3-52.

Neither of these provisions include an express scienter requirement, nor does the text imply any intent by the New Jersey Legislature to require proof of scienter. In 1980, the U.S. Supreme Court addressed this issue when it interpreted the substantially identical language in Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q.[7] *Aaron v. SEC*, 446 U.S. 680 (1980). The Supreme Court held the language of Section 17(a)(2), an analogue to NJUSL Section 52(b), "is devoid of any suggestion whatsoever of a scienter requirement." *Id.* at 696. The Supreme Court further held that the language of Section 17(a)(3), an analogue to NJUSL Section 52(c), does not require proof of scienter because it "quite plainly focuses upon the *effect* of particular conduct on members of the investing public, rather than upon the culpability of the person responsible." *Id.* at 697 (emphasis in original). The same logic applied by the Supreme Court in *Aaron* should govern this Court's analysis.

Moreover, the New Jersey Legislature could have imposed a scienter requirement on the Bureau if it had wanted to do so. The NJUSL's private right of action for fraud, N.J.S. § 49:3-71

[7] The language of Sections 17(a)(2) and 17(a)(3) is essentially identical to NJUSL Sections 52(b) and 52(c): Section 17(a)(2) prohibits "[o]btain[ing] money or property by means of" untrue statements of material facts or the omission of material facts, 15 U.S.C. § 77q(a)(2), while Section 17(a)(3) prohibits engaging in any "transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser," 15 U.S.C. § 77q(a)(3).

("Action for deceit; liability"), demonstrates that the Legislature knew how to incorporate such a requirement into a Section 52(b) and 52(c) claim. And when the Legislature includes a requirement in one section of a statute but excludes it from another section, courts should assume that the omission was intentional and should "not strain" to read the requirement into the text. *In re Freshwater Wetlands Protection Act Rules*, 180 N.J. 478, 492 (2004).

Since the plain, unambiguous text of Sections 52(b) and 52(c) does not include an express or implied scienter requirement, this Court should not read such a requirement into the statute. Doing so would render the NJUSL inconsistent with parallel state and federal statutory provisions, as well as the fundamental legislative policy of the NJUSL and the Uniform Securities Acts. As is explained below, such a ruling would also be out-of-line with federal and state precedents which uniformly hold that provisions identical to Sections 52(b) and 52(c) do not require scienter.

2. Imposing an extratextual scienter requirement would be inconsistent with parallel statutory provisions in other jurisdictions and the fundamental policy of the NJUSL.

One of the admonitions in the NJUSL is that it be construed consistently with other federal and state securities laws to the extent possible. *See* N.J.S. § 49:3-75. Just as Sections 52(b) and 52(c) of the NJUSL are analogous to Sections 17(a)(2) and 17(a)(3) of the federal Securities Act of 1933, as discussed above, these provisions are *identical* to Sections 101(2) and 101(3) of the Uniform Securities Act of 1956 (and also, incidentally, to Sections 501(2) and 501(3) of the Uniform Securities Act of 2002). Courts interpreting the Uniform Securities Acts as enacted in other states consistently find that the antifraud provisions in those acts do not require scienter, particularly where the government is acting as plaintiff. Inferring a scienter

requirement into Sections 52(b) and 52(c) of the NJUSL would render the NJUSL inconsistent other state securities laws.

State courts addressing this issue have overwhelmingly followed the U.S. Supreme Court's analysis in *Aaron* and have found that scienter is not required for analogous provisions in the securities laws of their respective states. *See Harrington v. Sec'y of State*, 129 So. 3d 153, 170 (Miss. 2013) (analogizing the state's securities statute to the "nearly identical" language of the Securities Act of 1933 and holding that scienter is not required under provisions identical to Sections 52(b) and (c)); *Trivectra v. Ushijima*, 144 P.3d 1, 14 (Haw. 2006) (same); *Tanner v. State*, 574 S.E.2d 525, 530 (Va. 2003) (same); *Sec'y of State Secs. Div. v. Tretiak*, 22 P.3d 1134, 1140-42 (Nev. 2001) (same); *State v. Shama Resources LP*, 899 P.2d 977, 982 (Idaho 1995) (same); *State v. Larsen*, 865 P.2d 1355, 1359 (Utah 1993) (same); *Foster v. Alex*, 572 N.E.2d 1242, 1244-45 (Ill. Ct. App. 1991) (same); *State v. Temby*, 322 N.W.2d 522, 528-29 (Wisc. 1982) (same); *Sprangers v. Interactive Techs., Inc.*, 394 N.W.2d 498, 503 (Minn. 1986) (same, and stating that Minnesota's securities parallel provision is a "derivative" of Section 17(a)(2) of the Securities Act of 1933); *State v. Gunnison*, 618 P.2d 604, 606 (Ariz. 1980) (same, and referring to the Securities Act of 1933 as the "federal counterpart" to the Arizona Securities Act); *Kittlison v. Ford*, 608 P.2d 264, 265-66 (Wash. 1980) (same).

This Court should follow the consensus among federal and state courts, including courts in New Jersey,[8] and hold that neither Section 52(b) nor Section 52(c) requires proof of scienter.

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[8] *See* Memorandum of Law in Support of Plaintiff's Motion for Partial Summary Judgment Dismissing with Prejudice Defendants' Scienter, Due Diligence, and Loss Causation Defenses, 16-17 (Aug. 21, 2019) (New Jersey cases cited).

3. Section 52 of the NJUSL should be interpreted in accordance with Section 17(a) of the Securities Act of 1933, not Rule 10b-5 under the Securities Exchange Act of 1934.

Defendants erroneously contend that this Court should interpret Section 52 in light of cases construing Rule 10b-5[9] promulgated by the U.S. Securities and Exchange Commission (the "SEC") under the Securities Exchange Act of 1934, instead of Section 17(a) of the Securities Act of 1933. Defs. Mem. at 35 (Nov. 18, 2019). Defendants base their argument on textual similarities between Section 52 and SEC Rule 10b-5. SEC Rule 10b-5 is not an appropriate analogue to Section 52 – and the cases cited by Defendants interpreting Section 52 in this manner were erroneously decided – because the scienter requirement inferred in SEC Rule 10b-5 arises not from its text but from specific language in the Rule's authorizing statute, Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b).

Despite using identical language, Section 52 and SEC Rule 10b-5 cannot be interpreted alike. While Sections 52(b) and 52(c) are independent statutes, Rule 10b-5 is an SEC rule and therefore reflects the requirements of its authorizing statute. Section 10(b) has been held to presuppose scienter, which necessarily defines the potential scope of any rule the SEC issues pursuant to Section 10(b).

Section 10(b) makes it unlawful to "use or employ . . . any *manipulative or deceptive device or contrivance*" in connection with the sale of a security. 15 U.S.C. § 78j(b) (emphasis added). The U.S. Supreme Court has interpreted this statute as presupposing an intention by the U.S. Congress to require scienter. Specifically, in *Ernst & Ernst v. Hochfelder*, the Supreme Court evaluated this issue and explained: "'manipulative or deceptive' used in conjunction with 'device or contrivance' strongly suggest that § 10(b) was intended to proscribe knowing or

[9] 17 CFR § 240.10b-5.

intentional misconduct." 425 U.S. 185, 197 (1976).[10] The Supreme Court also was moved by the fact that the SEC, when it first promulgated the rule, had expressed its intention to only apply the rule to scienter-based frauds. *See id.* at 213 (stating the SEC's argument that Rule 10b-5 should not be interpreted to require scienter "cannot be harmonized with the administrative history of the Rule, a history making clear that when the Commission adopted the Rule it was intended to apply only to activities that involved scienter"). For the SEC to seek to apply the rule *ex post* to non-scienter based frauds was administratively troubling to the Court, and it accordingly concluded that "despite the broad view of the Rule advanced by the Commission . . ., its scope cannot exceed the power granted the Commission by Congress under § 10 (b)." *Id.* *Accord Aaron*, 446 U.S. at 689-94 ("[T]he rationale of *Hochfelder* ineluctably leads to the conclusion that scienter is an element of a violation of § 10(b) and Rule 10b-5, regardless of the identity of the plaintiff or the nature of the relief sought."). The proper federal statutory analogue to Section 52 thus is Section 17(a) of the Securities Act, not Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5 promulgated thereunder. SEC Rule 10b-5 requires scienter because Section 10(b) requires scienter. The language in Section 10(b) has no analogue in Sections 52(b) or 52(c).

State courts that have addressed whether parallel provisions in their own statutes should be analogized to Section 17(a) of the Securities Act of 1933 or SEC Rule 10b-5 have consistently held that Section 17(a) is the appropriate analogue. This Court should follow the overwhelming consensus among other state courts[11] and conclude likewise.

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[10] The Supreme Court also explained that, "[v]iewed in isolation, the language of subsection (b), and arguably that of subsection (c), could be read as proscribing [the enumerated conduct] whether the wrongdoing was intentional or not." *Hochfelder*, 425 U.S. at 212.

[11] *See supra* Section II.B.2. (cases cited); *Marram v. Kobrick Offshore Fund, Ltd.*, 809 N.E.2d 1017, 1024-25 (Mass. 2004); *State v. Kershner*, 801 P.2d 68, 69 (Kan. Ct. App. 1990).

4. Section 49(e) does not compel the court to impose an extratextual scienter requirement on either Section 52(b) or 52(c).

Defendants argue that, even if scienter is not required under the plain text of Sections 52(b) and 52(c), this Court should nonetheless require the Bureau to prove scienter under these provisions because of definitional language in Section 49(e) of the NJUSL. Section 49(e) expands the definition of the terms "fraud," "deceit," and "defraud." Specifically, Section 49(e) provides that these terms as used in the NJUSL are "not limited to common-law fraud or deceit," and that certain misrepresentations and omissions of material facts *can* constitute "fraud" or "deceit," as long as they are made with scienter. N.J.S. § 49:3-49(e)(1). Thus, Section 49(e) applies where the NJUSL requires the court to determine whether particular conduct constitutes "fraud," "deceit," or actions to "defraud". Neither Section 52(b) nor 52(c) require such a showing, and this Court should not read the definitional provision to limit or restrict Sections 52(b) or 52(c) to circumstances involving scienter.

i. Section 49(e) does not impose a scienter requirement for Section 52(b).

Section 49(e) does not graft a scienter requirement onto Section 52(b) because Section 52(b) does not use the terms "fraud," "deceit," or "defraud." Therefore, an alleged violation of Section 52(b) is not an allegation that the alleged misrepresentations or omissions constitute "fraud," "deceit," or actions to "defraud." Defendants turn the logic and text of Section 49(e) on its head and urge this Court to read the definitional provision to say that, since the fraud definition "includes" intentional misrepresentations and omissions, all misrepresentations necessarily require proof of intent. This reading is inconsistent with the statutory text.

Defendants' reading of Section 49(e) is also inconsistent with common law. Common law historically recognized separate causes of action based on intentional misrepresentation or omission, often referred to as "fraud" or "deceit," and negligent, or even innocent,

misrepresentation. *See* W. Page Keeton et al., Prosser and Keeton on the Law of Torts, §§ 105, 107 (5th ed. 1984) (recognizing causes of action for both intentional and negligent misrepresentation or omission); Restatement (Second) of Torts, §§ 525 (Liability for Fraudulent Misrepresentation) and 552 (Information Negligently Supplied for the Guidance of Others); Restatement (Second) of Contracts, Ch. 7, Introductory Note (1981) ("Topic 1 of this Chapter deals with situations in which a party has been induced to make a contract by a misrepresentation, that is, an assertion, either fraudulent or non-fraudulent, that is not in accord with existing facts.").

Section 49(e) indicates that the New Jersey Legislature was aware of the range of actions for misrepresentation or omission traditionally recognized in courts of law and equity – both those that require proof of intent and those that do not – and sought to capture all of this conduct within the definition of "fraud" or "deceit." It is implausible that the New Jersey Legislature intended, in defining these specific terms, to limit other terms used in the statute, particularly where Section 52(b) reflects a range of actions traditionally available and Section 49(e) expressly communicates the New Jersey Legislature's desire to expand the statute's definitional scope. *See* N.J.S. § 49:3-49(e) (stating that these terms "are not limited to common-law fraud or deceit," and that the definition is "in addition to the usual construction" of these terms). It is equally implausible that the New Jersey Legislature intended to restrict the application of Section 52 in ways that other jurisdictions do not restrict their own parallel statutory provisions. In fact, the plain text of the NJUSL demonstrates otherwise. *See* N.J.S. § 49:3-75 (stating that the NJUSL "shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact similar laws and to co-ordinate the interpretation and administration of this act with related federal regulations").

Accordingly, the plain text of both Sections 52(b) and 49(e) demonstrate that Section 49(e) does not limit or restrict the application of Section 52(b) by imposing a scienter requirement.

ii. Section 49(e) does not impose a scienter requirement for Section 52(c).

Likewise, Section 49(e) does not impose a scienter requirement onto Section 52(c), despite the latter's use of the terms "fraud" and "deceit." Section 52(c) does not impose liability for committing a "fraud" or "deceit," but instead imposes liability for "any act, practice, or course of business which *operates or would operate as* a fraud or deceit upon any person." N.J.S. § 49:3-52(c) (emphasis added).

The U.S. Supreme Court explained that identical language in Section 17(a) and Rule 10b-5 "quite plainly focuses upon the *effect* of particular conduct on members of the investing public, rather than upon the culpability of the person responsible," *Aaron*, 446 U.S. at 697. *See also Hochfelder*, 425 U.S. at 212 (explaining that, viewed in the absence of Section 10(b), the text of Rule 10b-5(b) and (c) does not compel a scienter requirement). The culpability of the person responsible for misrepresenting or omitting material information makes no difference to the investor who purchases or considers purchasing a security based in part on that information. Thus, it is unnecessary under Section 52(c) to show that any particular act, practice, or course of business actually constituted a "fraud" or "deceit." If Section 52(c) required such a showing, there would be no apparent need for Section 52(c), as it would effectively prohibit conduct that is already covered under Section 52(a), which makes it unlawful "to employ any device, scheme, or artifice to defraud." N.J.S. § 49:3-52(a). This would render Section 52(c) as mere surplusage, which is contrary to fundamental principles of statutory construction. *See*, *e.g.*, *In re Attorney General*, 200 N.J. 283, 297-98 (2009) ("We must presume that every word in a statute has

meaning and is not mere surplusage, and therefore we must give those words effect and not render them a nullity.”).

Since Section 52(c) does not require proof that any particular act, practice, or course of business constitutes “fraud” or “deceit,” Section 49(e) cannot be read to impose a scienter requirement to establish a violation of Section 52(c).[12]

C. Sections 52(b) and 52(c) of the NJUSL do not require proof of loss causation.

Under the NJUSL, as is the case with parallel state and federal statutory provisions, investor loss causation is neither a prerequisite nor a recognized affirmative defense in the Bureau’s enforcement actions. Despite Defendants’ urging, the court should decline to read the NJUSL in a way that would potentially allow wrongdoers to escape liability under Sections 52(b) and 52(c) simply because their misconduct has not yet caused demonstrable investor financial losses. Doing so would be incompatible with the plain text of Sections 52(b) and 52(c), which contain no such limitation of liability, and would undermine the Bureau’s ability to deter misconduct and prevent investor harm.

1. The plain text of Sections 52(b), 52(c), and 49(e) does not support a requirement to prove causation of investor losses and reading such a requirement into the NJUSL would be inconsistent with parallel state and federal enforcement provisions.

Neither Section 52(b) nor Section 52(c) include an express requirement to show that the alleged misconduct caused investor financial losses, nor does the text imply any intent by the New Jersey Legislature to impose such a requirement or defense.

Other state and federal courts that have addressed this issue have refused to read loss causation into substantially identical civil enforcement provisions of other state securities laws,

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[12] Notably, Defendants have failed to cite a single case holding that Section 49(e) grafts a scienter requirement onto Sections 52(b) and (c).

either as a necessary element of a claim or as an affirmative defense. *See*, *e.g.*, *Hirsch v. Arizona Corp. Comm'n*, 352 P.3d 925, 931-32 (Ariz. Ct. App. 2015) (concluding that the Arizona Corporation Commission need not prove loss causation); *Mass. Mut. Life Ins. Co. v. Residential Funding Co., LLC*, 55 F. Supp. 3d 235, 245 (D. Mass. 2014) (holding that loss causation is not an affirmative defense under the Massachusetts Uniform Securities Act); *FHFA v. HSBC N. Am. Holdings Inc*., 988 F. Supp. 2d 363, 367-68 (S.D.N.Y. 2013) (same, under the Virginia and District of Columbia securities laws); *Nat'l Credit Union Admin. Bd. v. Morgan Stanley & Co.*, No. 13-6705, 2014 BL 117755, *3-6, 2014 WL 1673351, 2014 U.S. Dist. LEXIS 58751 (S.D.N.Y. Apr. 28, 2014) (same, under the Texas and Illinois securities laws).

Federal courts that have addressed this issue under the federal securities laws have consistently held that, unlike private plaintiffs, the SEC is not required to prove loss causation under either Section 17(a) of the Securities Act of 1933 or Rule 10b-5 under Section 10(b) of the Securities Exchange Act of 1934. *See*, *e.g.*, *SEC v. Pirate Inv'r LLC*, 580 F.3d 233, 239 n.10 (4th Cir. 2009); *SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir. 1985) (holding that "unlike private litigants," the SEC "is not required to prove that . . . the misrepresentations caused any investor to lose money"); *Berko v. SEC*, 316 F.2d 137, 143 (2d Cir. 1963) (holding that the SEC need not prove loss causation because the "[SEC's] duty is to enforce the remedial and preventive terms of the statute in the public interest, and not merely to police those whose plain violations have already caused loss or injury"); *SEC v. Ahmed*, 308 F. Supp. 3d 628, 657 n.22 (D. Conn. 2018); *SEC v. Lek Securities Corp.*, 276 F. Supp. 3d 49, 59 (S.D.N.Y. 2017).

Seemingly aware that the overwhelming legal consensus is contradictory to their position on loss causation, Defendants fall back on the definition of "fraud," "deceit," and "defraud" in Section 49(e) to justify their request that this Court read loss causation into Sections 52(b) and

52(c). This argument fails with respect to loss causation for the same reasons it fails with respect to scienter: neither Section 52(b) nor Section 52(c) require proof that the alleged misconduct amounts to "fraud," "deceit," or actions to "defraud," and so Section 49(e) does not control.

The plain text of Sections 52(b) and 52(c) does not support a loss causation requirement or affirmative defense. The overwhelming consensus among state and federal courts that have considered the issue in connection with identical language in parallel statutes rejects a loss causation requirement or affirmative defense. The New Jersey-specific definitional provision in Section 49(e) does not compel a different result. Therefore, this Court should not read such terms into the statute where doing so would render the NJUSL inconsistent with parallel provisions in other state and federal securities laws.

2. Imposing an extratextual loss causation requirement would undermine the ability of the Bureau to police the securities markets, deter misconduct, and prevent investor harm.

Rather than limiting the remedial and preventive impact of Sections 52(b) and 52(c) by requiring the Bureau to prove loss causation, this Court should construe the NJUSL "flexibly to effectuate its remedial purposes." *See Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972); *Frishman v. Maginn*, 912 N.E.2d 468, 477 (Mass. App. Ct. 2009) (explaining that "[t]he [Massachusetts Uniform Securities] Act must be construed not technically and restrictively, but flexibly to effectuate [its] remedial purpose[]").

State and federal securities regulators serve unique and critical roles in policing the securities markets, deterring misconduct, and preventing investor harm. The role of the regulators like the Bureau is both different and much broader than the interest of individual private litigants. The NJUSL reflects that distinction by granting the Bureau a panoply of tools to protect investors. While "meritorious private actions to enforce [the] antifraud securities laws

are an essential supplement to criminal prosecutions and civil enforcement actions," *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007), they are indeed a supplement. Rather than simply "polic[ing] those whose plain violations have already caused demonstrable loss or injury," the Bureau must be able to "enforce the remedial and preventive terms of the statute in the public interest" to deter misconduct and prevent investor harm, not solely to redress harm that has already been done. *Berko*, 316 F.2d at 143.

The Bureau's ability to protect investors through enforcement actions would be significantly curtailed if the Bureau were forced to wait for investor losses before enforcing the critical investor protection provisions in Section 52. As with scienter, restricting the Bureau's ability to bring actions under Sections 52(b) and 52(c) in this way would potentially make New Jersey far more attractive to those who are inclined to break the law. Such an approach would also be incompatible with the array of remedies available to the Bureau which do not presuppose or contemplate the existence of financial losses, such as stop orders, cease and desist orders, civil injunctive relief, appointment of a receiver, rescission, disgorgement, and civil monetary penalties. *See* N.J.S. §§ 49:3-63, 49:3-69, 49:3-70.1.

Accordingly, investor loss causation is not an element of an action by the Bureau to enforce Sections 52(b) and 52(c), and this Court should not read loss causation into the NJUSL in a manner which would allow wrongdoers to escape liability simply because they had not yet caused demonstrable investor financial losses. This result is compelled by the plain text of Section 52, as well as the overwhelming consensus among courts that have considered the issue in light of identical language in parallel state and federal statutes. Reaching a different result would also significantly blunt an important investor protection tool granted to the Bureau by the NJUSL. This result would be incompatible with the plain text of Sections 52(b) and 52(c),

which contain no such limitation of liability, and would undermine the Bureau's ability to deter misconduct and prevent investor harm.

IV. Conclusion

This Court should decline Defendants' invitation to misread the NJUSL. Defendants get the law wrong on each of the issues addressed above. The scope what constitutes an "offer" of securities under the NJUSL is far broader than Defendants' narrow contract-law interpretation, and there are substantial disputes of material fact as to whether Defendants offered securities in New Jersey under the NJUSL. Furthermore, neither scienter nor causation of investor financial loss are elements that the Bureau has to prove to demonstrate that Defendants violated Sections 52(b) or (c) of the NJUSL. This Court should decline to read the limitations urged by Defendants into the NJUSL, as doing so would be inconsistent with parallel state and federal securities laws and severely blunt the Bureau's ability to protect investors.

Dated: March 31, 2020

North American Securities Administrators Association, Inc.

By: ________________________________

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