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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
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LISA NASS-ROMERO,
on behalf of herself and all
others similarly situated,

Plaintiff/Appellant,

vs.

Ct. App. No. 30,540

VISA U.S.A., INC., AND MASTERCARD
INTERNATIONAL, INC.,

Defendants/Appellees.

APPELLANT'S BRIEF IN CHIEF

Civil Appeal from the First Judicial District
County of Santa Fe
No. D-101-CV-2004-00413

The Honorable Sarah Singleton

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I. SUMMARY OF PROCEEDINGS

A. Nature of the Case

Plaintiff-Appellant Lisa Nass-Romero ("Plaintiff" or "Appellant"), seeking to represent a class of consumers, appeals a ruling dismissing a petition against the defendant credit card companies, Visa U.S.A., Inc. ("Visa") and MasterCard International, Inc. ("MasterCard", together "Defendants" or "Appellees"), for violations of the New Mexico antitrust and consumer protection. The District Court erred chiefly by narrowly interpreting New Mexico's expansive, pro-consumer antitrust law and misinterpreting a key federal precedent, which supports Plaintiff's position.

B. Course of Proceedings

Plaintiff filed this putative class action in the First Judicial District Court of New Mexico on March 3, 2004, alleging violations of the New Mexico Antitrust Act and Unfair Practices Act. Judge Hall heard oral argument on the defendants' motion to dismiss on September 14, 2004.

Judge Hall retired at the beginning of 2010, causing the case to be reassigned to Judge Singleton. Oral argument on the Appellees' Motion to Dismiss before Judge Singleton took place on May 14, 2010. Relying largely on

Associated General Contractors v. Carpenters, 459 U.S. 519 (1983) ("*AGC*"), the district court granted Appellees' Motion to Dismiss and dismissed the complaint with prejudice, and entered judgment on June 9, 2010.

C. Statement of the Case

Appellant seeks to represent a class of all New Mexico consumers who have purchased goods from New Mexico merchants who accept Visa and MasterCard credit cards and debit cards as a form of payment. In order to be able to accept Visa and MasterCard credit card payments, Visa and MasterCard also required merchants to accept their Visa and MasterCard debit cards ("Visa Check" and "Master Money," together "Debit Cards"). (Complaint ¶ 3 (RP 3)). Appellees' market power over this tying arrangement resulted in the rapidly escalating use of the Visa Check and MasterMoney debit cards by consumers and forced merchants to pay supra-competitive, exorbitant and fixed fees for these debit card transactions to MasterCard and Visa. (Complaint ¶ 5 (RP 3-4)). As Visa and MasterCard raised their debit card-interchange fees every year, merchants had no choice but to raise their prices to all shoppers who made purchases from them - whether or not they used a debit card - to pay for the merchants increased costs. (Complaint ¶ 4 (RP 3)).

At the heart of Plaintiffs' claim in this case is the enormous market power possessed by Visa and MasterCard in the credit card market, which they exploited to force merchants to accept Visa and MasterCard debit cards and pay unnecessary fees for debit card transactions, which do not carry the risk of credit card transactions because the money comes directly from the consumer's bank account. (Complaint ¶ 34 (RP 15)). Visa and MasterCard's "Honor All Cards" rules operated as an anti-competitive tying arrangement requiring merchants to accept their debit cards in order to be able to accept their credit cards - a form of payment that is critical to their business. (Complaint ¶ 34 (RP 15)). Only in a marketplace restrained by Visa and MasterCard's enormous power in the credit card market would merchants pay credit card-interchange fees for debit card transactions. *Id.* (Complaint ¶ 54 (RP 20)).

Essentially, Visa and MasterCard, through their debit card tying scheme, designed and perpetrated a massive restraint of trade, the result of which was to impose a hidden "sales tax" on every retail transaction in New Mexico by merchants who accepted their credit and debit cards, whether or not the purchaser used one of the cards. These merchants had little choice but to incorporate this hidden tax in their resales to consumers. (Complaint ¶ 4 (RP 3)). Consequently,

Plaintiff and hundreds of thousands of other New Mexico consumers paid overcharges for consumer goods they purchased from these New Mexico merchants.

Appellant alleges that the Appellees' actions violated the New Mexico Antitrust Act and the New Mexico Unfair Practices Act because merchants passed on these extra charges to all New Mexico consumers purchasing goods or services from these merchants, whether or not they used a debit card for their transactions. These consumers were the ultimate and foreseeable targets of Visa and MasterCard's restraint of trade. They seek to recover the ill-gotten gains extracted from them by Visa and MasterCard's actions.

D. Procedural History of Related Actions

Two federal actions are related to the instant case.

1. The Merchants' Action

In October 1996, certain merchants and retail trade associations filed a series of class action lawsuits against the Defendants in the United States District Court for the Eastern District of New York. *In re Visa Check/MasterMoney Antitrust Litigation (a/k/a Wal-Mart Stores, Inc. et al. v. Visa U.S.A., Inc. and Master/Card International, Inc.)*, 280 F.3d 124 (2nd Cir. 2001). The allegations included,

among other things, that Visa and MasterCard violated federal antitrust laws by forcing merchants who accept their credit cards for payment also to accept Visa and MasterCard-branded debit cards. Plaintiffs claimed that Visa and MasterCard's actions caused merchants to pay excessive fees on Visa and MasterCard signature debit and credit transactions, which injured competition, merchants and consumers. The Merchants sought: (1) an injunction prohibiting Defendants from engaging in the alleged violations of the federal antitrust laws (including the elimination of the alleged forced acceptance of Visa and MasterCard-branded debit card transactions for payment by merchants who accept Visa and MasterCard-branded credit cards for payment), and (2) damages for the alleged excess fees paid.

During the course of the Merchants' Action, the U.S. Court of Appeals for the Second Circuit upheld the lower court's decision to certify a class of four million merchants, and the district court later granted the Merchants' cross-motion for summary judgment on a host of key issues. 280 F.3d 124 (2d Cir. 2001). On June 4, 2003, the merchants entered into proposed settlements with Visa and MasterCard, that would, among other things, allow merchants to accept the Visa or MasterCard branded credit cards without accepting their debit cards (and vice

versa), reduce the prices charged to merchants for some debit transactions for a period of time, and pay into a settlement fund amounts totaling $3.05 billion. On January 23, 2004, the District Court presiding over those actions entered an order and final judgment granting final approval to the settlements for the direct purchasers. None of this settlement money went to New Mexican consumers.

2. The Department of Justice Action

In its 1998 action against the Defendants, the Department of Justice ("DOJ") alleged that Visa and MasterCard's rules permitted member banks to issue credit and charge cards on both the Visa and MasterCard networks, but prohibited them from issuing cards on the only two other major general purpose credit card networks not controlled by member banks –American Express and Discover. *United States v. Visa U.S.A., Inc.*, 163 F.Supp.2d 322, 329 (S.D.N.Y. 2001). The government maintained that the exclusionary rules restrained competition among credit card networks and credit card issuers, harming consumers in both the credit and debit card markets.

The district court analyzed the government's claims under the rule of reason, beginning by defining two product markets: (1) general purpose cards; and (2) general purpose card network services. *See* 163 F.Supp. 2d at 335. The court

found that Visa and MasterCard assessed market power in the network services market - the market in which the associations operate. *See Id.* at 340. The court held that the challenged exclusionary rules "weaken[ed] competition and harm[ed] consumers." *Id.* at 329-330-400. Defendants appealed, arguing that the district court had erred in its conclusion that their respective exclusionary rules violate the Sherman Act. The Second Circuit affirmed. *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 234 (2d Cir.)

Visa/MasterCard cases have been dismissed under the state statues of Arizona, Tennessee, District of Columbia, Iowa, Kansas, Maine, Michigan, Minnesota, North Carolina, North Dakota, South Dakota, Nebraska, New York, Vermont, and Wisconsin. Generally, these courts determined that the Plaintiffs injuries were too remote to fall within the protections of the state antitrust laws.

In two states, California and West Virginia, the courts allowed the Visa/MasterCard cases to proceed which eventually resulted in settlements. The California court recently granted final approval of a $31 million settlement between the Plaintiffs and Visa/MasterCard. In West Virginia, Judge Wilson approved a final settlement for $16.2 million, which funded several sales tax holidays for West Virginia consumers.

II. STATEMENT OF THE FACTS.

The instant action was filed in March 2004 in the First Judicial District Court of New Mexico. In contrast to the Merchants' Action, in which merchants were granted relief from Visa and MasterCard's anti-competitive practices, Appellant commenced this action as a class action on behalf of consumers in New Mexico who purchased goods from merchants who: (1) accept Visa and MasterCard credit cards as a form of payment, and (2) have been forced to accept Visa and MasterCard debit cards as a condition of accepting Visa and MasterCard credit cards. Plaintiff alleged that Visa and MasterCard violated NMSA 1978, § 57-1-1 et seq. ("Antitrust Act") and NMSA 1978, § 57-12-1 et seq. ("Unfair Practices Act)" and common laws by engaging in a tying arrangement of credit and debit cards which produces artificially-inflated prices for consumer goods.

A. Debit Card vs. Credit Card Risk, the Threat Debit Cards Posed, and the Defendants' Response to Counter that Threat

Debit is a distinct product from credit. In a debit card transaction, the bank takes money out of a shopper's checking account on the day of the sale. (Complaint ¶ 10(f) (RP 6-7)). The customer uses his or her own money to pay the selling merchant; the only function of the debit card issuers to provide a payment apparatus. (Complaint ¶ 10 (RP 6-8)). The cost of supplying this network service

is negligible. (Complaint ¶¶ 56, 57 (RP 20-21)). A debit transaction is effectively an electronic check transaction.

In a credit card transaction, the customer uses the bank's money to pay for the sale, and he or she will repay the bank for the loan sometime in the future even "convenience users" of credit cards are being extended "credit" by a bank at least until the 25-day grace period is reached and the "loan" is repaid. (Complaint ¶ 23(RP 13)). In credit transactions, banks bear the risk that the cardholder may not ultimately pay off the loan in full. (Complaint ¶ 10(d) (RP 6)). Banks also lose the "time value" of this money. Banks and credit card companies charge merchants for the his risk of non-payment and cost of the time value to retailers by shaving off a substantial percentage, usually about 3 percent, in reimbursing the merchant seller. (Complaint ¶ 44 (RP 17-18)). This "discount fee" varies from 1.4 to 4.5% of the transaction amount. So, for example, if a shopper charges $100, the credit card companies will pay the merchant $97. Discount fees from the merchant are but one benefit of credit card use to banks. Banks also gain access to new loan customers who pay high interest rates on credit card debt as well as the possibility of substantial fees.

Credit cards and debit cards now exist side-by-side, but that was not always so. Credit cards came first and preceded the communications advances of the past thirty years that made possible instantaneous funds transfers from retail bank account holders. By the time that debit cards evolved, Defendants maintained vastly lucrative credit card networks. (Complaint ¶ 9 (RP 5-6)).

Low cost, immediate, riskless "debit card" transfers represented a huge threat to the entrenched credit card mechanisms in the same way that telegraphy threatened the "Pony Express". The gravamen of the Complaint is that the defendants met this threat by allegedly extortionate and deceptive conduct. The central extortion allegation is that defendants used their market power to force merchants to accept credit and debit cards on equal terms, through the "Honor All Cards" rule, thereby earning credit card fees on debit card transactions. At the heart of Plaintiff's claim in this case is the enormous market power possessed by Visa and MasterCard in the credit card market. As established by the DOJ's case against Visa and MasterCard and affirmed by the Second Circuit, it is a rare merchant in this country who can stay in business for long without accepting Visa and MasterCard credit cards. (Complaint ¶ 65 (RP 24)). The essence of the deceptive conduct was to camouflage the debit card and look like a credit card to

make them indistinguishable to merchants and consumers. (Complaint ¶ 70 (RP 25)).

The Complaint alleges that defendants skimmed billions of dollars, imperceptibly, a little at a time, with the effect of raising prices for all purchases at retail establishments that accepted Defendants' cards. As Visa and MasterCard raised their signature debit card interchange fees every year, participating merchants had no choice but to raise their prices to all consumers to pay for the increased costs, regardless of whether they actually used Visa or MasterCard debit cards. (Complaint ¶ 97 (RP 30)).

In sum, the $3 billion settlement in the Merchants' Action is a mere fraction of the supra-competitive fees collect by Defendants. More critically, that money represents a windfall for retailers. Defendants knew that their interchange fees are ultimately paid by consumers, not retailers. Because of the Supreme Court's *Illinois Brick* rule[1], merchants alone had standing in federal court to recover for overcharges – even though they were able to pass on those higher costs to customers.

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[1] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) held that only purchasers who purchased directly from an antitrust law violator have standing to sue under the federal antitrust laws.

As for New Mexico consumers, they have not received and will not receive a penny of the $3 billion that will be paid to merchants in the Merchants' Action. The bottom line is that this lawsuit will be the only opportunity for New Mexico consumers to recover for Visa and MasterCard's decade-long restraint of trade which earned them millions in ill-gotten gains.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The District Court erred in determining that the Plaintiffs-Appellants injuries were too remote and, therefore, they did not have standing under the New Mexico Antitrust Act and Unfair Practices Act.

2. The District Court erred in failing to find that Plaintiff-Appellant and those similarly situated were within the target area of defendants' actions.

3. The District Court erred in determining the Plaintiffs-Appellants complaint failed to state a claim upon which relief could be granted as a matter of law.

IV. STANDARD OF REVIEW

The appellate court is not bound by the trial court's conclusions of law and may address the legal issues to determine if the trial judge applied correct principles of law. *Martinez v. Martinez*, 93 N.M. 637, 676, 604 P.2d 366, 369 (1979). In granting a motion to dismiss under Rule 1-012(B)(6) NMRA, a court

determines the legal sufficiency of the complaint, accepting the facts pleaded therein as true, and that determination is subject to de novo review by the appellate court, which must resolve all doubts in favor of the sufficiency of the complaint. *Padwa v. Hadley*, 127 N.M. 416, 419, 981 P.2d 1234, 1999-NMCA-067, cert. denied, 127 N.M. 389, 981 P.2d 1207 (1999). The question is whether the plaintiff can recover or be entitled to relief under any state of facts provable under the complaint. *Anadarko Petroleum Corp. v. Baca*, 117 N.M. 1767, 169, 870 P.2d 129, 131 (1994).

Because the standing question is raised in a motion to dismiss under Rule 1-012(b)(6) NMRA 2004, the Court must take the factual allegations made in the complaint as true and indulge all reasonable inference from those facts. *Valdez v. State*, 132 N.M. 667, 54 P.3d 71, 2002-NMSC-028. Accordingly, Appellant respectfully requests this Court to reverse the District Court's decision to grant the Motion To Dismiss pursuant to Rule 1-012(B) (6) NMRA.

V. ARGUMENT

A. The District Court Misinterpreted New Mexico Law And United States Supreme Court Precedent.

In dismissing the Complaint, the district court looked to other states' interpretations of their laws that purported to follow the *AGC* opinion of Justice

Stevens (Hearing on Defendants' Motion to Dismiss, May 14, 2010 (Tr: 41-42)). The Court reasoning was incorrect for three reasons. First, the Court erred in relying so heavily on the interpretations of other states. Although the majority of other states dismissed similar complaints, others did not. The court disregarded the positive results that plaintiffs had achieved in both non-dismissing states, and disregarded the New Mexico antitrust statutes command to look at federal law: "the Antitrust Act shall be construed in harmony with the judicial interpretations of the federal antitrust laws," N.M.S.A. 1978, § 57-1-15. The New Mexico Antitrust statute says nothing about other States' laws.

Plaintiff agrees that the most relevant federal precedent is *AGC*, 459 U.S. 519 (1983). Other states relied on *AGC* to dismiss complaints. Those courts and the district court erred in doing so. A careful review of *AGC* demonstrates that its analysis and logic support plaintiff's position. The Supreme Court found standing lacking in *AGC* precisely because the elements present in this case were lacking in *AGC*.

AGC grew out of "a dispute between parties to a multiemployer collective-bargaining agreement", *AGC*, at 520. In *AGC*, a labor union sued contractors' associations with which it had entered into bargaining agreements, association

members and others, alleging a conspiracy to restrain the union's business activities in violation of the Sherman Act. 459 U.S. 519. The gist of the antitrust claim was that union carpenters had lost business because the association had encouraged third parties, subcontractors, and landlords, to use nonunion companies, thereby diminishing the demand for union labor. *Id.* at 527. The harm was not higher prices, but diminished job opportunities for some, but not all, workers. *Id.* at 527. The alleged "coercion" allegedly "adversely affected the trade of certain unionized firms and thereby restrained the business activities of the unions." *Id.* The Court held correctly that the antitrust laws were not enacted to protect any particular sector of the labor movement and that the complaint did not sufficiently allege that the union was "injured in [its] business or property" by reason of anything forbidden in the antitrust laws. *Id.* at 519. The AGC plaintiffs did not have standing under the federal antitrust laws because:

- the plaintiff was not a consumer (*Id.*, at 539);
- the damages were not overcharges (*Id.*, at 539);
- there was no allegation of any harm to price competition or consumer welfare, the core interest the antirust laws protect (*Id.*, at 542);

- the defendant was not alleged to be a trust dominating interstate commerce (*Id.*, at 539); and
- there was no diminution of the goods and services available to society at large (*Id.*, At 539).

All of these elements are present here. Justice Stevens, himself an able antitrust lawyer before he joined the High Court, clearly understood these distinctions. As he noted, the critical statutory language was originally enacted in 1890, as § 7 of the Sherman Act. 26 Stat. 210: "The legislative history of the section shows that Congress was primarily interested in creating an ***effective remedy*** for ***consumers*** who were forced to pay ***excessive prices*** by the ***giant trusts and combinations that dominated certain interstate markets***." *AGC,* at 530 (emphasis added).

In summarizing the Supreme Court's understanding of the Sherman Act, *AGC*, as the legislative history of Sherman Act shows, it "was enacted to assure customers the benefits of price competition," and "our prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market." *Id.* at 538. Here, the injury caused by Visa and MasterCard's scheme is to the customers of participating merchants-- New Mexico shoppers.

The *AGC* opinion denied standing because the union was "neither a consumer nor a competitor in the market in which trade was restrained." *Id.* at 539. Further, it was foreseeable that merchants forced to accept the Visa and MasterCard debit cards would pass on the cost of Appellees' anticompetitive tying arrangement to their own customers: Plaintiff and the class she seeks to represent. (Complaint ¶ 5 (RP 3-4)).

B. New Mexico Provides a Unique and Powerful Remedy to Those Within the Zone of Protection, Only if They Did Not Purchase a Product

This case arises under the unique and powerful law of New Mexico. The New Mexico private damage provisions amply demonstrate its intent to empower retail shoppers to recover damages. The best place to begin this analysis of legislative intent is the Act itself: when a statute is clear and unambiguous, courts should give it its plain and ordinary meaning. *E.g. State v. Bennet*, 134 N.M. 705, 82 P.3d 72, 2003-NMCA-147. The Act should be read in its entirety, and courts should construe each part in connection with every other part to produce a harmonious whole. *Romero v. Valencia County*, 135 N.M. 214, 62 P.3d 305, 2003 NMCA-019. The New Mexico Antitrust statute is remedial, and as such should be liberally construed to "suppress the mischief and advance the remedy."

Albuquerque Hilton Inn. v. Haley, 90 N.M. 510, 512, 565 P.2d 1027, 1029 (1977). See also *State ex rel. Bird v. Apodoca*, 91 N.M. 279, 284, 573 P.2d 213, 218 (1977).

Section 57-1-3(A) of the Antitrust Act expressly grants standing to "any person... injured in his business or property, ***directly or indirectly***" by an antitrust violation. (Emphasis added). This section repudiated, for New Mexico, the Supreme Court holding in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), that only a direct purchaser can sue under the federal antitrust act. NMSA 1978, § 57-1-3(C), in turn, expressly grants a defendant the "pass on" defense which the Supreme Court denied to federal antitrust defendants in *Hanover Shoe Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). Both *Illinois Brick* and *Hanover Shoe* based their holdings, in part, on the conclusion that Congress intended for the federal antitrust laws to be enforced by direct purchasers even if that precluded indirect purchasers from having a remedy. See *Hanover Shoe*, 292 U.S. at 494; compare *Illinois Brick*, 431 U.S. at 735, with *Id.* at 754 (Brennan. J., dissenting) (noting that the majority opinion goes far to frustrate the clear congressional intent to protect consumers).

The New Mexico Statute went further to expand protection to citizens of New Mexico. NMSA 1978, § 57-1-3(D) includes language not found in other antitrust statutes: it states that "business or property" shall include "business or non-business purchases and business and non-business ***injuries.***" (Emphasis added). Thus, the injury need not even be a purchase. This expansive and uniquely expansive definition demonstrates the clear legislative intent broadly to protect consumers in New Mexico, even if they are not purchasers. This language strongly counsel providers a remedy to consumers who were the alleged intended targets of the scheme. *cf. State ex. rel W.M. Carroll & Co. v. K.L. House Construction Co.*, 99 N.M. 186, 187, 656 P.2d 236, 237 (1982) (holding that standing under the "little Miller Act" is broader than under the federal counterpart in part because the limited standing under the federal act based on congressional intent that is inapplicable in New Mexico).

Consumers who have been indirectly harmed are therefore clearly within the "zone of interests to be protected" by the Act. *Key v. Chrysler Motors Corp.*, 121 N.M. 764,918 P.2d 350, 1996 NMSC-038 – indeed, they are the primary beneficiaries of the Act's protections. The inclusion of "non-business injury" in addition to "non-business purchasers" shows this broad protective purpose. The

New Mexico legislature could not possibly have anticipated at the time of the 1979 amendment that evolving technology instantaneous payment through debit card transactions the wave of the future. But the inclusion of the "non-business injury" language provides an important clue that this statute – passed in response to a federal decision that limited standing to direct purchasers – was meant to empower citizens indirectly injured to maintain an action, if they were injured in the pocketbook. The *AGC* opinion notes that "the infinite variety of claims that may arise make it virtually impossible to announce a black letter rule that will dictate the result in every case." *Id.* at 536.

C. New Mexico Common Law Supports Plaintiffs' Position

In *Key,* 121 N.M. 764,918 P.2d 350, 1996-NMSC-038, the New Mexico Supreme Court equated the statutory standing analysis with the question whether a particular statute grants a plaintiff a cause of action. As *Key* indicates, the standing doctrine in New Mexico traditionally requires that the claimant: (1) have a personal stake in the outcome of the case, (2) allege both injury in fact and a causal connection between the injury and the challenged conduct, and (3) allege a likelihood that the injury will be redressed by a favorable decision. *Id.* ¶ 11; *cf. City of Sunland Park v. Santa Teresa Servs. Co.*, 134 N.M. 243, 75 P.3d 843,

2003-NMCA-106. Further, to acquire standing under a statute, the claimant must demonstrate "that the interest sought to be protected by the complaint is arguably within the zone of interests to be protected or regulated by the statute." *Key*, 121 N.M. 764,918 P.2d 350, 1996-NMSC-038. This is fundamentally a question of legislative intent: "Whether we ask if [plaintiff] had standing to sue or whether we ask if the Act provide [plaintiff] with a cause of action we must look to the Legislature's intent as expressed in the Act or other relevant authority." *Id.*

Justice Stevens, in articulating a federal standard for antitrust standing, did not disregard common law precepts. "Instead, as was required in common-law damages litigation in 1890, the question requires us to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *AGC* at 535. In New Mexico, the intent of the legislature would be better served by asking if the harm to the plaintiff was a foreseeable consequence of the defendant's antitrust violation. If the act was foreseeable, then the plaintiff would have standing to sue under the Act.

Because the Legislature is presumed to be aware of the common law and to have acted with it as a backdrop, the New Mexico common law of causation is a relevant to the interpretation of Section 57-1-3(A). *Sims v. Sims*, 122 NM. 618,

930 P.2d 153, 1996-NMSC-078; *see also AGC*, 459 U.S. at 532-33. It has long been a rule under the common law of New Mexico that a negligent defendant is liable for the harm proximately caused by his or her negligence. *MacVeagh v. Atchison Topeka and Santa Fe R.R.*, 3 N.M. 327, 5 P. 457, 459 (1885) ("A common carrier, the same as any other person is only liable where the injurious act complained of is the proximate and not the remote cause of the loss"). For a cause-in-fact to become the proximate cause, the harm caused by the negligent act must be foreseeable. See *Calkins v. Cox Estates*, 110 N.M. 59, 61, 792 P.2d 36, 38 (1990). Proximate cause superimposes considerations of foreseeability on causation-in-fact in order to limit the potentially limitless liability arising from mere cause-in-fact. *Andrews v. Saylo*r, 134 N.M 545, 80 P3d 482, 2003-NMCA-132. As then-Judge Minzner noted, "Foreseeability is imposed (on cause in fact) to preclude a finding of liability where defendant's conduct was part of the causal chain of the injury but the resulting injury could not have been reasonably foreseen by the defendants." *Pittard v. The Four Seasons Motor Inn, Inc.* 101 N.M. 723, 730, 688 P.2d 333, 340 (Ct. App. 1984).

These familiar principles form the backdrop against which the Act was passed, and inform the interpretation of its grant of standing to those

"injured…directly or indirectly", as does the unique language to the New Mexico statute that injury includes "business or non-business purchases and business and non-business injuries." 57-1-3 (D). Because the Legislature was presumptively aware of the common law of proximate causation and foreseeability, it certainly intended those principles to define the outer boundary of antitrust standing in New Mexico for those indirectly harmed.

D. New Mexico Consumers Suffered Foreseeable Harm and Therefore Have Standing to Sue Under the New Mexico Antitrust Act

The question for standing purposes becomes whether it was foreseeable that the direct purchasers would pass on the costs of the violation to their own customers? Because of Defendants' market dominance and their uniform application of inflated fees, it was plainly foreseeable that the merchants would pass on the harm of their anticompetitive antitrust violation to their customers. Because their fees are being applied to nearly every merchant and operate much like a sales tax, there is no competitive advantage or incentive not to pass on the fees. Plaintiff under the Act has standing to sue, and the District Court erred in granting Defendants' Motion to Dismiss. Plaintiff respectfully requests that this Court reverse the District Court's dismissal of this action and remand this case to the District Court for further proceedings on the Plaintiff's complaint.

E. **The New Mexico Unfair Practices Act is Remedial and Must be Applied Liberally to Facilitate and Accomplish its Purposes and Intent to Protect New Mexico Consumers Against Deceptive and Unconscionable Trade Practices.**

The District Court committed reversible error when it ruled that the New Mexico Unfair Practices Act ("UPA") does not apply to the Plaintiffs claims. The UPA constitutes remedial legislation; accordingly, the District Court must interpret the provisions of UPA liberally to facilitate and accomplish its purposes and intent. *Salmeron v. Highlands Ford Sales, Inc.*, 271 F.Supp.2d 1314 (2003). *See* §§ 57-12-2(D), 57-12-2(E), 57-12-3; *State ex rel Stratton v. Gurley Motor Co.,* 105 N.M. 803, 737 P.2d 1180, 1185 (Ct. App. 1987), overruled on other grounds*, Gonzales v. Surgidev Corp.,* 120 N.M. 151, 899 P.2d 576 (1995). The UPA "applies to ***all misleading or deceptive statements***, whether intentionally or unintentionally made...." *Stevenson v. Louis Dreyfus Corp.,* 112 N.M. 97, 811 P.2d 1308, 1311 (1991). (Emphasis added). By applying this interpretation, New Mexico courts "insure that the Unfair Practices Act lends the protection of its ***broad application*** to innocent consumers." *Id.* (Emphasis added).

Defendants have knowingly made false or misleading representation to Plaintiff and other consumers for the cost of the services provided. (Complaint ¶

175 (RP 45)). Consumers use the debit cards, at least in part, on the basis of their belief that no additional cost is extended to them for use of the cards. In fact an extra "hidden" cost was added to the price of each good purchased in New Mexico to compensate the merchants who were forced to buy and accept Visa and MasterCard debit cards at fixed and supra-competitive prices.

Plaintiff has additionally pleaded facts supporting a claim for unconscionable trade practices, by her pleading of facts, which could lead to the conclusion of a gross disparity between price and value. To maintain a claim for unconscionable conduct, a plaintiff must plead facts establishing any "act or practice in connection with the sale…of…goods which to a person's detriment… (2) results in gross disparity between the value received by a person and the price paid. *See* § 57-12-2(E) The enhanced prices for their services, charged by Defendants is, in and of itself, actionable under the UPA; however, there are even more clearly unlawful since they are the product of a collusive scheme Defendants formulated in secret to impose such prices. Whether the disparity is so gross as to fall within the proscription of the UPA is a fact-bound issue that cannot be resolved on a Rule 12 (b) (6) motion to dismiss.

For protection under the UPA a plaintiff need not even be a "consumer." Instead, "[*a]ny person*" *who suffers any loss of money or property* as a result of a misleading or deceptive oral or written statement may bring an action to recover damages". NMSA 1978, § 57-12-10B (1987). (Emphasis added). Clearly under the UPA, a plaintiff does not have to purchase directly from the violator to state a cause of action. To hold otherwise would deprive consumers of an important remedy expressly intended for their benefit.

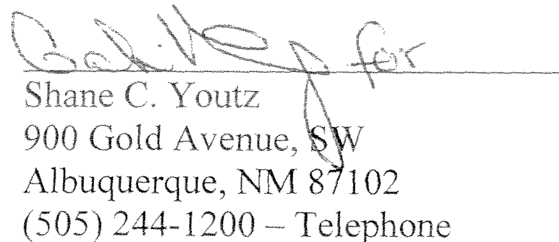
VI. CONCLUSION

Plaintiff has pled facts supporting liability for both deceptive and unconscionable trade practices. The district court erred in dismissing the UPA claims.

Dated: January 13, 2011

Respectfully submitted,

YOUTZ & VALDEZ, P.C.



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I hereby certify that a true and correct copy of the foregoing pleading was mailed this 13th day of January, 2011, to:

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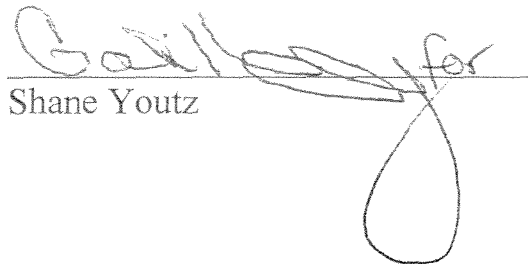

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