IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

NEW MEXICO STATE INVESTMENT COUNCIL, as Trustee, Administrator, and Custodian of the LAND GRANT PERMANENT FUND and the SEVERANCE TAX PERMANENT FUND,

Plaintiff-Appellee,

and

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

Plaintiffs-Intervenors-Appellants,

v.

No. 34,042
Santa Fe County
D-101-CV-2011-01534

ELLIOT BROIDY,

Defendant-Appellee,

and

GARY BLAND, et al.,

Defendants.

REPLY BRIEF WITH MOTION TO SUPPLEMENT RECORD TO DISCLOSE DAY PITNEY'S CONFLICTS OF INTEREST

The qui tam plaintiff-intervenors submit this reply brief and move the Court to supplement the record with information which has been newly uncovered and filed in District Court. This new information reveals that the law firm of Day Pitney LLP has disqualifying conflicts of interest which it did not disclose to its client, the State Investment Council. Day Pitney hid these conflicts of interest from the 11 members of the SIC, including Governor Susanna Martinez, State Treasurer Tim Eichenberg, and State Land Commissioner Aubrey Dunn, Jr.

Kenneth Ritt of Day Pitney has acted as the lead litigator on this case, both in the district court and this Court. For example, see signature block in the Answer Brief in this appeal,

> Kenneth W. Ritt
> Special Assistant Attorney General
> Day Pitney LLP
> One Canterbury Green
> Stamford, Connecticut 06901
> (203) 977-7318

Mr. Ritt and the other attorneys at Day Pitney did not disclose to the SIC that Day Pitney represented Deutsche Bank, the parent company of Aldus Equity. Aldus Equity is the company that was run by the defendant Saul Meyer.

The Day Pitney law firm also failed to disclose to the SIC that it represented several other companies that are defendants in the pay to play litigation, including Citigroup, Merrill Lynch, Bank of America (Merrill Lynch's parent), and Ernst & Young. In this situation, the interests of the SIC were directly contrary to the interests of Day Pitney's Wall Street clients, like Citigroup and Deutsche Bank. The SIC and its lawyers have a duty to recover money from these defendants, which will go to public schools, teachers, and children throughout New Mexico.

The new information also shows that Day Pitney continued this deception at the May 25, 2015, meeting of the State Investment Council.

Day Pitney's continuing conduct since 2010 violates New Mexico's Rules of Professional Conduct for attorneys. These rules apply to Day Pitney lawyers when they practice law in New Mexico as assistant attorneys general. It makes no difference that Day Pitney's main offices are in Connecticut.

Since 2010 Mr. Ritt has concealed Day Pitney's disqualifying conflicts from the client – the SIC – and from the courts. As a result, Day Pitney's conflicts have tainted all of the proceedings in this Court and in the district court.

This information has been submitted to Judge Louis P. McDonald because the Supreme Court has appointed him to preside over the consolidated Vanderbilt/Austin cases, with authority to decide whether to consolidate related cases, such as the instant case.

This information cannot be submitted to the district court in this case because Judge Singleton ruled that qui tams do not have standing to raise conflicts relating to the Attorney General's staff. **[RP 3931-32]** That ruling needs to be corrected by this court, see **[BIC 48-49]**.

Respectfully submitted,

VICTOR R. MARSHALL & ASSOCIATES, P.C.

By /s/ Victor R. Marshall
Victor R. Marshall
Attorneys for State ex rel. Frank Foy,
Suzanne Foy, and John Casey, Appellants
12509 Oakland NE
Albuquerque, New Mexico 87122
505/332-9400 505/332-3793 FAX

I hereby certify that a true and correct
copy of the foregoing was emailed to
all counsel of record on November 25, 2015.

/s/ Victor R. Marshall
Victor R. Marshall

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO, Plaintiff,
ex rel. FRANK C. FOY, SUZANNE B. FOY,
and JOHN CASEY, *Qui tam* Plaintiffs,

v.

Consolidated
No. D-101-CV-200801895
No. D-101-CV-200901189

VANDERBILT CAPITAL ADVISORS, LLC; *et al.*

Defendants.

NOTICE OF RELATED PROCEEDING

The plaintiffs hereby give the Court notice of a related proceeding: State of New Mexico ex rel. Frank Foy and John Casey v. Day Pitney LLP, No. D-101-CV-2015-02049. A copy of the complaint is attached and incorporated as part of this notice. This case was initially filed under seal on September 14, 2015, pursuant to the Fraud Against Taxpayers Act, NMSA 1978, §§ 44-9-1 through -15. The complaint and supporting materials were provided to Attorney General Hector Balderas on September 14.

The case was initially filed under seal for a period of 60 days, per § 44-9-5. The statutory 60 day sealing period expired on Friday, November 13. No motion to extend the sealing period was filed. (Mr. Balderas' staff indicated that Mr. Balderas would seek to extend the sealing of this complaint for another 90 days, but such a motion was not filed within the statutory period.)

The matters disclosed in the attachment are extremely serious. Day Pitney has violated the duties of loyalty and honesty which every lawyer owes to a client. By violating the duties which it owed to the State Investment Council, Day Pitney has compromised the integrity of this proceeding, and every related proceeding. Before the Court takes any action

in this case, the Court needs to consider and investigate the information contained in the attachment.

Day Pitney's misconduct affects critical issues in this case, including:

1. The defective Vanderbilt settlement that Day Pitney proposed in 2013, which this Court rejected on July 12, 2013;

2. The current efforts by Day Pitney and Hector Balderas to revive the rejected Vanderbilt settlement, contrary to the District Court's 2013 ruling and also the Supreme Court's 2015 rulings in favor of Foy and the State; and

3. The "status report" filed on October 22, 2015 by Day Pitney and Hector Balderas and others, wherein Day Pitney and Mr. Balderas announce their joint intention to seek dismissal of all the FATA claims asserted by Mr. Foy and the State, for reasons which Day Pitney and Mr. Balderas cannot explain.

Upon information and belief, the 11 members of the State Investment Council are unaware of the information contained in the attached complaint. One purpose of the lawsuit against Day Pitney is to provide SIC members with information which Day Pitney has hidden from them.

Respectfully submitted,

VICTOR R. MARSHALL & ASSOCIATES, P.C.

By /s/ Victor R. Marshall
Victor R. Marshall
Attorneys for Plaintiff State of New Mexico
and *Qui Tam* Plaintiffs Frank Foy,
Suzanne Foy, and John Casey
12509 Oakland NE
Albuquerque, New Mexico
505/332-9400
victor@vrmarshall.com

I hereby certify that a true and correct
copy of the foregoing was efiled and served
via Odyssey File and Serve to
all counsel of record on November 16, 2015.

/s/ Victor R. Marshall
Victor R. Marshall

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

INITIALLY FILED UNDER SEAL
PER NMSA 1978, § 44-9-5(B)

STATE OF NEW MEXICO, ex rel.
FRANK FOY and JOHN CASEY,

Plaintiff and Qui Tam Relators,

D-101-CV-2015-02049

v.

DAY PITNEY LLP;
JOHN DOES 1-9; JOHN DOES 10-19,

Defendants.

COMPLAINT FOR DAMAGES AND OTHER RELIEF UNDER THE FRAUD AGAINST TAXPAYERS ACT

For its complaint under the Fraud Against Taxpayers Act, the State of New Mexico alleges and states:

1. This lawsuit is brought pursuant to the Fraud Against Taxpayers Act, §§ 44-9-1 through -15 ("FATA"), as amended in 2015, and as construed in *State ex rel. Foy v. Austin Capital*, No. 34,013, 2015 WL 3904949, 2015-NMSC-___ (Jun. 25, 2015).

2. PARTIES

3. The plaintiff State of New Mexico ("the State") is one of the 50 United States of America. Qui tam relators Frank Foy and John Casey bring this case on behalf of the State, including the State Investment Council ("SIC") and the Educational Retirement Board ("ERB"), which are State agencies. Foy and Casey are qui tam relators for the State in *State ex rel. Foy v. Austin Capital*, *supra*, and in *State ex rel. Foy v. Vanderbilt*, No. D-101-CV-200801895. The Supreme Court has consolidated the *Foy/Vanderbilt* and *Foy/Austin* cases. The undersigned law firm is counsel for the State in the *Foy/Vanderbilt* and *Foy/Austin* cases, and has been since 2008.

4. Defendant Day Pitney is a law firm which has undertaken to represent the SIC concerning some of the matters uncovered by *Foy/Vanderbilt* and *Foy/Austin* in 2008 and 2009.

5. Defendant John Does 1 through 9 are residents of New Mexico who participated in the violations of FATA, but whose identities and actions are not yet known. Defendant John Does 10 through 19 are other persons who participated in the violations of FATA, but whose identities and actions are not yet known.

6. JURISDICTION AND VENUE

7. The court has jurisdiction over the parties and the subject matter of this complaint. Venue is proper in the First Judicial District of New Mexico for Santa Fe County.

8. GENERAL ALLEGATIONS

9. As used in this complaint, the following terms have the meanings defined in § 44-9-2 of FATA: "claim", "employer", "knowingly", "person", "political subdivision", and "state".

10. THE STATE AND QUI TAM RELATORS ARE PURSUING FATA CASES THAT FRANK FOY FILED IN 2008 AND 2009 TO RECOVER MONEY FOR THE STATE AND ITS AGENCIES.

11. 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.

12. The qui tam plaintiff Frank Foy is the former chief investment officer at New Mexico's Educational Retirement Board ("ERB"). The *Vanderbilt* complaint alleged that the defendants (mostly Wall Street firms) misrepresented the investment products which they sold to 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.

13. While Mr. Foy's complaint remained under seal, as required by § 44-9-5(B), Foy's counsel negotiated with Attorney General 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 the 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).

14. When the *Vanderbilt* case was unsealed in January 2009, it started a chain of events that ultimately led to the resignations of Gary Bland, the State Investment Officer at the State Investment Council, and Bruce Malott, Chairman of the Educational Retirement Board. 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.

15. On June 25, 2015, qui tam plaintiffs Foy and Casey won their appeal in *State ex rel. Foy v. Austin Capital*, No. 34,013, 2015 WL 3904949, 2015-NMSC-___ (Jun. 25, 2015). The Supreme Court ruled that the provision in FATA for mandatory treble damages is primarily compensatory, and therefore FATA can have retroactive effect, as stated in § 44-9-12(A), without violating the constitutional prohibitions on *ex post facto* legislation. Therefore, the State and Foy can use FATA as a remedy against frauds that occurred before the statute was enacted in 2007. Many of the investment frauds started before 2007.

16. WHEN IT WAS HIRED IN 2010, DAY PITNEY CONCEALED ITS DISQUALIFYING CONFLICTS OF INTEREST.

17. In 2010, the SIC circulated a request for proposals for outside attorneys to represent the SIC concerning the pay to play conspiracy which Frank Foy had exposed in the *Vanderbilt* and *Austin* lawsuits. When Day Pitney applied for the SIC contract, Day Pitney stressed its experience as attorneys for Thomas P. DiNapoli, the New York State Comptroller. Mr. DiNapoli was the sole trustee for the New York Common Fund, a huge pension fund. Day Pitney pointed out that the Common Fund had already recovered millions of dollars from persons involved in pay to play. In August 2011, Day Pitney was awarded the contract to represent the SIC.

18. When Day Pitney applied for and was awarded the SIC contract, and when it performed under the contract, Day Pitney failed to disclose that their client Thomas DiNapoli was then under criminal investigation by New York Attorney General Andrew Cuomo for possible participation in pay to play. The New York criminal investigation included many of the defendants that the State had sued in *Foy/Austin*, such as Saul Meyer,

Aldus Equity, Dan Hevesi, Leo Hindery, and Hank Morris. See the *Foy/Austin* amended complaint of June 2009, which describes "The New Mexico - New York connection" at paragraphs 102-05.

19. Day Pitney concealed the facts about the criminal investigation of its client DiNapoli, even though Day Pitney had a duty to disclose them in writing to the SIC when it applied for the SIC contract. These facts created a major conflict of interest for Day Pitney, between its duty of undivided loyalty to its client DiNapoli and its duty of undivided loyalty to another client, the SIC. (Note: In late 2010, the New York Attorney General Andrew Cuomo announced that he would not indict Mr. DiNapoli.)

20. When Day Pitney applied for and was awarded the SIC contract, and when it represented the SIC, Day Pitney misled the SIC by representing that they played a significant role in recovering money for the New York common fund, when they did not. Because Day Pitney represented DiNapoli, who was under criminal investigation at the time, the New York Attorney General's office did not allow Day Pitney to play any significant role in their investigation and recovery of money. The New York Attorney General's Office recovered the money for the NY Common Fund, not Day Pitney or DiNapoli. Day Pitney's misleading statements about its role in the New York recoveries were the major reason it was awarded the SIC contract.

21. Day Pitney's representation of Mr. DiNapoli created another actual conflict, because the New York Common Fund and the SIC were both creditors of many of the defendants named in *Foy/Vanderbilt* and *Foy/Austin*. The Common Fund and the SIC were competing creditors, because recoveries for the Common Fund or other New York agencies reduced

the defendants' ability to pay the SIC. This conflict has impaired the SIC's ability to recover money from defendants like Aldus, Saul Meyer, Wetherly, Weinstein, Schiff, Howell, Ramirez, and Wissman.

22. When Day Pitney applied for and was awarded the SIC contract, and when it represented the SIC, Day Pitney failed to disclose the fact that it represented Citigroup, one of the main defendants that the State had already sued in *Foy/Vanderbilt*. Day Pitney concealed this from the SIC, even though it had a duty to disclose it in writing to the SIC. Day Pitney's representation of Citigroup created a major conflict of interest for Day Pitney, a clash between the best interests of Citigroup and the best interests of the State of New Mexico.

23. When Day Pitney applied for and was awarded the SIC contract, and when it represented the SIC, Day Pitney failed to disclose the fact that it represented Merrill Lynch, one of the defendants that the State had already named in *Foy/Vanderbilt*. See Amended Vanderbilt Complaint filed March 8, 2010. Day Pitney concealed its representation of Merrill Lynch from the SIC, even though it had a duty to disclose it in writing to the SIC. Day Pitney's representation of Merrill Lynch created a major conflict of interest for Day Pitney, a clash between the best interests of Merrill Lynch and the best interests of the State of New Mexico.

24. Day Pitney failed to disclose the fact that it also represented Bank of America, the parent corporation of Merrill Lynch. The interests of the SIC and Bank of America conflicted, because if the State recovered money from Merrill Lynch, either by judgment or settlement, Bank of America's consolidated income and assets would be reduced.

25. When Day Pitney applied for and was awarded the SIC contract, and when it performed under the contract, Day Pitney failed to disclose the fact that it represented Ernst & Young, one of the defendants that the State had already sued in *Foy/Vanderbilt*. Day Pitney concealed this from the SIC, even though it had a duty to disclose it in writing to the SIC. Day Pitney's representation of Ernst & Young created a major conflict of interest for Day Pitney, a clash between the best interests of Ernst & Young and the best interests of the State of New Mexico.

26. When Day Pitney applied for and was awarded the SIC contract, and when it performed under the contract, Day Pitney failed to disclose the fact that it represented Deutsche Bank, one of the defendants that the State had already sued in *Foy/Austin*. Day Pitney concealed this from the SIC, even though it had a duty to disclose it in writing to the SIC. Day Pitney's representation of Deutsche Bank created a major conflict of interest for Day Pitney, between the best interests of Deutsche Bank and the best interests of the State of New Mexico.

27. Day Pitney represented Citigroup, Ernst & Young, Merrill Lynch, Bank of America, and Deutsche Bank in federal and state court cases which can be found on Westlaw. It is possible that Day Pitney also represented FATA defendants in other proceedings, or on other matters, besides the ones listed here.

28. A partial Westlaw search of court cases reveals the following cases where Day Pitney represented defendants in the State's FATA lawsuits: *Nathan v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, No. 3:07CV238WWE, 2007 WL 3102186 (D. Conn. Oct. 19, 2007); *Chylinski v. Bank of America, N.A.*, No. 3:08-CV-322 (JCH), 2008 WL 4738692 (D. Conn. Oct. 16,

2008 & Apr. 15, 2009); *Sanders v. Citibank*, 305 F. App'x 750 (2d Cir. 2009); *Fenwick v. Merrill Lynch & Co., Inc.*, No. 3:06cv880 (WWE), 2009 WL 42464 (D. Conn. Feb. 20, 2009 & Apr. 9, 2009); *Ancil v. Ally Financial, Inc.* (*Deutsche Bank, N.A.* among defendants represented by Day Pitney), 998 F. Supp. 2d 127 (S.D.N.Y. 2014); *Babb v. Capitalsource, Inc.* (*Deutsche Bank* among defendants represented by Day Pitney), 588 F. App'x 66 (2d Cir. 2015); *Deutsche Bank Nat'l Trust Co. v. WMC Mortgage, LLC*, No. 3:13-CV-1347 (CSH), 2015 WL 1650835 (D. Conn. Apr. 14, 2015).

29. DAY PITNEY VIOLATED NEW MEXICO'S RULES OF PROFESSIONAL CONDUCT.

30. As set forth above and below in this complaint, Day Pitney violated the New Mexico Rules of Professional Conduct for attorneys, including but not limited to:

31. Rule 16-101. Competence.

32. Rule 16-103. Diligence.

33. Rule 16-104. Communication.

34. Rule 16-107. Conflict of interest: Current clients.

35. Rule 16-108. Conflict of interest; Current Clients; Specific Rules.

36. Rule 16-109. Duties to former clients.

37. Rule 16-110. Imputation of conflicts of interest.

38. Rule 16-116. Declining or terminating representation.

39. Rule 16-201. Advisor.

40. Rule 16-303. Candor toward the tribunal.

41. Rule 16-304. Fairness to opposing party and counsel.

42. Rule 16-401. Truthfulness and statements to others.

43. Rule 16-501. Responsibilities of partners, managers and supervisory lawyers.

44. Rule 16-805. Disciplinary authority.

45. Day Pitney continues to violate these Rules.

46. A law firm may not act as an advocate in one matter against a person that the law firm represents in some other matter, even when the matters are wholly unrelated. See Rules 16-107(B)(3) and 16-110(A).

47. After being awarded the SIC contract, Day Pitney continued its concealment and misrepresentations about the facts described above.

48. In its application and in its contract with the SIC, Day Pitney stated that it would "observe the highest standard of ethics". This statement was knowingly false, because Day Pitney knew that it had conflicts that it did not disclose to the SIC. Day Pitney knew that it had conflicts which prevented it from acting with undivided loyalty to the SIC, and solely in the best interests of the SIC. Whenever Day Pitney submitted a bill to the SIC, it was making a false, fraudulent, or misleading claim for payment, because Day Pitney had not acted with the highest standard of ethics. Day Pitney was not even acting with the minimum standard of ethics imposed on every lawyer practicing in New Mexico.

49. In its contract with the SIC, Day Pitney stated that it would act with a higher standard of care and competence and expertise "in the field of civil litigation, and the pursuit of recovery of damages resulting from securities law violations, fraud, breach of fiduciary duty, aiding and abetting, unjust enrichment and other similar claims". This statement was knowingly false. Day Pitney was not even acting with the minimum

standards of competence, ethics, and diligence that are imposed on every lawyer practicing in New Mexico. Whenever Day Pitney submitted a bill to the SIC, it was making a false, fraudulent, or misleading claim for payment, because Day Pitney was billing for services that did not meet the highest standards of ethics, competence, and diligence, or even the minimum standards.

50. DAY PITNEY PROVIDED INCOMPETENT LAWYERING.

51. In 2011 Day Pitney advised the SIC that it needed to file suit in a hurry because the statutes of limitations were about to run out. Day Pitney's legal advice was incorrect and incompetent, because civil statutes of limitations do not run against the State of New Mexico.

52. In 2011 Day Pitney advised the SIC that it was better litigation strategy to file in federal court, rather than in state court as Foy had done. This was bad advice, prompted in part by Day Pitney's unfamiliarity with New Mexico state courts.

53. On April 22, 2011, Day Pitney signed a contingent fee agreement with the SIC. In section 12, Day Pitney "warrants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance or services required under the Agreement". This warranty was false, and Day Pitney knew that it was false.

54. In May 2011, Day Pitney filed a complaint in federal court, based upon diversity jurisdiction. *New Mexico State Investment Council v. Meyer, et al,* No. 1:11-CV-00390 JB/LAM. This was plain legal error, because the State cannot invoke federal diversity jurisdiction. Defendant Anthony Correra filed a motion to dismiss for lack of federal

jurisdiction, which forced Day Pitney to dismiss the complaint. Day Pitney's federal court strategy was incompetent and incorrect. Any attorney undertaking to represent the State of New Mexico needs to know this basic rule of federal jurisdiction. Day Pitney failed to follow this rule, even though it had been paid over one million dollars to devise a litigation plan for the SIC, a state agency. Kenneth Ritt of Day Pitney never offered any explanation for this error. Scott Fuqua of the Attorney General's office told the court that he did not know this rule of diversity jurisdiction.

55. Day Pitney did not admit its mistake to the SIC. Instead, Day Pitney concealed its mistake from the SIC by recommending a shift to state court because "Anthony Correra was playing games in federal court". This was false: Anthony Correra wasn't playing games; he was simply invoking the statutory limitations on federal court jurisdiction.

56. In all, it took Day Pitney five tries before it managed to file a complaint which could barely survive Rule 12 motions to dismiss. Day Pitney filed a federal court complaint on May 6, 2011; and complaints in state court on May 6, 2011; June 30, 2011; February 20, 2012; and July 17, 2012.

57. Since the inception of the SIC contract, Day Pitney has submitted bills and received payment for services which it did not provide.

58. Upon information and belief, Day Pitney has submitted false invoices to the SIC that are grossly inflated. For example, on November 22, 2013, a permanent associate at Day Pitney (Clifford Nichols III), filed an affidavit swearing that since March, 2010, he had "devoted approximately 3,000 hours to the client."

59. Every bill submitted by Day Pitney was a false claim, because Day Pitney was billing for services which did not meet the highest standards of ethics or competence.

60. DAY PITNEY HAS FAVORED THE INTERESTS OF OTHER DAY PITNEY CLIENTS THAT ARE DEFENDANTS IN THE FATA CASES.

61. After being awarded the contract, Day Pitney favored the best interests of its clients DiNapoli, Citigroup, Deutsche Bank, Ernst & Young, Merrill Lynch and Bank of America ahead of the best interests of its other client, the SIC. In so doing, Day Pitney also favored its own financial interests, because DiNapoli and these Wall Street clients were more lucrative and more important to Day Pitney over the long run. These Wall Street clients are more likely to generate recurring legal business for Day Pitney than the SIC's one time engagement.

62. Day Pitney has pressed for settlements without any discovery, which is utterly imprudent and the opposite of due diligence. By avoiding discovery, Day Pitney has helped its other clients conceal their wrongdoing against the State.

63. After being awarded the contract, Day Pitney favored the interests of its other clients Citigroup, Ernst & Young, Bank of America and Merrill Lynch by negotiating a proposed settlement in the *Foy/Vanderbilt* case that would have released Citigroup, Ernst & Young, and Merrill Lynch, and their affiliates (including Bank of America), for a relatively small amount of money – $24.6 million.

> The Defendant Released Parties comprise Vanderbilt Capital Advisors, LLC, Vanderbilt Financial, LLC, Vanderbilt Financial Trust, Pioneer Investment Management USA Inc., Pioneer Global Asset Management S.p.A., UniCredit S.p.A. (f/k/a Unicredito Italiano, S.p.A.), Patrick A. Livney, Stephen C. Bernhardt, Kurt W. Florian, Jr., Osbert M. Hood, Ron D.

> Kessinger, Robert P. Nault, James R. Stern, Anthony J. Koenig, Jr., Mark E. Bradley, **Ernst & Young LLP**, PricewaterhouseCoopers LLP, ABN AMRO Inc., ACA Management, LLC, Credit AgricoleSecurities (USA), Inc. (f/k/a Calyon Securities (USA), Inc.), **Citigroup, Inc., Citigroup GlobalMarkets Inc.**, Fortis Securities LLC, Jefferies Capital Management, Inc., JP Morgan SecuritiesLLC (f/k/a Bear, Stearns & Co., Inc. and JP Morgan Securities, Inc.), JP Morgan Chase Bank,N.A., **Merrill Lynch & Co., Inc., Merrill Lynch Pierce Fenner & Smith, Inc.**, StoneCastleSecurities, LLC, UBS Securities LLC., Katten Muchin Rosenman, LLP, Richards, Layton & Finger, P.A. and Clifford Chance US LLP.

Day Pitney Motion To Approve and Enforce Settlement Agreement, *Foy/Vanderbilt,* at 2 n.2 (Feb. 21, 2013) [Day Pitney's clients are shown in bold].

64. Upon information and belief, the Day Pitney clients Citigroup, Ernst & Young, Merrill Lynch and Bank of America contributed little or no money to the proposed settlement, which would have given them a complete release from all claims by the SIC and the ERB.

65. On July 13, 2013, Judge Pfeffer rejected the settlement proposed by Day Pitney for numerous reasons, including lack of diligence in pursuing discovery, failure to comply with FATA, and failure to carry out the representations which movants had made to him earlier. His decision criticized Gary King and Day Pitney for proposing such a settlement.

> 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". . . .
> 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] . . .

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. That is, if the Supreme Court reverses the determination that FATA claims that predate enactment are barred by *ex post facto* protections, thereby allowing such claims to proceed, the proposed settlement would not be based on an accurate assessment of Defendants' exposure. It bears noting that, prior to this Court's ruling on the *ex post facto* issue, the State had supported *Qui tam* Plaintiffs' position and filed *amicus curiae* briefs in that regard. . . .

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. . . .

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.

66. As of the filing of this complaint in September 2015, Day Pitney is continuing to work behind the scenes to push through this inadequate, no discovery settlement that Judge Pfeffer rejected. Day Pitney is continuing its efforts even after the New Mexico Supreme

Court ruled that the State of New Mexico can use the Fraud Against Taxpayers Act in the consolidated *Foy* case to recover treble damages plus attorneys fees from Citigroup, Ernst & Young, Deutsche Bank, and Merrill Lynch, no matter when they committed their investment frauds against the State.

67. In trying to push through these settlements and dismissals which would benefit other Day Pitney clients, Day Pitney is actively conspiring with Peter Simmons of Fried Frank, the law firm which appears as counsel of record for Deutsche Bank, and the Vanderbilt defendants also.

68. Day Pitney's conflict of interest is exacerbated by the fact that Citigroup, Deutsche Bank, Ernst & Young, and Merrill Lynch would each be jointly and severally liable under FATA for the entire amount of the State's losses. This is one reason why Day Pitney is trying to destroy the State's FATA claims in the Foy cases.

69. DAY PITNEY IS SABOTAGING THE STATE'S FATA CASES TO INCREASE ITS CONTINGENT FEES.

70. There is another reason for Day Pitney's continuing attempts to sabotage the Foy FATA cases: under the SIC contingent fee contract of 2011, amended in 2015, Day Pitney receives a percentage share of any recoveries that it negotiates, but Day Pitney receives no share of the recoveries from Foy's FATA cases. This creates a conflict of interest between the State's best interests and Day Pitney's financial interest in collecting larger fees from the State. This conflict has caused Day Pitney to favor settlements that generate fees for Day Pitney, even though much larger recoveries are available under FATA, along with the recovery of attorneys fees from the defendants. Day Pitney is pursuing alternative causes of

action which do not provide for attorneys fees, so the SIC is paying money to Day Pitney that it cannot recover.

71. As one example, Day Pitney is continuing to promote the no discovery $24.6 million settlement in *Foy/Vanderbilt* even though Judge Pfeffer has rejected it, and even though the Supreme Court has ruled in favor of the State and Foy. Day Pitney is continuing to promote that settlement against the best interests of the State, because Day Pitney would receive a contingent fee of 12% of that amount, or $2,952,000, not counting possible credits. In the process, Day Pitney would protect its other clients.

72. By contrast, suppose that the Foy cases recover $500 million, plus attorneys fees for qui tam counsel and the Attorney General. This would be a much better outcome for the State, but not for Day Pitney, because Day Pitney would receive nothing from Foy's cases. And this would not be a good outcome for Day Pitney because its clients Citigroup, Merrill Lynch, Deutsche Bank, Bank of America and Ernst & Young would be jointly and severally liable to the State.

73. It was always in the State's best interest for the SIC and ERB to actively support Foy's FATA cases, because FATA gives the State many litigation advantages: mandatory treble damages, § 3(C)(1); joint and several liability, § 13; recovery of attorneys fees and expenses for qui tam counsel and government counsel, § 7(D) and (E); a reward to qui tams based on the proceeds of the action or settlement, § 7(A) and (B); proof of fraud by a preponderance of the evidence, rather than clear and convincing evidence, § 12(C); liability for conspiracy, § 3(A)(4); liability for misleading statements, § 3(A)(2); liability for reckless disregard or deliberate ignorance, § 2(C)(2) and (3); the services of qui tams and qui tam

counsel, § 5; and civil penalties of $5,000 to $10,000 per violation, § 3(C)(2). However, Day Pitney persuaded the SIC and the ERB not to support the FATA cases, and to sabotage them whenever possible, in order to protect its fees and its other clients.

74. In every instance, Day Pitney persuaded the SIC to pursue causes of action that Day Pitney recommended even though they were not nearly as advantageous to the State as FATA. For example, the SIC and the ERB lost their entire $90 million investment in Vanderbilt Financial Trust. Under Day Pitney's recommended cause of action – for breach of fiduciary duty – the actual damage recovery would be $90 million, while under FATA it would be $270 million.

75. Because of all these conflicts, Day Pitney falsely advised the SIC that it could deny the qui tam relators any share of the recoveries. This is what Day Pitney tried to do in the Vanderbilt settlement which Judge Pfeffer rejected. See sections 1 and 5 of Judge Pfeffer's decision, quoted above. Day Pitney's self-serving advice was legally incorrect, because Day Pitney's efforts are classified as an "alternative remedy" under FATA, which gives Foy the same rights, including the right to a reward, as he has in his FATA cases. § 44-9-6(H). See also paragraph 40 of the Supreme Court decision (Foy is entitled to 25 to 30% of any recovery).

76. If Day Pitney were entitled to any contingent fee percentage, which is denied, that percentage would have to be paid by the state agencies on top of the percentage paid to Foy. It is not in the State's best interests to pay duplicate fees.

77. As part of its efforts to sabotage the FATA cases, Day Pitney has repeatedly made arguments in court that undercut the State's claims arising from the tainted investments.

78. For example, Day Pitney informed the SIC and the court that the SIC cannot recover damages from an investment firm if that particular investment made money for the SIC, even if that firm paid bribes and kickbacks to Marc Correra. This advice is legally incorrect; Day Pitney gave this bad advice in order to protect its Wall Street clientele, to the detriment of the SIC.

79. Under the law in New Mexico and in most states, there are two alternative ways to measure damages. The first method is based upon the losses suffered by the plaintiff. The second method is based upon the ill-gotten gains of the defendants, often called restitution or unjust enrichment. The first method covers damages based on injury or damage done to the plaintiff, whereas the second method recovers damages based on the unjust enrichment of the defendants. Either method is available, depending on the circumstances of a particular situation. When a lawyer represents a plaintiff it is part of the lawyer's job to evaluate and use the method most advantageous to the plaintiff. For example, the Vanderbilt Financial Trust lost $90 million in principal plus income from that principle, so the best measure of damages is the loss to the State of New Mexico. On some of the other pay to play investments, the State of New Mexico received a decent rate of return, so the State's recovery is measured by the unjust enrichment of the investment firms that paid the bribes. Under this alternative remedy, the investment firm must pay back the money it made on the investment. When the SIC or the ERB places an investment with a Wall Street firm, the firm makes money in a wide variety of ways, such as management fees ("2 and 20"), trading commissions, marking up the cost of the investment to the client, etc. Some of these methods are disclosed. Some are not.

80. So Day Pitney was wrong when it advised the SIC and the court that there were no damages recoverable on investments that made money for the SIC, even if the investment firm paid kickbacks and bribes to get the business.

81. Even after Foy's counsel pointed out that the State could recover restitutionary damages in those situations, Day Pitney has still refused to pursue those claims.

82. Day Pitney has refused to ask the investment firms to disclose all their charges and markups, even though the SIC had a right to demand this information. Furthermore, the SIC had a fiduciary duty to collect this information in the ordinary course of business to make sure that it was not being gouged by the investment firms.

83. Day Pitney also has refused to make the SIC's accounting data available to Foy, so that he could do proper damage calculations to compare the alternative measures of damages that the SIC can recover.

84. To hinder the State's FATA claims, Day Pitney refused to provide Foy with an unencrypted hard drive with the documents Day Pitney has. Day Pitney's refusal makes it impossible for Foy's counsel to use a search engine to index the encrypted parts of the hard drive.

85. Day Pitney has acted this way because it is favoring the interests of its clientele (Wall Street) over the interests of its client (the SIC). This is a breach of Day Pitney's duty of undivided loyalty. "In the practice of law, there is no higher duty than one's loyalty to a client." *Mercer v. Reynolds*, 2013-NMSC-002, ¶ 1, 292 P.3d 466.

86. DAY PITNEY IS TRYING TO PROTECT ITS WALL STREET CLIENTELE.

87. In addition to the specific conflicts identified above, Day Pitney has always had a broader conflict which has caused it to act against the best interests of the State. A large part of Day Pitney's revenues are derived from representing Wall Street firms. Day Pitney's main branches are located in financial centers with a heavy concentration of clients in the banking and securities sectors. Because Day Pitney receives so much money from banking and securities clients, it is unwilling to advocate positions that would alienate its Wall Street clientele.

88. The pay to play litigation in New Mexico requires the State's lawyers to be zealous advocates against the Wall Street firms that defrauded the State, but Day Pitney is unwilling to do this. Instead, Day Pitney has steered its litigation efforts away from its Wall Street clientele. And Day Pitney has knowingly given incorrect legal advice to the SIC.

89. Because of its conflicts, Day Pitney has sued people who received or arranged kickbacks, but not the Wall Street firms that paid the kickbacks to get investments from the SIC. The firms that pay bribes are equally liable with the people who receive the bribes. However, Day Pitney has shied away from suing the bribe payors because they are Wall Street firms. This is especially damaging to the State because the Wall Street firms have the financial resources to pay hundreds of millions of dollars in damages, whereas Day Pitney has sued individuals who have much more limited resources.

90. Day Pitney filed a meritless motion to disqualify the Marshall law firm, on the grounds that the firm was seeking to recover money under FATA for both the SIC and the ERB. Day Pitney spuriously claimed that this created a disqualifying conflict of interest. The court rejected this motion:

> [T]here is no adversity between the agencies and, therefore, no conflict, because, under FATA, qui tam intervenors do not represent the interests of either SIC or ERB, but only the interests of the State as a whole.

SIC v. Bland Order Denying Motion To Disqualify Qui Tam Counsel, at 1 (Jul. 22, 2014).

91. Day Pitney made these false accusations of conflict in order to cover its own real conflicts. Day Pitney also invented this nonexistent conflict to stymie the State's recoveries under FATA, because Day Pitney will not receive a contingent fee on those recoveries.

92. Despite its large billings to the SIC, Day Pitney did not know many of the basic facts supporting the lawsuit which it filed. For example Alfred Jackson moved to dismiss Day Pitney's complaint, contending that New Mexico did not have long arm jurisdiction over him. Day Pitney was unaware that the SIC minutes showed that Alfred Jackson attended at least one SIC meeting in Santa Fe. Qui Tam counsel had to inform Day Pitney of this fact during a court hearing.

93. Despite its large billings, Day Pitney did not properly handle the key pieces of evidence: the secret tape recordings of Saul Meyer at Aldus. No one at Day Pitney listened to these tapes carefully. No one at Day Pitney bothered to understand the references in the recordings, or the context of the recordings. Day Pitney prepared and relied on a slapdash transcription which missed much of the key information. Frank Foy and qui tam counsel listened to the recordings over and over again and extracted much more information from them.

94. Day Pitney falsely stated that the pay to play conspiracy at the SIC was separate from pay to play at the ERB, even though Day Pitney knew this was not true. Day Pitney did this in order to cut down the State's FATA claims and increase its own fees.

95. DAY PITNEY COVERED UP THE CONFLICTS OF GARY KING AND SETH COHEN.

96. Day Pitney also made false or misleading statements about the pay to play conspiracy in order to cover up Attorney General Gary King's conflicts of interest due to his dealings with Bruce Malott, chairman of the ERB. 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.

97. 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).

98. Assistant Attorney General Seth Cohen was in charge of FATA cases at the AGO, as "Special Counsel to the Attorney General for *Qui tam* Litigation." Seth Cohen also had a conflict, because his cousin Amanda Cooper is a suspected wrongdoer in the pay to play conspiracy uncovered by the Foy cases. Amanda Cooper was a key Richardson aide. She served as executive director of the Moving America Forward Foundation, a purported charitable foundation which Anthony Correra used as a vehicle for laundering kickbacks.

In February 2009, qui tam plaintiffs served Ms. Cooper with a subpoena *duces tecum* for MAFF records. This subpoena is still in force, although Ms. Cooper has opposed it.

99. Qui tams raised these and other issues in a motion to disqualify Mr. King, with supporting exhibits. However, the district court in *Bland* summarily denied the motion, ruling that the qui tam plaintiffs had no standing to raise any of these conflicts. Therefore these conflicts were never explored in *SIC v. Bland.* In the meantime, Day Pitney coordinated with Seth Cohen in seeking partial dismissal of the *Foy/Austin* case before the Supreme Court had the opportunity to rule in favor of Foy and the State upholding FATA. Seth Cohen, Gary King, and Day Pitney had a duty to uphold FATA in the courts, but they did the opposite once Seth Cohen and Day Pitney took charge.

100. As against the State of New Mexico and qui tam plaintiffs, Day Pitney's communications with the SIC are not protected by the attorney-client privilege, because they come within the exceptions in Rule 11-503(D)(3) (breach of duty by lawyer) and 11-503(D)(5) (joint clients). However, the privilege exists as against the defendants in the pay to play cases, and it is in the best interests of the State to protect these communications, at least initially. Therefore the court should enter an order protecting Day Pitney information from disclosure to the defendants, while making it available to plaintiff in this case.

101. DAY PITNEY HAS VIOLATED THE FRAUD AGAINST TAXPAYERS ACT.

102. The defendants knowingly presented, or cause to be presented, to an employee, officer or agent of the State or political subdivision or to a contractor, grantee or other recipient of State or political subdivision funds, a false or fraudulent claim for payment or approval, in violation of § 44-9-3(A)(1).

103. On many occasions, the defendants knowingly made or used, or caused to be made or used, a false, misleading, or fraudulent record, or statement to obtain or support the approval of or the payment on a false or fraudulent claim, in violation of § 44-9-3(A)(2).

104. According to public records provided by the SIC in August 2015, which may or may not be accurate or complete, Day Pitney has so far submitted 20 claims for payment from the SIC, for a total of $2,911,073.14. Each claim for payment is a violation of § 44-9-3(A)(1) and (A)(2) of FATA.

105. The defendants participated in a conspiracy to defraud the State by obtaining approval or payment on a false or fraudulent claim, in violation of § 44-9-3(A)(3).

106. The defendants conspired to make, use or cause to be made or used, a false, misleading or fraudulent record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the State or a political subdivision, in violation of § 44-9-3(A)(4).

107. The defendants, when in possession, custody or control of property or money used or to be used by the State, knowingly delivered or caused to be delivered less property or money than the amount indicated on a certificate or receipt, in violation of § 44-9-3(A)(5).

108. The defendants, when authorized to make or deliver a document certifying receipt of property used or to be used by the State, knowingly made or delivered receipts that falsely represented a material characteristic of the property, in violation of § 44-9-3(A)(6). In most instances, the misrepresentations concerned the billings which the defendants made to the State.

109. The defendants knowingly received public property (money) from the SIC in violation of § 44-9-3(A)(7).

110. All of the defendants knowingly deceived or misled the State by failing to disclose important facts which they were obligated to disclose.

111. The defendants knowingly made or used, or cause to be made or used, false, misleading or fraudulent records or statements to conceal, avoid or decrease an obligation to pay or transmit money or property to the State, in violation of § 44-9-3(A)(8).

112. As the beneficiaries of the inadvertent or deliberate submission of a false claim, and having subsequently discovered the falsity of the claim, the defendants failed to disclose the false claim to the State within a reasonable time after discovery, in violation of § 44-9-3(A)(3).

113. All of the defendants are jointly and severally liable for the acts of the other defendants, because all of them participated in the conspiracy against the State. In addition, § 44-9-7 imposes joint and several liability on the defendants.

114. All of the defendants unjustly enriched themselves at the expense of the State. Therefore they are liable for damages in restitution, disgorging their ill-gotten gains.

115. Day Pitney has caused damages to the State, including but not limited to: the amounts paid to Day Pitney; the impairment of the State's ongoing claims against all of the fraudfeasors; the sabotage of the State's FATA recoveries; and the amount of attorneys fees and expenses incurred by qui tam counsel in fighting against Day Pitney's continuing efforts to sabotage the State's FATA recoveries.

116. If Day Pitney is not enjoined from further violations of FATA, the damages to the State will run in the hundreds of millions of dollars, measured by the difference between the actual value of the State's claims and the small amounts negotiated by Day Pitney. This injury will be irreparable, because it is unlikely that Day Pitney has enough resources or insurance to cover the State's losses.

117. DAY PITNEY HAS VIOLATED THE 2011 CONTINGENT FEE LEGISLATION.

118. Day Pitney has violated the special statutory provision which the Legislature added in 2011 to protect Frank Foy and other qui tam plaintiffs. In 2011, the SIC and Day Pitney 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.

119. 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. See Judge Pfeffer's decision, *supra*.

120. TO COVER ITS TRACKS, DAY PITNEY PROVIDED ALMOST NOTHING IN WRITING TO THE SIC.

121. To conceal its conflicts, Day Pitney did not provide the SIC with written memos justifying and explaining its actions. This was a deliberate strategy by Day Pitney to avoid accountability for the conflicted and incompetent advice it was giving to the SIC. For example, for the $24.6 million Vanderbilt settlement, Day Pitney did not provide the SIC with a settlement memo setting out the pluses and minuses of the settlement it was proposing. This was a violation of Day Pitney's contract and its obligation to provide enough information so that the client can make informed decisions.

122. Day Pitney did not provide any written memos to the SIC until after qui tam counsel pointed out this deficiency in court.

123. Day Pitney was required to provide the SIC with a draft strategy or litigation plan outlining all necessary steps, roles and responsibilities for recovering funds. It did not.

124. Day Pitney was required to provide regular status reports to the SIC. It did not.

125. Day Pitney was required to submit detailed statements accounting for all services performed and services incurred. Upon information and belief, it did not.

126. TO COVER ITS TRACKS, DAY PITNEY INTERCEPTED RELATORS' COMMUNICATIONS TO THE SIC.

127. Upon information and belief, Day Pitney intercepted communications from Foy and Foy's counsel to the SIC, even though Foy's counsel was also representing the SIC and the ERB. Those agencies are parts of the State of New Mexico, and Foy and qui tam counsel have been trying to recover money for them. In short, the SIC was a shared client,

represented both by Day Pitney and the undersigned law firm. Communications between Foy and the SIC were protected by the attorney-client privilege. Nevertheless, upon information and belief, Day Pitney intercepted or delayed communications to the SIC, in order to prevent its wrongdoing from being known by the full SIC.

128. TO COVER ITS TRACKS, DAY PITNEY OPERATED WITH A SECRET SIC SUBCOMMITTEE THAT VIOLATED THE OPEN MEETINGS ACT, THE INSPECTION OF PUBLIC RECORDS ACT, AND THE SIC QUORUM REQUIREMENT.

129. When Day Pitney persuaded the SIC to agree to the settlements that Day Pitney had negotiated, without discovery, Day Pitney obtained approval from an illegal secret subcommittee of the SIC. This secret subcommittee of three people operated in total secrecy, without an agenda, without minutes, without recorded votes, without action in an open meeting, and without action by the 11 person SIC. The proposed settlements which Day Pitney presented to the courts were ultra vires, null and void, because they violated 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).

130. ON MAY 26, 2015, DAY PITNEY MADE FALSE OR MISLEADING STATEMENTS TO THE MEMBERS OF THE SIC, TO PERSUADE THEM TO RATIFY THE VANDERBILT SETTLEMENT WHICH JUDGE PFEFFER HAD

ALREADY REJECTED. DAY PITNEY DECEIVED THE SIC TO PROTECT ITS CONTINGENT FEE AND TO CONCEAL ITS MALFEASANCE.

131. In the spring of 2015, the use of the SIC secret litigation subcommittee became controversial, and its illegality became apparent. At that point Day Pitney decided to ask the 11 members of the SIC to ratify all of its settlements, without providing them adequate information to make fully informed decisions. Only 2 of the 11 members of the SIC had served on the secret subcommittee, which also had never received adequate information from Day Pitney.

132. Day Pitney wanted to protect its contingent fees and conceal its malfeasance, so Day Pitney decided to continue its practice of misleading the SIC. For the SIC's monthly meeting on Tuesday, May 26, 2015 Kenneth Ritt of Day Pitney traveled to New Mexico and participated in the SIC's meeting.

133. At the beginning of the May 26 meeting, SIC member Lee Rawson made a motion to defer any action to ratify the settlements, because the members did not have adequate information. The members approved that motion unanimously. http://governor.state.nm.us/Webcast.aspx

134. Before the doors were closed for an executive session to discuss the pay to play litigation, several misleading statements were made to the members of the SIC:

135. The official SIC agenda described the Vanderbilt settlement as "approved". This statement was false, because the SIC's proposed settlement with Vanderbilt had been vigorously rejected by the court.

136. State Investment Officer, Steve Moise told the SIC members:

> The word "approved" that you see on the agenda doesn't mean Council approved, it means court approved. That's the reason we're looking at it.

With respect to the $24.6 million Vanderbilt settlement, this statement was false. The Vanderbilt court had rejected, not approved, the settlement.

137. These false statements were especially serious because the rejected $24.6 million Vanderbilt settlement was far bigger than all of the other settlements combined.

138. The agenda also misled the SIC members by lumping the Vanderbilt settlement in the middle of a long list of settlements which had been approved by a court.

139. Upon information and belief, during the executive session Kenneth Ritt of Day Pitney persuaded the SIC to ratify the Vanderbilt settlement. Upon information and belief, Mr. Ritt did not provide the SIC members with a copy of Judge Pfeffer's decision. This deprived the SIC members of the opportunity to read judge Pfeffer's decision for themselves, so that they can understand what was wrong with the proposed settlement. Day Pitney withheld this vital information to conceal its malfeasance and to protect its contingent fee of almost three million dollars on the Vanderbilt settlement.

140. Upon information and belief, during the executive session Day Pitney did not tell the SIC members about its conflicts of interest in the Vanderbilt settlement. Day Pitney did not tell the SIC members that Day Pitney represented Citigroup, Ernst & Young, Merrill Lynch and Bank of America.

141. By misleading the 11 members of the SIC, Day Pitney convinced them that they should ratify all the settlements, even though the members had voted unanimously that they did not have sufficient information about the settlements.

PRAYER FOR RELIEF

WHEREFORE, the plaintiffs pray for

A. An award of actual damages, including damages measured by the difference in value between the Day Pitney settlements and the real value of the State's FATA claims;

B. Rescission and cancellation of the Day Pitney contract, with disgorgement and restitution of all sums received by the defendants or expended by the State under the contract;

C. A court order disqualifying Day Pitney as acting as counsel for the SIC or the ERB or any other State agency;

D. A court order disqualifying Day Pitney from acting as counsel for any other person implicated in the Foy cases, SIC v. Bland, or any related cases;

E. A court order commanding Day Pitney not to communicate any information about the Foy cases, SIC v. Bland, or any related cases to any person other than the State of New Mexico;

F. A court order requiring Day Pitney to return all records, information, and documents to the State, and to destroy any copies;

G. A preliminary and a permanent injunction prohibiting Day Pitney from representing the State or any adverse parties in any case or administrative proceeding related to the matters described in this complaint;

H. Reasonable attorneys fees and expenses incurred by qui tam plaintiffs, as provided in § 44-9-7(D), including attorneys fees and expenses incurred in fighting Day Pitney's attempts to sabotage the State's FATA cases;

I. Pre- and post-judgment interest under NMSA 1978, §§ 56-8-3 and -4, or as otherwise provided by law;

J. Mandatory trebling of the foregoing amounts as required by § 44-9-3(C)(1);

K. A statutory award to qui tam plaintiffs as provided in § 44-9-7(A) and (B);

L. Judgment that each of the defendants is jointly and severally liable for the total of the above amounts, per § 44-9-13;

M. The costs of this civil action, per § 44-9-3(C)(3);

N. Payment by defendants of any gross receipts taxes or other taxes that may be applicable;

O. Civil penalties of not less than $5,000 or more than $10,000 for each violation, per § 44-9-3(C)(2);

P. After the awards to qui tam plaintiffs and counsel, distribution of the remaining proceeds to the State, as provided in § 44-9-7(F);

Q. Reasonable expenses incurred in the action plus reasonable attorneys fees incurred in this action by the State, which shall be paid by defendants, as provided in § 44-9-7(E);

R. If the State pursues an alternative remedy, the qui tam plaintiffs and counsel shall be entitled to the same rights, rewards, and fees in such a proceeding as they would have had if the original action had continued, as provided in § 44-9-6(H);

S. Equitable, declaratory, and injunctive relief as appropriate; and

T. Such other and further relief as may be appropriate.

VICTOR R. MARSHALL & ASSOCIATES, P.C.

By 
Victor R. Marshall
Attorneys for Plaintiff State of New Mexico and
Qui Tam Plaintiffs Frank Foy and John Casey
12509 Oakland NE
Albuquerque, New Mexico 87122
505/332-9400
victor@vrmarshall.com