IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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

Appellants,

v. Ct. App. No. 31421

AUSTIN CAPITAL MANAGEMENT, LTD; *et al.*

Defendants/Appellees.

REPLY BRIEF BY PLAINTIFFS ON THE EXPRESS RETROACTIVITY OF THE NEW MEXICO FRAUD AGAINST TAXPAYERS ACT

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Oral Argument Is Requested

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This brief, according to the word count provided by WordPerfect Version X5, the body of the foregoing brief contains 3585 words, exclusive of those parts excepted by Rule 12-213(F)(1). The text of the brief is composed in 14 point proportionally-spaced typeface (Calisto MT).

TABLE OF AUTHORITIES

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Introductory Note: Defendants have filed three separate answer briefs – by defendants Topiary/Deutsche Bank, Psilos, and Bruce Malott. In their answer briefs, the defendants inject their assertion that the judiciary has been deprived of subject matter jurisdiction to adjudicate any of the claims against them. These "jurisdiction" arguments are entirely spurious, and they have already been rejected by both judges in the district court. To avoid distractions, this reply brief concentrates on the sole issue on which this interlocutory appeal was granted: the constitutionality of FATA. The defendants' pseudo-jurisdictional arguments are addressed in separate reply briefs.

The reply briefs should be read in the following order for clarity:

1. This brief, which deals with the express retroactivity of the Fraud Against Taxpayers Act ("FATA"), the sole issue on which the interlocutory appeal was granted;

2. Plaintiffs' reply brief about the Psilos defendants' assertion that the Legislature has deprived the judiciary of subject matter jurisdiction over this case, due to NMSA 1978, § 44-9-9(A).

3. Plaintiffs' reply to the assertion by Bruce Malott and others that they are immune from court jurisdiction due to NMSA 1978, § 44-9-9(B).

I. DEFENDANTS PERSIST IN IGNORING FATA TO TALK ABOUT THE FEDERAL QUI TAM STATUTE AND CASES, EVEN THOUGH THE NEW MEXICO LEGISLATURE CRAFTED ITS OWN QUI TAM STATUTE TO REACH A DIFFERENT RESULT ON RETROACTIVITY.

Throughout their answer brief, the defendants violate the first three rules of statutory construction:

> (1) Read the statute; (2) read the statute; (3) read the statute!

In re England, 375 F.3d 1169, 1182 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 1152 (2005) (quoting Felix Frankfurter as recounted in Henry J. Friendly, *Benchmarks* 202 (1967)).

The defendants refuse to read the plain text of FATA, because it destroys their arguments. The defendants cannot come to grips with FATA, so they try to change the subject. The defendants doggedly persist in talking about the federal False Claims Act and federal cases, rather than the state statute which controls this case.

The defendants refuse to acknowledge what is evident from the plain text: the New Mexico Legislature was not content to follow the federal statute and cases, because federal law had proved unsatisfactory. So the Legislature crafted its own qui tam statute to reach different results: New Mexico eliminated any criminal offenses from FATA, turning it into a purely civil

statute so that it could constitutionally be applied as a remedy for conduct prior to its enactment, as explicitly stated in NMSA 1978, § 44-9-12(A). Simply by reading the text of FATA and contrasting it with the False Claims Act, one can clearly see that the New Mexico Legislature traded off criminality in order to gain retroactivity, in accordance with a long line of federal and state cases holding that retroactive civil statutes are constitutional, and that civil punishment is different than criminal punishment. *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798); *Colbert v. Journal Publishing Co.*, 19 N.M. 156, 142 P. 146 (1914); *Hudson v. United States*, 522 U.S. 93 (1997); *State v. Nunez*, 2000-NMSC-013, 129 N.M. 63, 2 P.3d 264; UJI 13-1827 NMRA.

Defendants avoid the fact that violation of the FCA has always been a crime under federal law. See *In re Peraltareavis*, 8 N.M. 27, 41 P. 538 (1895). Therefore, any retroactive expansion of the FCA would be a retroactive expansion of the criminal law, falling afoul of the *ex post facto* clause. Since FATA contains no crimes, it does not retroactively expand the definition of crimes. See *Grygorwicz v. Trujillo*, 2006-NMCA-089, 140 N.M. 129, 140 P.3d 550 – extending civil statute of limitations does not violate *ex post facto* clause.

In their answer brief, all the defendants try to gloss over the deliberate differences between the state and federal statutes, by saying that FATA is

"analogous" to the FCA. On the issue at hand – retroactivity – FATA is not "analogous" to the FCA at all; it is flatly contrary to the FCA. The Supreme Court ruled in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997) that Congress did not intend to have the FCA operate retroactively. By contrast, the New Mexico Legislature intended FATA to operate retroactively. The Legislature said so in § 44-9-12(A), and it drafted the statute to achieve this end: FATA contains no crimes, and no forfeitures, and it caps damages at treble damages, less than the damages already available under the civil common law of New Mexico.

When the New Mexico legislature writes a statute which differs from a federal statute, it is the court's duty to identify and enforce those differences. *San Juan Agricultural Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, 150 N.M. 64, 257 P.3d 884 (cited and quoted at BIC 18-19, but ignored by all the Answer Briefs).

In our system of federalism, the New Mexico Legislature is not a clone of Congress, and neither are its statutes. Unfortunately, Judge Pfeffer started from the faulty premise that FATA is a clone of the FCA. All the errors in the District Court flow from that incorrect premise.

II. DEFENDANTS DOGGEDLY INSIST ON MAKING THE *HALPER* MISTAKE: THEY CONFLATE CIVIL AND CRIMINAL PUNISHMENTS, CONTRARY TO *HUDSON* AND *COLBERT*.

Throughout the answer brief, the defendants equate the word "punitive" with the word "criminal." If a measure is "punitive," ergo it is "criminal."

The defendants' faulty syllogism, punitive = criminal, is exactly the error which the federal Supreme Court committed in *United States v. Halper*, 490 U.S. 435 (1989). Several years later, in *Hudson v. United States*, 522 U.S. 93 (1997), the Supreme Court recognized its own error, as only it can do, and overruled *Halper*. Under *Hudson*, it is reversible error to conflate civil punishment with criminal punishment, as the defendants do here.

Not only is the defendants' argument contrary to *Hudson*, it is also contrary to *Colbert*, where the New Supreme Court explained that the state's common law authorizes civil punishment, in the form of punitive damages. Civil punitive damages are awarded for serious torts, not crimes, and they do not violate any constitutional provisions. Likewise, defendants are contradicting the authoritative statement of New Mexico law as set forth in the UJI 13-1827. This uniform jury instruction was quoted in the Brief in Chief but ignored by the Answer Brief, so it is worth repeating here:

> Punitive damages are awarded for the limited purposes of punishment and to deter others from the commission of like offenses.

III. FATA CONTAINS NO CRIMINAL PENALTIES OR DISGUISED CRIMINAL PENALTIES.

Once one actually reads the text of FATA, this becomes an easy case to decide, because FATA creates no crimes, imposes no forfeitures, contains no disguised criminal penalties, and is not linked to the commission of any crime.

If one surveys the leading cases which distinguish between civil and criminal statutes, one can see that most of them deal with the same recurring problem: an ostensibly civil statute which is linked to or predicated upon the commission of a crime. The courts have repeatedly grappled with the difficult problems presented by statutes of this type. Fortunately, the Legislature was well aware of these problems, so it drafted FATA to eliminate them, making this an easy case by comparison.

In *Kennedy, Attorney General v. Mendoza-Martinez*, 372 U.S. 144 (1963), the challenged statute authorized Attorney General Robert Kennedy to strip convicted draft dodgers of their American citizenship in a summary nonjudicial proceeding, a power which Kennedy eagerly exercised. Not surprisingly, the Supreme Court struck down the statute on due process grounds, not *ex post facto* grounds.

The defendants cite *State v. Nunez*, 2000-NMSC-013, ¶ 57, 129 N.M. 63, 2 P.3d 264 without mentioning that the case actually supports plaintiffs' position. The *Nunez* court held that the forfeiture of an automobile may violate double jeopardy because the forfeitures "are expressly predicated on [a] violation of the Controlled Substances Act," and "[t]he forfeiture statute entirely subsumes the criminal offense." By contrast, FATA contains no forfeitures and is not predicated upon the commission of any crime.

In *State v. Kirby*, 2003-NMCA-074, ¶¶ 33-34, 133 N.M. 782, 70 P.3d 772, this Court held that, although the New Mexico Securities Act contains penalties which may deter people from engaging in securities violations, the mere presence of this purpose is insufficient to make these sanctions criminal, since deterrence may serve civil as well as criminal goals. Defendants manage to cite *Kirby* in their Answer Brief without mentioning that it supports the conclusion that FATA cannot be treated as a criminal statute.

Statutes requiring the registration of sex offenders present especially difficult problems, because they are enacted after the fact and they are linked to the commission of a crime. Nevertheless, such statutes have been upheld under both the state and federal constitutions. *Smith v. Doe*, 538 U.S. 84

(2003); *State v. Drucktenis*, 2004-NMCA-032, 135 N.M. 223, 86 P.3d 1050. *A fortiori*, FATA is constitutional, because it is not linked to any crime.

IV. DEFENDANTS MISCITE OR IGNORE MANY OF THE CONTROLLING AUTHORITIES.

Defendants argue at AB 37 that FATA is unconstitutional because it allows for an award of attorneys fees for conduct which may have occurred prior to enactment of the statute. Defendants are contradicting the controlling authority in New Mexico on this very point. In *Cutter Flying Serv., Inc. v. Straughan*, 80 N.M. 646, 459 P.2d 350 (1969), the Supreme Court held that a statute allowing attorneys fees is valid as affecting debts incurred before the statute, because the statute applies only to cases filed after the statute's effective date. Such a statute is considered remedial and prospective and therefore not unconstitutional. Plaintiffs cited *Cutter* in their Brief in Chief, but defendants ignore it.

Defendants also deliberately disregard *Melaven v. Schmidt*, 34 N.M. 443, 280 P. 900 (1929), in which the Legislature retroactively changed the measure of a corporate shareholder's liability. The Supreme Court held that this legislative change was constitutional, even though it had the effect of increasing the shareholders liability. Plaintiffs cited this controlling authority at BIC 35, but defendants pretend that it does not exist.

Defendants miscite *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), because they fail to mention that *Landgraf* states that the *ex post facto* clause is applicable only to penal legislation, citing *Calder v. Bull.*

> We have construed the Clauses as applicable only to penal legislation. See *Calder v. Bull, 3 U.S. 386, 3 Dall. 386, 390-391, 1 L. Ed. 648 (1798)* (opinion of Chase, J.).

Landgraf, 511 U.S. at 267.

Defendants, at Topiary AB 22, skillfully mischaracterize *United States ex rel. King v. Solvay S.A.*, ___ F. Supp. 2d ___, 2011 WL 4834030 (S.D. Tex. Oct. 12, 2011). In *Solvay* neither the qui tam relators nor the federal district judge bothered to read the New Mexico statute, so they mistakenly assumed that the statute was silent on the question of retroactivity. Therefore the court mistakenly applied the usual presumption against retroactivity. *Id.*, at *46.

Defendants cite *Massachusetts v. Schering-Plough Corp.*, 779 F. Supp. 2d 224 (D. Mass. 2011), which is neither controlling nor persuasive, since it is a federal court interpretation of Massachusetts law. Furthermore, the judge in *Schering-Plough* awarded treble damages under a different Massachusetts statute. And the court acknowledged that *Hughes Aircraft* rests on the presumption against retroactivity. "Accordingly, the Supreme Court has never

directly addressed the question of whether retroactive application of the FCA implicates the Ex Post Facto Clause." 770 F. Supp. 2d at 235 n.6.

Defendants also cite a not-published-anywhere ruling from a federal judge in an ongoing case under the FCA in California, with pendant state claims under the qui tam laws of 31 different states. The judge refers to Judge Pfeffer's ruling in *Vanderbilt*, but the judge also states that his is a tentative ruling, and he grants leave to amend, so this decision is not even published on Westlaw or Lexis.

Defendants fail to deal with several important cases cited in the Brief in Chief, including: *State ex rel. Schwartz v. Kennedy*, 120 N.M. 619, 904 P.2d 1044 (1995) – revocation of a driver's license for DWI does not constitute "punishment" for purposes of double jeopardy; *City of Albuquerque v. One 1984 White Chevy*, 2002-NMSC-014, 132 N.M. 187, 46 P.3d 94 – civil forfeiture statute is constitutional even though it may cause a degree of punishment, because that does not override the statute's primarily remedial purpose.

Defendants also mischaracterize the record. The defendants did not file a 12(B)(1) motion at the outset of the *Vanderbilt* case, as they should have done if they believed the retroactivity argument had any merit. In federal court the defendants filed omnibus motions to dismiss, but they did not argue

retroactivity as one of the grounds for dismissal. They merely dropped footnotes purportedly reserving the question of retroactivity for some other time. Defendants cited no cases in their footnotes, which indicates that they researched the issue and found it so lacking in merit as to be unworthy of inclusion in a real motion to dismiss.

V. TREBLE DAMAGES ARE NOT MANDATORY UNDER FATA. IF THE DEFENDANT COOPERATES, THE COURT HAS DISCRETION TO REDUCE THEM TO DOUBLE DAMAGES, WHICH ARE CONSIDERED COMPENSATORY RATHER THAN PUNITIVE UNDER *MARCUS*.

Defendants argue at AB 37 that FATA imposes mandatory treble damages. This is incorrect. FATA gives the trial judge discretion to reduce treble damages to double damages if the defendant cooperates with the Attorney General. In *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), the United States Supreme Court held that double damages are considered compensatory, and therefore not subject to constitutional challenge. 317 U.S. at 538-41.

Once again, it would be helpful if the defendants actually read the statute. Defendants cite the treble damage provision in § 44-9-3(C), but then they fail to read the very next subsection:

> D. A court may assess not less than two times the amount of damages sustained by the state if the court finds all of the following:
>
> (1) the person committing the violation furnished the attorney general with all information known to that person about the violation within thirty days after the date on which the person first obtained the information;
>
> (2) at the time that the person furnished the attorney general with information about the violation, a criminal prosecution, civil action or administrative action had not been commenced with respect to the violation, and the person did not have actual knowledge of the existence of an investigation into the violation; and
>
> (3) the person fully cooperated with any investigation by the attorney general.

Furthermore, New Mexico has several statutes which do impose mandatory treble damages, and no one has suggested that those statutes must be treated as criminal penalties under the Constitution. Of those cited at BIC 13, five impose mandatory treble damages: NMSA 1978, § 20-9-4 (wrongful retention of United States State property), § 27-14-4 (remedies for medicaid false claims), § 36-2-17 (attorney deceit or collusion), § 39-2-13 (collection of excessive fees or fees for services not rendered), and § 60-8A-9(E) (franchisee action against supplier).

VI. DEFENDANTS' FAULTY LEGAL ANALYSIS WOULD INVALIDATE ALL AWARDS OF PUNITIVE DAMAGES IN CIVIL CASES.

The erroneous arguments made by defendants prove far too much. By combining the *Halper* mistake with a faulty *Kennedy* analysis, the defendants manage to prove that all awards of punitive damages in civil cases are unconstitutional. According to defendants, punitive damages must be treated as criminal sanctions and therefore subjected to the limitations of the *ex post facto* clause [and double jeopardy and proof beyond a reasonable doubt, although defendants never mention these criminal provisions].

According to defendants' misconceived analysis, punitive damages and FATA must be treated as criminal sanctions because:

- They are punitive. [The *Halper* mistake – punishment for a tort or a {crime}??.]
- The purpose of punitive damages is punitive. [No doubt. *See* UJI 13-1827.]
- The effect of punitive damages is punitive.
- FATA imposes an affirmative disability or restraint, because the fraudfeasors might be debarred from doing business with state agencies. [This is a bizarre twist on *Kennedy* factor #1.]

- Punitive damages have historically been regarded as punishment. [*Kennedy* factor #2. Of course punitive damages do impose civil punishment, as stated in UJI-1827. This is the *Halper* mistake repeated.]

- The sanction involves some level of scienter. [*Kennedy* factor #3. Of course all serious torts involve some degree of scienter or *mens rea*.]

- The sanction will promote the traditional aims of punishment [*Kennedy* factor #4. Yes, civil punitive damages do promote the aim of punishment, and deterrence. UJI-1827. This is the *Halper* mistake in yet another guise.]

- The behavior is already a crime. [*Kennedy* factor #5. Yes, it is conceivable that the conduct of the defendant fraudfeasors might be prosecuted as a crime – but not under FATA. Any criminal prosecution would occur under a pre-existing criminal statute which might encompass the same behavior. This case is no different than any serious automobile accident, where the culpable party might face criminal prosecution. But that possibility does not transform a civil tort case into a criminal action.]

- An alternative purpose cannot rationally be assigned to the sanction. [*Kennedy* factor #6. Defendants seem to acknowledge that FATA has some compensatory purposes, but then they conclude it has no rational purpose

except punishment. This is the legal equivalent of a double backflip with a full twist, using *Kennedy* as a springboard.]

• The sanction appears excessive. [*Kennedy* factor #7. According to the Wall Street defendants, if they swindled the State of New Mexico out of $100,000,000, then they cannot be held liable for double or treble damages, because those would be large numbers in absolute dollar terms. So say defendants. But punitive damages are judged in relation to actual damages, and FATA imposes a statutory cap at treble damages, which is a much lower multiple than allowed at common law.]

In short, there are good reasons why *Kennedy* is neither conclusive nor exhaustive, even as a checklist, for *ex post facto* analysis. *Kennedy* is not an *ex post facto* case. *Kennedy* predates *Halper* and *Hudson*, so it does not properly differentiate between civil and criminal punishments. Kennedy depends on how one scores the listed factors. [For a correct scoring under Kennedy, *see* the Brief in Chief.] And *Kennedy* can be used to reach almost any conclusion, including the conclusion that civil punitive damages are unconstitutional.

VII. FATA HAS A SEVERANCE CLAUSE, BUT DEFENDANTS WANT TO TOSS THE ENTIRE STATUTE.

The defendants make an incomprehensible argument about severing the severance clause, so as to toss out the entire statute, including those parts

which can be applied retroactively without any constitutional question whatever. The only colorable question relates to the increment in damages between double damages and treble damages. As pointed out in Point VI above, the increment between double and treble damages is discretionary rather than mandatory. There is no question about the constitutionality of the provisions relating to double damages [*Marcus*], attorneys fees [*Cutter*] or the other remedies in FATA.

Once again, defendants are turning the law on its head. The purpose of a severability clause is not to thwart or nullify the statute, but to save as much of the statute as possible "without impairing the force and effect of the remaining parts." *Bradbury & Stamm Constr. Co. v. Bureau of Revenue*, 70 N.M. 226, 230-31, 372 P.2d 808, 811 (1962); *State v. Frawley*, 2007-NMSC-057, ¶ 30, 143 N.M. 7, 172 P.3d 144. Yet the defendants manage to interpret the severance clause as tossing out the entire statute, including all the parts which are plainly constitutional. That is quite a remarkable feat.

VIII. THE CONDUCT ALLEGED IN THE COMPLAINT – FRAUD AND RECKLESS MISREPRESENTATION – WAS ALREADY ACTIONABLE AND PUNISHABLE UNDER NEW MEXICO'S CIVIL LAW. SO FATA SIMPLY PROVIDES MORE EFFECTIVE REMEDIES FOR CONDUCT WHICH WAS ALREADY UNLAWFUL.

Defendants' *ex post facto* argument is hollow at its core. The essence of any *ex post facto* claim is that the defendants committed acts which were legal when committed, only to have them made illegal *after the fact*. Amid the cloud of arguments in this case, this central core is missing, because the defendants' acts of fraud and misrepresentation were already illegal when the defendants committed them.

Plaintiffs made this point in their Brief in Chief, at 37-42. The Attorney General also made this point in his amicus briefs supporting the constitutionality of FATA's retroactivity clause. In their answer briefs, the defendants skip over this point entirely, because they have no answer to it. The defendants cannot, and do not, contend that the conduct alleged in the complaint was legal prior to July 1, 2007. Fraud, reckless misrepresentation, and conspiracy have always been against the civil law of New Mexico. These wrongful acts have always been serious torts, and they have always been punishable by civil punitive damages, in amounts greater than provided by FATA.

So FATA simply provides more effective remedies for old wrongs. Were it not for FATA and Frank Foy, the defendants would have succeeded in the frauds which they perpetrated on the State before and after July 1, 2007.

CONCLUSION

FATA was carefully designed by the Legislature, to make it purely a civil statute, with no criminal penalties and no disguised criminal penalties, so that FATA could be used as a remedy for fraud and reckless misrepresentation committed against the State prior to 7/1/07. Fraud and misrepresentation were already torts under New Mexico law; FATA makes it more likely that the fraudfeasors will be brought to justice.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing was emailed to all counsel of record and the Honorable John Pope this 13th day of February, 2012.

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