IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

NEW MEXICO STATE INVESTMENT COUNCIL

Plaintiff-Appellee,

and FRANK FOY, SUZANNE FOY and JOHN CASEY,

Intervenors-Appellants,

v.

GARY BLAND, et al.,

Defendants,

and SAUL MEYER and RENAISSANCE PRIVATE EQUITY PARTNERS, LP d/b/a ALDUS EQUITY PARTNERS, LP,

Defendants-Appellees.

Santa Fe County
Sarah M. Singleton, District Judge
Case No. D-101-CV-2011-01534
Ct. App. No. 34,077

THE NEW MEXICO STATE INVESTMENT COUNCIL'S ANSWER BRIEF

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

PRELIMINARY STATEMENT

This is the second in a series of four nearly identical appeals serially filed by appellants challenging settlements the State of New Mexico has entered into in its lawsuit pursuing pay-to-play corruption of the New Mexico State Investment Council's ("NMSIC's") investment process.[1] *See* Court of Appeals No. 33,787 ("First Appeal"); Court of Appeals No. 34,042 ("Third Appeal"); and Court of Appeals No. 34,570 ("Fourth Appeal"). In all of these appeals, Appellants seek to enlist this Court in their misguided effort to divest the State of its authority to prosecute its own legal claims brought by the NMSIC in this lawsuit. This time, Appellants attack a settlement (1) in which the Settling Defendants[2] *admit liability*, (2) which fully protects the State if the Settling Defendants have provided any false financial/ability-to-pay information, and, (3) which requires Settling Defendants to fully cooperate with the State. **[RP 5569-5574]**

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

[2] The Settling Defendants dismissed by the District Court's order appealed herein are Saul Meyer ("Meyer") and Renaissance Private Equity Partners, LP d/b/a Aldus Equity Partners, LP ("Aldus"). These are the only defendants involved in this appeal, a point obfuscated by Appellants' scattershot, *ad hominem* tactics.

The District Court's July 22, 2014 Order ("Dismissal Order") **[RP 6032-6034],** the subject of this appeal, is based on the District Court's conclusion—central to this appeal—that the settlement between the Settling Defendants and NMSIC was "fair, adequate, and reasonable under the circumstances." **[RP 6033]** Before reaching this conclusion, the District Court invited Appellants to present evidence regarding the fairness, adequacy, and reasonableness of the settlement. **[RP 6032]** Appellants declined the opportunity to do so. **[RP 6032-6033]; [6-19-14 Tr . 39:17-21]**

Because the Settling Defendants admitted liability, the only question before the Court was the adequacy of the settlement terms. **[RP 6033-6034]** The Court found the terms adequate both because the Settling Defendants had "limited financial means" and because the State would receive valuable cooperation in the pursuit of its claims against other targets. **[RP 6033-6034]** Appellants have not contested either of these points.

The Court's review of the settlements followed the process established in its prior approval of the first round of settlements in this case (the subject of the First Appeal). The March 30, 2014 Order **[RP 5861-5862]** approving those first settlements, was, in turn, based upon and incorporated the District Court's February 12, 2014, 50-page Findings of Fact and Conclusions of Law Related to

the *Qui Tam* Intervenors' Objections to Settlements ("Findings and Conclusions").[3] **[RP 5635-5684]** In those Findings and Conclusions, the District Court laid out the analytical framework—equally applicable here—in which the Court conducts its review of proposed settlements in this case.[4]

Notwithstanding the District Court's careful analysis, and despite the Settling Defendants' admission of liability, promise to cooperate, and demonstrated financial limitations, Appellants now, in effect, attempt to call into question the adequacy of the settlements. They do so without challenging a single factual finding by the District Court, not one. Instead, Appellants contend that the District Court committed various legal errors in approving the settlements. They decry the settlement approval process for failing to meet standards that the case law shows to be fictitious. They claim to have had their right to discovery violated, though they were both provided discovery and can show no such right

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

[4] While the District Court noted, in previously approving the first round of settlements, that its Findings and Conclusions "have no binding or preclusive effect on other issues which might arise as to other parties to this action," it also explicitly provided that "these findings and conclusions might provide the legal frame work for analysis of future proposed settlements." **[RP 5636]**

exists. They contend the District Court exceeded its jurisdiction, when it took pains to avoid doing so.

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

SUMMARY OF PROCEEDINGS

The District Court's Findings and Conclusions in support of its initial (March 30, 2014) approval of the first round of settlements in this case (the subject of the First Appeal), sets forth a comprehensive account of most of the procedural history leading up to the Dismissal Order that Appellants (not Defendants, but third-party Intervenors) challenge here. The following summary reflects the District Court's procedural and factual findings that bear most directly on the issues addressed in this Answer Brief. It also incorporates those previous findings and conclusions from the Court's prior approval of the first round of settlements in this case insofar as they most assuredly "provide the legal frame work for analysis of future proposed settlements." **[RP 5636]**

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

This case involves a pay-to-play scheme at the NMSIC during former Governor Bill Richardson's ("Richardson") tenure as Chair of the NMSIC. **[RP**

5639, FOF 11] Anthony Correra, a friend of and advisor to Richardson, was at the heart of the play-to-play scheme, serving as *de facto* gatekeeper for investments made by the NMSIC in private equity funds, hedge funds, real estate funds and collateralized debt obligations ("CDOs"). **[RP 5639, FOF 11-12]**

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

Gary Bland, the State Investment Officer from 2003 to 2009, played an integral role in the execution of the pay-to-play scheme. **[RP 5637, 5639, 5648,**

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[5] Marc and Anthony Correra, Aldus, Saul Meyer and Gary Bland were not Settling Defendants for purposes the District Court's Findings and Conclusions at the time those Findings and Conclusions were issued. **[RP 5635-6]** Accordingly, the District Court's descriptions of these defendants' actions are not binding on them. **[RP 5635-6]** For purposes of this appeal, these factual recitations are not presented as final conclusive determinations as to these defendants, but are instead presented for factual context for the issues presented in the appeal. Because the Settling Defendants here (Aldus/Renaissance and Meyer) have admitted liability for breach of fiduciary duty to and breach of contract with NMSIC, the factual basis of their misconduct is not in dispute. **[RP 5569-5574]**

FOF 6, 11, 40] In so doing, NMSIC alleges that Bland breached his fiduciary duties to the NMSIC. **[RP 2870-2871]**

Aldus—a Settling Defendant in the instant appeal—was a paid advisor to the NMSIC on investments in private equity funds during this time. **[RP 5637-5638, FOF 7]** It played a central part in the pay-to-play scheme. **[RP 5637-5638, FOF 7]** Meyer—also a Settling Defendant in the instant appeal—was a partner in Aldus who pleaded guilty to criminal charges for pay-to-play in New York, and admitted to engaging in an improper pay-to-play scheme involving the NMSIC. **[RP 5638, FOF 8]** Meyer specifically admitted that his conduct in New Mexico violated his duties as a fiduciary to NMSIC. **[RP 5638, FOF 8]** Meyer admitted under oath that he recommended "certain proposed investments pushed on [him] by politically-connected individuals in New Mexico...knowing that these politically-connected individuals or their associates stood to benefit financially or politically from the investments and that the investments were not necessarily in the best economic interests of New Mexico." **[RP 5638-5639, FOF 9]**

2. Intervenors' Qui Tam Cases.

Appellants' intervention in this case stems from their two *qui tam* cases under the New Mexico Fraud Against Taxpayers Act ("FATA"), NMSA (1978) §§ 44-9-1 to 44-9-14, broadly alleging fraud and investment-related misconduct at

the NMSIC and the New Mexico Educational Retirement Board ("NMERB"). **[RP 5640-5641, FOF 16-17]**

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

The second *qui tam* case, *State of New Mexico ex rel. Frank C. Foy v. Austin Capital Management Ltd.*, No. D-101-CV-2009-1189 ("*Austin*"), named 74 defendants, (again, most of whom have never been served) including the Settling Defendants whose settlements are at issue in this appeal. **[RP 5640-5641, FOF 17]** *Austin* focuses primarily on alleged fraud in connection with hedge funds linked to investments involving Bernard Madoff, but also generally alleges pay-to-play at both NMERB and NMSIC. **[RP 5640-5641, FOF 17]**

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

On April 28, 2010, Judge Pfeffer entered an order of dismissal in *Vanderbilt,* ruling that application of FATA to conduct predating FATA's enactment violated the *Ex Post Facto* Clauses in the state and federal Constitutions. On July 8, 2011, Judge Pope entered an order of dismissal in *Austin* similar to that entered in *Vanderbilt.* The Court of Appeals granted interlocutory review of the dismissal in *Austin* and affirmed, a decision that until recently was *sub judice* on certiorari before the Supreme Court. **[RP 5643, FOF 22]** The interlocutory appeal had triggered a stay of the *Austin* case which is now no longer applicable. On June 25, 2015, the New Mexico Supreme Court rendered its decision in *State ex rel. Foy v. Austin Capital Mgmt., Ltd.*, , 2015-NMSC-____ (No. 34,013, June 25, 2015) reversing the Court of Appeals. The decision from the Supreme Court does not directly affect the State's enforcement plan because the State previously decided not to bring FATA claims in this action.

*3. **The State's Enforcement Program.***

In 2010, the NMSIC and the NMAGO began implementation of the State's own enforcement plan to obtain recoveries from corruption of the NMSIC's investment process. **[RP 5643-5644, FOF 23]** As the District Court found, the

plan, among its other features: (i) reflects the determination that pay-to-play claims would be more effectively advanced under the New Mexico Securities Act and the common law than under FATA, even if FATA could be retroactively applied **[RP 5643-5644, FOF 23 (citing [RP 5330-5334, Frank Aff. ¶ 10])]**; and (ii) initially targets individuals such as Settling Defendants with the aim of building evidence against larger targets, particularly investment entities and investment fund managers to be subsequently pursued. **[RP FOF 23 (citing [RP 5330-5334, Frank Aff. ¶ 11])]**

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

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

The *Austin* and *Vanderbilt Qui Tam* Plaintiffs (intervening Appellants here) opposed the State's motions. **[RP 5644, FOF 25]**

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

While Judge Pope thereafter held a hearing on the motion for partial dismissal in *Austin*, he had not rendered a decision when the Court of Appeals stayed all proceedings in the district court. **[RP 5645, FOF 27]**

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

In 2011, NMSIC commenced this action. **[RP 1-17]** Ultimately, claims were made against 17 defendants, many, but not all of whom, had also been named in *Vanderbilt* and *Austin*. **[RP 2829-2875]** This action asserts claims for breach of

fiduciary duty, aiding and abetting breach of fiduciary duty, breach of contract and unjust enrichment in connection with pay-to-play corruption of NMSIC's investment process for alternate investments. **[RP 2829-2875]**

4. The Appellants' Role in the Instant Case.

The District Court deemed this action to be an "alternate remedy" to the *Austin* case under Section 44-9-6(H) of FATA **[RP 5665-5666, COL 7]** and held that Appellants, as *qui tam* plaintiffs, have the "same rights" with respect to this action that they would have had in *Austin* "but no greater rights." **[RP 5665, COL 7]**

Accordingly, pursuant to the rights that Section 44-9-6(H) of FATA provides to a *qui tam* plaintiff with respect to an alternate remedy proceeding initiated by the State, the District Court entered its Order granting Appellants' Motion to Intervene in this case on January 18, 2012. **[RP 1470-1471]** Appellants seek a monetary "reward" under FATA (notwithstanding having no personal knowledge).

On April 3, 2012, as Intervenors in this action, Appellants filed a Motion to Disqualify the Attorney General based on the same alleged conflicts asserted in Intervenors' Brief in Chief here. **[RP 2196-2308]**; **[BIC 48-50]**. The District Court denied the Motion on October 16, 2012. **[RP 3931-3932]**

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

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

5. The Agreement with Settling Defendants.

On July 10, 2013, NMSIC entered into a settlement agreement with the Settling Defendants. **[RP 5569-5574]**

The settlement was approved by the NMSIC in conformity with its then in effect Recovery Litigation Settlement Policy ("Settlement Policy"), which had been voted on and adopted at an open meeting on June 26, 2012. **[RP 5647, FOF 36]**. The Settlement Policy permitted a Litigation Committee to approve settlements and required all settlements to be subject to the Inspection of Public Records Act. **[RP 5647, FOF 36]**

In the settlement agreement, the Settling Defendants admit their liability to NMSIC for breach of fiduciary duty and breach of contract in connection with their participation in pay-to-play. **[RP 5569]**

The settlement agreement requires Settling Defendants to pay $523,000 to the NMSIC, in addition to the $127,000 Settling Defendant Meyer had previously paid to the NMSIC. **[RP 5569-5570]**

The settlement agreement further requires each Settling Defendant to cooperate fully in the State's ongoing investigation into pay-to-play at NMSIC, including providing testimony upon request. **[RP 5570]** The settlement agreement also become null and void if the Settling Defendants provided or provide any false information or testimony. **[RP 5570]**

The settlement agreement contains mutual releases. NMSIC releases the Settling Defendants from any claim "arising out of or relating to the investments by NMSIC." **[RP 5571]** This release would include Intervenors' FATA claims.

On May 26, 2015, the NMSIC held a publicly-noticed meeting for which the agenda had been made publicly available. *See* Affidavit of Charles V. Wollmann, filed June 29, 2015, ("Wollmann Aff."), ¶ 5.[6] At the public portion of the May 26 meeting, and pursuant to the previously published agenda, NMSIC unanimously adopted the May 2015 Amended Recovery Litigation Settlement Policy

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

("Amended Settlement Policy"). **[Wollmann Aff. ¶ 7]** Under the Amended Settlement Policy, the NMSIC withdrew its delegation of authority to the Litigation Committee and established that "all settlements shall be voted on in open, public session by the SIC." **[Wollmann Affidavit ¶ 7]**

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

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

To facilitate efficient litigation administration, NMSIC proposed and the District Court adopted, over Intervenors' repeated objections, an "early settlement" phase during which only discovery essential to settlement discussions would be permitted. **[RP 5645, FOF 29]**

In a September 1, 2013 Order **[RP 4358-4362]** addressing the first group of defendants as to whom NMSIC sought voluntary dismissal, the District Court held:

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

This holding is equally applicable here.

In this order, the District Court also set forth the procedure it would use to evaluate subsequent settlements and related voluntary dismissals (including those at issue here) sought by the NMSIC. **[RP 4358-4360]** The Order provided that Intervenors would have 14 days "after the filing of any further motion for voluntary dismissal based on a proposed settlement with a Defendant who is also a named defendant in either [the *Austin* or *Vanderbilt qui tam* cases] to file a memorandum opposing the motion." **[RP 4359]** The order further provided that the memorandum filed by Intervenors "must set forth the basis for the Qui Tam Intervenors' position that the proposed settlement is not fair, adequate and reasonable under all the circumstances and identify the evidence upon which they will rely." **[RP 4359]** The State and/or a settling Defendant then has 14 days to file a response that must also "identify the evidence upon which such party will rely" in demonstrating the fairness, adequacy and reasonableness of the settlement. **[RP 4360]**

By correspondence on October 17, 2013, NMSIC's counsel transmitted the settlement agreement that is the subject of the instant appeal to counsel for Intervenors. **[RP 5581-5583]** NMSIC's counsel explained the significant risk of inability to recover if the litigation continued because of the limited financial resources of the Settling Defendants and the additional claims those defendants faced from third parties. **[RP 5581-5582]** NMSIC's counsel also provided

Intervenors with the confidential financial statements of the Settling Defendants, demonstrating their limited ability to pay. **[RP 5581]** Finally, NMSIC's counsel asked Intervenors if they objected to the settlements, and, if so, upon what basis. **[RP 5582]**

Counsel for Intervenors did not respond to the query made in NMSIC's October 17, 2013 correspondence. **[RP 5566]**

On January 10, 2014, the State filed its Motion for Voluntary Dismissal of Saul Meyer and Renaissance Private Equity Partners, LP d/b/a Aldus Equity Partners, LP and separately filed under seal its evidentiary submission in support of the Motion. **[RP 5561-5593]** The Motion attached the settlement agreements, indicating that liability was admitted and that the Settling Defendants' already limited finances would only become more limited if costly litigation continued in this case and/or Settling Defendants had to settle claims in other matters pending against them. **[RP 5562]** The evidentiary submission consisted of sworn financial statements from the Settling Defendants. **[RP 5585-5593]**

On January 24, 2014, Intervenors filed their Response to the State's Motion, raising many of the arguments raised here. **[RP 5595-5607]** The State filed its Reply on February 7 **[RP 5612-5623]**, and Defendant Renaissance Private Equity Partners d/b/a Aldus Private Equity Partners, LP filed its joinder in the State's Motion on the same date. **[RP 5626-5628]**

On February 17, 2014, Intervenors filed a "Motion for Genuine Evidentiary Hearing" in which they requested a "full evidentiary hearing" and contended—notwithstanding the fact that both Meyer and Aldus had already admitted liability in their settlements—that the court was being asked "to operate in utter ignorance about what Aldus and Saul Meyer actually did." **[RP 5691-5692]**

On June 19, 2014, the District Court held a two-hour hearing in which it heard the pending motions. **[6-19-14 Tr.]**

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

At the June 19, 2014 hearing, the District Court ruled that the Intervenors had failed to follow the process established by the Court in its September 1, 2013 Order by "ignor[ing] the requirement that they set forth why they think the proposed settlement is inadequate or unreasonable" for purposes of a setting an evidentiary hearing. **[6-19-14 Tr. 53:4-19]**

In its July 22, 2014 Order **[RP 6032-6034]** dismissing the Settling Defendants, the District Court made the following determinations:

- "Intervenors were given the opportunity to identify the evidence they would present in opposition to the settlement"; **[RP 6032]**
- "Intervenors indicated at the June 19, 2014 hearing that they had no evidence to present in opposition to the settlement"; **[RP 6032]**

- "Without such evidence, the Court sees no point in conducting any further evidentiary hearing concerning the settlement," and "in the Court's view, Intervenors' admission that they have no evidence to produce effectively constituted a withdrawal of Intervenors' motion for an evidentiary hearing"; **[RP 6032-6033]**
- Intervenors are not entitled to take "full-blown discovery before the approval of a settlement," under FATA's settlement provision that "presumes potential resolution of claims *before* full discovery and a trial on the merits"; **[RP 6033]** (emphasis in original)
- "Having considered the briefing, evidence, and arguments of the parties, the Court concludes that the settlement is fair, adequate and reasonable under the circumstances;" **[RP 6033]** and,
- In support of its conclusion, the Court further held that the Settling Defendants have:
    - ✓ admitted liability;
    - ✓ agreed to cooperate with Plaintiff; and
    - ✓ have demonstrated that they have limited financial means.

    [RP 6033-6034]

The District Court had previously ruled, in its Findings and Conclusions in connection with the first set of settlements approved in this case, that this first set

of "findings and conclusions might provide the legal frame work for analysis of future proposed settlements." **[RP 5636]** Among the Court's Findings and Conclusions that provide the framework for the approval of the settlement at issue here are the following:

- "The cooperation that the Settling Defendants have already provided and agreed to continue to provide are an integral element of NMSIC's overall enforcement plan"; **[RP 5674, COL 26]**
- "[B]ecause FATA vests the State with ultimate authority and control over FATA actions brought on its behalf, the settlement decisions by NMSIC warrant considerable deference"; **[RP 5682, COL 42]**
- Because "[t]he settlements with the Settling Defendants are part of the NMSIC's overall enforcement plan . . .[and] Courts will routinely defer to the government's overall enforcement plan," the District Court "will defer to NMSIC's enforcement plan"; **[RP 5682, COL 43]**
- "Nothing about the pendency of *Austin* deprives this Court of the authority to carry out the responsibilities set forth in FATA Section 44-9-6"; **[RP 5682, COL 45]**
- "Like the [Federal False Claims Act], FATA contemplates that when

the government settles a related action or obtains an alternate remedy, it may extinguish some or all of a qui tam plaintiff's claim"; and, **[RP 5682-5683, COL 46]** (citations omitted)

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

*8. **Appellants' Serial Challenges to Settlements in this Case.***

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

On March 30, 2014, in the absence of any stay, Judge Singleton entered her Order of Dismissal **[RP 5861-5862]** with respect to the first set of settlements in this case, incorporating her Findings and Conclusions and stating that the "Order is

a Final Order for purposes of Rule 1-054(B)(2) NMRA." **[RP 5861]** Intervenors then filed a Motion by Qui Tam Petitioners to Modify Writ to Deal with Changed Circumstances, asking the Supreme Court to vacate, rather than prevent entry of, the Order of Dismissal and to extend the time for them to appeal. On May 1, 2014, the Supreme Court denied the Petition. *Foy v. Singleton*, No. 34,610 (May 1, 2014). **[RP 5888-5889]**

On April 28, 2014, Intervenors filed their notice of appeal in the First Appeal (Ct. App. No. 33,787) **[RP 5867-5870]** regarding the first set of settlements approved by the District Court in this case. They filed their docketing statement on May 28, 2014. That appeal raises nearly the identical issues raised in the instant appeal.

On August 25, 2014, Intervenors filed their notice of appeal in the Third Appeal (Ct. App. No. 34,042) **[RP 6055-6059]** regarding yet another settlement approved by the District Court in this case. This appeal differs from the others in that it involves a settlement with a party that was not a party to any *qui tam* action.

On February 27, 2015, Intervenors filed their notice of appeal in the Fourth Appeal (Ct. App. No. 34,570) regarding yet another set of settlements approved by the District Court in this case. Again, the appeal raises nearly identical issues to the first two appeals.

9. The Vanderbilt Settlement.

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

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

Intervenors (as *qui tam* plaintiffs in *Vanderbilt*) did not oppose the settlement and instead filed a motion to stay *Vanderbilt* until the Supreme Court rendered its decision in the *Austin* appeal.[7] **[BIC 18]** The State argued in opposition to the stay that the State's ability to assert common law claims against Vanderbilt (unaffected by Intervenors' FATA *Ex Post Facto* issue) negated the significance of the *Austin* appeal with regard to the *Vanderbilt* settlement. **[RP 4625-4630]** The State requested a hearing on the Enforcement Motion and the

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[7] On June 25, 2015, the New Mexico Supreme Court rendered its decision in *Austin. State ex rel. Foy v. Austin Capital Mgmt., Ltd.*, , 2015-NMSC-____ (No. 34,013, June 25, 2015). The slip opinion is available at http://www.nmcompcomm.us/nmcases/nmsc/slips/SC34,013.pdf

motion for stay. Judge Pfeffer did not hold a hearing but, instead, issued a decision staying *Vanderbilt* on July 12, 2013, **[RP 5961-5967]** noting that the State had not initially sought dismissal of all of the *qui tam's* claims that it was seeking to settle. **[RP 5964-5966]** To date, the Vanderbilt settlement monies remain in escrow and cannot yet be invested for, or distributed to, the NMSIC trust beneficiaries.

ARGUMENT

I. STANDARD OF REVIEW

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

Appellants' Brief in Chief also mistakenly asserts that "[t]he district court erred by dismissing the case *via summary judgment*." **[BIC 1]** (emphasis added). As the record clearly reflects, the District Court was not asked to and did not make any sort of summary judgment ruling here whatsoever. Instead, the District Court was asked to and did review and approve settlements under Section 44-9-6(C) of

FATA, and it accordingly granted the voluntary dismissal sought by the State. Therefore, Appellants' contentions that Settling Defendants "have the burden to demonstrate the absence of any genuine issues of material fact" and that this Court "must view the matters presented in the light most favorable to support the right to trial on the issues" **[BIC 1]** are false.

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

Appellants have not sought review of any of the factual findings made by the District Court. By asserting that "[a]ll of the questions in this appeal involve questions of statutory interpretation," **[BIC 1]** Intervenors have expressly waived any challenge to the District Court's factual findings. Even had they not done so, however, the District Court's factual findings still remain uncontested because Intervenors failed to "set forth a specific attack on any finding," as required by Rule 12-213(A)(4) NMRA.[8] Indeed, Intervenors do not challenge a single factual finding made by the District Court. All of the findings must therefore be "deemed conclusive." *Id.; Blea v. Fields*, 2005-NMSC-029, ¶ 22, 138 N.M. 348, 120 P. 3d 430.

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

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

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

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

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

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

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

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

Appellants seek to undermine the State's discretion and divest it of control over its own legal claims in order to force pursuit of these claims under FATA (and a money "reward" **[BIC 2]** at the expense of NMSIC trust beneficiaries). Appellants argue that the State's enforcement plan must take a back seat to Appellants' own claims because, they say, those claims "give[] the State many advantages" **[BIC 23]** and present "the State's best remedy against these fraudfeasors." **[BIC 24]** Thus, by virtue of their status as Intervenors, Appellants, private individuals (who, by their own admission, lack personal whistleblower

knowledge), purport to know what serves the State's interests better than the State itself.

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

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

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

States ex rel. Mergent Servs. v. Flaherty, 540 F.3d 89, 93 (2nd Cir. 2008) (noting that the only injury in *qui tam* case is that suffered by the government).

FATA preserves the State's ultimate control over all claims in this case and in *Austin* because it has to. FATA "closely tracks the longstanding federal False Claims Act" ("FCA"). *State ex rel. Foy v. Austin Capital Mgmt., Ltd.*, , 2015-NMSC-____, ¶ 25 (No. 34,013, June 25, 2015). As has been explained, addressing the analogous issue under the FCA:

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

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

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

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

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

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

Following its plan, the State has used its claims against several defendants in this action, including the Settling Defendants, as leverage to obtain their cooperation and truthful testimony in building cases against the remaining defendants, as well as against targets with greater financial resources. Undue impingement on the State's effort to settle claims threatens to thwart the State's ability to implement its litigation plan. For this reason, the District Court

appropriately gave "deference to decisions that might impact the government's overall enforcement plan." **[RP 5669-5670, COL 16]**

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

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

[RP 5671, COL 19] Intervenors made no such showing. Despite their rhetoric that the settlements were "collusive or inadequate," Appellants cite nothing to support that they were. **[BIC 28]**

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

As the record reflects, the District Court more than adequately fulfilled its obligations under Section 44-9-6 (C) of FATA in approving the State's settlements. It requested detailed briefing **[RP 4358-4362]**, conducted a hearing **[6-19-14 Tr.]**, offered Intervenors the opportunity to present evidence **[6-19-14 Tr. 36:20-25] [RP 6032-6033]**; and considered both the admission of Settling Defendants and the evidence of their limited financial means. **[RP 6033-6034]** Further, it did all of this after its remarkably thorough vetting of the overall

investigation and process used by NMSIC to pursue such settlements, as reflected in the District Court's exhaustive, 50-page Findings and Conclusions issued in connection with the initial set of settlements the District Court approved. **[RP 5635-5684]** These facts thoroughly refute Appellants' contention the District Court improperly "rubber-stamp[ed]" the settlements. **[BIC 26]**

Without factual basis for their position, Appellants resort to asserting that the District Court's approval of the settlements variously violated FATA. None of Appellants' attacks withstand scrutiny.

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

Despite the thoroughness of the District Court's review, Appellants contend that it committed "a plain error of law" when it followed FCA cases by "rubber-stamp[ing]" the settlements. **[BIC 26]** In Appellants' view, this was an error so egregious as to be "an insult to the New Mexico Legislature." **[BIC 27]**.

Apparently, the legal error is that when Section 44-9-6(C) of FATA requires "a hearing providing *qui tam* plaintiff an opportunity to present evidence" **[BIC 29]** in opposition to a settlement, it actually requires something more than the District Court's providing Appellants the opportunity to present evidence. **[BIC 30]** Appellants contend that by providing the "absolute right to present evidence," FATA dramatically departs from the otherwise identical FCA provision, 31 U.S.C.S. § 3730(C)(2)(B), thereby compelling stricter judicial scrutiny and

displacing deference to the State with "protect[ion] of the qui tam plaintiffs."[10] **[BIC 30, 34]**

Because this argument finds no support anywhere, Appellants rely solely on their invented legislative history for FATA, the absence of citation to or evidence for which underscores its fictional status. **[BIC 30]** *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (when a party cites no authority to support an argument, the court may conclude no such authority exists). Contrary to Appellants' argument, however, although FCA does not, like FATA, *expressly* provide *qui tam* plaintiffs the opportunity to present evidence at a hearing challenging a settlement, federal legislative history indicates that that was Congress' actual intent. *U.S. ex rel. McCoy v. Cal. Med. Review, Inc.*, 133 F.R.D. 143, 148-49 (N.D. Cal. 1990); *U.S. ex rel. Nudelman v. Int'l Rehab. Assocs., Inc.*, 2004 WL 1091032, at *1, n.1 (E.D. Pa. May 14, 2004).

Accordingly, federal courts reviewing government settlements or dismissals under the FCA have routinely allowed *qui tam* plaintiffs to present evidence at hearings despite the fact that the FCA has no express requirement. *See, e.g., U.S. ex rel. McCoy*, 133 F.R.D. at 148-9 (providing for evidence in the evaluation of government's *qui tam* settlement); *Nudelman*, 2004 WL 1091032, at *1, n.1

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

(same); *U.S. ex rel. Schweizer v. Oce N.A.*, No. 06-648, 2013 WL 3776260, at *11(D.D.C. July 19, 2013) (acknowledging permissibility of limited discovery for evaluating contested the FCA settlement); *Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 930 (10th Cir. 2005) (approving government's dismissal of *qui tam* action granted after "five-day evidentiary hearing"); *U.S. ex rel., Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1143 (9th Cir. 1998) (noting "four-day evidentiary hearing" for FCA dismissal).

In addition, courts in states with *qui tam* provisions nearly identical to FATA's have applied rational basis review—among the most deferential standards in American jurisprudence—notwithstanding the fact that *qui tam* plaintiffs have the same express statutory right to present evidence at a hearing in opposition to the state's dismissal as provided in FATA.[11] *International Game Tech. v. Second Judicial Dist.* ("*IGT*"), 127 P.3d 1088, 1099-1100 (Nev. 2006) (holding that review of the state's dismissal "implicated...constitutional concern[s]" and adopting a

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[11] Appellants falsely suggest that FATA applies a "good cause requirement[]" for settlements. **[BIC 27, 29, 30]** That requirement applies only to *dismissals* under Section 44-9-6(B), and not to settlements under Section 44-9-6(C). An outright dismissal of a claim appropriately requires a different showing than the settlement of claim because, as is the case here, the State receives consideration for a settled claim. Nonetheless, as the cases cited herein demonstrate, and as the *Vanderbilt* court correctly found **[RP 5644, FOF 26]**, even courts applying the good cause standard for dismissal accord considerable deference to the State.

rational basis review); *Laraway v. Sutro & Co.*, 116 Cal. Rptr. 2d 823, 830-31 (Ct. App. 2002) (same).

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

Appellants argue that the District Court violated FATA and committed a "plain error of law" through its "no discovery" ruling. **[BIC 26-31, 36-40]**

In enacting FATA, the Legislature did not provide *qui tam* plaintiffs a statutory right to discovery in challenging the State's settlements. The District Court, therefore, made discovery decisions within its sound discretion. *Hartman*, ¶ 20, (rulings on discovery within discretion of district courts). Appellants have failed to meet their burden in showing that discretion was abused.[12] *Id.*

The District Court held that Intervenors were allowed discovery as to the Settling Defendants. **[6-19-14 Tr. 37:4-11]** Moreover, the District Court correctly held that permitting over-broad discovery in a settlement context threatens to defeat the purpose of settlement (in addition to alienating cooperating witnesses and increasing defense costs that might directly reduce funds available for recovery while exponentially increasing prosecution costs). **[RP 6033]** As the Court

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[12] Contrary to Appellants' suggestion, FATA does not provide a *qui tam* plaintiff with new unbridled rights to conduct burdensome discovery or otherwise interfere with the State's prosecution of the case. Rather, FATA expressly provides courts with discretion to limit a *qui tam* plaintiff's participation if the *qui tam* plaintiff's conduct would "interfere with or unduly delay the state's prosecution of the case." NMSA 1978 § 44-9-6(D).

explained, "FATA expressly provides for settlement, which presumes resolution of claims before full discovery and a trial of the merits. . . . The extent of discovery appropriate in connection with a settlement approval hearing is limited to whether the settlement is fair, adequate and reasonable." **[RP 6033]** The District Court found that "allowing full-blown discovery as of right would risk transforming the [settlement approval] hearing into a trial on the merits.... It would put the cart before the horse, in essence making trial a precondition of settlement." *Id. citing United States ex rel. Schweizer v. Oce N.A.*, 956 F. Supp. 2d 1, 9 (D.D.C. 2013).

Moreover, the additional discovery Appellants argue that they needed would have been of almost no value because the Settling Defendants here admitted liability and offered proof that their ability to pay was limited and decreasing. Appellants nonetheless argue that they needed to do discovery on such liability questions as: "What did the defendants do?" and "When did they do it?" and "How did the defendants communicate...?" **[BIC 36]** Because liability was admitted, there is little to no value to this discovery for purposes of reviewing the settlements. To the extent such information has value as to other defendants or targets, the Settling Defendants remain available for deposition and have committed their cooperation. **[RP 6034]**

Appellants likewise say they needed discovery to determine damages issues such as, for example, "What is the amount of treble damages under FATA?" **[BIC**

37] The Settling Defendants provided sworn, detailed financial statements showing very limited financial resources (and agreeing that their settlements are void if the information they provided is false). **[RP 5585-5593]** Under the circumstances, spending resources quantifying damages that could never be recovered is a fool's errand.

Finally, within the same procedural framework, the State developed and provided ample evidence to substantiate and justify the settlements.[13] **[RP 5673-5674, COL 23]** The State's multi-million page document review and witness interviews provided the appropriate basis for judging the adequacy of the settlements. **[RP 5647, FOF 35]**; *United States ex rel. Schweizer*, 956 F. Supp. 2d at 13.[14] By contrast, years after Appellants sued these Settling Defendants *in fraud*, purporting themselves to be whistleblowers entitled to a "reward" **[BIC 2]**, Appellants have presented no evidence to support their case. **[RP 6032]**

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[13] The documents from which this evidence was gleaned was provided to Appellants/Intervenors. As the District Court found:

> Prior to the hearing [NMSIC] provided millions of pages of documents and responses to discovery to Intervenors in the course of discovery. **[RP 5662, FOF 73]**

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

C. The District Court Offered to Allow Presentation of Evidence.[15]

Appellants make the remarkable contention that they "had plenty of evidence to present against Meyer and Renaissance, but the court denied them the opportunity." **[BIC 25]** This argument is patently false.

The District Court specifically offered Appellants the opportunity to present evidence, and Appellants ***declined that opportunity***, complaining that they had not had a sufficient chance to conduct discovery.

> THE COURT: Let me just cut to the chase. Do you have any new evidence you want to present about this settlement that you didn't present previously?
>
> MR. MARSHALL: The answer is we would if the Court had allowed discovery, because we would have pursued discovery with respect to these folks. We concentrated on the other folks...

[6-19-14 Tr. 36:20-25]

Later, in the same discussion with the Court, counsel for Appellants stated:

> MR. MARSHALL: So there's no point in having an evidentiary hearing, . . .

[6-19-14 Tr. 39:17-18]

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[15] Part B, subpart 2 of Appellants' Argument in the Brief in Chief addresses a ruling the District Court made specifically with respect to its approval of the first group of settlements, which is the subject of the First Appeal (Ct. App. No. 33,787) and is not applicable here. The fact that Appellants carelessly left this misplaced argument in the Brief in Chief in this appeal merely underscores the perfunctory nature of Appellants' effort.

Appellants weren't denied an evidentiary hearing; they declined an evidentiary hearing in protest of having what they viewed to be insufficient discovery. With the same discovery, however, the State was able to amass millions of pages of documents and conduct dozens of interviews. **[RP 5647, FOF 35]**

Now, in this appeal, contrary to what they said at the hearing, the Appellants have "plenty of evidence to present." **[BIC 25]** The sole example Appellants reference is "an audio recording of Saul Meyer plotting to get rid of Frank Foy and Evalynne Hunnemuller, the executive director of the ERB." **[BIC 25]** But this evidence is of no consequence. First, it goes to Meyer's culpability when Meyer, in his settlement agreement, has already admitted his liability and wrongdoing. **[RP 5569]** Second, it relates to the ERB when the settlement deals only with claims by the NMSIC. **[RP 5569-5570]** This Court should give no credence to Appellants' evidence shell game.

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

Appellants extensively quote an order from the *Vanderbilt* case while ignoring that the issues and ruling in *Vanderbilt* are inapplicable here. **[BIC 14-19]** The circumstances surrounding the decision in *Vanderbilt* to stay rather than approve a settlement differ markedly from this case.

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

Here, by contrast, the outcome of the FATA retroactivity question is of no consequence in evaluating the settlements. First, even with FATA applying retroactively, Settling Defendants here established their limited ability to pay, so any purported advantages of FATA claims as opposed to the claims here (breach of fiduciary duty and breach of contract) are of no practical consequence.

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

5644, FOF 24-5] Moreover, the claims pursued by the State here are unaffected by FATA's retroactivity.

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

Appellants' claim that the District Court "had no jurisdiction over the claims in the *Austin* case," and yet "tried the *Austin* case *in abstentia*" is demonstrably false. **[BIC 23]** The District Court did nothing of the sort.

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

Section 44-9-6(H) of FATA provides that a "finding of fact or conclusion of law made in the [alternate remedy proceeding pursued by the State] that has become final shall be conclusive on all parties to the action under the Fraud Against Taxpayers Act." Thus, under this provision, where, as here, the State

pursues its own claims in an alternate remedy proceeding, the outcome of that proceeding is preclusive with respect to the original *qui tam* proceeding. The District Court acknowledged this provision but stopped short of making any determination about the effect of its ruling on the *Austin* case. **[RP 5682-5683, COL 46]** The District Court merely stated that its approval of the settlements in this case "*may* extinguish some or all of a qui tam plaintiff's claims." *Id.* (emphasis added).

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

Appellants are, in effect, promoting the untenable proposition that they can "participate as a party" and assert a "right to [their] reward and attorney fees" as to the State's claims against Settling Defendants here but can still pursue *the State's claims* against *the same defendants for the same conduct* in *Austin*. **[BIC 27]** In other words, Appellants want two bites of an apple that isn't theirs.

Appellants also say that the District Court violated the stay imposed in *Austin* by operation of Rule 12-203(E) NMRA because of the interlocutory appeal on FATA's retroactivity. **[BIC 23-24]** The stay does not apply to this case and in

any event, on September 19, 2011, the State moved this Court for a partial lifting of the stay in the *Austin* interlocutory appeal. The State did so for the express purpose of obtaining dismissal of NMSIC pay-to-play claims in the *Austin* case, thereby facilitating pursuit of its pay-to-play claims here. **[RP 5645, FOF 27]** Over Intervenors' objections, this Court granted the State's motion, partially lifting the stay to allow resolution of the dismissal of Intervenors' NMSIC pay-to-play claims in *Austin* (Ct. App. No. 31,421, Oct 10, 2011). The District Court's approval of the settlements here, therefore, in no way violated the letter or spirit of the stay, particularly as it was modified by the State's motion.

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

Appellants also argue, without citation to authority, that the District Court's Order of Dismissal is not a final appealable order because it does not adjudicate whether Intervenors are entitled to a share of the settlement proceeds and attorneys' fees. **[BIC 40-41]** An otherwise final order is not, however, rendered non-final for purposes of appeal where issues remain as to such things as an award of costs or attorneys' fees for services rendered in the litigation that is the subject of the appeal. *Kelly Inn No. 102, Inc. v. Kapnison*, 1992-NMSC-005, ¶¶ 11-29, 113 N.M. 231, 824 P.2d 1033.

Conversely, the District Court's October 16, 2012, Order Denying Intervenors' Motion to Disqualify the Attorney General **[RP 3931-3932]**, which

Appellants apparently claim was erroneous **[BIC 48-50]**, is not a final appealable order, and, if it were, the time to appeal expired long ago.

VI. THE SETTLEMENTS ARE NOT PROCEDURALLY DEFECTIVE.

In its rulings with respect to the first set of settlements it approved in this case, the District Court correctly, and expressly, rejected Intervenors' contentions that the settlements were conducted in a manner that violated the Inspection of Public Records Act, NMSA 1978, § 14-2-1 *et seq.* ("IPRA") and the Open Meetings Act, 1978 NMSA § 10-15-1 *et seq.* ("OMA"). This ruling has equal force here since the settlement at issue here was approved using the same process as the first group of settlements, and Intervenors merely incorporated by reference their earlier objections **[6-19-14 Tr. 45:8-11]** and have made on appeal the exact same challenges to that process here as were made on the First Appeal.

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

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

Appellants make the unsupported assertion that the settlement at issue in this case violated IPRA. **[BIC 42-43]** The District Court has previously and soundly rejected this argument as it applied to other settlements, finding:

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

[RP 5664, COL 4] Appellants have cited nothing in the record to dispute that this conclusion is equally applicable here. Accordingly, Appellants' claim that the settlement agreement somehow violated IPRA should be rejected. *See In re Estate of Heeter,* 1992-NMCA-032, ¶ 15, 113 N.M. 691, 831 P.2d 990 ("[t]his [C]ourt will not search the record to find evidence to support an appellant's claims").

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

The District Court found that settlements were approved pursuant to the Recovery Litigation Settlement Policy ("Settlement Policy") **[RP 5968-5969]** adopted at a public meeting of the NMSIC on June 26, 2012. **[RP 5664, COL 3]** The Settlement Policy formed a Litigation Committee to "actively participate in

settlement negotiations, as appropriate, with the authority of the [NMSIC] for settlement resolution and related decisions." [16] **[RP 5968]**

As the District Court correctly concluded, the actions of the Litigation Committee are the very type of attorney-client privileged litigation decision-making exempted by OMA. **[RP 5663, COL 3]** *citing* Bd. of Cnty. Comm'rs v. Ogden, 1994-NMCA-010, ¶ 17, 117 N.M. 181, 870 P.2d 143, NMSA 1978 § 10-15-1(H)(7)(2013) (the OMA "does not require that a decision regarding litigation be made in an open meeting"). [17]

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

[17] Amici in the First Appeal suggest that the Litigation Committee was required to vote in open session, even though the preceding discussion could be held in closed session, because the *Ogden* decision has been effectively superseded by *Bd. of Comm'rs v. Las Cruces Sun-News*, 2003-NMCA-102, 134 N.M. 283, 76 P.3d 36, *overruled on other grounds, Republican Party v. N.M. Taxation & Revenue Dep't,* 2012-NMSC-026, 283 P.3d 853. In fact, the *Sun-News* decision relates to an IPRA request, not a claimed violation of the OMA. The holding of *Sun-News* is that settlement agreements must be produced in response to an IPRA request, which the NMSIC does not dispute.

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

The Litigation Committee's review and approval of the settlement in this case—in turn approved by the AG via signed public court filings **[RP 5567]**—therefore constituted an exercise of the Attorney General's authority to settle cases. As a consequence, the Litigation Committee was not required to follow the technical requirements of OMA. *See, e.g., Open Meetings Act Compliance Guide,* at 9 (8th Edition 2015) ("Of course, where the chief policymaking official of an agency is a single individual the [OMA] does not apply because the official is not a public body, complete decision making authority is vested solely in the official, and no deliberation or vote is necessary for effective action").

Even if the Litigation Committee were subject to OMA, the processes followed here satisfied OMA's purposes and therefore did not violate OMA. *See Parkview Cmty. Ditch Ass'n v. Peper,* 2014-NMCA-049, ¶ 13, 323 P.3d 939 ("[u]nder the substantial compliance standard, 'when the [OMA] has been sufficiently followed so as to carry out the intent for which it was adopted and

serve the purpose of the statute,' no violation has occurred" (citing *Guitierrez v. Albuquerque,* 1981-NMSC-061 ¶ 14, 96 N.M. 398, 631 P.2d 304)).

Notwithstanding the applicability of OMA's attorney-client exception, Amici in the First Appeal (not here) argue that OMA, nonetheless, required NMSIC to provide notice in advance of any Litigation Committee meeting together with an agenda and limited meeting minutes. **[Amici 18]** The benefit of such actions, in theory, would be to confirm that the meetings were properly closed and that only privileged matters were discussed. **[Amici 20]** In this case, however, the subject of these meetings has been outlined in open court, and there is no suggestion that anything improper was discussed. Since the purpose of OMA's requirements has been satisfied, these arguments should not be allowed to invalidate the settlement agreements. *See Parkview* ¶ 16 (where the purpose of the procedure was not relevant in context, action without following the technical procedures would not be invalidated). Similarly, even if the failure of the Litigation Committee to vote in an open session were a technical violation of the OMA, it would not be a basis to invalidate the actions of the Litigation Committee. Presumably, the purpose of voting in open session is accountability, but in the case of the Litigation Committee all actions were taken only by unanimous consent. **[RP 5664, COL 3]** Accordingly, there would be no additional information

provided if the Litigation Committee had voted in open session to approve the settlement.

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

To the extent that NMSIC's approval of the settlement agreements had any procedural deficiencies, they have been cured by NMSIC's subsequent actions. *See Kleinberg v. Bd. Of Educ.,* 1988-NMCA-014,¶ 30, 107 N.M. 38, 751 P.2d 722, ("procedural defects in the Open Meetings Act may be cured by taking prompt corrective action"). Specifically, at a duly noticed public meeting held May 26, 2015, a majority of a quorum of the NMSIC voted in open session to approve again the settlement as to the two Settling Defendants at issue in this appeal, **[Wollmann Aff., ¶ 8]** [18] thus mooting the issue of the procedural sufficiency of

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[18] The relevant facts in the Wollman Aff. may be judicially noticed. *See* Rule 11-201 NMRA (2012), NM Rules of Evidence, Art. 2 § B ("The court may judicially notice a fact that is not subject to reasonable dispute because it (1) is generally known within the court's territorial jurisdiction, [or] (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"). The ratification of this settlement can be confirmed by reference to the minutes of this meeting available on the NMSIC's website. http://www.sic.state.nm.us/meeting-materials.aspx (Meeting Minutes for May 26, 2015 at page 3); *see also* Dan Boyd, *SIC Votes for Transparency on Settlement Agreements*, Albuquerque Journal, May 27, 2015, http://www.abqjournal.com/590590/news/sic-votes-for-transparency-on-settlement-deals.html ("The SIC then voted to ratify nearly a dozen settlements. . . . All those settlements had been previously approved by the SIC's litigation committee and publicly divulged, in some cases after formal records requests were filed"); *Citation Bingo, Ltd. v. Otten*, 1996-NMSC-003,¶ 9, n. 2, 121 N.M. 205,

the settlement agreement with the two Settling Defendants. Further, the Council has amended its Settlement Policy so all settlements must be considered and approved by the Council as a whole.[19] **[*Id.*, ¶ 7]**

The NMSIC's judicially-noticeable actions address all purported OMA violations identified by appellants and comport with the actions Amici requested in the First Appeal. *See* Amici Brief at 10 (stating, "[the Settlement Agreements] are without effect and must be ratified or rejected by vote of a majority of a quorum of the SIC in an open public meeting"). Because there can no longer be any doubt that the alleged technical deficiencies in the settlements have been resolved, this

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910 P.2d 281 (Supreme Court taking judicial notice of "recent newspaper references").

[19] *See also* Justin Horwath, *Investment Council Strips Subcommitee of Authority over Settlements*, Santa Fe New Mexican, May 26, 2015 http://www.santafenewmexican.com/news/local_news/investment-council-strips-subcommittee-of-authority-over-settlements/article_eb102506-d1b8-5456-b20d-42850f6d6501.html ("a foundation board member who wrote a legal brief on the issue, called the council's policy change a 'very good move for openness' that will allow the public to know how the full 11-member body votes on settlement agreements"); Dan Boyd, *SIC Votes for Transparency on Settlement Agreements*, Albuquerque Journal, May 27, 2015, http://www.abqjournal.com/590590/news/sic-votes-for-transparency-on-settlement-deals.html ("Daniel Yohalem, a Santa Fe attorney who is representing FOG and the press association, called the revised SIC settlement policy a 'complete victory' for the state's Open Meetings Act"); May 26, 2015 NMSIC Meeting Minutes, available at http://www.sic.state.nm.us/meeting-materials.aspx (voting in open session of publicly-notice meeting to approve/ratify all settlements, and amending litigation committee policy).

Court should affirm the District Court's decision without reaching the issues raised regarding the OMA. *See Palenick v. City of Rio Rancho,* 2013-NMSC-029, ¶16, 306 P.3d 447 (where plaintiff had alleged that his termination was ineffective due to violations in the OMA the court held, "because we conclude that [plaintiff's] actions amounted to waiver by estoppel we need not address whether the OMA was violated in this case, or the associated issues").

CONCLUSION

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

Dated: June 29, 2015

Respectfully submitted,

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I certify that a true and correct
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