IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
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STATE OF NEW MEXICO, *ex rel.* FRANK FOY,
SUZANNE FOY AND JOHN CASEY,

Appellants,

v.

Santa Fe County
Sarah M. Singleton, District Judge
D-101-CV-201101534
Ct. App. No. 34,042

NEW MEXICO STATE INVESTMENT COUNCIL
and ELLIOT BROIDY,

Appellees.

BRIEF IN CHIEF

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Oral Argument Is Requested

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INTRODUCTION AND SUMMARY

All of the issues in this brief are issues of first impression for the appellate courts of New Mexico. This court's decision on these issues will affect several hundred million dollars in potential recoveries for the State of New Mexico.

All of the questions in this appeal involve questions of statutory interpretation, so they are reviewed *de novo* by the appellate courts. *Tri-State Generation and Transmission Ass'n v. D'Antonio*, 2012-NMSC-039, ¶ 11, 289 P.3d 1232.

The district court erred by dismissing the case via summary judgment. *Vives v. Verzino*, 2009-NMCA-083, ¶ 7, 146 N.M. 673 ("Summary judgment is foreclosed either when the record discloses the existence of a genuine controversy concerning a material issue of fact, or when the district court granted summary judgment based upon an error of law."). By summarily dismissing the qui tams' objections without discovery and without an evidentiary hearing, the district court also acted contrary to sections 5 and 6 of FATA, quoted in part B.

The present case (*SIC v. Bland*) is an outgrowth of two cases filed by the qui tam plaintiff Frank Foy under New Mexico's Fraud Against Taxpayers

Act, NMSA 1978, §§ 44-9-1 through -15("FATA"). *State ex rel. Foy v. Vanderbilt* and *State ex rel. Foy v. Austin Capital.* The present case is based on the facts uncovered by Mr. Foy in *Vanderbilt* and *Austin.* Because the present litigation is an "alternative remedy" to Mr. Foy's cases, section 6 of FATA explicitly grants Mr. Foy the right to intervene in the present case, to object to any settlement proposed by the Attorney General, to have an evidentiary hearing on his objections, and to receive the same reward as in *Vanderbilt* and *Austin.* However, at the urging of then Attorney General Gary King, the district court (Hon. Sarah Singleton) infringed all of the special statutory rights which the Legislature gave to Mr. Foy.

Both the *Vanderbilt* and *Austin* cases are stayed while the New Mexico Supreme Court decides whether the 20 year retroactivity provision in FATA is constitutional. For reasons that have never been adequately explained, Gary King has tried to settle Mr. Foy's cases for relatively small amounts before the Supreme Court issues its ruling, in violation of the continuing automatic stay imposed by Rule 12-203(E).

In 2013, the Attorney General went to Judge Stephen Pfeffer and asked him to dismiss the *Vanderbilt* case. Judge Pfeffer firmly rejected the proposed settlement as contrary to FATA.

After being rebuffed by Judge Pfeffer, Gary King went judge shopping. He negotiated secret settlements for small amounts with some of the defendants in the *Austin* case and the *Bland* case. Mr. King was required to present these proposed releases and settlement of the *Austin* claims to the district judge having jurisdiction over that case, the Hon. Louis McDonald, or to the Court of Appeals, or to the Supreme Court, because those courts had jurisdiction to lift the stay pending appeal.

Gary King did not apply to Judge McDonald, or the Court of Appeals, or the Supreme Court, probably because he feared that those courts would reach the same decision as Judge Pfeffer. Instead, Mr. King went forum shopping to Judge Singleton and asked her to dismiss claims in *Austin*, even though Judge Singleton has no jurisdiction over the *Austin* case, and even though *Austin* continues to be subject to an automatic stay which Judge Singleton has no authority to lift. Nevertheless, Judge Singleton did as the AG requested, without following the stringent requirements for settlement of claims under the Fraud Against Taxpayers Act.

Therefore the decision below must be reversed because the district court acted in excess of its jurisdiction, and in violation of an automatic stay imposed by Rule 12-203(E). The district court also acted contrary to:

- the Fraud Against Taxpayers Act ("FATA"), §§ 44-9-1 through -15, and especially § 44-9-6(B), (C), and (H) [all references are to NMSA 1978];
- the Open Meetings Act, §§ 10-15-1 through -5;
- the Inspection of Public Records Act, §§ 14-2-1 through -12;
- § 6-8-2(B) (a statutory quorum is required for action by the State Investment Council);
- § 6-8-24, which allows the SIC to pursue contingent fee litigation only if the litigation does not prejudice or impair the right of qui tam litigants under FATA;
- *San Juan Agricultural Water Users Ass'n v. KNME*, 2011-NMSC-011, ¶¶ 37-40, 150 N.M. 64 (it is error to follow federal case law interpreting a federal statute which is different than the state statute);
- Rule 12-203(E) (automatic stay during interlocutory appeal); and
- the Rules of Civil Procedure and Rules of Evidence, which provide that a party must be allowed to conduct discovery when there are disputes about material facts.

Note: Hector Balderas replaced Gary King as Attorney General on January 1, 2015. All of the events in this appeal occurred during Gary King's tenure. So this brief uses "Gary King", "Attorney General", and "AGO"

[Attorney General's Office] to refer to Mr. King and his staff, not Mr. Balderas and his current staff.

STATEMENT OF PROCEEDINGS

Frank Foy's qui tam lawsuits under the Fraud Against Taxpayers Act. On July 14, 2008, the qui tam plaintiff Frank Foy filed a sealed complaint on behalf of the State of New Mexico under the Fraud Against Taxpayers Act ("FATA"). *State ex rel. Foy v. Vanderbilt Financial Trust et al.*, No. D-101-CV-200801895. The *Vanderbilt* case is the first case ever filed in state court under FATA.

The qui tam plaintiff Frank Foy is the former chief investment officer at New Mexico's Educational Retirement Board ("ERB"). The *Vanderbilt* complaint alleged a massive pay to play conspiracy at the State Investment Council and the Education Retirement Board. The SIC manages the State permanent funds which support public schools and universities, while the ERB provides retirement benefits to school teachers.

While Mr. Foy's complaint remained under seal, as required by § 44-9-5(B), Foy's counsel negotiated with Gary King and his staff about how to proceed with the case. Gary King elected not to intervene, but agreed that Mr. Foy and his law firm should unseal the complaint and prosecute the civil

action on behalf of the State. FATA requires the Attorney General to make an early election whether to intervene or to let qui tam prosecute the case. § 44-9-5(D). Once the Attorney General decides not to intervene and take over the case, then "the qui tam plaintiff shall have the right to conduct the action." § 44-9-6(F).

When the *Vanderbilt* case was unsealed in January 2009, it started a chain of events that ultimately led to the resignations of Bruce Malott, Chairman of the Educational Retirement Board, and Gary Bland, the Chief Investment Officer of the State Investment Council. In 2009 Frank Foy filed a second FATA case that expanded upon and provided more details about the pay to play conspiracy described in *Vanderbilt*. The second case is *State ex rel. Foy v. Austin Capital et al.*, Corrected First Amended Complaint, No. D-101-CV-200901189 **[RP 4681-769]**.

Both cases were filed under the Fraud Against Taxpayers Act, a qui tam statute enacted by the Legislature in 2007. In broad terms, the Fraud Against Taxpayers Act is modeled after the federal False Claims Act ("FCA"), 12 Stat. 696 (1863), a qui tam statute which dates back to "Lincoln's Law", enacted during the Civil War. However, when the New Mexico Legislature enacted FATA, it made numerous improvements on the federal statute. The

Legislature changed the text of the statute to overrule federal cases where federal judges had rubber-stamped settlements by the government over the objections of the qui tam plaintiffs, without a hearing on the evidence. The Legislature fixed other parts of the federal act which had proved problematic, and added stronger protections for the procedural and monetary rights of the qui tam plaintiff. See Part B.

FATA contains an explicit 20-year retroactivity provision that allows FATA to be used as a remedy for frauds that were committed against the State at any time after July 1, 1987. § 44-9-12(A). In *Vanderbilt* and *Austin*, the lower court judges ruled that this part of the statute was unconstitutional as *ex post facto* legislation. The Court of Appeals accepted an interlocutory appeal in *Austin* on August 31, 2011. At that point, appellate Rule 12-203(E) imposed an automatic stay on all proceedings in the *Austin* case. That stay remains in effect, but it has been violated by the proceedings in this case. See Part A.

The Court of Appeals affirmed the ruling that parts of FATA are unconstitutionally retroactive. *State ex rel. Foy v. Austin Capital Management, Ltd.*, 2013-NMCA-043, 297 P.3d 357, *cert. granted*, 300 P.3d 1181 (Mar. 15, 2013).

The New Mexico Supreme Court granted certiorari and heard oral argument on November 14, 2013. The Supreme Court case number is 34,013. The Court might issue a decision at any time.

No matter how the Supreme Court rules on the retroactivity issues, the *Vanderbilt* and *Austin* cases will go forward, because both cases allege violations of FATA that occurred after the effective date of the statute. The interlocutory appeal will not affect those claims.

The *Austin* district court case is currently assigned to Judge Louis P. McDonald in the Thirteenth Judicial District. It is automatically stayed by operation of Rule 12-203(E) pending the Supreme Court's decision. The *Vanderbilt* case is also stayed, by an order entered by Judge Stephen Pfeffer on July 12, 2013, discussed below.

Gary King's later lawsuit based on the same facts against the same defendants. Meanwhile, in August, 2010, the SIC and Gary King hired Day Pitney, a medium sized firm from Connecticut, to investigate the pay to play scheme uncovered by Mr. Foy in *Vanderbilt* and *Austin*. Initially, the SIC paid Day Pitney on a hourly basis. Then the SIC and Day Pitney wished to change to a contingent fee contract, so they asked for authorization from the Legislature. The 2011 Legislature did authorize contingent fee contracts for

the SIC, but only after it added a specific new provision directing the AG and the SIC not to "prejudice or impair" the rights of a qui tam plaintiff like Frank Foy. § 6-8-24. See Part B.3.

In May 2011, Day Pitney and Gary King filed a complaint in federal court on behalf of the State Investment Council, based on the same operative facts as the *Austin* case, against the same defendants, alleging breach of fiduciary duty and conspiracy. Day Pitney's purported federal complaint was based on diversity jurisdiction. However, it is well settled that a state cannot invoke diversity jurisdiction, because the State of New Mexico itself is not a citizen of the state for purposes of diversity jurisdiction. *Moor v. County of Alameda*, 411 U.S. 693, 717 (1973).[1]

The AGO and Day Pitney withdrew their facially defective federal complaint and ultimately filed the present case in state court. State Investment Council v. Gary Bland, Guy Riordan, Saul Meyer, Renaissance Private Equity Partners, LP d/b/a Aldus Equity Partners, LP, Marc Correra, Anthony Correra, Alfred Jackson, Daniel Weinstein, Vicky L. Schiff, Julio Ramirez,

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[1] The head of Gary King's civil division, Scott Fuqua, admitted that he was ignorant about the diversity rule. Day Pitney offered no explanation for filing in the wrong court. This is one of several instances where Day Pitney and Gary King's staff did not meet the standards of competence required of attorneys in litigation of this magnitude.

Barrett Wissman, William Howell, Marvin Rosen, Daniel Hevesi, Elliott Broidy, Milton Robert Carr, and Henry Morris, No. D-101-CV-201101534. (Hereafter referred to as "the *Bland* case" or "the present case".)

The *Bland* case is an offshoot of the *Austin* case and the *Vanderbilt* case. The *Bland* case is based on the same operative facts. Of the 17 named defendants in *SIC v. Bland*, 15 are already named defendants in the *Austin* case. The only exceptions were Robert Carr and Elliott Broidy. Elliott Broidy and Markstone (Broidy's firm) were not listed by name as defendants in the 2009 *Austin* complaint, but they were included in the list of investments where kickbacks might have occurred and identified as potential additional defendants. Paragraphs 63 and 64 of the complaint stated:

> 63. Kickbacks on investment business from the State of New Mexico were also paid, arranged, or received by the various firms, funds, and persons shown on Exhibits 1 and 2 to this Amended Complaint.
>
> 64. Defendants John Does are additional individuals or entities who have participated and conspired with the defendants to perform the unlawful acts or omissions alleged herein, but their identities and actions are unknown or inadequately known at this time. These defendants are referred to in the masculine, although they may be feminine or artificial persons. Discovery in this case will provide information about these unidentified defendants, so that they can then be identified as named defendants. There are probable additional defendants whose

> identity is known to plaintiffs at this time, but discovery is needed to provide additional corroboration about their involvement in the matters herein, because the named defendants and the Doe defendants have denied and concealed their involvement.

On line 159 in Substituted Exhibit 1 to the *Austin* complaint ("Latest Available Tabulation of Third-Party Fees on SIC and ERB Business (Oct. 19, 2009)), Foy identified the Markstone/Broidy investment as a pay to play transaction involving John Doe defendants. Broidy and Markstone are within the explicit scope of the FATA complaint filed by Mr. Foy in 2009. Foy has been prevented from amending his complaint to name Broidy and Markstone by name rather than John Doe, due to the stay of proceedings in *Austin* and opposition by Gary King. Foy will amend his complaint after the stay is lifted.

The *Bland* lawsuit is an "alternate remedy" under § 44-9-6(H) of FATA. FATA does allow the Attorney General to pursue other actions as an alternative to the qui tam's lawsuit. However if the State pursues an alternate remedy, FATA expressly gives qui tam the same rights in the alternate action. "If an alternate remedy is pursued, the qui tam plaintiff shall have the same rights in such a proceeding as the qui tam plaintiff would have had if the action had continued pursuant to this section." *Id.* These rights include the qui tam's right to his reward and attorney fees, the right to intervene and

participate as a party in the alternate action, and the right to present evidence in the alternate action. Gary King and the district court deprived the qui tam plaintiffs of these rights. See Part B.

The *Bland* case was assigned to the Honorable Sarah M. Singleton. The qui tam plaintiffs exercised their statutory right to intervene as additional plaintiffs **[RP 1470]**.

At the request of the Attorney General's office, the district court refused to stay the *Bland* case until the Supreme Court decides the *Austin* interlocutory appeal, over the vigorous objections of the qui tam plaintiffs **[RP 4113-15; 4311-16]**.

The prohibition against discovery. At Gary King's request, the district court also refused to allow discovery, again over the strenuous objections of the qui tam plaintiffs. On January 19, 2013, Judge Singleton denied qui tams' motion to compel discovery. The order allowed qui tam plaintiffs to get a copy of the documents which defendants had already provided, plus a copy of any insurance agreement, but beyond that, the court prohibited all discovery **[RP 4006-08]**. The qui tam plaintiffs were thus barred from conducting the discovery which they sought to evaluate the settlements. Without the right to gather evidence, the right to present evidence is meaningless. *See, e.g.*, Rules 1-

012, 1-026, and 1-056(F) – a party must be allowed to conduct discovery when there are disputes about material facts. In this instance, almost all of the major issues of fact were disputed. See Parts B and C.

In the *Bland* case, there were no depositions. No interrogatories. No requests for production of documents. No identification of persons likely to have information about the case. No requests for admissions. No subpoenas to compel testimony from witnesses. The qui tam plaintiffs filed motions **[RP 2560-2614; 3547-3714]**, but they were blocked by the court at the request of Gary King and the defendants.

Instead of real discovery, the AGO and the defendants engaged in what they called "informal discovery" **[RP 2537]**. The defendants provided Gary King's staff with whatever information the defendants voluntarily chose to provide. Relying upon these selective disclosures from the defendants, which were never tested by discovery, the AGO negotiated a series of relatively small settlements, including $1,000,000 from Markstone **[RP 6024]**.

The jurisdictional problem and judge shopping. In exchange for these small sums, the settlements released and dismissed the FATA claims against these defendants in the *Austin* case, a case not assigned to Judge Singleton. The qui tam plaintiff intervenors repeatedly pointed out that Judge Singleton

only had jurisdiction over the case assigned to her, not the *Austin* case **[7-15-13 Tr. 1819-24; RP 4184-85, 5410-11]**. If Gary King and the SIC wanted to release any of the claims in *Austin* as part of a negotiated settlement, they were required to make a motion in the *Austin* case. The AGO might have negotiated a release limited to the weakly pled complaint for fiduciary breach which the AGO filed with Judge Singleton, subject to objections by qui tams, but not the FATA claims in *Austin*. Instead, the AGO tried to sneak in a global release of all claims for or on behalf of the SIC, which includes the FATA claims in *Austin*. For example, see the release of William Howell, a defendant in the *Austin* case **[RP 4159-64]**.

Gary King was required to present the settlement of the claims in *Austin* to Judge McDonald, or to the Court of Appeals, or to the Supreme Court. These courts were assigned the case and each of them had authority to lift the stay. However, the AGO chose not to do this, and decided instead to engage in judge shopping by going to Judge Singleton, who has no jurisdiction over the *Austin* case. This is forum shopping. And it is a maneuver to evade the automatic stay in *Austin*.

Judge Singleton approved a release of all SIC claims in *Austin*, a case over which she has no jurisdiction or authority, a case which is not assigned to

her, and a case which is stayed by the appellate courts. In her findings and conclusions **[RP 5635-84]**, Judge Singleton never explains how she had jurisdiction over the *Austin* case, and she never addresses the appellate stay. See Part A. In effect, Judge Singleton tried the *Austin* case *in absentia*, and without evidence.

Judge Pfeffer's rejection of the SIC's proposed settlement. Before going to Judge Singleton, Gary King and Day Pitney had already attempted these same no-discovery tactics in the *Vanderbilt* case, but they were firmly rejected by Judge Pfeffer. The AGO and the SIC negotiated a secret and hasty settlement with the *Vanderbilt* defendants, for $24.6 million – in exchange for no discovery **[RP 4562-81]**. Foy objected because it was improper to settle without real discovery, and because the amount was quite inadequate in relation to the State's damage claims, which exceed five hundred million dollars.

Judge Pfeffer rejected the settlement proposed by the AG, Day Pitney, and the SIC. He explained his reasons in a very thoughtful opinion, which is set forth here in detail. Qui tams submit that this ruling correctly states the law that governs judicial approval or rejection of proposed settlements under FATA.

1. As preliminary matters to seeking acceptance of its proposed settlement, the State asks this Court to declare that "the *qui tam* plaintiffs have no right to object to the proposed settlement of NMSIC's claims and/or finding, pursuant to Section 44-9-6.C. . . ." to conclude "that the proposed settlement is fair, adequate and reasonable under all of the circumstances," and to "disapprov[e] any reward to the *qui tam* plaintiffs or fees to their counsel." Given the posture of the matter, this Court need not reach the majority of the State's arguments.

2. . . . . Given that the appellate decision in the companion [*Austin*] lawsuit will illuminate the very same significant issue in this matter, and based on the analysis below, the State's Motion to Approve and Enforce Settlement Agreement shall be denied and this matter shall be stayed until a decision is rendered by the Supreme Court in the companion matter.

3. While the State asserts that "the Court can approve a settlement, notwithstanding the objection of a *qui tam* plaintiff, if it finds that the proposed settlement is 'fair, adequate and reasonable under all of the circumstances,'" the State omits crucial aspects of the applicable statutory provision. *Compare* Motion to Approve, at 4, *with* § 44-9-6.C. Paragraph C of Section 44-9-6 provides: "The 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.*" (Emphasis added) [by the court]. Ostensibly, the purpose of Paragraph C of Section 44-9-6 is to afford *qui tam* plaintiffs the opportunity to test the fairness, adequacy, and reasonableness of proposed settlements, as well as to give the Court an adequate basis on which to rest its

assessment. The statutory scheme does not permit the evaluation to be made unilaterally by the State. Likewise, it would be inappropriate for this Court to attempt to evaluate the proposed settlement based on the conclusory assertions of the State and Defendants.

Allowing the *Qui tam* Plaintiffs to test the fairness, adequacy, and reasonableness of a proposed settlement "under all the circumstances" suggests that "all the circumstances" be knowable and can be adequately assessed. At this stage, this Court is not in a position to adequately assess all the circumstances integral to determining whether the proposed settlement is fair, adequate, and reasonable. . . . Ultimately, it is the responsibility of this Court, in determining the propriety of a proposed settlement, to hold the interests of the citizens of New Mexico paramount and to ensure that the public's coffers arc reimbursed fairly, adequately, and reasonably under all of the circumstances. *See* § 44-9-6.C.

4. In addition, the State's proposed settlement ignores that this Court explicitly allowed *Qui tam* Plaintiffs to pursue all remaining claims pursuant to Section 44-9-3.A(9), . For example, any post-enactment and NMERB claims are still the province of *Qui tam* Plaintiffs. The State's proposed settlement essentially presumes a *de facto* expansion of this Court's December 20, 2011 Order Granting Partial Dismissal.

5. The State also "asserts that the proposed settlement of NMERB's claims is fair, adequate and reasonable under all the circumstances" for a variety of reasons. *See* Motion to Approve, at 9. For instance, the State asserts that "[l]ittle meaningful discovery has been conducted." Motion to Approve, at 9, ¶ 2. Given the State's assertion, this Court seriously questions whether it could fairly assess the propriety of the proposed settlement agreement, or if the State itself can assess the fairness, adequacy, and

reasonableness of the proposed agreement under all of the circumstances. *See* § 44-9-6.C. Again, the Court must determine, "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. 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.

6. Paragraph H of Section 44-9-6 states:

> Notwithstanding the provisions of Section 5 of the Fraud Against Taxpayers Act, the attorney general may elect to pursue the state's claim through *any alternate remedy available to the state,* including an administrative proceeding to determine a civil money penalty. *If an alternate remedy is pursued, the qui tam plaintiff shall have the same rights in such a proceeding as the qui tam plaintiff would have had if the action had continued pursuant to this section. . . .*

(Emphasis added) [by the court].

Given the decision to stay this matter pending resolution of the *ex post facto* issue by the Supreme Court, this Court will save for another day issues raised by the State pertaining to the extent of *Qui Tam* Plaintiffs' rights to awards, attorney fees, and expenses. Nonetheless, it is troubling that the State is seeking to deny *Qui tam* Plaintiffs any rights for their efforts under FATA based on an issue currently before the Supreme Court that, if resolved in *Qui tam* Plaintiffs' favor, could result in a mandatory award and attorney fees for them under a settlement or other disposition.

There is no indication that, *but for Qui tam* Plaintiffs initiating this litigation, the State was pursuing, or even contemplating pursuing, claims the *Qui tam* Plaintiffs made and that have apparently resulted in the proposed settlement. The State even initially acquiesced to *Qui tam* Plaintiffs' litigation pursuant to Section 44-9-5, , supported *Qui tam* Plaintiffs' position in trying to pursue claims that predated FATA's enactment, and did not involve itself to any great extent until *Qui tam* Plaintiffs had already expended a good deal of time and, very likely, expense, to pursue its claims and defend against dismissal.

This Court allowed the State to take over a portion of the "operative complaint" premised expressly on the State's ability to pursue "any alternate remedy available to the state" for the claims that would otherwise be at risk of being barred by *ex post facto* protections and allowed the *Qui Tam* Plaintiffs to proceed with all remaining claims. *See* State of New Mexico's Memorandum of Points and Authorities in Support of its Motion for Partial Dismissal, at 1, 3 (May 6, 2011); *see also* Order Granting Partial Dismissal, at 2 (Dec. 20, 2011). When the State sought partial dismissal of the *Qui tam* Plaintiffs' original claims, it made representations to this Court acknowledging *Qui tam* Plaintiffs' continuing rights under FATA. . . . The State clearly anticipated that *Qui tam* Plaintiffs would continue to have "the same rights" in an alternate proceeding "as the *qui* plaintiff would have had if the action had continued pursuant to" FATA, and this Court relied the State's assertions in ruling on its Motion for Partial Dismissal. . . .

IT IS ORDERED that the State's Motion to Approve and Enforce Settlement Agreement shall be, and hereby is, DENIED.

> **IT IS FURTHER ORDERED** that *Qui tam* Plaintiffs' Motion to Stay Proceedings Until Decision by New Mexico Supreme Court shall be, and hereby is, GRANTED.

[RP 6109-15]

Judge Pfeffer's ruling is the correct interpretation of the Fraud Against Taxpayers Act. Therefore qui tams incorporate it as part of their argument, see Part B. Judge Pfeffer found that the AGO was not complying with FATA or the AGO's representations to the court. And he rejected the AGO's attempts to infringe Mr. Foy's rights.

Judge Singleton took judicial notice of Judge Pfeffer's decision **[7-15-13 Tr. 26:23-24]**, but refused to follow it in any respect.

The SIC's secret subcommittee. The settlement contracts with Broidy, Markstone and the others were never approved by the SIC in an open meeting. The SIC operated in secret by delegating complete settlement authority to a subcommittee consisting of two SIC members and Jessica Hernandez, Esq., the Governor's legal counsel and deputy chief of staff. See Exhibit A, SIC "Recovery Litigation Settlement Policy", filed by appellees on February 18, 2015. This policy was drafted primarily by Evan Land, the SIC's General Counsel **[11-25-13 Tr. 19:19-20]**.

SIC member Peter Frank testified that the proposed settlements were approved by the secret litigation subcommittee, but not by the SIC itself. According to Mr. Frank, the litigation subcommittee has met 7 or 8 times, operating in complete secrecy, with no published notice of meetings, no published agendas, no open meetings, no notice of executive sessions, and no minutes. According to Mr. Frank and the AGO, the SIC can delegate all of its litigation and settlement authority to two SIC members and the Governor's counsel, who is not a member of the SIC. According to Mr. Frank, this three-person subcommittee can unanimously approve and sign settlements without any action by the eleven-member SIC. Furthermore, this subcommittee of a public agency can operate in total secrecy. **[11-25-13 Tr. 16:11-24:22]** Judge Singleton agreed. She denied qui tam's motion to prohibit secret settlements **[RP 4005]**.

The SIC's actions violate the Open Meetings Act, §§ 10-15-1 through -5; the Inspection of Public Records Act, §§ 14-2-1 through -12; and the statutory quorum requirement imposed on the SIC by § 6-8-2(B). Nevertheless, Judge Singleton has ruled that the use of a secret subcommittee is legal and allowable. See Conclusions of Law ¶¶ 1-4 **[RP 5663-64]**. Unless this decision is promptly reversed, it will nullify the Open Meetings Act and IPRA, and the

quorum requirements for public bodies. State agencies, county commissions and city councils will immediately seize upon this ruling to act in secret, with no public notice, no public action, and no public records. See Part C.

The expedited dismissal without a hearing. The SIC filed an expedited motion for the dismissal of Elliot Broidy **[RP 6020-29]**. The court approved the motion by granting summary judgment, without discovery, an evidentiary hearing, or oral argument **[RP 6046-48]**. This violates § 44-9-6(B) and (C), which explicitly require an evidentiary hearing. In addition, the summary dismissal violates Rule 56. A court cannot grant summary judgment when there are genuine disputes about material facts, as there were in this instance. Where the facts are disputed or unknown, Rule 56 requires discovery.

ARGUMENT

PART A. THE DISTRICT COURT ACTED BEYOND ITS JURISDICTION, AND IN VIOLATION OF THE CONTINUING STAY IN *AUSTIN*.

1. The district court had no jurisdiction over the claims in *Austin*, because that case is assigned to another judge.

Judge Singleton had no jurisdiction over the claims in the *Austin* case, because that case is assigned to Judge McDonald. And she had no authority to release the FATA claims in *Austin*, because that case was subject to an automatic stay, and still is. Yet Gary King and the defendants persuaded her

to exceed her jurisdiction, without citing any authority that would allow this. In effect, Judge Singleton tried the *Austin* case *in absentia*.

In *Austin*, Frank Foy filed a demand for jury trial. Therefore Judge Singleton infringed Mr. Foy's constitutional right to jury trial. **[RP 4439]**

2. The district court violated the automatic stay by releasing Foy's claims in *Austin* while that case is on interlocutory appeal before the Supreme Court.

In situations where the State can use FATA as a remedy against fraudfeasors, FATA gives the State many advantages, including:

- mandatory treble damages, § 44-9-3(C)(1);
- attorneys fees for qui tam counsel and the AGO, paid by the defendants, § 44-9-3(C)(4);
- joint and several liability, § 44-9-13;
- a civil penalty for each violation, § 44-9-3(C)(2);
- no requirement to prove specific intent to defraud, § 44-9-3(B); and
- a lower standard of proof (preponderance of the evidence), § 44-9-12(C).

This is why the Legislature enacted FATA in the first place: to give the State major advantages in pursuing frauds, with a boost from qui tam plaintiffs and qui tam counsel.

Gary King violated the automatic stay by asking the District court to dismiss FATA claims before the Supreme Court has a chance to rule on them. Gary King is usurping the authority of the Supreme Court to decide a pending appeal. Gary King is throwing away the opportunity to use the State's best remedy against these fraudfeasors. His actions are especially puzzling, because Gary King agrees with qui tam plaintiffs that FATA is constitutional as written **[RP 5155-95]**.

PART B. GARY KING AND THE DISTRICT COURT VIOLATED THE FRAUD AGAINST TAXPAYERS ACT AND § 6-8-24.

1. The district court violated several provisions of FATA.

The district court and Gary King did not obey the detailed rules laid down in FATA for the prosecution and settlement of qui tam cases. Instead of following the plain text of FATA, they committed a plain error of law by following a few contrary federal cases, where certain federal judges decided to rubber-stamp settlements under the FCA over the objections of a qui tam relator. Yet the district court and Gary King were informed that the New Mexico Legislature had added new provisions to FATA in order to overrule

those federal cases. This deliberate disregard for the statute is an insult to the New Mexico Legislature.

The *Bland* lawsuit is an "alternate remedy" under § 44-9-6(H) of FATA. FATA does allow the Attorney General to pursue other actions as an alternative to the qui tam's lawsuit. However, if the State pursues an alternate remedy, FATA expressly gives qui tam the same rights in the alternate action. "If an alternate remedy is pursued, the qui tam plaintiff shall have the same rights in such a proceeding as the qui tam plaintiff would have had if the action had continued pursuant to this section." *Id.* These rights include the qui tam's right to his reward and attorney fees, the right to intervene and participate as a party in the alternate action, and the right to present evidence in the alternate action. The AG and the district court deprived the qui tam plaintiffs of these statutory rights under FATA.

The New Mexico Legislature added extra protections in FATA for qui tam plaintiffs who object to a settlement negotiated by the AG. *Inter alia*, FATA requires that:

(A) the court must provide an evidentiary hearing on their objections, not merely a hearing, § 44-9-6(B); and

(B) the AG must prove "good cause" for dismissing a case over the qui tam's objections, § 44-9-6(B); and

(C) once filed, a qui tam action can be dismissed only with the written consent of the court, "taking into account the best interest of the parties involved and the public purposes behind the Fraud Against Taxpayers Act." § 44-9-5(A).

<u>These three requirements do not appear in the federal statute</u>. The Legislature added these requirements to FATA to prevent the government from entering into collusive or inadequate settlements with defendants; to prevent the government from cheating the qui tam plaintiff out of his reward; to prohibit district judges from rubber-stamping settlements; and to expose frauds – and the settlement of fraud cases – to scrutiny by the public.

Here is the text of the relevant provisions in FATA. The underlined provisions do not appear in the federal statute: the New Mexico Legislature added them to prevent rubberstamp settlements with little or no discovery. These provisions govern the present case:

> § 44-9-5
>
> A. A person may bring a civil action for a violation of Section 3 of the Fraud Against Taxpayers Act [44-9-3] on behalf of the person and the state. The action shall be brought in the name of the state. <u>The</u>

person bringing the action shall be referred to as the qui tam plaintiff. Once filed, the action may be dismissed only with the written consent of the court, taking into account the best interest of the parties involved and the public purposes behind the Fraud Against Taxpayers Act.

D. Before the expiration of the sixty-day period or any extensions of time granted by the court, the attorney general shall notify the court that the state:

(1) intends to intervene and proceed with the action; in which case, the seal shall be lifted and the action shall be conducted by the attorney general on behalf of the state; or

(2) declines to take over the action; in which case, the seal shall be lifted and the qui tam plaintiff may proceed with the action.

E. When a person brings an action pursuant to this section, no person other than the attorney general on behalf of the state may intervene or bring a related action based on the facts underlying the pending action.

§ 44-9-6

B. The state may seek to dismiss the action for good cause notwithstanding the objections of the qui tam plaintiff if the qui tam plaintiff has been notified of the filing of the motion and the court has provided the qui tam plaintiff with an opportunity to oppose the motion and to present evidence at a hearing.

C. The 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.

> F. If the state elects not to proceed with the action, the qui tam plaintiff shall have the right to conduct the action.
> H. Notwithstanding the provisions of Section 5 of the Fraud Against Taxpayers Act [44-9-5], the attorney general may elect to pursue the state's claim through any alternate remedy available to the state, including an administrative proceeding to determine a civil money penalty. If an alternate remedy is pursued, the qui tam plaintiff shall have the same rights in such a proceeding as the qui tam plaintiff would have had if the action had continued pursuant to this section.

Under New Mexico's Fraud Against Taxpayers Act, in contrast to the False Claims Act, the qui tam plaintiffs have an absolute right to present evidence at a hearing on a proposed settlement and dismissal. The New Mexico Legislature added the evidence and good cause requirements to FATA, underlined above, in order to (a) eliminate any presumption that a proposed settlement is fair, adequate, and reasonable; (b) eliminate the notion found in some federal cases that the government has "unfettered discretion" to dismiss qui tam cases; (c) require the AG to present evidence, rather than argument, proving that the settlement is fair, adequate and reasonable under all the circumstances; and (d) overrule federal cases holding that the government can settle without allowing discovery to the qui tams.

The qui tam plaintiffs specifically pointed out that New Mexico made statutory changes to the statute to require an evidentiary hearing on any

proposed settlement. **[RP 5430-33]**. However the District court decided to follow federal cases which contradict New Mexico's statute:

> Court: . . . all the False Claims Act cases - - not all of them, but ones I looked at, there have been no depositions done.

[11-1-13 Tr. 42:15-17]

The court reaffirmed its no discovery ruling in Conclusion of Law ¶ 16 **[RP 5669-70]**, which follows a few federal judges who decided to rubber-stamp settlements under the federal statute. This is a plain error of law, because the New Mexico Legislature enacted new text in FATA to overrule these federal cases. When a New Mexico statute deals with an issue, a court cannot follow federal cases to the contrary. *San Juan Agricultural Water Users, infra*. The district court repeated this error with Broidy and Markstone. "The case law in the *Qui Tam* False Claims Act [the federal statute, not the NM statute] is just abundantly clear that you do not have to do full-blown discovery before you can determine whether or not to settle a case . . . ." **[6-19-14 Tr. 54:4-6]**

2. The district court erroneously ruled that the amount of damages is irrelevant to the evaluation of a settlement.

At the beginning of the hearing on November 1, 2013, the district court listed the factors that it would consider in deciding whether to approve the

settlement. The relevant factors included "the range of reasonableness of the settlement fund in light of the best possible recovery and the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." **[11-1-13 Tr. 11:23-12:2]**

"Best possible recovery" is another way of asking "What is the defendants' maximum exposure?" This requires a calculation of the damages that the State could recover if it prevailed on its claims, using the damage theories which are most favorable to the State.

Qui tams agreed with the court that the calculation of damages was a central inquiry in evaluating the settlement of any case. **[11-1-13 Tr. 34:17-24]; [11-1-13 Tr. 35:5-13]**

Qui tams then pointed out that they had been denied discovery on either measure of damages, either loss to the State or unjust enrichment to the defendants **[11-1-13 Tr. 35:14-37:20]**. At this point, the court reversed itself, and ruled that information on damages was not important for a decision on settlement, even though this was one of the material issues which the court had already listed earlier in the hearing.

> Qui tam counsel: And without simply having had discovery, we don't have that information [to calculate damages].

> Court: Mr. Marshall, to me, the issue at this hearing is not whether you have the ability to make that calculation now, but is whether somebody who is making the decision to settle considered those facts.
> Counsel: I want the facts, Your Honor.
> Court: I understand you want the facts, but that's not important for settlement purposes. . . .
> Counsel: I want to ask somebody from the SIC, okay, what was the gain or loss on this particular investment. We don't know that information.
> Court: I don't think you need to know that at this stage.

[11-1-13 Tr. 37:19-38:24]

This ruling is another error of law, because it adopts an incorrect legal standard. The standard is not whether the government considered damages. That standard is so vacuous that it means nothing. In every case, the government will say that it considered damages in the course of deciding to settle the case. That is a rote recitation in every settlement hearing, but it begs the relevant question: what were the maximum damages?

Damage calculations are part of routine due diligence for any attorney in any case, big or small, yet the AGO and Day Pitney never did them. Even worse, the SIC refused to provide the financial data from its records, which are public records, so that qui tams could do the calculations for themselves.

When the district court ruled that information about the best possible recovery was irrelevant to settlement, the court contradicted the case law

which it had cited earlier. Even more importantly, this ruling obliterates the heightened requirements which FATA has imposed when the government tries to settle with defendants over the objections of the qui tam relator.

Rather than being deferential to the AG, FATA is protective of the qui tam plaintiffs, because the Legislature decided that government lawyers had usually done a poor job protecting the state's interests. So the Legislature enlisted the help of qui tam plaintiffs and their lawyers, and gave them strong protections in return. Yet Judge Singleton ignored FATA, and invented a new legal standard that even drops below the standards in the cases cited by the court.

As a result, the proposed settlement amounts are grossly inadequate. Day Pitney estimated the maximum liability to be in the range of 300 to 500 million dollars **[11-26-13 Tr. 37:15-39:19]**. [This estimate is actually too low, because Day Pitney and Gary King's staff never did proper damage calculations.] Under FATA, all the defendants are jointly and severally liable for the entire damages **[11-26-13 Tr. 38:1-6]**.

3. Gary King and Day Pitney violated § 6-8-24.

The AGO, Day Pitney, and the SIC are also violating the special statutory provision which the Legislature added in 2011 to protect Frank Foy

and other qui tam plaintiffs. In 2011, the SIC and the AGO sought statutory authorization to enter into contingency fee contracts for litigation, like the one under which Day Pitney is now operating. Before the legislators agreed to do this, they enacted a special provision specifically designed to protect Mr. Foy's rights in the pending *Vanderbilt* and *Austin* cases, which were the subject of hearings during the 2011 session:

> 6-8-24. Qui tam plaintiffs.
>
> Nothing in this 2011 act shall prejudice or impair the rights of a qui tam plaintiff pursuant to the Fraud Against Taxpayers Act.

The New Mexico Senate added this special protection for Frank Foy as a floor amendment. It passed by a vote of 37-0.

Once Gary King and Day Pitney entered into a contingent fee contract, per the new statute, one of the first things they did was to try to eliminate Mr. Foy's rights as a qui tam plaintiff, contrary to the statute. They filed a motion in *Vanderbilt* to dismiss Foy's case, and to deny him any reward or attorneys fees. See paragraph 1 of Judge Pfeffer's Order, above. After Judge Pfeffer rejected their tactics, Gary King and Day Pitney bypassed Judge McDonald and the Court of Appeals and the Supreme Court. Instead they went to Judge

Singleton, and this time they were successful: they persuaded her to impair Mr. Foy's rights under FATA and § 6-8-24.

4. The district court violated *San Juan Agricultural Water Users Association.*

In *San Juan Agricultural Water Users Ass'n v. KNME*, 2011-NMSC-011, ¶¶ 37-40, 150 N.M. 64, the Supreme Court held that the district court and the Court of Appeals erred in following federal case law when the federal statute is different than the state statute on the same subject. The lower courts erred by relying upon federal court cases interpreting the federal Freedom of Information Act ("FOIA") as a guide to interpreting New Mexico's Inspection of Public Records Act ("IPRA"), since there were significant differences between the statutes.

In the present case, the district court repeated the same mistake. The court relied on federal cases interpreting the False Claims Act ("FCA") as a guide to interpreting New Mexico's Fraud Against Taxpayers Act ("FATA"), despite the manifest differences between the statutes, discussed above.

PART C. THE DISTRICT COURT DENIED QUI TAM PLAINTIFFS DISCOVERY ON DISPUTED FACTS RELEVANT TO THE EVALUATION OF SETTLEMENT, CONTRARY TO FATA AND THE RULES OF CIVIL PROCEDURE AND EVIDENCE.

1. Where there are disputes about material facts, they can only be resolved through discovery.

In this case, almost all of the material facts were disputed, such as:

- What did the defendants do? ;
- When did they do it? ;
- How did the defendants communicate in furtherance of their conspiracy, and how did they co-ordinate? ;
- What was the amount of loss to the State of New Mexico on each investment? ;
- What was the amount of gain (unjust enrichment) to the defendants on each investment? ;
- What is the amount of treble damages under FATA? ;
- What are the real financial resources of each defendant? ;
- What was the amount of the bribes and kickbacks, and who ended up with that money? ;
- What political connections did the defendants use? ;
- Did the plaintiffs' attorneys do real discovery? ;

• Were the defendants also engaged in kickback schemes in New York and California?

All of these facts are material to the approval or rejection of a proposed settlement. When there are genuine disputes about material facts, the only way to resolve them is through discovery. While a district court can impose reasonable limitations on discovery, the court may not prohibit one side from discovery into the relevant facts. In the adversarial system of justice as it exists in America, a court cannot allow one side to present their version of the evidence, while prohibiting the other side from gathering contrary evidence.

This is especially true in cases of conspiracy and possible criminal wrongdoing, where the defendants have good reasons to conceal and lie. In cases like this, the documents never tell the whole story.[2] As a court in New York said in the criminal case against Hank Morris, who is one of the *Austin* defendants:

> [T]he law is not so naive to believe that bribery may only be shown by proof of a formal written contract setting forth the *quid pro quo* of the parties to the bribe as to the payment on the one hand, and the official

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[2] In the present case, there was a massive "document dump" of millions of pages. Many of the documents are duplicates **[11-25-13 Tr. 55:8-9]** and most of them are chaff. At best, the documents provided some hints for further discovery, like depositions.

> misconduct on the other. Bribery is, instead, "often perpetrated subtly with winks, nods and walks in the park" and that proof may be from circumstantial and inferential evidence. *People v. Bac Tran*, 80 N.Y.2d 170 (1992).

People v. Morris, 2010 N.Y. Slip Op. 51331(U), at *41 [28 Misc. 3d 1215(A) (2010).]

A district court cannot simply allow the parties and lawyers on one side present their self-serving version of the supposed facts, while prohibiting the lawyers on the other side from finding out the real facts. A district court can grant summary judgment only if two conditions are met: (1) there is no genuine dispute about the material facts, and (2) the moving parties are entitled to judgment as a matter of law. Neither one of these conditions has been met in this case.

To prepare for the evidentiary hearing, qui tam plaintiffs propounded discovery asking for the most basic information. Qui tam's discovery tracked the list in Rule 1-026(B)(3), including the name and address of persons who likely have information about the case; copies of documents which the parties might use to support their claims or defenses; a computation of each category of damages claimed; a copy of any insurance agreement **[RP 3566-67]**.

This is "basic information that is needed in most cases to prepare for trial or make an informed decision about settlement." Fed. R. Civ. P. 26, Advisory Committee notes to 1993 amendments [emphasis added]. It is part of the minimal due diligence and competence that is required in every case, and most certainly in a case like this one.

Judge Singleton refused to allow the discovery. She said that the disclosure of persons with knowledge would be "over-onerous and burdensome" **[12-21-12 Tr. 10:24]**. She made this ruling without knowing who those persons might be. She also said that qui tams could obtain that information through discovery after the settlements. This makes no sense, because the court and the qui tam plaintiffs needed discovery before the settlements were made final, not afterwards. **[12-21-12 Tr. 45:7-9]**

Throughout these proceedings, the district court erred by relying on statements by the attorneys for the AG and the defendants concerning disputed facts. The statements, representations, or arguments of counsel are not evidence. *V.P. Clarence Co. v. Colgate*, 1993-NMSC-022, ¶ 2, 115 N.M. 471.

2. The "Order of Dismissal" is not a final appealable judgment.

The March 30 "Order of Dismissal" is defective under the Rules of Civil Procedure. The order claims to be a final appealable order under Rule 1-

054(B)(2), but it does not meet the requirements of that rule. The order does not adjudicate all issues relating to these four defendants, because it does not adjudicate the 25 to 30% share of the settlement which goes to Mr. Foy, or the amount of attorney fees which are paid by these defendants, as required by § 44-9-7(D). This subsection of FATA gives Mr. Foy a statutory first priority for his reward and attorneys fees. Then subsection (E) says that "The state is entitled to all proceeds collected in an action or settlement not awarded to a qui tam plaintiff." [Emphasis added.]

It is not clear from the record whether the district court intended to rule on these issues. The district court had said earlier that it was not ruling on FATA rewards and attorneys fees. **[7-15-13 Tr. 43:11-20]** Based on that, qui tams never filed a motion for the statutory reward and attorneys fees, and the court never held a hearing on the issue. The final judgment has no provision granting or denying FATA rewards and fees **[RP 6046]**.

The court did discuss and distinguish some of the cases mentioned below, but the purpose of its discussion is not clear. It is well established, both from the text of the statute and the cases, that qui tam's reward and attorneys fees are paid when the government pursues a different remedy as an alternative to the FATA claim. *See, e.g., United States ex rel. Bledsoe v. Community Health*

Systems, Inc., 342 F.3d 634 (6th Cir. 2003) (government settled with some defendants in an alternative action, denying qui tam any reward; court of appeals reversed and allowed qui tam to amend his complaint and claim his reward); *United States ex rel. Roberts v. Accenture, LLP*, 707 F.3d 1011 (8th Cir. 2013) (qui tam was entitled to reward from settlement, despite government's claim that settlement was unrelated to qui tam's original complaint); *United States ex rel. Barajas v. United States*, 258 F.3d 1004, 1010 (9th Cir. 2001) (same); *United States ex rel. Alderson v. Quorum Health Group, Inc.*, 171 F. Supp. 2d 1323 (M.D. Fla. 2001) (when government tried to deny the qui tam his statutory reward by claiming that its recovery was for "administrative recoupment claims" putatively unrelated to the qui tam's fraud claims, the court rejected the argument). In any event, it would be reversible error to dispose of these issues by summary judgment with no hearing, and no notice to the qui tams, if that is what the court tried to do.

PART D. THE SIC VIOLATED THE OPEN MEETINGS ACT, THE INSPECTION OF PUBLIC RECORDS ACT, AND THE QUORUM REQUIREMENT IN § 6-8-2.

In agreeing to these settlements, the SIC repeatedly violated the Open Meetings Act; the Inspection of Public Records Act; and the statutory

requirement that the SIC must act as a body of 11 members, with a minimum quorum of 6 members. § 6-8-2. Therefore the settlements are void.

These settlement contracts were never approved by the SIC in an open meeting. Instead, based on legal advice from Evan Land and the AGO, the SIC delegated complete settlement authority to a 3 person subcommittee that operates in complete secrecy. See SIC "Recovery Litigation Settlement Policy," Exhibit A, filed by appellees on February 18, 2015. This secret subcommittee consists of two SIC members, Peter Frank and Linda Eitzen, and Jessica Hernandez, Esq., the Governor's legal counsel and deputy chief of staff.

The SIC never reviewed the settlement agreements; only the secret subcommittee did. Peter Frank testified that the proposed settlements were approved by the secret litigation subcommittee, but not by the SIC itself. According to Mr. Frank, the litigation subcommittee has met 7 or 8 times, operating in complete secrecy, with no published notice of meetings, no published agendas, no open meetings, no notice of executive sessions, and no minutes. According to Mr. Frank and Gary King, the SIC can delegate all of its litigation and settlement authority to two SIC members and the Governor's counsel, who is not a member of the SIC. This three-person subcommittee can

unanimously approve and sign settlements without any action by the eleven-member SIC. Furthermore, Gary King and the SIC and the defendants argued that this subcommittee can operate in total secrecy, without keeping any records. Unfortunately, the district court agreed with them. **[11-25-13 Tr. 16:11-24:22]**

The SIC's actions violate the following laws:

- The Open Meetings Act, , §§ 10-15-1 through -5;
- The Inspection of Public Records Act, , §§ 14-2-1 through -12;
- 1.15.2.119 NMAC, which requires agencies to maintain records of meetings permanently; and
- The statutory quorum requirement imposed on the SIC by § 6-8-2(B).

Despite these laws, Judge Singleton erroneously ruled as a matter of law that the use of a secret subcommittee is legal and allowable. Conclusions of Law ¶¶ 2-4 **[RP 5663-64]**.

In July, 2012, qui tams filed a motion to prohibit secret settlements **[RP 2906-56]**. Judge Singleton denied the motion, saying that she did not have the authority to enjoin the SIC to follow the law **[12-21-12 Tr. 54:8]**. This is another plain error of law, because courts do have the authority to order the

executive branch to comply with thethe law. *State ex rel. Clark v. Johnson*, 1995-NMSC-048, 120 N.M. 562. Otherwise, the rule of law would not exist.

Unless the district court decisions are promptly reversed, they will nullify the Open Meetings Act and IPRA. State agencies and county commissions and city councils will immediately use this ruling to act in secret, with no public notice, no public action, and no public records.

Gary King erroneously advised the SIC and the district court that the SIC can delegate authority to a subcommittee which can operate without complying with these statutes. By giving this plainly erroneous legal advice, Gary King contradicted an official Attorney General's opinion on the subject:

> A public policy-making body may not create an alter-ego with a "fact-finding group" facade when, in fact, its subordinate unit is shrouded with a substantial amount of decision-making authority. "Government by delegation" cannot be used as pretext to closing meetings in New Mexico.

N.M. Att'y Gen. Op. 90-20.

Gary King and his immediate staff also contradicted the advice given by the Assistant Attorney General who attends all SIC meetings to ensure that the SIC complies with IPRA and the Open Meetings Act.

See also *Arkansas Gazette Co. v. Pickens*, 522 S.W.2d 350, 354 (Ark. 1975) (university Board of Trustees is subject to open meeting statute, and therefore

its committees are also subject to the statute; "Surely a part (of a board) is not possessed of a prerogative greater than the whole.").

Furthermore, while public agencies usually have an attorney-client privilege, the attorney client exception cannot "swallow the rule of public access." *Prior Lake American v. Mader*, 642 N.W.2d 729, 742 (Minn. 2002). Although some discussions might be held in secret, the minutes may be public. The public body bears the burden of proving the exceptions which it claims. *Multimedia Publ'g v. Henderson Cnty.*, 525 S.E.2d 786, 792 (N.C. Ct. App. 2000).

Because the proposed settlements were not authorized by the SIC or its Litigation Committee in accordance with the Open Meetings Act, the settlements are void. § 10-15-3(A):

> No resolution, rule, regulation, ordinance or action of any board, commission, committee or other policymaking body shall be valid unless taken or made at a meeting held in accordance with the requirements of Section 10-15-1 . . . .

The actions of the SIC Litigation Subcommittee also violate the quorum requirement and the majority vote requirement imposed by the Legislature on the SIC. § 6-8-2(A) provides for an eleven-member State Investment Council and § 6-8-2(B) provides that:

> All actions of the council shall be by majority vote, and a majority of the members shall constitute a quorum.

Some members of the SIC are *ex officio*, some are appointed by the Legislature, and some by the Governor. § 6-8-2(A). The statutory quorum requirement protects the diversity of representation on the Council. The "Recovery Litigation Policy" delegates complete decision-making authority to a small group, so it disenfranchises the other 9 members of the SIC. It deprives the SIC members of the knowledge which they need to fulfill their fiduciary responsibilities. In government, secrecy breeds stupidity.[3]

Many public bodies would love to delegate authority to secret subcommittees which would operate without any notice or records. This delegation maneuver would be a great convenience to public officials, since they would no longer have to act in public. There are many county commissioners and school board members who would love to adopt this tactic, if this Court were to allow it.

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[3] It should be noted that this subcommittee violates the SIC's own stated policy, which says that "The Council's litigation committee shall be comprised of at least three SIC members." There were only two SIC members on the subcommittee.

The Attorney General and Day Pitney argue that settlement agreements are not subject to the requirements of the Open Meetings Act, citing *Board of Cnty Comm'rs v. Ogden*, 1994-NMCA-010, 117 N.M. 181. The AGO and Day Pitney mischaracterize *Ogden*, which dealt with a decision to file a lawsuit. *Ogden* is not on point, because this case involves a public body entering into a contract – the settlement agreement – to settle a pending lawsuit. Public contracts must be approved in public session. Matters relating to litigation may be discussed in closed session, but settlements are not exempted from the Open Meetings Act or IPRA by the attorney-client privilege. The attorney-client privilege does not extend to contracts between a public agency and its adversaries in litigation. If it did, then all settlement agreements would be exempt from disclosure under the Open Meetings Act and IPRA, in perpetuity.

The Legislature has already considered the confidentiality of settlement agreements. It has allowed only six months of temporary confidentiality, and only for Risk Management. § 15-7-9(A)(2).

These settlement agreements were reached in November and December 2012, but they were kept secret for months. The settlement agreements were not protected by the attorney-client privilege, since they were known to the

defendants. So the settlement contracts were not kept secret from the defendants, but they were kept secret from the public.

The SIC also violated provisions in the federal and state constitutions which require the government to disclose financial information to the citizenry. See U.S. Const. art. I, § 9, cl. 7 ("a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time") and N.M. Const. art. V, § 9 (report of all moneys must be made to the governor and the legislature). The purpose of these provisions is quite plain: to give citizens the right to know how the government is using their money.

The public has a constitutional right to financial information because (a) it is the public's money that government spends, (b) the public elects the government, (c) our government is based upon the consent of the governed, and the public has the right to know what they are consenting to, and (d) our Founding Fathers understood that "the power over the purse" was the foundation of all the individual civil liberties in the Bill of Rights. See The Federalist No. 58 (James Madison, Feb. 20, 1788).

PART E. GARY KING AND HIS STAFF HAD PERSONAL CONFLICTS OF INTEREST. THE DISTRICT COURT ERRED BY RULING THAT QUI TAMS HAD NO STANDING TO RAISE THESE CONFLICTS.

Gary King had a disqualifying conflict of interest, because of his dealings with the defendant Bruce Malott. Mr. Malott is an Albuquerque CPA who was the Chairman of the ERB until he was forced to resign after being named as a defendant in the *Vanderbilt* and *Austin* cases. Mr. Malott was one of the main conspirators and fraudfeasors in the pay to play scheme.

Mr. Malott was also the Campaign Treasurer for Gary King, during and after his 2002 run for Congress. During the course of the Foy lawsuits, The Albuquerque Journal broke the story that Gary King certified Mr. Malott's electronic signature on King's reports to the Federal Election Commission, without Mr. Malott's permission. In so doing, Gary King might have committed one or more felonies under federal law. *See, e.g.*, 18 U.S.C. § 1001 (making a false statement to the United States).

Former Assistant Attorney General Seth Cohen also had a conflict, because his cousin Amanda Cooper is a suspected wrongdoer in *Austin*, *Vanderbilt*, and *Bland*. Qui tam plaintiffs served Ms. Cooper with a subpoena *duces tecum* in 2009 which is still in force **[RP 2225-27]**.

Qui tams raised these and other issues in a Motion to Disqualify Mr. King, with supporting exhibits **[RP 2196-2308]**. However, the district court summarily denied the motion, ruling that the qui tam plaintiffs had no standing to raise any of these conflicts **[RP 3931-32]**.

This is another error of law. First, Mr. Foy has standing because FATA grants him standing. Second, Mr. Foy has a direct financial stake in this case, because he is entitled to a large monetary award, plus attorney fees. Third, Mr. Foy is a party to this litigation, and a party has the right to raise conflicts of interest by public officials which might affect the integrity of the case. Fourth, Gary King's involvement in the *Bland* case undermines the public's confidence in the AGO. Fifth, these conflicts provide one explanation for Gary King's refusals to follow FATA and honor the automatic stay. Sixth, the court's refusal to hear the motion to disqualify does not promote public confidence in the judiciary. The district court's refusal to hear evidence about these conflicts of interests creates at least an appearance of impropriety, i.e.

that the court enabled Mr. King's cover-up. That was not the intent of the district court, but that was the effect of the court's rulings.[4]

CONCLUSION AND REQUEST FOR RELIEF

The rulings of the district must be reversed. This court must rule on each of the issues raised here, to provide guidance about FATA to the lower courts, and to prevent any repetition of the mistakes that have been made in this case. Judge Pfeffer's excellent analysis of FATA should be confirmed in all major respects. And all further proceedings before Judge Singleton should be stayed until the Supreme Court issues a decision in *Austin*.

REQUEST FOR ORAL ARGUMENT

Qui tam plaintiff-intervenors request oral argument for the following reasons:

- These cases involve more than $500,000,000 in potential recoveries for the State of New Mexico.

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[4] Note: Hector Balderas replaced Gary King as Attorney General on January 1, 2015. The new Attorney General and his new staff need to review these conflicts and the handling of this case. Gary King, Seth Cohen and Deputy Attorney General Scott Fuqua are no longer at the AGO, but it is their actions that created the problems in this case which confront this Court.

• The district court and Gary King have committed errors which impair the functioning of the Fraud Against Taxpayers Act.

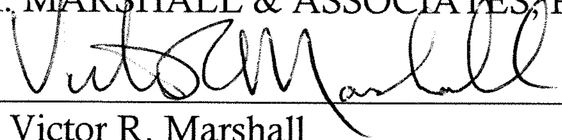
• By approving a secret subcommittee, the district court has nullified the Open Meetings Act, the Inspection of Public Records Act, and the statutory quorum requirement for the SIC.

• The district court acted beyond its jurisdiction, and in violation of the automatic stay.

• When material facts are disputed, a judge cannot allow one side to present its version of the facts while barring the other side from discovery.

Respectfully submitted,

VICTOR R. MARSHALL & ASSOCIATES, P.C.



By ______________________

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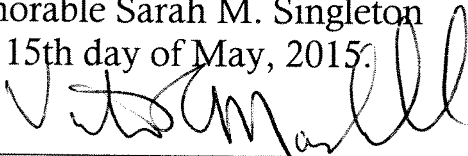
I hereby certify that a true and correct copy of the foregoing was emailed to all counsel listed below and the Honorable Sarah M. Singleton this 15th day of May, 2015.



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