IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO *ex rel.* FRANK FOY, SUZANNE FOY AND JOHN CASEY,

Plaintiffs-Appellees and
Plaintiffs-Intervenors-Appellants,

v.

THE NEW MEXICO STATE INVESTMENT COUNCIL, 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

DEFENDANT-APPELLEE MARVIN ROSEN'S ANSWER BRIEF

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This brief, according to the word count provided by Microsoft Word Professional Plus 2010, the body of the following brief contains 8,380 words, exclusive of those parts excepted by Rule 12-213(F)(1). The text of the brief is composed in 14 point proportionally-spaced typeface (Times New Roman).

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TABLE OF AUTHORITIES

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Defendant-Appellee Marvin Rosen ("Rosen"), by and through his undersigned counsel, submits this Answer Brief in opposition to the Brief in Chief submitted by the Appellant Qui Tam Intervenors ("Qui Tam Intervenors") dated April 20, 2015 ("Brief in Chief" or "BIC"). For the reasons set forth below, the Findings of Fact and Conclusions of Law of Judge Singleton of the First Judicial District Court of Santa Fe County (the "District Court") dated February 12, 2014 ("Findings and Conclusions") **[25 RP 5635-894]** and the Order of Dismissal dated March 30, 2014 **[26 RP 5861]** should be affirmed.

PRELIMINARY STATEMENT

Qui Tam Intervenors ask this Court to ignore all relevant precedents and authorities (including rulings from courts across the nation that have considered this issue), and in so doing to overturn the well-reasoned and extensively-supported determination of the District Court that the settlement between the New Mexico State Investment Council ("NMSIC" or "Plaintiff") and Rosen was fair, adequate and reasonable. Judge Singleton based her Findings and Conclusions on a two-day evidentiary hearing during which Qui Tam Intervenors were granted every conceivable right under the New Mexico Fraud Against Taxpayers Act ("FATA"). Qui Tam Intervenors presented no evidence during the hearing, even though prior to that hearing they had received ***millions*** of pages of documents—including discovery from Rosen. Now, having ignored discovery and presented no

evidence, Qui Tam Intervenors have chosen to burden this Court with an appeal that simply ignores the law and the factual record.

As set forth below, FATA unquestionably authorized Rosen and NMSIC to settle this lawsuit, and the District Court carefully followed all appropriate procedures. Indeed, Rosen (and the other Appellees Daniel Weinstein, Vicky Schiff, and William Howell (together with Rosen, "the Settling Defendants")) fastidiously followed the instructions of the District Court, engaged in extensive discovery and arm's-length negotiations relating to the settlements. Most importantly, the Settling Defendants provided Qui Tam Intervenors with all the documentary and electronic discovery that was provided to NMSIC, and made themselves available for cross-examination at an evidentiary hearing in open court.

Based on that record, the District Court adhered to FATA and all applicable authority in approving the proposed settlements. As important, the Qui Tam Intervenors then ignored their obligation to present evidentiary facts to show any unfairness in the settlements. As such, the District Court properly determined that Rosen's settlement with NMSIC was fair, adequate and reasonable, and its Findings and Conclusions should be affirmed.

STATEMENT OF FACTS

In July 2012, NMSIC filed a Third Amended Complaint in this action. **[13 RP 2829-75]**. The complaint alleges that Rosen aided and abetted a pay-to-play

scheme in which Gary Bland, Saul Meyer, and Aldus Equity Partners, LP caused NMSIC to make investments for the purpose of benefiting politically-connected individuals, rather than solely on the basis of the underlying merits of the investments and in the best interests of the public trust funds and their beneficiaries. (Complaint **[13 RP 2829, 2861 ¶¶ 5, 137**; *see also* FOF **[25 RP 5637-49 ¶¶ 7-15]**). The complaint further alleges that Rosen was unjustly enriched in connection with these investments made by NMSIC. (FOF **[25 RP 5649 ¶ 40]**).

During the time period relevant to this action, Rosen was a FINRA Registered General Securities Representative at a FINRA Registered broker-dealer known as Diamond Edge Capital Partners, LLC ("DECP"), which is currently known and doing business as Emerald Point Capital, LLC. (Rosen Aff. **[23 RP 5293 ¶ 4]**; *see also* FOF **[25 RP 5636-37 ¶ 3; 25 RP 5650-51 ¶ 43]**). DECP acted as a placement agent for certain private equity funds and hedge funds (the "client funds"), including funds in which NMSIC made investments on behalf of the Public Trust Funds. (Rosen Aff. **[23 RP 5294 ¶ 5]**; Complaint **[13 RP 2830, 2862 ¶¶ 5, 137, 139, 140]**; *see also* FOF **[25 RP 5636-37, 5650-51 ¶¶ 3, 43]**). DECP was paid placement fees by the client funds – not NMSIC – under contracts DECP signed with those client funds. (*See* **11-25-13 Tr. 84:11-15**; *see also* FOF **[25 RP 5650-51 ¶ 43]**). Documents produced by DECP to NMSIC and the Qui Tam

Intervenors show that DECP was paid approximately $1.3 million in connection with investments by NMSIC in three DECP client funds. (Rosen Aff. **[23 RP 5294 ¶¶ 6, 7]**; *see also* FOF **[25 RP 5650-51 ¶ 43]**).

NMSIC's Investigation and Qui Tam Intervenors' Access to Information

NMSIC and its counsel, Day Pitney LLP, extended considerable effort to investigate the claims in the complaint and the appropriateness of a settlement with Rosen. (*See* FOF **[25 RP 5643-45 ¶¶ 23, 29-30]**). Lawyers for Day Pitney filtered, processed and reviewed millions of documents and other data, including information collected by the U.S. Securities and Exchange Commission and other third-parties. (*See* Nichols Aff. **[24 RP 5326-29 ¶¶ 8-22]**; *see also* FOF **[25 RP 5646 ¶¶ 31-32]**). This included desktop or laptop data from twenty-two NMSIC employees, complete images of NMSIC file and e-mail servers, sixty-eight server backup tapes, server home directories for 22 NMSIC employees, e-mail files for e-mail addresses used by the NMSIC investment groups, over 2.7 million pages of paper documents, and audio recordings of NMSIC and subcommittees. (Nichols Aff.[1] **[24 RP 5326-27 ¶¶ 10-14, 18]**; *see also* FOF **[25 RP 5647 ¶ 35]**). Rosen produced over 15,000 pages of documents to NMSIC. (Cert. Service dated Sept. 30, 2013 **[20 RP 4409-13]**).

[1] Mr. Nichols reaffirmed the testimony contained in his Affidavit in open court at the evidentiary hearing. **[11-25-2013 Tr. at 52]**.

All this information then was produced to Qui Tam Intervenors well before the settlement approval hearing. (*See* FOF **[25 RP 5662 ¶ 73]**). The District Court approved informal discovery as part of an "early settlement phase." (*See* FOF **[25 RP 5645 ¶ 29]**). This ensured that Qui Tam Intervenors received the fruits of NMSIC's document collection, including a disk produced by Rosen of approximately 15,000 documents previously produced to NMSIC. Significantly, the Qui Tam Intervenors conceded that they received that discovery at a December 21, 2012 hearing with the District Court. **[12-21-2012 Tr. at 10:6-18]**.

In addition to discovery, Day Pitney conducted interviews with more than a dozen NMSIC employees, along with Defendants Weinstein, Schiff, Rosen, and Howell, Saul Meyer, Richard Ellman, Matt O'Reilly, Alfred Jackson, Danny Villaneuva, Sr., Danny Villaneuva, Jr., and M. Robert Carr. (Nichols Aff. **[24 RP 5328-29 ¶ 22]**; *see also* FOF **[25 RP 5646 ¶ 33]**). Rosen and his counsel met with an attorney for NMSIC in October 2012. (Rosen Aff. **[23 RP 5295 ¶ 12]**; *see also* FOF **[25 RP 5646, 5648 ¶¶ 33, 39]**). Rosen honestly and completely answered all of the questions posed to him by the attorney for NMSIC. (Rosen Aff. **[23 RP 5295 ¶ 12]**).[2] Rosen agreed to provide continuing cooperation and truthful testimony at depositions and trials. (FOF **[25 RP 5648 ¶ 39]**).

[2] Mr. Rosen reaffirmed the testimony contained in his Affidavit in open court at the evidentiary hearing. **[11-25-2013 Tr. at 71-72]**.

NMSIC's Settlement with DECP and Rosen

After this meeting, Day Pitney negotiated a settlement with White & Case LLP, counsel for Rosen, in accordance with NMSIC's Recovery Litigation Settlement Policy. (Frank Aff. **[24 RP 5331 ¶ 6]**; *see also* FOF **[25 RP 5647-48 ¶¶ 37, 38]**). As part of the proposed settlement, DECP agreed to pay $300,000 with respect to all claims as to Rosen, DECP and its employees. (Rosen Aff. **[23 RP 5294 ¶ 8]**; *see also* FOF **[25 RP 5655 ¶ 55]**). DECP has agreed to pay this amount in part because DECP is currently being wound down, as reflected in documents produced to NMSIC and the Qui Tam Intervenors, and because this litigation has already been extremely costly and the costs of continued litigation would be exponentially higher than the amount paid under the proposed settlement. (Rosen Aff. **[23 RP 5294 ¶ 8]**; *see also* FOF **[25 RP 5650-51 ¶ 43]**).

The General Counsel for NMSIC and Day Pitney submitted the agreement to the Litigation Committee of NMSIC and recommended approval. (Frank Aff. **[24 RP 5331 ¶ 6]**; *see also* FOF **[25 RP 5650-51 ¶ 46]**). Day Pitney, the General Counsel for NMSIC and the Litigation Committee participated in a November 2012 telephone conference where the recommendation for approval of the settlement agreement with Rosen was discussed, which included an assessment of the complexity of the litigation, the risk of establishing liability on NMSIC's FATA and common law claims, the risks of establishing damages on NMSIC's

common law claims, the value of Rosen's cooperation and agreement to provide truthful testimony. (Frank Aff. **[24 RP 5331-32 ¶ 7]**; *see also* FOF **[25 RP 5652-53 ¶ 47]**).[3] The Litigation Committee unanimously approved the recommendation to approve the settlement after concluding that the settlement was fair, adequate and reasonable because the benefits, including witness cooperation, outweighed the risks and cost of proceeding to trial. **[***Id.***]**. The parties executed written settlement agreements, which included a commitment on the part of the Settling Defendants to cooperate with NMSIC and its counsel, an acknowledgment that the agreements would be null and void if any information provided to Plaintiffs by the Settling Defendants was later found to be false, a mutual release of claims arising out of or relating to the investments by NMSIC, and a severability clause. (FOF **[25 RP 5654-55 ¶¶ 49-56]**).

The District Court Considers the Settlements

In April 2013, NMSIC moved the court to dismiss the claims against Rosen and to approve a proposed settlement. (Motion for Voluntary Dismissal of Defendant Marvin Rosen, filed Apr. 18, 2013 **[19 RP 4165-74]**; *see also* FOF **[25 RP 5656 ¶ 58]**). Qui Tam Intervenors filed only procedural objections but did not challenge the settlements or request an evidentiary hearing. (FOF **[25 RP 5656 ¶ 58]**). Oral argument on the motions for voluntary dismissal was held in July 2013.

[3] Mr. Frank reaffirmed the testimony in his Affidavit in open court at the evidentiary hearing. **[11-25-2013 Tr. at 10-11]**.

(FOF **[25 RP 5656 ¶ 59]**). Qui Tam Intervenors challenged the fairness, adequacy and reasonableness of the settlements and made an oral request for an evidentiary hearing. [*Id.*]. The District Court ordered Qui Tam Intervenors to submit a memorandum setting forth their grounds for objecting to each settlement and the evidence in support of any objections, but Qui Tam Intervenors failed to do so. (FOF **[25 RP 5657 ¶ 60]**). The District Court then gave Qui Tam Intervenors another chance to file a memorandum, but again Qui Tam Intervenors failed to do so. (FOF **[25 RP 5657-58 ¶¶ 62-63]**). Qui Tam Intervenors finally filed a memorandum in October 2013. (FOF **[25 RP 5658 ¶ 63]**). The District Court held a hearing on November 1, 2013, at which time Qui Tam Intervenors requested gain and loss information on the investments, which was provided by NMSIC on November 15, 2013. (FOF **[25 RP 5659-60 ¶¶ 65-66]**).

On November 25 and 26, 2013, the District Court held an open hearing on the proposed settlement motions. (FOF **[25 RP 5660 ¶ 67]**). Counsel for NMSIC, Qui Tam Intervenors and the Settling Defendants appeared. In addition to calling each of the Settling Defendants to testify, Plaintiff called two additional witnesses, Clifford Nichols, a Day Pitney attorney who was involved in the investigation and negotiation of the settlement agreements, and Peter Frank, a member of NMSIC's Litigation Committee. Rosen appeared at the hearing via video conference link, and was cross-examined by Qui Tam Intervenors. (*See* **11-25-2013 Tr. at 72:20-**

93:16; *see also* FOF [**25 RP 5660 ¶ 67**]). Qui Tam Intervenors did not use any document in cross-examining Rosen. [*See* **11-25-2013 Tr. at 72:20-93:16**]. On February 12, 2014, the District Court issued its Findings and Conclusions, and on March 30, 2014 granted the Settling Defendants' motions for voluntary dismissal.

ARGUMENT

I. Standard of Review

The District Court made findings of fact based on an extensive record relating to how NMSIC investigated the claims against the Settling Defendants. This included findings with respect to Qui Tam Intervenors' receipt of discovery from NMSIC and Rosen, and then Qui Tam Intervenors' decision not to use any of that information to challenge NMSIC's settlement with DECP and Rosen.

Findings of fact made by the district court are subject to the substantial evidence standard of review. *State ex rel. King v. B & B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 12, 329 P.3d 658 (citing *Landavazo v. Sanchez*, 1990-NMSC-114, 111 N.M. 137, 802 P.2d 1283); *see also Sims v. Sims*, 1996-NMSC-078, ¶ 65, 122 N.M. 618, 930 P.2d 153 ("Findings of fact made by the district court will not be disturbed if they are supported by substantial evidence."). Substantial evidence refers to "relevant evidence that a reasonable mind would find adequate to support a conclusion." *Sims*, 1996-NMSC-078, ¶ *65*. On appellate review, the evidence is

to be viewed in the light most favorable to support the findings of the trial court. *Id.*

Indeed, the New Mexico Supreme Court has instructed that, in reviewing challenged findings of a district court, "it is the evidence which is supportive of the finding, not that which is adverse, that usually decides the issue." *Id.* ¶ 65. "It is not our function to weigh the evidence or its credibility, and we will not substitute our judgment for that of the trial court as to the facts established by the evidence, so long as the findings are supported by substantial evidence." *Getz v. Equitable Life Assurance Soc'y*, 1977-NMSC-018, ¶ 8, 90 N.M. 195, 561 P.2d 468. Only where the finding is "clearly contrary to the logical conclusions demanded by the facts and circumstances of the case" will the court reverse a district court ruling. *Sims*, 1996-NMSC-078, ¶ 65.

As set forth below, Qui Tam Intervenors present no credible argument that the Findings and Conclusions are "clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." *Id.* ¶ 65. Consequently, Judge Singleton's decision must be affirmed.

II. The District Court Correctly Applied the Settlement Approval Process Set Forth Under FATA

A. FATA's Legislative History Shows that the District Court Applied the Correct Standard

According to Qui Tam Intervenors, although FATA was modeled on the federal False Claims Act ("FCA"), FATA contains "extra protections" or "heightened requirements" for a settlement to be approved over qui tam plaintiff's objections. **[BIC 32]**. Qui Tam Intervenors claim that these "heightened" protections include a requirement of an evidentiary hearing, a "good cause" showing, and an assessment by the Court that the best interest of the parties and the purposes of FATA have been served. **[BIC 25-26]**. These "new" requirements were included, according to Qui Tam Intervenors, to "prevent rubberstamp settlements with little or no discovery." **[BIC 26]**. Qui Tam Intervenors cite no authority or legislative history to support their contention that FATA should be interpreted any differently than the FCA. This is not surprising. There is no support for a different interpretation to be found.

To the contrary, as the New Mexico Supreme Court has recognized, FATA "tracks closely the longstanding federal False Claims Act." *State ex rel. Peterson v. Aramark Corr. Servs., LLC*, 2014-NMCA-036, ¶ 4, 321 P.3d 128 (citing *State ex rel. Foy v. Austin Capital Mgmt., Ltd.*, 2013-NMCA-043, ¶ 4, 297 P.3d 357); see also Joel M. Androphy, *Federal False Claims Act and Qui Tam Litigation* §14, at

14-2 (10th ed. 2011) ("Generally, the state False Claims Acts track the language of the federal FCA."). In the authoritative treatise *Federal False Claims Act and Qui Tam Litigation* (10th ed. 2011) (hereinafter "*Androphy*"), Joel Androphy sets forth the similarities and differences between the twenty-seven state false claims acts and the federal statute. In describing the similarities between the federal and state false claims statutes, Mr. Androphy specifically cites the section of New Mexico's FATA with respect to the state's authority to settle a lawsuit over a qui tam plaintiff's objections, noting that under both federal and state law, "[t]he state may settle a case if 'the court determines, after a hearing, that the proposed settlement is fair, adequate and reasonable under all the circumstances.'" *Androphy* at §14.04[5], at 14-2-22 (citing NMSA 1978, § 44-9-6(C) (2007)).

B. The District Court Afforded Qui Tam Intervenors an Evidentiary Hearing as Required Under FATA

While Qui Tam Intervenors' argument that FATA should be applied any differently than the FCA is incorrect, it is also a straw man, meant to distract the Court from one very important fact. Here, Qui Tam Intervenors received the very same evidentiary hearing they claim they are owed under the "heightened" or "extra" protections of FATA – and that hearing came after they were provided with extensive discovery.

Under the FCA, "[t]he Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court

determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." 31 U.S.C. § 3730(c)(2)(B). Similarly, FATA instructs that "[t]he state may settle the action with the defendant notwithstanding any objection by the qui tam plaintiff if the court determines, after a hearing providing the qui tam plaintiff an opportunity to present evidence, that the proposed settlement is fair, adequate and reasonable under all of the circumstances." § 44-9-6(C).

Qui Tam Intervenors were given just such an evidentiary hearing. The District Court held a two-day public hearing. During this hearing, NMSIC called Peter Frank, a member of the Litigation Committee, and Clifford Nichols, a Day Pitney attorney, as witnesses. (FOF **[25 RP 5660 ¶ 67]**). Additionally, each of the Settling Defendants testified and was made available for cross-examination by the Qui Tam Intervenors. (*Id.*). Counsel for NMSIC, the Settling Defendants and Qui Tam Intervenors made oral argument and presented documentary evidence. Qui Tam Intervenors attended this hearing and were provided a full and fair opportunity to question witnesses and present evidence. Thus, the District Court followed the requirements of ***both*** the FCA and FATA in approving the settlements.

Qui Tam Intervenors, however, attempt to obfuscate the fact that they were afforded an evidentiary hearing by positing that Judge Singleton somehow used the

wrong standard during the two-day evidentiary hearing. Qui Tam Intervenors rely on a discussion of FATA by District Judge Pfeffer [*see* **BIC 16**] in arguing that Judge Singleton applied the wrong FATA standard. [*See* **BIC 20**]. In reality, however, Judge Singleton applied the exact same standard as Judge Pfeffer because she held a hearing which provided the qui tam plaintiff an opportunity to present evidence. **[BIC 16]**. Judge Pfeffer had opined that "an evidentiary hearing is statutorily prescribed, presumably, to allow qui tam plaintiffs to test such facets as the adequacy of the efforts made to obtain discovery prior to making settlement decisions so that the propriety of that settlement can be legitimately assessed." **[BIC 17]**. Here, Judge Singleton afforded Qui Tam Intervenors just that opportunity.

Not satisfied at being provided the very opportunity they claim to have been denied, Qui Tam Intervenors complain about the mechanics of the hearing. **[BIC 22]**. For example, Qui Tam Intervenors complain that they were given "a little over 4 hours, timed by a watch," time which was taken up by "legal arguments, objections, authentication, etc.," which Qui Tam Intervenors claim are "the sort of issues that are usually eliminated by discovery." (*Id.*). But this complaint belies the flaws in argument. Qui Tam Intervenors freely admit that they were provided ***over four hours*** of time (out of a total hearing time of eleven hours) to present any evidence or argument they had regarding the inadequacy of any proposed

settlement, and they chose to present no fact evidence notwithstanding the discovery they received or their own alleged investigation into this case. **[11-25-2013 Tr. at 91:1-2]**. Obviously, this is a significant amount of time (the same amount of time that was allotted to NMSIC), and Judge Singleton provided Qui Tam Intervenors more than enough time to present their position.[4]

C. The District Court Properly Considered Federal Law in Making its Conclusions

Qui Tam Intervenors also contend that Judge Singleton committed "plain error" by citing to and following federal law in her determination that Qui Tam Intervenors were not entitled to full-blown discovery (i.e., full written and deposition discovery into the merits of the claims) and in rendering her Conclusions. **[BIC 24, 29]**. Qui Tam Intervenors apparently believe that those federal cases cited by the District Court "rubber-stamped settlements over the objections of a qui tam relator," whereas FATA was drafted specifically "to overrule those federal cases." **[BIC 24-25, 28-29]**. Qui Tam Intervenors, of course, cite nothing to support this reading of FATA.

Instead, Qui Tam Intervenors cite to *San Juan Agric. Water Users Ass'n. v. KNME-TV*, 2011-NMSC-011, 150 N.M. 64, 257 P.3d 884, for the proposition that

[4] Qui Tam Intervenors' claim that the District Court acted improperly by counting the time Qui Tam Intervenors used to read certain affidavits against their four-hour limit also is misleading – Qui Tam Intervenors fail to inform this Court that they were provided with most if not all of these affidavits days before the hearing. **[11-25-2013 Tr. at 71:20-23]**. Counsel's lack of preparation cannot be charged as an error by the District Court.

a court should not follow federal law when a federal statute differs from the state statute. **[BIC 35]**. In that case, however, the New Mexico Supreme Court declined to look to federal law interpreting the FOIA statute to aid in interpreting the New Mexico Inspection of Public Records Act (IPRA) because of significant substantive textual and legislative purpose differences between the two laws. *San Juan,* 2011-NMSC-011, ¶ 41. But here, as noted above, those differences do not exist – the FCA and FATA are completely congruous and in fact, FATA "closely tracks" the FCA. In any event, the issue in *San Juan* was whether an undisclosed principal has standing to enforce an IPRA request made by that principal's agent – a question that the New Mexico statute on its face answered differently than the federal FOIA statute. Thus, in *San Juan*, federal law clearly conflicted with New Mexico law. Here, on the other hand, the issue is whether a settlement is fair, adequate and reasonable, the same standard in both FATA and the FCA, and citation to federal law is simply to analyze the factors and considerations that are undertaken to determine if a settlement is fair, adequate and reasonable. Hence, Judge Singleton correctly applied FATA and should be affirmed.

III. This Court Should Affirm the District Court's Approval of the Settlements

Under New Mexico law, settlements are favored. *Bogle v. Potter*, 1961-NMSC-025, ¶ 21, 68 N.M. 239, 360 P.2d 650 ("[I]t is the policy of the law to favor compromise and settlement."); *see also Ratzlaff v. Seven Bar Flying Serv., Inc.*,

1982-NMCA-071, ¶ 21, 98 N.M. 159, 646 P.2d 586 ("[T]he policy of our law is to favor amicable settlement of claims without litigation when the agreements are fairly secured, are without fraud, misrepresentation, or overreaching, and when they are supported by consideration."). This policy extends to settlements in class actions. *See, e.g., Murken v. Solv-Ex Corp.*, 2006-NMCA-065, ¶ 8, 139 N.M. 633, 136 P.3d 1043. A FATA action is akin to a class action because the qui tam plaintiff is suing in a representative capacity. *See* § 44-9-5 ("A person may bring a civil action for a violation of Section 3 of the Fraud Against Taxpayers Act *on behalf of* the person and the state.") (emphasis added). In the context of class actions, the New Mexico Supreme Court has explained that the authority to approve a class action settlement is in the sound discretion of the district court, and deference is to be paid to the district court's judgment. *See Platte v. First Colony Life Ins. Co.*, 2008-NMSC-058, ¶ 7, 145 N.M. 77, 194 P.3d 108.

A. The Proposed Settlements Were Correctly Approved

Judge Singleton used the appropriate standard in determining that the proposed settlements were fair, adequate and reasonable under a balancing of relevant factors. *See Androphy* at §13.01. The common factors employed to make this determination are borrowed from the class action context[5] and include: 1) the

[5] The factors considered by New Mexico courts in determining whether a class action settlement is fair, adequate and reasonable are the same as those used in the federal context. *See Rivera-Platte v. First Colony Life Ins. Co.*, 2007-NMCA-158, ¶ 42, 143 N.M. 158, 173 P.3d 765. Thus, as with FATA, New Mexico is in alignment with federal law and there is no reason to think that

complexity, expense and likely duration of the litigation, 2) the reaction of the stakeholders to the settlement, 3) the stage of the proceedings and the amount of discovery completed, 4) risks of establishing liability, 5) risks of establishing damages, 6) ability of defendants to withstand a greater judgment, 7) the range of reasonableness of the settlement in light of the best possible recovery, 8) the range of reasonableness of the settlement fund in light of the attendant risks of litigation. *See* COL **[25 RP 5669-70 ¶ 16]**; *U.S. ex rel. Resnick v. Weill Med. Coll. of Cornell Univ.*, 2009 WL 637137, at *5 (S.D.N.Y. Mar. 5, 2009); *U.S. ex rel. Nudelman v. Int'l Rehab. Assocs., Inc.*, 2006 WL 925035, at *43 (E.D. Pa. Apr. 4, 2006); *U.S. ex rel. Schweizer v. Océ N. Am.*, 2013 WL 3776260, at *8 (D.D.C. Jul. 19, 2013). At the November 25-26, 2013 hearing, the District Court noted additional factors that would be considered, namely, whether the settlements were the result of arm's-length negotiations and the opinion of counsel. **[11-25-2013 Tr. at 9:17-23]**. Not every factor needs to be proven or weigh in favor of approving the proposed settlement for the settlement to be adjudicated fair, adequate and reasonable. *See* COL **[25 RP 5671 ¶ 18]**; *see also Resnick*, 2009 WL 637137 at *5.

The District Court also correctly noted that the decision to approve a settlement over a qui tam plaintiff's objection is not a decision on the merits, but

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New Mexico should apply a wholly different standard to approving proposed settlements under FATA.

rather the evidentiary hearing is meant to force the government to present the rationale for its decision to settle and to provide the qui tam plaintiff an opportunity to bring issues of collusion or discrepancies between the strength of the case and the proposed settlement to the court's attention. (*See* COL **[25 RP 5671 ¶ 19]**). It is this premise that Qui Tam Intervenors never accepted in demanding a right to try the case on its merits – a position that would effectively preclude settlements and which has no basis in law under FATA or the FCA.

1. The Complexity, Expense and Likely Duration of the Litigation Favors Settlement

The District Court found that this case has had a "long and protracted history of legal wrangling" in the four years it has been pending, and will likely take many more years to complete given the complexity of the issues and the number of defendants. *See Nudelman*, 2006 WL 925035 at *14 (case pending for six years "has already had a long and protracted history of legal wrangling...is a complex and expensive one that could conceivably take several more years and many more dollars in legal fees to resolve."). Significant additional discovery, depositions and motion practice remain to be completed in order to prepare the case for trial, which would be time consuming and expensive for all parties. *See Resnick*, 2009 WL 637137 at *2. As the District Court said, the reason the court endorsed an "early settlement phase" was to provide time for the parties to determine if they could settle and avoid the expense of litigation, particularly as it relates to discovery.

(COL [25 RP 5672 ¶ 21]). Additionally, the District Court correctly found that settling with some of the defendants would make the remaining litigation more streamlined and less complex and expensive for the remaining parties. (*Id.*). Qui Tam Intervenors introduced no fact evidence to call this Finding into question.

2. In this Case, the Reaction of the Qui Tam Intervenors to the Settlement Should Not be a Factor Considered by the Court

The District Court correctly found that this factor is not decisive because, while the objection by the Qui Tam Intervenors was the reason for the hearing, it alone cannot control the determination of whether the settlements are fair, adequate and reasonable. (*See* COL [25 RP 5672-73 ¶ 22]). In order for the reaction of the Qui Tam Intervenors to be a factor, the Qui Tam Intervenors must articulate a basis for their objections supported by evidence such that the District Court could have evaluated whether those objections were supported by the record. *See id.; see also Nudelman*, 2006 WL 925035 at *14 (rejecting relator's objection because "[i]n short, we cannot and do not draw the same conclusions from the evidence before us that the Relator does."). This is what Qui Tam Intervenors studiously failed to do. Indeed, Qui Tam Intervenors repeatedly represented to the District Court that they had evidence supporting their objections, but then chose to introduce no such evidence at the hearing. (*See* COL [25 RP 5672 ¶ 22]). Thus, as the District Court

found, this factor is of "little relevancy" in determining whether to approve the settlements. (*Id.*).

3. The Stage of the Proceedings Favors Settlement

Because NMSIC is statutorily granted the authority to make settlements, it is not required to complete all discovery or try all cases to conclusion. Rather, the inquiry is whether NMSIC had "sufficient information, through adequate discovery, to reasonably assess the risks of litigation vis-à-vis the probability of success and range of recovery." *See Schweizer*, 2013 WL 3776260 at *13 (finding the government had "adequate information to make an informed judgment regarding the settlement" after conducting an "extensive investigation" including "extensive document review" and interviews with a variety of witnesses).

Here, Day Pitney undertook an extensive investigation into the facts of this case, including the review of 2,699,759 pages of documents from the SEC, 15,000 pages of documents from DECP and Rosen, 130,000 pages of documents from third-parties, desktop or laptop data from 22 NMSIC employees, 70,000 paper documents from NMSIC, complete images of NMSIC file and e-mail servers, 68 server backup tapes, complete copies of server folders used by NMSIC employees to store investment-related documents through December 2010, updated e-mail files for NMISC employees through December 2010, server home directories for 22 NMSIC employees, e-mail files for e-mail addresses used by the NMSIC

investment groups, and audio recordings of NMISC and subcommittees. (FOF **[25 RP 5646-47 ¶¶ 31-35]**). Additionally, Day Pitney conducted interviews with over 23 individuals. (FOF **[25 RP 5646 ¶ 33]**). It was on the basis of this investigative effort that NMSIC concluded that the proposed settlements were fair, adequate and reasonable. Moreover, as to Rosen, counsel for NMSIC admitted that its investigation uncovered no evidence to support liability as against Rosen or DECP. **[11-26-2013 Tr. at 32:11-33:7]**.

Having had access to this discovery information, Qui Tam Intervenors offered no evidence to show that relevant evidence of improper activity or culpable conduct was overlooked as to Rosen or DECP. The District Court thus correctly concluded that NMSIC "conducted sufficient discovery and investigation" to evaluate the merits of the parties' respective positions, the risks of litigation and the range of possible recovery. (COL **[25 RP 5673-74 ¶ 23]**).

4. The Risks of Establishing Liability Weigh in Favor of Settlement

The risks of establishing liability under FATA, the common law, or under a conspiracy theory of liability are substantial and weigh in favor of approving the settlement. As the District Court said, "there is a real risk that Intervenors would be unable to establish liability under FATA against the Settling Defendants." (COL **[25 RP 5675 ¶ 28]**). Indeed, Qui Tam Intervenors have resorted to espousing a theory of liability under which defendants and a large group of

unnamed individuals and entities are part of a nationwide conspiracy and are, therefore, jointly and severally liable for all investment losses suffered by NMSIC. (*See id.*). Once again, however, Qui Tam Intervenors failed to present any evidence to support this conjecture. (*See id.*). Qui Tam Intervenors also failed to identify any FATA claim against DECP or Rosen (and hence, there would be no basis for treble or other damages). For example, no evidence was submitted showing that DECP or Rosen knowingly made false claims in connection with the three investments by DECP's client funds. Nor was any evidence submitted linking DECP or Rosen to any corruption, nor is there evidence showing that the three investments were tainted in any way. As such, no basis exists for an unjust enrichment claim, nor was any evidence submitted showing that Marc Correra – a target of NMSIC's investigation – was paid by or at the direction of DECP or Rosen in connection with any investment related to DECP. (*See* COL **[25 RP 5676 ¶ 31]**). Furthermore, the fee payments received by DECP (and, indirectly, Rosen) were from the client funds themselves, not from the State of New Mexico, further undermining any unjust enrichment claim on behalf of the State. Qui Tam Intervenors offered no evidence to rebut any of this.

In addition, no evidence was presented at the hearing to support any of the elements required to find a conspiracy between the defendants. (COL **[25 RP 5678 ¶ 34]**). Under New Mexico law, the elements for civil conspiracy are: 1) a

conspiracy between two or more individuals existed; 2) specific wrongful acts were carried out by the defendants pursuant to the conspiracy; and 3) the plaintiff was damaged as a result of such acts. *Ettenson v. Burke*, 2001-NMCA-003, ¶ 12, 130 N.M. 67, 17 P.3d 440. A civil conspiracy is defined as "a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means." *Las Luminarias of the N.M. Council of the Blind v. Isengard*, 1978-NMCA-117, ¶ 5, 92 N.M. 297, 587 P.2d 444. To find a conspiracy, New Mexico courts require an agreement between the alleged conspiring defendants. *Sante Fe Techs. v. Argus Networks*, 2002-NMCA-030, ¶ 43, 131 N.M. 772, 42 P.3d 1221 ("Civil conspiracy is an agreement to accomplish an unlawful purpose or a lawful purpose by unlawful means."). Qui Tam Intervenors presented no evidence to show any agreement between DECP or Rosen and other defendants, or concerted action involving DECP or Rosen, and thus there is no basis for the civil conspiracy claim.

5. The Risks of Establishing Damages Weighs in Favor of Settlement

The damages in this case would be difficult to calculate and prove, and as the District Court recognized, complexity of establishing damages favors settlement. (COL **[25 RP 5678-79 ¶ 35]**). Not only are investments of the type at issue complex to value, but NMSIC has admitted that, to date, it has realized a net gain on the three investments connected to DECP and Rosen.

The "traditional measure of damages in a false claims act case is the difference between the market value of what the government was promised and what it actually received." *Nudelman*, 2006 WL 925035 at *17. As the district court found, no evidence was presented by the Qui Tam Intervenors to show losses because some of the investments have made gains for NMSIC. (COL **[25 RP 5678 ¶ 35]**). Furthermore, NMSIC is still invested in two of the three client funds and thus there are no final gains or losses on those investments. Qui Tam Intervenors also made no attempt to present evidence to show that the investments were worthless or bad investments – because in fact their performance suggests just the opposite. *See Nudelman*, 2006 WL 925035 at *16 (finding high risk of establishing damages where "the services in this matter cannot be said to be completely worthless").

6. Ability to Withstand a Greater Judgment Was Not Raised as an Issue by Defendant Rosen

Qui Tam Intervenors take issue with the settlement for the sole reason that Rosen recently bought a new apartment in New York City. **[BIC 33]**. Yet, Rosen never claimed ability to pay as an issue in the District Court, so Qui Tam Intervenors' argument is factually and legally irrelevant.

7. The Range of Reasonableness of the Settlement in Light of the Best Possible Recovery Weighs in Favor of Settlement

NMSIC has thus far realized a net gain on the three client fund investments relating to DECP and Rosen, and FATA does not permit recovery if the State has not suffered a loss. As such, the best possible FATA recovery is zero. As to the unjust enrichment claim, no recovery is possible, as Rosen and DECP were paid by the client funds, not by the Plaintiff or the State of New Mexico. In any event, NMSIC presented evidence that the best theoretically possible recovery as against Defendant Rosen is $1,234,276, the amount in fees that DECP received from the client funds on all three investments. (*See* COL **[25 RP 5680 ¶ 38]**). Qui Tam Intervenors contended that the best possible recovery is in excess of $300,000,000, but again offered no legal or factual basis for that claim. The District Court determined that NMSIC's estimation was the proper basis on which to analyze this factor because the lower estimation was "more realistic." (COL **[25 RP 5680-81 ¶ 39]**). Using NMSIC's figure, the settlement amount with Defendant Rosen represents 24% of the best possible recovery, which is a reasonable settlement amount. *Id.; see also Nudelman*, 2006 WL 925035 at *17 (settlement of $3.5 million was reasonable when best possible recovery was $10 million). Qui Tam Intervenors have not offered any real evidence to explain why this amount is unreasonable.

8. The Range of Reasonableness of the Settlement in Light of the Attendant Risks of Litigation Weighs in Favor of Settlement

This factor did not require the District Court to make a complete assessment of the merits of the Qui Tam Intervenors' claims or NMSIC's assessment of those claims. *See Schweizer*, 2013 WL 3776260 at *13. Rather, the District Court could find this factor in favor of the proposed settlement by finding that NMSIC evaluated the strengths of Qui Tam Intervenors' claims and the attendant litigation risks based on significant investigative effort, and that Qui Tam Intervenors offered no evidence or otherwise identified any flaws in that reasoning. The District Court thus correctly reached that conclusion. (COL **[25 RP 5681 ¶ 40]**).

9. Deference to Arm's-Length Negotiation Between Experienced Counsel Weighs in Favor of Settlement

A settlement that is the product of arm's-length negotiations by experienced counsel following meaningful discovery "will enjoy a presumption of fairness." *Resnick*, 2009 WL 637137 at *2; *accord Schweizer*, 2013 WL 3776260 at *12. As the District Court noted, Qui Tam Intervenors failed to put forth any evidence of collusion between counsel for NMSIC and DECP or Rosen, and thus have failed to rebut this presumption. (COL **[25 RP 5671-72 ¶ 20]**); *see Schweizer*, 2013 WL 3776260 at *12. Judge Singleton expressly rejected Qui Tam Intervenors' arguments that Day Pitney is conflicted because it is a securities defense firm and that the New Mexico Attorney General's Office is conflicted because of a

relationship between Attorney General Gary King and former ERB chairman, Bruce Malott, finding both allegations to be without merit. (COL **[25 RP 5671-72 ¶ 20]**). Instead, the District Court rightly found that the arm's-length negotiation favored approval of the settlement. (*See id.*).

10. Deference to the State's Overall Enforcement Plan Weights in Favor of Settlement

The District Court found that the Government remains the real party in interest in this action. (COL **[25 RP 5681-82 ¶ 42]**). Judge Singleton thus found that deference should be given to decisions that might impact the Government's enforcement plan. (COL **[25 RP 5682 ¶ 43]**); *Resnick*, 2009 WL 637137 at *3. Here, NMSIC explained its enforcement plan in open court, and that the Settling Defendants have and will continue to play a role in effecting that plan through their cooperation and agreement to provide testimony. Judge Singleton recognized that this cooperation is an "integral element" in NMSIC's enforcement plan. (COL **[25 RP 5674 ¶ 26]**). Qui Tam Intervenors provided nothing to refute the arguments of NMSIC that the Settling Defendants' cooperation would be an important component of its overall enforcement plan and a factor that weighed in favor of approval of the settlement. (COL **[25 RP 5674 ¶ 26]**). In addition, NMSIC here has been advised by experienced counsel. As set forth in *Schweizer*, "the opinion of experienced counsel should be afforded substantial consideration by a court in

evaluating the reasonableness of a proposed settlement." 2013 WL 3776260 at *13 (citations omitted).

IV. Qui Tam Intervenors Were Provided With the Discovery They Claim to Have Been Denied

The most remarkable of all of Qui Tam Intervenors' claims is that the District Court "refused to allow discovery" **[BIC 11, 39]** and "prohibit[ed]" them from discovery into the relevant facts on which to judge the proposed settlements. **[BIC 11, 37]**. Tellingly, by way of footnote, Qui Tam Intervenors admit that they were the beneficiary of significant discovery. **[BIC 38, n. 2]**. Indeed, "millions of pages" of documents were provided to Qui Tam Intervenors, including 15,000 pages from Defendant Rosen and DECP. (*Id.; see also* FOF **[25 RP 5662 ¶ 73]**).[6] Although Qui Tam Intervenors complain about that production of documents in their Brief, they chose not to use a single document in the evidentiary hearing.

Qui Tam Intervenors complain that the informal discovery undertaken in the action was insufficient. **[BIC 12]**. This argument is meritless. As this Court has noted, when settlements are reached prior to external discovery, settlements may be still approved if there has been sufficient informal discovery to evaluate the merits of the parties' positions during settlement negotiations. *See Rivera-Platte v.*

[6] Curiously, Qui Tam Intervenors cannot make up their minds about how they view the documents provided to them, on the one hand labelling the production of millions of documents a "document dump" **[BIC 38, n.2]** and on the other hand bemoaning the so-called "selective disclosures" produced during discovery. **[BIC 12]**. Either way, discovery was provided and it was Qui Tam Intervenors' responsibility to review it and use it, or to present other facts.

First Colony Life Ins. Co., 2007-NMCA-158, ¶ 49, 143 N.M. 158, 173 P.3d 765. In *Rivera-Platte*, there had been no depositions or written discovery responses exchanged. *See id.* ¶ 48. There, in order to avoid the expense and time of formal discovery, the parties used a third-party to gather and assess the information relevant to negotiating the settlement. *Id.* ¶¶ 50-51. The Court of Appeals explained that informal discovery is desirable because settlements reduce litigation costs, and found that there was sufficient evidence to support the district court's finding that this factor weighed in favor of settlement. *Id.* ¶ 51.

Although Qui Tam Intervenors, like the appellants in *Rivera-Platte*, contend that they were denied discovery on the measure of damages **[BIC 31]**, Qui Tam Intervenors were never entitled to conduct or complete full-blown discovery on the merits prior to proposed settlement approval, as Judge Singleton rightly concluded. (COL **[25 RP 5664-65 ¶ 5]**). This is because FATA expressly provides for settlement which presumes resolution of claims *prior to* full discovery and/or trial of the merits of a potential claim. No court has held that qui tam plaintiffs objecting to a proposed settlement are entitled to full-blown discovery in order to test whether the settlement is inadequate. Indeed, courts have held that qui tam plaintiffs are not so entitled. *See Schweizer*, 2013 WL 3776260 at *9 ("[A]llowing 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."). Instead, as Judge Singleton noted, the extent of discovery appropriate in connection with a settlement approval hearing is limited to whether the settlement is fair, adequate and reasonable. *See* COL **[25 RP 5664 ¶ 5]**; *U.S. ex rel. McCoy v. Cal. Medical Review, Inc.*, 133 F.R.D. 143, 149 (N.D. Cal. 1990) (right to limited discovery regarding the fairness of the proposed settlement); *Nudelman*, 2004 WL 1091032 at *1, n.1 (qui tam plaintiff allowed a "reasonable amount" of discovery when government and defendants only offered general averments that settlement was fair).

Here, as recognized by Judge Singleton in her Findings, NMSIC proposed an early settlement phase of discovery which would be limited to that which was essential for settlement discussions. (COL **[25 RP 5645 ¶ 29]**). Qui Tam Intervenors served "overly broad and extremely burdensome discovery requests on the defendants" which the District Court found to be "inconsistent with this Court's intention to allow the parties an opportunity to settle the case before incurring substantial discovery costs" (*id.*), the same consideration used by this Court in *Rivera-Platte*. Judge Singleton did, however, allow Qui Tam Intervenors discovery relating to the settlement discussions. (*Id.*). In fact, as Judge Singleton found, Qui Tam Intervenors were provided "millions of pages of documents and responses to discovery" by the Plaintiff and 15,000 pages of documents from Defendant Rosen. (FOF **[25 RP 5662 ¶ 73]**). This, Judge Singleton rightly and

reasonably held, was "sufficient discovery to evaluate the proposed settlements." (*Id.*). Despite the voluminous materials produced to them, Qui Tam Intervenors offered no evidence at the hearing to call into question the settlement analysis or amount as to Rosen or DECP.[7] Qui Tam Intervenors cannot now turn their litigation decision to present no evidence into an error by the District Court.

Day Pitney was engaged in a multiple year-long informal discovery process and used that information to base the settlement negotiation. (FOF **[25 RP 5645 ¶ 30]**). The evidence submitted at the evidentiary hearing demonstrated the extent of the considerable investigative effort undertaken by Day Pitney. For example, Clifford Nichols, Senior Counsel at Day Pitney LLP and appointed Special Assistant Attorney General, has devoted 3,000 hours to work on behalf of NMSIC since March 2010. (Nichols Aff. **[24 RP 5325 ¶ 5]**).

V. The Pendency of the *Austin* Action Does Not Prevent the District Court From Approving the Settlements

Qui Tam Intervenors argue that the settlements "sneak[ily]" included a release of the FATA claims against the Settling Defendants in *Austin*, another qui tam case that is not before Judge Singleton. **[BIC 13-14]**. Qui Tam Intervenors go so far as to contend that "Judge Singleton tried the *Austin* case *in absentia*." **[BIC 23]**. Qui Tam Intervenors yet again argue against a straw man.

[7] Thus, Qui Tam Intervenors' argument that because they were denied the right to discovery – which is false – their right to present evidence was therefore rendered meaningless **[BIC 11-12]** is a red herring. Qui Tam Intervenors were provided with extensive discovery and were provided repeated opportunities by the District Court to present evidence at the hearing.

Judge Singleton never asserted jurisdiction over the *Austin* case. Rather, Judge Singleton found that the pendency of the *Austin* action did not deprive her of the authority to approve the proposed settlements in a case pending in her court. (COL **[25 RP 5682 ¶ 45]**). Judge Singleton explicitly left it up to the *Austin* court to determine the preclusive effect the District Court's approval of the settlements might have with respect to Qui Tam Intervenors' claims in that other action. (COL **[25 RP 5683 ¶ 47]**). In fact, Judge Singleton acknowledged the possibility that the *Austin* court might not find the settlement release sufficient – in which case, the severability provision in the settlement agreements would go into effect in order to preserve the finality of the settlement and dismissal in the instant case. (COL **[25 RP 5683-84 ¶ 49]**). Thus, Qui Tam Intervenors' claims that Judge Singleton wrongly usurped jurisdiction over the *Austin* action totally ignores the actual substance of Judge Singleton's Findings and Conclusions.[8]

As important, the *Austin* complaint does not include allegations against Rosen or DECP in connection with NMSIC, resting only on claims with respect to an alleged investment by the New Mexico Education Retirement Board ("ERB"). The *Austin* complaint contains only two sentences relating to Rosen and DECP: (i)

[8] At the evidentiary hearing, all the parties agreed that the preclusive effect of Judge Singleton's ruling as to the fairness, adequacy and reasonableness of the proposed settlements would be an issue for the *Austin* court to decide. Nothing in Judge Singleton's Conclusions changes that fact. Furthermore, no effort has been made to give Judge Singleton's ruling preclusive effect in the *Austin* action, and thus, that issue is not properly before this Court. Qui Tam Intervenors' attempt to seek an advisory opinion on that issue must be rejected.

that an investment fund named Psilos paid or arranged kickbacks through DECP and Rosen; and (ii) that DECP and Rosen have close connections with New York pension officials. No evidence in support of either allegation is stated in the *Austin* complaint, nor was any evidence put forward by Qui Tam Intervenors in this proceeding. Qui Tam Intervenors also have offered no evidence showing that DECP or Rosen acted as a placement agent relating to the ERB, nor that DECP or Rosen ever marketed Psilos to the ERB. As such, Qui Tam Intervenors have shown no link between this case and *Austin*.

VI. The Settlement Process Did Not Violate the Open Meetings Act or the Inspection of Public Records Act

Qui Tam Intervenors also take issue with Judge Singleton's Findings and Conclusions because, in their view, the proposed settlements were approved by a "secret subcommittee" in violation of the Open Meetings Act and the Inspection of Public Records Act. **[BIC 20-21, 41-48]**. Qui Tam Intervenors ignore the extensive Findings made by Judge Singleton in concluding that the proposed settlements did not fun afoul of the Open Meetings Act or IPRA. (FOF **[25 RP 5647 ¶ 36; 25 RP 5652-53 ¶¶ 46-48]**; COL **[25 RP 5663-65 ¶¶ 2-5]**). They also ignore the fact that after many promises to present evidence against the settlements, Qui Tam Intervenors chose to offer nothing at an open public hearing on the settlements. Thus, Qui Tam Intervenors have offered no evidence to support the conclusion that Judge Singleton's Findings were not supported by

substantial evidence, and Judge Singleton's Conclusions based on those Findings should not be disturbed.

CONCLUSION

For the reasons set forth above the Findings and Conclusions and the Order of Dismissal of the District Court should be affirmed.

Dated: May 20, 2015
Santa Fe, New Mexico

Respectfully submitted,

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