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

STATE OF NEW MEXICO, ex rel. FRANK C. FOY
AND SUZANNE B. FOY,

Qui Tam Plaintiffs,

v.

D-101-CV-2008-1895

VANDERBILT CAPITAL ADVISORS, LLC; et al.,

Defendants.

ORDER OF DISMISSAL

THIS MATTER COMES before the Court upon its review of pleadings before it and, being fully advised in the premises, the Court finds and determines:

I. **Claims made pursuant to the Fraud Against Taxpayers Act shall be dismissed on *Ex Post Facto* grounds.**

A. **The constitutional framework.** The alleged actions that form the basis of this *qui tam* action antedate the effective date of the Fraud Against Taxpayers Act (or "FATA"). *See* NMSA 1978, §§ 44-9-1 to 44-9-14, *et seq.* (eff. July 1, 2007). Although Section 44-9-12(A) explicitly permits the retroactive application of the FATA to matters preceding its effective date, such application must be scrutinized to determine whether it accords with constitutional protections. *See, e.g., Smith v. Doe*, 538 U.S. 84, 92 (2002); *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994).

The Supreme Court of the United States has indicated that the *Ex Post Facto* Clause and Due Process Clause of the Constitution of the United States "demonstrate that retroactive statutes raise particular concerns." *Landgraf*, 511 U.S. at 266. "Article I [of the Constitution of the United States]

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contains two *Ex Post Facto* Clauses, one directed to Congress (§ 9, cl. 3), the other to the States (§ 10, cl. 1)." *Id.* at 266 n.19; *see also* N.M. CONST. art. II, § 19 ("No ex post facto law, bill of attainder nor law impairing the obligation of contracts shall be enacted by the legislature."). "The *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation." *Landgraf*, 511 U.S. at 266. "The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive application." *Id.* (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976)).

The U.S. Supreme Court has observed that a legislative body's "responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals," and that "[t]he constitutional prohibitions against the enactment of *ex post facto* laws . . . reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens." *Id.* at 267 & n.20. Because of concerns with retroactive application of legislation, the Court has "frequently noted . . . that there is a 'presumption against retroactive legislation [that] is deeply rooted in our jurisprudence,'" and that, "[a]ccordingly, [it] appl[ies] this time-honored presumption unless [the legislative entity] has clearly manifested its intent to the contrary." *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 946 (1997) (quoting *Landgraf*, 511 U.S. at 265). Likewise, the Supreme Court of New Mexico has expressed concerns with retroactive application of statutes. *Cf. Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 33, 132 N.M. 207, 219, 46 P.3d 668, 680 ("'[W]hen a statute affects vested or substantive rights, it is presumed to operate prospectively only.' Furthermore, if the application of a 'newly enacted law retrospectively would diminish rights or increase liabilities that have already accrued,' then

prospective application may be required by the Constitution." (Internal citations omitted).).

In *Hughes Aircraft*, the U.S. Supreme Court employed the presumption against retroactivity to find that amendments to the federal counterpart of New Mexico's FATA, the False Claims Act (or "FCA"),which New Mexico's act parallels in significant respects, could not apply retroactively. *See id.* at 951-52. Here, because the Legislature has clearly manifested an intent to apply the FATA retroactively, the presumption against retroactivity does not resolve the matter before this Court. Nonetheless, federal case law addressing the presumption against retroactivity, along with other case law addressing *ex post facto* issues, provide instructive guidance to address the conspicuous issue this case presents: whether the FATA constitutes penal legislation, the retroactive application of which is "flatly prohibited" by the Constitution. *Cf. Landgraf*, 511 U.S. at 266.

A legislative entity "may enact laws with retrospective effect so long as the laws are within constitutional limits." *Cf., e.g., United States v. Allison Engine Co., Inc.*, 2009 WL 3626773, *3 (S.D. Ohio). An expressly retroactive law is not within constitutional limits where it provides for penal sanctions. *Cf. Landgraf*, 511 U.S. at 266. Although the most clearly prohibited retroactive application of a statutory provision would be one expressly imposing a criminal penalty, the *ex post facto* prohibition also applies in civil cases where the civil penalty is punitive in nature. *See, e.g., De Veau v. Braisted, Jr.*, 363 U.S. 144, 160 (1960) (plurality opinion of Frankfurter, J.) ("The mark of an ex post facto law is the imposition of what can fairly be designated punishment for past acts. The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession."); *see also Louis Vuitton S.A.*

v. Spencer Handbags Corp., 765 F.2d 966, 971-72 (2nd Cir. 1985); *Allison Engine*, 2009 WL 3626773, at *5; *United States ex rel. Baker v. Community Health Systems, Inc.*, No. 1:05-cv-00279-WJ-WDS, Doc. 83 (D. N.M. Mar. 19, 2010) (mem. op. & order).

The U.S. Supreme Court has set out the following framework for determining whether a statutory provision constitutes retroactive punishment prohibited by the *Ex Post Facto* Clause:

> We must "ascertain whether the legislature meant the statute to establish 'civil' proceedings." If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is "'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'"

Smith v. Doe, 538 U.S. 84, 92 (2002) (internal citations omitted); *accord Allison Engine*, 2009 WL 3626773, at *5.

In determining whether a penalty is punitive or remedial in nature, the Supreme Court of New Mexico has, in the past, given less deference to legislative descriptions and intent than has the Supreme Court of the United States and has expressly rejected the test recognized by the U.S. Supreme Court. *Compare Smith*, 538 U.S. at 92 (citing, in part, *Hudson v. United States*, 522 U.S. 93, 100 (1997), and *United States v. Ursery*, 518 U.S. 267, 290 (1996), for the proposition that "[b]ecause we ordinarily defer to the legislature's stated intent, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty"), *with State v. Nunez*, 200-NMSC-013, ¶ 40, 129 N.M. 63, 76, 2 P.3d 264, 277 ("'[C]learest proof' is such an inaccessible standard that it requires the judiciary to suspend its own interpretation of the constitution in favor of that of the legislature."); *id.* at ¶ 47, 129 N.M. at 77, 2 P.3d at 278 ("The *Ursery* Court's willingness to cede to Congress so much of its control over fundamental constitutional protections is contrary to New Mexico law."); *and with State v. Kirby*, 2003-NMCA-

074, ¶ 29, 133 N.M. 782, 789, 70 P.3d 772, 779 ("[W]e expressly disavow any reliance on those portions of the *Hudson* opinion that place heavy emphasis on the label attached by the legislative body enacting the penalty or that indicate that a proponent of a double jeopardy claim must present the 'clearest proof' of the punitive purpose or effect of the sanction. *Nunez* squarely rejects both propositions.").

With that said, it seems that New Mexico's appellate courts now embrace the approach of the U.S. Supreme Court in its willingness to give more deference to legislative intent and labeling. *See Kirby*, 2003-NMCA-074, at ¶ 33, 133 N.M. at 790, 70 P.3d at 780 (quoting *Hudson*, 522 U.S. at 99 for the principle that "'A court must first ask whether the legislature, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other."'"); *id* at ¶ 38, 133 N.M. at 791, 70 P.3d at 781 (citing *Hudson* as authority for the observation that "it should not go unnoticed that the Legislature chose to label the penalty a *civil* penalty" (emphasis in original)); *see also State v. Druktenis*, 2004-NMCA-032, ¶ 30, 135 N.M. 223, 233, 86 P.3d 1050, 1060 (characterizing New Mexico Supreme Court's parenthetical descriptions of *Hudson* as "the test" for determining whether a statute is intended as punitive or remedial). *But cf. Baker*, at 33 (citing *U.S. v. Halper*, 490 U.S. 435, 447-448 (1989), and stating that "the labels 'criminal' and 'civil' are not of paramount importance"). Because it appears that New Mexico's appellate courts now apply the federal standards and do not find greater protections under the Constitution of New Mexico, and because this State must give at least the protections found by the U.S. Supreme Court, this Court will rely on the framework set forth by the U.S. Supreme Court in *Smith*, which relied on its decision in *Hudson*. *See Smith*, 538 U.S. at 1147-49.

Under the first prong of *Smith*, the legislative-intent prong, a court must "consider the

statute's text and its structure to determine the legislative objective." *Smith*, 538 U.S. at 94. "A conclusion that the legislature intended to punish would satisfy an *ex post facto* challenge without further inquiry into its effects, so considerable deference must be accorded to the intent as the legislature has stated it." *Id.* at 92-93. It is arguable, given the statutory scheme, that the Legislature intended to impose punishment for violations of the FATA. *See infra* at I.C. However, for purposes of this analysis, this Court assumes that the Legislature did not intend to impose a punitive sanction and therefore proceeds to the second prong of the analysis–whether the purpose or effects of the FATA indicate it is punitive in nature, or civil and non-punitive.

B. **FATA's purpose or effects**. All parties seem to agree that the purpose or effects of the FATA are analyzed using factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). Those factors are "neither exhaustive nor dispositive" but are instead "useful guideposts." *See Smith*, 538 U.S. at 97 (internal quotations omitted). In *Allison Engine* and *Baker*, federal district courts for New Mexico and Ohio relied on the *Mendoza-Martinez* factors to assess whether amendments to the FCA should be applied retroactively. Both courts concluded that the FCA's statutory scheme is punitive in purpose and effect and, consequently, that retroactive application of amendments to that scheme would violate the *Ex Post Facto* clause. *See Allison Engine*, 2009 WL 3626773, at *10; *Baker*, at 38. Although Plaintiffs attempt to characterize the conclusion in *Baker* as "dicta," it is clear from the text of the opinion and order that the court's conclusion that retroactive application of the amendments to the FCA would violate the *Ex Post Facto* clause is an independent and alternative basis for dismissal and is not dicta. *Compare* Plaintiffs' March 31, 2010 Response to Supp. Authority, at 7, ¶ 2, *with Baker*, at 31 (stating, "*[a]lternatively*, the Court finds that application of the amendment would violate the Ex Post Facto

Clause" (emphasis added)); *see also Allison Engine*, 2009 WL 3626773, at *10 (stating "*[a]lso*, retroactive application of the new FCA language to these Defendants violates the Ex Post Facto Clause" (emphasis added.); *see generally State v. Alderette*, 111 N.M. 297, 298-99, 804 P.2d 1116, 1117-18 (distinguishing an alternative ground for a decision from mere dicta). The following enumerated sub-parts consider the seven factors recognized in *Mendoza-Martinez* with respect to the matter before this Court.

(1) **Whether the sanction "has been regarded in our history and traditions as a punishment" (*Smith*, 538 U.S. at 97):** The FATA imposes upon a violator of its provisions mandatory treble damages, a minimum civil penalty of $5,000 up to $10,000 for each violation, the costs of the civil action brought to recover damages or penalties, and reasonable attorney fees, including those of the attorney general or state agency counsel. § 44-9-3.C. In *Landgraf*, the Supreme Court of the United States stated that "[r]etroactive imposition of punitive damages would raise a serious constitutional question." 511 U.S. at 281. The Court cited *Louis Vuitton* for the concern that "retroactive application of punitive treble damages provisions of the Trademark Counterfeiting Act of 1984 'would present a potential *ex post facto* problem.'" *Landgraf*, 511 U.S. at 281; *see also Allison Engine*, 2009 WL 3626773, at *5 (citing *Louis Vuitton* for the same concern).

Although in the context of determining whether the federal False Claims Act applies to actions of states and municipalities, the U.S. Supreme Court has made fairly explicit declarations regarding the punitive nature of the treble-damages provisions of that federal counterpart to the FATA. For instance, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), the Court, in analyzing whether the federal counterpart to the FATA applied to state

governmental entities, stated that "the current version of the FCA imposes damages that are essentially punitive in nature, which would be inconsistent with state *qui tam* liability in light of the presumption against imposition of punitive damages on governmental entities." *Id.* at 784-85. The Court distinguished its prior indication that damages under an earlier version of the FCA were remedial rather than punitive based on "that version of the statute impos[ing] only double damages and a civil penalty of $2,000 per claim" whereas "the current version, by contrast, generally imposes treble damages and a civil penalty of up to $10,000 per claim." *Id.* at 785 (distinguishing *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1942), and indicating in parenthetical that in *Marcus* it had "not[ed] that double damages in original FCA were not punitive, but suggest[ed] that treble damages, such as those in the antitrust laws, would have been").

In *Cook County v. United States ex rel. Chandler*, 538 U.S. 119 (2003), the Court assessed whether the FCA applied to municipalities and acknowledged that in *Stevens*, it had determined that amendments to the FCA that increased the ceiling on recoverable damages from double to treble and that raised the fine from $2,000 to the range of $5,000 to $10,000 "turn[ed] what had been a 'remedial' provision into an 'essentially punitive' one." 538 U.S. at 129-30. The Court further recognized in *Chandler* that it "did indeed find the punitive character of the treble damages provision a reason not to read 'person' [in the FCA] to include a State" within its scope and also acknowledged that "the damages multiplier has compensatory traits along with the punitive." *Id.* at 130. The Court ultimately recognized the punitive nature of the FCA damages provision and did not negate its conclusion in *Stevens*, but instead found in favor of including municipalities within the scope of the FCA based, *not* on any finding that the sanction was not punitive, but by weighing presumptions against one another, stating:

> The presumption against punitive damages thus brings only limited vigor to the County's aid. Working against the County's position, however, is a different presumption, this one at full strength: the "cardinal rule . . . that repeals by implication are not favored." . . . . The County's argument . . . is not merely that the treble damages feature of the 1986 amendments was meant to bypass municipal corporations; the argument is that the treble damages amendment must be read to eliminate the FCA's coverage of municipal corporations entirely, after being the statutory law for over a century.

Id. at 132 (internal citations omitted). In other words, the Court concluded that, although the FCA's amended sanctions providing for treble damages are punitive and that there is a presumption against applying punitive sanctions to governmental entities, because the FCA had applied to municipalities for over twenty-five years prior to the amendments and, because Congress did not explicitly repeal statutory provisions that included municipalities within the scope of the FCA when it amended the FCA to increase the sanctions, the presumption that repeals by implication are disfavored trumped the presumption that punitive sanctions are not applied to governmental entities. Therefore, the Court concluded that the FCA, with the amended, enlarged penalties, continued to apply to municipalities. Subsumed within the Court's weighing of presumptions is its recognition that the FCA's provisions for treble damages and $5,000 to $10,000 fines are punitive.

In *Baker*, the U.S. District Court for New Mexico rejected the Government's reliance on *Chandler* for the argument "that treble damages under the FCA has a compensatory side, and that it serves a remedial purpose as well as a punitive objective." *See Baker*, at 33. The court stated that "*Chandler* would be mischaracterized to stand for the proposition that the FCA is generically a civil remedial statute to which the Ex Post Facto [Clause] does not apply." *Id.* at 33-34. The court further observed that in *Chandler* "[t]here was no discussion on the punitive nature of the FCA in the context of a violation of the Ex Post Facto clause," and "[t]hus, *Chandler* [was] not helpful" to the court's analysis of the *ex post facto* issue pertaining to the amendments to the FCA. *Id.* at 34. Also,

in *Pacificare Health Systems, Inc., v. Book*, 538 U.S. 401 (2003), decided after *Chandler*, the Court again acknowledged the punitive nature of the FCA, setting apart the treble-damages provisions of the federal *qui tam* provisions from other treble damages provisions and stating that it had "characterized the treble-damages provision of the False Claims Act . . . as 'essentially punitive in nature.'" *Id.* at 406 (dicta) (quoting *Stevens*, 529 U.S. at 784).

In *Allison Engine*, the United States District Court for the Southern District of Ohio stated that "[c]ourts have consistently recognized that the FCA punishes those who violate it, with particular attention being paid to the FCA's treble damages clause." 2009 WL 3626773, at *7. The court named a number of courts that "have . . . recognized the punitive nature of FCA damages." *Id.* It concluded that "Congress intended to impose punishment when it enacted the FCA and the amendments thereto." *Id.* The court went on to rely on its conclusion that Congress intended the amendments to the FCA to impose punishment in order to address the issue of whether FCA sanctions have historically been regarded as punitive and found that the factor weighed in favor of finding those sanctions to be punitive in nature and effect.. *Id.* at *8.

The U.S. Supreme Court's view that the FCA's treble damages provisions are punitive in nature tilt strongly in favor of concluding that the treble damages provision of New Mexico's counterpart "has been regarded in our history and traditions as a punishment." The federal district court's analysis in *Allison Engine* also cuts in favor of that conclusion. 2009 WL 3626773, at *7-*9; *see generally State v. Ellis*, 2008-NMSC-032, ¶ 21, 144 N.M. 253, 258, 186 P.3d 245, 250 (indicating appropriateness of looking "to case law from other jurisdictions which [the Court found] instructive"). This Court weighs the first *Mendoza-Martinez* factor in favor of finding that the FATA has a punitive purpose and effect.

(2) **Whether the sanction "comes into play only on a finding of scienter" (*Mendoza-Martinez*, 372 U.S. at 168):** In order to impose penalties under the FATA, there must be a finding that the violator acted "knowingly" §§ 44-9-2, 44-9-3.A; *see also* Plaintiffs' Oct. 22, 2009 Response, at 3. "Knowingly" constitutes a scienter element. *See Allison Engine*, 2009 WL 3626773, at *8 (relying on federal caselaw for the proposition that "'[f]or a qui tam action to survive summary judgment, the relator must produce sufficient evidence to support an inference of knowing [illegible]'" and [illegible] that "[t]his factor weighs in favor of a finding that the FCA [illegible] punitive in nature and effect"); BLACK'S LAW DICTIONARY 1345 (6th ed. 1990) ("Knowingly . . ."); Plaintiffs' Oct. 22, 2009 Brief, at 3 (discussing FATA's scienter element). [illegible] play only on a finding of scienter, and the second factor weighs in favor of concluding that the sanction is punitive.

(3) **Whether the sanction "imposes an affirmative disability or restraint" (*Smith*, 538 U.S. at 97):** The FATA's sanctions "do not approach imprisonment" and therefore, the third factor, weighs in favor of finding that the FATA has a civil purpose or effect rather than a punitive one. *See Allison Engine*, 2009 WL 3626773, at *8 (analyzing federal counterpart).

(4) **Whether the sanction "promotes the traditional aims of punishment" (*Smith*, 538 U.S. at 97):** In *Allison Engine*, the court evaluated this factor as follows:

> Sanctions provided in the civil version of the FCA are intended to deter conduct. However, the fact that deterrence is one purpose of FCA sanctions does not render FCA sanctions punitive for purposes of Ex-Post-Facto-Clause analysis. Yet, FCA sanctions also, as set forth [in the court's analysis of whether FCA sanctions have historically been regarded as punishment], *have a strong punitive purpose and deterrence is one purpose of punishment*. Therefore, this factor weighs in favor of a finding that the FCA sanctions are punitive in nature and effect.

2009 WL 3626773, at *9. The court relied in part on its analysis of whether the sanction has historically been regarded as punishment to reach its conclusion on the "traditional aims of punishment" factor. Likewise, this Court finds its analysis on that topic useful in that regard. *See supra* Subpart (1). That analysis demonstrates that the sanction of treble damages serves a traditionally punitive aim.

In addition, the provision for multiple penalties indicate that the sanctions are primarily punitive. The FATA provides for treble damages, a civil penalty of between $5,000 and $10,000 for each violation, the costs of the action brought to recover damages or penalties, and reasonable attorney fees. § 44-9-3.C; *see also* Plaintiffs' Oct. 22, 2009 Response, at 3 (stating "§ 44-9-14 of FATA provides that its extraordinary remedies are in addition to all the other remedies available elsewhere under [any other law or available under common law]"). It seems that, if the FATA were not punitive in purpose or effects, simple damages, the costs of bringing the action, and reasonable attorney fees would cover any remedial purpose or effect. Also, FATA's provisions for distribution of "proceeds and penalties" demonstrate that a significant portion of the sanctions exceed any remedial purposes and are treated as criminal penalties would be treated. § 44-9-7.E (including, "civil penalties shall be deposited in the current school fund . . . " and a portion of proceeds remaining after other specific distributions shall be deposited "into the general fund").

Finally, another indicator of the primarily punitive nature of the FATA comes in the form of *Qui Tam* Plaintiffs' own acknowledgments. In one pleading, Plaintiffs stated:

> Another obstacle is that the existing common law and statutes for fraud and misrepresentation have proven in practice to be ineffectual, difficult to prove, and *not much of a deterrent to wrongdoing*.
>
> To solve these problems, the Legislature created a powerful new tool – the Fraud Against Taxpayers Act – to be used against persons who cheat the State of

New Mexico. . . .

. . . .

> Section 44-9-3(C) imposes several mandatory awards against FATA violators: mandatory treble damages; a civil penalty of $5,000 - $10,000 per violation; costs; and attorneys fees to the *qui tam* plaintiff and to the State. These provisions are a departure from the common law, where *exemplary damages* and attorneys fees to the plaintiff *are not mandatory*. These mandatory awards have several public purposes: to create a *financial incentive* for private plaintiffs to pursue claims under FATA; to maximize the State's recoveries; *and to punish and deter persons who deceive the State.*

Plaintiffs' Oct. 22, 2009 Response, at 3, 5 (emphasis added). In addition to directly acknowledging the punitive nature of the FATA, the *Qui Tam* Plaintiffs' recognition of a financial incentive does not go to any perceived remedial aspect of the legislation but is instead consistent with the U.S. Supreme Court's indication in *Hughes Aircraft* that such incentives are deterrents, which also signifies a punitive nature:

> "[*Qui tam* statutes are] passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effect means of *preventing frauds* on the Treasury is to make the perpetrators of them liable to actions by private persons, acting, if you please, under the strong stimulus of personal ill will or the hope of gain. . . ."

Hughes Aircraft, 520 U.S. at 949 (quoting *Marcus*, 317 U.S. at 541, n.5); *see also Stevens*, 529 U.S. at 784-85 (stating "'[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers'"); *Allison Engine*, 2009 WL 3626773, at *9 (indicating that one aim of punishment is deterrence).

The fourth *Mendoza-Martinez* factor weighs in favor of concluding that FATA's purpose or effects are punitive.

(5) **Whether "the behavior to which [the sanction] applies is already a crime" (*Mendoza-Martinez*, 372 U.S. at 168):** Committing fraud against the Government was

already a crime apart from FATA's provisions. Although Plaintiffs attempt to sculpt *Baker* in order to argue that "it is not a crime to violate the New Mexico Fraud Against Taxpayers Act" (see Plaintiffs' March 31, 2010 Response to Supp. Authority, at 7, ¶ 3), the statutory language of the FATA itself indicates that the fraudulent actions it addresses may also be prosecuted criminally and gives ultimate deference to the attorney general in determining whether to allow *qui tam* actions to proceed when that action is based on allegations or transactions that are the subject of a criminal proceeding in which the state is a party. *See* § 44-9-9.C; *see also* § 44-9-6.G; § 44-9-12.B. The "already a crime" factor does not mean that a civil statute itself must contain a criminal component. *Cf. Druktenis*, 2004-NMCA-032, at ¶ 32, 135 N.M. at 233, 86 P.3d at 1060; *Kirby*, 2003-NMCA-074, at ¶ 35, 133 N.M. at 791, 70 P.3d at 781.

The U.S. Supreme Court in *Mendoza-Martinez* did not elaborate on how the "already a crime" factor should be applied–that is, when a behavior to which the civil sanction applies is already a crime, whether it should be weighed in favor of finding the sanction to have a punitive purpose or effect, or a civil purpose or effect. *See* 372 U.S. at 168. Although the Court did not address the factor in *Smith*, its analysis in *Hudson* suggests that when a behavior is already a crime, the factor should weigh in favor of finding the sanction to be punitive. *See Hudson*, 522 U.S. at 105 (dicta); *cf. Smith*, 538 U.S. at 97 (dicta). The analyses by the Court of Appeals of New Mexico in *Druktenis* and *Kirby*, as well as that of the U.S. District Court of New Mexico in *Baker*, suggest that those courts would be of the same mind. *See Druktenis*, 2004-NMCA-032, at ¶ 32, 135 N.M. at 233, 86 P.3d at 1060; *Kirby*, 2003-NMCA-074, at ¶ 35, 133 N.M. at 791, 70 P.3d at 781; *Baker*, at 37-38.

In contrast, in *Allison Engine*, the court found that when behavior is already proscribed as a crime the factor weighs in favor of finding a civil purpose or effect for the sanction. *See* 2009 WL

3626773, at *9. However, a careful reading of the cases cited by the U.S. Supreme Court in *Mendoza-Martinez* as bases for the factor suggests that a conclusion that a behavior is already a crime weighs in favor of finding a sanction to be punitive. *Cf. Mendoza-Martinez*, 372 U.S. at 168 n.26; *United States v. La Franca*, 282 U.S. 568 (1931) (cited in *Mendoza-Martinez*) *Lipke v. Lederer*, 259 U.S. 557 (1922) (cited in *Mendoza-Martinez*). In *La Franca*, the Court stated: "Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a *punishment* for the infraction of the law." 282 U.S. at 573 (emphasis added). In *Lipke*, the Court found that when evidence of a crime is essential to determining whether a statute applies to an individual's actions, a sanction "clearly involves the idea of *punishment* for infraction of the law–the definite function of a penalty." 259 U.S. at 562 (emphasis added) (citations omitted). The underpinnings for the factor suggest that when an action is already a crime, this factor should weigh in favor of finding the sanction to be penal.

This Court notes that in *Allison Engine*, even weighing the "already a crime" factor in favor of finding a civil purpose or effect, the federal district court nonetheless ultimately concluded, based on its analysis of the other factors, that the FCA is punitive and that its amended provisions should not be applied retroactively. Despite this Court's conclusion that fraud already being a crime should weigh in favor of finding the FATA to be punitive in nature or effect, for purposes of this analysis, this Court will assume the contrary and weigh the factor as the federal district court did in *Allison Engine*–in favor of finding a civil or remedial purpose or effect.

(6) Whether the sanction "has a rational connection to a nonpunitive purpose" (*Smith*, 538 U.S. at 97): In *Chandler*, the U.S. Supreme Court observed that the multiplier in the FCA has both a compensatory function as well as a punitive one. *See Chandler*,

538 U.S. at 130. The court in *Allison Engine* relied upon that observation to conclude that this factor weighed in favor of finding a civil purpose or effect for the civil version of the FCA. *See Allison Engine*, 2009 WL 3626773, at *9 (relying on *Chandler*, 538 U.S. at 130). However, as indicated above, in *Chandler*, the Court did not conclude that the compensatory aspect of the sanction rendered it non-punitive. *See supra* at I.A(1). Ultimately, the Court accepted its prior position that the FCA's sanctions are indeed punitive and decided the matter by weighing the presumption against imposing punitive sanctions on municipalities against the presumption that repeals by implication are not favored. *See Chandler*, 538 U.S. at 132; *see also supra* at I.A(1).

More authoritative is the Court's pronouncement that "the current version of the FCA imposes damages that are essentially punitive in nature," its discussion distinguishing double damages from treble damages and distinguishing the FCA's former $2,000 per claim civil penalty from its revised civil penalty of up to $10,000 per claim, its reliance on precedent in stating "'[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers,'" and the fact that in *Chandler*, the Court did not reverse the position it took in *Stevens* on the punitive nature of the FCA sanctions but instead accepted that position. *See Chandler*, 538 U.S. at 130-32; *Stevens*, 529 U.S. at 784-85 (internal citations omitted).

Likewise, in *Baker*, the U.S. District Court for the District of New Mexico took a different view of *Chandler* than the U.S. District Court for the District of Ohio did in *Allison Engine*. *See Baker*, at 34. Consistent with this Court's analysis of *Chandler*, the court in *Baker* recognized the purpose of the Court's reference in *Chandler* to a compensatory aspect of treble damages–that is, to continue to subject municipalities to the FCA's provisions after it had been amended "*[d]espite the*

punitive nature of treble damages under the statute." *Id.* (emphasis added). In *Chandler* "[t]here was no discussion on the punitive nature of the FCA in the context of a violation of the Ex Post Facto clause," and "*Chandler* would be mischaracterized to stand for the proposition that the FCA is generically a civil remedial statute to which the Ex Post Facto [Clause] does not apply." *Id.* at 33-34.

In *Kirby*, the Court of Appeals of New Mexico found an alternative, remedial purpose to which the civil penalty for securities violations may rationally be connected because the Legislature earmarked the civil penalty funds for public education and training on securities matters, which was the subject of the statute the court was analyzing. In contrast, the FATA's civil penalty is not earmarked for public education and training on matters specific to the FATA but, instead, are to be deposited into the current school fund. *Compare* § 44-9-7.E(1) *with Kirby*, 2003-NMCA-074, at ¶ 36, 133 N.M. at 791, 70 P.3d at 781. Another portion of the proceeds are deposited into the general fund. § 44-9-7.E(3)(b). Although there may be a compensatory aspect to some of the FATA sanctions, based on the logic of the Court in *Stevens*, the sixth factor should weigh in favor of finding that the FATA has a punitive purpose or effect.

As with the fifth factor, this Court notes that although the court in *Allison Engine* weighed this factor in favor of finding an alternative civil purpose, it ultimately concluded that the FCA was punitive in purpose or effect. Therefore, although careful evaluation indicates that the sixth *Mendoza-Martinez* factor should weigh in favor of finding that the FATA is punitive in purpose or effect, for purposes of this analysis, this Court will assume the contrary, weighing it in favor of finding a civil purpose or effect.

(7) **Whether the sanction "is excessive with respect to [an alternative**

nonpunitive] purpose" (*Smith*, 538 U.S. at 97): The court in *Allison Engine* set forth the following analysis of the seventh factor, which this Court relies upon with respect to New Mexico's FATA:

> The alternative purpose identified for the FCA is to compensate for loss. However, the sanctions recoverable under the FCA can far exceed those necessary to compensate the Government for fraud. More specifically, the FCA provides for a "civil penalty of not less than $5,000 and not more than $10,000 . . . plus three times the amount of damages which the Government sustains. . . ." . . . *see e.g. [United States v.] Halper*, 490 U.S. [435,] 559 [(1989)] . . . (penalties of $130,000 for an actual loss of $585 bore "no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as punishment in the plain meaning of the word . . ."). Since the sanctions recoverable under the FCA can far exceed those necessary to compensate the Government for its loss, this factor weighs in [favor] of a finding that the FCA sanctions, particularly the treble damages provision, are punitive in nature and effect.

Allison Engine, 2009 WL 3626773, at *9.

Likewise, in this matter, the treble damages and penalties sought under the FATA can far exceed those necessary to compensate the Government for its alleged loss. For example, *Qui Tam Plaintiffs* seek $90,000,000 for lost principal on just one trust investment, lost principal and income on various other investments, trebling of those damages, and penalties. Just assuming trebling of that identified amount, the sanction would exceed actual damages by $180,000,000. That additional amount would be excessive with respect to any possible alterative non-punitive, or remedial, purpose.

In addition, FATA's provision for joint and several liability could exacerbate the disproportional relationship between the sanction and any alternative non-punitive purpose. *See* § 44-9-13. That is, FATA's sanctions for particular defendants who played minimal roles and who may have never had much to gain financially could be exponentially excessive under joint and several liability provisions. For the reasons stated, the seventh *Mendoza-Martinez* factor weighs in favor of finding the FATA to be punitive in purpose or effect.

C. **Other considerations.** "Absent conclusive evidence of [legislative] intent as to the penal nature of a statute, these [seven] factors must be considered in relation to the statute on its face." *Mendoza-Martinez*, 372 U.S. at 168. The *Mendoza-Martinez* factors "are 'neither exhaustive nor dispositive.'" *Smith*, 583 U.S. at 97.

In addition to the majority of the seven factors weighing in favor of finding a punitive purpose or effect, the FATA is punitive on its face. Unlike statutory provisions allowing for automobile forfeiture or administrative driver's license revocation for driving while intoxicated, or administrative fines for securities violations, the FATA cannot be characterized as a regulatory scheme. *Compare City of Albuquerque v. One (1) 1984 White Chevy*, ¶ 2002-NMSC-014, ¶ 16, 132 N.M. 187, 191, 46 P.3d 94, 98; *State ex rel. Schwartz v. Kennedy*, 120 N.M. 619, 632, 904 P.2d 1044, 1057 (1995); *Kirby*, 2003-NMCA-074, at ¶ 36, 133 N.M. at 791, 70 P.3d at 781. The FATA presents no alternative regulatory purpose comparable to taking drivers' means to drive or licenses to drive so as to physically protect the public from those individuals driving while intoxicated. *Compare One (1) 1984 White Chevy*, 2002-NMSC-014, at ¶ 16, 132 N.M. at 191, 46 P.3d at 98; *Kennedy*, 120 N.M. at 632, 904 P.2d at 1057. Nor is there any alternative purpose for the FATA comparable to fining those who do not comply with a comprehensive regulatory scheme so as to prevent investors from being deceived or swindled. *Compare Kirby*, 2003-NMCA-074, at ¶ 36, 133 N.M. at 791, 70 P.3d at 781. The FATA has but one objective–to define and prosecute violations of the FATA itself.

The statutory scheme and its language indicate that the FATA is punitive. For instance, apparently foreseeing the potential constitutional and practical issues that could arise should the attorney general also choose to pursue fraudulent claims through the criminal justice process, the

Legislature gave the State, through the attorney general, fairly broad authority over *qui tam* actions, including, as indicated above, the authority to preclude a court from obtaining jurisdiction. *See* § 44-9-9.C; *see also* §§ 44-9-6.C; 44-9-5.D(2).

The Act's use of the term "prosecute" also suggests a punitive purpose or effect, or legislative intent to punish as well. *See* §§ 44-9-6, 44-9-7. Early in this country's jurisprudence, the Supreme Court of the United States observed that "an action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding, although it take the form of a civil action; *and the word 'prosecution' is not inapt to describe such an action.*" *La Franca*, 282 U.S. at 575 (emphasis added). Although the term "prosecution" may also be used in the context of civil litigation, the more common usage is in the pursuit of criminal actions. *See* BLACK'S LAW DICTIONARY 1221 (*e.g.*, "A criminal action; a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime. . . . The continuous following up, through instrumentalities created by law, of a person accused of a public offense with a steady and fixed purpose of reaching a judicial determination of the guilt or innocence of the accused. . . ."). While not dispositive in and of itself, the Legislature's choice of terms is yet another indicator of the punitive nature of the scheme and bolsters the already conclusive indicators of that purpose and effect.

Finally, but significantly, the statutory scheme would prove unworkable if applied retroactively. Section 44-9-9.A precludes a court from having jurisdiction over a *qui tam* action brought by a present or former state employee "unless the employee, during employment with the state in good faith, exhausted existing internal procedures for reporting false claims and the state failed to act on the information provided within a reasonable period of time." If the FATA were

applied to conduct that preceded its enactment, the jurisdictional requirement would be impossible to evaluate because the requirement for reporting such claims would not have existed at the time of the conduct and agencies would not have been on notice that they are to have internal procedures in place for reporting false claims. *Cf.* Plaintiffs' Oct. 22, 2009 Response, at 21 ("[D]uring this period of time there were no existing procedures for reporting false claims under FATA. To the best of Mr. Foy's knowledge this is still the case: no agency has promulgated regulations for false claim reporting. The State needs to promulgate regulations so whistleblowers know how to report false claims, and these regulations need to have a bypass system so that whistleblowers can be protected . . . .").

D. **Plaintiffs fail to explain how distinctions between the FATA and FCA make the FATA non-punitive.** In their most recent pleading on the *ex post facto* issue, Plaintiffs argue that "it is understandable that the defendants would like the Court to overlook the improvements in the State's statute, but it would be legal error for the Court to do so." *See* Plaintiffs' March 31, 2010 Response to Supp. Authority. However, the glaring omission in Plaintiffs' argument and pleading is any explanation of how those improvements make the FATA non-punitive. Plaintiffs themselves have previously gone to great lengths to emphasize how much more onerous the FATA is than the FCA. *See, e.g.*, Plaintiffs' Oct. 22, 2009 Response, at 2-7. Plaintiffs have also acknowledged that the FATA's penalties are essentially the same as those that the federal courts have determined are punitive. *See id.* at 5, ¶ D; *Baker*, at 31-38; *Allison Engine*, 2009 WL 3626773, at *8-10; *Hughes Aircraft*, 520 U.S. at 947-49. Nothing in Plaintiffs' March 31 Response alters the analysis or the conclusion that the FATA is a punitive statutory scheme, the retroactive application of which would violate federal and state prohibitions against *ex post facto*

laws.

E. **Dismissal of FATA claims.** Given that the majority of the seven *Mendoza-Martinez* factors weigh strongly in favor of finding that the FATA is punitive in purpose or effect and that it is punitive on its face, this Court concludes that *Qui Tam* Plaintiffs' claims made pursuant to the FATA require retroactive application of punitive statutory provisions that had not been enacted at the time of the conduct contained in the factual allegations. As such, the claims would violate the *Ex Post Facto* Clauses of the Constitutions of the United States and of the State of New Mexico. Accordingly, all FATA claims shall be, and hereby are dismissed with prejudice.

F. **This decision does not preclude enforcement actions by the State of New Mexico.** While in the midst of a serious economic downturn, the cause of which may very well be related to activities such as those alleged by *Qui Tam* Plaintiffs, the temptation exists to punish past conduct. But this is exactly why the prohibition embodied in the *ex post facto* protections exist. By way of comparison, in *Landgraf*, the prohibition against application of *ex post facto* laws precluded individuals from having to answer allegations of repugnant civil rights violations. The situation presented by the *Qui Tam* Plaintiffs' claims in this matter epitomizes the Supreme Court's concern in *Landgraf*–that a legislative body's "responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." 511 U.S. at 266. Although the acts alleged by Plaintiffs may very well be deserving of punishment, the Constitutions of the United States and of the State of New Mexico preclude retroactive application of punitive statutory schemes that did not exist at the time of the alleged conduct, regardless of how loathsome that conduct might be. *See, e.g., Landgraf*, 511 U.S. at 266.

Nothing contained in this Order negates our State's chief law enforcement officer's–the

Attorney General's discretion to pursue criminal, civil, or administrative sanctions based on laws that were in effect at the time of the alleged wrongful conduct if he deems it appropriate.

G. **Retroactivity of the FATA.** It bears noting that analyses of *Qui Tam* Plaintiffs and *Amicus Curiae* on the issue of *ex post facto* laws are somewhat dubious. For example, *Amicus Curiae* attempts to distinguish *Landgraf* with such assertions as "the retroactivity of the FATA applies to pending claims [and a]s such, it does not implicate any consideration of an ongoing or decided court decision, as in Landgraf or Allison Engine;" that "[h]ere, the statute was enacted prior to the initiation of the case;" that "[t]here is a great distinction between applying a rule retroactively to a case in process and to applying the rule to past conduct where no action has been taken;" and that "[c]hanging the conduct and nature of a case in progress, or a case that has been decided has fewer implications for the defendant than one in which the statutory provisions guiding the suit are fully in place before the action began." *Amicus Curiae* Jan. 20, 2010 Brief, at 9; Plaintiffs' Feb. 1, 2010 Memorandum, at 1 ("The Plaintiffs . . . agree in all respects with the excellent *amicus* brief filed by the Attorney General."). The Court rejects such arguments on several bases.

First, *Amicus Curiae*, and by incorporation, Plaintiffs, cite no authority for their assertions. Second, this Court finds no indication in any of the applicable case law that an *ex post facto* law can be applied to conduct that antedates the enactment of the law so long as the statute was in place before an action is commenced and, furthermore, the suggestion defies logic. If the assertion were accepted, there would be no *ex post facto* concern for any action commenced after a statute is enacted, even when the sanction is clearly punitive. Third, *Amicus Curiae* mistakes the federal district court's analysis in *Allison Engine* of "whether Congress intended the retroactivity language

to apply to 'cases' *pending* on [the date Congress made the provisions effective], or to 'claims' *pending* [on that date]," which is an analysis of what the plain language of the statute meant, with that court's analysis of the *ex post facto* issue. *See Allison Engine*, 2009 WL 3626773, at *3-*10 (emphasis added). *Amicus Curiae* conflates the two issues and reaches, at best, a spurious conclusion. Negating *Amicus Curiae*'s misapprehension is the federal district court's statement, in addition to its overall analysis, that "*[e]ven if* the retroactivity clause enacted as part [of] [the Fraud Enforcement and Recovery Act, which is the act that amended portions of the FCA,] was to be found by *a reading of its plain language* to apply to the 'claims' *pending* in this case, application of this retroactivity language to these Defendants *would violate the Ex Post Facto Clause of the U.S. Constitution.*" *Id.* at *4 (emphasis added); *see generally Alderette*, 111 N.M. at 298-99, 804 P.2d at 1117-18 (distinguishing an alternative ground for a decision from mere dictum).

Much like the previous arguments, Plaintiffs, in their most recent pleading on the issue of retroactivity, further argue that "federal retroactivity analysis depends upon 'settled expectations.'" Plaintiffs' March 31, 2010 Response to Supp. Authority, at 8, ¶ 5. However, a more exacting analysis of *Baker* reveals that the court was addressing the Government's argument, much like that of Plaintiffs and *Amicus Curiae* in the matter before this Court, that "retroactive application of [amendments to the FCA] would not upset Defendants' settled expectations, because the Supreme Court's decision [interpreting pre-FCA law] was not decided at the time Defendants acted." *Baker*, at 32. The court summarily rejected defendants' argument, stating "*the real question* is whether retroactive application of [the amendments to the FCA] would violate the Ex Post Facto clause." *Id.* at 32-33 (emphasis added). The reference to "settled expectations" in *Landgraf* addresses whether a statutory provision has a retroactive effect. *See id.* Here, it is clear that the FATA has a

retroactive effect because, in addition to the obvious retroactive effects of the FATA increasing a party's liability for past conduct and providing a new cause of action, the Legislature has expressly made the FATA retroactive. Thus, like the conclusion reached by the court in *Baker*, "the real question is whether retroactive application" of the FATA would violate the *Ex Post Facto* Clause, which this Court's analysis has determined to be the case. *See supra* at I.D.

Another misconception that is somewhat interrelated to those previously discussed is *Amicus Curiae's* assertions that: "The FATA does not create a cause of action for previously permissible conduct–it merely provides an alternative avenue for actions based on previously barred conduct. The FATA merely makes it more likely that such conduct will be acted upon." Jan. 20, 2010 Brief, at 9-10; *see also* Plaintiffs' March 31, 2010 Response to Supp. Authority, at 8, ¶ 4. Very similar arguments were squarely rejected by the U.S. Supreme Court in *Hughes Aircraft*. A lengthy excerpt from the unanimous decision in that case, in which the Court addressed the presumption against retroactivity, undermines the arguments of *Amicus Curiae* and Plaintiffs:

> Respondent first argues that the 1986 amendment *does not "'impose new duties with respect to transactions already completed'" because since 1863, "the FCA has made it unlawful to knowingly submit a false claim for payment to the United States." The same argument was made, and rejected, in Landgraf. There, we noted that the provision of the Civil Rights Act of 1991 authorizing compensatory damages "does not make unlawful conduct that was lawful when it occurred," but we "[n]onetheless" held that "the new compensatory damages provision would operate 'retrospectively' if it were applied to conduct occurring before" its effective date. . . . see also Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 303 . . . (1994) (holding that *an increase in monetary liability could not be applied retroactively even though the "normative scope of Title VII's prohibition on workplace discrimination" was not altered*).
>
> Respondent next contends that "the 1986 Amendments to the *qui tam* bar *do not create a new cause of action where there was none before, change the substance of the extant cause of action, or alter a defendant's exposure for a false claim by even a single penny [and] thus d[o] not 'increase a party's liability for past conduct.'" . . . . Again, respondent is mistaken.* While we acknowledge that the *monetary*

> *liability faced by an FCA defendant is the same* whether the action is brought by the Government or by a *qui tam* relator, the 1986 amendment *eliminates a defense* to a *qui tam* suit–prior disclosure to the Government–and therefore changes the substance of the existing cause of action for *qui tam* defendants by "'*attach[ing] a new disability, in respect to transactions or considerations already past.*'" . . . *Beazell v. Ohio*, 269 U.S. 167, 169-170 . . . ("[Any] statute . . . which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*").
>
> *Nor is it the case that the 1986 amendment does not "create a new cause of action."* As respondent himself recognizes, "*as a result of the 1986 Amendments, the federal courts are open to an FCA action brought by a private relator on behalf of the United States, whereas "[p]rior to 1986, once the United States learned of a false claim, only the Government could assert its rights under the FCA against the false claimant.*"
>
> *The extension of an FCA cause of action to private parties in circumstances where the action was previously foreclosed is not insignificant.* As a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good. . . .
>
> . . . .
>
> *In permitting actions by an expanded universe of plaintiffs with different incentives, the 1986 amendment essentially creates a new cause of action, not just an increased likelihood that an existing cause of action will be pursued. . . .*

Hughes Aircraft, 520 U.S. at 948-49 (some internal citations omitted) (emphasis added).

Here, *Qui Tam* Plaintiffs themselves recognize the relevant changes in the law, which are akin to the alterations analyzed in *Hughes Aircraft*. Plaintiffs have acknowledged:

• "In 2007, the New Mexico Legislature enacted a radical new statute to make it easier for the State of New Mexico to recover money." Plaintiffs' Oct. 22, 2009 Brief, at 3.

• "To solve these problems, the Legislature created a powerful new tool – the Fraud Against Taxpayers Act – to be used against persons who cheat the State of New Mexico. . . . In virtually every instance, FATA changes or adds to existing laws to make it more likely that the State will actually recover substantial damages from wrongdoers." *Id.*

• "The Legislature included these broader concepts to go beyond the strict common law elements for fraud. . . . When it enacted the FATA, the Legislature knocked down most of these hurdles." *Id.* at 3-4.

• "By design, the Fraud Against Taxpayers Act is extremely broad. It encompasses any 'false or fraudulent claim.' 'Claim' is defined very broadly . . . ." *Id.* at 4.

• "Likewise, the phrase 'false or fraudulent' is also extremely broad. *Id.* at 4.

• "Section 44-9-3(C) imposes several mandatory awards against FATA violators: mandatory treble damages; a civil penalty of $5,000 - $10,000 per violation; costs; and attorneys fees to the *qui tam* plaintiff and to the State. These provisions are a departure from the common law, where exemplary damages and attorneys fees to the plaintiff are not mandatory. These mandatory awards have several public purposes: to create a financial incentive for private plaintiffs to pursue claims under FATA; to maximize the State's recoveries; and to punish and deter persons who deceive the State. *Id.* at 5.

Even more compelling than the situation in *Hughes Aircraft*, *Qui Tam* Plaintiffs acknowledge that the FATA increases monetary liability by providing for *mandatory* treble damages and civil penalties. Moreover, prior to enactment of the FATA, the possibility of *qui tam* actions did not exist in state law. Although in *Hughes Aircraft* the Court was addressing the presumption against retroactivity, its analysis and citation of *Beazell* for the principle that "[Any] statute . . . which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*," indicate that the same concepts are instructive in analyzing *ex post facto* violations. Once a sanction is determined to be punitive, changes in the law that affect a defendant's substantive rights under that law, such as creating a new cause of action,

altering a defendant's exposure for past conduct, or depriving a defendant of a defense that was available according to law at the time when the act was committed, are prohibited as *ex post facto*. *Cf., e.g., Hughes Aircraft*, 520 U.S. at 947-49; *Allison Engine*, 2009 WL 3626773, at *8; *Alderette*, 11 N.M. at 300, 804 P.2d at 1119 (recognizing same concept in judicial context); *Norush*, 97 N.M. at 662, 642 P.2d at 1121 (recognizing same concept in judicial context).

Finally, *Amicus Curiae* also asserts that "[g]enerally, a court is supposed to apply the law that is in effect at the time of trial." Jan. 20, 2010 Brief, at 9 (citing *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974)). That assertion, as indicated by the authority *Amicus Curiae* cites for the assertion, presupposes that one is only addressing a non-punitive assessment. *Bradley*, cited by *Amicus Curiae*, addressed whether a statutory change affecting attorneys fees should apply to attorney services that were rendered prior to enactment of the provision in a matter that was pending on appeal based on a challenge to the fee award. There was no issue as to whether the amendment was punitive in nature, implicated any punitive sanction or statutory scheme, or in any way constituted an *ex post facto* law.

H. <u>This Court cannot rewrite the statutory scheme to make it constitutional.</u>

Plaintiffs argue that "if the Court believes that FATA is constitutionally invalid, then the severability clause comes into play," and that "[a]pplying the severability directive in § 44-9-15, the Court would simply award the amount of compensatory damages found by the jury, without any punitive damages." *See* Plaintiffs' March 31, 2010 Response to Supp. Authority, at 6, "Step 5." This Court rejects Plaintiffs' invitation to rewrite the statutory scheme to make it constitutionally acceptable. The provision that is severable is the retroactivity provision. Therefore, the entire statutory scheme is left in tact to address conduct that occurred after its enactment.

Plaintiffs have essentially asked this Court to rewrite the statutory scheme to tease out a constitutionally acceptable cause of action. Plaintiffs' suggested course is rife with pitfalls. For instance, this Court cannot assume the role of the Legislature and infer how that body would re-balance the various statutory provisions that depend on the overall structure it enacted. *See State v. Frawley*, 2010-NMCA-021, ¶ 30, 143 N.M. 7, 18, 172 P.3d 144, 155 (discussing standards for severability to remedy unconstitutional statutory provisions). This Court cannot rewrite the statutory scheme to make the retroactivity clause constitutional or to fashion penalties that would be non-punitive. *See id.* at ¶¶ 30, 31.

II. ***Qui Tam* Plaintiffs' claims made pursuant to the Unfair Practices Act shall be dismissed because that act does not apply to securities transactions.** Plaintiffs fail to address Defendants' argument that the Unfair Practices Act (or "UPA") does not apply to securities transactions. In addition, a review of decisions from other jurisdictions wherein courts have analyzed analogous unfair trade practices provisions reveals that the majority view is that securities transactions do not come within the scope of such statutory provisions. *See Crowell v. Morgan Stanley Dean Witter Svcs, Co., Inc.*, 87 F.Supp. 2d 1287, 1294-95. (S.D. Fla. 2000) (holding that Florida's Deceptive and Unfair Trade Practices Act does not apply to claims arising from the sale of securities and recognizing that "'almost all state and federal courts construing similar statutes have held that consumer protection laws do not apply to security transactions'" (internal citation omitted)). The United States District Court for the District of New Mexico has recognized that UPA's application is limited to sales, leases, rentals, or loans of goods or services or to the extension of credit or collection of debts, and the court was unwilling to extend UPA's reach to different types of transactions. *See Nanodetex Corp. v. Sandia Corp.*, 2007 WL 4356154 (D.N.M. 2007), at *4.

For those reasons alone, this Court finds that the securities violations alleged by Plaintiffs are not within UPA's scope and, therefore, all claims made pursuant to the UPA shall be dismissed. In addition, and similarly, Plaintiffs did not respond to Defendants' argument that a *qui tam* action is an inappropriate vehicle by which to pursue UPA claims. This Court agrees with Defendants' assertion and dismisses the UPA claims on that independent basis as well.

IT IS THEREFORE ORDERED that all claims made by *Qui Tam* Plaintiffs pursuant to the FATA **shall be and hereby are dismissed** because they require retroactive application of that act and would violate federal and state prohibitions against *ex post facto* laws.

IT IS FURTHER ORDERED that all claims made by *Qui Tam* Plaintiffs pursuant to the UPA **shall be and hereby are dismissed** because the claims are based on securities transactions and do not come within the scope of the UPA.

ENTERED this 28th day of April, 2010.

STEPHEN PFEFFER
District Judge, Division VI

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