IN THE NEW MEXICO SUPREME COURT

STATE OF NEW MEXICO, *ex rel.* HECTOR BALDERAS, ATTORNEY GENERAL,

Plaintiff-Respondent,

vs.

No. S-1-SC-37430
(Ct. App. No. A-1-CA-36906)

BRISTOL-MYERS SQUIBB COMPANY, SANOFI-AVENTIS U.S. LLC, SANOFI US SERVICES INC., formerly known as SANOFI-AVENTIS U.S. INC., SANOFI-SYNTHELABO INC., and DOE DEFENDANTS 1 TO 100,

Defendants-Petitioners.

PETITION FOR WRIT OF CERTIORARI

ARNOLD & PORTER KAYE SCHOLER LLP

Kirk Ogrosky
Murad Hussain
601 Massachusetts Ave, N.W.
Washington, DC 20001-3743
Telephone: (202) 942-5000

Anand Agneshwar
250 West 55th Street
New York, NY 10019-9710
Telephone: (212) 836-8000

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

Earl E. DeBrine, Jr.
Timothy C. Holm
P.O. Box 2168
500 Fourth Street, N.W., Suite 1000
Albuquerque, NM 87103-2168
Telephone: (505) 848-1800

Counsel for Defendants-Petitioners

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 12-502(E), I hereby certify that this Petition for Writ of Certiorari complies with the type-volume limitation of Rule 12-502(D)(3). According to Microsoft Office Word, the body of the Petition, as defined by Rule 12-502(D)(2), contains 3,150 words.

DATED this 22nd day of January 2019.

/s/ Earl E. DeBrine, Jr.
Earl E. DeBrine, Jr.

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INTRODUCTION

Defendants-Petitioners ("Defendants") seek this Court's review of important questions concerning the intersection of *res judicata* law and *qui tam* actions regularly brought on the State of New Mexico's behalf in federal and state courts, seeking millions or billions of dollars against companies doing business here. Without hearing oral argument, the panel below expanded federal law to create an unheralded common law exception to *res judicata*, contrary to federal and New Mexico law. Under the panel's new rule, if the State (or any other governmental entity) does not intervene in a *qui tam* action, that action's dismissal for failure to state a claim will **never** preclude the government from relitigating the underlying facts. In other words, **only** summary judgment or a trial verdict for the defense will bar a non-intervening government from later suing over the same operative facts. No other court has ever held this, no party argued this below, and this new rule will multiply lawsuits in New Mexico and federal courts alike.

Defendants manufacture the prescription cardiovascular medication Plavix, which the State alleges was misleadingly marketed. In 2017, these same Defendants prevailed in an earlier-filed *qui tam* case, *U.S. ex rel. Dickson v. Bristol-Myers Squibb Co.* ("*Dickson*"), brought on behalf of the federal government, New Mexico, and other states under the federal False Claims Act ("FCA"), New Mexico Medicaid False Claims Act, NMSA 1978, §§ 27-14-1 *et*

seq. ("New Mexico FCA"), and other laws. Unlike the federal FCA, the New Mexico FCA prohibits *qui tam* claims from proceeding without the State's written approval. After giving that approval, the State declined to intervene in *Dickson* but let the relator proceed with the suit. Simultaneously, it engaged private plaintiffs' lawyers to pursue this suit in New Mexico district court, based on the same operative facts alleged in *Dickson*. Troubled by the State's claim-splitting, the district court stayed this case so the State could consolidate its claims in one forum. The State refused.

Dickson was then dismissed on the merits under Federal Rule of Civil Procedure 12(b)(6). Soon after, the district court below denied Defendants' motion to dismiss this case based on *res judicata*, erroneously focusing on the two suits' different legal theories. On Defendants' interlocutory appeal, the panel affirmed on different grounds by creating its new *res judicata* exception. This Court should grant review to bring the decision in line with the law of New Mexico and all other state and federal courts.

First, the panel's decision conflicts with *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), which establishes that Rule 12(b)(6) dismissals are final merits judgments that bar litigants **and their privies** from relitigating related claims. Instead of applying *Moitie*'s rule, the panel misread lower courts' FCA cases as exempting non-intervening governments from the preclusive effect of a

qui tam action's Rule 12(b)(6) dismissal. Those cases did not rest on Rule 12(b)(6) generally, but specifically on Rule 9(b)'s technical fraud-pleading deficiencies, which the *Dickson* court stated was not the basis for its dismissal.

Second, the panel failed to discuss Federal Rule of Civil Procedure 41(b), under which *Dickson*'s dismissal was a judgment "on the merits" because it did not say otherwise. This Court has confirmed that New Mexico's similar Rule 1-041(B) gives prior dismissals preclusive effect if affected parties had notice and opportunities to be heard—as the State did in *Dickson*.

Finally, the panel violated established federalism principles by revising the *Dickson* judgment's finality. The panel erroneously relied on cases involving federal courts' exercise of original or appellate jurisdiction to write or rewrite *qui tam* dismissal orders. The panel had no such jurisdiction over *Dickson*.

OPINION BELOW

This petition seeks review of the Court of Appeals' October 24, 2018 decision ("Op."). Defendants' motion for rehearing was denied on December 12, 2018, after the State filed a requested response. This petition timely followed.

QUESTIONS PRESENTED FOR REVIEW

A. Whether the dismissal of a *qui tam* relator's New Mexico claims for failure to state a claim bars the State from relitigating the same operative facts, where the State had notice of its relator's claims and the opportunity and right to intervene in or dismiss them, but refused to take any action despite a judicial request to do so?

B. Whether, for *res judicata* purposes, a federal judgment dismissing a *qui tam* relator's New Mexico claims under Federal Rule of Civil Procedure 12(b)(6) is "on the merits" as to the State's later-filed overlapping action in New Mexico court?

FACTS MATERIAL TO THE QUESTIONS PRESENTED

I. THE *QUI TAM* SUITS FILED ON NEW MEXICO'S BEHALF

A. *Dickson*

In March 2011, *qui tam* relator Elisa Dickson sued Defendants in federal court, alleging that they marketed Plavix by misrepresenting its effectiveness. Filed in Illinois, *Dickson* was transferred to New Jersey and finally dismissed in 2017. *See* RP622-646 (published at 332 F.Supp.3d 927 (D.N.J. 2017)).

The *Dickson* relator's various legal theories included a claim under the New Mexico FCA, which she brought "on behalf of … the State of New Mexico." RP753; RP890-893. New Mexico's FCA is unique among *qui tam* statutes, because it provides that the State, upon receiving a complaint, "shall conduct an investigation of the factual allegations and legal contentions" and "make a written determination of whether there is substantial evidence that a violation has occurred" **before** the *qui tam* claim can proceed—or else the State **must** dismiss

the claim. NMSA 1978, § 27-14-7(C). In 2012, the State declined to intervene in *Dickson* but let the claim proceed (RP623), while retaining the rights to intervene later, dismiss the claim at any time, or stay it if discovery would interfere with a civil prosecution arising from the same facts. NMSA 1978, § 27-14-8(B), (D), (E). And if the relator succeeded, the State would get 70 percent (or more) of any future New Mexico-related recovery. *Id.* § 27-14-9(B).

In June 2017, the *Dickson* court granted Defendants' third motion to dismiss the case, holding that under Rule 12(b)(6), the relator's "specific allegations" showed she "could not" establish any material misrepresentations under *Universal Health Services v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (2016). RP633-634; *see also* RP630 ("[Section] 3. Materiality under *Escobar*"). Given this holding, the court declined Defendants' request to reconsider the "law of the case" that the relator's allegations satisfied Rule 9(b)'s standard for "pleading fraud with particularity." RP629-630 & n.7 ("[Section] 2. Rule 9(b)").

Dickson's dismissal did not state that it was "without prejudice" to anyone. Op. ¶32. Neither the relator, New Mexico, nor any other government moved to clarify, modify, or appeal the dismissal.

B. *JKJ*

In November 2011, a second Plavix-related *qui tam* suit was filed against Defendants in New Jersey federal court: *U.S. ex rel. JKJ Partnership 2011 LLP v.*

Sanofi-Aventis U.S. LLC ("*JKJ*"). This case also included a New Mexico FCA claim—which was dropped in 2017. RP438-439; Hr'g Tr. (Mar. 1, 2017) at TR7:7-22, TR34:14-35:8; Hr'g Tr. (Nov. 3, 2017) at TR49:14-22. In 2018, the court dismissed the rest of *JKJ*. 315 F.Supp.3d 817 (D.N.J. 2018).

II. THE SUIT BELOW

In September 2016, with *Dickson* and *JKJ* still pending, the State filed this suit, similarly alleging that Defendants promoted Plavix by misrepresenting its effectiveness. RP2-4. Instead of suing under the New Mexico FCA, the State asserted alleged violations of different statutes and the common law. RP1057.

Defendants moved to dismiss these claims or, alternatively, to stay the case for violating the rule against claim-splitting. RP129-463. In March 2017, the district court agreed that the State's claims shared "common operative facts" with *Dickson*, and stayed the case to "avoid the possibility of inconsistent judgments" and give the State "the opportunity to cause the dismissal of the *Dickson* action" or "consolidate" the claims in one forum. RP524-525. By April 2017, the State had "taken no action" in *Dickson*, so the court continued the stay, reiterating that both cases arose from "common facts." RP527. Still, the State never took any action.

After *Dickson*'s dismissal, the stay below was lifted in July 2017. RP596-599. Defendants supplemented their motion to dismiss to include *res judicata*

grounds. In December 2017, the court denied Defendants' motion as to *res judicata* but certified the issue for interlocutory appeal. RP1060.[1]

In February 2018, the Court of Appeals granted Defendants' application for interlocutory appeal. It affirmed the district court in October 2018, and denied rehearing without an opinion in December 2018.

BASIS FOR GRANTING THE WRIT

The panel created a new exception to *res judicata* that ignores precedent and misreads the federal cases it relied on. The panel correctly recognized that "[b]ecause [*Dickson*] was in federal court, federal law determines the preclusive effect of a federal judgment." Op. ¶14 (quotation marks omitted). But the panel's actions did not match its words. Had it given "appropriate deference to [the] federal court judgment[]," *Deflon v. Sawyers*, 2006-NMSC-025, ¶2, 139 N.M. 637, it would have reached the correct result: *Dickson*'s dismissal precludes this case.

Res judicata and the rule against claim-splitting are "grounded upon public policy designed to avoid a multiplicity of suits" that burden defendants and the courts alike. *State ex rel. Foy v. Austin Capital Mgmt., Ltd.*, 2015-NMSC-025, ¶20 (quotation marks omitted). Instead of correcting the district court's obvious

[1] The district court also dismissed some claims on other grounds, including a statutory safe harbor for agency-approved conduct. RP1051-1056.

errors,[2] the panel affirmed on novel grounds. Looking solely at whether the *Dickson* dismissal was a "final judgment … on the merits," *Potter v. Pierce*, 2015-NMSC-002, ¶10, the panel held that *Dickson* was not a merits judgment as to the State and had no preclusive effect here. Op. ¶¶31-34.

The panel announced a new rule that no party briefed: a *qui tam* relator's "failure to adequately plead an FCA claim under Rule 12(b)(6), **regardless of the standard applied**," will not preclude a non-intervening government. Op. ¶31 (emphasis added). In other words, **only** summary judgments and trial verdicts for *qui tam* defendants will have *res judicata* effect against the government. No federal or state court has ever so held. Moreover, this new rule conflicts with decisions by U.S. Supreme Court, this Court, and the Court of Appeals.

I. THE PANEL'S DECISION CONFLICTS WITH U.S. SUPREME COURT PRECEDENT GIVING RULE 12(B)(6) DISMISSALS PRECLUSIVE EFFECT AGAINST PARTIES AND PRIVIES ALIKE.

The panel ignored that Rule 12(b)(6) dismissals are final merits judgments that preclude litigants **and** their privies from bringing related claims in the future. The panel cited *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3

[2] Notably, the district court refused to apply this Court's "transactional approach" for assessing whether two cases involve the same "cause of action." *Potter*, 2015-NMSC-002, ¶11; *compare* RP1059 (rejecting *res judicata* because *Dickson* and this case involved different legal theories), *with* RP524-527 (finding both cases arose from common operative facts), *and Pielhau v. State Farm Mut. Auto. Ins. Co.*, 2013-NMCA-112, ¶14 (courts must "focus on the underlying facts rather than the legal theories relied on in the first action").

(1981)), for the "general rule that a dismissal under Rule 12(b)(6) is an adjudication on the merits for claim preclusion purposes." Op. ¶32; *id.* ¶16 (similar); *accord Turner v. First New Mexico Bank*, 2015-NMCA-068, ¶8 (applying *Moitie* to New Mexico Rule 1-012(B)(6)).

The panel applied *Moitie* only to *Dickson*'s relator. Op. ¶32. However, she did not sue in her personal capacity, but "on behalf of" New Mexico (RP753), as its statutory privy after the State investigated her complaint and authorized her to proceed. NMSA 1978, § 27-14-7(C); Op. ¶17 (Defendants' arguments). Yet the panel held that *Dickson*'s dismissal was not a merits adjudication as to the State. Op. ¶33. This conflicts with *Moitie*, which explicitly covers privies:

> A final judgment on the merits of an action precludes the parties **or their privies** from relitigating issues that were or could have been raised in that action.

452 U.S. at 398 (emphasis added).

This rule applies equally to *qui tam* judgments. In *U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. 928 (2009), which concerned FCA appellate deadlines, the Supreme Court agreed "that the United States is bound by the judgment in all FCA actions regardless of its participation in the case." *Id.* at 936. The panel discounted this as merely "a statement of the [petitioner's] argument." Op. ¶28. Not so. *Eisenstein* repeated this as a pure statement of law. 556 U.S. at 936 (citing

"[t]he fact that the Government is bound by the judgment"). Then-Solicitor General Elena Kagan also conceded the principle in the United States' brief:

> [T]he government can be bound by the judgment in a *qui tam* action **even when it elects not to become a party, but instead allows the relator to litigate on its behalf.**

U.S. Br. as Amicus Curiae 27, *Eisenstein*, No. 08-660, 2009 WL 870023 (Mar. 31, 2009) (emphasis added).[3]

The panel also misread several lower courts' *qui tam* decisions as analogous to *Dickson*. Those decisions stem from *U.S. ex rel. Williams v. Bell Helicopter Textron, Inc.*, 417 F.3d 450 (5th Cir. 2005), which the panel read for the proposition "that a Rule 12(b)(6) dismissal is based only on the relator's complaint, not the factual bases underlying the allegations," such that "a dismissal does not preclude the government's claims when the government has not intervened." Op. ¶20. The panel decided, solely on policy grounds, that "the government should not be bound by the relator's weaknesses in pleading what might be a valid claim, **whatever those weaknesses are.**" *Id.* ¶31 (emphasis added).

But that is not what *Williams* or those other cases held. They did not concern Rule 12(b)(6) deficiencies of all kinds, but only hyper-technical

[3] The panel also mistakenly relied on *Kellogg Brown & Root Servs., Inc. v. U.S. ex rel. Carter*, 135 S.Ct. 1970 (2015). Op. ¶31 (modifying *Carter* quote about unrelated statutory preclusion). *Carter* noted that what qualifies as a "merits" judgment for *res judicata* "is not before us." 135 S. Ct. at 1979.

deficiencies under Rule 9(b)'s "who, what, when, where, and how" fraud-pleading standard. *Williams*, 417 F.3d at 453-54. By contrast, Defendants' repeated efforts to dismiss *Dickson* under that standard never succeeded. *See supra* p.5. The panel wanly insisted that *Williams*, like *Dickson*, was "not limited to the Rule 9(b) pleading standard"—but then quoted *Williams* as resting on non-compliance "with the requirements of Rule 9(b)." *Id.* ¶31 (quoting 417 F.3d at 453). In any event, there is nothing unfair about binding the State to a "relator's weaknesses in pleading," Op. ¶31, because the New Mexico FCA—unlike the federal FCA—requires the State to dismiss, at the outset, any claim whose "factual allegations" lack substance. NMSA 1978, § 27-14-7(C); *see supra* pp.4-5; RESTATEMENT (SECOND) OF JUDGMENTS § 37 reporter's note, cmt. B (where private party can bring action "only with the authorization of the responsible public authority, the latter is concluded by the action").

In ruling that Rule 12(b)(6) *qui tam* dismissals of **any** kind will not preclude a government privy, the panel's decision squarely conflicts with *Moitie*. By definition, **every** Rule 12(b)(6) dismissal rests "only on the relator's complaint, not the factual bases underlying the allegations." Op. ¶20. Yet Rule 12(b)(6) dismissals are nonetheless "judgment[s] on the merits" precluding even privies. *Moitie*, 452 U.S. at 398, 399 n.3. The panel's decision thus conflicts with precedent on an issue never briefed below.

II. THE PANEL'S DECISION IGNORED THE RELEVANT FEDERAL RULE AND CONFLICTS WITH THIS COURT'S READING OF THE ANALOGOUS STATE RULE.

The panel also never discussed Federal Rule of Civil Procedure 41(b). *Cf.* Defs.' Br. 34 (invoking Rule 41). Rule 41(b) provides that an involuntary dismissal under another rule—*e.g.*, 12(b)(6)— "operates as an adjudication on the merits," "[u]nless the dismissal order states otherwise" or rests on "lack of jurisdiction, improper venue, or failure to join a party." Under New Mexico's similarly worded Rule 1-041(B), this Court gives *res judicata* effect to merits dismissals only if "the party affected has notice" and "hearing, or an opportunity to be heard." *Otero v. Sandoval*, 1956-NMSC-008, ¶¶3-5.

In *Dickson*, New Mexico had actual notice, opportunities to be heard, and the absolute right to intervene in or dismiss its claim at any time. NMSA 1978, § 27-14-8(B) & (D). The district court below specifically stayed this case so the State could "**take some action** that would alleviate the danger of inconsistent judgments." RP527 (emphasis added). The State easily could have dropped its *Dickson* claim, just like it dropped its *JKJ* claim before that case's dismissal. *See supra* p.6. Indeed, the *Dickson* relator also sued on behalf of Hawaii, Louisiana, and Mississippi, which were all pursuing related lawsuits in their own state courts—and they all dropped their claims from *Dickson* just before its dismissal. RP754 n.1. Nothing prevented New Mexico from doing the same and

consolidating its *Dickson* claim with this case, or otherwise seeking to limit the *Dickson* dismissal's effect.

Therefore, even applying *Otero*'s guidance, *Dickson* has preclusive effect as to the State. This Court should grant review to clarify Rule 41(b)'s role here.

III. THE PANEL'S DECISION VIOLATES FEDERALISM PRINCIPLES.

The panel modified the *Dickson* judgment without any power to do so, defying this Court's instruction to "grant[] appropriate deference to federal court judgments," *Deflon*, 2006-NMSC-025, ¶2, and conflicting with the core federalism principle that "the State courts have no power to revise the action of the Federal courts," *Claflin v. Houseman*, 93 U.S. 130, 137 (1876); *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 58 (1912) (same).

The panel read the *Williams* line of *qui tam* cases as allowing it to "**construe** the [*Dickson*] order as without prejudice to the government." Op. ¶33 (emphasis added). But the federal courts in those cases did not "construe" any dismissal orders; they **wrote or modified** those orders pursuant to their direct or appellate jurisdiction. *Id.* ¶¶20-25 (citing cases); *Williams*, 417 F.3d at 456 ("MODIFY[ING] the judgment to be without prejudice"). Unlike the government in *Williams*, New Mexico never challenged how the *Dickson* dismissal did not expressly exempt the State from its scope. *See* Op. ¶32; Defs.' Br. 33-34

(quoting order). Because the panel cannot modify *Dickson*, it could only "construe" it by applying Rule 41(b).

The opinion further conflicts with *Apodaca v. AAA Gas Co.*, 2003-NMCA-085, 134 N.M. 77, which found that "the only applicable exception … to the rule precluding claim splitting is where the court **expressly reserves** a plaintiff's right to maintain a second action." *Id.* ¶83 (citing RESTATEMENT § 26(1)(b)) (emphasis added). By contrast, the *Dickson* dismissal did not expressly reserve anything, because it "does not specify whether it is with or without prejudice to Relator or the government." Op. ¶32. This Court should grant review to clarify whether New Mexico courts can ignore Rule 41 and modify federal judgments by writing "without prejudice to New Mexico" into orders that say no such thing.

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be granted and the decision below should be vacated and reversed.

Respectfully submitted,

By: */s/ Earl E. DeBrine, Jr.*

ARNOLD & PORTER
KAYE SCHOLER LLP

Kirk Ogrosky
Murad Hussain
601 Massachusetts Ave, N.W.
Washington, DC 20001-3743
Telephone: (202) 942-5000

Anand Agneshwar
250 West 55th Street
New York, NY 10019-9710
Telephone: (212) 836-8000

MODRALL, SPERLING, ROEHL,
HARRIS & SISK, P.A.

Earl E. DeBrine, Jr.
Timothy C. Holm
500 Fourth Street, N.W., Suite 1000
P.O. Box 2168
Albuquerque, NM 87103-2168
Telephone: (505) 848-1800
edebrine@modrall.com
tholm@modrall.com

Counsel for Defendants-Petitioners

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent via email this 22nd day of January 2019, to:

P. Cholla Khoury
Consumer & Environmental
Protection, Division Director
Assistant Attorney General
Office of the NM Attorney General
408 Galisteo Street
Santa Fe, NM 87501
Telephone: (505) 827-6000
Ckhoury@nmag.gov

Daniel Alberstone
Jonas P. Mann
Peter Klausner
Baron & Budd, P.C.
15910 Ventura Blvd., Suite 1600
Encino, CA 91436
Telephone: (818) 839-2333
dalberstone@baronbudd.com
jmann@baronbudd.com
pklausner@baronbudd.com

Marcus J. Rael, Jr.
Robles, Rael and Anaya, P.C.
500 Marquette Ave. NW Suite 700
Albuquerque, New Mexico 87102
Telephone: (505) 242-2228
marcus@roblesrael.com

Russell Budd
Barron & Budd, P.C.
The Centrum
3102 Oak Lawn Ave. #1100
Dallas, TX 75219
Telephone: (214) 521-3605
rbudd@baronbudd.com

Burton LeBlanc
Baron & Budd, P.C.
2600 CitiPlace Dr.
Baton Rouge, LA 70808
Telephone: (225) 927-5441
bleblanc@baronbudd.com

Attorneys for Plaintiff-Respondent

MODRALL, SPERLING, ROEHL, HARRIS
& SISK, P.A.

By: */s/ Earl E. DeBrine, Jr.*
Earl E. DeBrine, Jr.

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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: _____

Filing Date: October 24, 2018

NO. A-1-CA-36906

STATE OF NEW MEXICO ex rel. HECTOR BALDERAS, ATTORNEY GENERAL,

Plaintiff-Appellee,

v.

BRISTOL-MYERS SQUIBB COMPANY, SANOFI-AVENTIS U.S. LLC, SANOFI US SERVICES, INC. f/k/a SANOFI-AVENTIS U.S. INC., SANOFI-SYNTHELABO INC., and DOE DEFENDANTS 1 to 100,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Sarah M. Singleton, District Judge Pro Tem

Office of the Attorney General
Consumer & Environmental Protection
P. Cholla Khoury, Assistant Attorney General
Santa Fe, NM

Robles, Rael and Anaya, P.C.
Marcus J. Rael, Jr.
Albuquerque, NM

ATTACHMENT 1

Baron & Budd, P.C.
Daniel Alberstone
Jonas P. Mann
Peter KlausnerEncino, CA
Russell Budd
Dallas, TX
Jules Burton LeBlanc IV
Baton Rouge, LA

for Appellee

Arnold & Porter Kaye Scholer LLP
Kirk Ogrosky
Murad Hussain
Washington, DC
Anand Agneshwar
New York, NY

Modrall, Sperling, Roehl, Harris & Sisk, P.A.
Earl E. DeBrine, Jr.
Timothy C. Holm
Albuquerque, NM

for Appellants

OPINION

VANZI, Chief Judge.

{1} In this interlocutory appeal, we consider whether a federal district court's dismissal of qui tam claims for failure to state a claim bars the State from pursuing different claims arising from similar facts, where the State had not intervened in the qui tam action. We conclude that it does not and, therefore, affirm the denial of Defendants' motion to dismiss.

BACKGROUND

Qui Tam Actions

{2} In order to situate the facts leading to this appeal, we begin with an overview of qui tam actions generally and the relevant statutes that establish and govern them. "In a 'qui tam action,' a private plaintiff, . . . known as a 'relator,' brings suit on behalf of the government to recover a remedy for a harm done to the government." 36 Am. Jur. 2d *Forfeitures and Penalties* § 83 (2018) (footnotes omitted). "He or she pursues the government's claim against the defendant and asserts the injury in fact suffered by the government, which confers standing on the relator to bring the action as a representative of the [s]tate and as a partial assignee of the government's claim." *Id.* (footnotes omitted). A qui tam action arises only by statute, specifically authorizing a private party to sue on behalf of the government. *Id.* The federal False Claims Act (FCA) and state laws similar to it are typical qui tam statutes. *See United*

Seniors Ass'n v. Philip Morris USA, 500 F.3d 19, 24 (1st Cir. 2007) (stating that the FCA is a "typical and commonly-invoked qui tam action").

The FCA and the New Mexico Medicaid False Claims Act

{3} "The [FCA] prohibits false or fraudulent claims for payment to the United States, and authorizes civil actions to remedy such fraud to be brought by the Attorney General or by private individuals in the government's name." 32 Am. Jur. 2d *False Pretenses* § 85 (2018); 31 U.S.C. §§ 3729-3733 (2012). Under the FCA, "[t]he Attorney General diligently must investigate a violation of the false claims statute[,]" and "[i]f the Attorney General finds that a person has violated or is violating such statute, the Attorney General may bring a civil action against the person." 32 Am. Jur. 2d *False Pretenses* § 85; 31 U.S.C. § 3730(a). In addition, the FCA permits relators to "file qui tam civil actions on behalf of the United States for the making of a false claim against government funds." 32 Am. Jur. 2d *False Pretenses* § 85; 31 U.S.C. § 3730(b).

{4} Similarly, the New Mexico Medicaid False Claims Act (MFCA), NMSA 1978, §§ 27-14-1 to -15 (2004), provides for liability where a person presents "a claim for payment under the medicaid program knowing that such claim is false" or otherwise defrauds the state through the state medicaid program. Section 27-14-4. Like the FCA, the MFCA requires the Human Services Department (HSD) to investigate suspected violations and permits HSD to bring a civil action. Section 27-

14-7(A). In addition, the MFCA contains a qui tam provision that permits "[a] private civil action [to] be brought by an affected person for a violation of the [MFCA] on behalf of the person bringing suit and for the state." Section 27-14-7(B).

{5} Both the FCA and MFCA require a relator to provide a copy of the complaint and written disclosure of material evidence possessed by the relator to the government so that the government may determine whether there is substantial evidence that a violation has occurred. 31 U.S.C. § 3730(b)(2); § 27-14-7(C). The complaint is sealed for at least sixty days to allow the government to undertake such an investigation. 31 U.S.C. § 3730(b)(2); § 27-14-7(C). Upon completion of the investigation, the government may either "proceed with the action, in which case the action shall be conducted by the [g]overnment[,]" or decline to take over the action. 31 U.S.C. § 3730(b)(4); § 27-14-7(E). If the government declines to pursue the claims in the relator's complaint, "the person who initiated the action shall have the right to conduct the action." 31 U.S.C. § 3730(c)(3); § 27-14-8(D). Regardless of whether the government intervenes in the action, the relator may receive a portion of any ensuing recovery. 31 U.S.C. § 3730(d); § 27-14-9.

{6} The FCA and MFCA differ in that, under the MFCA, the relator may continue the action only "[i]f the department determined that there is substantial evidence that a violation of the [MFCA] has occurred" and that "[i]f the department determines

that there is not substantial evidence that a violation has occurred, the complaint shall be dismissed." Section 27-14-7(C), (E)(2).

The First Suit: *In re Plavix Marketing, Sales Practice & Products Liability Litigation*

{7} The first suit at issue was initiated in March 2011 by relator Elisa Dickson (Relator), who filed a complaint alleging that Bristol-Myers Squibb Company, Sanofi-Aventis U.S., LLC; Sanofi-Aventis U.S., Inc.; and Sanofi-Synthelabo, Inc., (Defendants), manufacturers and marketers of the prescription drug Plavix, promoted Plavix in violation of the FCA and various states' similar fraud statutes, including New Mexico's MFCA. *See In re Plavix Mktg., Sales Practice & Prods. Liab. Litig. (No. II) v. Bristol-Myers Squibb Co.*, ___ F. Supp. 3d ___, 2017 WL 2780744, at *1-4 (D.N.J. 2017).[1] Pursuant to the provisions of the MFCA, Relator served New Mexico with "a copy of the complaint and written disclosure of substantially all material evidence and information [Relator] possesses." Section 27-14-7(C). New Mexico declined to intervene in Relator's suit and, therefore, declined to take over litigation of the MFCA claim. *In re Plavix Mktg.*, 2017 WL 2780744, at *2.

[1]Relator filed the initial complaint in Illinois, but the suit was transferred to the United States District Court for the District of New Jersey to be part of the Plavix Multi-District Litigation. *Id.* at *2.

{8} Relator filed several amended complaints. *Id.* In August 2015, the federal district court dismissed the New Mexico MFCA claim, among others, for failure to state a claim for relief. *Id.* A year later, in August 2016, Relator filed a fourth amended complaint reasserting the MFCA claim, among others. *Id.* at *3. On Defendants' motion, the federal district court dismissed Relator's fourth amended complaint in June 2017. *Id.* at *1, *3. Relator did not appeal the dismissal or request permission to amend the complaint again. This final dismissal is central to Defendants' claim preclusion argument.

The Second Suit: *State of New Mexico ex rel. Hector Balderas, Attorney General v. Bristol-Myers Squibb, et al.*

{9} Shortly after Relator filed the fourth amended complaint in *In re Plavix Marketing*, but before its final dismissal, the New Mexico Attorney General (the State) brought the present action in the First Judicial District Court. The complaint alleges that "Defendants' false, deceptive, and unfair labeling and promotion of their prescription antiplatelet drug Plavix" violated the New Mexico Unfair Practices Act (UPA), NMSA 1978, §§ 57-12-1 to -26 (1967, as amended through 2009); the New Mexico Medicaid Fraud Act (MFA), NMSA 1978, §§ 30-44-1 to -8 (1989, as amended through 2004); and the New Mexico Fraud Against Taxpayers Act (FATA), NMSA 1978, §§ 44-9-1 to -14 (2007, as amended through 2015), as well as common law and equitable causes of action. The complaint did not allege violations of the MFCA.

{10} Defendants moved to dismiss the State's complaint, arguing that the State had failed to state its claims. They also maintained that the suit should be dismissed without prejudice or stayed pending resolution of the *In re Plavix Marketing* action and that the State was inappropriately splitting its claims. Without ruling on the substantive arguments in the motion, the state district court stayed the action pending the outcome of Defendants' motion to dismiss in *In re Plavix Marketing*. Once the federal district court dismissed Relator's fourth amended complaint, the state district court lifted the stay and ordered supplemental briefing on the impact of the dismissal of Relator's claims on the State's complaint and Defendants' motion to dismiss. In supplemental briefing, Defendants argued that the doctrine of claim preclusion bars the State's complaint. They also argued that, even if claim preclusion did not bar the State's claims in their entirety, the claims based on the MFA and FATA should be dismissed for failure to state a claim for the same reasons relied on by the federal district court.

{11} The state district court granted in part and denied in part Defendants' motion to dismiss for failure to state a claim. It found that the State's MFA claim failed as a matter of law and that the economic loss doctrine barred the State's negligence claim. It therefore dismissed those claims with prejudice. It found that the State had inadequately pleaded the UPA and equitable tolling claims but dismissed those claims without prejudice and ordered the State to file an amended complaint if it

chose to rectify the deficiencies in the first complaint. The court found the remaining claims adequately pleaded. The State then filed its first amended complaint, which includes claims for violations of the UPA and FATA, as well as common law claims for fraud and unjust enrichment.

{12} In a separate order, the state district court denied Defendants' motion to dismiss the State's complaint on claim preclusion grounds. Although it stated that Relator's claims had been dismissed "with prejudice," it found that "[claim preclusion] does not apply here because the causes of action are not the same in the two suits" and that "[R]elator in [*In re Plavix Marketing*] did not assert any of the claims the State asserts in this case, but rather only a single New Mexico [MFCA] claim." It also stated that "while [R]elator . . . stood in the shoes of the State of New Mexico for purposes of the New Mexico [MFCA] claim, [R]elator did not stand in the State's shoes for purposes of the claims asserted by the State here." Finally, the state district court concluded that "in a case such as this, where [R]elator's claims were dismissed based on a failure to comply with the heightened pleading requirements of [Federal Rule of Civil Procedure] 9(b), and not based on the merits of the claim, it would be inappropriate to bar the State's claims."

{13} However, the state district court also found that "[r]egarding the application of [claim preclusion] only," its order "(1) does not practically dispose of the merits of the action, (2) involves a controlling question of law as to which there is

substantial ground for difference of opinion, and (3) an immediate appeal from this order or decision may materially advance the ultimate termination of the litigation." *See* NMSA 1978, § 39-3-4(A), (B) (1999) (providing for interlocutory appeal of district court orders pursuant to this Court's appellate jurisdiction). It therefore certified for interlocutory appeal the portion of the order pertaining to application of claim preclusion. This Court granted Defendants' application for interlocutory appeal. *See* Rule 12-203 NMRA (governing interlocutory appeals).

DISCUSSION

{14} The issue before the Court is whether the federal court's dismissal of Relator's MFCA claim precludes the State's claims for violations of the UPA and FATA, as well as common law fraud and unjust enrichment. We review such questions of law de novo. *Bank of N.Y. v. Romero*, 2016-NMCA-091, ¶ 15, 382 P.3d 991. In addition, "[b]ecause the prior action was in federal court, federal law determines the preclusive effect of a federal judgment." *Moffat v. Branch*, 2005-NMCA-103, ¶ 11, 138 N.M. 224, 118 P.3d 732; *see* Restatement (Second) of Judgments § 87 (1982) ("Federal law determines the effects under the rules of [claim preclusion] of a judgment of a federal court."). However, this Court may rely on both federal and New Mexico law on claim preclusion because "[f]ederal law and New Mexico law are not divergent on claim preclusion doctrine, and both find the Restatement (Second) of Judgments . . . persuasive." *Moffat*, 2005-NMCA-103, ¶ 11.

General Claim Preclusion Law

{15} "[Claim preclusion] prevents a party or its privies from repeatedly suing another party for the same cause of action when the first suit involving the parties resulted in a final judgment on the merits." *Rosette, Inc. v. U.S. Dep't of the Interior*, 2007-NMCA-136, ¶ 33, 142 N.M. 717, 169 P.3d 704. Generally, the doctrine applies where "three elements are met: (1) a final judgment on the merits in an earlier action, (2) identity of parties or privies in the two suits, and (3) identity of the cause of action in both suits." *Id.* When these elements are satisfied, the defense of claim preclusion bars relitigation not only of claims actually brought by the plaintiff and its privies, but also claims that could have been brought in the first action. *Kirby v. Guardian Life Ins. Co. of Am.*, 2010-NMSC-014, ¶ 61, 148 N.M. 106, 231 P.3d 87.

{16} For claim preclusion to apply, the first suit must have ended in a "judgment on the merits." *Rosette, Inc.*, 2007-NMCA-136, ¶ 33. Generally, a dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a "judgment on the merits" for purposes of claim preclusion. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981).[2] Although this general rule is often stated broadly, it is not without nuance. Because "[a] motion to dismiss for failure to state

[2]"Because the language of Rule 1-012 [NMRA] closely parallels that of its federal counterpart, Rule 12 of the Federal Rules of Civil Procedure, we find federal authority interpreting Rule 12 . . . instructive." *Doe v. Roman Catholic Diocese of Boise, Inc.*, 1996-NMCA-057, ¶ 5, 121 N.M. 738, 918 P.2d 17. We also cite to Rule 1-012(B)(6) NMRA and Federal Rule of Civil Procedure 12(b)(6) interchangeably.

a claim under Rule 1-012(B)(6) . . . tests the legal sufficiency of the complaint, not the facts that support it[,]" *Wallis v. Smith*, 2001-NMCA-017, ¶ 6, 130 N.M. 214, 22 P.3d 682, the designation of such a dismissal as "on the merits" is something of a misnomer. In *Kirby*, the New Mexico Supreme Court explained that "[a] dismissal with prejudice is an adjudication on the merits *only to the extent that* when a claim has been dismissed with prejudice, the [final judgment on the merits] element of [claim preclusion] . . . will be presumed so as to bar a subsequent suit." 2010-NMSC-014, ¶ 66 (emphasis added). This is so because "[i]f this were otherwise, plaintiffs could simply ignore dismissals and file the same claim as many times as they wished, so long as the claim never progressed to a determination of the substantive issues." *Id.* Thus, the intent behind considering a Rule 12(b)(6) dismissal as "on the merits" is practical: to limit repetitive filings. *See Kirby*, 2010-NMSC-014, ¶ 66. Such a dismissal obviously does not involve "a judicial determination of" the actual merits. *See id.* ¶ 67. Conversely, "[t]he words 'without prejudice' when used in an order or decree generally indicate that there has been no resolution of the controversy on its merits and leave the issues in litigation open to another suit as if no action had ever been brought." *Bralley v. City of Albuquerque*, 1985-NMCA-043, ¶ 18, 102 N.M. 715, 699 P.2d 646.

Defendants' Arguments

{17} Defendants contend that the elements of claim preclusion are met here. Defendants argue that the *In re Plavix Marketing* dismissal was "on the merits" because Relator either failed to plead the requisite materiality under *Universal Health Services, Inc. v. United States ex rel. Escobar*, ___ U.S.___, ___, 136 S. Ct. 1989, 2001-03 (2016), or failed to allege conduct recognized as violative of the FCA. *See United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 487 (3d Cir. 2017) ("A [FCA] violation includes four elements: falsity, causation, knowledge, and materiality."); *In re Plavix Mktg.*, 2017 WL 2780744, *8 (same). They also claim that the State was in privity with Relator because Relator represented the State's interests in the *In re Plavix Marketing* action. Finally, they argue that the State's claims "arise out of a common nucleus of operative facts" related to Defendants' marketing practices and, therefore, constitute the "same cause of action" as in *In re Plavix Marketing*. In sum, Defendants maintain that, as a privy to Relator, the State was required to bring all of its claims in *In re Plavix Marketing*, and having failed to do so, the State must be barred from bringing them in a different suit.

Claim Preclusion in the Context of Qui Tam Actions

{18} We first observe that, as a general proposition, "[i]f [the relator] had litigated a qui tam action to the gills and lost, neither another relator nor the [government]

could start afresh." *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 853 (7th Cir. 2009). This is true because the relator sues on behalf of the government to vindicate the government's interests, and, although the government is not a named party to the relator's suit, it is a real party in interest. *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 934 (2009) (stating that the government, although a real party in interest, is not a "party" to a qui tam action).

{19} However, courts have also recognized that, under certain circumstances, the government's role in vindicating public interests militates against preclusion of its claims. *Cf.* Nathan D. Sturycz, *The King and I?: An Examination of the Interest Qui Tam Relators Represent and the Implications for Future False Claims Act Litigation*, 28 St. Louis U. Pub. L. Rev. 459, 462-63 (2009) (noting that even though "[i]n the non-FCA context, the concepts of preclusion would normally prevent duplicative litigation[, a]pplication of preclusion [in FCA cases] is muddled . . . by the distinction between the interests represented in a prior private cause of action and those represented in FCA litigation"). Thus, courts have repeatedly found that suits by or on behalf of the government should not be precluded by certain actions of a private party, even when that party acts as a qui tam relator. This is especially true when the first suit is dismissed for reasons unrelated to the merits of the claims.

{20} For example, federal courts have relied on the fact that a Rule 12(b)(6) dismissal is based only on the relator's complaint, not the factual bases underlying

the allegations, to hold that such a dismissal does not preclude the government's claims when the government has not intervened. *See, e.g.*, *United States ex rel. Williams v. Bell Helicopter Textron, Inc.*, 417 F.3d 450, 455-56 (5th Cir. 2005).

{21} In *Williams*, the district court dismissed the relator's FCA claims because the relator failed to plead them with sufficient particularity under Rules 12(b)(6) and (9)(b). *Williams*, 417 F.3d at 455. The district court dismissed the complaint with prejudice as to both the relator and the government, stating that it was "dismissing the claims against the government with prejudice because it believed 'the United States has had ample opportunity to participate in the prosecution of those claims if [it] had any notion that any of them has the slightest merit,' " suggesting that the government's failure to intervene indicated that it found the claims meritless. *Id.*

{22} The United States Court of Appeals for the Fifth Circuit reversed and modified the dismissal to be without prejudice as to the government. *Id.* at 456. First, the court dismissed as "unreasonable" any speculation about the government's reasons for not intervening and the district court's inference that the government would have intervened if it found the relator's FCA claims "meritorious." *Id.* at 455. It observed that the FCA requires the Attorney General to conduct an investigation of the relator's allegations, but the FCA "does not require the government to proceed if its investigation yields a meritorious claim." *Id.* "Indeed, absent any obligation to the contrary, it may opt out for any number of reasons. For example, a decision not to

intervene may 'not necessarily be an admission by the [government] that it has suffered no injury in fact, but rather the result of a cost-benefit analysis.' " *Id.* (alterations omitted) (quoting *United States ex rel. Berge v. Bd. of Trs. of the Univ. of Ala.*, 104 F.3d 1453, 1458 (4th Cir. 1997)). The court concluded, "[G]iven the Rule 9(b) deficiencies, the government may have determined that the costs associated with proceeding based on a poorly drafted complaint outweighed any anticipated benefits." *Williams*, 417 F.3d at 455.

{23} The *Williams* court then noted that a dismissal with prejudice as to the government would give private parties "perverse incentives" to file poorly drafted or improperly pleaded qui tam actions. *Id.* "By essentially requiring the government to intervene in order to avoid forfeiting any future claims against the defendant, private parties would have the added incentive to file FCA suits lacking in the required particularity, knowing full well that the government would be obligated to intervene and ultimately 'fill in the blanks' of the deficient complaint." *Id.* It went on to state that the district court's approach would allow "a relator, in the most egregious of circumstances, to make sweeping allegations that, while true, he is unable to effectively litigate, but which nonetheless bind the government, via [claim preclusion], and prevent it from suing over those concerns at a later date when more information is available." *Id.* (internal quotation marks and citation omitted). It

therefore concluded that the district court had abused its discretion by dismissing the complaint with prejudice as to the government. *Id.* at 456.

{24} Without deciding the preclusive effect of a Rule 12(b)(6) dismissal on future related actions, but relying on *Williams*, the Eleventh Circuit also modified a district court's dismissal for failure to state a claim to be without prejudice to the government. *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1057 (11th Cir. 2015). A number of federal district courts have also followed *Williams* and held that a dismissal of a relator's complaint for insufficient pleading should be without prejudice to the government. In each of these cases, the government had declined to intervene in the relators' actions. *See, e.g.*, *United States v. KForce Gov't Sols., Inc.*, No. 8:13-cv-1517-T-36TBM, 2014 WL 5823460, at *6 n.2, *9 (M.D. Fla. Nov. 10, 2014) (dismissing an FCA complaint for failure to satisfy the Rule 9 pleading requirements and stating that dismissal is without prejudice to the government); *United States ex rel. Boros v. Health Mgmt. Assocs.* (*Health Mgmt. I*), No. 4:10-cv-10013-KMM, 2013 WL 12077816, at *1-2 (S.D. Fla. July 26, 2013) (clarifying that dismissal was without prejudice to the government after the relator's FCA complaint was dismissed for failure to state a claim); *United States ex rel. Banigan v. Organon USA, Inc.*, Civil Action H-08-3314, 2013 WL 12142351, at *34 (S.D. Tex. Feb. 1, 2013) (agreeing that "the dismissal [for inadequate pleadings] should be without prejudice to the [government] because it has no involvement in preparing the

complaint" and stating that "if the [c]ourt dismisses [the r]elators' complaint on insufficient pleading grounds, the dismissal would not preclude the government from bringing or continuing an action involving the same or similar claims"); *United States ex rel. Rostholder v. Omnicare, Inc.*, No. CCB-07-1283, 2012 WL 3399789, at *15 (D. Md. Aug. 14, 2012) (stating that "[t]he government's decision not to intervene . . . does not suggest that the government necessarily believed that no FCA case was viable . . . [and a]ccordingly, it would be inappropriate to dismiss with prejudice as to the [government] *or as to the states or localities* on whose behalf relator brought this claim" (emphasis added)), *aff'd*, 745 F.3d 694 (4th Cir. 2014). *But see Lusby*, 570 F.3d at 853 (stating that the district court erred in ordering a qui tam complaint dismissed with prejudice to the plaintiff and without prejudice to the government, but holding that judgment in a private suit did not bar a later qui tam action).

{25} Similarly, courts have dismissed a complaint with prejudice to the relator, but without prejudice to the government, where the relator failed to prosecute or acted improperly in litigation. *See, e.g.*, *United States ex. rel. Prince v. Va. Res. Auth.*, 2014 WL 3405657, at *3 (W.D. Va. July 10, 2014) (failure to prosecute), *aff'd*, 593 Fed. App'x 230 (4th Cir. 2015); *United States ex rel. King v. DSE, Inc.*, No. 8:08-CV-2416-T-23EAJ, 2013 WL 610531, at *11 (M.D. Fla. Jan. 17, 2013) (litigation misconduct); *cf. United States ex rel. Vaughn v. United Biologics, L.L.C.*, ___ F.3d.

___, 2018 WL 5000074, at *5 (5th Cir. 2018) (stating that "when the case's outcome is decided by the relator's voluntary decision to quit, courts tend not to bind the [g]overnment to that decision automatically" and collecting cases).

{26} Although distinguishable on its facts, *State ex rel. Peterson v. Aramark Correctional Services, LLC*, 2014-NMCA-036, 321 P.3d 128, echoes the reasoning in *Williams*. In *Peterson*, this Court considered whether a summary judgment in the plaintiff's personal injury suit barred the same plaintiff's later qui tam action against the same defendant. 2014-NMCA-036, ¶¶ 1-2. Holding that it did not, this Court noted that, as a qui tam relator, the plaintiff represented the state, rather than himself, and therefore, his capacity in the two suits was not the same and the "same parties or their privies" element of claim preclusion was not met. *Id.* ¶¶ 24, 33. In its analysis, this Court, like *Williams*, recognized that claim preclusion in the qui tam context could operate adverse to the public interest. *Peterson*, 2014-NMCA-036, ¶ 30. It stated that " 'it would be inappropriate to snuff out the government's interest [in the qui tam action] just because a potential relator thoughtlessly omitted a qui tam claim from a[n earlier] personal suit.' " *Id.* (alterations omitted) (quoting *Lusby*, 570 F.3d at 852). "[W]ere a personal lawsuit held to preclude a qui tam suit on claim preclusion grounds, the government would be incapable of vindicating its interest

by bringing a new qui tam suit, either on its own or through another relator" because the government would be bound by the judgment in the personal lawsuit. *Id.*[3]

{27} Defendants argue that the *Williams* holding is inapposite for three reasons. Defendants first argue that the United States Supreme Court's decision in *Eisenstein* supersedes *Williams*. Defendants rely on the statement in *Eisenstein* that "the [government] is bound by the judgment in all FCA actions regardless of its participation in the case." 556 U.S. at 936. But the *Eisenstein* Court was not considering the issue here; rather, the issue there was whether the government was a "party" to a privately initiated FCA action such that the private party could benefit from the longer period in which to appeal provided to the government under Federal Rule of Appellate Procedure 4(a)(1)(B). *Eisenstein*, 556 U.S. at 931. "The general rule is that cases are not authority for propositions not considered." *Sangre de Cristo Dev. Corp. v. City of Santa Fe*, 1972-NMSC-076, ¶ 23, 84 N.M. 343, 503 P.2d 323.

{28} In addition, the statement relied on by Defendants was a statement of the appellant's argument, not a statement of law by the Court. *See Eisenstein*, 556 U.S. at 936 ("[*P*]*etitioner relies on the fact* that the [government] is bound by the judgment in all FCA actions regardless of its participation in the case." (emphasis

[3]Notably, although it was unnecessary for the *Peterson* Court to discuss this fact under the circumstances of that case, "the district court granted [the defendant's] motion for summary judgment, and dismissed, with prejudice, all claims brought on behalf of [the qui tam p]laintiff, stating, however, that its order did not prejudice the [s]tate's ability to bring a related action based on the same facts." *Id.* ¶ 20.

added)). "[I]n light of *Eisenstein*'s narrow holding—that the [g]overnment was not a 'party' for the purposes of [Rule] 4(a)(1)(B)—it would be inappropriate to interpret this passing observation so broadly." *Vaughn*, 2018 WL 5000074, at *6 (rejecting an argument that *Eisenstein* abrogated *Williams*); *accord USA ex rel. Mastej v. Health Mgmt. Assocs.* (*Health Mgmt. II*), No. 2:11-cv-89-FtM-29DNF, 2014 WL 12616929, at *2 (M.D. Fla. June 10, 2014); *Health Mgmt. I*, 2013 WL 12077816, at *1. Finally, as shown above, a number of federal courts have relied on *Williams* after *Eisenstein* was decided in 2009. *But see Lusby*, 570 F.3d at 853 (stating that *Eisenstein* foreclosed dismissal without prejudice as to the government).

{29} Defendants next argue that the policy considerations in *Williams* are inapposite because the MFCA "required New Mexico to determine whether there was substantial evidence of a violation . . . and to dismiss the claim if none existed." They argue that this "obligation means that no qui tam complaint brought under the [MFCA] should ever receive the State's approval to proceed if, like the [*Williams*] complaint, it is so facially deficient that it lacks substantial evidentiary support." It is true that Section 27-14-7 requires that, when a claim is supported by substantial evidence, the state must either pursue the claim or permit the relator to pursue it. *See* § 27-14-7(E) (providing that if there is substantial evidence, the state "*shall*: (1) proceed with the action, in which case the action shall be conducted by the department; or (2) notify the court and the person who brought the action that it

declines to take over the action" (emphasis added)). However, Defendants' argument conflates a determination of evidence supporting a claim with a determination of the adequacy of the relator's complaint. The state is required to determine only whether "there is substantial evidence that a violation has occurred," not whether the relator's complaint adequately alleges a violation. Section 27-14-7(C); *see Wallis*, 2001-NMCA-017, ¶ 6 (stating that "[a] motion to dismiss for failure to state a claim under Rule 1-012(B)(6) . . . tests the legal sufficiency of the complaint, not the facts that support it"). To hold that the state is required to involve itself in the articulation of the relator's claims in the complaint is tantamount to requiring the state to intervene in the action. Such a result is contrary to the clear intent of the MFCA to deputize private parties to seek recovery on the state's behalf. *See Berge*, 104 F.3d at 1458 (stating that "the plain language of the [FCA] clearly anticipates that even after the [government] has 'diligently' investigated a violation . . . , the [g]overnment will not necessarily pursue all meritorious claims; otherwise there is little purpose to the qui tam provision permitting private attorneys general"); *see Vaughn*, 2018 WL 5000074, at *5 (citing *Williams* for the proposition that "the non-intervening [g]overnment should not be bound by the fate of an incompetent relator, lest it be forced to intervene in every action"); *see also* § 27-14-8(D) ("If the state elects not to proceed with the action, the person bringing the action shall have the right to conduct the action."); *cf. Williams*, 417 F.3d at 455 (stating that the government

might decline to intervene, even if there is evidence of a violation, because "the costs associated with proceeding based on a poorly drafted complaint [by the relator] outweighed any anticipated benefits").

{30} Finally, Defendants contend that *Williams* is factually distinguishable from the circumstances here. They argue that in *Williams*, the qui tam complaint was dismissed because it was "so deficient [under Rule 9(b)] that the court never reached the merits of the claim[,]" *Williams*, 417 F.3d at 456, whereas here Relator's claim was instead dismissed based on the "heightened pleading standard for materiality under the FCA," rather than the pleading requirements for fraud under Rule 9(b). *In re Plavix Mktg.*, 2017 WL 2780744, *10. They point out that the federal district court found that Relator had "pleaded herself out of court" by alleging facts that negated an essential element of an FCA claim. Thus, because Relator "could not plead the required element of 'materiality' as a matter of law[,]" the dismissal was on the merits.

{31} We do not read *Williams* as narrowly as Defendants. The *Williams* holding was not limited to the Rule 9(b) pleading standard. Instead, the core of the *Williams* holding is the failure to adequately plead an FCA claim under Rule 12(b)(6), regardless of the standard applied. *See Williams*, 417 F.3d at 453 (stating that the defendant "moved to dismiss under Rule 12(b)(6) for failure to state a claim because the complaint did not comply with the requirements of Rule 9(b)"). The reasoning

for the holding was that the government should not be bound by the relator's weaknesses in pleading what might be a valid claim, whatever those weaknesses are. In other words, "[w]hy would Congress want [a poorly plead but meritorious] earlier suit to bar a later potentially successful suit that might result in a large recovery for the [g]overnment?" *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1979 (2015); *see id.* (rejecting an argument that "a first-filed suit would bar all subsequent related suits even if that earlier suit was dismissed for a reason having nothing to do with the merits"). Hence, even if the *In re Plavix Marketing* dismissal was not based on Rule 9(b), an issue we need not decide, *Williams* would still apply here. *See KForce Gov't Sols.*, 2014 WL 5823460, at *9 (dismissing the relator's complaint where "the facts . . . plead . . . preclude a claim under the FCA" with prejudice, but without prejudice as to the government).

Dismissal of Relator's Qui Tam Action Does Not Bar the State's Claims

{32} The dismissal order in *In re Plavix Marketing* does not specify whether it is with or without prejudice to Relator or the government. *In re Plavix Mktg.*, 2017 WL 2780744, at *1, *23. Nevertheless, because the order did not provide for a fifth amendment and disposed of all of Relator's claims, we construe it as an adjudication on the merits as to Relator, consistent with the general rule that a dismissal under Rule 12(b)(6) is an adjudication on the merits for claim preclusion purposes. *Moitie*, 452 U.S. at 399 n.3 (stating that "[t]he dismissal for failure to state a claim

under Federal Rule of Civil Procedure 12(b)(6) is a judgment on the merits" (internal quotation marks and citation omitted)); *see Kirby*, 2010-NMSC-014, ¶ 66 (stating that this approach prevents repetitive suits); *Bralley*, 1985-NMCA-043, ¶ 14 ("An order dismissing a party's entire complaint without authorizing or specifying a definite time for leave to file an amended complaint, is a final order for purposes of appeal.").

{33} However, for the reasons stated in *Williams* and its progeny, we construe the order as without prejudice to the government. *Cf. Bralley*, 1985-NMCA-043, ¶ 18 (stating that "[t]he words 'without prejudice' when used in an order or decree generally indicate that there has been no resolution of the controversy on its merits and leave the issues in litigation open to another suit as if no action had ever been brought"). Thus, as to the State, the federal district court's dismissal of Relator's fourth amended complaint is not a "final judgment on the merits" for claim preclusion purposes. "Because the claim preclusion doctrine does not bar a subsequent lawsuit unless all [of the claim preclusion] elements are met, we do not consider the parties' remaining claim preclusion arguments." *Peterson*, 2014-NMCA-036, ¶ 33.

CONCLUSION

{34} Consistent with federal FCA and claim preclusion law, we construe the *In re Plavix Marketing* dismissal as without prejudice to the State's claims, and, therefore,

hold that the dismissal does not bar the State's present claims under the UPA and FATA, as well as common law claims for fraud and unjust enrichment. Accordingly, we affirm the state district court's denial of Defendants' motion to dismiss.

{35} **IT IS SO ORDERED.**

LINDA M. VANZI, Chief Judge

WE CONCUR:

J. MILES HANISEE, Judge

JULIE J. VARGAS, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. A-1-CA-36906

STATE OF NEW MEXICO, *ex rel.* HECTOR BALDERAS, ATTORNEY GENERAL,

Plaintiff-Appellee,

v.

BRISTOL-MYERS SQUIBB COMPANY, SANOFI-AVENTIS U.S. LLC, SANOFI US SERVICES INC., formerly known as SANOFI-AVENTIS U.S. INC., SANOFI-SYNTHELABO INC., and DOE DEFENDANTS 1 TO 100,

Defendants-Appellants.

Appeal from the First Judicial District Court
County of Santa Fe
The Honorable Sarah M. Singleton judge *pro tempore*
Dist. Ct. No. D-101-CV-2016-02176

DEFENDANTS-APPELLANTS' MOTION FOR REHEARING

ARNOLD & PORTER KAYE SCHOLER LLP

Kirk Ogrosky
Murad Hussain
601 Massachusetts Ave, NW
Washington, DC 20001
Telephone: (202) 942-5000

Anand Agneshwar
250 West 55th Street
New York, NY 10019-9710
Telephone: (212) 836-8000

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

Earl E. DeBrine, Jr.
Timothy C. Holm
500 Fourth Street, N.W., Suite 1000
P.O. Box 2168
Albuquerque, NM 87103-2168
Telephone: (505) 848-1800

Counsel for Defendants-Appellants

ORAL ARGUMENT REQUESTED

ATTACHMENT 2

Pursuant to New Mexico Rule of Appellate Procedure 12-404, Defendants-Appellants ("Defendants") respectfully move this Court to rehear the decision set forth in its October 24, 2018 opinion ("the Opinion"). Without hearing oral argument, the Court affirmed the denial of Defendants' motion to dismiss the State's case as barred by *res judicata*. At issue is the preclusive effect of a federal court's prior dismissal of the related *Dickson* case involving the federal and New Mexico False Claims Acts ("FCAs").

Dickson was dismissed under Federal Rule of Civil Procedure 12(b)(6). This Court held solely that the *Dickson* dismissal was "without prejudice to the State's claims" here (Op. ¶ 34), and thus was "not a 'final judgment on the merits' for claim preclusion purposes" (*id.* ¶ 33). This holding rested on a legal conclusion that was not briefed or argued by any party: that dismissal due to a private relator's "failure to adequately plead an FCA claim under Rule 12(b)(6), regardless of the standard applied," will never be with prejudice to a non-intervening governmental entity. (*Id.* ¶ 31.) This conclusion ignored Federal Rule 41, misread federal precedents, mistakenly rewrote a federal judgment, and should be revisited.

The question here is not what the *Dickson* dismissal ***should*** have said; the only question is what it actually ***did*** say. Under Rule 41, which the Opinion overlooks, a Rule 12(b)(6) dismissal is a merits adjudication "with prejudice" unless the issuing court says otherwise. This is true even for FCA cases where the

government has not intervened. The *Dickson* dismissal order was issued without caveats, so it was with prejudice to all claims.

State courts have no power to revise final federal judgments. In all of the cases cited by the Opinion where federal courts dismissed an FCA relator's case "without prejudice" to the government, those courts did so when exercising their own direct or appellate jurisdiction to enter or revise the FCA judgment. The Opinion errs by treating this Court as similarly situated to those courts.

Had the State wanted the *Dickson* dismissal to be without prejudice to its rights, it could have—even without intervening—asked the *Dickson* court to modify the dismissal or appealed to the federal circuit court. The State did nothing, despite being given the opportunity to do so by the district court below, through its stay orders. Because the State sat on its hands, once the appellate deadline expired, the *Dickson* judgment became a final merits judgment, with prejudice—and without exception.

Finally, even if this Court could rewrite a federal judgment, the Opinion erroneously relies on cases where a relator's federal FCA claims failed to satisfy Federal Rule 9(b)'s requirement to plead fraud with particularity. The Opinion expands those cases, particularly *U.S. ex rel. Williams v. Bell Helicopter Textron, Inc.*, 417 F.3d 450 (5th Cir. 2005), by misreading them as "not limited to the Rule 9(b) pleading standard" (*id.* ¶ 31), which no party in this case argued. But even if

all Rule 12(b)(6) dismissals for lack of specificity warrant dismissal "without prejudice" to the government, *Dickson* was not dismissed because the pleadings ***lacked*** specificity, but because they were ***so*** specific that they affirmatively foreclosed FCA relief.

I. UNDER FEDERAL LAW, THE *DICKSON* DISMISSAL IS A MERITS DISMISSAL "WITH PREJUDICE," BECAUSE THE ORDER DID NOT SAY OTHERWISE, AND A STATE COURT CANNOT REVISE THAT FINAL FEDERAL JUDGMENT.

The Opinion correctly observes that "federal law determines the preclusive effect of a federal judgment," and that federal and New Mexico law ordinarily "are not divergent on claim preclusion doctrine." (Op. ¶ 14 (quotation marks and citations omitted).) However, the Opinion's analysis of Rule 12(b)(6) dismissals overlooks federal rules and precedent.

A. The Opinion Overlooks Federal Rule 41.

The Opinion states that "the designation of such a dismissal as 'on the merits' is something of a misnomer." (Op. ¶ 16.) It then errs by concluding, based on New Mexico case law, that a dismissal under ***Federal*** Rule 12(b)(6) "obviously does not involve a judicial determination of the actual merits." (*Id.* (quotation marks omitted).)

Rule 41, unmentioned in the Opinion, provides that while voluntary dismissals are presumptively without prejudice, *see* Fed. R. Civ. P. 41(a)(1)(B), ***involuntary*** dismissals are presumptively on the merits, with prejudice.

Specifically, Rule 41(b) states that a dismissal under any other rule "operates as an adjudication on the merits," "[u]nless the dismissal order states otherwise" or the dismissal is "for lack of jurisdiction, improper venue, or failure to join a party under Rule 19." *Id.* R. 41(b) (cited in Defs.' Br. 34); *cf. Apodaca v. AAA Gas Co.*, 2003-NMCA-085, ¶ 83 ("The only applicable exception we find to the rule precluding claim splitting is where the court ***expressly reserves*** a plaintiff's right to maintain a second action." (citing Restatement (Second) of Judgments § 26(1)(b)) (emphasis added)).

Thus, "[a] district court's dismissal under Rule 12(b)(6) is, of course, with prejudice unless it ***specifically orders*** dismissal without prejudice." *Carter v. Norfolk Cmty. Hosp. Ass'n, Inc.*, 761 F.2d 970, 974 (4th Cir. 1985) (emphasis added); *Sheldon v. Vermonty*, 269 F.3d 1202, 1207 (10th Cir. 2001) (when a claim is dismissed as "facially deficient," "as is the case with a dismissal under [Rule] 12(b)(6) for failure to state a claim, such a dismissal fully disposes of the case, and it must therefore be with prejudice"); *Sherman v. Am. Fed'n of Musicians*, 588 F. 2d 1313, 1314 (10th Cir. 1978) ("[A] dismissal for failure to state a claim upon which relief can be granted is with prejudice." (quotation marks omitted)).

B. The Opinion Errs By Rewriting A Final Federal Judgment Over Which A State Court Lacks Jurisdiction.

The Opinion relies on a line of cases stemming from *U.S. ex rel. Williams v. Bell Helicopter Textron, Inc.*, 417 F.3d 450 (5th Cir. 2005), for the proposition "that suits by or on behalf of the government ***should not*** be precluded by certain actions of a private party, even when that party acts as a *qui tam* relator," "especially . . . when the first suit is dismissed for reasons unrelated to the merits of the claims." (Op. ¶ 19 (emphasis added).) Regardless of what the *Dickson* court "should" have done, that is not the question for this Court. A state court may only apply federal law to what the *Dickson* court actually did.

Rule 41(b) gave the *Dickson* court the discretion to order that the case was being dismissed "without prejudice" to New Mexico. That court chose not to, and its dismissal order did not say it was "without prejudice" to anyone. (Op. ¶ 32; *see also* Defs.' Br. 33-34 (quoting order).) By operation of Rule 41, the dismissal was therefore an adjudication on the merits, with prejudice—and without exceptions. "Rule 41(b) and the doctrine of *res judicata* do not . . . operate independently of each other; rather, the latter extends the scope of the former to include not only 'the plaintiff,' but also those in privity therewith." *In re Schimmels*, 127 F.3d 875, 884 (9th Cir. 1997) (barring government's bankruptcy claims against FCA defendant due to earlier merits dismissal of relators' own bankruptcy claims, despite government's non-intervention in FCA case).

A state court has no power to revise the *Dickson* dismissal's scope. Federalism principles prevent state courts from rewriting federal judgments. *E.g.*, *Claflin v. Houseman*, 93 U.S. 130, 137 (1876) ("the State courts have no power to revise the action of the Federal courts"). The decisions cited in the Opinion which ordered FCA dismissals "without prejudice" to the federal government all involved federal courts exercising ***original or direct appellate jurisdiction*** over the dismissals in question. (*See* Op. ¶¶ 20-25 (citing cases).) But a state court considering the *res judicata* effect of the *Dickson* judgment has no jurisdiction over what the *Dickson* judge did. By disregarding the *Dickson* dismissal's text and how Rule 41 applies to it, the Opinion is effectively writing "without prejudice to New Mexico" into a final federal judgment that says no such thing. The Opinion thus interferes with the federal judiciary's control over the finality of its decisions through an impermissible collateral attack.

The State never challenged the *Dickson* court's discretionary drafting of its dismissal. It had ample opportunity to do so, because the court below stayed this case specifically so the State could address its claim-splitting. When a government "believes that its rights are jeopardized by an ongoing *qui tam* action," one obvious solution is intervention. *U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 936. But ***even without intervening*** in *Dickson*, the State could have moved the federal court to clarify that its dismissal was without prejudice to the government.

E.g., *U.S. ex rel. Mastej v. Health Mgmt. Assocs., Inc.*, No. 4:10-CV-10013, 2013 WL 12077816, at *1 (S.D. Fla. July 26, 2013) (deciding federal government's motion for clarification) (cited in Op. ¶ 28); *cf. Apodaca*, 2003-NMCA-085, ¶ 82 (noting that *res judicata* can be avoided by asking a court "to expressly reserve the plaintiff's right to maintain a second action"). Or the State could have sought to modify the order by appealing the judgment. *E.g.*, *U.S. ex rel. Williams v. Bell Helicopter Textron, Inc.*, 417 F.3d 450, 455-56 (5th Cir. 2005) (deciding federal government's appeal on that discrete issue) (cited in Op. ¶¶ 20-24, 26-31, 33).

The State did none of these things. Knowing full well that *res judicata* was a live question in this case, the State let the *Dickson* reconsideration and appellate deadlines expire in 2017. It then attacked the dismissal order collaterally in this state case. This Court cannot accept the State's untimely invitation to rewrite the *Dickson* judgment. *See V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 226 (10th Cir. 1979) ("proper procedure for review" of erroneous judgments is "by direct appeal, not collateral attack.").

C. The Opinion Misreads The U.S. Supreme Court's FCA Decisions.

First, the Opinion misreads the U.S. Supreme Court's decision in *Eisenstein*. There, the Supreme Court noted that the petitioner relied on "the fact that the United States is bound by the judgment in all FCA actions regardless of its participation in the case." *Id.* at 936. The Opinion discounts that passage as

merely "a statement of the [petitioner's] argument, not a statement of law by the [Supreme] Court." (Op. ¶ 28.) But it ***was*** a statement of law, as the Supreme Court later repeated, *see* 556 U.S. at 936 (citing "[t]he fact that the Government is bound by the judgment"), and as ***conceded*** by then-Solicitor General Elena Kagan in the United States' brief: "[T]he government can be bound by the judgment in a *qui tam* action even when it elects not to become a party, but instead allows the relator to litigate on its behalf." Br. for U.S. as Amicus Curiae at 27, *Eisenstein*, No. 08-660, 2009 WL 870023 (S. Ct. Mar. 31, 2009). Thus, appellate decisions before and after *Eisenstein*—including one decided after the close of briefing here—confirm that "it is well-settled that a final judgment on the merits of a relator's claim will have a binding effect on even the non-intervening Government." *U.S. ex rel. Vaughn v. United Biologics, L.L.C.*, No. 17-20389, 2018 WL 5000074, at *5 (5th Cir. Oct. 16, 2018) (citing *Eisenstein*) (cited in Op. ¶¶ 25, 28-29); *U.S. ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 853 (7th Cir. 2009) (cited in Op. ¶¶ 18, 28) (relying on *Eisenstein* and criticizing dismissal of relator's *qui tam* claim "without prejudice" to the government, because if a relator "ha[s] litigated a *qui tam* action to the gills and lost, neither another relator nor the United States could start afresh"); *Schimmels*, 127 F.3d at 884.

Second, the Opinion mistakenly relies on the Supreme Court's decision in *Kellogg Brown & Root Servs., Inc. v. U.S. ex rel. Carter* ("*KBR*"), 135 S. Ct. 1970

(2015). (*See* Op. ¶ 31 (modifying *KBR* quote).) *KBR* only addressed the interpretation of a ***statutory*** FCA bar that gives preclusive effect to an earlier-filed, related *qui tam* case. *KBR* explicitly declined to address the government's claim preclusion arguments, stating that what qualifies as a merits judgment for *res judicata* "is not before us." 135 S. Ct. at 1979.

III. THE OPINION MISCONSTRUES FEDERAL LAW AND THE BASIS FOR THE *DICKSON* DISMISSAL.

The Opinion further errs by relying on the *Williams* line of cases, because they were all limited to dismissals of a relator's claim for failure to plead fraud with the particularity required by Federal Rule 9(b). (*See* Op. ¶¶ 20-24 (citing *Williams*, *Urquilla-Diaz*, *KForce*, *Boros*, *Banigan*, and *Rostholder*).) The State argued for these cases' application on the theory that the *Dickson* dismissal was under Rule 9(b). But that was simply not true, as shown by the *Dickson* opinion. (*See* Defs.' Br. 35-36; Defs.' Reply 15-17.) This Court's Opinion does not disagree, but instead adopts a position that even the State did not argue: that the *Williams* line of cases is not limited to Rule 9(b), but rather applies to *all* "failures to adequately plead an FCA claim under Rule 12(b)(6), regardless of the standard applied." (Op. ¶ 31.) No authority supports that position, the Opinion does not cite any, and it is at odds with Rule 41 and federal precedent. *See supra* § I.A.

At most, *Williams* only supports the proposition that federal courts should exercise their discretion under Rule 41(b) and dismiss FCA claims "without

prejudice" to the non-intervening government if the relator's allegations lack ***specificity***.[1] But not all Rule 12(b)(6) dismissals are for lack of specificity.

Rather, there are generally two types of deficient claims: those that are too vague, even under Rule 8(a)'s lenient pleading standard, and those that are "well-pleaded" yet still fail to "state[] a plausible claim for relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Unlike *Williams*, *Dickson* was not dismissed because the pleadings were not clear or precise enough. Rather, it was a substantive dismissal because the pleadings were so specific, they ***affirmatively*** foreclosed the possibility of "materiality" as a matter of law and pled the relator out of court. (*See* Defs.' Br. 35-36.) The Opinion errs by shoehorning the substantive *Dickson* analysis into *Williams*' framework for non-specific pleadings.

The Opinion's application of the *Williams* line of cases also overlooks the Restatement (Second) of Judgments ("Restatement"), which provides: "Where . . . the proceeding may be brought by a private party only with the authorization of the responsible public authority, the latter is concluded by the [first] action." RESTATEMENT § 37 reporter's note, cmt. B. Unlike the federal FCA, the New Mexico FCA only permitted the *Dickson* relator to proceed with "the authorization

[1] *See Williams*, 417 F.3d at 456 (holding concerned a Rule 12(b)(6) motion "based on a lack of specificity in the complaint as required by Rule 9(b)"); Reply Br. of United States at 7, *Williams*, No. 04-10468, 2004 WL 5558581 (5th Cir. Dec. 9, 2004) (limiting appeal to asking whether FCA *qui tam* dismissals are on the merits as to the government when "based on the fact that the relator lacked sufficient personal knowledge to state his own claim with the requisite particularity").

of the responsible public authority," *see id.*, because the suit could only proceed once the State investigated the "factual allegations and legal contentions ***made in the complaint***" and then made "a written determination" that "there is substantial evidence that a violation occurred." (*See* Defs.' Reply 3-4 (citing Restatement and NMSA 1978, § 27-14-7(C)).)

The Opinion states that New Mexico "is required to determine ***only*** whether 'there is substantial evidence that a violation occurred,' not whether the relator's complaint adequately alleges a violation." (Op. ¶ 20 (emphasis added). But § 27-14-7(C) expressly requires the State to investigate the complaint's "allegations" and "contentions" as well, thereby passing judgment on its legal sufficiency before a relator may proceed with the suit. Thus, once the *Dickson* complaint was dismissed under Rule 12(b)(6) without any qualifying language under Rule 41, the State's claims here became "concluded" by *Dickson*'s dismissal. *See* RESTATEMENT § 37 reporter's note, cmt. B.

CONCLUSION

For the foregoing reasons, Defendants-Appellants respectfully request rehearing of the Court's Opinion.

November 8, 2018

Respectfully submitted,

By: */s/ Earl E. DeBrine, Jr.*

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

Earl E. DeBrine, Jr.
Timothy C. Holm
500 Fourth Street, N.W., Suite 1000
P.O. Box 2168
Albuquerque, NM 87103-2168
Telephone: (505) 848-1800
edebrine@modrall.com
tholm@modrall.com

ARNOLD & PORTER KAYE SCHOLER LLP

Kirk Ogrosky
Murad Hussain
601 Massachusetts Ave, NW
Washington, DC 20001
Telephone: (202) 942-5000
Murad.Hussain@arnoldporter.com
Kirk.Ogrosky@arnoldporter.com

Anand Agneshwar
250 West 55th Street
New York, NY 10019-9710
Telephone: (212) 836-8000

Counsel for Defendants-Appellants

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent via email this 8th day of November 2018, to:

P. Cholla Khoury
Consumer & Environmental
Protection, Division Director
Assistant Attorney General
Office of the NM Attorney General
408 Galisteo Street
Santa Fe, NM 87501
Telephone: (505) 827-6000
Ckhoury@nmag.gov

Daniel Alberstone
Jonas P. Mann
Peter Klausner
Baron & Budd, P.C.
15910 Ventura Blvd., Suite 1600
Encino, CA 91436
Telephone: (818) 839-2333
dalberstone@baronbudd.com
jmann@baronbudd.com
pklausner@baronbudd.com

Marcus J. Rael, Jr.
Robles, Rael and Anaya, P.C.
500 Marquette Ave. NW Suite 700
Albuquerque, New Mexico 87102
Telephone: (505) 242-2228
marcus@roblesrael.com

Russell Budd
Barron & Budd, P.C.
The Centrum
3102 Oak Lawn Ave. #1100
Dallas, TX 75219
Telephone: (214) 521-3605
rbudd@baronbudd.com

Burton LeBlanc
Baron & Budd, P.C.
2600 CitiPlace Dr.
Baton Rouge, LA 70808
Telephone: (225) 927-5441
bleblanc@baronbudd.com

Attorneys for Plaintiff-Appellee

MODRALL, SPERLING, ROEHL, HARRIS
& SISK, P.A.

By: */s/ Earl E. DeBrine, Jr.*
Earl E. DeBrine, Jr.

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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO ex rel.
HECTOR BALDERAS, Attorney General,

Plaintiff-Appellee,

v.

BRISTOL-MYERS SQUIBB COMPANY, SANOFI-AVENTIS U.S. LLC, SANOFI U.S. SERVICES INC., formerly known as SANOFI-AVENTIS U.S. INC., SANOFI-SYNTHELABO INC., and DOE DEFENDANTS 1-100,

Defendants-Appellants.

No. A-1-CA-36906

ORDER DENYING MOTION FOR REHEARING

This matter is before the Court on Appellants' motion for rehearing and Appellee's response thereto. The original panel has considered the motion and response.

THE COURT ORDERS THAT the motion is **DENIED**.

LINDA M. VANZI, Chief Judge

ATTACHMENT 3