IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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

Plaintiff-Respondent,

vs.

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.

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

PLAINTIFF-RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Rule 12-318(F)(3). According to Microsoft Word 2013 for Office , the body of this brief, as defined by Rule 12-318(F)(1), contains 7140 words.

BY: /s/ Marcus J. Rael, Jr.
Marcus J. Rael, Jr.

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I. INTRODUCTION

From the outset of this case, Defendants have made repeated attempts to dispose of the State's claims based on a false narrative – i.e., that once she initiates a lawsuit, a *qui tam* relator is in privity with the State for all purposes, *even for claims she was never authorized to bring in the first instance*. However, that is simply not true; a *qui tam* relator is a creature of statute, and her authority to act on behalf of the State extends only so far as the statute allows.

Here, Eliza Dickson, filed a complaint in an Illinois federal court that was then transferred to a New Jersey federal court as part of the federal Plavix MDL. Dickson was a putative *qui tam* relator pursuing a single, statutory claim under New Mexico state law. That claim, under the New Mexico Medicaid Fraud Act, was dismissed by the District of New Jersey for failure to meet the heightened pleading standards of Rule 9(b) of the Federal Rules of Civil Procedure. The order dismissing Dickson's complaint made no mention of barring the State's claims here, likely because the State was neither a "party" to that *qui tam* action, nor in privity with the relator with respect to any claims other than the single claim she brought there in federal court.

Prior to the District of New Jersey's dismissal of Dickson's complaint, the State filed its own action here in state court, asserting wholly different claims that were unavailable to Dickson or any other relator. Moreover, the State's charging allegations here rest on different facts. While both lawsuits broadly concern

Defendants' actions and statements with regard to the marketing of its drug Plavix, the State's claims here focus on particular unfair and deceptive practices employed by Defendants, the gravamen of which focuses heavily on Defendants' failure to disclose Plavix's ineffectiveness on a subset of the State's population who are "poor metabolizers." These material charging allegations cannot be found in Dickson's operative complaint.

Based on this record, the district court here found that because the State was proceeding on different claims that the relator had no standing to pursue, they were not affected by the federal court's dismissal of Dickson's complaint. On review, the Court of Appeal, applying the applicable law, *interpreted* the New Jersey federal court's dismissal order as without prejudice to the State's claims.

Defendants now attempt to recast the Court of Appeal's *interpretation* of that dismissal order as either a "collateral attack" on a federal judgment or an unsupported creation of an exception for the State to pursue its claims here. Neither is true. The lower courts here simply interpreted the effect of a federal judgment on the litigants before them, as courts do every day. Moreover, the Court of Appeals' opinion is sound, based on numerous cases holding that where, as here, the State has not participated in or supervised a *qui tam* action, and that action is dismissed at the pleading stage, the State's claims are not precluded, especially claims that the relator had no standing to bring in the first instance.

To accept Defendants' arguments would dramatically expand the consequences of foreign *qui tam* litigation beyond its statutory scope and intent. In essence, every *qui tam* filing would require the Attorney General to travel around the country, intervening in cases to protect against the loss of State claims as a result of a relator's unartful pleading, or the relator's inability to assert possible claims because she lacked standing. The lower panel's ruling avoids the impracticable consequences of such a decision.

In short, notwithstanding Defendants' repeated assault on the truth, it still remains a fact that the State was never a party to Dickson's *qui tam* action, never participated in or supervised the relator, and the State's complaint here alleges both different facts and different claims. Moreover, critically, the federal court's dismissal of Dickson's complaint for her failure to meet the heightened pleading standards of Rule 9(b) was **not** an adjudication on the merits of the different claims the State asserts here. *Res judicata* does not apply and the Court of Appeals ruling should be affirmed.

II. FACTUAL AND PROCEDURAL BACKGROUND

In 2011, Dickson filed a federal lawsuit against Defendants, putatively as a *qui tam* relator. Dickson alleged claims under the federal False Claims Act[1] and similar state statutes, including a single claim under New Mexico law for violation

[1] 31 U.S.C. §§ 3729, *et seq.*

of the New Mexico Medicaid False Claims Act.[2] In particular, Dickson alleged that "Defendants marketed Plavix as superior to aspirin and other products 'in order to induce the New Mexico State Government to … pay for prescriptions of Plavix that were not medically necessary.'" [RP 132-133].

Dickson's case[3] remained in the pleading stage without any involvement from the State. The State never intervened in Dickson's case. The State never appeared in Dickson's case, nor took any role, supervisory, participatory or otherwise, in Dickson's case. Judge Wolfson of the United States District Court for the District of New Jersey eventually dismissed Dickson's case based on her failure to meet the heightened pleading standard for pleading her fraud-based claims under Rule 9(b).[4]

Prior to the court's dismissal of *Dickson*, the State of New Mexico filed its complaint here against Defendants, alleging that certain sales and marketing practices employed by Defendants, related to their blockbuster drug Plavix, violated a number of the State's consumer protection laws. [RP 2-49] ("Compl."). The State's complaint alleged causes of action not found in *Dickson* for violations of the New Mexico Unfair Practices Act, the New Mexico Medicaid Fraud Act, and the New

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[2] NMSA 1978 §§ 27-14-1, *et seq.*

[3] *United States ex rel. Dickson v. Bristol Myers Squibb Co.*, MDL Nos. 13-2418, 13-1039 (D.N.J.) ("*Dickson*")

[4] "[T]he Court finds the imposition by the Supreme Court in Escobar of a heightened pleading standard for materiality under the FCA to be dispositive of Relator's allegations in the 4AC." *In re Plavix Mktg., Sales Practice & Prod. Liab. Litig. (No. II)*, 332 F. Supp. 3d 927, 944 (D.N.J. 2017).

Mexico Fraud Against Taxpayers Act, as well as common law claims of fraud, negligence, and unjust enrichment. (Compl. ¶¶ 100-189.) Moreover, unlike *Dickson*, the State has not alleged a claim under the state's Medicaid False Claims Act.

In contrast to Dickson's complaint, the State's complaint here alleges that Defendants knew and failed to disclose that Plavix is ineffective on certain patient populations; that Defendants' labeling, promotion, marketing, and sale of Plavix constituted false, deceptive, unfair, and unlawful conduct (Compl. ¶¶ 2-6; 27-95.); that, since March 1998, Defendants knew or should have known that Plavix has a diminished or no effect on a significant percentage of New Mexico's patient population and failed to disclose that information to patients and prescribing physicians (Compl. ¶¶ 3; 29-47.), and; that Defendants knew or should have known that those patients for whom Plavix would have reduced or no efficacy could have been identified easily through a simple genetic test and failed to disclose that information as well. (Compl. ¶¶ 3; 35.)

Additionally, the State also contends that Defendants failed to disclose what they knew about Plavix, withheld any information that conflicted with Defendants' goal of maximizing Plavix sales (Compl. ¶¶ 4; 6; 48-60.), and that Defendants even minimized adverse information about Plavix by influencing physicians to prescribe

higher doses of Plavix, putting patients at higher risk of gastrointestinal bleeding and other complications. (Compl. ¶¶ 34; 54; 61-68.)

It was not until March 25, 2010, by order of the Food and Drug Administration, that Defendants finally added a "black box warning" to Plavix's label. This warning disclosed that Plavix does not become effective until it is metabolized into its active form by the CYP2C19 liver enzyme. (Compl. ¶¶ 29-47.) This warning is significant because patients with certain CYP2C19 genotypes poorly metabolize Plavix, which results in reduced or no efficacy. (Compl. ¶¶ 29-30.) The black box warning recommends that patients who are poor CYP2C19 metabolizers should therefore consider an alternative treatment. (Compl. ¶ 31.) The black box warning, accordingly, suggests that prescribing physicians consider genetic testing of their patients to determine whether they are a poor metabolizer. (Compl. ¶ 31.) None of these charging allegations contained in the State's complaint were at issue in *Dickson.*

Defendants moved to dismiss the State's complaint, and the State timely opposed. [RP 129-228; 471-497]. Defendants argued that the State's complaint was barred under the doctrine of claim splitting because the *qui tam* relator was pursuing her Medicaid False Claim Act claim nominally on behalf of New Mexico while the State brought other Plavix-related claims in this case. [RP 132-136]. While this

motion to dismiss was pending, the district court ordered the case stayed pending the outcome of Defendants' motion to dismiss in *Dickson*. [RP 524-526].

While Defendants argue that the district court gave the State an opportunity to dismiss its claims in *Dickson* or consolidate in a single forum, Defendants conveniently ignore the fact that the State had requested that Defendants stipulate to have Dickson's New Mexico state-law claim transferred here, but that Defendants refused. [RP 944]. Indeed, if Defendants' concern was litigating New Mexico claims in different jurisdictions, as they repeatedly complained to the district court, they could have easily consented to the State's request to transfer the New Mexico claim from the New Jersey federal court to the district court here. [RP 943].

The federal court in *Dickson* then dismissed the *qui tam* relator's complaint, including the cause of action she brought under the New Mexico Medicaid False Claims Act—the relator's sole cause of action under New Mexico state law. [RP 623-647]. The court's dismissal order made no mention of the State of New Mexico.

With *Dickson* dismissed, the district court here lifted its stay and ordered supplemental briefing on the impact of the relator's claim in New Jersey. [RP 596-599]. Defendants filed supplemental briefing in support of their motion to dismiss, now arguing that the doctrine of *res judicata* required the dismissal of the State's claims here given the federal court's dismissal of the relator's New Mexico Medicaid False Claims Act cause of action. [RP 607-696]. The State opposed. [RP 940-953].

The district court denied Defendants' motion to dismiss. [RP 1057-1062]. The district court held that "the causes of action are not the same in the two suits . . . [a]nd with the exception of the State's FATA claim, the relator could not have asserted the claims the State asserts here because the relator lacked authority to do so."[RP 1059].

The district court further held that "while the relator in the *Dickson* case stood in the shoes of the State of New Mexico for purposes of the New Mexico False Claims Act claim, the relator did not stand in the State's shoes for purposes of the claims asserted by the State here." [RP 1059]. Finally, the district court held that because the New Jersey federal court dismissed the relator's claim based on her failure to meet Rule 9(b)'s heightened pleading standard, the dismissal was "not based on the merits of the claim, it would be inappropriate to bar the State's claims." [RP 1059]. Defendants appealed.

Following briefing, the Court of Appeals affirmed the district court's decision, correctly holding that "a federal district court's dismissal of *qui tam* claims for failure to state a claim [does not bar] the State from pursuing different claims arising from similar facts, where the State had not intervened in the qui tam action." *State ex rel. Balderas v. Bristol-Myers Squibb Co.*, 2019-NMCA-016, ¶ 1, 436 P.3d 724, 726, cert. granted (Mar. 11, 2019).

The Court of Appeals recognized 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.'" *Balderas*, 2019-NMCA-016, ¶ 18 (quoting *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 853 (7th Cir. 2009)). However, the panel noted that "courts have also recognized that, under certain circumstances, the government's role in vindicating public interests militates against preclusion of its claims," and that "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." *Balderas*, 2019-NMCA-016, ¶¶19-20 (citing *United States ex rel. Williams v. Bell Helicopter Textron, Inc.*, 417 F.3d 450, 455-56 (5th Cir. 2005)).

Accordingly, in interpreting the court's dismissal order in *Dickson*, the Court of Appeals held "we construe it as an adjudication on the merits as to Relator …. However, for the reasons stated in Williams and its progeny, we construe the order as without prejudice to the government." *Balderas*, 2019-NMCA-016, ¶¶32-33.

III. STANDARD OF REVIEW

Whether the elements of *res judicata* are satisfied is a legal question, which this Court reviews *de novo*. *Kirby v. Guardian Life Ins. Co. of Am.,* 2010-NMSC-014, ¶ 61, 148 N.M. 106, 124, 231 P.3d 87, 105.

IV. ARGUMENT

As both the district court and the Court of Appeals correctly held, Defendants did not and cannot meet their burden to show that *res judicata* should apply to this case. The failure of Dickson to meet the heightened pleading standard under Rule 9(b) on a claim she pursued in federal court, does not operate to preclude the State from now enforcing its other, distinct consumer protection laws here in state court.

"*Res judicata* is a judicially created doctrine designed to promote efficiency and finality by giving *a litigant* only one full and fair opportunity to litigate a claim and by precluding any later claim that *could have*, and should have, been brought as part of the earlier proceeding." *Potter v. Pierce*, 2015-NMSC-002, ¶ 1, 342 P.3d 54, 55 (emphasis added). Here, the State was not a "litigant" in *Dickson,* and the claims brought by the State here could not have been brought by Dickson or any other relator, as privity did not exist as to these other claims.

The party asserting *res judicata* has the burden of establishing all its elements. *Moffat v. Branch*, 2005-NMCA-103, ¶ 10, 138 N.M. 224, 227–28, 118 P.3d 732, 735–36. "The party asserting *res judicata* must satisfy the following four requirements: (1) [t]he parties must be the same, (2) the cause of action must be the same, (3) there must have been a final decision in the first suit, and (4) the first decision must have been on the merits." *Kirby v. Guardian Life Ins. Co. of Am.*, 2010-NMSC-014, ¶ 61, 148 N.M. 106, 124, 231 P.3d 87, 105 (citing *City of Sunland*

Park v. Macias, 2003–NMCA–098, ¶ 18, 134 N.M. 216, 75 P.3d 816; *Bennett v. Kisluk*, 112 N.M. 221, 225, 814 P.2d 89, 93 (1991); internal quotations omitted).

Defendants have not and cannot make this showing, as Defendants continue to gloss over the fact that the relator is neither the State, nor in privity with the State as to the claims it pursues now.

Moreover, the dismissal of the relator's complaint at the pleading stage under Rule 9(b) is not an adjudication on the merits, which is why Defendants have repeatedly pivoted away from that fact, and avoided addressing the *Dickson* court's express holding that "[b]ecause FCA claims allege fraud, they are subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b)." *In re Plavix Mktg., Sales Practice & Prod. Liab. Litig. (No. II)*, 332 F. Supp. 3d 927, 938 (D.N.J. 2017). "[T]he Court finds the imposition by the Supreme Court in *Escobar* of a heightened pleading standard for materiality under the FCA to be dispositive of Relator's allegations in the 4AC. As such, other than observing that the *Escobar* decision constitutes a supervening change in law with regard to the materiality element, this Court need not decide whether the pleading standard for other elements of the FCA or for pleading fraud with particularity under 9(b) have been affected by that decision." *Id.* at 944.

Finally, contrary to Defendants' arguments, the application of *res judicata* is not axiomatic. "Because *res judicata* may govern grounds and defenses not

previously litigated, however, it blockades unexplored paths that may lead to truth. For the sake of repose, *res judicata* shields the fraud and the cheat as well as the honest person. It therefore is to be invoked only after careful inquiry." *Brown v. Felsen*, 442 U.S. 127, 132 (1979). Additionally, courts "are no strangers to preventing the application of *res judicata* where other practical concerns outweigh the traditional ones and favor separate actions." *Suarez Cestero v. Pagan Rosa*, 198 F. Supp. 2d 73, 90 (D.P.R. 2002) (citing *Brown*, 442 U.S. 127; *U.S. v. Am. Heart Research Found., Inc.*, 996 F.2d 7, 11 (1st Cir. 1993)).

V. THE FEDERAL COURT'S DISMISSAL OF DICKSON'S COMPLAINT WAS NOT AN ADJUDICATION ON THE MERITS FOR THE PURPOSES OF *RES JUDICATA*.

A. Defendants Misconstrue the Operation and Meaning of F.R.C.P. Rule 41(b).

The federal court's dismissal of the relator's complaint under Rules 12(b)(6) and 9(b) was *not* an adjudication on the merits, as Defendants contend. Defendants rely heavily on what they consider to be the "plain text" of Federal Rule of Civil Procedure 41, but their reliance is misplaced, as their interpretation of the rule's "adjudication on the merits" language was specifically rejected by the United States Supreme Court in *Semtek International Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 121 S. Ct. 1021, 149 L. Ed. 2d 32 (2001).

In *Semtek*, the defendant made the same argument that Defendants make here: that because the "dismissal … did not otherwise specif[y] … it follows … that the dismissal is entitled to claim preclusive effect." *Id.* at 501 (internal quotations omitted). The court stated that "[i]mplicit in [defendant's] reasoning is the unstated minor premise that all judgments denominated 'on the merits' are entitled to claim-preclusive effect." *Id.* However, the court held that "[t]hat premise is not necessarily valid" *Id.*, and reasoned that, "over the years the meaning of the term judgment on the merits has gradually undergone change, and it has come to be applied to some judgments … that do not pass upon the substantive merits of a claim and hence do not (in many jurisdictions) entail claim-preclusive effect." *Id.* at 502 (internal quotations omitted).

The *Semtek* court then, in no uncertain terms, explicitly *rejected* the idea that Rule 41(b) stands for the proposition that <u>any</u> dismissal with prejudice results in the automatic application of *res judicata*:

> In short, it is no longer true that a judgment "on the merits" is necessarily a judgment entitled to claim-preclusive effect; and there are a number of reasons for believing that the phrase "adjudication upon the merits" does not bear that meaning in Rule 41(b). To begin with, Rule 41(b) sets forth nothing more than a default rule for determining the import of a dismissal (a dismissal is "upon the merits," with the three stated exceptions, unless the court "otherwise specifies"). This would be a highly peculiar context in which to announce a federally prescribed rule on the complex question of claim preclusion, saying in effect, "All federal dismissals (with three specified exceptions) preclude suit elsewhere, unless the court otherwise specifies."

> And even apart from the purely default character of Rule 41(b), it would be peculiar to find a rule governing the effect that must be accorded federal judgments by other courts ensconced in rules governing the internal procedures of the rendering court itself. Indeed, such a rule would arguably violate the jurisdictional limitation of the Rules Enabling Act: that the Rules "shall not abridge, enlarge or modify any substantive right,"

Id. at 503. Here, Defendants are arguing for an abridgment of the State's substantive rights to enforce its consumer protection laws based on a *qui tam* relator's failure to successfully move past the pleading stage.

The Tenth Circuit, citing the *Semtek* decision, found that because "Rule 41(b) only establishes a default rule from which the district court can depart, its use of the phrase 'adjudication on the merits' does not represent a binding, 'federally prescribed rule on the complex question of claim preclusion.'" *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1218 (10th Cir. 2006) (quoting *Semtek*, 531 U.S. at 503). "[T]he phrase 'adjudication on the merits,' as used in Rule 41(b), while preventing refiling in the same federal court, should not be read to preclude the assertion of claims in state court in cases where the federal court has not passed upon the substantive merits of the claim." *Brereton*, 434 F.3d at 1218 (quoting *Semtek*, 531 U.S. at 502-03). Thus, "when a [federal] court rules that a dismissal is with prejudice, it is saying only that the claim cannot be refiled in **that court**." *Styskal v. Weld Cty. Bd. of Cty. Comm'rs*, 365 F.3d 855, 859 (10th Cir. 2004) (citing *Semtek*, 531 U.S. at 506; emphasis added); *see also Matosantos Commercial Corp. v. Applebee's Int'l,*

Inc., 245 F.3d 1203, 1210 (10th Cir. 2001) ("It has been noted that the phrase 'on the merits' is 'an unfortunate phrase, which could easily distract attention from the fundamental characteristics that entitle a judgment to greater or lesser preclusive effect.'").

New Mexico law does not diverge from the holding in *Semtek*. "[A] dismissal with prejudice does not automatically result in claim preclusion…" *The Bank of New York v. Romero*, 2016-NMCA-091, ¶ 13, 382 P.3d 991, 995. This Court has previously recognized that while "language of our cases may be read literally to mean that a dismissal with prejudice is 'an adjudication on the merits,' … such a reading [can be] be a distortion…" *Kirby v. Guardian Life Ins. Co. of Am.*, 2010-NMSC-014, ¶ 66, 148 N.M. 106, 125, 231 P.3d 87, 106 (internal citations omitted).

The panel below recognized this distinction as well, and that "[i]f [the relator] had litigated a qui tam action to the gills and lost, neither another relator nor the [government] could start afresh." Op. ¶ 18 (quoting *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 853 (7th Cir. 2009)). However, the panel also recognized that the "on the merits" designation is a technical and practical one because "such a dismissal obviously does not involve 'a judicial determination of' the actual merits." Op. ¶ 16.

"A dismissal with prejudice is an adjudication on the merits only to the extent that when a claim has been dismissed with prejudice, the fourth element of res

judicata (a final valid judgment on the merits) will be presumed so as to bar a subsequent suit against the *same defendant* by the *same plaintiff* based on the *same transaction.*" *Kirby v. Guardian Life Ins. Co. of Am.*, 2010-NMSC-014, ¶ 66, 148 N.M. 106, 125, 231 P.3d 87, 106 (emphasis added).

Here, however, Defendants continue to ignore that the plaintiffs in *Dickson* and the instant suit are not the same **and** that the gravamen of the State's complaint here focuses on certain unfair and deceptive practices engaged in by Defendants that were not at issue in the realtor's operative complaint that was dismissed.

Moreover, none of the cases cited by Defendants offer support for their position. For instance, in *Lujan v. Dreis*, the Tenth Circuit found that an order of "dismissal for failure to state a claim and a dismissal for failure to prosecute" that did not specify whether it was with or without prejudice was "with prejudice" as to the pro se prisoner plaintiff who brought the action. *Lujan v. Dreis*, 414 F. App'x 140, 143 (10th Cir. 2011). However, the order in *Lujan* has nothing to do with the effect of a dismissal on a non-party. Similarly, *Webb v. Claimetrics Mgmt., LLC* concerns "[t]he district court dismiss[al of the] action with prejudice as a sanction for [the plaintiff's] misrepresentations concerning diversity jurisdiction." *Webb v. Claimetrics Mgmt.*, LLC, 412 F. App'x 107, 108 (10th Cir. 2011). Again, that decision has nothing to do with establishing *res judicata*.

The panel below did not, as Defendants contend, make a "fundamental mistake" in its opinion. Rather, Defendants' legal analysis concerning the import of Rule 41(b) is both shallow and fatally flawed.

B. The Court of Appeals Interpretation of the Effect of a Federal Court Judgment Does Not Constitute a Collateral Review.

The federal court's dismissal order *in Dickson* makes no mention of the State of New Mexico, presumably because the State was not a "party" to that case and the court had given no thought of impacting the State's rights to pursue its consumer protection claims here in New Mexico. Moreover, despite Defendants' display of righteous indignation, it should be mentioned that the record is devoid of any effort made by Defendants to have the *Dickson* court include language in its judgment to expressly preclude the State from pursuing its claims here. Query whether Defendants made a strategic decision not to make that request in fear that the *Dickson* court would have denied it.

Following the dismissal in *Dickson,* the lower courts here were presented with the question as to the effect of the *Dickson* dismissal order on the State's complaint. To resolve that question, the district court in the first instance, and subsequently the lower panel, had to naturally interpret the effect, if any, of the federal court's dismissal order, something courts across the country do every day. Clearly, the resolution of that question did not constitute a collateral review or collateral attack on a federal court judgment.

Indeed, Defendants' "collateral attack" and "public policy" arguments are unsupported distractions, as not a single one of the cases cited by Defendants has anything to do with *qui tam* actions or determining the rights of the government after a relator's complaint is dismissed at the pleading stage.

The Court of Appeals rightly held that because such a "dismissal is based only on the relator's complaint, not the factual bases underlying the allegations" it is inappropriate "to hold that such a dismissal [precludes] the government's claims when the government has not intervened. *State ex rel. Balderas v. Bristol-Myers Squibb Co.*, 2019-NMCA-016, ¶ 20, 436 P.3d 724, 730, cert. granted (Mar. 11, 2019) (citing See, e.g., *United States ex rel. Williams v. Bell Helicopter Textron*, Inc., 417 F.3d 450, 455-56 (5th Cir. 2005)).

Moreover, Defendants' argument that the lower panel's reliance on *Williams v. Bell Helicopter* reflects a "basic misunderstanding of federalism principles" is wrong, and ignores the differences between the instant case and *Williams*. Unlike *Dickson's* dismissal order, which makes no mention of the government, the federal district court in *Williams* expressly dismissed that complaint with prejudice as to both the relator *and the government,* and provided its reasoning for that determination.[5]

[5] "The court has determined that it should not make the dismissal without prejudice to the United States. Bell already has been required to devote more than enough attention to the claims made against it in this litigation, and the United States has

Because of the express language in the court's order in *Williams* dismissing the government's claims **with prejudice**, the federal government was forced to appeal to correct that error. Here, there was no such error. The order dismissing *Dickson* is silent as to the State of New Mexico (or any other state) and, therefore, no action by the State was necessary to clarify or modify it. Thus, the lower panel's reliance on *Williams* to interpret the effect of a federal judgment is entirely appropriate.

In *Williams*, the Fifth Circuit also rejected the argument that Defendants make here – that the Court should not speculate on the State's motives and, on that basis, dismiss its claims based on a case to which it was not a party:

> The district court stated 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 she had any notion that any of them has the slightest merit." We find the district court's speculation as to the motives of the government's actions is unreasonable, especially given the fact that the complaint was dismissed under Rule 12(b)(6) due to lack of specificity.

U.S. ex rel. Williams v. Bell Helicopter Textron Inc., 417 F.3d 450, 455 (5th Cir. 2005). The Fifth Circuit reasoned that while the FCA requires the Attorney General to make an investigation of a relator's complaint, it "does not require the government

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had ample opportunity to participate in the prosecution of those claims if she had any notion that any of them has the slightest merit." *U.S. ex rel. Williams v. Bell Helicopter Textron, Inc.*, No. 4:02-CV-996-A, 2004 WL 579505, at *6 (N.D. Tex. Mar. 18, 2004), aff'd as modified, 417 F.3d 450 (5th Cir. 2005).

to proceed if its investigation yields a meritorious claim… While the government could have opted to intervene and amend, it is not the court's duty to speculate as to the costs and benefits associated with such a strategy." *Id.*

In the end, the *Williams* court refused to apply the preclusive effect of a dismissal with prejudice of a relator's claim to the United States in a subsequent action, reasoning that:

> "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. Accordingly, in order to avoid such perverse incentives, we find that the district court abused its discretion in dismissing the claims as to the United States with prejudice after holding that the *qui tam* complaint failed to meet the heightened pleading standard of Rule 9(b). Such a holding guards against concerns previously raised by this court that the FCA allows 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 *res judicata*, and prevent it from suing over those concerns at a later date when more information is available.'"

U.S. ex rel. Williams, 417 F.3d at 455 (quoting *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 757–58 (5th Cir. 2001)).

These decisions are not unique; numerous courts have held that for purposes of *res judicata*, the dismissal of a relator's complaint for pleading deficiencies does not operate as a final judgment, and the government's later-raised claims should not be barred. *See USA v. Health Mgmt. Assocs. Inc.*, No. 2:11-CV-89-FTM-29DNF,

2014 WL 12616929, at *2 (M.D. Fla. June 10, 2014) ("dismissal with prejudice to the government would be inappropriate because the dismissal was based on the relator's failure to comply with the heightened pleading requirements of Rule 9(b), a matter unrelated to the merits of the claims. If the Court were to accept defendants' position, the government would essentially be compelled to intervene in FCA suits and 'fill in the blanks' of a defective complaint in order to protect its rights."); *United States v. Organon USA, Inc.*, No. CV H-08-3314, 2013 WL 12142351, at *34 (S.D. Tex. Feb. 1, 2013) (holding that because the FCA does not require the government to intervene if its investigation shows a meritorious claim, a dismissal with prejudice as to the United States when it declined to intervene was improper where the complaint failed to meet the heightened pleading standard of Rule 9(b)).

Without question, it is Defendants (not the State) who are advocating that this Court *expand* the actual holding in *Dickson* by interpreting the dismissal order to include the State's claims when the State is not even mentioned in the order, the State's other distinct causes of action, as well as the facts alleged, were not before the *Dickson* court, and the State was not in privity with the relator on any claim it now asserts here. *Cf. United States v. Purdue Pharma L.P.*, 600 F.3d 319, 329 (4th Cir. 2010) (holding that a qui tam relator's release "of course, did not prohibit the government or another relator from pursuing similar claims against [the defendant].").

Moreover, Defendants' reliance on *Federated Department Stores, Inc. v. Moitie* is similarly misplaced. In *Moitie*, the *same party* failed to appeal a federal court ruling, and instead filed a new case in state court while his co-plaintiffs appealed. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 396, 101 S. Ct. 2424, 2427, 69 L. Ed. 2d 103 (1981). The non-appealing plaintiff's state court cases were removed to federal court and dismissed on res judicata grounds while the appeal of the former co-plaintiffs was successful. *Id.* at 397. The non-appealing plaintiff argued that he should be able to avail himself of the successful appeal. *Id.* The United States Supreme Court held that "[a] judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause [of action]." *Id.* at 398 (quoting *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 325, 47 S.Ct. 600, 604, 71 L.Ed. 1069 (1927)).

Of course, this is an unremarkable ruling and, in any event, Defendants ignore that in *Moitie*, unlike the instant case, the "party" refiling was the *same party.*

C. Dickson's Complaint Was Dismissed for Failure to Meet the Heightened Pleading Standards of Rule 9(b).

The *Dickson* court's decision was squarely based on the relator's failure to meet the heightened pleading requirements for materiality under Rule 9(b) in light of the supervening change in law resulting from the United States Supreme Court's 2016 decision in *Universal Health Services v. U.S. ex rel. Escobar* 136 S.Ct. 1989

(2016) ("*Escobar*"). As the *Dickson* court found: "[b]ecause [relator's] [federal] FCA claims allege fraud, they are subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b)" *Id.* at 938. The court then went on to find that the failure to meet the heightened pleading standard for materiality "to be dispositive of Relator's allegations in the 4AC." *Id.* at 944.

VI. THE STATE WAS NEITHER A PARTY TO *DICKSON* NOR IN PRIVITY WITH THE RELATOR WITH RESPECT TO THE CLAIMS THE STATE ASSERTS NOW.

Defendants have failed to meet their burden and establish the first requirement of *res judicata*: that the parties are the same. The State of New Mexico was not a party to or involved in any manner *in Dickson.* As the United States Supreme Court held, while the government is "aware of and minimally involved in" every *qui tam* action, the government is not a "party" to an action unless it intervened in the case. *U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 931 (2009). Here, the relator *in Dickson* proceeded on her own, and it is undisputed that the State never intervened in her case.

Nor have Defendants shown that the State is in privity with the relator with respect to the claims the State asserts now. As this Court has recognized, "[d]etermining whether parties are in privity for purposes of *res judicata* requires a case-by-case analysis." *Deflon v. Sawyers*, 2006-NMSC-025, ¶ 4, 139 N.M. 637, 640, 137 P.3d 577, 580, as corrected (June 29, 2006). This Court, citing the Tenth

Circuit, held that "[t]here is no definition of 'privity' which can be automatically applied in all cases involving the doctrines of *res judicata* and collateral estoppel… Privity requires, at a minimum, a substantial identity between the issues in controversy and showing that the parties in the two actions are really and substantially in interest the same." *Deflon*, 2006-NMSC-025, ¶ 4 (quoting *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1174 (10th Cir. 1979)).

Despite this well-established law, Defendants continue to argue that simply because the relator in *Dickson* pursued her *qui tam* action and failed, she is in privity with the State for even claims that she never had standing to pursue in the first instance. But Defendants are wrong. Because Dickson has no standing to pursue the claims the State now asserts, it cannot be said that the State and Dickson "are really and substantially in interest the same".

Moreover, to the extent that privity exists between Dickson and the State, it is entirely limited by statute to her New Mexico Medicaid False Claims Act cause of action. Dickson had statutory authority to pursue her New Mexico Medicaid False Claims Act claim and no other without the authorization of the State, which she never sought or obtained. *See* NMSA 1978 § 27-14-7. And because a qui tam relator is by nature a creature of statute, her authority extended only as far as the statute allowed and no further. "A qui tam relator has Article III standing to sue only as a relator, on behalf of the government. His standing is in the nature of an assignee of

the government's claim." *U.S. ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905, 910 (9th Cir. 1998). "[T]he FCA effectively assigns the government's claims to qui tam plaintiffs…, who then may sue based upon an injury to the federal treasury." *U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993). Accordingly, to the extent Dickson was in privity with the State, that privity does not extend beyond what the statute "assigned" to her. And it is undisputed that the State did not assign to Dickson any of the claims it now asserts here.

Because Dickson could not bring any claim beyond the Medicaid Fraud Act, *res judicata* cannot apply to any other claim. "*[R]es judicata* does not bar a subsequent action unless the plaintiff could and should have brought the claim in the former proceeding." *Potter*, 2015-NMSC-002, ¶ 15 (citing *In re Intelogic Trace, Inc.*, 200 F.3d 382, 388 (5th Cir. 2000); *Bank of Santa Fe v. Marcy Plaza Assocs.*, 2002–NMCA–014, ¶¶ 24–27, 131 N.M. 537, 40 P.3d 442). "[C]ourts consistently have refused to apply res judicata to preclude a second suit that is based on a claim that could not have been asserted in the first suit." *Alvear-Velez v. Mukasey*, 540 F.3d 672, 678 (7th Cir. 2008) (citing *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 142 F.3d 26, 38 (1st Cir. 1998)); cf. *Wedow v. City of Kansas City, Mo.*, 442 F.3d 661, 669 (8th Cir. 2006) (*res judicata* "does not apply to claims that did not exist when the first suit was filed"). *Res judicata* only applies to subsequent claims

"as long as they could have been raised" by the plaintiff in the earlier action. *Pielhau v. State Farm Mut. Auto. Ins. Co.*, 2013-NMCA-112, ¶ 8, 314 P.3d 698, 700.

Finally, Defendants' suggestion that the State should be precluded from enforcing its consumer protection laws here because it had "notice" of the *Dickson* action but failed to intervene has no support in the law. The State does not dispute that in the context of the *qui tam* action filed by relator it was it was in privity with her with respect to her claim under the state's Medicaid Fraud Act. However, Defendants' argument goes too far.

None of the authorities cited by Defendants support a finding that simply because privity existed between the State and the relator with respect to the one claim she asserted in *Dickson* under New Mexico state law, that somehow that privity extends to any other claim the State pursues now for which no privity ever existed. And since the State was neither a party to, nor a real party in interest in, *Dickson* with respect to the claims it asserts now, it was not compelled to assert in *Dickson* the claims it now asserts based on facts never adjudicated in that *qui tam* action.

VII. THE CLAIMS ALLEGED BY THE STATE ARE DISTINCT FROM THE CLAIMS THE *DICKSON* COURT DISMISSED.

Fundamentally, this action contains core factual allegations not asserted in *Dickson*. Specifically, the State alleges that Plavix has a diminished or no effect on a significant percentage of New Mexico's patient population, and Defendants failed to disclose that information to patients and prescribing physicians. By contrast, in

Dickson the relator alleged that Defendants falsely marketed Plavix as superior to aspirin to State purchasers. These differences in these charging allegations are material, and do not comprise the substantial identity between the issues in controversy necessary for privity and *res judicata*. It is well-established that "[p]rivity requires, at a minimum, a substantial identity between the issues in controversy…" *St. Louis Baptist Temple, Inc.*, 605 F.2d at 1174 (citing *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940); *Green v. Bogue*, 158 U.S. 478 (1895)).

Indeed, these cases can only be thought of as involving the same claims to the extent that the term "claims" is so broadly defined as to include all of Defendants' actions in the marketing of Plavix. Obviously, that cannot be true. The gravamen of the State's claims here are, to a significant degree, materially different than what the relator alleged in her complaint. The realtor's complaint contained a single state claim under the New Mexico Medicaid False Claims Act. That claim is not found in the State's complaint here. Conversely, the State's complaint contains several causes of action, based largely on different facts that no relator, anywhere, could have brought because only the State has standing to pursue those claims.

The State's causes of action here are based, in large part, on allegations that were not made in the operative complaint in *Dickson*. For example, the State alleges that since March 1998, Defendants knew or should have known that Plavix has a

diminished or no effect on a substantial and significant percentage of New Mexico's patient population, because they lack the CYP2C19 liver enzyme essential to metabolize the drug. (Compl. ¶¶ 3, 29.) The State further alleges that a simple genetic test has been available to determine whether patients are poor CYP2C19 metabolizers. (Id. at ¶ 31.) Defendants' willful concealment of this genetic issue from consumers and healthcare providers forms the basis of the State's UPA, FATA, fraud, and unjust enrichment claims. (Id., ¶¶ 100, 112, 122, 148, 154.)

The relator's operative complaint in *Dickson* did not include any allegations regarding the genetic obstacles that limit Plavix's utility, and undergird the State's case here. The factual basis of the relator's False Claims Act cause of action instead rested upon representations made to State government purchasers regarding Plavix's relative efficacy. Thus, even under the "transactional" approach to *res judicata*, the two cases do not involve the identical or common nucleus of facts.

VIII. CONCLUSION

Based on the foregoing, it is clear that Defendants have not shown and cannot show that the application of *res judicata* is appropriate here to bar the State's claims. The Court should affirm the Court of Appeals ruling and permit the State's case to proceed to trial.

Dated: June 28, 2019

Respectfully submitted,

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