STATE OF NEW MEXICO
COUNTY OF SAN JUAN

STATE OF NEW MEXICO, ex rel.
THE STATE ENGINEER,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, et al.,

Defendants,

vs.

THE JICARILLA APACHE TRIBE
AND THE NAVAJO NATION,

Defendant-Intervenors.

No. CV 75-184
Honorable James J. Wechsler
Presiding Judge

SAN JUAN RIVER BASIN
ADJUDICATION

SAN JUAN RIVER
GENERAL STREAM
LITIGATION

SUPPLEMENTAL EMERGENCY MOTION TO
VACATE ORDERS OF NOVEMBER 14 AND DECEMBER 26, 2007

The San Juan Agricultural Water Users Association and Hammond and their counsel (Victor Marshall) respectfully submit the following supplemental support for their motion to vacate the orders entered in this case on November 14 and December 26, 2007. These materials demonstrate that Judge Sanchez' orders are being cited by opposing counsel in other cases to support sanctions against Mr. Marshall. In particular, Judge Sanchez' order of November 14 is being used by the defendants in the "pay-to-play" litigation. *State ex rel. Foy v. Vanderbilt*, No. D-101-CV-2008-1895 and *State ex rel. Foy v. Austin Capital*, No. D-101-CV-2009-1189. In these cases, the State of New Mexico seeks to recover several hundred million dollars in damages from Wall Street firms and persons who participated in a kickback scheme. One of the defendants in the *Vanderbilt* case has cited Judge Sanchez' order on November 17 as proof that "Mr. Marshall is a non-remorseful recidivist, and only

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significant sanctions will deter him from continuing to use our courts as a tool of intimidation, harassment and abuse." *See* Exhibit 1, Page 5.

In the Albuquerque Journal of May 13, 2010, a guest Op-Ed piece referred to Judge Sanchez' orders as proof that the pay-to-play lawsuits are "based on a falsehood" because "his attorney is well versed in playing fast and loose with allegations, as documented in various court records around the state." *See* Exhibit 2. This Op-Ed piece was submitted by a public relations firm and a lawyer for one of the pay-to-play defendants.

In short, Judge Sanchez' orders are being cited in other cases, and in the present case, as proof against the parties represented by this law firm. Of course this is not proof at all, and it is unrelated to the merits of the particular cases. It is character assassination, and it is effective.

In the present case, the undersigned law firm simply pointed out that the Constitution required the joinder of all absent parties, so that absent parties would have a meaningful opportunity to be heard, and to speak for themselves. In raising the issue of joinder, this law firm was carrying out not only its duties to its clients, but also to the judicial system. Yet, Judge Sanchez' orders of November 17 and December 27 are being cited as proof of wrongdoing.

It is respectfully submitted that the Court itself has a duty to protect litigants and their counsel from this kind of tactic. Additionally, Judge Sanchez' orders of November 14 and December 26 are no longer viable because the Court is now considering the issue of joinder, as it must.

WHEREFORE, movants respectfully ask the Court to vacate the orders of November 17 and December 27, 2007.

Respectfully submitted,

VICTOR R. MARSHALL & ASSOCIATES, P.C.

By _____

Victor R. Marshall
Attorneys for San Juan Agricultural
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The Hammond Conservancy District
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by email to the attorneys electing email service at: wrattorney@11thjdc.com and to the La Plata parties electing email service at wrlaplata@11thjdc.com this 14th day of May, 2010.

I further certify that a true and correct copy of the foregoing has been served on the following attorneys by facsimile, by mail to Gary Horner, Dan Israel and William Johnson, and by email to Jolene McCaleb, Elizabeth Taylor, and Richard Cole on May 14, 2010.

Stanley Pollack and Bidtah Becker
Jay Burnham
John Draper and Jeffrey Wechsler
J.M. Durrett, Jr.
Robert Kidd and Michael Garcia
Tracy Hofmann, Arianne Singer and D.L. Sanders
Stephen Hughes, John Sullivan and Michael Thomas
Maria O'Brien
Gary Risley

_____

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

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

Qui tam Plaintiffs,

- vs -

VANDERBILT CAPITAL ADVISORS, LLC, *et al.*,

Defendants.

NO: D-101-CV-2008-01895

MARLA WOOD'S MOTION FOR SANCTIONS

Marla Wood hereby moves for sanctions against Plaintiffs' counsel Victor R. Marshall, for naming her as a purported defendant in this lawsuit solely for the improper purposes of harassment and abuse. In support of this Motion, Ms. Wood states as follows:

1. Ms. Wood incorporates by reference Marla Wood's First Motion to Dismiss, Pursuant to Rule 1-012(B) NMRA 2010, filed simultaneously herewith.

2. Mr. Marshall had no good faith basis for naming Ms. Wood as a purported defendant, in violation of Rule 1-011 NMRA 2010.

3. The few supposed facts on which Mr. Marshall's pleading purports to rely are false. Moreover, as a frequent requestor under the Inspection of Public Records Act, Mr. Marshall would have known his allegations are false if he had conducted the required reasonable investigation before filing by employing the Act or otherwise.

4. As public records reflect, Ms. Wood and Mr. Malott were married on August 8, 2008; that is, more than two years after the Vanderbilt transaction at issue in this lawsuit was

> of justice, from the nature of their institution. . . . To fine for contempt, imprison for contumacy, enforce the observance of order, [etc.], are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others . . . .

Id. (quoting *United States v. Hudson*, 11 U.S. 32, 34, 3 L. Ed. 259 (1812)). In addition, the Court instructed that a trial court "may award attorney's fees in order to vindicate its judicial authority and compensate the prevailing party for expenses incurred as a result of frivolous or vexatious litigation." *Id.* at 5.

11. Mr. Marshall has demonstrated time and again that a word to the wise is insufficient to cause him to conform his conduct to the requirements of the Rules. In fact, rather than having the intended effect, admonitions without sanctions appear to embolden Mr. Marshall to engage in further misconduct, apparently based on the assumption that he will suffer no real adverse consequences in the future, because he has suffered none in the past. For example:

a. Upon removal of this very case to federal court, Judge Brack held that Mr. Marshall's pleading contained allegations that were "so unsubstantial as to be frivolous;" "plainly without color of merit;" "a mere pretense;" "no claim at all;" of the type the "Tenth Circuit has admonished" should not be filed; and therefore inadequate to vest jurisdiction in the federal courts. *State of New Mexico ex rel. Foy v. Vanderbilt Capital Advisors, LLC., et al.*, No. CIV 09-0178 RB/MEH (D.N.M. April 13, 2009) (Brack, J. Memorandum Opinion and Order on remand) (internal quotation marks and citations omitted). But rather than heeding the warnings in Judge Brack's opinion, Mr. Marshall claimed victory based on the remand order and plowed full steam ahead in his attempts to proceed on his defective pleading before this Court.

b. An IPRA opinion by our Court of Appeals published in the State Bar Bulletin just last month held that Mr. Marshall advocated a position that "lacked any colorable basis;" found that Mr. Marshall's filings included representations that were belied by the appellate record and contrary to representation made to the Court at oral argument; "admonish[ed]" Mr. Marshall "to be more careful in litigation practice and procedure;" and observed that "one must question the wisdom" of Mr. Marshall's approach to the litigation. *San Juan Agricultural Water Users Association, et al. v. KNME-TV, et al.*, 2010-NMCA-012, ¶¶ 29-32. Nevertheless, in complete disregard of the good counsel of our Court of Appeals, Mr. Marshall has taken a number of inconsistent positions that fly in the face of the IPRA statute in lawsuits presently pending before this Court

and other New Mexico District Courts. Accordingly, Mr. Marshall is demonstrating once again that judicial advice, direction, and even admonishment absent sanctions are ineffective to alter his behavior.

c. In *State of New Mexico ex rel. State Engineer v. United States*, D-1116-CV-75-184 (11th Judicial District Court November 14, 2007), the Court held that Mr. Marshall filed an objection that "was a sham under Rule of Civil Procedure 1-011," and that "Mr. Marshall showed a lack of professionalism." The Judge did not impose a sanction, but warned that "if the Court again finds that Mr. Marshall files further pleadings that are suggestive of this type of unprofessional conduct on his part, the Court may well seek to find Mr. Marshall in contempt" (attached as Exhibit B hereto).[1]

Accordingly, Mr. Marshall's subsequent misconduct here demonstrates that substantial sanctions are necessary to provide an effective deterrent against future misconduct.

12. Moreover, the form of harassment and abuse pursued by Mr. Marshall here is particularly insidious, because it has the tendency to discourage citizens from participating in Governmental affairs in the future, for fear of subjecting their families to abuse. In this regard, Mr. Marshall's misconduct is analogous to his past use of Strategic Litigation Against Public Participation (SLAPP suits) to intimidate and harass citizens exercising their Constitutional rights to participate in the democratic process. *See* Frederick M. Rowe and Leo M. Romero,

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[1] *See also In re McCarthey*, 368 F.3d 1266, ** 8 - 9 (10th Cir. 2004) (citation and internal quotation marks omitted). The *McCarthey* Court denied Mr. Marshall's petition for a writ of mandamus seeking discovery from the presiding Judge regarding the denial of Mr. Marshall's motion to recuse. The Court explained its ruling as follows: "Embroiling the presiding judge in the adversarial processes of any case is not only unseemly, it is calculated to give rise at the least to a resulting appearance of bias against the aggressor litigant although . . . that species of boot strap bias cannot be recognized, as a matter of law, as a disqualifying circumstance. To do so would simply invite manipulated harassment by any lawyer unscrupulous enough to willingly embark on a course of conduct designed to disqualify an otherwise impartial judge whose views are thought to be adverse to the interests of the client. Such a tactic would, at worst, cause an unjustified voluntary disqualification of the presiding judge or, at least, cause endless delay in the litigation while those maneuvers are in process."

Resolving Land-Use Disputes by Intimidation: SLAPP Suits in New Mexico, 32 N.M.L. Rev. 217, 221-23 and n.24 (2002) ("*SLAPP Suits*").

13. The *SLAPP Suits* article recounts how Mr. Marshall used the threat of "'the possibility of significant financial liability'" and of "'find[ing] out afterwards that litigation is serious, stressful, expensive, and mostly futile,'" as a tool of intimidation calculated to deter First Amendment rights and chill citizen opposition in public forums and participation in the democratic process. 32 N.M.L. at 221 (quoting threatening letter from Mr. Marshall). Mr. Marshall followed through on his threats with litigation, and the Attorney General of New Mexico opposed Mr. Marshall's SLAPP suit in an *amicus* brief filed in our Court of Appeals expressing "'concern about the improper use of the courts to deter New Mexico citizens from exercising their First Amendment right to petition the government for redress of grievances and to deprive governmental bodies of the benefits of public participation in the political process.'" *Id.* at 223. The aggrieved citizens ultimately prevailed; the ACLU brought a SLAPP-back lawsuit on their behalf against Mr. Marshall and his clients; and the SLAPP-back lawsuit resulted in a successful settlement by the ACLU lawyers. Carlson, *Group Settles Wal-Mart Case*, Abq. Journal, June 18, 2004 (attached as Exhibit C hereto). Yet, by his misconduct in this case, Mr. Marshall again has demonstrated his willingness to use the legal system for harassment and intimidation in a manner that necessarily has a chilling effect on future participation in Government affairs and the democratic procesa.

14. In sum, Mr. Marshall is an unremorseful recidivist, and only significant sanctions will deter him from continuing to use our Courts as a tool of intimidation, harassment, and abuse.

WHEREFORE, Marla Wood respectfully requests that this Court exercise its inherent authority and discretion to impose whatever sanctions Your Honor considers necessary to deter future misconduct.

Respectfully submitted,

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Counsel for Marla Wood

DATED: March 12, 2010.

The undersigned certifies that on the 12th day of March, 2010, the foregoing Motion was served electronically upon the following, pursuant to agreement of the parties:

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ERB Legal Fee Reimbursement Is Justifiable

BY JACK BRANT
Attorney, Albuquerque

Ordinarily, I would have no part of trying a case in the "court of public opinion." But the multiple press conferences called by opposing counsel and the tendency for every aspect of the case to become an "UpFront" column or front page news story require me to rise in this unfamiliar forum on behalf of my client, Educational Retirement Board Chairman Bruce Malott.

For openers, Malott initially was appointed by Gov. Gary Johnson and has volunteered thousands of hours to protect the interests of our teachers and other educational employees.

Those efforts, and those of the many board members who similarly volunteer their time and expertise, have resulted in the ERB's investment returns being ranked in the top 11 percent nationally since Malott was elected chairman five years ago, up from the bottom 25 percent under the previous leadership. That includes the 2008-2009 market losses that were nearly as large as those suffered during the Great Depression.

Malott is now taken to task for requiring the state to pay his attorney's fees incurred in a lawsuit that stems from his ERB service and is, quite simply, based on a lie made by a disgraced and disgruntled former employee and his media savvy lawyer.

Malott's demand is based on a New Mexico statute established in 1967, not some recent backroom dealing as intimated in Thom Cole's recent UpFront column.

The actions of the board in their March meeting simply established internal rules for applying that statute.

Malott is required to have personal counsel in addition to a state provided risk management attorney because of the conflicts created by the state's interests and Malott's personal interests. This is a very common occurrence in complex litigation matters.

The lie beneath all this is Frank Foy's claim that he was "vehemently opposed" to the very investment he now decries when, in fact, a tape recording of the May 12, 2006, ERB meeting undisputedly has Foy recommending the ill-fated investment in his then role as ERB's chief investment officer.

Two important questions arise.

First, if our laws did not provide protection for volunteer citizens like Malott and hundreds of others statewide when they are subject to a lawsuit attacking the way they did their job, exactly who would step forward to offer their time and expertise to operate these key government functions?

Second, if Foy's case is based on a falsehood at its core, why would anyone pursue such litigation?

Not surprisingly, one only need "follow the money."

Recent New Mexico law now allows successful plaintiffs to collect a bounty of 25 percent for collecting funds improperly taken from the government.

The plaintiff and his attorney simply see a big payday of nearly $200 million from attacking ERB and its board members. His attorney is well versed in playing fast and loose with allegations, as documented in various court records around the state.

Unlike the multi-million dollar fund operatives who have pleaded guilty to misleading state and municipal investment organizations nationwide, Malott is a successful professional of national standing and a community leader who volunteered for community service.

Yet he finds his reputation under siege by a disgruntled former ERB employee who is trying to capitalize on unrelated "pay to play" issues in order to cash in on millions of taxpayer dollars if he and his lawyer can convince a jury he is in fact the proverbial knight on a white horse.

I point out that these are really taxpayer dollars because, after all, any award he might recover must be paid with state funds.

There is little question that many investments turned bad in a much overheated market during the last few years.

And a brief survey of the current economic landscape shows that many expert professionals were misled about the integrity of investments made, while still others were unconcerned with either their personal integrity or the integrity of the investments they were pushing.

New Mexico's ERB hardly stands alone in the wreckage. Blaming those who were trying to do their best, looking back with 20/20 hindsight, is an understandable personal reaction but not necessarily accurate or fair.

This is why we have a legal system that bases results on actual evidence, not conjecture, media spin or avarice.

And that is why I generally avoid this "court of public opinion" when representing clients.

Bottom line is that questioning Malott for simply requesting reimbursement as allowed by the law is tantamount to revictimizing the victim, rather than examining the motives of those who force the situation in the first place.

And suggesting that volunteer board members are somehow unworthy of this protection in return for their volunteer service would be penny wise and pound foolish.

Jack Brant is with the Law Office of Jack Brant, PC; submitted with the assistance of communications firm DW Turner.