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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
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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. 33787

DEFENDANTS-APPELLEES DANIEL WEINSTEIN'S AND VICKY SCHIFF'S ANSWER BRIEF

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STATEMENT OF FACTS AND PROCEEDINGS

Defendants-Appellees Dan Weinstein and Vicky Schiff ("Weinstein and Schiff"), by and through their 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.

In sum, the District Court properly determined that Weinstein's and Schiff's settlement with NMSIC was fair, adequate and reasonable. The District Court's, Findings and Conclusions should be affirmed.

In July 2012, NMSIC filed a Third Amended Complaint in this action. **[13 RP 2829-75].** The complaint alleges that Weinstein and Schiff 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, 2851-54 ¶¶ 5, 106-112**; *see also* FOF **[25**

RP 5637-49 ¶¶ 7-15]). The complaint further alleges that Weinstein and Schiff were unjustly enriched in connection with these investments made by NMSIC. (FOF **[25 RP 5649 ¶ 40]**).

During the relevant time periods, Weinstein and Schiff were principals of two now defunct firms, Wetherly Capital Group, LLC, a placement agent firm, and DAV-Wetherly Financial, LP ("Wetherly"), a broker dealer firm. Wetherly specialized in raising capital from public pension funds, endowments, foundations and Taft Harley union funds throughout the United States. (Weinstein Aff. **[23 RP 5280, ¶¶ 8, 9, 10]**; [11-25-2013 Tr. at 105-106]; *see also* FOF **[25 RP 5637 ¶ 5; 25 RP 5649 ¶ 42]**). Wetherly acted as a placement firm 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. (Schiff Aff. **[23 RP 5274 ¶ 21]**;[11-25-2013 Tr. at 102, 104] *see also* FOF **[25 RP 5637]**).

Wetherly was paid placement fees by the client funds under contracts it had with those client funds. Wetherly was paid approximately $2,388,125 in fees in connection with investments by NMSIC in eight Wetherly client funds. (Schiff Aff. **[23 RP 5274¶ 21]; [23 RP 5277-Ex. A]**; *see also* FOF **[25 RP 5649 ¶42]**). From these fees, Wetherly in turn paid Marc Correra, its sub-agent, $676, 250. FOF **[25 RP 5649 ¶42]**. After Wetherly paid overhead, administrative, employee expenses and payments to outside partners, of these fees, Schiff, as a principal in

Wetherly, received approximately $27,960 that Wetherly earned from the placement fees earned from the eight investments. Schiff Aff. **[23 RP 5274-75¶¶ 21, 22, 23].** She received no commissions for placement of these investments. **[NMSIC Pre-Hearing Brief 23 RP 5234 ¶14]** Similarly, Weinstein received approximately $41,941.20 that Wetherly earned from these placement fees, along with commissions of $106,813. Schiff Aff. **[23 RP 5274-75 ¶¶ 21, 22, 23.]**

NMSIC reported that it has experienced a net gain of $67,848,563 on the eight Wetherly investments made by NMSIC. **[NMSIC Pre-Hearing Brief 23 RP 5235 ¶¶ 23]; NMSIC's Response to Intervenors' Oral Discovery Request 24 RP 5407-10]**.

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 Weinstein and Schiff and the other Settling Defendants. (*See* FOF **[25 RP 5645 ¶ 30]**). Schiff and Weinstein had their counsel provide Day Pitney with copies of all the documents that were produced to enforcement and regulatory authorities investigating pay-to-play allegations. Schiff Aff. **[23 RP 5273 ¶ 18]** (Weinstein Aff. **[23 RP 5289 ¶58].** 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 email addresses used by the NMSIC investment groups, over 2.7 million pages of paper documents, and audio recordings of NMSIC and subcommittees. (Nichols Aff. **[24 RP 5326-27 ¶¶ 10-14, 18]**; *see also* FOF **[25 RP 5647 ¶ 35]**).

All this information then was produced to Qui Tam Intervenors well before the settlement approval hearing. *(See* FOF **[25 RP 5662 ¶ 73]**). This ensured that Qui Tam Intervenors received the results of NMSIC's document collection. The Qui Tam Intervenors acknowledged that they received that discovery at a December 21, 2012 hearing with the District Court. **[12-21-2012 Tr. at 10:6-18]**.

The District Court had approved informal discovery as part of an "early settlement phase." *(See* FOF **[25 RP 5645 ¶ 29]**). In addition to discovery and document investigation, Day Pitney conducted interviews with more than a dozen NMSIC employees, along with Defendants Weinstein and Schiff, Rosen, 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]**). Weinstein and Schiff and their counsel met with two attorneys for NMSIC in July 2011. (Schiff Aff. **[23 RP 5273 ¶ 19]**;

(Weinstein Aff. [23 RP 5289¶**59]**; *see also* FOF **[25 RP 5646, 5648 ¶¶ 33, 39]**). Weinstein and Schiff answered questions posed by Day Pitney in interviews FOF **[25 RP 5646 ¶ 33]; [25 RP 5648 ¶ 39]**). The information they provided was, to the best of their knowledge and belief, true and accurate. (FOF **[25 RP 5654 ¶ 52]**). Weinstein and Schiff agreed to provide continuing cooperation and truthful testimony at depositions and trials as part of the settlement. (FOF **[25 RP 5648 ¶ 39]**).

NMSIC's Settlement with Weinstein and Schiff

Day Pitney negotiated a settlement with counsel for Weinstein and Schiff, 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, Weinstein and Schiff agreed to, and did pay, $100,000 with respect to all claims against them (FOF **[25 RP 5654 ¶ 50]**). Weinstein decided to settle with NMSIC because of the cost of litigation which he could not afford. **(See 11-25-2013 Tr. at TR-102).** Schiff decided to settle with NMSIC because the protracted litigation would wipe her out financially and professionally. **(See 11-25-2013 Tr. at TR-170-171].**

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 telephone conference on November 30, 2012, during which the recommendation for approval of the settlement agreement with Weinstein and Schiff was discussed along with 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 their cooperation and agreement to provide truthful testimony, and the risk that they would be unable to withstand a greater judgment. (Frank Aff. **[24 RP 5331-32 ¶ 7]**; *see also* FOF **[25 RP 5652-53 ¶ 47]**). 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's Consideration and Approval of the Settlements

In April 2013, NMSIC moved the District Court to dismiss the claims against Weinstein and Schiff and to approve a proposed settlement. (Motion for Voluntary Dismissal of Defendants Weinstein and Schiff, filed Apr. 18, 2013 **[18 RP 4148-49]**; **[19 RP 4151-55]**; *see also* FOF **[25 RP 5656 ¶ 58]**). Qui Tam Intervenors filed only procedural objections but did not challenge the fairness, adequacy and reasonableness of 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. (FOF **[25 RP 5656 ¶ 59]**). Qui Tam Intervenors challenged the fairness, adequacy and reasonableness of the settlements for the first time 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. Weinstein and Schiff appeared at the hearing via video conference link, and were cross-examined by Qui Tam Intervenors. (*See* **11-25-2013 Tr. at 102-148; Tr. at 160 -169**)[1]; *see also* FOF **[25 RP 5660 ¶ 67]**). 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 of NMSIC's investigation of the claims against the Settling Defendants, Qui Tam Intervenors' receipt of discovery from NMSIC, the testimony of the Settling Defendants, and a consideration of all the factors supporting the approval of the settlements under the applicable law.

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[1] Weinstein and Schiff reaffirmed the testimony in their respective affidavits in open court at the evidentiary hearing. [11-25-2013 Tr. At 94, 95, 153].

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.]

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 outlined hereafter, Qui Tam Intervenors present no credible argument that the Findings and Conclusions of the District Court are "clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." *Id.* ¶ 65. Consequently, Judge Singleton's decision should be affirmed.

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

The Answer Brief filed by Rosen on May 20, 2015 outlines FATA's legislative history and demonstrates that the District Court applied the correct standard. Rosen's Answer brief further outlines how the District Court conducted the evidentiary hearing, affording the Qui Tam Intervenors a full and fair opportunity to present evidence that complied with FATA. Further, Rosen's Answer brief summarizes how the District Court properly considered Federal law and employing the appropriate standard in determining that the settlements were fair, adequate and reasonable under a balancing of the relevant factors. Rather than repeat what has already been stated in Rosen's Answer brief, Weinstein and Schiff, incorporate by reference and adopt Rosen's argument, points and authorities. (*See* Rosen's Answer Brief, Argument, Point II.pgs 11-15).

However, some additional matters ought to be brought to the attention of the Court. The Qui Tam Intervenors mock the District Court's evidentiary hearing held on November 25 and 26, 2013. They boldly assert:

***The purported "evidentiary hearing"**. The court allowed qui tam plaintiffs a little over 4 hours, timed by watch. Much of the time was consumed by legal arguments, objections, authentication, etc., the sort of issues that are usually eliminated by discovery. At the hearing, the AG and defendants presented affidavits which neither the court nor qui tam counsel had seen before. When qui tam counsel asked for time to read the unseen affidavits, the court ruled that taking time to read them would count against qui tam's time limit. (BIC pg. 22)*

The assertion is misleading and inaccurate in several respects. On November 8, 2013, NMSIC disclosed to the Qui Tam Intervenors, and filed with the court, the names of witnesses and detailed summaries of their expected testimony, including Weinstein and Schiff. **[23 RP 5211-16]**. On November 8, 2013, Weinstein and Schiff disclosed to the Qui Tam Intervenors their exhibits, namely financial information, all of which were utilized at the hearing **[23 RP 5217].** The affidavits, including Weinstein's and Schiff's, which the Qui Tam Intervenors claim they did not see until the hearing where actually filed with the Court and served on the Qui Tam Intervenors on November 22, 2013. **[23 RP 5217].** There was no surprise.

In sum, the Qui Tam Intervenors had ample, prior notice of the evidence that was presented at the hearing and could have prepared accordingly.

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

Under New Mexico law, public policy favors settlement of cases. *Hovet v. Lujan,* 2003–NMCA–061, ¶ 12, 133 N.M. 611, 66 P.3d 980. *See also 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. In addition, "due deference" is given to the factual findings of the district court. [Id.]

A. <u>The Proposed Settlements Were Correctly Approved</u>

The District Court used the appropriate standard in determining that the proposed settlements were fair, adequate, and reasonable under a balancing of relevant factors. The common factors employed to make this determination are

borrowed from the class action context[2] and include: 1) the 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. Call. 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. Oce 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.

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[2] 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, -U 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 New Mexico should apply a wholly different standard to approving proposed settlements under FATA.

The District Court also noted that limited purpose of the hearing required by Section 44-9-6(C) for considering a settlement over a qui tam plaintiff's objection is not a decision on the merits, but the following:

> *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 or discrepancies between the government and the defendant or significant and unexplained discrepencies between the strength of the case and the settlement. See Schweizer*, 2013 WL 3776260". *(See* COL **[25 *RP* 5671 ¶ 19]).**

With these factors in mind, the District Court correctly found that the settlement were fair, adequate, and reasonable.

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

The District Court found that this case is "complex, expensive and likely to continue for years". (COL **[25 RP 5672 ¶ 21)**. The District Court noted that it would not have "endorsed the concept of an early settlement phase if the litigation were likely to be simple, inexpensive and easily concluded. [Id.] The District Court wisely noted that the intent behind phased discovery was to "enable people to determine whether they could settle without investing a lot of money in the litigation process, in particular, in discovery." [Id.] The District Court also 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 dispute this finding.

2. In this Case, the Reaction of the Qui Tam Intervenors to the Settlement Was Properly Not 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. Qui Tam Intervenors failed to articulate any basis to their objections and did not present evidence supporting their objections. (*See* COL **[25 RP 5672 ¶ 22]**). Thus, as the District Court found, this factor is of "little relevancy since the objections of Qui Tam Intervenors were and remain unexplained and unsubstantiated" in determining whether to approve the settlements. (*See* COL **[25 RP 5672-73 ¶ 22]**).

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-a-vis the probability of success and range of recovery." *See Schweizer,* 2013 WL 3776260 at *13.

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, 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 NMSIC employees through December 2010, server home directories for 22 NMSIC employees, e-mail files from e-mail addresses used by the NMSIC investment groups, and audio recordings of NMSIC 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.

Having had access to this information, Qui Tam Intervenors offered no evidence to show that relevant evidence of improper activity or culpable conduct was ignored or overlooked with respect to Weinstein and Schiff. 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]**). The District Court noted that the Qui Tam Intervenors' theory is that "[A]ll defendants and many more unnamed individuals and entities are part of a nationwide conspiracy and are, therefore, jointly and severally liable for all investment losses suffered by NMSIC on any investment tainted by pay-to-play." *(See id.)*. Qui Tam Intervenors failed to present any evidence to support this speculation. *(See id.)*.

As against Weinstein and Schiff, the District Court noted that if the NMSIC were to proceed against them, the claim would be that "they were unjustly enriched to the extent of any benefit they received in connection with certain investments on which Wetherly paid commissions" to Julio Ramirez ("Ramirez") or split placement agent fees with Marc Correra ("Correra"). The District Court observed that establishing liability would require proof that Weinstein and Schiff "knowingly rendered substantial assistance and encouragement to Ramirez and Correra, who, in turn, knowingly rendered substantial assistance and encouragement to Meyer and Bland to breach their fiduciary duties". Weinstein

and Schiff denied this took place. The District Court found Qui Tam Intervenors failed to refute this denial. *(See* COL **[25 RP 5677 ¶ 32]**). Consequently, the District Court concluded the following:

> If NMSIC were to pursue its claims against Weinstein and Schiff through trial, its ability to prove their state of mind would likely depend, in large part, on their credibility as witnesses. Where credibility is a factor, there is always a risk of establishing liability. *Id.*

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]**). As the District Court noted, in New Mexico 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. To find a conspiracy, there must be an agreement between the alleged conspiring defendants. To find a conspiracy, New Mexico courts require an agreement between the alleged conspiring defendants. *Santa Fe Techs. v. Argus Networks,* 2002-NMCA-030, ¶ 43, 131 N.M. 772, 42 P.3d 1221. Again, Qui Tam Intervenors presented no evidence to show any agreement between Weinstein and/or Schiff and other defendants, or concerted action involving them. As stated by the District Court, "[T]he risk of not proving a

conspiracy in which the Settling Defendants participated weighs in favor of the settlements." *Id.*

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

The damages in this case would be difficult to calculate and prove, and was clearly recognized by the District Court: "[T]here is a major risk that Intevenors would be unable to establish damages under FATA. The complexity of establishing damages favors settlement." (COL **[25 RP 5678-79 ¶ 35]**).

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 damages and noted that some of the investments in which the settling defendants were involved in did not result in losses. (COL **[25 RP 5678 ¶ 35]**).

The District Court observed that while recovery of investment losses under FATA is "theoretically possible, it may be that the Intervenors would have to prove that the investment losses were induced by a fraud related to the inherent value of the investments themselves, not the corruption of the investment process".(COL **[25 RP 5679 ¶ 36]**).

As to Weinstein and Schiff, the District Court found that there could be a range of recovery on a theory of unjust enrichment. It reasoned that the Qui Tam

Intervenors claim of $300,000,000 was "neither assured of success nor supported by the evidence". The District Court reasoned that a determinative factor was NMSIC's analysis and more realistic approach:

*"[I]f the best possible recovery is based, instead, on NMSIC's unjust enrichment claims, Weinstein and Schiff have a settlement fund that is more than 4% of the best possible recovery, which is not necessarily outside the range or reasonableness -even if the value of their cooperation is ignored completely "**[25 RP 5679** ¶ **39**]).

Consequently, the Court found that the risk factor involved in establishing damages militated in favor of settlement.

6. Ability to Withstand a Greater Judgment.

The District Court did not lose sight of the fact that if NMSIC pursued Weinstein and Schiff through trial, there was a risk of their ability to satisfy, pay and withstand a judgment. The District Court found specifically the following:

*Based on the financial information presented at the hearing, Weinstein and Schiff do not appear to have the financial means to pay a multi-million dollar judgment. They are also named, but have not been served, as defendants in Austin. NMSIC has a reasonable concern that, if it were to continue to litigate its claims against Weinstein and Schiff, their costs of defense this action, as well as their costs of defending the Austin action, might dissipate any assets that would be available to satisfy a judgment of any amount. Moreover, because Weinstein and Schiff are residents of California, NMSIC would likely have to incur expenses to enforce a judgment there and would be subject to claims that certain assets under Californian law. "**[25 RP 5681** ¶ **41**]).

Consequently, the District Court concluded that this factor, the ability to withstand a judgment, favored settlement. *Id.* This is a reality given the

circumstances. Weinstein decided to settle with NMSIC because of the cost of litigation which he could not afford. **(See 11-25-2013 Tr. at TR-102).** Schiff decided to settle with NMSIC because the protracted litigation would wipe her out financially and professionally. **(See 11-25-2013 Tr. at TR-170-171].** Their payment of $100,000 to settle this litigation would well have been dissipated but for the District Court's program to encourage early settlements without the parties incurring the expense of depositions, formal discovery, motion practice and trial preparation.

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

As of December 2013, NMSIC had realized a net gain of $67,848,563 on the eight investments made by NMSIC that were placed by Wetherly. [**NMSIC Pre-Hearing Brief 23 RP 5235 ¶¶ 23]; NMSIC's Response to Intervenors' Oral Discovery Request 24 RP 5407-10]**. As such, the best possible FATA recovery is zero. As to the unjust enrichment claim, Weinstein and Schiff maintained that no recovery is possible, as Wetherly were paid by the client funds, not by the NMSIC or the State of New Mexico.

In any event, NMSIC presented evidence that the theoretically best possible recovery as against Weinstein and Schiff was up to $2,388,125, the amount in fees that Wetherly 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, even though they offered no legal or factual basis for that claim. As mentioned previously, 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 Weinstein and Schiff represents 4% of the best possible recovery, which is a reasonable settlement amount. Qui Tam Intervenors have not offered any real evidence to explain why this amount is unreasonable, particularly given the financial situation of Weinstein and Schiff.

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. 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]**), a conclusion that Qui Tam Intervenors have not articulated a basis for challenge.

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." As the District Court noted, Qui Tam Intervenors failed to put forth any evidence of collusion between counsel for NMSIC and Weinstein and Schiff. They have not rebutted this presumption. (COL **[25 RP 5671-72 ¶ 20));** *see Schweizer,* 2013 WL 3776260 at *12. Moreover, the District Court 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 ERE 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 Weighs 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]**). The District Court thus found that deference should be given to decisions that might impact the Government's enforcement plan. (COL **[25 RP 5682 ¶ 43]**). NMSIC explained its enforcement plan in open court, and explained that the Settling Defendants have and will

continue to play a role in effecting that plan through their cooperation and agreement to provide testimony. The District Court 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 has been advised by experienced counsel.

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. *(Id,' see also* FOF **[25 RP 5662 ¶ 73]**). 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]**. As this Court has noted, when settlements are reached prior to formal 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. *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 were taken nor 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.This is especially true as it applies to Weinstein and Schiff, because the money they chose to use for settlement would have be devoured in discovery and motion practice.

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 the District Court rightly and wisely concluded. (COL **[25 RP 5664-65 ¶ 5]**). Instead, as the District Court

noted, that "Intervenors were allowed substantial discovery sufficient to allow them to determine the fairness of the settlements". (COL **[25 RP 5665 ¶ 5]**). The District Court was well within its discretion to concluded that 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]**.

Here, as recognized by the District Court, 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.* The District Court did, however, allow Qui Tam Intervenors discovery relating to the settlement discussions. *(Id.).* In fact, it found that Qui Tam Intervenors were provided "millions of pages of documents and responses to discovery" by NMSIC. (FOF **[25 RP 5662 ¶ 73]**). There 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 Weinstein and Schiff.

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.

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 the District Court. **[BIC 13-14]**. Qui Tam Intervenors go so far as to contend that "Judge Singleton tried the *Austin* case *in absentia."* **[BIC 23]**..

The Intervenors cannot rely on the pendency of *Austin* as a basis to object to NMSIC's settlement with Weinstein and Schiff because the *Austin* Court has no personal jurisdiction over them because the Intervenors have never served them with process. It is fundamental that proper service of process is required before a court can exercise jurisdiction over a defendant and render a binding judgment. *See Trujillo v. Goodwin,* 2005–NMCA–095, ¶ 8, 138 N.M. 48, 116 P.3d 839 (stating that a court lacks jurisdiction to pronounce judgment over a defendant who has not been properly summoned into court); *see also Jueng v. N.M. Dep't of Labor,* 1996-NMSC-006, ¶ 7, 121 N.M. 237, 240, 910 P.2d 313, 316 (1996) ("[F]ailure to serve a party with process in a proper manner generally means ... that the court has no

power over that party and cannot render [a] judgment binding that party." (alteration in original) (internal quotation marks and citations omitted)). A default judgment entered in the absence of proper service or waiver of service is invalid and should be set aside. *See Vann Tool Co. v. Grace,* 1977-NMSC-054 ,¶ 12, 90 N.M. 544, 545–46, 566 P.2d 93, 94–95 (1977) (reversing the trial court's denial of the defendant's motion to set aside default judgment where the defendants were not properly served under statute governing service on non-resident defendants because the court lacked jurisdiction over the defendants).

Before the *Austin* case was stayed the Intervenors had had more than two years to serve Weinstein and Schiff and failed to do so.

On the other hand, the District Court had jurisdiction over Weinstein and Schiff, and under Section 44-9-6 had the power and authority to consider the proposed settlement notwithstanding the pendency of *Austin.* Approval of the settlement did not impair, affect or otherwise alter any rights or claims that Qui Tam Intervenors may have against Schiff and Weinstein in *Austin* to the extent that such claims are in relation to alleged New Mexico Educational Retirement Board losses and damages.

Although Intervenors urged the District Court to wait for the Supreme Court's decision in *Austin,* even assuming that FATA may be retroactively applied, however, and even assuming that the Intervenors make service on Weinstein and

Schiff, the Intervenors have still not demonstrated a right to object to any of these settlements, because they have still not articulated a viable FATA claim against Schiff and Weinstein, much less with the particularity FATA requires.

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.

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 the District Court's Findings and Conclusions because 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 the District Court 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]**).

CONCLUSION

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

Dated: June 4, 2015

Santa Fe, New Mexico

Respectfully submitted,

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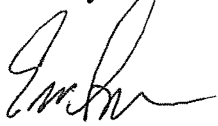
I hereby certify that a true and correct copy of the foregoing was e-mailed to all counsel listed below and the Honorable Sarah M. Singleton this

4th day of June, 2015.



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