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

D-101-CV-2011-01534

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

Plaintiff,

vs.

GARY BLAND, *et al.*,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATED TO THE QUI TAM INTERVENORS' OBJECTIONS TO SETTLEMENTS

The Court enters is findings of fact and conclusions of law following the hearing held on November 25 and 26, 2013, to determine whether the settlements NMSIC has entered into with Defendants Daniel Weinstein ("Weinstein"), Vicky L. Schiff ("Schiff"), Marvin Rosen ("Rosen"), and William Howell ("Howell") (collectively the "Settling Defendants") are fair, adequate and reasonable under all the circumstances.

The Court overrules the objections to the settlements raised by the Qui Tam Intervenors, Frank Foy, Suzanne Foy and John Casey (collectively the "Intervenors"), and grant NMSIC's April 18, 2013, motions for the voluntary dismissal of the Settling Defendants from this action.

The Court limits the effect of these findings and conclusions to the parties interested in the Settlement proceedings and to the fairness of the proposed settlements with the Settling Defendants. Except to the extent that these findings and conclusions might provide the legal frame work for analysis of future proposed settlements, these findings and conclusions have no binding or preclusive effect on other issues which might arise as to other parties to this action.

I

FINDINGS OF FACT

A. The Parties Concerned with Settlement

1. NMSIC is the state agency that serves as trustee of and is responsible for investing the Land Grant Permanent Fund and the Severance Tax Permanent Fund (collectively the "Public Trust Funds"), which are established under the New Mexico Constitution for the benefit of the citizens of New Mexico. Judicial Notice: N.M. Const. art. VIII, § 10, art. XII, §§ 2, 7; NMSA 1978 §§ 6-8-6, 6-8-7(A) (2011), 7-27-3.1 (1983).

2. The Intervenors are qui tam plaintiffs in two actions they brought under the New Mexico Fraud Against Taxpayers Act ("FATA"): *State of New Mexico ex rel. Frank C. Foy v. Vanderbilt Capital Advisors, LLC,* No. D-101-CV-2008-1895 ("*Vanderbilt*") and *State of New Mexico ex rel. Frank C. Foy v. Austin Capital Management Ltd.,* No. D-101-CV-2009-1189 ("*Austin*"). Judicial Notice.

3. Rosen during the time period relevant to this action was a FINRA Registered General Securities Representative at a FINRA Registered broker-dealer known as Diamond Edge

Capital Partners, LLC ("DECP"), which is currently known and doing business as Emerald Point Capital, LLC. (Rosen Aff. ¶ 4). DECP acted as a placement agent for certain private equity funds and hedge funds (the "client funds"), including funds in which NMSIC made investments on behalf of the Public Trust Funds. (Rosen Aff. ¶ 5; Third Amended Complaint ¶¶ 5, 137, 139, 140).

4. Howell acted as a private equity consultant to InterMedia Advisors, LLC, its fund InterMedia VII, and GSC Recovery III, L.P., performing introduction and referral services for those clients. (August Affidavit, Paragraphs 15 and 19). NMSIC made investments with InterMedia. (Howell August 24, 2011 Affidavit ("August Affidavit"), Paragraph 14).

5. Weinstein and Schiff were the principals in Wetherly Capital Group, LLC and DAV-Wetherly Financial, LP, a placement agency firm that represented private equity firms. Wetherly employed Julio Ramieriz who worked in New Mexico. Wetherly then retained Marc Correra, through his broker dealer, to act as subagent on placements and investments in New Mexico. Wetherly is defunct and has no assets.

B. The Pay-to-Play Scheme - Background.

6. Between 2003 and 2009, defendant Gary Bland ("Bland") was the New Mexico State Investment Officer and a member of the Council. Judicial Notice.

7. It is alleged that Defendant Renaissance Private Equity Partners, LP d/b/a Aldus Equity Partners, LP ("Aldus") was an investment advisor to NMSIC that evaluated and made

recommendations on investments in private equity funds. Saul Meyer ("Meyer") was a partner in Aldus. Third Amended Complaint For Money Damages ("TAC"), ¶¶ 61-64; Judicial Notice: Corrected First Amended Complaint Under The Fraud Against Taxpayers Act ("FAC") in *Austin*, ¶¶ 46, 98.

8. In 2009, the New York Attorney General indicted Meyer as a result of an investigation into a pay-to-play scheme to defraud the New York Common Retirement Fund, one of the largest public-pension funds in the country. It is alleged that when Meyer pled guilty, he made an allocution in which he admitted wrongdoing not only in connection with the New York pay-to-play scheme, but also in connection with a New Mexico pay-to-play scheme. Meyer admitted that Aldus owed fiduciary duties to NMSIC and was "obligated to provide objective investment advice, free from conflicts, politics and other improper pressures." He further admitted that he violated his own fiduciary obligations and "succumbed to pressures exerted on [him] by pension fund officials and other politically connected individuals who [he] understood were motivated for personal, financial and political gain." TAC, ¶¶ 77, 78 (allegations not denied or contested by the Intervenors).

9. In his allocution, Meyer stated that, as an advisor to NMSIC:

> I had a fiduciary duty to act exclusively in the best interests of the State of New Mexico. On numerous occasions, however, contrary to my fiduciary duty, I ensured that Aldus recommended certain proposed investments that were pushed on me by politically-connected individuals in New Mexico. I did this 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 interest of New Mexico.

TAC, ¶ 80 (allegation not denied or contested by the Intervenors).

10. Despite the disputes between the Plaintiff and the Intervenors, their claims about the scheme Meyer outlined in his allocution share many fundamental elements. TAC, FAC.

11. The Plaintiff and the Intervenors both claim that Bland was actively involved in furthering the pay-to-play scheme in dereliction of his fiduciary duties; that defendant Anthony Correra was Governor Richardson's close friend, fund raiser and advisor; that Anthony Correra was Bland's confidant and advisor and that Anthony Correra was set up as a *de facto* gatekeeper for certain investments at NMSIC, including private equity funds. TAC, ¶¶ 3-8, 48, 53, 54, 56, 59; FAC, ¶¶ 21, 25.

12. The Plaintiff and the Intervenors both claim that defendant Marc Correra, Anthony Correra's son, was an active Richardson supporter and a close Bland associate who received millions of dollars in connection with NMSIC investments in private equity funds, hedge funds, real estate funds and collateralized debt obligations. TAC, ¶ 56; FAC, ¶ 24.

13. The Plaintiff and the Intervenors both claim that Meyer was pressured by the Correras to recommend certain private equity funds and that Bland was pressured by the Correras to recommend certain private equity funds, approve other investments and select certain investment managers. TAC, ¶¶ 56-59, 68; FAC, ¶¶ 24, 25, 98-101.

14. The Plaintiff and the Intervenors both claim that some fund managers, including general partners in private equity limited partnerships, participated in the scheme and that the

Correras were not the only politically-connected individuals who were enriched by the scheme. TAC, ¶¶ 82-163; FAC, ¶¶ 33-42, 44-45, 47-48, 50-62.

15. The Plaintiff and the Intervenors both claim that NMSIC suffered losses in excess of $100,000,000 on tainted investments. Judicial Notice: State of New Mexico's Memorandum of Points and Authorities in Support of Its Motion for Partial Dismissal filed in *Vanderbilt* on December 20, 2011, at 8; First Amended and Supplemental Complaint ("SAC") filed in *Vanderbilt* on March 8, 2010, ¶¶ 184-186.

C. The Qui Tam Actions.

16. In *Vanderbilt*, the Intervenors allege that defendant Vanderbilt Capital Advisors, LLC and its affiliates ("Vanderbilt") violated FATA by making false claims to the New Mexico Educational Retirement Board (the "ERB") and to NMSIC about the risks inherent in a series of investments the ERB and NMSIC made in complex financial instruments known as Collateralized Debt Obligations ("CDOs"). The Intervenors also allege that there was pay-to-play at the ERB and NMSIC. Of the 49 defendants named in the *Vanderbilt* complaint, only three are defendants in this lawsuit: Bland, Anthony Correra and Marc Correra. None of the Settling Defendants is a defendant in *Vanderbilt*. SAC, ¶¶ 74-87, 98-103, 131, 154.

17. In *Austin*, the Intervenors allege that Austin Capital Management, Ltd. and its affiliates ("Austin") made false claims to the ERB and NMSIC about the expected performance of and risks associated with a hedge fund of funds that operated as a "feeder fund" to Bernard L. Madoff Investment Securities. The Intervenors also elaborate on the allegations in the

Vanderbilt complaint regarding pay-to-play at the ERB and NMSIC. There are 74 defendants named in the *Austin* complaint, including all four of the Settling Defendants. There is no allegation in the *Austin* complaint that anyone made false claims about the expected performance of or risks associated with any NMSIC investment other than the Austin hedge fund of funds. Nor is there an allegation that any of the Settling Defendants had anything to do with the Austin hedge fund of funds investment. The only claims against the Settling Defendants in *Austin* are for their alleged participation in the pay-to-play scheme. FAC, ¶¶ 2, 143-145.

18. Settling Defendants Weinstein and Schiff were never served with process in *Austin*. The other two Settling Defendants, Rosen and Howell, appeared and filed motions to dismiss in the fall of 2009. Rosen moved to dismiss the *Austin* complaint for failure to state a FATA claim and failure to plead fraud with particularity. Howell moved to dismiss for failure to state a claim and lack of personal jurisdiction. Affidavit of Daniel Weinstein ("Weinstein Aff."), ¶ 62; Affidavit of Vicky L. Schiff ("Schiff Aff."), ¶ 26; Judicial Notice: Diamond Edge Capital Partners and Marvin Rosen's Motion to Dismiss filed in *Austin* on September 29, 2009; Defendant William R. Howell's Motion to Dismiss Corrected First Amended Complaint Under the Fraud Against Taxpayers Act for Lack of Personal Jurisdiction and for Failure to State a Claim filed in *Austin* on October 14, 2009; *Austin* docket.

19. While Intervenor Frank Foy worked at the ERB and claims to have been fired because of his opposition to pay-to-play at that agency, he denies having any personal knowledge about the kickbacks alleged in his qui tam complaints. Judicial Notice: Affidavit of

Frank C. Foy Concerning Concealment of Kickbacks filed in *Austin* on October 22, 2009, ¶¶ 1, 3.

20. In paragraph 4 of his *Austin* affidavit, Frank Foy swore that he was not the original source of any information about pay-to-play at NMSIC: "I never worked at the SIC, so I was never in a position to know about those kickbacks or illegal inducements. I had no responsibility or authority for the SIC's business, nor did I have access to their files." *Id*., ¶ 4.

D. Frank Foy's IPRA Action.

21. In order to obtain access to NMSIC's files, Mr. Foy served an information request on NMSIC in 2009 under the New Mexico Inspection of Public Records Act and commenced an action in the Second Judicial District claiming he did not receive full compliance: *Foy v. New Mexico State Investment Council*, No. D-202-CV-2009-01864. On November 14, 2011, Judge Pope entered an order in which he denied Intervenor Foy certain relief and provided him a limited time in which to petition for further relief.[1] Judge Pope ruled that if Mr. Foy did not file such a petition within the time permitted, the Court would find and order the production by NMSIC "to be sufficient, complete and in compliance with the Inspection of Public Records Act." Although Mr. Foy has never filed such a petition, the Intervenors continue to claim that NMSIC has not complied. Judicial Notice: Order Regarding Motion for Reconsideration and

[1] In this Order Judge Pope found that Intervenor Foy had refused to accept a hard drive containing approximately 1.834 million files. Counsel was ordered to accept this hard drive. A further disclosure of an additional 25,348 pages was also ordered. Intervenor Foy's counsel was directed to inform the Court within 60 days if he had grounds to seek further discovery. If Intervenor Foy did not seek further court action within 60 days, the production by SIC was deemed sufficient. Order filed Nov. 14, 2011. The court takes judicial notice that the docket in D-202-CV-2009-01864 indicates that no action was taken within 60 days.

Subsequent Case Proceedings; Tr. November 26, 2013, at TR-70, TR-77 (remarks of Victor Marshall).

E. Retroactive Application of FATA Held Unconstitutional.

22. On April 28, 2010, Judge Pfeffer entered a dismissal order in *Vanderbilt* holding that retroactive application of FATA to conduct occurring before its effective date (July 1, 2007), would violate the Ex Post Facto Clauses in both the United States and New Mexico Constitutions. On July 8, 2011, Judge Pope, who was presiding over *Austin* at the time, entered a dismissal order in *Austin* based on the constitutional infirmities with a retroactive application of FATA. While the Court of Appeals declined to hear an interlocutory appeal of the constitutional issue in *Vanderbilt*, it thereafter allowed an interlocutory appeal in *Austin*, and affirmed the decision below. *State ex rel. Foy v. Austin Capital Mgmt., Ltd.*, 2013-NMCA-043, 297 P.3d 357 (Ct. App. 2012). The Supreme Court granted certiorari and, on November 14, 2013, heard oral argument. Judicial Notice. No decision has yet been entered in the Supreme Court.

F. NMSIC's Plan to Effect Recoveries and the Intervenors' Opposition.

23. Meanwhile, NMSIC moved forward on a plan formulated by Day Pitney lawyers who had been commissioned Special Assistant Attorneys General to obtain recoveries from those involved in improper payments to third-party marketers and other pay-to-play schemes, including some of the defendants named in *Vanderbilt* and *Austin*. The Council's enforcement plan is to pursue claims of pay-to-play using theories of liability other than FATA. The plan has two basic elements: the first is this lawsuit, which focuses on individuals; the second is to pursue

entities, including fund managers that received investments in exchange for political favors. The Council has always anticipated that the more substantial recoveries would come from fund managers and other entities, not from individuals. Affidavit of Peter B. Frank ("Frank Aff."), ¶¶ 10, 11.

24. Acting with and through the New Mexico Attorney General's Office ("NMAGO"), NMSIC decided to dismiss the pay-to-play claims involving NMSIC from *Vanderbilt* and *Austin* to avoid defenses like claim splitting and to streamline the enforcement process. Judicial Notice: State of New Mexico's Motion for Partial Dismissal and State of New Mexico's Memorandum of Points and Authorities in Support of Its Motion for Partial Dismissal filed in *Vanderbilt* and *Austin* on May 6, 2011.

25. On May 6, 2011, the NMAGO filed contested motions for partial dismissal in both *Austin* and *Vanderbilt*. The motions sought dismissal of only those portions of the *Austin* and *Vanderbilt* complaints that dealt with pay-to-play at NMSIC. The motions did not address the qui tam plaintiffs' claims regarding nondisclosure of the investment risks associated with the Vanderbilt CDOs or the Austin hedge fund of funds, nor did they address the claims of pay-to-play at the ERB. *Id.*

26. On December 20, 2011, Judge Pfeffer entered an Order Granting Partial Dismissal. The Court 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." Judicial Notice: Order Granting Partial Dismissal.

27. While Judge Pope had not yet rendered a decision on the motion for partial dismissal in *Austin* when the Court of Appeals granted the qui tam plaintiffs' application for interlocutory appeal, thereby staying all proceedings in the district court. In order to obtain relief from the stay, the NMAGO filed a motion on September 19, 2011, 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 the Intervenors' objection. *Austin*, No. 31,421, slip op. (Ct. App. Oct. 10, 2011). Judicial Notice.

28. No decision has yet been made on the motion for partial dismissal in *Austin*. Judicial Notice: *Austin* docket.

29. In order to facilitate settlements, NMSIC suggested and this Court adopted, over the Intervenors' repeated objections, the notion of an "early settlement" phase during which only discovery essential for settlement discussions would be permitted. The Intervenors promptly served overly broad and extremely burdensome discovery requests on the defendants. This Court found that the discovery Intervenors sought was inconsistent with this Court's intention to allow the parties an opportunity to settle the case before incurring substantial discovery costs but allowed the Intervenors to obtain discovery focused on the relevant issues.

G. Day Pitney's Investigation.

30. Day Pitney engaged in an investigative process to identify and evaluate evidence that could support claims for recoveries against various individual and entities. Affidavit of Clifford E. Nichols III ("Nichols Aff."), ¶ 7.

31. Day Pitney identified and acquired potentially relevant data from NMSIC, the United States Securities and Exchange Commission (the "SEC") and other third-parties; devised systems for storing and accessing the voluminous data; utilized document analysis teams to review the data; and assembled documents and other materials for use in preparing for witness interviews, settlement negotiations and potential trial. Nichols Aff., ¶¶ 6, 8-20.

32. In reviewing documents, Day Pitney implemented various advanced machine learning tools such as predictive coding, concept grouping, near-duplication detection and e-mail threading. These tools, which are often referred to as technology assisted review, or TAR, enabled the reviewers on the document analysis teams to work more efficiently with the documents and identify potentially relevant information with greater accuracy than standard linear review. Nichols Aff., ¶ 21.

33. As part of its investigation, Day Pitney lawyers conducted interviews of more than a dozen NMSIC employees. They also reviewed detailed summaries of interviews conducted by NMSIC's predecessor counsel (Paul Hastings) and transcripts of testimony taken by the SEC. Day Pitney lawyers also met with and interviewed Meyer, Weinstein, Schiff, Rosen, Howell, and numerous other individuals. Day Pitney lawyers have also met and had discussions with counsel for other defendants and numerous fund managers. Nichols Aff., ¶ 22.

34. NMSIC also obtained discovery of the defendants, including each of the Settling Defendants, to supplement the information and documents Day Pitney already had. Tr. November 25, 2013, at TR-56 (testimony of Clifford Nichols).

35. What Day Pitney did by way of investigation may be quantified as follows: review of 2,699,759 pages of documents from the SEC, 130,000 pages of documents from third parties, desktop or laptop data from 22 NMSIC employees, 70,000 paper documents from NMSIC, complete images of NMSIC file and e-mail servers, 68 server backup tapes, complete copies of serve folders used by NMSIC employees to store investment-related documents through December 2010, updated e-mail files for NMISC employees through December 2010, server home directories for 22 NMSIC employees, e-mail files for e-mail addresses used by the NMSIC investment groups, and audio recordings of NMISC and subcommittees; conducted interviews with over 23 individuals; review interview summaries or transcripts prepared by its predecessor or the SEC..

H. The Settlement Process.

36. At an open meeting held on June 26, 2012, the Council voted on and adopted its Recovery Litigation Settlement Policy. The Policy provides for the creation of a Litigation Committee comprising at least three Council members and delegates authority to the Litigation Committee "for settlement resolution and related decisions." It also provides that: "All settlements shall be subject to IPRA." Frank Aff., ¶ 5; Plaintiff's Exhibit A.

37. Pursuant to the Recovery Litigation Settlement Policy, lawyers from Day Pitney negotiated proposed settlements at arm's length with counsel for the Settling Defendants.

38. Day Pitney and counsel for the Settling Defendants are all experienced counsel. DLA Piper in Los Angeles and Sommer Udall Sutin in Santa Fe negotiated on behalf of

Weinstein and Schiff. White & Case in New York negotiated on behalf of Rosen and DEPC. Scoppeta Seiff Kretz & Abercrombie in New York and Butt, Thornton & Baehr in Albuquerque negotiated on behalf of Howell.

39. The Settling Defendants each made themselves available for interviews by Day Pitney attorneys and answered their questions. The Settling Defendants agreed to provide continuing cooperation and truthful testimony at depositions and trials as part of a settlement. Weinstein Aff., ¶ 59; Schiff Aff., ¶¶ 18-19; Affidavit of Marvin Rosen ("Rosen Aff."), ¶ 12; Affidavit of William Howell ("Howell Aff."), ¶ 11; Plaintiff's Exhibits B, C, D.

40. NMSIC's theory of recovery against the Settling Defendants was as follows: Meyer and Bland breached their fiduciary duties to NMSIC by giving preferential treatment to certain investments because Marc Correra was getting paid. By accepting the payments knowing that Meyer and Bland would give the investments preferential treatment, Correra provided substantial assistance to Meyer and Bland to breach their fiduciary duties. NMSIC alleges that the Settling Defendants provided substantial assistance to Correra – and indirectly to Meyer and Bland – by paying or arranging for others to make the payments to him. In its complaint, NMSIC alleges that the Settling Defendants acted knowingly and were unjustly enriched to the extent they received payments in connection with investments on which they had aided and abetted a breach of fiduciary duty. TAC, ¶¶ 106-112, 127-142, 176-177, 182-183.

41. By virtue of its investigation and the discovery it conducted, as well as its interviews of Weinstein, Schiff, Rosen and Howell, Day Pitney was able to evaluate fairly the

merits of the Settling Defendants' positions during the settlement negotiations, the risks of litigation, and the range of possible recovery. The Settling Defendants have since given sworn testimony setting forth the positions they advanced in the negotiations.

42. Weinstein and Schiff's position was and is that they did nothing wrong. Weinstein and Schiff were principals of a now-defunct placement agent firm, Wetherly Capital Group, which owned a broker-dealer firm known as DAV-Wetherly Financial (together "Wetherly"). Defendant Julio Ramirez was an employee of Wetherly. Weinstein and Schiff said that Wetherly was paid a total of $2,788,125 in fees in connection with eight NMSIC investments, a figure that turned out to have been overstated by $400,000. They said that, after Ramirez left Wetherly, Marc Correra acted as a sub-agent for Wetherly. They said that Wetherly paid Marc Correra on four NMSIC investments: $218,750 on American Value Partners, $187,500 on CIM Fund III, $70,000 on Levine Leichtman Capital Partners IV and $200,000 on Levine Leichtman Deep Value. Weinstein and Schiff claimed to have no knowledge of any wrongdoing by Bland, Meyer, the Correras or Ramirez in connection with NMSIC investments. Weinstein and Schiff claimed to have limited financial means and provided sworn financial statements to Day Pitney. Weinstein Aff., ¶¶ 9, 20, 46, 48-56, 60; Schiff Aff., ¶¶ 6, 11, 20, 21. The evidence introduced at the hearing showed that since the closure of Wetherly, Weinstein and Schiff are self-employed, and have invested their cash reserves in different business. Since 2010, Weinstein and Schiff have not earned any taxable income. Since 2010 Weinstein and Schiff have depleted their assets to fund their respective business ventures and are living off their

savings. Tr. November 25, 2013, at TR-98—102; 155-156; 170. Weinstein testified he cannot afford the cost of litigation. Tr. November 25, 2013, at TR-102. Schiff testified protracted litigation would wipe her out financially and professionally. Tr. November 25, 2013, at TR-170-171.

43. Marvin Rosen's position was and is that he did nothing wrong. Rosen is a principal of a financial consulting firm formerly known as Diamond Edge Capital Partners ("DECP"), which is now being wound down. DECP acted as a placement agent for certain private equity funds and hedge funds (the "client funds"), including funds in which NMSIC made investments on behalf of the Public Trust Funds. (Rosen Aff. ¶ 5; Third Amended Complaint ¶¶ 5, 137, 139, 140). Rosen said that DECP was paid fees of $1,234,276.03 in connection with three NMSIC investments: Fenway III, The Optima Fund and Lightyear II. Rosen said that he received $159,166.48: $71,250.00 on Fenway III, $57,916.48 on The Optima Fund and $30,000.00 on Lightyear II. Rosen claimed that neither he nor anyone else from DECP paid Marc Correra or arranged to have someone else pay him in connection with any of the three investments. No evidence was introduced at the hearing showing that Rosen or DECP employed Marc Correra. (See generally Tr. Nov. 25 at 71-94) Neither the Plaintiff nor Intervenors presented any evidence with regard to any FATA claim against Rosen or DECP. (See generally, Tr. Nov. 25 at 71-94). Rosen claimed that neither he nor anyone else from DECP worked with or communicated with Marc Correra in connection with any of the three investments. Rosen Aff., ¶¶ 4-11. Rosen had only minimal contact with Marc Correra. Rosen first met Marc Correra

on the street in Albuquerque, New Mexico. (Tr. Nov. 25 at 73). Rosen also spoke to Marc Correra at some point between 2005 and 2007 on a phone call lasting five to ten minutes. (Tr. Nov. 25 at 77). Apart from that call, Rosen did not have any other communication with Marc Correra, nor did he arrange or direct anyone to communicate with Marc Correra on his behalf. (Tr. Nov. 25 at 79). Intervenors were afforded an opportunity to put forth evidence at the hearing to substantiate their objections to the Rosen settlement. Intervenors failed to do so. (Marvin Rosen's Objection to Intervenors' Exhibit List, filed Nov. 14, 2013). Intervenors also had an opportunity to cross-examine Rosen at the public hearing on the proposed settlement. (See Tr. Nov. 25 at 72-93).

44. William Howell's position was that whatever questionable conduct NMSIC might claim he engaged in outside of New Mexico, he did nothing wrong in the State of New Mexico. Howell said that, acting as a private equity consultant, he or his companies received fees of $600,000 in connection with two NMSIC investments: $450,000 on GSC Recovery III and $150,000 on InterMedia VII. Howell admitted that, on behalf of GSC Group (the manager of GSC Recovery III), he made and carried out arrangements to pay Marc Correra $225,000. Howell also admitted that, on behalf of InterMedia Advisors (the manager of InterMedia VII), he made and carried out arrangements to pay Marc Correra $50,000. Howell Aff., ¶¶ 5-10. During the relevant time period, Howell made only one trip to New Mexico. During that trip, he had dinner with Marc Correra on April 3, 2006. (Howell August Affidavit, Paragraph 12). Howell asserted that they transacted no business and specifically did not discuss the two New Mexico

investments with which Howell was associated. (Howell August Affidavit, Paragraphs 14 and 26; Howell hearing testimony). Howell had no contact with any New Mexico official, and any services he performed were performed outside of New Mexico. (Howell August Affidavit, ¶¶ 17, 18, 21, 23, 27. Therefore, Howell claimed, the courts of New Mexico do not have personal jurisdiction over him.

45. Day Pitney reasonably concluded that, if a jury believed Weinstein, Schiff and Rosen, establishing liability against them would be extremely difficult. Similarly, Day Pitney reasonably concluded that, if the Court believed that Howell had never come to New Mexico in connection with the NMSIC investments, establishing personal jurisdiction over him would be extremely difficult. Day Pitney hedged against the risk that the four defendants were not being truthful by insisting that any settlement would be void if NMSIC later learned that a Settling Defendant had not been truthful. Plaintiff's Exhibits B, C, D.

46. After Day Pitney reached agreements in principle with the Settling Defendants, the General Counsel for the New Mexico State Investment Office and Day Pitney (collectively "NMSIC's Counsel") submitted them to the Litigation Committee and recommended that the committee approve them. Frank Aff., ¶ 6.

47. On November 30, 2012, all members of the Litigation Committee participated in a telephone conference with NMSIC's Counsel. There was a discussion of the bases for Counsel's recommendation that NMSIC settle with Weinstein, Schiff and Rosen, which recommendation included an assessment of the complexity of the litigation, the risks of establishing liability on

NMSIC's common law claims, the risks of establishing damages on NMSIC's common law claims, the value of the Settling Defendants' cooperation and agreement to provide truthful testimony and the risk that Weinstein and Schiff would be unable to withstand a greater judgment. The Litigation Committee unanimously approved Counsel's recommendation. The Litigation Committee concluded that the settlements were fair, adequate and reasonable, because the benefits, including witness cooperation, outweighed the risks and cost of proceeding to trial. Frank Aff., ¶ 7.

48. On December 5, 2012, all members of the Litigation Committee participated in a telephone conference with NMSIC's Counsel. There was a discussion of the bases for Counsel's recommendation that NMSIC settle with Howell, which recommendation included an assessment of the complexity of the litigation, the risks of defeating Howell's jurisdictional motion, the risks of establishing liability on NMSIC's common law claims, the risks of establishing damages on NMSIC's common law claims and the value of the Howell' cooperation and agreement to provide truthful testimony. The Litigation Committee unanimously approved the recommendation. The Litigation Committee concluded that the settlement was fair, adequate and reasonable, because the benefits, including witness cooperation, outweighed the risks and cost of opposing Howell's jurisdictional motion and, if successful, proceeding to trial. Frank Aff., ¶ 8.

I. The Settlement Agreements.

49. Thereafter, the parties executed written Settlement Agreements. Plaintiff's Exhibits B, C, D.

50. Pursuant to paragraph 1 of their Settlement Agreement with NMSIC, Weinstein and Schiff have paid $100,000. Plaintiff's Exhibit B.

51. In paragraph 2, Weinstein and Schiff agreed to cooperate with NMSIC and undertake: "(a) to meet with counsel for NMSIC at mutually convenient times and places to provide information and answer questions about the subject matter of [this] Action; (b) to make themselves reasonably available for telephone conferences with NMSIC's counsel to provide information and answer questions about the subject matter of [this] Action; (c) to execute, if requested by NMSIC one or more affidavits truthfully setting forth knowledge they have about the subject matter of [this] Action; (d) to appear, if requested by NMSIC, without subpoena, at mutually agreeable times and places to provide truthful testimony at depositions in [this] Action and other civil actions that NMSIC may hereafter commence based on the subject matter of [this] Action; (e) to appear, if requested by NMSIC, without subpoena, to provide truthful testimony at the trial of [this] Action or other actions that NMSIC may hereafter commence based on the subject matter of [this] Action." *Id*.

52. In paragraph 3, Weinstein and Schiff represented that, to the best of their knowledge, the information they had previously disclosed to NMSIC's counsel was true and accurate. They acknowledged that the Settlement Agreement is conditioned on their truthful

cooperation, that it would be null and void if they provided false information or testimony with knowledge of its falsity and, in that event, NMSIC reserved all of its rights to seek redress. *Id.*

53. In paragraphs 4 and 5, the parties exchanged mutual releases. The release from NMSIC states that it releases Weinstein and Schiff from any claim "arising out of or relating to the investments by NMSIC." *Id.* The release and the agreement does not cover claims relating to ERB.

54. Paragraph 11 contains a severability clause so that if one or more provisions is declared invalid by a court of competent jurisdiction, then the remaining provisions shall nonetheless remain in full force and effect. *Id.*

55. Pursuant to paragraph 1 of their Settlement Agreement with NMSIC, Rosen and DEPC have paid $300,000. Paragraphs 2, 3, 4 and 5 are substantially the same as the corresponding paragraphs in the Settlement Agreement with Weinstein and Schiff. Paragraph 14 is a severability provision identical to paragraph 11 of the Settlement Agreement with Weinstein and Schiff. Plaintiff's Exhibit C.

56. Pursuant to paragraph 1 of his Settlement Agreement with NMSIC, Howell has paid $125,000. Paragraphs 2, 3, 4 and 5 are substantially the same as the corresponding paragraphs in the other two Settlement Agreements. The severability provision is contained in paragraph 13. Plaintiff's Exhibit D.

J. NMSIC's Pursuit of Additional Settlements and the Intervenors' Opposition.

57. In approving the Settlement Agreements, the Litigation Committee believed that it would be advantageous to have cooperating witnesses, one or more of whom could give truthful testimony against other defendants and fund managers. The Litigation Committee also believed that the settlements would encourage other defendants and target fund managers to come forward and negotiate their own settlements without the need for risky and expensive litigation. Frank Aff., ¶ 12.

K. NMSIC's Motions for Voluntary Dismissal and the Intervenors' Opposition.

58. On April 18, 2013, while the Enforcement Motion was pending in *Vanderbilt*, the Plaintiff filed motions for voluntary dismissal of the Settling Defendants in order to effect the settlements. The Intervenors filed procedural objections on May 3, 2013, but did not challenge the fairness, adequacy and reasonableness of the settlements, nor did they request an evidentiary hearing.

59. This Court heard oral argument on the motions for voluntary dismissal at a hearing on July 15, 2013. At that hearing, the Intervenors challenged the fairness, adequacy and reasonableness of the settlements for the first time. Their counsel made a request in open court for an evidentiary hearing. Indicating that they had affirmative evidence to present, Intervenors shall claimed that they had "enough of the things that we put together independently that we want an evidentiary hearing." Tr. July 15, 2013, at TR-32.

60. This Court ordered the Intervenors to submit memoranda by July 29, 2013, stating the grounds for their objections to each settlement and identifying the supporting evidence. The Intervenors did not file any memoranda. Instead, they claimed that the Proposed Order prepared by the Plaintiff's counsel to memorialize the Court's rulings did "not correctly reflect what the court ordered" and requested a presentment hearing. This Court then gave the Intervenors an opportunity to present specific objections to the form of the Proposed Order. Instead, they filed a motion to stay the entire action pending the decision by the New Mexico Supreme Court on the FATA retroactivity issue, as well as a series of substantive objections to the Proposed Order. This Court denied the motion to stay and overruled the objections.

61. On August 21, 2013, this Court issued a Notice of Evidentiary Hearing for November 25 and 26, 2013, for the purpose of hearing the Intervenors' objections to the settlements and determining whether those settlements were fair, adequate and reasonable under all the circumstances.

62. On September 1, 2013, this Court entered an Order on Motions for Voluntary Dismissal. In paragraph 2, this Court stated that the Intervenors "must file, no later than September 16, 2013, a memorandum that sets forth the basis for their position that the proposed settlements with these Defendants are not fair, adequate and reasonable under all of the circumstances and identifies the evidence upon which they will rely at the hearing." In a footnote to the quoted statement, this Court ruled that it was up to the Intervenors "to rebut the presumption that the settlements… are fair, adequate and reasonable." Specifically, this Court

stated that Intervenors would have to show that: "(1) there is a low risk of [Intervenors] failing to establish liability against these four Settling Defendants under FATA, (2) there is a low risk of [Intervenors] failing to establish damages against them under FATA, (3) the settlement amounts are not within the range of reasonableness in light of the best possible recovery and (4) the settlement amounts are not within the range of reasonableness in light of all the attendant risks of litigation." This Court also stated that Intervenors would have to "show evidence that these four Settling Defendants 'knowingly' made 'false claims' in connection with specific investments that caused NMSIC to sustain 'damages.'" Finally, this Court stated that Intervenors would have to show, as a threshold matter, that the courts of New Mexico have personal jurisdiction over Howell.

63. When the Intervenors failed to file a memorandum on September 16, 2013, as ordered, the Plaintiff filed a request that the Court enter an order granting the motions for voluntary dismissal without a hearing. This Court declined to enter a default, and, instead, set a new deadline of October 1, 2013, for the Intervenors to file a memorandum. The Intervenors filed a memorandum on October 1, 2013, but it did not address the specific points of proof identified in this Court's September 1, 2013, Order.

64. The Intervenors' memorandum contained no discussion of the nature of the Intervenors' FATA claims against the Settling Defendants. It did not identify a single "false claim" made by any of the Settling Defendants in connection with any investment, much less explain how any such "false claim" caused NMSIC to suffer "damages" or what the nature and

extent of those damages might be. There was no indication of what "the best possible recovery" would be under FATA against any of the Settling Defendants. Nor did the Intervenors' memorandum discuss litigation risks or suggest what the boundaries of the range of reasonableness would be. The Intervenors' memorandum also failed to address any of Howell's arguments in support of his renewed motion to dismiss for lack of personal jurisdiction.

65. On November 1, 2013, the Court held a motion hearing. At that hearing, Intervenors' counsel again represented that he had evidence to support the Intervenors' position. Tr. November 1, 2013, at TR-14. Intervenors' counsel complained, however, that his clients lacked certain "basic information" that they had been seeking "for years" but "have not gotten": information about gains and losses on particular investments. *Id*. at 35-36. He said he particularly wanted to see figures for "cash in, cash out." *Id*. at 35. He complained that if NMSIC asserted at the hearing that there was no loss on any of the investments associated with the Settling Defendants, the Intervenors would have "no way of verifying that or rebutting that." *Id.* at TR-36-37. Intervenors' counsel said that: "I want to ask somebody from SIC, okay, what was the gain or loss on this particular investment." *Id.* at TR-37-38. Intervenors' counsel indicated that, at the hearing, he would ask NMSIC's witness to give him "the exact numbers." *Id.* at TR-39.

66. On November 15, 2013, NMSIC served a response to the Intervenors' oral discovery request that provided current (mostly as of September 30, 2013) gain and loss information on all 13 of the investments associated with the Settling Defendants, together with a

chart showing cash in, cash out, and, where applicable, residual values.[2] *See* Certificate of Service of Plaintiff's Response to Intervenors' Oral Discovery Request.

M. The November 25-26, 2013, Fairness Hearing.

67. On November 25 and 26, 2013, this Court held a hearing on the Intervenors' objections to the fairness, adequacy and reasonableness of the settlements. NMSIC called as witnesses Peter Frank, a member of the Litigation Committee, and Clifford Nichols, a Day Pitney attorney. Each of the Settling Defendants also testified. All six witnesses were made available for both cross-examination and any direct examination the Intervenors wanted to conduct as part of their case. None of the Intervenors was called as a witness to testify about why they thought the settlements were unfair, inadequate or unreasonable.

68. Even though Intervenors' counsel maintained, at the November 1 hearing, that information about investment losses was essential to his presentation, he did not offer the evidence of investment losses that NMSIC had provided. Nor did Intervenors' counsel ask Peter Frank any questions about investment losses.

69. Similarly, at the November 1 hearing, Intervenors' counsel previewed his cross-examination of defendant Howell on the jurisdictional issue: "What did you and Mr. Correra talk about [when you met in New Mexico]? Why did you end up paying him or working out these deals with Mr. Correra?" *Id.* Despite this preview, at the fairness hearing, Intervenors'

[2] Some parties have taken exception to the accuracy of these charts. The Court takes no position on whether or not these charts were accurate.

counsel waived his right to conduct any cross-examination of Howell. This Court, however, asked Howell about his meeting with Marc Correra and other matters. Tr. November 25, 2013, at TR-174 to TR-178.

70. In closing argument, Intervenors' counsel explained his theory of recovery against the Settling Defendants: Just like the more than one hundred other defendants named in the *Vanderbilt* and *Austin* complaints – as well as countless other individuals and entities – Weinstein, Schiff, Rosen and Howell were engaged in a nationwide conspiracy responsible for, among other misdeeds, the submission of false claims to the ERB and NMSIC with respect to every investment listed on spreadsheets attached as exhibits to the *Austin* complaint. By virtue of the conspiracy, he explained, they are all jointly and severally liable for treble damages and attorneys' fees for the resulting FATA violations. The damages are to be measured, in his view, by the total losses to the ERB and NMSIC on all tainted investments before trebling. The losses to NMSIC on the Vanderbilt CDOs alone total $100,000,000. Therefore, according to Intervenors' counsel, each of the conspirators, including each of the Settling Defendants, faces the prospect of a judgment on the NMSIC-related FATA claims well in excess of $300,000,000.

71. During the hearing, Intervenors' counsel also suggested an alternative damages theory: that placement agent fees paid on investments constituted "losses" to NMSIC because those payments reduced the amounts that would otherwise have been available for investment. The evidence, however, was that, at least with respect to the investments at issue in this hearing, the placement agent fees did not reduce the amounts otherwise available for investment, but

rather were expenses paid by fund managers out of their management fees, no different from payments to employees made by fund managers with internal marketing departments. Tr. November 25, 2013, at TR-136.

72. The only way in which Intervenors' counsel narrowed and focused his claims at all was to say that the Settling Defendants are liable on any investment in which Marc Correra acted on their behalf – regardless of whether they knew of his wrongdoing: "They're liable whether they knew or should have known or didn't know at all." For Weinstein and Schiff that would be four of the eight investments on which Wetherly was paid. For Rosen and DEPC there was no evidence that Correra worked on their behalf in connection with any investment. For Howell, the evidence was that Correra was acting on behalf of InterMedia Advisors and GSC Group. Tr. November 26, 2013, at TR-73.

73. Prior to the hearing Plaintiff provided millions of pages of documents and responses to discovery to Intervenors in the course of discovery. In addition, Settling Defendant Rosen provided 15,000 pages of documents to Intervenors. Intervenors were provided sufficient discovery to evaluate the proposed settlements.

II

CONCLUSIONS OF LAW

1. FATA provides that "the state may settle the action with the defendant notwithstanding any objection by the qui tam plaintiff if the court determines, after a hearing providing the qui tam plaintiff an opportunity to present evidence, that the proposed settlement is fair, adequate and reasonable under the circumstances." N.M. STAT. ANN. § 44-9-6(C) (2012). The Court has followed the statute, providing Qui Tam Intervenors a hearing and an opportunity to present evidence. (See generally Tr. Nov. 25 and Tr. Nov. 26).

A. There Are No Procedural Defects in the Settlement Process.

2. The Intervenors claim that the procedure followed by NMSIC in approving the settlements violated the Open Meetings Act, because the settlement decisions were made by the Litigation Committee "in secret, without an agenda, or minutes, or any action in open session… with no public notice and no public record." Highlighted Transcript of Hearing December 21, 2012 on Secret Settlements and the SIC's New Policy of Openness, filed on December 6, 2013.

3. The fact that the Litigation Committee did not approve the settlements in an open session does not violate the Open Meetings Act, because the Open Meeting Act "does not require that a decision regarding litigation be made in an open meeting." *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) (exempting from the open meetings requirement "meetings subject to the attorney-client privilege pertaining to threatened or pending litigation in which the public body is or may become a participant."). The fact that the Litigation Committee made the decision, rather than

the Council as a whole, does not violate the Open Meetings Act, because delegation of authority is permissible. Indeed, in an earlier filing in this action, the Intervenors implicitly conceded that the Council could properly delegate settlement authority to a committee of its members consistent with the Open Meeting Act but maintained that the delegation had to be publicly voted on and recorded. Reply in Support of Plaintiff-Intervenors' Motion to Prohibit Secret Settlements, filed on September 7, 2012, at 4. The Council delegated settlement authority to the Litigation Committee in its Recovery Litigation Settlement Policy. The Policy was publicly voted on and recorded at an open meeting held on June 26, 2012. The Policy was followed with respect to these settlements: because the Litigation Committee was unanimously in favor of the settlements, a vote of the full Council in open session was not required. There was no violation of the Open Meetings Act.

4. The settlements also comply with IPRA. The Policy states that: "All settlements shall be subject to IPRA." 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.

5. Intervenors are not entitled to conduct or complete full-blown discovery prior to proposed settlement approval. FATA expressly provides for settlement, which presumes resolution of claims *prior to* full discovery and/or trial of the merits of a potential claim. Courts have held that qui tam plaintiffs objecting to a proposed settlement are not entitled to full-blown discovery in order to test whether the settlement is inadequate. *See United States ex rel. Schweizer v. Oce North America*, No. 06-648, 2013 WL 3776260, at *9 (D.D.C. July 19, 2013),

("[A]llowing 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."). The extent of discovery appropriate in connection with a settlement approval hearing is limited to whether the settlement is fair, adequate and reasonable. *U.S. ex rel. McCoy v. Cal. Medical Review, Inc.*, 133 F.R.D. 143, 149 (N.D. Cal. 1990) (right to limited discovery regarding the fairness of the proposed settlement); *U.S. ex rel. Nudelman v. Int'l Rehab. Assocs., Inc.*, 2004 WL 1091032, at *1, n.1 (E.D. Pa. May 14, 2004) (qui tam plaintiff allowed a "reasonable amount" of discovery when government and defendants only offered general averments that settlement was fair). Here the Intervenors were allowed substantial discovery sufficient to allow them to determine the fairness of the settlements.

B. The Extent of the Intervenors' Rights under FATA.

6. The Intervenors also maintain that the settlements are not "fair, adequate and reasonable under all of the circumstances" within the meaning of Section 44-9-6(C) of FATA.

7. While "the action" referred to in Section 44-9-6(C) is a qui tam action, the provision is nonetheless applicable in this case. Section 44-9-6(H) allows the State to take control of a qui tam action, even when it declines to intervene pursuant Section 44-9-5(D)(1), by electing to pursue its claims "through any alternate remedy." Section 44-9-6(H) further provides that, if the State pursues an alternate remedy, "the qui tam plaintiff shall have the same rights in such a proceeding as the qui tam plaintiff would have had if the action had continued pursuant to this section." This section gives the qui tam plaintiff the "same rights" with respect to an alternate remedy that he would have had in the qui tam action – but no greater rights. Therefore,

as a preliminary matter, this Court must consider what rights the Intervenors would have had in *Austin* had the State intervened and whether these settlements may impair those rights.

8. Under the federal False Claims Act (the "FCA"), on which FATA is based, the qui tam plaintiff (referred to as a "relator") is entitled to the same share of a recovery from an alternate remedy as the share "to which she would have been entitled had the government pursued its claim by intervening in the relator's qui tam action." *United States ex rel. Barajas v. United States*, 258 F.3d 1004, 1006 (9th Cir. 2001). The relator's right to share in the proceeds of an alternate remedy is no greater, however, than it would have been in the qui tam action, and, therefore, a relator has no right to share in the proceeds unless he had a viable qui tam claim. *Donald v. Univ. of Cal. Bd. of Regents*, 329 F.3d 1040, 1044 (9th Cir. 2003); *accord United States ex rel. Bledsoe v. Cmty. Health Sys.*, 501 F.3d 493, 522 (6th Cir. 2007) (relator not entitled to share in the proceeds of a settlement obtained by the government where his FCA complaint did not state a claim); *United States ex rel. Hefner v. Hackensack Univ. Med. Ctr.*, 495 F.3d 103, 112 (3d. Cir. 2007) (relator who failed to show that alleged false claims were knowingly submitted was not entitled to share in the proceeds of a settlement made by the government, because he is entitled only to the "same rights" he would have had in the FCA action) (the FCA "evinces no intent to compensate relators who bring unfounded [qui tam] claims, whether the claims are legally or factually unfounded").

9. FATA should be interpreted in the same way, and the Intervenors should have a right to share in the proceeds of these settlements only if they would have had a right to share in the proceeds of a settlement reached by the State after intervening in *Austin*. In that situation,

assuming the existence of valid FATA claims against the Settling Defendants, the Intervenors would have been entitled to an award under Section 44-9-7(A)(2). Section 44-9-7(A)(2) provides for an award of "no more than ten percent of the proceeds of the action or settlement." Whether an award should be zero percent, ten percent or something in between depends on the "significance of the information" that the qui tam plaintiff provides and his role "in advancing the case to litigation." *Id.*

10. The Plaintiff has not sought a determination by this Court of what share, if any, of the proceeds the Intervenors are entitled to if the settlements NMSIC made with the Settling Defendants are approved. The Intervenors initially asked this Court not to consider the issue in connection with these motions to dismiss but later reversed direction and asked that the issue be considered.

11. Having considered the issue, the Court has concluded that, because the Intervenors will have the same right to a share of the proceeds of these settlements that they would have had if the NMAGO had intervened in *Austin*, approval of these settlements will not deprive the Intervenors of any right they would otherwise have had. Therefore, the Court need not consider whether or how much they ultimately will get paid in determining whether the settlements are fair, adequate and reasonable under all the circumstances. That question is appropriately reserved for another day.

12. In addition to having a right to a share of the proceeds, qui tam plaintiffs also ordinarily have a right to object to the settlement of a qui tam action. The Intervenors have that right in this action to the extent the State is pursuing an alternate remedy, but again only to the

extent they would have had such a right in *Austin*. Looked at another way, this action can be a related action in which NMSIC is seeking an alternate remedy only to the extent that the qui tam plaintiff had a viable claim based on the same facts. *See Hill v. Vanderbilt Capital Advisors, LLC*, 834 F. Supp. 2d 1228, 1262 (D.N.M. 2011) (dictum) (where the duplicative portion of a qui tam action is dismissed, a later-filed suit may no longer be a "related action" barred by Section 44-9-5(E)), *appeal dismissed*, 702 F.3d 1220 (10th Cir. 2012).

13. The Intervenors would not necessarily have had a right to object to a settlement with Weinstein and Schiff in *Austin*, because Intervenor Foy never served them with process and, unless and until they are served, the *Austin* court has no jurisdiction over them. While *Austin* was stayed at the time these settlements were consummated, the Intervenors had had more than two years to serve Weinstein and Schiff before the stay was entered, and yet they failed to do so.

14. Because there may be no viable claims against Rosen, DEPC and Howell related to conduct that occurred before July 1, 2007, the effective date of FATA, whether the Intervenors' would have had the right to object to the settlements with Rosen, DEPC and Howell in *Austin* would have depended, in part, on whether the Supreme Court reverses the decision of the Appellate Court about the retroactive application of the statute. The Plaintiff and the Settling Defendants have urged this Court, however, not to wait for the Supreme Court's decision but instead to evaluate the fairness of the settlements on the assumption that the statute is given full retroactive effect. This Court will make that assumption for purposes of evaluating the settlements.

15. Even assuming that FATA may be retroactively applied, however, and even assuming that the Intervenors could belatedly correct their failure to make service on Weinstein and Schiff, the Intervenors have still not demonstrated a right to object to any of these settlements, because they have still not articulated a viable FATA claim against any of the four Settling Defendants, much less with the particularity FATA requires. Nonetheless, the Court will not, at this point, conclude that the Intervenors could not possibly have some viable FATA claim and will proceed to analyze NMSIC's settlement decisions and determine whether the settlements with the Settling Defendants are fair, adequate and reasonable under all of the circumstances.

C. The Framework for Analyzing the Fairness of the Settlements.

16. There are no reported New Mexico cases discussing the criteria for determining whether a settlement is fair under FATA. The Court will look to federal cases dealing with False Claims Act ("FCA") for guidance. The determination of whether a settlement is fair, adequate and reasonable is conducted using a balancing test of relevant factors. *See* Joel M. Androphy, FEDERAL FALSE CLAIMS ACT AND QUI TAM LITIGATION §13.01 (10th ed. 2011). In considering whether settlements under the FCA are fair, adequate and reasonable, federal courts have "looked for guidance to principles governing judicial review of class action settlements" and considered the following factors: (1) whether the settlement is the result of arm's length negotiations; (2) the opinion of experienced counsel; (3) the complexity, expense and likely duration of the litigation; (4) the reaction of the qui tam plaintiff to the settlement; (5) the stage of the proceedings and the amount of discovery completed; (6) the terms of the settlement in

relation to the strengths and weaknesses of plaintiff's case, including (a) the risks of establishing liability; (b) the risks of establishing damages; (c) the range of reasonableness of the settlement fund in light of the best possible recovery; and (d) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation; (7) the ability of the defendants to withstand a greater judgment; and (8) deference to decisions that might impact the government's overall enforcement plan. *Schweizer*, 2013 WL 3776260, at *8-9, 12-14; *United States ex rel. Resnick v. Weill Med. Coll. of Cornell Univ.*, No. 04 Civ. 3088, 2009 U.S. Dist. LEXIS 24376, at *5 (S.D.N.Y. Mar. 5 2009); *United States ex rel. Nudelman v. Int'l Rehab. Assocs., Inc.*, No. 00-1837, 2006 WL 925035, at *14 (E.D. Pa. Apr. 4, 2006).

17. In determining whether NMSIC's settlements are "fair, adequate and reasonable under all the circumstances" within the meaning of FATA, this Court is mindful that the "circumstances" related to these settlements are different in certain critical ways from those in any of the three FCA cases mentioned above. All three FCA cases involved settlements of qui tam claims in qui tam actions. This case involves the settlement of claims for alternate remedies in a related action. In all three FCA cases, the objecting qui tam plaintiff was the original source of the facts that formed the basis for his qui tam claims, which is a jurisdictional requirement under the FCA. *E.g.*, *Bailey v. Shell W. E&P Inc.*, 609 F.3d 710, 728-29 (5th Cir. 2010); *United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 349-50 (4th Cir. 2009); 31 U.S.C. § 3730(e)(4)(A). In this case, the Intervenors are not original sources. The settlements in all three FCA cases brought an end to the litigation. The settlements in this case will not end the litigation, because the case will go forward against the non-settling defendants. Moreover,

NMSIC's enforcement plan contemplates additional civil actions against fund managers and others.

18. "Not every factor needs to weigh in favor of the settlement for it to be considered fair, adequate and reasonable." *See United States ex rel. Resnick*, 2009 U.S. Dist. LEXIS 24376, at *5.

19. A Court's decision whether to approve a qui tam settlement is not a decision on the merits. 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. *See Schweizer*, 2013 WL 3776260, at *9.

D. The Settlements are Fair, Adequate and Reasonable.

20. Intervenors suggest that these settlements are not the result of arm's length bargaining by experienced counsel, but rather are the result of collusive deals forged by incompetent and conflicted counsel. Intrevenors have presented no evidence that would sustain their position. The Intervenors' argument that Day Pitney is conflicted because it is "a securities defense firm" and it is trying to deflate the case against the defendants to "benefit Day Pitney's larger clientele at the expense of this client" is unfounded, unwarranted, and wrong. Day Pitney's conduct of this case has demonstrated their ability and experience in this type of matter. Similarly, the Intervenors continue to assert that the NMAGO is conflicted in this case because Attorney General Gary King had a relationship with Bruce Malott, the former ERB Chairman.

This assertion is without merit as a basis for saying the settlements were not negotiated at arm's length by experienced counsel. Therefore, the court finds that the settlements were the result of arm's length bargaining by experienced counsel. This factor supports approval of the settlements. *See id.* at *12; *Resnick*, 2009 U.S. Dist. LEXIS 24376, at *6.

21. This litigation is complex, expensive and likely to continue for years. This Court would not have endorsed the concept of an early settlement phase of the case if the litigation were likely to be simple, inexpensive and easily concluded. "The intent behind this phased discovery was to enable people to determine whether they could settle without investing a lot of money in the litigation process, in particular, in discovery." Tr. December 21, 2012, at TR-45. Moreover, while this case will continue whether or not these settlements are approved, approval of the settlements will make the litigation at least marginally less complex and expensive for NMSIC, the remaining defendants and the Court. This factor supports approval of the settlements.

22. Intervenors' objection to the settlements is a factor that is not decisive. It is the reason a hearing was held, but it cannot control the determination of whether the settlements are fair. *See Schweizer*, 2013 WL 3776260, at *13. While the Qui Tam Intervenors have objected to the settlement, they have failed to articulate any basis for their objections that is supported by any evidence. Qui Tam Intervenors were required to so in order for this factor to be considered, as the Court would need to evaluate whether the objections were supported by the record. *See Nudelman*, 2006 WL 925035 at *14 (rejecting relator's claims as to defendant's intent based on Court's review of record evidence). Qui Tam Intervenors have repeatedly told the Court that

they have evidence supporting their objections, but no such evidence was presented at the hearing. Thus, the second factor is of little relevancy since the objections of Qui Tam Intervenors were and remain unexplained and unsubstantiated.

23. NMSIC has conducted sufficient discovery and investigation to fairly evaluate the merits of the Settling Defendants' positions during settlement negotiations, the risks of litigation and the range of possible recovery. *Rivera-Platte v. First Colony Life Ins. Co.*, 2007-NMCA-158, ¶ 49, 143 N.M. 158, 143 P.3d 765 (a "settlement may be approved if the plaintiffs 'have conducted sufficient informal discovery and investigation to fairly evaluate the merits of Defendants' positions during settlement negotiations.'") (citation omitted); *see Schweizer*, 2013 WL 3776260, at *13 (finding the government had "adequate information to make an informed judgment regarding the settlement" after having conducted an "extensive investigation," including "extensive document review" and witness interviews). The extensive investigation and discovery conducted by Day Pitney has allowed NMSIC to fairly evaluate the merits of the Settling Defendants' positions during settlement negotiations, without the need for prolonged and extensive discovery. Tr. November 1, 2013, at TR-42 (remarks by the Court: the idea of settling before conducting depositions "will militate in favor of settlement, not against it over the objection of the qui tam plaintiffs" as stated in *Nudelman*, 2006 WL 925035, at *14); *see United States ex rel. Schweizer*, 2013 WL 3776260, at *9 ("full-blown discovery" is not required to evaluate the fairness of a qui tam settlement). Moreover, the investigation and discovery will continue. If, in the course of that further investigation and discovery, NMSIC determines that

any of the Settling Defendants has not been truthful, it can void the settlement and reinstate its claims. This factor supports approval of the settlements.

24. The terms of the Settlement Agreements – which include provisions requiring cooperation and voiding the settlements for false information – are reasonable in relation to the strengths and weaknesses of both the qui tam claims and the common law claims asserted against the Settling Defendants. This factor supports approval of the settlements.

25. Even in the civil context, courts have recognized that a settling defendant's obligation to assist the plaintiff in pursuing claims against others is a "substantial benefit" that "strongly militates toward approval of the Settlement Agreement." *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003); *accord In re Mid-Atl. Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1386 (D. Md. 1983).

26. 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. NMSIC maintains that all of the Settling Defendants' cooperation has been valuable in terms of helping the Council and its counsel better understand the role of consultants and third-party marketers and the facts related to a number of investments made by the Council. NMSIC further maintains that the Settling Defendants' agreement to provide truthful testimony will be valuable in proving a number of basic facts at the trial of this action and possibly at the trial of actions yet to be filed. Finally, NMSIC believes that Defendant Howell's testimony will be particularly valuable in prosecuting its claims against Marc Correra and others. The Intervenors have provided no reason to conclude otherwise.

27. In considering the risks of litigation and the range of possible recoveries, from NMSIC's perspective, the monetary recoveries from these four individuals are only a part – and maybe not the greater part – of the consideration it is receiving in exchange for releases. Moreover, the fact that all of the Settling Defendants may have claims reinstated against them if it turns out they have provided or hereafter provide false information or testimony appears to outweigh any risks to NMSIC from these settlement.

28. There is a real risk that Intervenors would be unable to establish liability under FATA against the Settling Defendants. The Intervenors' theory of liability is that all the defendants and many more unnamed individuals and entities are part of a nationwide conspiracy and, as such, are all jointly and severally liable for all investment losses suffered by NMSIC on any investment tainted by pay-to-play. This Court has repeatedly admonished the Intervenors that there are risks in that unfocused approach. Nonetheless, the Intervenors have been unable or unwilling to articulate any claim that the Settling Defendants "knowingly" made "false claims" in connection with specific investments that caused NMSIC to sustain "damage" with respect those specific investments. There is a risk that such an individualized approach would be required to establish liability under FATA. *See United States v. Shaw*, 725 F. Supp. 896 (S.D. Miss. 1989) (recognizing that under FCA undisputed fact that loan approval process was tainted by bribes does establish that false or fraudulent claims were made in connection with each loan).

29. There is also a risk that the courts of New Mexico lack personal jurisdiction over Howell. Howell asserted arguments that he did not engage in any of the five acts enumerated in the long arm statute and that his contacts with the state were de minimus, and therefore

insufficient for the courts to maintain jurisdiction over him. NMSA 1978 §38-1-16(A) (1971); *Santa Fe Technologies, Inc. v. Argus Networks, Inc.*, 2002-NMCA-030, 131 N.M. 772, 42 P.3d 1221 (2001); *State Farm Mutual Insurance Company v. Conyers*, 1989-NMSC-071, ¶¶ 8-10, 109 N.M. 243, 784 P.2d 986. The Intervenors did not introduce any evidence to the contrary. Indeed, they chose not to cross-examine Howell at the hearing. While the Court is not ruling on the merits of this motion, it raises sufficient issues to demonstrate that there is substantial risk of lack of jurisdiction.

30. There is also a risk that NMSIC would be unable to establish liability on its common law claims.

31. If NMSIC were to proceed against Rosen, the claim would be that he was unjustly enriched to the extent of any benefit he received in connection with investments on which his firm, DECP, split placement agent fees with Marc Correra. Liability would require a showing that, by splitting fees, Rosen and DEPC knowingly rendered substantial assistance and encouragement to Correra, who, in turn, knowingly rendered substantial assistance and encouragement to Meyer and Bland to breach their fiduciary duties. The Intervenors did not come forward with any evidence of any fee splitting by Rosen and DEPC with Correra. Indeed, the Intervenors did not come forward with any evidence that Correra was even paid on The Optima Fund or Lightyear II. Moreover, the Intervenors did not come forward with any evidence that Rosen or anyone at DEPC paid Correra or arranged a payment to Correra in connection with Fenway III. The Intervenors have failed to identify a viable FATA claim

against Rosen or DECP (and hence, there would be no basis for treble or other damages). Thus, the risk of establishing liability against Rosen appears to be high.

32. If NMSIC were to proceed against Weinstein and Schiff, the claim would be that they were unjustly enriched to the extent of any benefit they received in connection with certain investments on which Wetherly paid commissions to Ramirez or split placement agent fees with Marc Correra. Liability would require a showing that they knowingly rendered substantial assistance and encouragement to Ramirez and Correra, who, in turn, knowingly rendered substantial assistance and encouragement to Meyer and Bland to breach their fiduciary duties. Weinstein and Schiff deny that they knew of any wrongdoing by Ramirez and Correra in New Mexico. The Intervenors did not come forward with any evidence to refute that denial. If NMSIC were to pursue its claims against Weinstein and Schiff through trial, its ability to prove their state of mind would likely depend, in large part, on their credibility as witnesses. Where credibility is a factor, there is always a risk of establishing liability. *See, e.g., In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 124-25 (D.N.J. 2002).

33. If NMSIC were to proceed against Howell, it would have to defeat Howell's motion to dismiss for lack of personal jurisdiction. There is a risk that Howell's motion would be granted. If NMSIC were then able to defeat the jurisdictional motion, there would still be a risk that it would be unable to prove all the elements of liability, including Howell's state of mind in acting as a conduit of payments from InterMedia Advisors and GSC Group to Marc Correra.

34. There is substantial risk that if conspiracy claims were to be made, that the elements of a conspiracy in which the Settling Defendants participated would not be shown. Under New Mexico law, the elements for civil conspiracy are: 1) a conspiracy between two or more individuals existed; 2) specific wrongful acts were carried out by the defendants pursuant to the conspiracy, and 3) the plaintiff was damaged as a result of such acts. *Ettenson v. Burke*, 2001-NMCA-003, ¶ 12 , 130 N.M. 67, 17 P.3d 440. To find a conspiracy, there must be an agreement between the alleged conspiring defendants. *Sante Fe Techs., Inc. v. Argus Networks, Inc.*, 2002-NMCA-030, ¶ 43, 131 N.M. 772, 42 P.3d 1221 ("Civil conspiracy is an agreement to accomplish an unlawful purpose or a lawful purpose by unlawful means."). Federal courts applying New Mexico law also found that there must be an alleged agreement or scheme. *See, e.g., McKean v. Hernandez*, 2010 WL 8752033, at *11 (D. N.M. Sept. 30, 2010) (dismissing civil conspiracy claim because plaintiff failed to present specific facts to show an agreement or concerted action); *see also Salazar v. City of Albuquerque*, 2013 WL 5554185 at *37 (D. N.M. Aug. 20, 2013) (dismissing civil conspiracy claim for failure to allege sufficient facts that the defendant participated in a civil conspiracy). Intervenors presented no evidence that would meet all of these elements as to the Settling Defendants. The risk of not proving a conspiracy in which the Settling Defendants participated weighs in favor of the settlements.

35. There is a major risk that Intervenors would be unable to establish damages under FATA. The complexity of establishing damages favors settlement. *See Coleman v. Hernandez*, 490 F. Supp.2d 278 (D. Conn. 2007). The "traditional measure of damages in a false claims act case is the difference between the market value of what the government was promised and what

it actually received." *Nudelman*, 2006 WL 925035, at *17. The Intervenors offered no compentent evidence on this point. Some of the investments with which Settling Defendants were involved did not result in losses.

36. Instead, the Intervenors maintain that they will establish damages in excess of $300,000,000 based on investment losses. While the recovery of investment losses under FATA is theoretically possible, it may be that the Intervenors would have to prove that the investment losses were induced by a fraud related to the inherent value of the investments themselves, not the corruption of the investment process. *See, e.g., United States ex. rel. Simpson v. Bayer Healthcare (In re Baycol Prods. Litig.)*, 732 F.3d 869, 880-81 (8th Cir. 2013) (Loken, J., concurring in part and dissenting in part) (stating under the FCA the fraud complained of must be the proximate cause of the injury). While the Intervenors claim that Vanderbilt and Austin misrepresented the risks of their CDOs and hedge fund of funds respectively, the Intervenors make no such claim about any other investment, nor do they claim – let alone demonstrate – that these Settling Defendants had anything to do with Austin or Vanderbilt.

37. While plaintiff in some dispute might be entitled to rescission or to damages measured by the defendant's gain – rather than some measure of the plaintiff's loss – there is a risk that such remedies are not available under FATA. *See, e.g., id.* at 881-82 (recognizing that under the FCA Congress only "*partially* assigned the government's damage claim for the 'injury in fact' allegedly suffered when it pays a false claim" and, thus, a claim that the government suffered an intangible injury to its sovereignty that resulted in a benefit to the defendant "lies

beyond what the government assigned to [the qui tam plaintiff] in the [FCA].") (Italics in original & citation omitted).

38. Assuming NMSIC established liability against a Settling Defendant on its common law claims, there would be a range of potential recoveries for unjust enrichment. A jury would have wide discretion in determining, as a matter of fact, how much a particular Settling Defendant was unjustly enriched with respect to a particular investment. Based on figures provided by the Settling Defendants, however, if NMSIC could prove that all of the investments were tainted, NMSIC could recover up to $2,388,125 against Weinstein and Schiff, up to $1,234,276 against Rosen and DEPC and up to $600,000 against Howell.

39. If the best possible recovery is, as the Intervenors claim, in excess of $300,000,000, then the settlement fund for each of the Settling Defendants seems quite "paltry." *Nudelman*, 2006 WL 925035, at *17. As shown above, however, the Intervenors' claim is neither assured of success nor supported by evidence. The determination of this factor should be based on an analysis of the more realistic approach offered by NMSIC. *See id.* If the best possible recovery is based, instead, on NMSIC's unjust enrichment claims, Weinstein and Schiff have a settlement fund that is more than 4% of the best possible recovery, which is not necessarily outside the range of reasonableness – even if the value of their cooperation is ignored completely. *See, e.g., In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2007) (approving settlement of class action securities litigation and noting that settlement recoveries of such actions are usually below 3% of the maximum potential recovery). The settlement fund for Rosen and DEPC is 24% of the best possible recovery. The settlement fund

for Howell is 25% of the best possible recovery. This factor supports approval of the settlements.

40. For the reasons discussed above, when the settlement payments are viewed in light of the attendant risks of litigation, they are all reasonable. This factor also weighs in favor of the proposed settlement when the Court finds that NMSIC evaluated the strengths of Qui Tam Intervenors' claims and the attendant litigation risks based on significant investigative effort. *See Schweizer*, 2013 WL 3776260 at *13. That is the case here. This factor supports approval of the settlements.

41. With Weinstein and Schiff there is also a risk that, if NMSIC were to pursue them through trial, they would be unable to withstand a greater judgment. Based on the financial information presented at the hearing, Weinstein and Schiff do not appear to have the financial means to pay a multi-million dollar judgment. They are also named, but have not been served, as defendants in *Austin*. NMSIC has a reasonable concern that, if it were to continue to litigate its claims against Weinstein and Schiff, their costs of defense this action, as well as their costs of defending the *Austin* action, might dissipate any assets that would be available to satisfy a judgment of any amount. Moreover, because Weinstein and Schiff are residents of California, NMSIC would likely have to incur expenses to enforce a judgment there and would be subject to claims that certain assets are exempt from execution under California law. This factor favors approval of the settlement with Weinstein and Schiff.

42. The last factor to be considered is the deference to which the State is entitled in decisions that might impact NMSIC's overall enforcement plan for seeking recoveries, not just

from the Settling Defendants, but also from their non-settling co-defendants and other individuals and entities. Because the Intervenors brought their qui tam actions on the State's behalf, and because FATA vests the State with ultimate authority and control over FATA actions brought on its behalf, the settlement decisions by NMSIC warrant considerable deference. The Government remains the real party in interest in qui tam action. *United States ex rel. Mergent Servs. v. Flaherty*, 540 F.3d 89, 93 (2nd Cir. 2008) (citation omitted); *New Mexico ex rel. NEA of N.M., Inc. v. Austin Capital Mgmt. Ltd.*, 671 F. Supp. 2d 1248, 1251 (D.N.M. 2009) (concluding that the State of New Mexico is real party in interest under FATA).

43. The settlements with the Settling Defendants are part of NMSIC's overall enforcement plan. This Court has acknowledged that "Courts will routinely defer to the government's overall enforcement plan." Tr. November 1, 2013, at TR-12; *see United States ex rel. Resnick*, 2009 U.S. Dist. LEXIS 24376, at *8. This Court will defer to NMSIC's enforcement plan.

44. For all of the foregoing reasons, this Court concludes that all three of the settlements are fair, adequate and reasonable under the circumstances and that NMSIC's motions for voluntary dismissal should be granted.

E. The Pendency of *Austin* Does not Bar Approval of the Settlements.

45. 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.

46. Like the FCA, 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

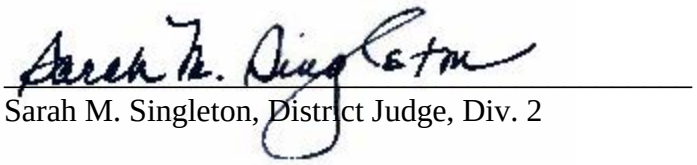
claims. *See, e.g., United States ex. rel. Sun v. Baxter Heathcare Corp. (In re Pharm. Indust. Average Wholesale Price Litig.),* 892 F. Supp. 2d 341, 344 (D. Mass. 2012) (decided under the FCA).

47. It will be up to the Court in *Austin*, however, to determine what effect this Court's decision approving the settlements has on the Intervenors' 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.

48. As to Weinstein and Schiff, they have never been served in *Austin* even though the case was pending for more than two years before it was stayed. Thus, the *Austin* court lacks jurisdiction of Weinstein and Schiff. *See Trujillo v. Goodwin*, 2005–NMCA–095, ¶ 8, 138 N.M. 48, 116 P.3d 839 (stating that a court lacks jurisdiction to pronounce judgment over a defendant who has not been properly summoned into court); *see also Jueng v. N.M. Dep't of Labor*, 1996-NMSC-006, ¶ 8, 121 N.M. 237, 910 P.2d 313 ("[F]ailure to serve a party with process in a proper manner generally means ... that the court has no power over that party and cannot render [a] judgment binding that party." (alteration in original) (internal quotation marks and citations omitted)).

49. If, for whatever reason, the *Austin* Court were to deny the pending motion for partial dismissal and rule that the release given by NMSIC was insufficient to release the Intervenors' FATA claims, then the severability provisions in the Settlement Agreements would

be invoked and that ruling would neither impair the finality of the settlement of NMSIC's common law claims nor invalidate the dismissal of the Settling Defendants from this action.



Sarah M. Singleton, District Judge, Div. 2

On the date of acceptance for efiling, copies of the above Findings of Fact and Conclusions of Law were eserved on those registered for eservice in this matter.