IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

NEW MEXICO STATE INVESTMENT COUNCIL

Plaintiff-Appellee

and FRANK FOY, SUZANNE FOY and JOHN CASEY,

Intervenors-Appellants,

v.

GARY BLAND, et al.,

Defendants,

and, DANIEL WEINSTEIN, VICKY L. SCHIFF, WILLIAM HOWELL and MARVIN ROSEN,

Defendants-Appellees.

Santa Fe County
Sarah M. Singleton, District Judge
Case No. D-101-CV-2011-01534
Ct. App. No. 33,787

THE NEW MEXICO STATE INVESTMENT COUNCIL'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellants seek to enlist this Court in their misguided effort to divest the State of its authority to prosecute its own legal claims brought by the New Mexico State Investment Council ("NMSIC") in this lawsuit.[1] They challenge the District Court's March 30, 2014 Order ("Dismissal Order") **[RP 5861-5862]** granting the State's dismissal of four defendants ("Settling Defendants")[2] from this action targeting pay-to-play corruption of the NMSIC's investment process. In return for this dismissal, the State exacted from the Settling Defendants both payments and full cooperation in pursuit of other, more substantial participants in the scandal. **[RP 5654-5655, FOF 50, 51, 55-6]** Cooperation serves as an "integral element" of the State's "overall enforcement plan" with respect to pay-to-play. **[RP 5674, COL 26]**

The District Court issued the Dismissal Order based on its conclusion—central to this appeal—that the settlements between the Settling Defendants and NMSIC were "fair, adequate and reasonable under all the circumstances." **[RP**

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[1] For purposes of this case, the New Mexico Attorney General's Office ("NMAGO") commissioned the NMSIC's counsel as Special Assistant Attorneys General working under the authorization of the NMAGO. Accordingly, the rights and powers conferred upon the NMAGO are shared, in this case, with the NMSIC. The State of New Mexico, the NMAGO, and the NMSIC are therefore interchangeably referred to as the "State."

[2] The Settling Defendants are Daniel Weinstein ("Weinstein"), Vicky L. Schiff ("Schiff"), William Howell ("Howell") and Marvin Rosen ("Rosen"). **[RP 5635]**

5635] The Court provided remarkably thorough substantiation for its Dismissal Order, basing it upon (and incorporating) 50 pages of Findings of Fact and Conclusions of Law Related to the *Qui Tam* Intervenors' Objections to Settlements ("Findings and Conclusions").[3] **[RP 5635-5684]** The District Court's Findings and Conclusions were, in turn, based upon multiple rounds of briefing and motion hearings as well as evidence and argument presented over the course of a two-day evidentiary hearing held on November 25 and 26, 2013.

In the face of this exhaustive review, Appellants (Intervenors below) contest the adequacy of the settlements—inherently a fact-intensive endeavor—without challenging a single factual finding by the District Court. Instead, Appellants contend that the District Court committed various legal errors in approving the settlements. They decry the settlement approval process as failing to meet standards the case law shows to be fictitious. They claim to have had their right to discovery violated, although they did obtain discovery and have no such right. They contend the District Court exceeded its jurisdiction, when it took pains to avoid doing so.

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[3] In addition to citations to the record proper, when citing the Findings and Conclusions in this brief counsel will also refer to the numbers of the Findings of Fact ("FOF") or the Conclusions of Law ("COL") sections of the Findings and Conclusions because they are more specific, and presumably more useful, than just page numbers.

Appellants' baseless arguments not only cut against law and fact; they urge, in overall effect, an unconstitutional encroachment on the State's authority over the prosecution of its own legal claims. This Court should soundly reject Appellants' arguments and affirm the well-supported decision of the District Court.

SUMMARY OF PROCEEDINGS

The District Court's Findings and Conclusions set forth a comprehensive account of the procedural history and factual bases for the March 30, 2014 Dismissal Order that Appellants (not Defendants, but third-party Intervenors) challenge here. The following summary reflects the District Court's factual and procedural findings that bear most directly on the issues addressed in this Answer Brief.

1. The Underlying Misconduct: Pay-to-Play Corrupts Investments at NMSIC.

This case involves a pay-to-play scheme at the NMSIC during former Governor Bill Richardson's ("Richardson") tenure as Chair of the NMSIC.[4] **[RP 5639, FOF 11]** Anthony Correra, a friend of and advisor to Richardson, was at the

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[4] The District Court limited the effect of its Findings and Conclusions to the parties directly involved in the settlement proceedings, stating:

> The Court limits the effect of these findings and conclusions to the parties interested in the Settlement proceedings and to the fairness of the proposed settlements with the Settling Defendants.

[RP 5636, Findings and Conclusions at 2]

heart of the play-to-play scheme, serving as *de facto* gatekeeper for so-called "alternative investments" made by the NMSIC in private equity funds, hedge funds, real estate and collateralized debt obligations ("CDOs"). **[RP 5639, FOF 11-12]**

Anthony Correra improperly influenced the NMSIC's investment decisions. Specifically, he pressured one of NMSIC's outside investment advisors, Aldus Equity Partners ("Aldus"), to recommend that NMSIC invest in certain funds based not upon what was in the best interests of the NMSIC, but upon political or financial support by those funds, including, among other payments, political contributions and/or payments made to Anthony Correra's son, Marc Correra.[5] **[RP 5638-5640, FOF 9, 11-14]**

Gary Bland, the State Investment Officer from 2003 to 2009, played an integral role in the execution of the pay-to-play scheme. **[RP 5637, 5639, 5648, FOF 6, 11, 40]** In so doing, NMSIC alleges that Bland breached his fiduciary duties to the NMSIC. **[RP 2870-2871]**

Aldus, a paid advisor to the NMSIC on investments in private equity funds during this time, played a central part in the pay-to-play scheme. **[RP 5637-5638,**

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[5] Note that Marc and Anthony Correra, Aldus, and Gary Bland are not Settling Defendants for purposes the District Court's Findings and Conclusions. Accordingly, the District Court's descriptions of these defendants' actions are not binding on them. *See* footnote 4 above.

FOF 7] Saul Meyer, a partner in Aldus who pleaded guilty to criminal charges for pay-to-play in New York, admitted to engaging in an improper pay-to-play scheme involving the NMSIC. **[RP 5638, FOF 8]** Meyer specifically admitted that his conduct in New Mexico violated his duties as a fiduciary to NMSIC. **[RP 5638, FOF 8]** Meyer admitted under oath that he recommended "certain proposed investments pushed on [him] by politically-connected individuals in New Mexico...knowing that these politically-connected individuals or their associates stood to benefit financially or politically from the investments and that the investments were not necessarily in the best economic interests of New Mexico." **[RP 5638-5639, FOF 9]**

Settling Defendants in this case are each alleged to have participated in the pay-to-play scheme by making or arranging improper payments to Marc Correra. By doing so, the Settling Defendants, while not major participants, are alleged to have aided and abetted Meyer's and Bland's breaches of their fiduciary duties to the NMSIC. **[RP 5648, FOF 40]** Settling Defendant Marvin Rosen, through Diamond Edge Capital Partners, LLC, acted as a placement agent for certain private equity funds and hedge funds in which the NMSIC made investments. **[RP 5636-5637, FOF 3]** Settling Defendant William Howell acted as a consultant to InterMedia Advisors, LLC, a firm that managed a private equity fund in which NMSIC invested. **[RP 5637, FOF 4]** Settling Defendants Daniel Weinstein and

Vicky L. Schiff worked through (now-defunct) Wetherly Capital Group, LLC, as placement agents for private equity firms in which NMSIC invested. **[RP 5637, FOF 5]**

2. Intervenors' Qui Tam Cases.

Appellants' intervention in this case stems from their two *qui tam* cases under the New Mexico Fraud Against Taxpayers Act ("FATA"), broadly alleging fraud and investment-related misconduct at the NMSIC and the New Mexico Educational Retirement Board ("NMERB"). **[RP 5640-5641, FOF 16-17]**

The first such case, *State of New Mexico ex rel. Frank C. Foy v. Vanderbilt Capital Advisors, LLC*, No. D-101-CV-2008-1895 ("*Vanderbilt*") claims that Vanderbilt Capital Advisors LLC made false statements to the NMERB and NMSIC regarding investments each fund made in Collateralized Debt Obligations ("CDOs"), but the complaint also asserts general allegations regarding pay-to-play. **[RP 5640, FOF 16].** Of the 49 defendants named in the *Vanderbilt* complaint, most of whom have never been served, only three are defendants here, Bland, Anthony Correra and Marc Correra. **[RP 5640, FOF 16]** None of the Settling Defendants in the instant case were named in *Vanderbilt*.

The second *qui tam* case, *State of New Mexico ex rel. Frank C. Foy v. Austin Capital Management Ltd.*, No. D-101-CV-2009-1189 ("*Austin*"), named 74 defendants, (again, most of whom have never been served) including the Settling

Defendants whose settlements are at issue in this appeal. **[RP 5640-5641, FOF 17]** *Austin* focuses primarily on alleged fraud in connection with hedge funds linked to investments involving Bernard Madoff, but also generally alleges pay-to-play at both NMERB and NMSIC. **[RP 5640-5641, FOF 17]**

As to the four Settling Defendants here, the status of the *Austin* case is uncertain. **[RP 5645, FOF 28]** Foy never served process on two of the Settling Defendants, Weinstein and Schiff. **[RP 5640-5641, FOF 17]** Settling Defendant Rosen moved to dismiss the *Austin* complaint for failure to state a claim and failure to plead fraud with particularity, a motion still pending in *Austin*. **[RP 5641, FOF 18]** Settling Defendant Howell moved to dismiss *Austin* for failure to state a claim as well as for lack of personal jurisdiction; those motions also remain pending in *Austin*.

In its Findings and Conclusions, the District Court found that Intervenors "have still not articulated a viable FATA claim against any of the four Settling Defendants, much less with the particularity FATA requires." **[RP 5669, COL 15]**

Foy, who formerly worked at NMERB, has denied under oath that he has any personal knowledge of any pay-to-play at NMSIC (or NMERB, for that matter). **[RP 5641-5642, FOF 19-20]**

On April 28, 2010, Judge Pfeffer entered an order of dismissal in *Vanderbilt,* ruling that application of FATA to conduct predating FATA's enactment violated

the *Ex Post Facto* Clauses in the state and federal Constitutions. On July 8, 2011, Judge Pope entered an order of dismissal in *Austin* similar to that entered in *Vanderbilt*. The Court of Appeals granted interlocutory review of the dismissal in *Austin* and affirmed, a decision that is currently sub judice on certiorari before the Supreme Court. **[RP 5643, FOF 22]** The interlocutory appeal triggered a stay of the *Austin* case. A decision from the Supreme Court either way will not negatively affect the State's enforcement plan.

3. The State's Enforcement Program.

In 2010, the NMSIC and the NMAGO began implementation of the State's own enforcement plan to obtain recoveries from corruption of the NMSIC's investment process. **[BIC 8]**, **[RP 5643-5644, FOF 23]** As the District Court found, the plan, among its other features: (i) reflects the determination that pay-to-play claims would be more effectively advanced under the New Mexico Securities Act and the common law than under FATA, even if FATA could be retroactively applied **[RP 5643-5644, FOF 23 (citing [RP 5330-5334, Frank Aff. ¶ 10])]**; and (ii) initially targets individuals such as Settling Defendants with the aim of building evidence against larger targets, particularly investment entities and investment fund managers to be subsequently pursued. **[RP FOF 23 (citing [RP 5330-5334, Frank Aff. ¶ 11])]**

As part of its enforcement plan, the NMSIC conducted a thorough pay-to-play investigation, including review of nearly 3,000,000 pages of documents (including investigative files from the Securities and Exchange Commission), review of substantial additional electronic files and nearly two dozen interviews **[RP 5647, FOF 35]**

On May 6, 2011, to avoid claim-splitting bars to litigation, and to streamline its enforcement program, the State moved to dismiss those portions of the *Austin* and *Vanderbilt qui tam* suits that related to pay-to-play at the NMSIC. **[RP 5644, FOF 24-25]** The State's motions did not seek dismissal of claims asserted on behalf of the NMERB, nor claims of direct fraud on NMSIC, such as the claims regarding nondisclosure of risks associated with the CDOs sold by Vanderbilt Capital Advisors, LLC. **[RP 5644, FOF 25]** The *Austin* and *Vanderbilt Qui Tam* Plaintiffs (intervening Appellants here) opposed the State's motions. **[RP 5644, FOF 25]**

On December 20, 2011, the district court in *Vanderbilt* entered an Order Granting Partial Dismissal. Judge Pfeffer expressly found and determined, among other things, that "The State of New Mexico through the Attorney General is entitled to deference on this matter pursuant to concepts of separation of powers." **[RP 5644, FOF 26]**

While Judge Pope thereafter held a hearing on the motion for partial dismissal in *Austin*, he had not rendered a decision when the Court of Appeals granted Foy's application for an interlocutory appeal of Judge Pope's earlier decision that retroactive application of FATA was unconstitutional. That appeal stayed all proceedings in the district court. **[RP 5645, FOF 27]**

Seeking relief from the stay, the State filed a motion on September 19, 2011, pursuant to Rule 12-203(E) NMRA, for a limited and partial remand that would allow the district court to decide the pending motion for partial dismissal. The Court of Appeals granted that motion over Foy's objection. *Austin*, No. 31,421, slip op. (Ct. App. Oct. 10, 2011). No decision has yet been made by the district court on the motion for partial dismissal in *Austin*. **[RP 5645, FOF 27-28]**

In 2011, NMSIC commenced this action, ultimately naming 18 defendants, many, but not all of whom, had also been named in *Vanderbilt* and *Austin*. This action asserts claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, breach of contract and unjust enrichment in connection with pay-to-play corruption of NMSIC's investment process for alternate investments. **[RP 2829-2875]**

4. The Appellants' Role in the Instant Case.

The District Court deemed this action to be an "alternate remedy" to the *Austin* case under Section 44-9-6(H) of FATA **[RP 5665-5666, COL 7]** and held

that Appellants, as *qui tam* plaintiffs, have the "same rights" with respect to this action that they would have had in *Austin* "but no greater rights." **[RP 5665, COL 7]**

Accordingly, pursuant to the rights that Section 44-9-6(H) of FATA provides to a *qui tam* plaintiff with respect to an alternate remedy proceeding initiated by the State, the District Court entered its Order granting Appellants' Motion to intervene in this case on January 18, 2012. **[RP 1470-1471]** Appellants seek a monetary "reward" under FATA.

On April 3, 2012, as Intervenors in this action, Appellants filed a Motion to Disqualify the Attorney General based on the same alleged conflicts asserted in Intervenor's Brief in Chief. **[RP 2196-2308]**; **[BIC 49-50]**. The District Court denied the Motion on October 16, 2012. **[RP 3931-3932]**

On June 17, 2012, Intervenors filed an Expedited Motion to Order SIC Attorneys to Confer in Good Faith with Qui Tam Plaintiffs about Discovery and Other Matters. **[RP 2700-2703]** The District Court denied that motion on October 20, 2012. **[RP 3940-3941]**

On July 23, 2012, Intervenors filed a Motion to Prohibit Secret Settlements. **[RP 2906-2919]** The District Court denied that motion on January 15, 2013. **[RP 4005]**

To facilitate settlements, NMSIC proposed and the Court adopted, over Intervenors' repeated objections, an "early settlement" phase during which only discovery essential to settlement discussions would be permitted. Pursuant to this process, Intervenors were permitted to obtain discovery. **[RP 5645, FOF 29]**

Intervenors also requested and obtained specific discovery on what they said was needed in order to evaluate the settlements with the Settling Defendants: the gains and/or losses on each of the 13 NMSIC investments with which the Settling Defendants were involved. **[RP 5659-5660, FOF 65-66]**

5. The Agreements with Settling Defendants.

In April of 2013, NMSIC entered into settlement agreements with the four Settling Defendants. **[RP 5656, FOF 58]**

The settlements were approved by the NMSIC in conformity with its then in effect Recovery Litigation Settlement Policy ("Settlement Policy"), which had been voted on and adopted at an open meeting on June 26, 2012. **[RP 5647, FOF 36]**. The Settlement Policy permitted a Litigation Committee to approve settlements and required all settlements to be subject to the Inspection of Public Records Act. **[RP 5647, FOF 36]** On May 26, 2015, the NMSIC held a publicly-noticed meeting for which the agenda had been made publicly available. *See*

Affidavit of Charles V. Wollmann, filed June 4, 2015, ("Wollmann Aff."), ¶ 5.[6] At the public portion of the May 26 meeting, and pursuant to the previously published agenda, NMSIC unanimously adopted the May 2015 Amended Recovery Litigation Settlement Policy ("Amended Settlement Policy"). **[Wollmann Aff. ¶ 7]** Under the Amended Settlement Policy, the NMSIC withdrew its delegation of authority to the Litigation Committee and established that "all settlements shall be voted on in open, public session by the SIC." **[Wollmann Affidavit ¶ 7]**

During the open portion of the May 26, 2015 NMSIC meeting, the full NMSIC approved and ratified all four settlement agreements entered into with the Settling Defendants in this case. **[Wollmann Affidavit ¶ 8]**

The settlement agreements required Weinstein and Schiff to pay $100,000, Rosen and Diamond Edge Capital Partners, LLC to pay $300,000, and Howell to pay $125,000. **[RP 5654-5655, FOF 50, 55, 56]**

The settlement agreements require each Settling Defendant to cooperate fully in the State's ongoing investigation into pay-to-play at NMSIC, including providing testimony upon request. **[RP 5654, FOF 51]** The settlement

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[6] The Wollmann Aff. was filed with this Court to address new facts mooting certain issues on appeal. *See Hamman v. Clayton Mun. Sch. Dist. No. 1,* 1964-NMSC-182, ¶ 6, 74 N.M. 428, 394 P.2d 273 ("The facts rendering the case moot do not necessarily have to appear from the record, but may be proved by extrinsic evidence, such as here, by affidavit and stipulation" (citation omitted)). *See also* discussion at Section VI. C. below.

agreements also become null and void if the Settling Defendants provided or provide any false information or testimony. **[RP 5654-5655, FOF 52]**

The settlement agreements contain mutual releases. NMSIC releases the Settling Defendants from any claim "arising out of or relating to the investments by NMSIC." **[RP 5655, FOF 53]** These releases would include Intervenors' FATA claims. Each settlement agreement also contains a severability clause so that if one or more provisions is declared invalid by a court, the remaining provisions nonetheless remain in full force and effect. **[RP 5655, FOF 53-54]**

6. The Vanderbilt Settlement.

In early 2013, NMSIC entered into a settlement with Vanderbilt Capital Advisors, LLC and its affiliates ("Vanderbilt"). **[RP 4562-4580]** Vanderbilt agreed to pay $20,000,000 to settle claims related to NMSIC's investments and $4,250,000 to settle with the ERB on its investments. **[RP 4570]**

On February 21, 2013, the NMAGO, on behalf of itself, the State, the ERB and NMSIC, filed a Motion to Approve and Enforce Settlement Agreement (the "Enforcement Motion") in *Vanderbilt*. The State asserted that the settlement was fair, adequate and reasonable under all of the circumstances and provided detailed evidentiary support for its position. **[RP 4545-4560]**

Intervenors (as *qui tam* plaintiffs in *Vanderbilt*) did not oppose the settlement and instead filed a motion to stay *Vanderbilt* until the Supreme Court

rendered its decision in the *Austin* appeal. **[Appellants' Brief in Chief ("BIC") 2]** The State argued in opposition to the stay that the State's ability to assert common law claims against Vanderbilt (unaffected by Intervenors' FATA *Ex Post Facto* problem) negated the significance of the *Austin* appeal with regard to the *Vanderbilt* settlement. **[RP 4625-4630]** The State requested a hearing on the Enforcement Motion and the motion for stay. Judge Pfeffer did not hold a hearing but, instead, issued a decision staying *Vanderbilt* on July 12, 2013, **[RP 5961-5967]** noting that the State had not initially sought dismissal of all of the *qui tam's* claims that it was seeking to settle. **[RP 5964-5966]** To date, the Vanderbilt settlement monies remain in escrow and cannot yet be invested for, or distributed to, the NMSIC trust beneficiaries.

7. The District Court's Approval of the Settlements and Grant of Dismissal.

On April 18, 2013, NMSIC filed motions for voluntary dismissal of the Settling Defendants to effect the settlements. Intervenors filed procedural objections on May 3, 2013 but did not challenge the fairness, adequacy and reasonableness of the settlements or request an evidentiary hearing. **[RP 5656, FOF 58]**

The District Court heard oral argument on the motions for voluntary dismissal on July 15, 2013. **[RP 5656, FOF 59]** At that hearing, Intervenors challenged the fairness, adequacy and reasonableness of the settlements for the

first time and requested an evidentiary hearing. **[RP 5656, FOF 59]** Intervenors claimed that they had evidence to present regarding the fairness, adequacy and reasonableness of the settlements. **[RP 5656, FOF 59]**

The District Court ordered Intervenors to submit briefing setting forth the basis for their specific objections to each settlement by July 29, 2013. **[RP 5657, FOF 60]** Intervenors did not file the required briefing but instead filed a motion, on August 5, 2013, objecting to the form of the Order requiring them to submit briefing and seeking to stay this case pending the New Mexico Supreme Court's decision in the *Austin* interlocutory appeal on the FATA retroactivity issue. **[RP 5657, FOF 60]**

On September 1, 2013, the District Court denied Intervenors' Motion to Stay. **[RP 5657, FOF 60]** That Order included the following ruling:

> The FATA scheme for bringing actions preserves the State's prosecutorial control over actions brought on its behalf. Although FATA allows private parties to initiate and retain an interest in the recovery [on] the State's claims, FATA also preserves the State's ultimate discretion to determine the ultimate nature of the State's prosecution of the FATA claims, including whether to dismiss them. **[RP 4361]**

The September 1 Order stated that the District Court would hold an evidentiary hearing to determine if the settlements met the criteria set forth in FATA. The Order required Intervenors to file a brief providing specific information regarding the adequacy of the settlements by September 16, 2013.

[RP 5657-5658, FOF 62] On October 1, Intervenors belatedly filed the brief ordered by the District Court but omitted much of the required information regarding Intervenors' opposition to the settlements. **[RP 5658, FOF 63]**

The Court held a two-day evidentiary hearing on November 25 and 26, 2013 on Intervenors' objections to the fairness, adequacy and reasonableness of the settlements. **[RP 5660, FOF 67]**

8. The District Court's Findings in Support of Order of Dismissal.

The District Court's Findings and Conclusions include the following Conclusions of Law:

- The NMSIC "conducted sufficient discovery and investigation to fairly evaluate the merits of Settling Defendants' positions during the settlement negotiations, the risks of litigation and the range of possible recovery"; **[RP 5673-5674, COL 23]**

- "The cooperation that the Settling Defendants have already provided and agreed to continue to provide are an integral element of NMSIC's overall enforcement plan"; **[RP 5676, COL 26]**

- NMSIC faced litigation risks in its claims against each of the Settling Defendants; **[RP 5676-5678, COL 30-34]**

- The settlement amounts for each Settling Defendant fell within the range of reasonableness, not even taking into account the value of the Settling Defendants' cooperation with the State's ongoing enforcement efforts; **[RP 5680-5681, COL 39]**

- "[B]ecause the FATA vests the State with ultimate authority and control over FATA actions brought on its behalf, the settlement decisions by NMSIC warrant considerable deference"; **[RP 5681-5682, COL 42]**

- Because "the settlements with the Settling Defendants are part of the NMSIC's overall enforcement plan . . .[and] Courts will routinely defer to the government's overall enforcement plan," the District Court "will defer to NMSIC's enforcement plan"; **[RP 5682, COL 43]**

- "The settlements are fair, adequate and reasonable under the circumstances and . . . NMSIC's motions for voluntary dismissal should be granted"; **[RP 5682, COL 44]**.

- "Nothing about the pendency of *Austin* deprives this Court of the

authority to carry out the responsibilities set forth in FATA Section 44-9-6"; **[RP 5682, COL 45]**

- "Like the [Federal False Claims Act], FATA contemplates that when the government settles a related action or obtains an alternate remedy, it may extinguish some or all of a qui tam plaintiff's claim"; **[RP 5682-5683, COL 46]** (citations omitted)

- "It will be up to the Court in *Austin*, however, to determine what effect this Court's decision approving the settlements has on [Foy's] claims in that case. The *Austin* court also is free to take judicial notice of these proceedings, including these findings of fact and conclusions of law and the evidence adduced at the hearing on the settlements, as well as the effect of Plaintiff's release on the allegations in the *Austin* case"; and, **[RP 5683, COL 47]**

- "If, for whatever reason, the *Austin* Court were to deny the pending motion for partial dismissal and rule that the release given by NMSIC was insufficient to release [Foy's] FATA claims, then the severability provisions in the Settlement Agreements would be invoked and that

ruling would neither impair the finality of the settlement of NMSIC's common law claims nor invalidate the dismissal of the Settling Defendants from this action." **[RP 5683-5684, COL 49]**

9. Appellants' First Unsuccessful Challenge to the Settlements.

On March 27, 2014, following the District Court's issuance of its Findings and Conclusions, Intervenors filed in the Supreme Court an Emergency Petition for Writ of Prohibition or Superintending Control and Request for Stay of All Proceedings in the District Court Pending this Court's Decision in the *Austin* retroactivity appeal ("the Petition"). **[RP 5762-5784]** The Petition raised the same issues raised in this appeal.

On March 30, 2014, in the absence of any stay, Judge Singleton entered an Order of Dismissal, incorporating her Findings and Conclusions and stating that the "Order is a Final Order for purposes of Rule 1-054(B)(2) NMRA." **[RP 5861-5862]** Intervenors then filed a Motion by Qui Tam Petitioners to Modify Writ to Deal with Changed Circumstances, asking the Supreme Court to vacate, rather than prevent entry of, the Order of Dismissal and to extend the time for them to appeal. On May 1, 2014, the Supreme Court denied the Petition. *Foy v. Singleton*, No. 34,610 (May 1, 2014). **[RP 5888-5889]** This appeal followed.

ARGUMENT

I. STANDARD OF REVIEW

Foy's Brief in Chief asserts that because "[a]ll of the questions in this appeal involve questions of statutory interpretation," they should be reviewed *de novo*. **[BIC 1]** To the limited extent that this appeal requires statutory interpretation, NMSIC agrees that the appropriate standard of review is *de novo*. This appeal, however, raises numerous questions that require no statutory interpretation. The appropriate standards of review for such questions are set forth below.

A. *All* of the District Court's Factual Findings Must Be Deemed Conclusive.

As an initial matter, Appellants have not sought review of any of the factual findings made by the District Court. By asserting that "[a]ll of the questions in this appeal involve questions of statutory interpretation," **[BIC 1]** Intervenors have expressly waived any challenge to the District Court's factual findings. Even had they not done so, however, the District Court's factual findings still remain uncontested because Intervenors failed to "set forth a specific attack on any finding" as required by Rule 12-213(A)(4) NMRA.[7] Indeed, Intervenors do not

[7] Even so, Appellants' Brief in Chief makes countless purported conspiracy theory and *ad hominem* assertions without citation. Because those assertions are unaccompanied by any support in the record, they are merely, at best, improper arguments of counsel, not evidence, and the Court should not consider them. *See State v. Hall*, 294 P.3d 1235, ¶ 28 (S.Ct. 2012); *Muse v. Muse*, 2009-NMCA-003, ¶ 51, 145, N.M. 451, 200 P.3d 104.

challenge a single factual finding made by the District Court. All of the findings must therefore be "deemed conclusive." *Id.; Blea v. Fields*, 2005-NMSC-029, ¶ 22, 138 N.M. 348, 120 P. 3d 430.

B. The Appeal Challenges the District Court's Application of the Law to the Facts.

Most of Intervenors' appeal challenges the propriety of the District Court's legal conclusion that NMSIC's settlements with the Settling Defendants were "fair, adequate and reasonable under all the circumstances," pursuant to Section 44-9-6 (C) of FATA.[8] The standard of review for the District Court's conclusions of law "is whether the trial court correctly applied the law to the facts." *Rienhardt v. Kelly*, 1996-NMCA-050, ¶ 6, 121 N.M. 694, 916 P.2d 963.

C. The District Court's Discovery Rulings Should Be Reviewed Under an Abuse of Discretion Standard.

Intervenors' Brief-in-Chief also challenges the scope of discovery allowed by the District Court prior to its approval of the settlement agreements and dismissal of the Settling Defendants. **[BIC 36-40]** Intervenors' attacks on the District Court's discovery rulings must be reviewed by this Court under an abuse of discretion standard. *Hartman v. Texaco, Inc.*, 1997-NMCA-032, ¶ 20, 123 NM 220, 937 P.2d 979.

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[8] In so doing, Appellants assert countless attacks, including the proverbial kitchen sink, without "explaining how [each] issue was preserved in the court below." Rule 12-213(A)(4) NMRA.

II. THE SEPARATION OF POWERS DOCTRINE REQUIRES DEFERENTIAL REVIEW OF THE STATE'S EXECUTIVE'S DISCRETION TO SETTLE ITS OWN CLAIMS.

This appeal calls for a review of the State's litigation decisions that necessarily is deferential. The District Court correctly ruled that because FATA preserves the State's control and discretion "over FATA actions brought on its behalf, the settlement decisions by NMSIC *warrant considerable deference*." **[RP 5681-5682, COL 42]** (emphasis added). As the District Court had previously explained, FATA protects "the State's prosecutorial control over actions brought on its behalf" and "preserves the State's ultimate discretion to determine the nature of the State's prosecution of the FATA claims, including whether to dismiss them." **[RP 4361]**

Appellants seek to undermine the State's discretion and divest it of control over its own legal claims in order to force pursuit of these claims under FATA. Appellants argue that the State's enforcement plan must take a back seat to Appellants' own misguided claims because, they say, those claims "give[] the State many advantages" **[BIC 23-4]** and present "the State's best remedy against these fraudfeasors." **[BIC 24]** Thus, by virtue of their status as Intervenors, Appellants, private individuals (who, by their own admission, lack personal whistleblower knowledge), purport to know what serves the State's interests better than the State itself.

The deference given the State by the District Court cannot be simply disregarded. It reflects the fundamental mandate of the New Mexico Constitution that no branch of our tripartite government "shall exercise any of the powers properly belonging to either of the others." N.M. Const. Art. III, §1. Authority over the pursuit of the State's legal claims is a core NMAGO/executive function. It requires the exercise of discretion and falls within the exclusive province of the NMAGO in the executive branch. The Legislature, through FATA, conferred limited rights on intervening Appellants. It did not nor could it authorize the kind of second-guessing of the executive's prosecutorial discretion over the State's claims that Appellants urge here.

A. *Qui Tam* Intervenors' Limited Rights under FATA Cannot Be Construed to Impinge upon the State's Authority.

The deference owed to the State's settlement decisions flows from the undisputable fact that all claims at issue in this appeal belong to the State of New Mexico. **[RP 5681-5682, COL 42]** These claims include both the NMSIC claims the District Court dismissed against the Settling Defendants and to any overlapping claims brought by the *qui tam* plaintiffs in *Austin*. *See New Mexico ex rel. NEA v. Austin Capital*, 671 F. Supp. 2d 1248, 1251 (D.N.M. 2009) (concluding that State of New Mexico is the real party in interest as to claims made under FATA); *United States ex rel. Mergent Servs. v. Flaherty*, 540 F.3d 89, 93 (2nd Cir. 2008) (noting that the only injury in *qui tam* case is that suffered by the government).

FATA preserves the State's ultimate control over all claims in this case and in *Austin* because it has to. FATA "tracks closely the longstanding federal False Claims Act" ("FCA"), including in this fundamental respect. *State ex rel. Foy v. Austin Capital Mgmt., Ltd.*, 2013-NMCA-043, ¶ 7, 297 P.3d 357, 364, *cert granted,* 2013-NMCERT-____, 3000 P.3d 1181 (No. 34,013, Mar. 15, 2013). As has been explained, addressing the analogous issue under the FCA:

> The qui tam provisions adopted by Congress do not contradict the constitutional principle of separation of powers. Rather, they have been crafted with particular care to maintain the primacy of the Executive Branch in prosecuting false-claims actions, even when the relator has initiated the process.

U.S. ex rel. Taxpayers Against Fraud v. General Elec. Co., 41 F.3d 1032, 1041 (6th Cir. 1994).

What keeps *qui tam* cases from impermissibly usurping state authority is the fact that "the Executive retains significant control over litigation pursued under the FCA by a qui tam relator." *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753 (5th Cir. 2001). When, as Intervenors urge here, *qui tam* rights are applied so that "the government's ability to exercise its authority has been thwarted," the constitutionally mandated separation of powers will likely have been breached. *Id.; accord International Game Tech. v. Second Judicial Dist.*, 127 P.3d 1088 (Nev. 2006) (applying deferential rational basis review of the state's dismissal of qui tam

case to preserve separation of powers); *Laraway v. Sutro & Co.*, 116 Cal. Rptr. 2d 823, 830-31 (Ct. App. 2002) (same).

B. Appellants' Second-Guessing of the State's Settlements Impermissibly Threatens to Thwart the State's Enforcement Plan.

The separation of powers concerns implicated by this appeal are not theoretical; they pose significant practical risks as well. Appellants challenge the State's resolution of its claims with the Settling Defendants, but, as the District Court correctly found, these settlements play an "integral" role in the State's overall "enforcement plan." **[RP 5674, COL 26]** In particular, resolution of claims with the Settling Defendants is but the first phase of that enforcement plan: suits primarily targeting individuals. **[RP 5643-5644, FOF 23]** The second phase targets fund managers and entities and is intended to seek more substantial recoveries. **[RP 5643-5644, FOF 23]**

Following its plan, the State has used its claims against minor defendants, like the Settling Defendants, as leverage to obtain their cooperation and truthful testimony in building cases against more significant targets. Undue impingement on the State's effort to settle claims threatens to thwart the State's ability to implement its litigation plan. For this reason, the District Court appropriately gave "deference to decisions that might impact the government's overall enforcement plan." **[RP 5669-5670, COL 16]**

This is not to say that there should be no meaningful review of the State's settlements. Rather, as the District Court correctly found:

> The limited purpose of the hearing required by Section 44-9-6(C) is to force the government to provide some reasoning behind its decision and to give the qui tam plaintiff an opportunity to direct the court's attention to such matters as collusion between the government and defendant or significant and unexplained discrepancies between the strength of the case and the settlement.

[RP 5671, COL 19] Intervenors made no such showing. Despite their suggestion that the settlements were "collusive or inadequate," Appellants cite nothing to support that they were. **[BIC 26]**

III. THE DISTRICT COURT DID NOT VIOLATE FATA IN APPROVING THE SETTLEMENTS.

As the record reflects, the District Court more than adequately fulfilled its obligations under Section 44-9-6 (C) of FATA in approving the State's settlements. It requested detailed briefing **[RP 5656-5658, FOF 59, 60, 62-63]**, conducted multiple hearings **[RP 5656, 5660, FOF 59, 67]**, including the two-day evidentiary hearing **[RP 5660, FOF 67]**, questioned and cross-examined witnesses when Intervenors chose not to do so **[RP 5660-5661, FOF 69]**, and issued its remarkably extensive and detailed 50-page Findings and Conclusions. **[RP 5635-5684]** The Findings and Conclusions, standing alone, refute Appellants' contention the District Court improperly "rubber-stamped" the settlements. **[BIC 24]**

Nonetheless, Appellants baselessly assert that the District Court conducted an insufficient review, variously violating FATA in the process. None of their assertions withstand scrutiny.

A. Appellants Overstate the Implications of Their Right to Present Evidence in Opposition to the Settlements.

Despite the thoroughness of the District Court's review, Appellants contend that it committed "a plain error of law" when it followed FCA cases by "rubber-stamp[ing]" the settlements. **[BIC 24]** In Appellants' view, this was an error so egregious as to be "an insult to the New Mexico Legislature." **[BIC 25]**.

Apparently, the legal error is that when Section 44-9-6(C) of FATA requires "a hearing providing *qui tam* plaintiff an opportunity to present evidence" in opposition to a settlement, it actually requires something more than the District Court's (two-day) hearing, which provided Appellants the opportunity to present evidence. **[BIC 26-28]** Appellants contend that by providing the "absolute right to present evidence," FATA dramatically departs from the otherwise identical FCA provision, thereby compelling stricter judicial scrutiny and displacing deference to the State with "protect[ion] of the qui tam plaintiffs."[9] **[BIC 28, 32-33]**

[9] The FCA contains a nearly identical provision that requires a hearing but does not *require* the opportunity to present evidence. **[BIC 27]** *Compare* NMSA 1978, 44-9-6(C) (2007) *with* 31 U.S.C. § 3730 (c)(2)(B).

Because this argument finds no support anywhere, Appellants rely solely on their invented legislative history for FATA, the absence of citation to or evidence for which underscores its fictional status. **[BIC 28, 32-33]** *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (when a party cites no authority to support an argument, the court may conclude no such authority exists). Contrary to Appellants' core argument, however, although FCA does not expressly require *qui tam* plaintiffs to present evidence at a hearing challenging a settlement, federal legislative history indicates that that was Congress' intent. *U.S. ex rel. McCoy v. Cal. Med. Review, Inc.*, 133 F.R.D. 143, 148-49 (N.D. Cal. 1990); *U.S. ex rel. Nudelman v. Int'l Rehab. Assocs., Inc.*, 2004 WL 1091032, at *1, n.1 (E.D. Pa. May 14, 2004).

Accordingly, federal courts reviewing government settlements or dismissals under the FCA have routinely allowed *qui tam* plaintiffs to present evidence at hearings despite the fact that the FCA has no express requirement. *See, e.g., U.S. ex rel. McCoy*, 133 F.R.D. at 148-9 (providing for evidence in the evaluation of government's *qui tam* settlement); *Nudelman*, 2004 WL 1091032, at *1, n.1 (same); *U.S. ex rel. Schweizer v. Oce N.A.*, No. 06-648, 2013 WL 3776260, at *11(D.D.C. July 19, 2013) (acknowledging permissibility of limited discovery for evaluating contested the FCA settlement); *Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 930 (10th Cir. 2005) (approving government's dismissal of *qui tam* action

granted after "five-day evidentiary hearing"); *and U.S. ex rel., Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1143 (9th Cir. 1998) (noting "four-day evidentiary hearing" for FCA dismissal).

In addition, courts in states with *qui tam* provisions nearly identical to FATA's have applied rational basis review—among the most deferential standards in American jurisprudence—notwithstanding the fact that *qui tam* plaintiffs have the same express statutory right to present evidence at a hearing in opposition to the state's dismissal as provided in FATA.[10] *International Game Tech. v. Second Judicial Dist.* ("*IGT*"), 127 P.3d 1088, 1099-1100 (Nev. 2006) (holding that review of the state's dismissal "implicated...constitutional concern[s]" and adopting a rational basis review); *Laraway v. Sutro & Co.*, 116 Cal. Rptr. 2d 823, 830-31 (Ct. App. 2002) (same).

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[10] Appellants falsely suggest that FATA applies a "good cause requirement[]" for settlements. **[BIC 28, 32-33]** That requirement applies only to *dismissals* under Section 44-9-6(B), and not to settlements under Section 44-9-6(C). An outright dismissal of a claim appropriately requires a different showing than the settlement of claim because, as is the case here, the State receives consideration for a settled claim. Nonetheless, as the cases cited herein demonstrate, and as the *Vanderbilt* court correctly found **[RP 5644, FOF 26]**, even courts applying the good cause standard for dismissal accord considerable deference to the State.

B. The District Court's Discovery Rulings Did Not Violate FATA.

Appellants argue that the District Court "contradict[ed]. . . FATA" and committed a "plain error of law" through its "no discovery" ruling. **[BIC 29, 36-39]**

In enacting FATA, the Legislature did not provide *qui tam* plaintiffs a statutory right to discovery in challenging the State's settlements. The District Court, therefore, made discovery decisions within its discretion. *Hartman*, ¶ 20, (rulings on discovery within discretion of district courts). Appellants have failed to meet their burden in showing that discretion was abused. *Id.*

The District Court expressly found that Intervenors were "allowed substantial discovery sufficient to allow [them] to determine the fairness of the settlements." **[RP 5664-5665, COL 5]** Among other discovery, the Court found that Intervenors were allowed the specific discovery they requested as to the gains and losses on investments connected with the Settling Defendants. **[RP 5659-5660, FOF 65-66]** These findings are conclusive.

Moreover, the District Court correctly held that permitting over-broad discovery in a settlement context threatens to defeat the purpose of settlement (in addition to alienating cooperating witnesses and increasing not only defense but also taxpayer prosecution costs and expenses). As the Court explained, "FATA expressly provides for settlement, which presumes resolution of claims *prior to* full

discovery and/or trial of the merits of a potential claim. . . . The extent of discovery appropriate in connection with a settlement approval hearing is limited to whether the settlement is fair, adequate and reasonable." **[RP 5664-5665, COL 5]** The District Court found that "allowing full-blown discovery as of right would risk transforming the [settlement approval] hearing into a trial on the merits.... It would put the cart before the horse, in essence making trial a precondition of settlement." *Id. citing United States ex rel. Schweizer v. Oce N.A.*, 956 F. Supp. 2d 1, 9 (D.D.C. 2013).

Moreover, within the same procedural framework, the State developed and provided ample evidence to substantiate and justify the settlements. As the District Court found, "NMSIC has conducted sufficient discovery and investigation to fairly evaluate the merits of the Settling Defendants' positions during settlement negotiations, the risks of litigation and the range of possible recovery." **[RP 5673-5674, COL 23]** *Rivera-Platte v. First Colony Life Ins. Co.*, 2007-NMCA-158, ¶ 49, 143 N.M. 158, 176 (Ct. App. 2007) (a "settlement may be approved if the plaintiffs 'have conducted sufficient informal discovery and investigation to fairly evaluate the merits of Defendants' positions during settlement negotiations'"). The State's multi-million page document review and witness interviews provided the

appropriate basis for judging the adequacy of the settlements. **[RP 5647, FOF 35]**; *United States ex rel. Schweizer*, 956 F. Supp. 2d at 13.[11]

C. The District Court Adequately Considered Potential Damages.

Appellants also contend that the District Court erred insofar as it purportedly ruled at the November 1, 2013 motion hearing that the amount of potential damages was not relevant to the adequacy of the settlements. **[BIC 30-34]** This argument is patently false. The District Court consistently ruled that the amount of potential damages is relevant. **[RP 5671, 5678-5681, COL 19, 35-39]**

The limited issue at the motion hearing cited by Appellants was whether they were entitled to discovery of investment gains and losses on the NMSIC investments connected with the Settling Defendants. **[RP 5659, FOF 65]** Based on the District Court's assumption, solely for purposes of evaluating the settlements, that potential damages were in excess of $300 million (notwithstanding impossible collectability issues), the Court correctly ruled that Appellants did not have to prove—and therefore did not need discovery of—gain and loss information on the handful of investments linked to the Settling Defendants. **[RP 5679, COL 36-37]**

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[11] The Appellants' recitation of the order in *Vanderbilt* indicating that "little meaningful discovery has been conducted" is misleading because it relates only to the proposed settlement of the ERB's claims against Vanderbilt, not NMSIC's, and has nothing to do with the settlements in this case. **[BIC 17]**

Even though the District Court had ruled that Appellants were not entitled to it, the court subsequently found that NMSIC had produced the gain and loss information sought by Appellants, with supporting accounting data, more than a week prior to the evidentiary hearing. **[RP 5659-5660, FOF 66]** Appellants cannot and do not contest this fact. Therefore, Appellants' false assertion that "the SIC refused to provide the financial data from its records, which are public records, so that qui tams could do the calculations themselves" **[BIC 32]** must be disregarded. *see Muse v. Muse*, 2009-NMCA-003, ¶ 51, 145, N.M. 451, 200 P.3d 104 ("The mere assertions and arguments of counsel are not evidence").

D. Judge Pfeffer's Stay of the Vanderbilt Settlement is Inapposite.

Appellants extensively quote an order from the *Vanderbilt* case while ignoring that the issues and ruling in *Vanderbilt* are inapplicable here. **[BIC 15-20]** The circumstances surrounding the decision in *Vanderbilt* to stay rather than approve a settlement differ markedly from this case.

Most significantly, the Court in *Vanderbilt* expressly based its decision on its belief that reversal of its ruling that FATA cannot be applied retroactively might significantly change the analysis of the proposed settlement. **[BIC 16]** The Court in *Vanderbilt* specifically noted that "if the Supreme Court reverses the determination that FATA claims that predate enactment are barred...the proposed settlement

would not be based on an accurate assessment of Defendants' exposure." *Id.* Here, by contrast, the District Court took nearly the opposite approach:

> The [State] and the Settling Defendants have urged this court...not to wait for the Supreme Court's decision but instead to evaluate the fairness of the settlements on the assumption that [FATA] is given full retroactive effect. The Court will make that assumption for purposes of evaluating the settlements.

[RP 5668, COL 14] This fact alone renders the *Vanderbilt* ruling inapplicable.

Second, the Court's ruling in *Vanderbilt* was driven in part by the fact that the State had neither included all of the claims it sought to settle in its initial motion for partial dismissal in *Vanderbilt* nor had it pursued alternate remedy proceedings with respect to all of those claims. **[RP 5964-5966]** Again, these circumstances contrast starkly with those presented here. The claims against the Settling Defendants are precisely the claims the State sought partial dismissal of in *Austin*, and they are, of course, claims the State has actively pursued here. **[RP 5644, FOF 24-5]**

IV. THE DISTRICT COURT NEITHER EXCEEDED ITS JURISDICTION NOR VIOLATED THE STAY.

Appellants' claim that the District Court "had no jurisdiction over the claims in the *Austin* case," and yet "tried the *Austin* case *in abstentia*" is demonstrably false. **[BIC 22-3]** The District Court did nothing of the sort.

The District Court followed the procedure outlined in FATA for conducting fairness hearings on settlements in this case, which it had deemed an "alternate remedy" to *Austin* under Section 44-9-6(H) of FATA. **[RP 5665-5666, COL 7-8]** To the extent that the District Court's approval of the settlements has an effect on Appellants' overlapping *qui tam* claims in *Austin*, it does so pursuant to the express terms of Section 44-9-6(H) of FATA. *See, e.g., United States ex rel. Sun v. Baxter Healthcare Corp. (In re Pharm. Indus. Avg. Wholesale Price Litig.)*, 892 F. Supp. 2d 341, 344 (D. Mass. 2012) (explaining the effect of government's alternate remedy proceeding on original *qui tam* case under the FCA provision upon which FATA's is based).

Section 44-9-6(H) of FATA provides that a "finding of fact or conclusion of law made in the [alternate remedy proceeding pursued by the State] that has become final shall be conclusive on all parties to the action under the Fraud Against Taxpayers Act." Thus, under this provision, where, as here, the State pursues its own claims in an alternate remedy proceeding, the outcome of that proceeding is preclusive with respect to the original *qui tam* proceeding. The District Court acknowledged this provision but stopped short of making any determination about the effect of its ruling on the *Austin* case. **[RP 5682-5683, COL 46]** The District Court merely stated that its approval of the settlements in

this case "*may* extinguish some or all of a qui tam plaintiff's claims." *Id.* (emphasis added).

Rather than exceeding its jurisdiction, the District Court specifically ruled that "[i]t will be up to the Court in *Austin*. . .to determine what effect this Court's decision approving the settlements has on the Intervenors' claims in that case." **[RP 5683, COL 47]** Appellants' argument that the District Court acted beyond its jurisdiction fails for this reason alone.

Appellants are, in effect, promoting the untenable proposition that they can "participate as a party" and assert a "right to [their] reward and attorney fees" as to the State's claims against Settling Defendants here but can still pursue *the State's claims* against *the same defendants for the same conduct* in *Austin*. **[BIC 25]** In other words, Appellants want two bites of an apple that isn't theirs.

Appellants also say that the District Court violated the stay imposed in *Austin* by operation of Rule 12-203(E) NMRA because of the interlocutory appeal on FATA's retroactivity. **[BIC 22-24]** The stay does not apply to this case and in any event, on September 19, 2011, the State moved this Court for a partial lifting of the stay in the *Austin* interlocutory appeal. The State did so for the express purpose of obtaining dismissal of NMSIC pay-to-play claims in the *Austin* case, thereby facilitating pursuit of its pay-to-play claims here. **[RP 5645, FOF 27]** Over Intervenors' objections, this Court granted the State's motion, partially lifting

the stay to allow resolution of the dismissal of Intervenors' NMSIC pay-to-play claims in *Austin* (Ct. App. No. 31,421, Oct 10, 2011). The District Court's approval of the settlements here, therefore, in no way violated the letter or spirit of the stay, particularly as it was modified by the State's motion.

V. THE ORDER OF DISMISSAL IS A FINAL APPEALABLE ORDER.

Appellants also argue, without citation to authority, that the District Court's Order of Dismissal is not a final appealable order because it does not adjudicate whether Intervenors are entitled to a share of the settlement proceeds and attorneys' fees. **[BIC 40]** An otherwise final order is not, however, rendered non-final for purposes of appeal where issues remain as to such things as an award of costs or attorneys' fees for services rendered in the litigation that is the subject of the appeal. *Kelly Inn No. 102, Inc. v. Kapnison*, 1992-NMSC-005, ¶¶ 11-29, 113 N.M. 231, 824 P.2d 1033.

Conversely, the District Court's October 16, 2012, Order Denying Intervenors' Motion to Disqualify the Attorney General, which Appellants apparently claim was erroneous **[BIC 49-50]**, is not a final appealable order, and, if it were, the time to appeal expired long ago.

VI. THE SETTLEMENTS ARE NOT PROCEDURALLY DEFECTIVE.

The District Court correctly rejected Intervenors' contentions that the settlements were conducted in a manner that violated the Inspection of Public

Records Act, NMSA 1978, § 14-2-1 *et seq.* ("IPRA") and the Open Meetings Act, 1978 NMSA § 10-15-1 *et seq.* ("OMA").

In any event, without conceding that Appellants' (or Amici's) assertions have merit, and to eliminate any question about its settlement process, NMSIC has cured any alleged deficiency under OMA and IPRA by again ratifying and approving the settlements. These issues have therefore been rendered moot.

A. Appellants Fail to Support Their Claim That NMSIC Violated the Inspection of Public Records Act.

Appellants make the unsupported assertion that the settlements at issue in this case violated IPRA. **[BIC 41-44]** The District Court soundly rejected this argument, finding:

> There is no evidence of any attempt to shield these settlements from IPRA. Moreover, the Settlement Agreements have been publicly filed in this action and the Court has held a public hearing about them.

[RP 5664, COL 4] Appellants have cited nothing in the record to dispute this conclusion. Accordingly, Appellants' claim that the settlement agreements somehow violated IPRA should be rejected.[12] *See, In re Estate of Heeter,* 1992-

[12] The settlements at issue were reached between April 9, 2013 and April 16, 2013. **[RP 4148-4174]**. Appellants' assertion that the settlement agreements were "reached in November and December 2012, but they were kept secret for months" **[BIC 47]** is contradicted by the settlement agreements themselves. **[RP 4148-4174]**

NMCA-032, ¶ 15, 113 N.M. 691, 831 P.2d 990 ("[t]his [C]ourt will not search the record to find evidence to support an appellant's claims").

B. The District Court Correctly Found That NMSIC's Approval of the Settlement Agreements Did Not Violate the Open Meetings Act.

The District Court found that all settlements at issue on this appeal were approved pursuant to the Recovery Litigation Settlement Policy ("Settlement Policy") adopted at a public meeting of the NMSIC on June 26, 2012. **[RP 5663-5664, COL 3]** The Settlement Policy formed a Litigation Committee to "actively participate in settlement negotiations, as appropriate, with authority of the NMSIC for settlement resolution and related decisions."[13] **[RP 5968]**

As the District Court correctly concluded, the actions of the Litigation Committee are the very type of attorney-client privileged litigation decision-making exempted by OMA. **[RP 5663-5664, COL 3]** *citing* Bd. of Cnty. Comm'rs v. Ogden, 1994-NMCA-010, ¶ 17, 117 N.M. 181, 870 P.2d 143, NMSA 1978 § 10-

[13] The District Court found that appellants had "implicitly conceded that the Council could properly delegate settlement authority to a committee of its members consistent with the [OMA] but maintained that the delegation had to be publicly voted on and recorded." **[RP 5663-5664, COL 3]** As it is undisputed that the delegation, via the Settlement Policy, was publicly voted on and recorded, the Litigation Committee acted within it proper authority. Accordingly, the argument made by Amici that the Litigation Committee "lacked lawful authority to settle any of the investment recovery lawsuits" **[Amici 10]** has not been preserved for appeal and should not be considered. *Crutchfield v. N.M. Dep't of Taxation & Revenue,* 2005-NMCA-022, ¶ 14, 137 N.M. 26, 106 P.3d 1273.

15-1(H)(7)(2013) (the OMA "does not require that a decision regarding litigation be made in an open meeting").

In addition, conducting litigation and settling matters on behalf of the State are functions vested in the Attorney General ("AG"). *See* NMSA 1978: § 8-5-2 (duties of the AG); § 36-1-19 (making the AG and district attorneys the exclusive representatives of the state and counties, with express exceptions not relevant here); § 26-1-22 (giving the AG authority to settle any matter involving the state). The AG delegated to NMSIC his litigation and settlement authority in this case.

The Litigation Committee's review and approval of settlements in this case—in turn approved by the AG via signed public court filings—therefore constituted an exercise of the Attorney General's authority to settle cases. As a consequence, the Litigation Committee was not required to follow the technical requirements of OMA. *See, e.g., Open Meetings Act Compliance Guide,* at 9 (8th Edition 2015) ("Of course, where the chief policymaking official of an agency is a single individual the [OMA] does not apply because the official is not a public body, complete decision making authority is vested solely in the official, and no deliberation or vote is necessary for effective action").[14]

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[14] Amici suggest that the Litigation Committee was required to vote in open session, even though the preceding discussion could be held in closed session, because the *Ogden* decision has been effectively superseded by *Bd. of Comm'rs v. Las Cruces Sun-News*, 2003-NMCA-102, 134 N.M. 283, 76 P.3d 36, *overruled on other grounds, Republican Party v. N.M. Taxation & Revenue Dep't,* 2012-

Even if the Litigation Committee were subject to OMA, the processes followed here satisfied OMA's purposes and therefore did not violate OMA. *See Parkview Cmty. Ditch Ass'n v. Peper,* 2014-NMCA-049, ¶ 13, 323 P.3d 939 ("[u]nder the substantial compliance standard, 'when the [OMA] has been sufficiently followed so as to carry out the intent for which it was adopted and serve the purpose of the statute,' no violation has occurred" (citing *Guitierrez v. Albuquerque,* 1981-NMSC-061 ¶ 14, 96 N.M. 398, 631 P.2d 304)).

Amici acknowledge the applicability of OMA's attorney-client exception but argue that OMA, nonetheless, required NMSIC to provide notice in advance of any Litigation Committee meeting together with an agenda and limited meeting minutes. **[Amici 18]** The benefit of such actions, in theory, would be to confirm that the meetings were properly closed and that only privileged matters were discussed. **[Amici 20]** In this case, however, the subject of these meetings has been outlined in open court, and there is no suggestion that anything improper was discussed. Since the purpose of OMA's requirements has been satisfied, these arguments should not be allowed to invalidate the settlement agreements. *See Parkview* ¶ 16 (where the purpose of the procedure was not relevant in context,

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NMSC-026, 283 P.3d 853. In fact, the *Sun-News* decision relates to an IPRA request, not a claimed violation of the OMA. The holding of *Sun-News* is that settlement agreements must be produced in response to an IPRA request, which the NMSIC does not dispute.

action without following the technical procedures would not be invalidated). Similarly, even if the failure of the Litigation Committee to vote in an open session were a technical violation of the OMA, it would not be a basis to invalidate the actions of the Litigation Committee. Presumably, the purpose of voting in open session is accountability, but in the case of the Litigation Committee all actions were taken only by unanimous consent. **[RP 5663-5664, COL 3]** Accordingly, there would be no additional information provided if the Litigation Committee had voted in open session to approve the settlement.

C. Any Conceivable Violation Has Been Cured by The NMSIC, Rendering These Issues Moot.

To the extent that NMSIC's approval of the settlement agreements had any procedural deficiencies, they have been cured by NMSIC's subsequent actions. *See Kleinberg v. Bd. Of Educ.*, 1988-NMCA-014,¶ 30, 107 N.M. 38, 751 P.2d 722, ("procedural defects in the Open Meetings Act may be cured by taking prompt corrective action"). Specifically, at a duly noticed public meeting held May 26, 2015, a majority of a quorum of the NMSIC voted in open session to approve again the settlements as to the four Settling Defendants at issue in this appeal. **[Wollmann Aff., ¶ 8]** Further, the Council has amended its Settlement Policy so all settlements must be considered and approved by the Council as a whole. *Id.*, ¶ 7.

The NMSIC's recent actions address all purported OMA violations identified by appellants and comport with the actions Amici request. *See* Amici Brief at 10 (stating, "[the Settlement Agreements] are without effect and must be ratified or rejected by vote of a majority of a quorum of the SIC in an open public meeting"). Because there can no longer be any doubt that the alleged technical deficiencies in the settlements have been resolved, this Court should affirm the District Court's decision without reaching the issues raised regarding the OMA. *See Palenick v. City of Rio Rancho,* 2013-NMSC-029, ¶16; 306 P.3d 447 (where plaintiff had alleged that his termination was ineffective due to violations in the OMA the court held, "because we conclude that [plaintiff's] actions amounted to waiver by estoppel we need not address whether the OMA was violated in this case, or the associated issues").

CONCLUSION

For the foregoing reasons, NMSIC respectfully requests this Court affirm the decision of the District Court. The actions of Appellants hurt the State and jeopardize prudent settlement payments and cooperation that strongly benefit the State.

Dated: June 4, 2015

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing was 1st class mailed to all counsel listed below and the Honorable Sarah M. Singleton this 4th day of June, 2015.

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