IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
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GALE COOPER, *pro se*

Plaintiff-Appellant,

vs. CT. APPEAL NO. 33,876

RICK VIRDEN, LINCOLN COUNTY SHERIFF
and CUSTODIAN OF THE RECORDS OF THE
LINCOLN COUNTY SHERIFF'S OFFICE;
and STEVEN M. SEDERWALL, FORMER
LINCOLN COUNTY DEPUTY SHERIFF

Defendants-Appellees.

APPEAL FROM THE THIRTEENTH JUDICIAL DISTRICT COURT,
SANDOVAL COUNTY, NEW MEXICO
CAUSE NO. D-1329-CV-2007-01364
HON. GEORGE P. EICHWALD, PRESIDING

PLAINTIFF-APPELLANT GALE COOPER'S ANSWER BRIEF TO DEFENDANTS-APPELLEES' BRIEF IN CHIEF

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In accordance with NMRA Rule 12-213(F)(1)(3), the body of this Brief in Chief contains 10,927 words as counted by Microsoft Word and Times New Roman typeface in 14 point font, exclusive of parts excepted by Rule 12-13(F)(1).

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Plaintiff-Appellant Gale Cooper (**“Cooper”**) files this *Answer Brief* (**“Cooper AB”**) to Defendants-Appellees’ (**“Defendants”**) *Joint Cross-Appeal Brief in Chief* (**“Defendants BIC”**).

OVERVIEW

Defendants continue dishonest progression: starting with their fraudulent murder case with illegal exhumations; progressing to District Court (**“Court”**) violation of Inspection of Public Records Act (NMSA 1978, §§ 14-2-1 to -12) **(“IPRA”**) to hide its incriminating DNA records; descending to contempt and forgery for records’ concealment; and now frivolously challenging their deserved, non-IPRA, $100,000 sanction, while bloating half-million tax dollar defense fees (**RP 2259**) in lieu of just postage cost for requested records mailing in 2007.

Cooper used IPRA to save New Mexico’s Billy the Kid history by exposing Defendants’ forensic hoax. (**Cooper BIC 2-3**) The Court found:

> “Case 2003-274 is a murder case, filed in 2003 in the Lincoln County Sheriff’s Department by Sheriff Tom Sullivan [**“Sullivan”**] and his commissioned Deputy Steve Sederwall [**“Sederwall”**] to be solved by forensic DNA acquisitions and matching, and accusing suspect Pat Garrett [**“Garrett”**] of murdering an innocent victim instead of Billy the Kid; with sub-investigation of Billy the Kid’s [**“the Kid”**] double homicide of Deputies James Bell and Robert Olinger [**“sub-investigation”**].” (**RP 2278 FOF 5**) After legal blockade to exhumations of the Kid and his mother for DNA, “[i]n 2004 Billy the Kid’s DNA was allegedly obtained for Case 2003-274 by Dr. Henry Lee [**“Lee”**] from an old carpenter’s bench [**“bench”**] on which Billy the Kid laid after being shot. Lee’s specimens were sent for DNA processing to Orchid Cellmark Lab [“**Orchid Cellmark**”] in Texas.” (**RP 2278 FOF 6-7**) “In 2005 newly elected Lincoln County Sheriff Rick Virden [“**Virden**”] deputized Sullivan and

> Sederwall [**“lawmen”**] to continue Case 2003-274 by exhuming Billy the Kid’s identity claimants John Miller and “Brushy Bill” Roberts [**“Arizona exhumations”**] for DNA match with Lee’s bench DNA to solve the Garrett murder [by proving the Kid survived as an old-timer]. On May 19, 2005, for Case 2003-274, John Miller and William Hudspeth were exhumed in Arizona and their bones were taken to Orchid Cellmark for DNA extractions and for DNA matching to the carpenter’s bench DNA.” (**RP 2278 FOF 8-9**)

From 2003 to 2006, the lawmen hid Case 2003-274’s records by § 14-2-1(A)(4)’s law enforcement exception. **(BIC 3**) In 2007, they switched hiding tactics to ridiculous non-IPRA excuses that Virden had no DNA records for his DNA murder case, and was clueless about retrieval; and that case records were his Deputies’ private hobby! IPRA enforcement litigation followed.

SUMMARY OF RELEVANT PROCEEDINGS

Cooper evokes Rule 12-213(B) NMRA to add “Proceedings” to her *Answer Brief* as “deemed necessary” to debunk Defendants’ global misinformation.

I. BACKGROUND

A. Summary: IPRA violations are fully addressed in Cooper’s *Brief in Chief* (**“Cooper BIC”**) and *Reply Brief* (**“Cooper RB”**). Proceedings herein address misconduct against the Court yielding the non-IPRA penalty. (**RP 2286 COL 28**)

B. IPRA’s Wrongful Records Denials

1. Request Phase had total wrongful denials of all four (4) requested DNA records categories (**RP 2278 FOF 10**), and no proper denial letter. (**RP 2278-2279 FOF 10-11**) Sederwall and Sullivan, resigning Deputyships on June 21, 2007,

claimed case records as "private property." (**RP 2278-2279 FOF 11**). The Court found: "**The requested records exist, and have been recoverable from the time of the request phase.**" (emphasis added) (**RP 2282 COL 5**)

2. <u>Enforcement Phase litigation</u> had total wrongful denials of all requested DNA records without valid IPRA exceptions, and by IPRA misstatement as for records' "possession only." (**RP 2282-2283 COL 4-5, 7, 9-12**) Court-ordered turn-overs were ignored. After three (3) years, Virden shamed records requests to Lee and Orchid Cellmark, and got no records. (**RP 2281 FOF 27**) Sederwall and Sullivan, though declared "public officials" and Virden's "agents," refused records turn-overs as "hobbyists." ((**RP 2279 FOF 11**) After four (4) years, Sederwall shamed an Orchid Cellmark request by omitting the known contact person's name (Calvin Ostler (**"Ostler"**)). (**RP 2284 COL 17**). From 2010 to 2012, Lee records were forged to feign compliance and "hobbyist" status. Cooper prevailed (**RP 2286 COL 28, 30, 31**), and separately appealed her IPRA damages and costs awards.

II. DEBUNKING DEFENDANTS' FACTS AND PROCEEDINGS

A. <u>Summary:</u> Deceptively, Defendants misrepresent facts and proceedings by designating their non-IPRA penalty as IPRA's, while concealing their contempt and forgeries violations; replacing Court's *Findings* with their rejected ones **("rejected *Findings*")**; and arguing against the IPRA "attorneys' fees" award by omitting its appealed error as Cooper's IPRA costs award.

B. <u>Defying Court's *Findings*</u>

1. Defendants use their rejected *Findings* (**Defendants BIC 1**) by ignoring:

> "All proposed findings of fact and conclusions of law are denied except those incorporated by the Court in its May 15, 2014 Findings of Fact and Conclusions of Law and Order of the Court." (**RP 2306 Judgment 1**)

C. <u>Defying Requested Records as Public</u>

1. Public nature is called "alleged." (**Defendants BIC 1**)

2. Concealed are Court orders declaring records public:

a. March 12, 2010 's *Summary Judgment* Order stated:

> "All evidence, documentary or otherwise, resulting from [Case 2003-274] is public record … Defendants are ordered to turn over to plaintiffs all information that has been collected as result of the investigation." (**RP 299-300**)

b. September 28, 2011's Order on January 21, 2011's *Evidentiary Hearing* stated:

> "The [Lincoln County Sheriff's Department] investigations of the homicide of Billy the Kid and of the double homicide of James Bell and Robert Olinger are related … All reports, lab results, and documents and items which were made, generated, received, or obtained during the course of these investigations are public documents under [IPRA]." (**RP 470**)

3. Concealed is that all Case 2003-274 records are law enforcement (**Cooper RB 2-4**): "Probable Cause Statement (**RP 162**); exhumation petitions for the Kid and his mother (**RP 166-178**); "Supplemental Report for Exhumation John Miller"

(**RP 164-165**); Sullivan's and Virden's letters (**RP 1218-1221, 1234**), and Lee and Orchid Cellmark records. (**Cooper AB 14, 21-22; Cooper RB 8, 9**)

D. <u>Obfuscating Sederwall's and Sullivan's Law Enforcement Status</u>

1. Feigning privatizing, Sederwall's and Sullivan's continuous Sheriff and/or Deputy tenures are obfuscated as: "affiliated with the Lincoln County Sheriff's Department in different capacities during … period relevant to this matter." (**Defendants BIC 1**) This conceals Court's holding them "public officials" and "commissioned deputies" responsible for the records. (**RP 2283 COL 13-14**)

2. Concealed is generating of all records in law enforcement tenures.

a. Exhumation petitions in 2003 to 2004 for the Kid and his mother list Petitioners Sullivan and Sederwall as Lincoln County *Sheriff* and *Deputy*. (**RP 1213, 1215-1219**) Case 2003-274's May 19, 2005 "Supplemental Report" for John Miller's exhumation lists Sederwall as *Sheriff's Deputy*. (**RP 164-165**)

b. Virden's November 28, 2005 letter, as *Sheriff*, stated:

> "Tom Sullivan and Steve Sederwall are Deputies with the Lincoln County Sheriff's Office [and] are assigned to investigate the shootings of William H. Bonney and Deputies Bell and Olinger." (**RP 183**)

c. Virden's May 2007 *Sheriff's* letter to Hamilton, Texas, Mayor Roy Rumsey for exhuming "Brushy Bill" Roberts stated:

> "This letter will inform you that Tom Sullivan and Steve Sederwall are both commissioned deputies with the Lincoln County New Mexico Sheriff's Department. They have been investigating case # 2003-274." (**RP 1136**)

d. Status was *Commissioned Deputy*. Lincoln County Attorney Alan Morel's **("Morel")** May 19, 2004 letter confirmed *Deputy Commission*:

> "Sheriff Sullivan advised me that he did issue a deputy sheriff's card to Mayor Sederwall … on a list as number 147." (**RP 179**)

In 2005, Virden, becoming Sheriff, issued Sederwall and Sullivan *Commissioned Deputy Cards*. (**Tr. 12/18/12, Plaintiff Cooper Ex's. 6, 7**) Sederwall's and Sullivan's June 21, 2007 resignation "Memorandum" confirmed *Commissioned Deputy* tenures till that date (**RP 20-26**); as did Morel's June 26, 2007 letter:

> "Mr. Sederwall and Mr. Sullivan surrendered their original Deputy Sheriff Commission cards at the meeting held on June 21, 2007." (**RP 38**)

3. Calling them "reserve deputies" - as if not "official" (**Defendants BIC 1**) - conceals Court's rejection of that ploy:

> "Sullivan's and Sederwall's argument of being 'unsalaried reserve deputies' is irrelevant to the records responsibility, since [they are Virden's] 'agent … with or without compensation.' " (**RP 2284 COL 15**)

And Virden's July 27, 2012 deposition confirmed them as *Commissioned Deputies* with card, badge, and shirt (**RP 1984 at page 38**); and that "reserve deputy" is non-existent in New Mexico statutes. (**RP 1983 at pages 35**)

4. Misleadingly, they are called not "records custodians" - feigning absolved records responsibility. (**Defendants BIC 7**) Concealed is Court's holding them responsible "public officers" and records deniers under §§ 14-2-5 and 14-2-11(B). (**RP 2283-2284 COL 13-16**)

E. **<u>Lying About Privatization</u>**

1. Privatization is fabricated as: "[the case] became entirely a private endeavor as it progressed." (**Defendants BIC 1**) Concealed is June 21, 2007's resignation "Memorandum" dated after requested records were generated. (**RP 26**)

2. Concealed are Court Orders and holdings that Case 2003-274 was public. (**Cooper AB 1-4; RP 2283-2284 COL 12-14**)

3. Ignored is absurdity of claiming "hobbyists" conducted a Sheriff's Department murder investigation with exhumations; then were taxpayer-funded for IPRA violation litigation as public officials!

4. Concealed is Virden's July 27, 2012 deposition's denying privatizing. (**RP 1993 at page 65**)

5. Concealed is Sederwall's locating the bench as *Deputy*; as he confirmed in the "Probable Cause Statement" he authored (**RP 243 at page 9**):

> "Deputy Sederwall of the Lincoln County Sheriff's Department located the carpenter's bench where the Kid's body was placed on July 14, 1881." (**Tr. 1/21/11, Plaintiff Ex 10 at page 8**)

6. Concealed is Court "frustration" at their privatizing ploy:

> "[COURT:] … The frustration all along has been … conducting a criminal investigation, and then morphing into some type of … hobby … I don't see how someone in a criminal case can take evidence and make it part of their personal collection." (**Tr. 2/4/13, 146-147**)

F. Misstating Requested Records

1. Requested DNA records are called "two categories." (**Defendants BIC 2**)

2. Concealed is Court's *Finding* four (4) categories (**RP 2278 FOF 10**); and April 24, 2007's IPRA request's adding:

> "Each category of documents requested in the numbered paragraphs [1 and 2] … is to be deemed a separate request to inspect the records … to the same extent as if … separate requests had been delivered instead of this single letter." (**Tr. 1/21/11, Plaintiffs Ex 3 at page 2**)

3. Fabricated is that Lee's report(s) are not for DNA. (**Defendants BIC 7**):

> "Dr. Lee 'never … made or prepared any findings with regarding to DNA samples." (**Defendants BIC 7**)

a. Semantic trickery pretends Lee had to extract DNA himself; ignoring that his bench specimens started chain of custody for "reference DNA" (**Tr. 1/21/11, 52-53**) from alleged "Billy the Kid blood" for identity matching with exhumed remains; as confirmed by Orchid Cellmark's records using Lee's specimens in Case 2003-274's DNA extractions. (**RP 2074-2078**)

b. Concealed are Court *Findings* confirming Lee's DNA recovery:

> "In 2004 Billy the Kid's DNA was allegedly obtained for Case 2003-274 by Dr. Henry Lee … from an old carpenter's bench on which Billy the Kid laid after being shot. Lee's specimens were sent for DNA processing to Orchid Cellmark Lab." (**RP 2278 FOF 7**)

4. Gibberish conceals no requested records' turn-overs:

> "[Sederwall] stated that all existing public records requested by Plaintiff-Appellant which had been produced to Dr. Cooper were not responsive to the original public records requests." (**Defendants BIC 8**)

G. Concealing No Proper Denial Letter

1. Summaries feign proper IPRA denial letter. (**Defendants BIC 2-4**)

2. Concealed is Court holding of no proper denial letter. (**RP 2282 COL 8**)

3. Concealed is Cooper's February 4, 2013 *Evidentiary Hearing's* cross-examining Morel to show no proper denial letter. (**Tr. 2/2/13, 153-154, Plaintiff Cooper Ex. 22**):

4. Concealed is that their "denial letters" were just records' shell games, switching responsibility and "privatizing." (**Cooper AB 15-17**)

H. Fabricating IPRA as for "Possession Only"

1. Defendants state:

> "Sheriff Virden asserted that he did not violate IPRA because he never … possessed … any documents … [of] Dr. Henry Lee or Orchid Cellmark and that he fulfilled his obligations to Plaintiff under IPRA." (**Defendants BIC 7-8**)

2. Concealed is IPRA, Court holding, and precedents. **(Tr. 12/18/13, 12-13**):

> "In both the request and enforcement phases, *Virden's records recovery refusal[s] have been misplaced and ignored IPRA by arguing that recovery pertains only to records in direct physical possession.* Section 14-2-6(A) NMSA 1978 states enforcement custodial responsibility "regardless of whether the records are in that person's actual physical custody and control." Section 14-2-6(F) NMSA 1978 repeats that "public records" can be held "on behalf of any public body." *Toomey v. Truth or Consequences,* N.M. Ct. Ap. No. 30,795, P.4. (2012) clearly stated "public agencies must produce all record[s], even those held by or created by a private entity 'on behalf of' the public agency.["] The DNA records of Lee and Orchid Cellmark were held on behalf of Lincoln Sheriff's Office by Lee and Orchid Cellmark, and are intrinsic to solving its Pat Garrett murder Case 2003-274." (emphasis added) (**RP 2282 COL 9**)

3. Fabricating Court agreement, Defendants quote September 28, 2011's Order for January 21, 2011's *Evidentiary Hearing*:

> "Sheriff Virden has produced everything which he has in his possession concerning his two investigations." (**Defendants BIC 5**)

But this reference to Virden's 2008 subpoenaed Case 2003-274 file (**"subpoenaed file"**) *did not excuse him from records recovery* (**RP 300; Tr. 12/18/13, 54**); as shown in that Order's omitted paragraph:

> "All reports, lab results, and documents and items which were made, generated, received, or obtained during the course of these investigations are public documents under [IPRA]." (**RP 470**)

4. Concealing Virden's refusal to request records, was stating: "[N]othing in those files [sic - file] was responsive to the IPRA requests." (**Defendants BIC 6**). In fact, Virden's subpoenaed file proved DNA records existed, and had a "Contact List" for getting them. (**Cooper BIC 6-7; RP 2279 FOF 14**)

I. <u>Feigning IPRA Compliance</u>

1. Concealing total IPRA noncompliance and forging Lee reports, referenced are a court-ordered "original" Lee report and Co-Plaintiff's non-IPRA subpoenaed Orchid Cellmark records - both five (5) years into litigation:

> "The district court admitted [in May 31, 2012's *Second Motion on ... Sanctions*] the 'Original Report' from Dr. Henry Lee and the one hundred thirty-three (133) pages received from Orchid Cellmark into evidence." (**Defendants BIC 6**)

2. Omitted is January 17, 2012's Hearing on *Plaintiffs' Motion to Supplement the Record and for Sanctions*, presenting the forged Lee reports and the Court's acknowledging sanctions. (**Cooper AB 12, 21**).

3. Concealed is that in May 31, 2012's *Second Motion to Supplement the Record and for Sanctions* Defendants' court-ordered depositions were a forgery sanction. (**RP 2280-2281 FOF 25**)

4. Concealed is Defendants' knowledge that they faced non-IPRA sanctions for discovery abuse, as they stated in Sederwall and Sullivan's April 20, 2012 *Response in Opposition to Gale Cooper's Second Motion for Sanctions*:

> "[T]he sanctions available under IPRA *and the sanctions available under Rule 1-037 NMRA 2012 are vastly different* because they deal with substantially different issues. *Rule 1-037 NMRA 2012 sanctions are based on procedural discovery issues*." (emphasis added) (**RP 1104**)

J. Obfuscating Awards as Just IPRA's

1. Defendants combine IPRA and non-IPRA awards to state:

> "[D]istrict court awarded nominal damages in the amount of $1,000, punitive damages in the amount of $100,000, attorney fees in the amount of $10,994.28 and costs in the amount of $8,629.56." (**Defendants BIC 9**)

2. In fact, IPRA awards were for "not providing the requested records" (**RP 2285 26**); and non-IPRA award was for "actions … subject to sanctions [since] providing altered records as discussed in Findings of Facts 25, 26, and 29 and Conclusions of Law 18 is wanton, willful, and in bad faith." (**RP 2285-2286 COL 19, 27**)

3. Court's non-IPRA award was identified by a UJI, not IPRA:

> "Based on Defendants' conduct, Plaintiff Cooper is entitled to punitive damages in the amount of one hundred thousand dollars ($100,000.00) against Defendants. (**RP 2285-2286 COL 25, 28**)

K. <u>Obfuscating Error in "Attorneys' Fees" Award</u>

1. Defendants repeat the Court's now appealed error naming some of Cooper's IPRA costs as "attorneys' fees which have not been previously paid." (**RP 2286 COL 30; Cooper AB 31**)

III. ACTUAL FACTS AND PROCEEDINGS FOR NON-IPRA SANCTIONS

A. <u>Summary:</u> After 2009's *Summary Judgment* ordering records turn-over, Defendants hid records by non-IPRA contempt and forgery. In 2010, Virden shamed Lee and Orchid Cellmark requests. (**Cooper AB 16-17**) In 2010 and 2011, forged Lee reports tricked the Court, until Cooper exposed them; and the Court ordered an "original" Lee report, which proved it was done for Case 2003-274. From 2010 to 2013, Hearings on non-IPRA sanctions for contempt and forgeries yielded 2014's non-IPRA penalty of $100,000. (**RP 2286 COL 28**)

B. <u>Non-IPRA Misconduct Against the Court and Sanctions</u>

> "On January 17, 2012 a Hearing on Sanctions was conducted and Plaintiffs stated … allegations of altered Lee reports. Production of the original Lee report was ordered.
>
> "On January 31, 2012 Sederwall turned over a twenty-five (25) page "original" Lee report … Its header identified Lee's work as for Case 2003-274.

"On May 31, 2012 a Hearing for Sanctions was conducted. The newest Lee report was presented as evidence of altering of the past Lee reports to conceal the law enforcement header, but was also called not original as lacking signatures … Sanctions included the ordering of new depositions of the Defendants.

"In his June 26, 2012 deposition Sederwall admitted to: removing law enforcement information from later Lee reports; called the twenty-five (25) page Lee report he first received from Lee as original; and admitted to knowing that the Orchid Cellmark client was Calvin Ostler."

"At an Evidentiary Hearing conducted on December 21 [sic – 18], 2012 and February 4, 2013 … Seterwall [sic] … admitted to altering the first Lee report's header to remove Case 2003-274 information; and admitted to creating the other report versions given to the Court and lacking law enforcement information." (**RP 2281 FOF 22, 23, 25, 26, 29**)

"In his June 26, 2012 deposition, Sederwall admitted to willful involvement in altering Lee reports by rewritings to remove the original law enforcement information in Lee's "first" report sent to him as Lincoln County Deputy Sheriff [in 2005] … Neither an "original" nor a "duplicate" report was presented [to the Court], only altered records which do not comply with IPRA law." (**RP 2284-2285 COL 18**)

C. <u>As to Contempt</u>

1. Court's turn-over Orders were defied; though in Sederwall's August 18, 2008 deposition, he admitted having Lee's carpenter's bench report (**RP 2279 FOF 17**); and Virden waited "three (3) years to begin records recovery," but never followed up "to get the records." (**RP 2281 FOF 29**)

2. Contempt was raised in June 3, 2010's *Plaintiffs' Motion for Mandatory Order of Disclosure and Production.* (**RP 302**)

3. Contempt, monetary fine, and incarceration for defying court-orders were raised in September 9, 2010's *Hearing on Mandatory Order of Production*:

> "MR. THREET … The Court has entered a summary judgment in which it was ordered that the records … be turned over to Plaintiff. And these records have not been turned over … [T]he Court can exercise its powers of contempt and incarcerate the Sheriff and his deputies … [I]t's one of the most shameful, flagrant contemptuous actions toward the Court I know." (**Tr. 9/9/10, 4-5, 11**)

4. Contempt motive for hiding records was revealed by Co-Plaintiff's non-IPRA, subpoenaed, Orchid Cellmark records proving them for Case 2003-274 (in-house Case 4444). (**Tr. 12/18/12 Co-Plaintiff Ex. 11-15**) The results were junk DNA! (**RP 2118-2122**) Defendants were lying about having "Kid's blood DNA!" That made the Arizona exhumations illegal!

a. "Evidence Evaluation Worksheet" for Case 2003-274 listed Lee's floorboard and bench specimens, and Arizona's exhumed bones (**RP 2074-2077**); and listed their DNA extractions in "Laboratory Report-Forensic Identity - Mitichondrial Analysis." (**RP 2078**)

b. Junk DNA was proven. October 15, 2004's "Laboratory Report, Forensic Identity, Mitochondrial Analysis for 4444A and 4444B" showed Lee's floorboard specimens "generated no [DNA] conclusions" (**RP 2120**); and Lee's bench specimens had insufficient "human mitochondrial DNA … [so] no conclusions …can be reached." (**RP 2121**) January 26, 2009's "Laboratory Report, Forensic Identity, Mitochondrial Analysis" yielded no "Kid's blood DNA," since "no conclusions with regard to the sample can be reached." (**RP 2118-2119**) And Orchid Cellmark never tested for "blood;" just for DNA!

c. Thus, Defendants' forensic hoaxing was revealed:

In his August 18, 2008 deposition Sederwall lied:

> "Q. Did they find blood?
> A. They did …
> Q. Well, what would there be to compare [it] with?
> A. … John Miller … anything."(**RP 1313 at page 45**)

In his July 26, 2012 deposition, Sederwall lied:

> "A. There's two DNA on this workbench. There's blood running down the edges of it." (**RP 1913 at page 35**)

On May 16, 2006, Sederwall and Sullivan lied to gulfnews.com:

> "They now have a Dallas lab [Orchid Cellmark] *comparing DNA from the bones they dug up to blood found on a bench on which Sullivan believes the Kid's body laid.*" (emphasis added) (**RP 2132 at page 6**)

5. Contempt was by shell games:

> "[COURT] … My concern is this, folks, I hope the Defendants aren't playing a shell game with the Court." (**TR. 12/18/12, 80**)

a. Total shell game was in Virden's March 5, 2008 *Motion to Dismiss*:

> "Defendants Sullivan and Sederwall have retained the documents sought by Plaintiffs and are characterizing them as personal records and thus maintaining that they do not have to produce the documents to Plaintiffs. Lincoln County cannot provide Plaintiffs with documents they do not possess or control." (**RP 92-83**)

b. Shell game switched Case 2003-274 to its sub-investigation lacking

DNA records; as Morel wrote in records refusal on April 27, 2007:

> "Case 2003-274 involves an investigation into the escape of William H. Bonney and the murder of two Lincoln County Deputies." (**RP 42**)

c. Shell game claimed no Case 2003-274 file in Morel's May 11, 2007's refusal letter (until 2008's file subpoena exposed that lie) :

> "Lincoln County nor the Lincoln County Sheriff's Office maintains any records of any kind whatsoever pertaining to Case No. 2003-274 and, therefore, have no records responsive to … your request." (**RP 46**)

> d. Shell game misnamed requested records - as in Virden's August 26, 2009 *Cross Motion for Summary Judgment*:

> "The only request Plaintiffs actually made to the Sheriff's Department pursuant to [IPRA] was for any reports or documents generated by Dr. Henry Lee and/or Orchid Cellmark Lab involving samples of Billy the Kid's blood that could have been used for DNA analysis." (**RP 226**)

e. Shell game hid Orchid Cellmark's client contact name (Ostler) for records' release. (**RP 1963 at page 191**). When Ostler's name was exposed, shell game switched to his being records "custodian" or "owner" (**RP 1815**). But Ostler's March 1, 2012 affidavit confirmed he worked for Case 2003-274:

> "I gave these samples [from floorboards and bench] to personnel whom I believed were from the Lincoln County Sheriff's Office." (**RP 761**)

f. Shell game had sham requests - on October 26, 2010 by Virden to Lee (**RP 361**) and Orchid Cellmark (**RP 362**), and by Sederwall on February 3, 2011 to Orchid Cellmark (**RP 668**). Virden confessed the game in his July 27, 2012 deposition:

"Q. You could have called Henry Lee [when Lee answered by letter of November 12, 2010 that he had a report] … You didn't call him?

A. No, sir.

Q. … And [after you found in your case file Orchid Cellmark Director] Dr. Staub, his name and his lab address, you could have called him up and said, 'Hey … see if there is any DNA reports or something … But you didn't?

A. No, sir." (**RP 2001 at pages 90-91**)

g. Shell game faked IPRA as only for possessed records (**RP 199, 569-570**) known to exist (**RP 212**); then denied both.

D. <u>As to Forgeries</u>

1. SUMMARY: Lee's records were forged to fake privatizing and to remove his conclusions contradicting hoax claims that the shot Kid "played dead" on the bench, escaped, but left "blood DNA" for matching in exhumations. Sederwall's August 18, 2008 deposition foisted the "Kid blood" hoax, plus lying that Orchid Cellmark worked for him as "hobbyist":

"A. The [bench] blood pattern showed that whoever was put on that bench was still alive … (**RP 206 at page 50**)

Q. [W]as [Orchid Cellmark] working for you, not for the Sheriff's Department?

A. Correct. (**RP 245 at page 64**)

2. FIRST LEE FLOORBOARD REPORT (FORGED): On February 18, 2010, Sederwall gave Cooper an unrequested, nine (9) page, February 25, 2005, report, signed by Lee and Ostler, on floorboards, titled "Examination of Lincoln County Court House" (**"first floorboard report"**). (**RP 840-848 (annotated as to forgery)**) Its non-law enforcement header had its May 22, 2004 requester as

"Steve Sederwall," an "Investigator" - like "Tom Sullivan." Its "Results and Conclusions" planned DNA testing. Sederwall's attorney offered it to the Court at March 9, 2010's *Presentment Hearing* as "the only Lee report in Sederwall's possession" (**RP 2279 FOF 17**); while hiding that Sederwall's August 18, 2008 deposition called *the bench report his only one*. (**Tr. 3/9/10, 8-9**) On April 6, 2010, Virden also gave Cooper that floorboard report. (**RP 839)**

3. LEE BENCH REPORT (FORGED): On November 10, 2010, Sederwall gave Cooper a sixteen (16) page Lee report on the bench, titled "Forensic Examination Report; Examination of Furniture from Pete Maxwell's of July 15, 1881" **("bench report")**. It had the same dates and non-law enforcement header as the first floorboard report's; but was in different font, lacked "Results and Conclusions," and its Lee and Ostler signatures were superimposable on the first floorboard report's - as if cut and pasted. (**RP 478-493**)

4. COURT GIVEN (FORGED) LEE REPORTS AS EXHIBITS E AND F: In January 21, 2011's *Evidentiary Hearing*, feigning IPRA compliance (**RP 473**), Defendants gave the Court, as Exhibit F, a Lee floorboard report (**"second floorboard report"**) alleged as given to Cooper in 2010. (**RP 830-838 (annotated for forgery))** Defendants gave, as Exhibit E, the sixteen (16) page, bench report. (**RP 814-829 (annotated for forgery)**). To trick the Court, Virden and Sederwall coordinated:

a. Virden, with counsel, used the bench report to feign "hobbyist" "investigating team" and date before his tenure (hiding its February 25, 2005 date):

> Q. If you can look at Exhibit E, that was requested and sent to Steven Sederwall … [O]n the first page, in the introduction, it looks like there's a forensic investigation team participating in a reinvestigation, from this report, when did that reinvestigation occur?
> A. It looks like July of 2004.
> Q. That was before you became Sheriff?
> A. That's correct." (**RP 986; Tr. 1/21/11, 125**)

b. Sederwall faked privatizing by *lying that Lee mailed him the report*s:

> Q. So did you personally ever receive a copy of [bench] Exhibit E?
> A. Yes, sir … Dr. Lee mailed it to me … At my house …
> Q. When you received the report, who did you think it belonged to?
> A. It belonged to me …
> Q. Let me have you take a look at Exhibit F … Is Exhibit F the report Dr. Lee did for the Lincoln County Courthouse CSI?
> A. Yes, sir .
> Q. Now, again, how did you obtain this report?
> A. It was mailed to me at my house.
> Q. And receiving it at your house, who did you think it belonged to ?
> A. To me. (**Tr. 1/21/11, 169-171**)

E. <u>Court Tricked:</u> Believing Exhibits E and F as genuine (**RP 2280 FOF 20**), the Court's September 28, 2011 Order on January 21, 2011's *Evidentiary Hearing* assumed IPRA compliance:

> "Reports have been produced of Dr. Lee on forensic sample recoveries in the Old Lincoln Courthouse [Exhibit F] and from an old carpenter's workbench [Exhibit E]." (**RP 470**).

F. <u>Forgery Detected:</u> The Court found:

> "In July, 2011 Cooper recognized that the Lee courthouse floorboard report (entered as Exhibit "F") was a rewrite of the alleged same floorboard report given on November 10, 2010, and that this rewriting also put in doubt the authenticity of the carpenter's bench report (Exhibit "E")." (**RP 2280 FOF 20 [sic – 21**])

G. <u>Proceedings on Non-IPRA Sanctions and "Original" Lee Report:</u>

1. September 23, 2011's *Hearing on Motion for Presentment* alerted the Court to discrepant Lee reports. (**RP 2280 FOF 21**)

2. October 12, 2011's *Motion for Sanctions* (**RP 473-524**), requested monetary sanction beginning March 12, 2010 (ultimately extending to June 4, 2014 - or 1546 days, times $100.00, times 3, equaling $463,800):

> "[D]efendants have introduced altered, or forged documents and attempted to pass them off as originals." (**RP 473**)
>
> "[A]ltering official records of the Lincoln County Sheriff's investigation of Case No. 03-274 is serious, and is a proper basis for imposing sanctions against the defendants.
>
> *"The imposition of a fine of $100 per day for each defendant from January 21, 2011, or from the date of this court's order granting summary judgment to Plaintiffs (entered March 12, 2010) until the defendants and each of them comply with an order to produce all documents previously ordered by the court.* (emphasis added)
>
> "Such other and further relief as the Court determines appropriate after a hearing on this matter." (**RP 476**)

3. November 9, 2011's *Plaintiffs' Reply in Support of Sanctions* stated:

> "[E]vidence has been provided that Defendants altered or forged the only [requested] documents they have provided to this Court and to the Plaintiffs … Therefore, this Court should … [a]ward Sanctions … against the Defendants … [T]heir games are … a fraud upon this Court." (**RP 577-578**)

4. January 17, 2012's *Hearing on Sanctions* requested sanctions:

> "[MR. THREET] [A]ll we have a is marionette show of manipulation … I ask the Court to simply impose the sanctions." (**Tr. 1/17/12, 25**)

The Court's February 23, 2012 Order deferred sanctions "to a later date." (**RP 751**)

5. "ORIGINAL" LEE REPORT: On January 31, 2012, court-ordered Sederwall turned-over to Plaintiffs a twenty-five (25) page, allegedly "original," Lee report (**"original report"**), dated February 25, 2005 and titled **"**Forensic Examination Report." (**RP 850-874 (annotated as to forgery issue**)) In his deposition of July 26, 2012, Sederwall admitted it was the actual Lee report he received in 2005. (**Cooper AB 24**) It confirmed Lee's statements.

On May 1, 2006, Lee wrote to Cooper's IPRA agent:

> "To set the record straight, *the Lincoln County Sheriff's Department contacted me*. … We examined a wooden bench, and floorboards at the courthouse. I completed my examination of the evidence and *submitted my report to the Lincoln County Sheriff's Department*." (emphasis added) (**RP 54**)

In his November 12, 2010 letter to Virden, Lee stated:

> "My only report issued in regards to the death of Billy the Kid was issued on February 25, 2005." (**RP 366**)

Lee's February 29, 2012 affidavit confirmed his reports for Case 2003-274:

> "I sent my drafts, reports, and my file on the investigation, to Steven M. Serderwall [sic] of the Lincoln County Sheriff's Department." (**RP 1081**)

a. “Original” report’s header had Case 2003-274 and lawmen:

> “Requested By: Lincoln County Sheriff’s Office, New Mexico… Local Case No. 2003-274 … Report to: Steve Sederwall, Lincoln County Sheriff’s Office, New Mexico.” “Introduction” [had] “forensic investigation team” [as] “Dr. Henry Lee … Calvin Ostler … Tom Sullivan, Sheriff, Lincoln County, New Mexico, Steve Sederwall Deputy Sheriff, Lincoln County, New Mexico.” [Sections were:] “Introduction,” “Item #1 Workbench,” “Item #2 Washstand,” “Item #3 A piece of Headboard,” “Examination of Lincoln county Court House [floorboards],” [and] “Results and Conclusion.” (**RP 850-874; RP 2280 FOF 23**)

b. It had Lee’s bench DNA samples for the Sheriff’s Department:

> “These two [swab] samples were transferred to Lincoln Sheriff Department. In addition, scraping samples … were placed into evidence envelopes and were transferred to Lincoln Sheriff Department.” (**RP 856 at page 9**)

c. It had “Results and Conclusions.” (**RP 873-874**)

d. It proved the forgeries’ had maliciously removed law enforcement information. Its bench and floorboard investigations stated:

> “At the request of *Steve Sederwall of Lincoln County Sheriff’s Office* … Dr. Henry Lee went to New Mexico on July 31, 2004, to assist in the investigation of the case of Billy the Kid … The forensic investigation team arrived at the Mr. Manny Miller residence … [on] July 31, 2004 … The three pieces of evidence [bench, washstand, headboard] had been removed from a storage building ... *by Sheriff Sullivan, Deputy Sederwall,* and members of Bill Kurtis Productions.” (emphasis added) (**RP 850-851 at pages 1-2**)
>
> “On Sunday, August 1, 2004, forensic investigation team examined the old Lincoln County Courthouse in Lincoln County New Mexico. Present *at the scene were Sheriff Sullivan, Deputy Sederwall* … and Sheriff Gary Wayne Graves of De Baca County.”(emphasis added) (**RP 866 at page 17**)

But the forged bench report stated:

> "The forensic investigation team arrived at the Mr. Manny Miller residence … [on] July 31, 2004 … *Investigator Sullivan, Investigator Sederwall,* and members of Bill Kurtis Productions had removed the three pieces of evidence from a storage building." (emphasis added) (**RP 479 at page 2**)

6. DEFENDANTS' RESPONSE: Insolent trickery continued in April 20, 2012's *Responses* to the *Sanctions' Motions*. Forged records were called "inadvertent error" (**RP 545**); "misunderstanding;" "editing for … [Sederwall's] website for 'clarification;' " "altering during the scanning process" **(RP 577-578)**; "personal documents" (**Tr. 1/17/12, 16**); and, most outrageously: "the changes aren't particularly significant" (**Tr. 1/17/12, 15**), "the substance of the content of the ["original"] report is no different that of the previous reports previously provided to Plaintiffs" (**RP 1106**), and exposing forgery is "a ploy by [Cooper] to keep this case from being disposed in order to fill the chapters of [her] new book!" (**RP 1105**) And Virden never tried to recover a genuine Lee report.

7. March 22, 2012's *Second Motion for Sanctions*, citing case law, requested sanctions as monetary, as depositions, and as discretionary:

> "Sanctions are appropriate and necessary in this case … as a punitive measure … (**RP 807**) Defendants … have abused discovery, altered documents and disregarded this Court's orders for production of records, Plaintiff Gale Cooper, through counsel, respectfully requests the Court order … [s]anctions against Defendants." (**RP 811**)

8. May 31, 2012's *Second Hearing on Sanctions* addressed forgeries using the "original" Lee report. Sanctions were requested, but deferred; except as new depositions. (**RP 2280-2281 FOF 25**) October 25, 2012's Order stated:

> "[The 'Original Report' from Dr. Henry Lee] demonstrates in its header that Dr. Lee did a combined report of DNA specimen recoveries on the old Lincoln County courthouse floorboards and on an old workbench on February 25, 2015 for Case # 2003-274, for the Lincoln County Sheriff's Department, and for Sheriff Tom Sullivan and Deputy Steve Sederwall." (**RP 1369**)

9. Cooper's May 1, 2012 *Reply to Sederwall's and* Sullivan's *Response* to her *Second Motion for Sanctions* requested non-IPRA sanctions under the Court's "inherent authority." (**RP 1210-1211**)

10. Sederwall's July 26, 2012 deposition admitted Lee report forging. (**RP 2281 FOF 26**):

> "Q. [S]omebody manufactured [the floorboard report]?
> A. I don't know if I typed this, if Cal [Ostler] typed it …" (**RP 1928 at pages 81-82**)
> "Q. … "Did you make up the [bench] report?
> "A. … The report has been massaged, it's been changed, it's been worked on … (**RP 1928 at page 83**)
> A. … [T]his was the original report [Lee] sent to me …(**RP 1929 at page 85**)
> "Q. Are you the one responsible for taking out [its] … Case No. 2003-274?
> A. … I guess you could say, yeah." (**RO 1955 at page 169**)

11. Cooper's November 14, 2012 *Pre-Evidentiary Hearing Brief* requested non-IPRA sanctions for "misconduct towards the court." (**RP 1408-1409**)

12. December 12, 2012's and February 4, 2013's *Evidentiary Hearing* presented Virden's admitted sham IPRA requests, and Sederwall's forgery admissions. The Court delayed sanctions. (**Tr. 12/18/12, 79**)

13. Cooper's May 23, 2013 *Motion for Award of Costs and Damages and Sanctions Against Defendants* requested non-IPRA sanctions for contempt and forgeries. (**RP 2194**)

14. In Cooper's December 18, 2013 *Hearing on Costs, Damages, and Sanctions*, she requested non-IPRA sanctions:

> "As to the non-IPRA sanctions … I contend [forgery] was willfully done for concealment of evidence directly to this Court … and obstruction of justice." (**Tr. 12/18/13, 35-36**)

H. <u>Decision:</u> The Court granted Cooper's sanction requests by award of a non-IPRA, $100,000, "punitive" penalty. (**RP 2306 Judgment 4**)

<u>ARGUMENT</u>

SUMMARY

Demonstrated is that Defendants' challenge of their non-IPRA $100,000 penalty, by arguing deceptively against it as a IPRA penalty, is meritless; and hides its non-IPRA sanctioning for contempt and forgery. Their challenge of "attorneys' fees" award is meritless by omitting Cooper's appeal of it as misstated IPRA costs. And Cooper argues for additional sanction of defense attorneys for this frivolous *Cross-Appeal*.

POINT I:
DEFENDANTS CANNOT IGNORE COURT *FINDINGS*

A. Summary: Defendants cannot argue against IPRA or non-IPRA penalties by substituting their rejected *Findings* for Court's *Findings*, while having no evidence or authorities in the record demonstrating Court errors.

B. No Preserved Court Errors Support Appeal

1. Defendants have no evidence or law in the record contradicting that their sanction was for non-IPRA contempt and forgery.

2. "Error objections must be in the record, not first on appeal." *Grassie v. Roswell Hospital Corp.,* 2011-NMCA-024, ¶ 37, 150 N.M. 283, 258 P.3d 1075:

> "Nothing the [defendant] argued … alerted the district court's mind to the argument made on appeal. The failure … implicates the core rationale of our preservation rules." (citing *Hinger v. Parker & Parnsley Petroleum Co.*, 120 N.M. 430, 440, 902 P.2d 1033, 1043 (Ct.App1995)).

C. Court's Findings Have Primacy

1. Defendants' appeal cannot simply ignore Court *Findings.*

2. Court of Appeals is bound by the *Findings*, "unless they are demonstrated to be clearly erroneous or not supported by substantial evidence." *Roybal v. Morris*, 1983-NMCA-101, ¶ 30, 100 N.M. 305, 311, 669 P.2d 1100, 1106.

> "Substantial evidence" [is] "such relevant evidence that a reasonable mind would find adequate to support a conclusion." *Landavazo v. Sanchez,* 1990-NMSC-114, ¶ 7, 111 N.M. 137, 802 P.2d 1283.
>
> "The evidence must be viewed by [the appellate court] in its most favorable light in support of the findings. If the evidence when so viewed, including the reasonable inferences therefrom, supports the findings, then

all contrary evidence must be disregarded." *Martinez v. Trujillo*, 1970-NMSC-056, ¶ 6, 81 N.M. 382, 467 P.2d 398.

"The function of an appellate court is to review the evidence presented … not to reweigh conflicting evidence." *Maloof v. San Juan Cnty. Valuation Protests Bd.*, 1992-NMCA-127, ¶ 17, 114 N.M. 755, 845 P.2d 849.

3. Defendants provided no valid evidence challenging Court *Finding*s; which are, thus, "controlling for the appeal." *Trinidad Indus. Bank v. Romero*, 1970-NMSC-038, ¶ 7, 81 N.M. 291, 466 P.2d 568 (citing *Case v. Henry*, 1951-NMSC-15, 55 N.M. 154, 228 P.2d 433).

"[An appeal] "shall set forth a specific attack on any finding, or such finding shall be deemed conclusive … [A contested] finding of fact … not supported by substantial evidence shall be deemed waived unless the argument identifies with particularity the fact or facts that are not supported by substantial evidence." NMRA Rule 12-213(A)(4).

"On appeal, a party should properly present this court with the issues, arguments, and proper authority. Mere reference in a conclusory statement will not suffice." *State v. Clifford*, 1994-NMSC-048, ¶ 19, 117 N.M. 508, 873 P.2d 254 (noting that the Court is "not required to do [counsel's] research" for them).

POINT II: DEFENDANTS CANNOT IGNORE COURT ORDERS

A. <u>Defendants' Ignoring Court Orders is Sanctionable Contempt:</u>

"Contempt [is] [c]onduct that defies the dignity or authority of a court … Because such conduct interferes with administration of justice, it is punishable … by fine or imprisonment." *Black's Law Dictionary* 313 (7th ed. 1999).

"[A]n order issued by a court with jurisdiction over the subject matter … must be obeyed by the parties until it is reversed by orderly and proper proceedings." *State v. Cherryhomes*, 1992-NMCA-111, ¶ 14, 114 N.M. 495, 840 P.2d 1261 (quoting *United States v. United Mine Workers of America,* 330 U.S. 258, 293, 67 S.Ct. 677, 696, 91 L.Ed. 884 (1947))

> “Willful violation of a court's order … directly affects a court's ability to discharge its duties.” *Id.* (citing *United States v. Dickinson,* 465 F.2d 496, 510 (5th Cir.1972).
>
> “Such a direct affront to the power of the court cannot be tolerated.” *Id.* (citing *Territory v. Clancy,* 7 N.M. 580, 37 P. 1108 (1894).

POINT III: DEFENDANTS’ ARGUING THAT PUNITIVE DAMAGES ARE NOT RECOVERABLE UNDER IPRA IS IRRELEVANT, SINCE THEIR PENALTY AWARD IS NON-IPRA

A. Defendants Deceptively Identify Their $100,000 Penalty IPRA’s

1. Defendants use *Faber v. King,* 2013-NMCA-080, 306 P.3d 519, overruled by *Faber v. King,* 2015-NMSC-015, 348 P.3d 172 **(“Opinion”)** to state:

> “The [Supreme] Court [Opinion] recognized that the policy which disfavored punitive damages against the state in both tort and contract cases should also apply to IPRA cases.” (**Defendants BIC 9-10**)

2. But Defendants have no evidence that their penalty is under IPRA, making their argument irrelevant. (**Defendants BIC 10**)

3. In fact, their non-IPRA penalty was for *misconduct against the Court* by contempt and forgery; while IPRA’s penalty-damages are for *misconduct against requesters* by improper denial of public records under § 14-2-11.

4. Also, Defendants’ IPRA penalty was separately awarded for wrongful records withholding. (**RP 2282 COL 8; RP 2285 COL 19, 26**).

5. Furthermore, the Court identified the $100,000 penalty as non-IPRA:

> “Defendants’ *conduct in providing altered records* as discussed in Findings of Facts 25, 26, and 29 and Conclusions of Law 18 is wanton, willful, and in bad faith.” (emphasis added) (**RP 2286 COL 27**)

B. Cooper Never Requested Punitive Damages Under IPRA

1. Under IPRA, Cooper requested § 14-2-11(C)(1-4) per day penalty-damages for wrongful records denial. (**Cooper BIC 13, 15, 18-21**)

C. The Opinion Supports Punitive Sanctions

1. Defendants omit that *Faber v. King's* Opinion supports punitive sanctions under a Court's "inherent authority … to 'control the parties and the litigation' ":

"In State ex rel. N.M. State Hwy. and Transp. Dep't v. Baca, 1995-NMSC-033, ¶¶ 21-22, 25, 120 N.M. 1, 896 P.2d 1148, this Court concluded that [awards] which are punitive and compensatory, did not conflict with Torrance because a court's inherent authority to 'control the parties and the litigation before it' outweighed the possible depletion of public revenues" (**Opinion ¶ 32**)

And *New Mexico State Highway Dept.* specifically upholds non-IPRA punitive sanctions for a litigant's misconduct to the Court. (**Cooper BIC 35-36**)

D. Defendants Preserved No Argument Against Their Non-IPRA Penalty

1. Defendants preserved no record challenging non-IPRA sanctions nor claiming IPRA addressed contempt and forgery; thus, failing Rule 12-213(A)(4) NMRA that "an [appeal] argument … shall contain … a statement explaining how the issue was preserved in the court." Moreover, the Court of Appeals "will not review arguments that were not preserved in the district court." *Los Vigiles Land Grant v. Rebar Haygood Ranch, LLC*, 2014-NMCA-017, ¶ 22, 317 P.3d 842.

> "To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court. . . . Where the record fails to indicate that an argument was presented to the court below … it will not be considered on

appeal." *Woolwine v. Furr's, Inc.*, 1987-NMCA-133, ¶ 20, 106 N.M. 492, 745 P.2d 717 (internal citations omitted)

E. Governmental Officials are Not Immune to Sanctions

1. Defendants irrelevantly challenge punitive damages against governmental entities under IPRA. (**Defendants BIC 10**)

2. But governmental officials are not immune to non-IPRA sanctions:

> "[A] district court's inherent power to impose sanctions includes the authority to issue non-compensatory monetary sanction against a public entity." *Harrison v. Board of Regents of Univ. of New Mexico*, 2013-NMCA-105, 311 P.3d 1236, *cert. granted sub. nom. Harrison v. Lovelace,* 2013-NMCERT-010, 313 P.3d 251 and *cert. quashed*, 2014-NMCERT-005, 326 P.3d 1112.

3. Supreme Court supports monetary "punitive sanction" against a governmental entity for bad faith litigation to preserve judicial process integrity. *New Mexico State Highway Dept.* ¶¶ 12, 18.

4. *Faber v. King's* Opinion, citing *New Mexico State Highway Dept.*, upheld punitive sanctions against a governmental entity. (**Opinion ¶ 32**)

5. Public policy supports punitive sanctions against governmental entities:

> "[As to] the *punitive sanction awarded* and the recognized immunity of governmental entities from punitive damages … [t]he majority distinguishes the *public policy grounds* for this governmental immunity based upon a need for additional control over abuses that occur during the judicial process … *[M]isconduct toward the court must be given greater weight than misconduct toward a party when punitive punishment of a governmental entity is in consideration.*" *Harrison* ¶ 32. (emphasis added)

POINT IV:
DEFENDANTS' ARGUMENT AGAINST IPRA "ATTORNEY FEES" AWARD IS IRRELEVANT TO COOPER'S FULL IPRA COSTS AWARD

A. Defendants Argue Deceptively Against Attorneys' Fees Award

1. Defendants mischaracterize the already-briefed Court error calling Cooper's out-of-pocked IPRA *costs* for attorneys, "attorneys' fees." (**Cooper BIC 41-42; Defendants AB 9, 12-13; Cooper RB 17-18**):

> "After a mediation ordered by the district court, all claims for attorney fees were resolved … The district court's award of attorney fees in the amount of $10,994.28 was in error and should be reversed." (**Defendants BIC 11**)

B. Ignored is IPRA's Intent for Costs Reimbursement

1. Under § 14-2-12(D)'s costs award is mandatory:

> "The court shall award … costs to any person whose written request has been denied and is successful in court action to enforce [IPRA]."

2. "Cost" is defined by out-of-pocket payment, not source :

> "Cost [is] … the expenses of litigation: those allowed in favor of one party against another." *Black's Law Dictionary* 349-350 (7th ed. 1999).
>
> "An expenditure of money [as] out-of-pocket expense … paid from one's own funds." *Id. 599.*
>
> "Certainly an important purpose of [42 U.S.C. § 1988] is to encourage private enforcement and vindication of civil rights by providing recovery of *all costs*." *Witherspoon v. Sielaff*, 507 F. Supp. 667, 669 (N.D. Ill. 1981). (emphasis added)

3. Cooper's correct cost award is $19,594.56. (**Cooper BIC 10**)

POINT V:
EACH DEFENDANT WAS A RESPONSIBLE PARTY

A. **Summary:** Defendants are each responsible for IPRA and non-IPRA violations.

B. Virden's Responsibility

1. Virden, under § 14-2-5 had to provide public records "[as] an integral part of the routine duties of public officers." As records custodian under § 14-2-6(A)(F) and *Toomey*, he had to provide public records not in his "*actual physical custody and control*," as held "*on behalf of*" him. Under § 14-2-7(E)(5), he had "to make available public records for inspection." Under § 14-2-11(B)(2) he shared responsibility for records denial.

2. As Sheriff, Virden was responsible for his Deputies' actions:

> "[Since] New Mexico has no statute setting forth the liability of the Sheriff for the acts of his deputy … we look to the common law for the basis of that liability … [T]he Sheriff has been held liable for the actions of his deputy undertaken by virtue of the deputy's office." *Karr v. Dow*, 1973-NMCA-016, ¶¶ 9, 10, 84 N.M. 708, 507 P.2d 455.
>
> "[U]nder the law of agency, the principal is bound by his chosen agent's deeds." *Marchman v. NCMB Texas Nat'l Bank*, 1995-NMSC-041, ¶ 56, 120 N.M. 74, 898 P.2d 709 (quoting *United States v. 7108 West Grand Ave.*, 15 F.3d 632, 634 (7th Cir.) *cert denied*, 512 U.S. 1212, 114 S.Ct. 2691, 129 L.Ed.2d 822 (1994).

C. Deputies' Responsibility

1. As Commissioned Deputies, Sederwall and Sullivan were public officials responsible for giving records under § 14-2-5, were responsible for records' denial under § 14-2-11(B)(2), and were Virden's agents. (**RP 2283-2284 COL 13- 14**)

> "[A] person may appoint an agent to do the same acts and to achieve the same legal consequences by performance of an act as if he or she acted personally." 3 Am. Jur. 2d Agency Section 18, at 442 (2002).
>
> "An agent is a person who, by agreement with another called the principal, represents the principal … with or without compensation." UJI 13-401, NMRA.
>
> "[D]eputies are hereby authorized to discharge all the duties which belong to the office of sheriff … with the same effect as though they were executed by the respective sheriffs." NMSA § 4-41-9,

2. Sederwall, as admittedly possessing Case 2003-274 records (**AB 2-3, 7; Tr. 3/9/10, 8-9**), held public records on behalf of Case 2003-274.

POINT VI: DEFENDANTS COMMITTED SANCTIONABLE NON-IPRA CONTEMPT AND FORGERY

A. <u>Summary:</u> Defendants committed non-IPRA misconduct against the Court of contempt and forgery, which yielded their non-IPRA penalty.

B. <u>Sanctions Are Proper</u>

1. As supported by the record, Defendants willfully defied and deceived the Court. "Obstructive tactics of violation of court orders and efforts to conceal the existence of evidence are sanctionable irrespective of the other issues." *Gonzales v. Surgidev*, 1995-NMSC-047, ¶¶ 3, 7, 120 N.M. 151, 899 P.2d 594.

> "It is enough that a party acted willfully … in order to support a district court's imposition of sanctions against that party." *Enriquez v. Cochran*, 1998-NMSC-157, ¶ 45, 126 N.M. 196, 967 P.2d 1136.
>
> "[Sanctions] … may only be imposed when the failure to comply is due to the willfulness, bad faith or fault of the disobedient party." *Allred v. Bd. of Regents of Univ. of N.M.*, 1997-NMCA-070, ¶ 20, 123 N.M. 545, 943 P.2d 579 (quoting *United Nuclear Corp. v. General Atomic Co.,* 96 N.M. 155, 202, 629 P.2d 231, 278 (1980)).

C. <u>Contempt Merits Sanctioning</u>

1. Defendants defied Court Orders "to provide or permit discovery" making sanctioning "the sound discretion of the trial court." *Marchman v. NCMB Texas Nat'l Bank*, 1995-NMSC-041, ¶ 51, 120 N.M. 74, 898 P.2d 709 (quoting *Medina v. Found. Reserve Ins. Co.*, 1994-NMSC-016, 117 N.M. 163, 870 P.2d 125).

2. Defendants defied Orders by deceitful claims to the Court as to being "hobbyists," as to IPRA applying only to "direct possession," as to playing "shell games" with responsibility, and as to shaming requests and forging records.

3. "Pursuant to § 34-1-2, NMSA 1978, a court may … punish contempts by reprimand, arrest, fine or imprisonment … to preserve the authority and vindicate the dignity of the court." *In re Klecan,* 1979-NMSC-094, ¶ 4, 5, 93 N.M. 637, 603 P.2d 1094 (quoting *State v. Clark*, 56 N.M. 123, 241 P.2d 328 (1952)).

D. <u>Forgery Merits Sanctioning</u>

1. Defendants' discovery abuse by giving forged records as genuine to deceive the Court as to IPRA compliance and "hobbyist" status, obstructed adjudication; and was willful, wanton, and in bad-faith. (**RP COL 18, 25, 27**).

> "When a party has displayed a willful, bad faith approach to discovery, it is not only proper, but imperative that severe sanctions be imposed to preserve the integrity of the judicial process." *United Nuclear Corp.*
>
> "[T]he degree to which … misrepresentations obstruct further discovery should guide the district court's decision [on sanctioning]." *Reed v. Furr's Supermarkets, Inc.* 2000-NMCA-091, ¶ 20, 129 N.M. 639 11 P.3d 603.

2. Severe sanctions are to be expected:

> "[A]ny party … who seeks to evade or thwart full and candid discovery incurs the risk of serious consequences." *Reed v. Furr's* (quoting 8A Charles Alan Wright et al., *Federal Practice and Procedure* § 2281, at 595 (2d ed. 1994))
>
> "Litigants would infer that they have everything to gain, and nothing to lose, if manufactured evidence merely is excluded [without sanction]." *Garcia v. Berkshire Life Ins. Co. of America*, 569 F.3d 1174 (2009) (quoting *Pope v. Federal Express Corp.*, 138 F.R.D. 675, 683 (W.D.Mo. 1990))
>
> "Moreover, the fabrications were carefully constructed to look like authentic documents." *Id.*, ¶ 8.

3. Defendants' forgery of public records is a crime under NMSA 1978, § 30-26-1(A)(E), "Tampering with public records":

> "Tampering with public records consists of:
>
> "A. knowingly altering any public record without lawful authority …
>
> "E. knowingly destroying, concealing, mutilating, or removing without lawful authority any public record or public document belonging to or received or kept by any public authority for information, record or pursuant to law. Whoever commits tampering with public records is guilty of a fourth degree felony."

POINT VII: SANCTIONING IS COURTS' INHERENT POWER

A. <u>Summary:</u> The Court had inherent power to impose the non-IPRA sanction.

B. <u>Courts' Inherent Power to Sanction</u>

1. The U.S. Supreme Court upholds courts' inherent power to impose sanctions for bad faith conduct toward the court. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S,Ct. 2123, 2135, 115 L.Ed.2d 27 (1991).

"Inherent judicial power is the power necessary to exercise the authority of the court' and includes the authority to sanction." *Harrison,* ¶ 15 (citing *In re Jade G.*, 2001-NMCA-058, ¶¶ 27-28, N.M. 687, 30 P.3d 376.)

"[A] court must be able to command the obedience of litigants and their attorneys if it is to perform its judicial functions." *Restaurant Mgmt. Co. v. Kidde-Fenwal, Inc.*, 1999-NMCA-101, ¶ 11, 127 N.M. 708, 986 P.2d 504.

"Under its inherent authority, a court may sanction parties and attorneys to ensure compliance with the proceedings of the court." *In re Jade G.*

"Certain implied powers must necessarily result to our courts of justice, from the nature of their institution … *To fine for contempt ... enforce the observance of an order, &c., are powers which cannot be dispensed with in court, because they are necessary to the exercise of all others*." *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812). (emphasis added)

C. Sanctionable "Willful" Misconduct

1. Willful misconduct to the Court is sufficient for sanctions. *Enriquez v. Cochran*, 1998-NMCA-157, ¶ 45, 126 N.M. 196, 967 P.2d 1136:

"A finding of willfulness may be based upon either a willful, intentional, and bad faith attempt to conceal evidence or gross indifference to discovery obligations." *Medina v. Found. Reserve Ins. Co.*, 1994-NMSC-016, ¶ 6, 117 N.M. 163, 870 P.2d 125.

2. Cooper's Court found "willful" and "bad-faith" misconduct by Defendants. (**RP 2284-2286 COL 18, 26, 27**)

D. Inherent Power to Sanction Includes Public Officials

1. A party's status is irrelevant to sanctions for defying courts' authority:

"A fundamental aspect of a court's exercise of its inherent power is the principle that a court's inherent authority extends to all conduct before the court and to all parties appearing before the court, regardless of the

party's status as a private litigant or as a governmental/public entity." *New Mexico State Highway Dept.* ¶ 27.

"It is beyond question that [a court's inherent] power extends to governmental attorneys and parties." *Noble Cnty. v. Rogers*, 745 N.E.d 194, 198-99 (Ind.2001)

POINT VIII:
COURT INTENDED NON-IPRA PUNITIVE SANCTION AWARD

A**. <u>Summary</u>:** For willful misconduct defying its authority, the Court imposed a non-IPRA punitive sanction for contempt and forgery.

B. <u>Severe Non-IPRA Sanction Was Justified</u>

1. A court has inherent authority to impose sanctions for contempt as in NMSA Section 34-1-2 "Contempts."

2. "Where a party's discovery conduct is dishonest, sanctions may be quite severe." *Reed v. Furr's*.

C. <u>Record Has Only Non-IPRA Sanctions Requests</u>

1. From 2010 to 2013, Cooper argued for non-IPRA sanctions for contempt and forgery, separate from IPRA damages; and never argued for punitive damages.

2. The Court held multiple hearings on non-IPRA sanctions; its orders addressed sanctions as either delayed or granted for repeat depositions; and its *Findings* reflected sanctionable non-IPRA violations. (**Cooper AB 12-25**)

3. The Court never addressed in litigation harm-suffered punitive damages.

D. <u>Punitive Damages Do Not Apply</u>

1. Punitive damages award is irrelevant to non-harm-suffered, whistleblower Cooper (**Cooper BIC 13-14, 16-17**), since it applies to misconduct causing "actual damages" to a party before a suit is filed. *Gonzales v. Surgidev* (citing *State v. Powell*, 114 N.M. 395, 400, 839 P.2d 139, 144 (Ct. App. 1992)).

2. Even if personal injury occurred, sanctions can be separately awarded:

> "[S]anctions … concern [a party's] misconduct towards the tribunal … The court's award of sanctions … was predicated on Appellant's 'pattern and practice of willful failures of discovery.' We find that the award of sanctions [is separate from] the award for punitive damages." *Gonzales v. Surgidev*, 1995-NMSC-047, ¶ 17, 120 N.M. 151, 899 P.2d 594.

E. <u>Semantic Issue of "Punitive Damages"</u>

1. The Court borrowed UJI "punitive damages" language to describe Defendants' "culpable mental state" for their contempt and forgery being "willful, wanton, and in bad faith;" so as to achieve punishment and deterrence, and to grant Cooper's sanctions requests for "enormity of the wrong":

> "Punitive damages are awarded for the limited purposes of punishment and to deter others from the commission of like offenses. The amount of punitive damages must be based on reason and justice taking into account all the circumstances, including the nature and enormity of the wrong." UJI 13-1827
>
> "A culpable mental state, for purposes of punitive damages includes all the terms within UJI 13-1827, NMRA, *i.e*, "malicious, willful, reckless, wanton, fraudulent or in bad faith." *Gonzales v. Sansoy,* 103 N.M. 127, 130, 703 P.2d 904, 907 (Ct.App.1984).

2. The Court stated:

> "UJI 13-1827, NMRA allows the award of punitive damages if the conduct of the Defendants is malicious, willful, reckless, wanton, or in bad faith.
>
> "Defendants' conduct in providing altered records as discussed in Findings of Facts 25, 26, and 29 and Conclusions of Law 18 is wanton, willful, and in bad faith.
>
> "Based on Defendants' conduct, Plaintiff Cooper is entitled to punitive damages in the amount of one hundred thousand dollars ($100,000.00) against Defendants." (**RP 2280-2281 COL 25, 27, 28**)

3. Using a UJI's "punitive damages" language to express penalty intent is harmless; and is compatible the Court's holdings on sanctionable conduct (**RP 2286 COL 28; RP 2280-2281 FOF 25, 26, 29**) "to punish violator[s] and preserve authority of court." *Hall v. Hall*, 1992, 114 N.M. 378, 838 P.2d 995, certiorari denied. 114 N.M. 314, 838 P.2d 468.

4. The Court's "punitive" monetary fine was for "vindicating authority of court." *In re Byrnes,* 2002-NMCA-102, ¶ 14, 132 N.M. 718, 54 P.3d 966.

> "Although … discovery sanctions cannot be entered as 'mere punishment,' all such sanctions involve an element of punishment." *United Nuclear Corp.* (citing *Norman v. Young*, 422 F.2d 474 (10th Cir. 1970).
>
> "As the court stated:
>
> > 'Our discovery procedures are meaningless *unless a violation entails a penalty proportionate to the gravity of the violation*. Discovery for all parties will not be effective unless trial courts do not countenance violations, and unhesitatingly impose sanctions proportionate to the circumstances.' " *Id.* (quoting *Buehler v. Whalen,* 70 Ill.2d 51, 374 N.E.2d 467 (1977)) (emphasis added)

POINT IX:
APPROPRIATENESS OF PUNITIVE AWARD AMOUNT

A. <u>Courts Have Wide Sanctions Options</u>

1. The Court has discretionary power to sanction:

> "The choice among the various sanctions rests within the discretion of the district court." *United States v. Sumitomo Marine & Fire Ins. Vo. Ltd.*, 617 F.2d 1365 (1980) (citing *Anderson v. Air West, Inc.*, 542 F.2d 522, 524 (9th Cir. 1976) (quoting *In re Josephson*, 218 F.2d 174, 182 (1st Cir. 1954)).

B. <u>Severe Sanction is Merited</u>

1. *United States v. Sumitomo Marine* addresses severe sanctions:

> "Severe sanctions were also necessary to further the third objective of Rule 37(b): generally deterring flagrant disobedience and callous disregard of court discovery orders." Quoting *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976) (per curiam) "The effectiveness of and need for harsh measures is particularly evident when the disobedient party is the government. (T)he public interest requires not only that Court orders be obeyed but further that Governmental agencies which are charged with the enforcement of laws should set the example of compliance with Court orders."

POINT X:
OVERRULING REQUIRES ABUSE OF DISCRETION

A. <u>Summary:</u> Defendants failed to prove the Court's abuse of discretion needed to overturn their $100,000 sanction award; and the Court had ample evidence and Hearings for its determination, as well years of enduring Defendants' contempts and forgeries.

B. The Record Supports Sanctions

1. Defendants cannot claim that "there is neither evidence nor inference from which the [finder of fact] could have arrived at its verdict." *Rhein v. ADT Automotive, Inc.,* 122 N.M. 646, ¶ 25, n. 4., 930 P.2d 783. In fact, from 2010 to 2013 the Court held Hearings on non-IPRA sanctions for contempt and forgery.

> "[To reverse the judgment, the argument must establish] that the court … committed a clear error of judgment in the conclusion it reached." *United Nuclear* at ¶ 370 (quoting *Wilson v. Volkswagen of America, Inc.,* 561 F.2d 494, 513 (4th Cir. 1977), cert. denied, 434 U.S. 1020, 98 S.Ct. 744, 54 L.Ed.2d 768 (1978)).

2. Defendants misconduct against the Court merited sanction:

> "[W]hen false evidence or testimony is provided under oath, knowingly and with intent to deceive, a party *commits fraud on the court*. It would be odd, therefore, if a court's power to impose the admittedly severe sanction … failed to account for the act's interference with the judicial process … For all these reasons, we conclude that the district court did not abuse its discretion by concluding that the severe sanction … was warranted in this case." *Garcia v. Berkshire Life Ins. Co. of America.* (emphasis added)

C. Defendants Have No Evidence of Abuse of Discretion

1. Defendants provided no evidence that the Court's non-IPRA penalty for contempt and forgery abused discretion by being unreasonable, in bad-faith, lacking reference to guiding principles, or too stern.

> "Discovery sanctions imposed by a trial court will be set aside only if the court clearly abused its discretion." *City of Dallas v. Cox.*793 S. W.2d 701 (1990) ¶¶ 1-5 (citing *Bodnow Corp. v. City of Hondo.* 721 S.W.2d 839, 840 (Tex.1986)).

"The test for abuse of discretion is … whether the trial court acted without reference to any guiding rules and principles." *Id.* (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985)).

"The Supreme Court reviews a trial court's decision to impose discovery sanctions for an abuse of discretion, and will disturb the trial court's ruling only when the trial court's decision is clearly untenable or contrary to logic and reason." NMRA, Rule 1-037(B)(2)

"It is '[o]nly where the sanction invoked is more stern than reasonably necessary' that a denial of due process results." *United Nuclear* at ¶ 393 (quoting *DiGregorio v. First Rediscount Corporation*, 506 F.2d 781, 787 (3rd Cir. 1974).

"[E]xhaustive review of the record [must show that the trial court] acted in bad faith [and was] manifestly erroneous." *Id.,* ¶ 370

2. Defendants have not provided "weight of evidence by facts and law that the [sanction] award was clearly wrong and unjust." *City of Dallas v. Cox.* ¶¶ 1-5.

"In determining the propriety of sanctions, the trial court is entitled to consider the entire record of the case." *Id.* (citing *Woodruff v. Cook,* 721 S.W.2d at 868–69 (Tex.App. Dallas 1986)).

3. Defendants merely preposterously ask the Court of Appeals to condone with impunity their willful bad-faith misconduct against the Court.

POINT XI:
DEFENDANTS' ATTORNEYS ARE ADDITIONALLY SANCTIONABLE

A. <u>Overview</u>: Cooper requests separate Court of Appeals sanction against Defendants' attorneys for their frivolous bad-faith *Cross-Appeal* lacking evidence, misstating IPRA law, concealing contempt and forgery, substituting rejected *Findings* for Court's *Findings*, and merely obfuscating the non-IPRA penalty and "attorneys' fees" awards without legitimate refutation.

B. A Frivolous Appeal is Sanctionable

1. Under Federal Rule of Appellate Procedure 38, sanction can be awarded if the appellate court determines that an appeal is frivolous.

> "[F]rivolous appeal [is] [a]n appeal having no legal basis … filed for delay … or to avoid payment of a judgment." *Black's Law Dictionary* 677 (7th ed. 1999).

2. Appellate courts have inherent authority to sanction attorneys:

> "[B]oth trial and appellate courts must have inherent power to impose a variety of sanctions on both litigants and attorneys in order to … deter frivolous filings." *New Mexico State Highway,* ¶ 11 (quoting *Martinez v. Internal Revenue Serv.* 744 F.2d 71, 73 (10th Cir. 1984)).

3. Sanctioning governmental attorneys is not an abuse of discretion. *United States v. Sumitomo Marine.*

B. Defendants' Attorneys' Are Sanctionable for Their Frivolous Appeal

1. Defendants' attorneys filed an appeal knowing "no meritorious defense existed;" which justifies SCRA 1986, Rule 1-011 (**"Rule 11"**) sanction. *Dona Ana Sav. and Loan Ass'n, F.A. v. Mitchell*, 1991, 113 N.M. ¶ 9, 576, 829 P.2d 655, *certiorari denied* 112 N.M. 235, 814 P.2d 103. Rule 11's "good ground" requirement demonstrates their pleading as groundless by fact or law. *Rivera v. Brazos Lodge Corp*., 1991, 111 N.M. 670, 808 P.2d 955.

> "An appeal may be frivolous if it consists of irrelevant and illogical arguments *based on factual misrepresentations and false premises*, or when … arguments of error are wholly without merit … making appellate-level sanctions appropriate." *Garcia v. Berkshire Life* (quoting *Lewis v. Comm'r of Internal Revenue*, 523 F.3d 1272, 1278 (10th Cir.2008))

> "Fines penalizing attorneys have frequently been held to be appropriate under … federal [R]ule 11 … Although the federal rule differs in part from [New Mexico's] Rule 11 … both versions permit the imposition of a fine as a sanction in appropriate cases." *Id.*
>
> "Rule 11 was 'designed to encourage honesty in the bar when bringing and defending actions [and] ought to be employed … [when] an attorney deliberately presses an unfounded claim or defense.' " *Rivera v. Brazos Lodge Corp.* (quoting *Boone v. Superior Court*, 145 Ariz. 235, 239, 700 P.2d 1335, 1339 (1985)).
>
> "A court may exercise its discretion and impose sanctions for a willful violation of [Rule 11] when it finds ... that a pleading by an attorney is not well grounded in fact, is not warranted by existing law or reasonable argument." *Id.*, ¶ 13.

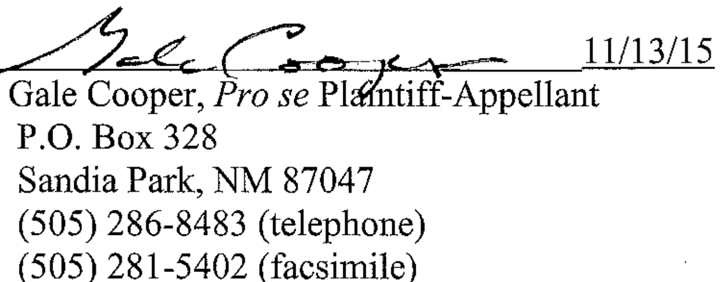
2. Defendants' attorneys' appeal, multiplying proceedings "unreasonably and vexatiously" by meritless argument, is sanctionable under 28 U.S.C. § 1927.

CONCLUSION

Since Defendants' *Cross-Appeal* lacks merit, Cooper requests upholding of her non-IPRA penalty award of $100,000; and that her IPRA "attorneys' fees" award be considered in light of her own appeal as to her full IPRA costs.

Alternatively, if "punitive damages" and "attorneys' fees" awards are deemed ambiguous, Cooper requests remanding to District Court for clarifications.

Furthermore, Cooper requests added sanction against Defendants' attorneys for their frivolous bad-faith *Cross-Appeal*.



11/13/15

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CERTIFICATE OF SERVICE

I, Gale Cooper, hereby certify that an original plus five (5) copies of the foregoing document were hand-delivered by me to the New Mexico Court of Appeals on November 13, 2015; and copies were sent by USPS mail to the following:

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