

IN THE COURT OF APPEALS OF THE  
STATE OF NEW MEXICO

No. 31,363

COURT OF APPEALS OF NEW MEXICO  
ALBUQUERQUE  
FILED

APR 03 2012

*Wendy F. Jones*

PING LU; JILL MCKEON; RICHARD MCKEON;  
STEPHEN SPENCER; SPENCER STOPA; and  
JUDY C. WINNEGAR, on their own behalf  
and on behalf of a class of similarly  
situated persons, *et al.*,

Plaintiffs-Appellants,

v.

THE EDUCATION TRUST BOARD OF NEW MEXICO;  
THE EDUCATION PLAN TRUST OF NEW MEXICO; and  
THE STATE OF NEW MEXICO,

Defendants-Appellees.

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Appeal from the First Judicial District Court  
Santa Fe County  
The Honorable Stephen D. Pfeffer  
District Court No. D-101-CV-2009-02051

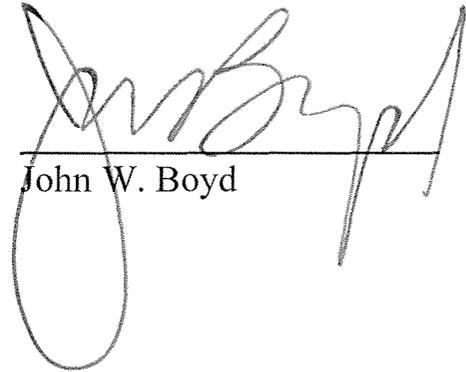
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**BRIEF OF *AMICI CURIAE* NEW MEXICO EDUCATION TRUST AND  
NEW MEXICO EDUCATION TRUST BOARD**

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**Certification of Compliance with Rule 12-215(A), NMRA**

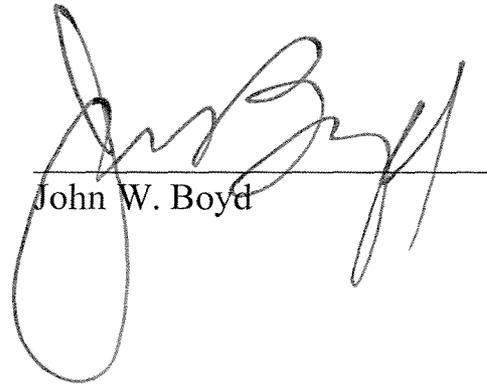
*Amici* have contacted the Appellants Ping Lu *et al.*, and Appellee the State of New Mexico, through their counsel of record, and have notified them of the intent to file this brief. They do not oppose the filing of this amicus brief.



John W. Boyd

## CERTIFICATE OF COMPLIANCE

As required by Rule 12-213(G) NMRA, we certify that this brief complies with Rule 12-213(F)(3) NMRA in that the brief is proportionately spaced, in 14-point font and the body of the brief contains 2,488 words. This brief was prepared and the word count determined using WordPerfect X3.



John W. Boyd

## **I. Introduction, including statement of the interest of *amici*.**

*Amici* are the New Mexico Education Trust (“NMET”) and its Board. Both are defendants in this litigation in the district court. Neither was the subject of the order of the district court dismissing plaintiffs’ claims against the State of New Mexico on the ground of sovereign immunity and as such have not participated as parties to the appeal.

As we explain in greater detail below, NMET is an entity created by New Mexico statute, NMSA 1978, § 21-21K-1 *et seq.* The New Mexico legislature, like legislatures throughout the country, created a statutory “education trust” (in New Mexico’s case, the NMET) to take advantage of a federal law that permits states to create trusts that facilitate tax-sheltered savings for college. Parents and others deposit funds in accounts administered by NMET. The earnings on those deposits are tax-sheltered and the trust must use the account-holder’s funds only to defray the expenses of a college education for the beneficiary of the deposits.

The litigation underlying this appeal arose because some account holders experienced extraordinary losses in their accounts during 2008 and 2009 as a result of declines in a particular bond fund (and, allegedly, two others).

OppenheimerFunds is the NMET’s investment advisor and administrator.

OppenheimerFunds, Inc. (“Oppenheimer Funds”) also managed the particular

bond funds in question.<sup>1</sup> Affidavit of Robert Desiderio, R.P. 000466-69. Because of the significantly greater than “benchmark” losses in Oppenheimer’s Core Bond Fund - the losses which are at the heart of the litigation - the Board made a demand on behalf of the affected account holders against Oppenheimer. The result was that the Board and Oppenheimer reached a settlement agreement under which Oppenheimer agreed to refund \$67.3 million dollars to the affected account holders.<sup>2</sup> Settlement Agreement, R.P. 1498-1536.

After the State and NMETB started negotiations with Oppenheimer but before the NMETB reached its settlement with Oppenheimer in 2010, Ping Lu et al filed this class action, alleging that the NMET and its Board had breached their contracts with account holders by investing account holder funds (or permitting

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<sup>1</sup> Under NMSA 1978, § 21-21K-3(A), the Board does not select investments itself, but must either designate the State Investment Council or a private investment advisor, approved by the SIC, to select the investments.

<sup>2</sup> This amount represents approximately 50-60% of the losses in the Core Bond Fund. Rpt. of Lionel Glancy, R.P. 1537-50 and Rpt. Of Greg Jarrell, R.P. 1551-57. Below, NMETB introduced evidence in this litigation that the settlement was highly favorable to the affected account holders. Rpt. Of Stephen G. Choi, R.P. 1558-79. The evidence established, *inter alia*, that the Board’s settlement with Oppenheimer was far more favorable than the average settlement in securities class action cases, by close to ten-fold. Choi Rpt., R.P. 1558-79. Although the plaintiffs in this litigation (“Ping Lu et al.”) requested the district court to hold a hearing on the fairness of this settlement, they later withdrew that motion. Notice of Withdrawal of Plaintiffs’ Motion for Court Review of Settlement Agreement, R.P. 00215-48.

Oppenheimer to invest funds) in derivative investments that caused the losses.

First Amended Complaint, R.P. 000370-394.

The class of account holders represented by named plaintiffs Ping Lu et al apparently now seeks to recover losses that are allegedly over and above the losses recouped in the settlement between NMET and Oppenheimer, the proceeds of which are now being distributed by Oppenheimer's claims administrator to account holders. The plaintiffs have not sued Oppenheimer.

In the litigation below, the plaintiffs not only sued NMET and its Board for breach of contract, they also sued the State of New Mexico for breach of contract, for reasons that become apparent when one reads the statutes that created the NMET and its Board. Those statutes effectively prevent any recovery from the Board or the Trust. In the face of these statutes, the Plaintiffs searched for a defendant additional to the Trust and its Board as a source of recovery, presumably the State's General Fund. Plaintiffs' theory against the State of New Mexico is that, in respect to the conduct of the Trust, the State of New Mexico "acted by and through" the Trust and its Board. First Amended Complaint, ¶ 12, R.P. 000372-73. In other words, the plaintiffs do not allege that the State breached any contract itself, only that NMET's conduct was, in effect, the State's conduct. First Amended Complaint, ¶ 13, R.P. 000373.

As has been set forth in the plaintiffs-appellants' opening brief, this appeal arose when the district court granted the State of New Mexico's motion to dismiss on the ground of sovereign immunity. R.P. 002248-49. Thus the issue before this Court is whether the State of New Mexico is entitled to invoke the defense of sovereign immunity in response to class plaintiffs' breach of contract complaint against NMET and its Board, in which class plaintiffs allege that NMET and its Board breached the account holder agreements with the plaintiffs by permitting excessive investments in derivatives.

*Amici* do not have a direct interest in the outcome of this appeal. They do have contracts with the named plaintiffs and the members of the class and accordingly do not here invoke the defense of sovereign immunity as such.<sup>3</sup> Their defense to the underlying litigation is not just that they did not breach their contracts with the affected account holders and that they have performed under these contracts by successfully recouping from Oppenheimer much of the class's losses, thereby fully discharging their fiduciary duties to the account holders. Their defense also arises from the provisions of the statutory scheme of the

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<sup>3</sup> Early in this litigation, the Attorney General's Office invoked the defense of sovereign immunity on behalf of the Board and Trust, but the district court rejected that defense. Motion to Dismiss, R.P. 000043-50; and Order Denying Motion to Dismiss, R.P. 000266-67.

Education Trust under which there can be no recovery of investment losses from the Trust or its Board. Their defense further arises from the provisions of the contracts themselves under which account holders agreed that they could not hold the Trust, its Board (or the State) liable for losses.

NMET's and its Board's defenses are, however, not before this Court in this appeal. *Amici's* interest in this appeal is to provide to this Court a meaningful description of the operation of the Board and the Trust in the context of the enabling act and the Board's contracts with account holders. Accordingly, *amici's* interest, as the entity whose statutory authority and putative liability underlie this litigation, is in assuring that this Court has available to it the context of this appeal, including the statutory and contractual framework and the background of this litigation.

## **II. The New Mexico Education Trust Act.**

Under § 529 of the Internal Revenue Code of 1986, the federal government provided a mechanism under which states could create so-called "529 plans." Through such plans, taxpayers are able to tax shelter their savings for their children's or others' college educations. In New Mexico and elsewhere, these 529 Plans are referred to as "education trusts." New Mexico's legislature established our State's plan in 1997. *See* NMSA 1978, § 21-21K-1, *et seq.*

(“Education Trust Act” or “the Act”). The NMET is “administratively attached” to the New Mexico Higher Education Department pursuant to NMSA 1978, § 21-21K-4(A). Under New Mexico law, an administratively attached agency is independent and outside the operational control of the government agency to which it is attached. *See* NMSA 1978, 9-1-7(A)(1) (“An agency attached to a department for administrative purposes only shall: [] exercise its functions independently of the department and without approval or control of the department.”).

The Act establishes an education trust fund into which parents, grandparents or others interested in financing a child’s college education can deposit money for that purpose. The growth of the funds on deposit is tax sheltered. These deposits are held by the defendant Education Trust Board (“ETB”) for the benefit of the students as they reach college. NMSA 1978, § 21-21K-3(A). The ETB is required “to provide that all money in the fund shall be invested either by the state investment officer according to the rules promulgated by the [State Investment] council, subject to approval of the board, or by a private investment advisor, approved by the council, pursuant to a contract between the board and the investment advisor.” NMSA 1978, § 21-21K-3(A). The ETB, made up of state employees and citizen volunteers, entered into a contract with Oppenheimer Funds

to select the investments for the funds and to manage those funds and investments. The ETB is required to review the investments quarterly. NMSA 1978, § 21-21K-3(A).

In addition to the foregoing provisions, the following provisions of the Education Trust Act are significant to this litigation:

**21-21K-3. Education trust fund; creation:**

**B. Expenditures from the fund shall be for payments to institutions of higher education on behalf of beneficiaries or for refunds, in accordance with the provisions of the Education Trust Act, and for costs of administering that act.**

**C. In no event shall any liability of, or contractual obligation incurred by, the program established pursuant to the provisions of the Education Trust Act obligate or encumber any of the state's land grant permanent funds, the severance tax permanent fund or any money that is a part of a state-funded financial aid program. Nothing in the Education Trust Act creates any obligation, legal, moral or otherwise, to fulfill the terms of any college investment agreement or prepaid tuition contract out of any source other than the education trust fund.**

**D. ....No member of the board, while acting within the scope of his authority or while acting as a trustee of any trust fund or account of the board, shall be subject to any personal liability for any action taken or omitted within that scope of authority.**

Thus, in creating the Education Trust, the legislature explicitly provided 1) the funds in the trust can be used only for paying institutions of higher learning for the beneficiaries, paying refunds pursuant to provisions that allow for refunds, and

for the expenses of administering the Trust (Subsec. B); 2) contractual obligations to beneficiaries may be satisfied only out of the trust funds themselves (Subsection C); 3) the state's land grant permanent funds, severance tax permanent fund and any money that is a part of a state-funded financial aid program cannot be accessed to pay any obligation of the Trust (*Id.*)<sup>4</sup>; 4) The members of the Trust Board are fully shielded from any personal liability (Subsec. D).

The foregoing reflects the legislature's "belt and suspenders" approach to making absolutely certain that persons in the position of these plaintiffs - who complained that the ETB breached a contract or otherwise mismanaged the funds - would be unable to do anything other than to get their money out. The Board, of course, has acted on behalf of its account holders to recoup money from its third-party investment advisor, and those funds are now being placed in the individual accounts of members of the class. This reflects the New Mexico legislature's choice that investments be made by others than the Board itself, thereby leaving

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<sup>4</sup> With all of the state's education funds unavailable, the only other conceivable source for funds to satisfy the plaintiffs claims might be New Mexico's general fund, but that avenue is precluded by statute:

**General fund created.** There is created a fund to be known as the "general fund" to which the state treasurer shall credit all revenues not otherwise allocated by law. **Expenditures from this fund shall be made only in accordance with appropriations authorized by the legislature.**

NMSA 1978 § 6-4-2. (Emphasis added.)

the Board free, as in the case of Oppenheimer's mismanagement of its Core Board Fund, to pursue claims on behalf of its account holders. But one thing is clear in the relationship between the Trust and the account holders: Depositors cannot get money from the trust except by accessing their own funds.<sup>5</sup> It is those funds, after all, that comprise the New Mexico Education Trust and it is this fact that appears to have prompted class plaintiffs to insist, notwithstanding the statutes cited above and the language of the contracts quoted below, that the State of New Mexico must somehow be held liable.

But as if to make doubly sure that account holders could not sue the Trust or its board for investment losses in their accounts, the legislature added the categorical language in 21-21K-3 C and it bears emphasis in this appeal:

**“Nothing in the Education Trust Act creates any obligation, legal, moral or otherwise, to fulfill the terms of any college investment agreement or prepaid tuition contract out of any source other than the education trust fund.”**

(Emphasis added.)

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<sup>5</sup> Other than in a comparatively small administrative fund, The New Mexico Education Trust has no assets other than the funds it holds in trust. NMET and its Board do not believe that the Ping Lu plaintiffs contend that they could levy a judgment on behalf of one group of account holders from the trust funds of other account holders.

### **III. The relevant contract language.**

There is no language in the statute that explicitly precludes the plaintiffs from *suing* the ETB. Rather, the Act prevents any *recovery* beyond the account holder's own funds. Thus, the statute appears to permit suits by account holders to recover a refund or to compel the payment of their funds for tuition should the Trust fail or refuse to do so. Furthermore, the *contracts* between the class members and the ETB preclude any liability on the part of the Board, the Trust, or the State for investment losses in an account.

The documents comprising the parties' contracts contain language reflecting the provisions of the Act quoted above. One of the terms that appears in bold text in the Plan Descriptions to which account holders agree to be bound is this:

**Under New Mexico law . . . neither the New Mexico 529 Program, the Board, any member of the Board or the State of New Mexico is liable for any loss incurred by any person as a result of participating in the New Mexico 529 Program.**

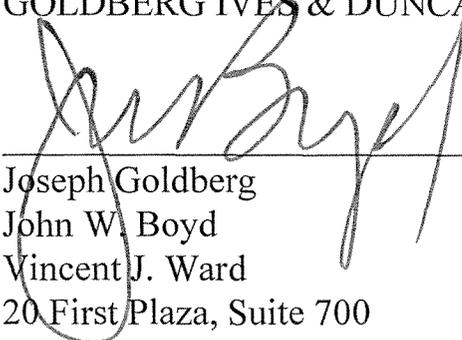
"The Education Plan Plan Description", p. 15., R.P. 000079, 000142.

**IV. Conclusion.** From the framework of the enabling statutes establishing and undergirding the NMETB, it could not be clearer that the legislature's intent was not to create a broad or general waiver of sovereign immunity with respect to the type of harm the Ping Lu plaintiffs allege. Rather, what is clear is the intent of

the legislature to limit account-holders' remedies against the Trust and its Board to recovery of whatever money is in their accounts. *Amici* respectfully suggest that the foregoing facts and law are significant to this Court's consideration of the dispute between the Appellants and the State of New Mexico on the issue of the applicability of sovereign immunity.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was sent via email to the following counsel of record this 3<sup>rd</sup> day of April, 2012:

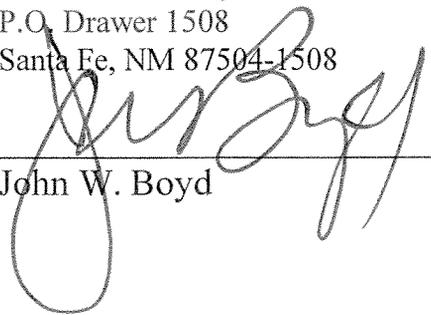
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