IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

UTTI ATHERTON, LAURA JARAMILLO,
JOHN DOE 1-99, and JANE DOE 1-99,

Plaintiffs-Appellees,

and

STATE OF NEW MEXICO, ex rel.
GARY K. KING, Attorney General,

Plaintiff-Appellee,

v.

No. 32,028

MICHAEL J. GOPIN,
an unlicensed New Mexico attorney,
d/b/a the Law Offices of Michael J. Gopin,

Defendant-Appellant.

Appeal from the Third Judicial District Court
Doña Ana County
The Honorable James T. Martin

BRIEF IN CHIEF

Oral Argument is Requested

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Statement Regarding Transcript Citations

Citations to all hearings are to the stenographic transcripts and substantially follow the form in Rule 23-112, NMRA, Appendix Part I.D, while including the date of the hearing cited.

Statement of Compliance

Pursuant to Rule 12-213(G), NMRA, this brief complies with the type-volume limitations set forth in Rule 12-213(F)(3), NMRA, because it is prepared in 14-point Times New Roman, and the body of the brief contains 10,890 words, according to WordPerfect X4.

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SUMMARY OF PROCEEDINGS

I. Nature of the Case and Course of Proceedings

Defendant Michael Gopin is a lawyer who is the principal of the Law Offices of Michael J. Gopin, a firm in El Paso, Texas. The firm at one time also had an office in Las Cruces, New Mexico. Defendant is not licensed to practice law in New Mexico, but the lawyers practicing in the Las Cruces office were members of the New Mexico State Bar.

Plaintiffs are former clients of the firm, as well as the New Mexico Attorney General. The original individual Plaintiffs moved for partial summary judgment early in the case, seeking a ruling that certain practices of the firm violated the Rules of Professional Conduct and the Unfair Practices Act. Trial counsel for Defendant entered an appearance at that time and asked the district court for additional time to respond to the motion. The district court ruled that because Defendant failed to file a timely response, he waived the right to controvert the facts asserted in Plaintiffs' motion. The district court thus accepted as true Plaintiffs' allegations and granted partial summary judgment on the merits.

Later in the case, the district court applied the partial summary judgment to 314 unnamed individuals. In other words, the district court entered judgment in favor of 314 individuals who did not appear in these proceedings and who did not submit a shred of evidence indicating their entitlement to summary judgment,

based on Defendant's procedural default. Defendant's liability under the UPA was thus decided three months after the complaint was filed and practically speaking before discovery.

In addition to this procedural sleight of hand, the district court misinterpreted the UPA. The court concluded that the actions taken by Defendant in advertising and operating his firm were "known by" him and were under his direction and were "therefore willful and deliberate." The district court ultimately entered judgment for Plaintiffs and awarded treble damages, as well as civil penalties, based on the court's finding that Defendant "willfully" violated the Act. The district court compounded the error when it awarded judgment interest at a rate of 15%.

The district court also allowed the Attorney General to obtain a double recovery for gross receipts taxes. As explained below, Defendant's firm already paid gross receipts taxes to the State in the course of representing its clients. Yet the district court has ordered Defendant, in effect, to pay gross receipts taxes again for each of those same clients. The district court's judgment is constitutionally infirm, it runs contrary to the UPA, and it violates rudimentary tenets of civil procedure.

II. Statement of Facts

A. Background Facts

Plaintiffs Atherton and Jaramillo filed a complaint in 2007, seeking private remedies under the Unfair Practices Act. [RP 47]. The complaint also alleged unauthorized practice of law and sought injunctive relief. Defendant's answer denied the allegations in the complaint. [RP 72]. In May 2008, the court entered a stipulated order dismissing the Attorney General as an involuntary plaintiff, allowing him to intervene on behalf of the State. [RP 282; 291].

In August 2008, the district court ordered Defendant to produce the names and addresses of the firm's New Mexico clients, as well as the contracts signed by them. [RP 350]. The trial scheduled for November 2008 was vacated due to then-presiding Judge Robles being selected for a seat on this Court. [RP 540]. In February 2009, the Attorney General moved to amend its complaint to include a claim for restitution, which the district court granted. [RP 718; 1166].

In May 2009, the district court entered an Amended Stipulated Order of Partial Dismissal. [RP 797]. Defendant agreed to pay $3,990.00 to Plaintiff Atherton, $900.00 to Plaintiff Jaramillo, and $300.00 to Plaintiff Romero. [RP 797]. The court ordered that upon payment to the named Plaintiffs, their claims would be deemed dismissed with prejudice. [RP 798].

B. Facts About Plaintiffs' First Motion for Partial Summary Judgment

Very early in the case, the original Plaintiffs moved for partial summary judgment, asking the district court to declare that the practice of having non-lawyers contract with clients constituted the unauthorized practice of law, that the practice of taking assignments of interests in clients' recoveries and collecting fees on non-contingent medical payments violated the Rules of Professional Conduct, and that advertising and operating Defendant's law practice violated the UPA. [RP 75]. At that point in the proceedings, there had been little to no factual development. Therefore, many of the "facts" in Plaintiffs' motion were disputed allegations.

On April 14, 2008, Defendant secured legal representation, and his attorney entered an appearance. [RP 207; Tr. 4/23/08, at 6]. The following week, his attorney asked the district court for additional time in which to respond to the partial summary judgment motion. [RP 209]. Defendant argued that there was good cause not to have responded earlier because he was diligently trying to secure insurance coverage, and when he found out that coverage would not be extended, he retained counsel. [RP 210; Tr. 4/23/08, at 4-5]. Defendant also explained that he was under the impression that the suit was going to be dismissed

because New Mexico-licensed attorneys were the only attorneys practicing in the Las Cruces office. [RP 210; Tr. 4/23/08, at 5].

The district court ruled that Defendant would be permitted to respond to the summary judgment motion on legal issues only. [Tr. 4/23/08, at 17-18]. The court ruled that under *Lujan v. City of Albuquerque*, 2003-NMCA-104, 134 N.M. 207, 75 P.3d 423, when a party fails to file a timely response to a motion for summary judgment, the non-movant "waives the right to respond to or to controvert the facts asserted in the summary judgment motion." [RP 223]. The court stated that it would therefore accept as true "all material facts pled" in Plaintiffs' motion. [RP 223; *see also* Tr. 4/23/08, at 18 ("You are bound, sir, by those facts.")]. Defendant's liability was thus decided not on the merits but based on his procedural default, leaving him with no way to contest the key facts in the case for the remaining four years of litigation. [RP 315].

C. Facts About the Motion for Joinder and Intervention

In June 2009, a group of would-be Plaintiffs moved for joinder and intervention, asking the court to substitute them for some of the Doe Plaintiffs. [RP 899]. In July 2009, another group of would-be Plaintiffs filed a similar motion. [RP 1093]. In opposing the motions, Defendant argued that there is no authority to support the proposition that intervening parties would be entitled to

the benefit of the partial summary judgment. [RP 939].

At the hearing on those motions, the district judge commented that it was his understanding that Defendant does not want the would-be Plaintiffs to "ride the coat-tails of the summary judgment order that's already been entered." [Tr. 7/28/09, at 8]. Defense counsel argued that the partial summary judgment was entered by procedural default, and Defendant would be unfairly prejudiced if the would-be Plaintiffs were permitted to benefit from that ruling. [Tr. 7/28/09, at 20]. The district court granted the motion for joinder and intervention, finding that there was no unfair prejudice to Defendant. [RP 1124; Tr. 7/28/09, at 24-25].

The court expressly ruled that the newly joined Plaintiffs "are entitled to the benefit of the existing judgment and all of the factual and legal conclusions associated with" it. [Tr. 7/28/09, at 26]; *see also* RP 1125 (ruling that all orders and judgments previously entered would be binding on the newly joined parties).

D. <u>Facts About Plaintiffs' Second Motion for Partial Summary Judgment</u>

In the summer of 2011, the Attorney General sought partial summary judgment on the issue whether Defendant's advertisement willfully violated the UPA because it failed to disclose his jurisdictional limitation and failed to deliver a "free initial consultation." [RP 1651]. The motion relied on the earlier grant of partial summary judgment for Plaintiffs. [RP 1651]. The joined Plaintiffs also

moved for partial summary judgment on the issue whether Defendant willfully violated the Act. [RP 1560]. They, too, relied on the earlier grant of partial summary judgment. [RP 1560].

The district court ruled from the bench, concluding that the standard of willfulness for treble damages is different from the standard of willfulness for the imposition of civil penalties. [Tr. 9/13/11 at 39-41]. The court found that Defendant's "method, act, and practice" had already been declared unlawful under the UPA on the original grant of partial summary judgment. *Id.* at 40; *see also id.* at 42; RP 1778. The court further found that Defendant "made a conscious decision" to advertise his firm in a particular way. *Id.* The court concluded that it was "an intentional act done with knowledge that harm may result." *Id.* The court ruled that there were no disputed issues of material fact that Defendant's advertising violated the UPA and that it "was done willfully." *Id.* at 42; *and see* RP 1778.

In December 2011, the district court entered an order granting partial summary judgment to the Attorney General, concluding that Defendant is subject to civil penalties under the Act. [RP 1777-78]. The court multiplied 314, the number of Defendant's former clients, by $5,000.00, the maximum amount per violation. [RP 1778-79; *and see* Tr. 9/13/11 at 43]. The court thus awarded the

Attorney General $1,570,000 in civil penalties. [RP 1779].

E. District Court Decision

The district court held a bench trial in January 2012. The only issues remaining for trial were whether the Attorney General was entitled to restitution and whether the individual Plaintiffs were entitled to treble damages. The court announced findings of fact and conclusions of law from the bench and incorporated those into its judgment. [RP 2025; Tr. 1/5/12 at 22]. The court adopted all "undisputed facts" from the original grant of partial summary judgment on the merits. [Tr. 1/5/12 at 22].

The district court granted treble damages to 12 individual plaintiffs in an amount totaling $190,258.13. [RP 2025-26]. The court also entered judgment in favor of the Attorney General in the amount of $1,570,000 for civil penalties. The court further awarded the Attorney General $757,358.56 for restitution for 110 consumers. [RP 2026]. The court awarded Plaintiffs attorney fees in an amount to be determined. [RP 2027]. The court also awarded 15% pre-judgment interest from the filing of the original complaint because of Defendant's "deliberate misconduct." *Id.*

QUESTIONS PRESENTED FOR REVIEW

I) Whether the district court erred in granting partial summary judgment on

the merits and in applying that ruling to the joined Plaintiffs and to hundreds of unnamed individuals.

II) Whether the district court misinterpreted the Unfair Practices Act in concluding that Defendant violated the Act and that he did so "willfully."

III) Whether the district court erred in allowing a double recovery in the form of gross receipts tax.

STATEMENT REGARDING PRESERVATION

I) Defendant asked for more time to respond to the partial summary judgment and filed a response. [RP 209; 225]. Defendant argued that the joined Plaintiffs would not be entitled to summary judgment based on the doctrine of law of the case. [RP 939; Tr. 7/28/09 at 20].

II) Defendant asked the district court to conclude that his law offices had the right to transact business by utilizing attorneys who were licensed to practice law in New Mexico. [RP 1949]. Defendant asked the district court to conclude that his conduct was not willful, that he is not subject to or liable for civil penalties under NMSA 1978, § 57-12-11, and that treble damages should not be assessed under § 57-12-10. [RP 1950-51].

III) Defendant objected to the inclusion of gross receipts tax in the damages amount. [RP 1950].

Defendant does not appear to have argued that the district court violated his right to due process of law. Even if Defendant failed to preserve a due process claim, the Court may nevertheless address it because it involves the public interest and the fundamental rights of a party. *See* Rule 12-216 (B), NMRA (appellate courts not precluded from considering questions involving public interest and fundamental rights).

STANDARDS OF REVIEW

I) "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280; *see also* Rule 1-056, NMRA. The Court reviews de novo a grant of summary judgment. *Id.* The Court must view the evidence in the light most favorable to the party opposing the motion. *Id.* The Court must also "draw all reasonable inferences in support of a trial on the merits." *Id.* (citation omitted).

Whether the doctrine of law of the case applies, as well as how it applies, are questions of law subject to de novo review. *State ex rel. King v. UU Bar Ranch Ltd. Partnership*, 2009-NMSC-010, ¶ 20, 145 N.M. 769, 205 P.3d 816.

The Court reviews de novo constitutional claims. *See TW Telecom of New Mexico, LLC v. NM Pub. Reg. Comm.*, 2011-NMSC-029, ¶ 15, 150 N.M. 12, 256

P.3d 24.

II) Statutory construction is a question of law that the Court reviews de novo. *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 45, 125 N.M. 721, 965 P.2d 305. Likewise, a trial court's award of treble damages under the UPA is a question of law that the Court reviews de novo. *G & G Serv., Inc. v. Agora Syndicate, Inc.*, 2000-NMCA-003, ¶ 39, 128 N.M. 434, 993 P.2d 751. The Court also reviews de novo the question whether the UPA's exemption applies. *Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 27, 147 N.M. 583, 227 P.3d 73.

This Court reviews for an abuse of discretion "whether a defendant acted in a manner to warrant the increased penalty" of a higher rate of judgment interest. *Sunnyland Farms, Inc. v. Central NM Elec. Co-op*, 2011-NMCA-049, ¶ 102, 149 N.M. 746, 255 P.3d 324, *cert. granted*, 150 N.M. 667, 265 P.3d 718, 2011-NMCERT-5 (May 17, 2011). "An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." *Id.*

III) In analyzing a double recovery issue, this Court has stated that "[i]n the absence of statutory guidance . . . , fundamental fairness must be our guide." *Ulibarri v. Homestake Mining Co.*, 112 N.M. 389, 394, 815 P.2d 1179, 1184 (Ct. App. 1991).

ARGUMENT

I. The District Court Erred in Granting Partial Summary Judgment on the Merits and in Applying That Ruling to the Joined Plaintiffs and to Hundreds of Unnamed Individuals.

A. The District Court Erred in Granting Partial Summary Judgment to Plaintiffs.

Summary judgment is to be granted only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Rule 1-056, NMRA. "New Mexico courts, unlike federal courts, view summary judgment with disfavor, preferring a trial on the merits." *Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶ 8, 148 N.M. 713, 242 P.3d 280. Summary judgment is "a drastic remedy to be used with great caution." *Pharmaseal Labs., Inc. v. Goffe*, 90 N.M. 753, 756, 568 P.2d 589, 592 (1977). Where reasonable minds differ as to issues of material fact, a court may not grant summary judgment. *Romero*, 2010-NMSC-035, at ¶ 7, 148 N.M. 713, 242 P.3d 280.

The Court has made clear that a failure to file a timely response to a summary judgment motion "does not alter the traditional summary judgment standard." *Lujan v. City of Albuquerque*, 2003-NMCA-104, ¶ 18, 134 N.M. 207, 75 P.3d 423. Thus, "the district court must assess whether, on the merits, the moving party satisfied the burden under Rule 1-056(C)." *Id.* Even where there is

a complete failure to respond to a summary judgment motion, the moving party may not be entitled to judgment. *See Brown v. Taylor*, 120 N.M. 302, 305, 901 P.2d 720, 723 (1995).

In *Lujan*, this Court quoted a Tenth Circuit case for the proposition that when a non-movant fails to file a timely response, he "'waives the right to respond or to controvert the facts asserted in the summary judgment motion.'" *Lujan*, at ¶ 18, 134 N.M. 207, 75 P.3d 423 (quoting *Reed v. Bennett*, 312 F.3d 1190, 1195 (10th Cir. 2002)). Under those circumstances, according to the Tenth Circuit, the court "'should accept as true all material facts asserted and properly supported in the summary judgment motion.'" *Id.* (quoting *Reed*, 312 F.3d at 1195).

While the *Lujan* Court cited *Reed* with approval, it is critical to understand what *Reed* actually held. *Reed* held that a district court cannot grant summary judgment for a failure to respond without first making the determinations required by FED. R. CIV. P. 56(c). *See Reed*, 31 F.3d at 1193. The *Reed* court did *not* hold that where there is a failure to respond within the time allotted by rule, and where the non-movant shows excusable neglect, he nevertheless waives the right to respond or to controvert the facts. As will be discussed below, the district court erred in its punitive application of *Lujan*'s adoption of *Reed*.

As stated, the summary judgment standard in New Mexico is different than

in federal court. Even if this Court believes that *Lujan* intended to import a portion of federal summary judgment jurisprudence into New Mexico law, the district court still erred in the instant case. A district court should accept as true only those facts that are "'properly supported'" in the motion. *See Lujan*, at ¶ 18, 134 N.M. 207, 75 P.3d 423 (quoting *Reed*, 312 F.3d at 1195). Furthermore, even in the face of a failure to respond to a summary judgment motion, the district court may grant the motion only where "appropriate." *Id.*

According to Rule 1-056(E), NMRA, the party opposing summary judgment "must set forth specific facts showing that there is a genuine issue for trial," and if he fails to do so, then "summary judgment, *if appropriate*, shall be entered against him." Rule 1-056(E), NMRA (emphasis added). Summary judgment is "appropriate" only when the movant has met its initial burden of production. *See* Rule 1-056(C), NMRA; *see also Romero*, at ¶ 10, 148 N.M. 713, 242 P.3d 280.

In the instant case, Plaintiffs did not meet their initial burden of production and did not establish a prima facie case. The facts in Plaintiffs' motion for partial summary judgment were not "properly supported," and summary judgment was not "appropriate" within the meaning of the rule. Most of the "facts" in Plaintiffs' motion were merely disputed allegations. Some were actually legal conclusions. [RP 77-80].

For example, Plaintiffs asked the district court to declare that the practice of having non-lawyers contract with clients constituted the unauthorized practice of law. [RP 115]. This obviously begs the factual question whether non-lawyers were contracting with clients. Plaintiffs presented no evidence of a contract signed by a non-lawyer from Defendant's office. Moreover, according to a leading consumer law treatise, "[in] most cases, states will allow non-attorneys to make legal forms available to consumers and to complete those forms at the direction of the consumer" as long as they are not giving legal advice. CARTER & SHELDON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 10.4.2.4 (7th ed. 2008).

Plaintiffs also asked the district court to rule that the practice of taking assignments of interests in clients' recoveries and collecting fees on non-contingent medical payments violated the Rules of Professional Conduct. [RP 115]. Again this raises a host of factual issues that were undeveloped. On top of the disputed facts, as a legal matter, it does not appear that New Mexico has decided the extent to which the UPA applies to the practice of law.[1] It is clear, however, that there is no private cause of action for a violation of the Rules and

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[1]For a thoughtful discussion about the constitutional separation of powers dimensions of this topic and a breakdown of how different jurisdictions address the issue, *see Beyers v. Richmond*, 937 A.2d 1082 (Pa. 2007) (holding that exclusive constitutional authority to regulate practice of law displaces UPA where misconduct governed by Rules of Professional Conduct is concerned).

that Plaintiffs and their lawyers do not have standing to seek their enforcement. *See* Rules of Professional Conduct, Preamble – Scope (violation of rule should not itself give rise to cause of action against lawyer, and antagonist in collateral proceeding does not have standing to seek enforcement of rule).

Plaintiffs further asked the district court to rule that advertising and operating Defendant's law practice violated the UPA. [RP 115-16]. Plaintiffs included speculation about what a person who saw the advertisements "would reasonably believe." [RP 77]. Again, this raises a host of disputed facts about how Defendant's law practice was operated and the effect of his advertisements. This Court has held that genuine issues of material fact preclude granting the plaintiff's partial summary judgment motion where the evidence gave rise to conflicting inferences about whether the defendant "knowingly made" "false or misleading" statements or "fail[ed] to disclose material facts" within the meaning of the UPA. *See Azar v. Prudential Ins. Co.*, 2003-NMCA-062, ¶ 81, 133 N.M. 669, 68 P.3d 909.

In *Azar*, this Court reversed the grant of partial summary judgment to the plaintiffs on their UPA claim not only because the record contained disputed issues of fact, but also because the facts needed further development. *Azar*, at ¶ 84, 133 N.M. 669, 68 P.3d 909. The same is true here. As demonstrated above,

the case was riddled with disputed facts when the district court granted partial summary judgment to Plaintiffs. At that point in the case, discovery was barely underway, and there had been little to no factual development. "Generally, a court should not grant summary judgment before a party has completed discovery, particularly when further factual resolution is essential to determine the central legal issues involved or the facts before the court are insufficiently developed." *Azar*, at ¶ 84, 133 N.M. 669, 68 P.3d 909 (internal quotations omitted).

With no analysis of the facts or law, and with no reference to how or why Plaintiffs had demonstrated entitlement to judgment on the merits at that early stage of the proceedings when discovery was barely underway, the district court granted the motion. [Tr. 6/9/08 at 8-9]. The district court's written order granting partial summary judgment likewise contains neither analysis nor rationale. [RP 315]. The district court's grant of partial summary judgment to Plaintiffs under the circumstances of this case is akin to a sanction for Defendant's failure to file a timely response to the motion. The Court should reverse the partial summary judgment.

B. The District Court Abused Its Discretion in Failing to Allow Defendant to Respond to the Facts in the Partial Summary Judgment Motion Because Defendant Demonstrated Excusable Neglect.

Under Rule 1-006(B)(2), NMRA, when an act is to be done within a specified time and a request for an extension is made after the expiration of the specified period, the court "for cause shown" may nevertheless "permit the act to be done where the failure to act was the result of excusable neglect." Plaintiffs filed their motion for partial summary judgment on March 13, 2008. [RP 75]. Defendant's trial counsel filed an entry of appearance on April 17, 2008. [RP 207]. Five days later, Defendant asked for additional time in which to respond to the pending partial summary judgment motion. [RP 209].

At the hearing on the motion for extension, Defendant asked for "a sporting chance to respond to the motion for summary judgment." [Tr. 4/23/08, at 6]. Defendant emphasized that "[w]e're only asking for whatever the court can indulge." [Tr. 4/23/08, at 6]. The district court granted Defendant 15 days in which to file a response, but it refused to allow Defendant to controvert the facts. [RP 223; *see also* Tr. 4/23/08, at 18].

Skeen v. Boyles, 2009-NMCA-080, 146 N.M. 627, 213 P.3d 531 is instructive and demonstrates that the district court in the instant case abused its

discretion when it failed to allow Defendant to respond fully to the summary judgment. Like the instant case, *Skeen* involved the failure to respond to a motion in a timely fashion. The district court denied a request for an extension and granted the motion as "unopposed." *Id.* at ¶ 39. On appeal, this Court held that the district court erred. *Id.* at ¶ 41.

The *Skeen* Court noted that "[t]he nature of our review is affected by the nature of the order entered by the district court." *Id.* at ¶ 43. The Court continued: "Our review is more exacting when the order being reviewed grants some sort of final relief without consideration of the merits of a claim or defense." *Id.* The Court reversed because the trial court's refusal to allow a late response to the motion had the effect of granting a default judgment. *Id.* at ¶ 47. The Court also based its reversal on the fact that the district court did not apply the correct legal standard because it failed to consider whether a late response would result in unfair prejudice to the movant or would interfere with the judicial process. *Id.* at ¶ 49.

On the latter point, the Court noted that before granting summary judgment based on a failure to respond, a district court should consider: "'(1) the degree of actual prejudice to the [opposing party], (2) the amount of interference with the judicial process, and (3) the culpability of the litigant.'" *Id.* at ¶ 44 (quoting

Lujan, at ¶ 12, 134 N.M. 207, 75 P.3d 423). Just as the district court in *Lujan* failed to undertake an analysis of these factors, so, too, did the district court in the instant case.

An analysis of those factors further supports the position that the district court abused its discretion in not allowing Defendant to controvert the "facts" in Plaintiffs' motion. As discussed, there was no actual prejudice to Plaintiffs because they moved for partial summary judgment on the merits three months after they filed their complaint, well before discovery was completed, and at a time when trial was set for eight months hence but actually took place almost four years later. For these reasons, too, there was no appreciable interference with the judicial process. Finally, Defendant did not act with culpable intent in failing to file a timely response to the motion. As he explained, he diligently attempted to secure coverage, and when his insurance carriers informed him that they would not extend coverage, he retained an attorney, who promptly entered an appearance and sought additional time to respond to the pending motion. [RP 209-210; Tr. 4/23/08, 5-6].

Another case that demonstrates that the district court abused its discretion is *D'Antonio v. Garcia*, 2008-NMCA-139, ¶¶ 16-18, 145 N.M. 95, 194 P.3d 126. There, a hearing examiner granted summary judgment in favor of the state

engineer and disposed of the defendant's case. *Id.* at ¶ 16. On appeal to the district court, that court concluded that the hearing examiner had erred because matters should be decided on the merits and not by default. *Id.* at ¶ 17. This Court had no qualms with that underlying rationale – i.e., the policy in favor of deciding cases on their merits – but the Court felt that where a party willfully fails to comply with an order, dismissal may be appropriate. *Id.* The Court reversed the decision of the district court and remanded for reinstatement of the hearing examiner's decision because the defendant had failed to comply with the scheduling order and had failed to respond to the summary judgment motion. *Id.* at ¶ 18. In marked contrast to the defendant in *D'Antonio*, Defendant in the instant case did not fail to act.

The district court's approach in implicitly acknowledging excusable neglect and in granting 15 additional days for Defendant to respond but in forbidding him to controvert the facts has no support in the law and is a gross abuse of discretion. The district court's conduct is especially inappropriate given this Court's important policy preference in favor of deciding cases on their merits. *See, e.g., Universal Constructors, Inc. v. Fielder*, 118 N.M. 657, 659-60, 884 P.2d 813, 815-16 (Ct. App. 1994) ("[i]t is general policy to decide claims on the merits"); *Lopez v. Wal-Mart Stores, Inc.*, 108 N.M. 259, 262, 771 P.2d 192, 195 (Ct. App. 1989)

("causes should be tried on their merits"). The effect of the district court's ruling was to silence Defendant for the remainder of the litigation in terms of the controlling facts and his liability to Plaintiffs.

The import of *Lujan* is that it is supposed to be a shield, not a sword. The district court found that *Lujan* was controlling and that it precluded the possibility of allowing Defendant to controvert the facts. [RP 223]. The court believed that it was required to allow Defendant to respond to the summary judgment motion "on legal issues only." [RP 223]. *Lujan* was never intended to be used as the district court used it here.

If a defendant does nothing in response to a plaintiff's summary judgment motion, then *Lujan* dictates that a district court must still consider whether the plaintiff is entitled to judgment. *Lujan*, at ¶ 18, 134 N.M. 207, 75 P.3d 423. Where, however, a defendant demonstrates excusable neglect for an earlier failure to respond, *Lujan* does not support the arbitrary and meaningless step of allowing Defendant 15 additional days to respond to the summary judgment motion on legal issues only with no way to controvert the movant's version of the facts.

The district court used *Lujan* not as a shield but as a sword – as a punishment for failing to file a timely response to the summary judgment motion. The "facts" – i.e., Plaintiffs' allegations against Defendant – continued to be

accepted as true and used against him until the district court entered judgment almost four years later. [RP 2025; 2032-2044]. Under no interpretation of the district court's decision can it be said that this case was decided on its merits.

C. The District Court Erred in Applying the Partial Summary Judgment to the Joined Plaintiffs and the Unnamed Individuals.

Even if the Court concludes that the district court correctly granted partial summary judgment in favor of the original Plaintiffs, there remains a serious problem with the court's application of that ruling to 314 other persons. At the hearing on Plaintiffs' motion to notify others about the pendency of these proceedings, Defendant argued that if the Attorney General is permitted to "throw out the net and pull them in" then the instant case will be converted to a class action. [Tr. 10/7/10 at 11]. The judge stated: "I'm probably going to need to see a motion to convert this matter to a class action. I think we're going to have to." *Id.* at 12. Plaintiffs never attempted to demonstrate the prerequisites for maintaining a class action or otherwise to comply with the requirements of Rule 1-023, NMRA. This is not a class action.

1. The Doctrine of Law of the Case Does Not Support Applying the Partial Summary Judgment to the Joined Plaintiffs and the Unnamed Individuals.

The district court's order allowing joinder and intervention simply states

that "all Orders and Judgments heretofore entered shall be binding on all parties." [RP 1125]. The district court did not offer a legal justification for extending the benefit of the partial summary judgment to the joined plaintiffs and the unnamed individuals. At the hearing, the judge stated that the joined parties were entitled to the benefit of the previously entered partial summary judgment because the facts are "undisputed." [Tr. 7/28/09, at 26]. The only reason that the facts were "undisputed" is because the court would not permit Defendant to refute them.

The district court's decision that the joined Plaintiffs and the unnamed individuals should have the benefit of the partial summary judgment that the original named Plaintiffs achieved through a procedural default is not justified under preclusion doctrines such as law of the case or collateral estoppel. Collateral estoppel does not apply because that doctrine relates to litigation of the same issue in successive suits. *See Cordova v. Larsen*, 2004-NMCA-087, ¶ 10, 136 N.M. 87, 94 P.3d 830. The doctrine of law of the case relates to litigation of the same issue recurring within the same suit. *See id.* However, as will be discussed, that doctrine does not apply here either. *Id.*

The doctrine has been expressed as follows: "a decision on an issue of law made at one stage of a case becomes binding precedent in successive stages of the same litigation." *Cordova*, 2004-NMCA-087, at ¶ 10, 136 N.M. 87, 94 P.3d 830.

There is a reason that the doctrine is called *law* of the case, as opposed to *facts* of the case. The doctrine "generally applies to questions of law, not 'purely fact' questions." *State ex rel. King v. UU Bar Ranch Ltd. Partnership*, 2009-NMSC-010, ¶ 20, 145 N.M. 769, 205 P.3d 816. Furthermore, the doctrine "leaves considerable discretion to appellate courts to interpret what, precisely, the law of the case is." *Id.* at ¶ 27. While application of the doctrine is discretionary, "it will not be used to uphold a clearly incorrect decision," nor "to accomplish an obvious injustice." *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 41, 125 N.M. 721, 965 P.2d 305.

The district court's decision to extend the benefit of the partial summary judgment achieved through a procedural default to hundreds of other parties cannot be upheld under the doctrine of law of the case. To say that the partial summary judgment is the law of the case would violate that doctrine in several respects. First of all, as stated, the doctrine does not apply to factual determinations. The partial summary judgment decided the facts of this case without giving Defendant an opportunity to rebut them. Secondly, the doctrine should not be used to uphold an obviously incorrect ruling such as a grant of partial summary judgment on the merits where material facts are in dispute. Third, applying the partial summary judgment to hundreds of others besides the original

named Plaintiffs would work an obvious injustice.

This Court has concluded that under the doctrine of law of the case, a defendant could not be bound by a summary judgment against a co-defendant premised upon deemed admissions. *See Alba v. Hayden*, 2010-NMCA-037, ¶¶ 9-10, 148 N.M. 465, 237 P.3d 767. Following the reasoning of *Alba*, the Court has concluded that a default declaratory judgment against a sole defendant would not become law of the case with respect to the plaintiff. *See Gallegos v. Nevada Gen. Ins. Co.*, 2011-NMCA-004, ¶ 20, 149 N.M. 364, 248 P.3d 912 (2010). The Court has also concluded that summary judgment cannot be supported on the ground that the law of the case controls. *See DiMatteo v. County of Doña Ana*, 109 N.M. 374, 380, 785 P.2d 285, 291 (Ct. App. 1989). These cases provide additional support for reversing the district court's application of the partial summary judgment to hundreds of individuals who never themselves came before the court to demonstrate their entitlement to a judgment on the merits.

2. Applying the Partial Summary Judgment to the Joined Plaintiffs and the Unnamed Individuals Violates New Mexico Law.

The district court's decision to apply the partial summary judgment to hundreds of individuals after the fact is so unusual and so unsound that it is difficult to find case law directly on point. A New Mexico case with somewhat

analogous facts demonstrates that the district court committed reversible error.

In *Azar*, only one plaintiff moved for partial summary judgment, but the district court granted the motion as to all of the plaintiffs, who were acting on behalf of a purported nationwide class. *Id.*, at ¶¶ 10; 86, 133 N.M. 669, 68 P.3d 909. The Court stated that in order for the plaintiffs to be entitled to partial summary judgment, they had the burden of showing that no genuine issue of material fact existed as to each element of their claims, as well as to the defendant's affirmative defenses. *Id.* at ¶ 88. The Court decided that the plaintiffs did not meet their burden, in particular because only one plaintiff had moved for partial summary judgment on only one claim. *Id.* Under these circumstances, the Court concluded that the district court erred in granting partial summary judgment to all plaintiffs on essentially all claims. *Id.*

For similar reasons, the district court erred in the instant case. Only the original named plaintiffs moved for partial summary judgment, yet the district court applied that judgment to numerous joined plaintiffs and hundreds of unnamed individuals. It should be considered that at the hearing on the motion for joinder and intervention, the would-be plaintiffs argued that if they are not permitted to join in the action, they would file suit and file their own summary judgment motion. [Tr. 7/28/09, at 5]. If that was the case, Defendant would have

had an opportunity to controvert the facts, which he was not permitted to do in response to the original motion. There is no legal justification for allowing the newly joined Plaintiffs and hundreds of other individuals to benefit from Defendant's earlier procedural default, in particular where they did not meet their burden of showing entitlement to partial summary judgment.

D. The District Court Violated Defendant's Right to Due Process of Law By Refusing to Permit Him to Respond to the Facts in Plaintiffs' Summary Judgment Motion and By Applying the Judgment Obtained Through Procedural Default to Hundreds of Joined Plaintiffs and Unnamed Individuals.

Our Constitutions guard against the deprivation of property without due process of law. *See* U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); N.M. CONST. art. II, § 18 ("No person shall be deprived of life, liberty or property without due process of law."). Punishing Defendant by refusing to allow him to controvert Plaintiffs' version of the facts was a sanction that violated Defendant's right to due process. Applying the partial summary judgment – which itself was procured through a violation of Defendant's due process rights – to all joined Plaintiffs and unnamed individuals further eroded Defendant's constitutional rights.

Azar demonstrates that the judgment must be reversed on due process grounds. In *Azar*, the defendant argued that the trial court violated its due process

rights by granting partial summary judgment to all of the plaintiffs "without giving [the defendant] notice and a reasonable opportunity to respond or present evidence to establish a genuine issue of material fact as to each of the claims adjudicated against it." *Azar*, 2003-NMCA-062, at ¶ 87, 133 N.M. 669, 68 P.3d 909. The Court agreed, noting that under the rule governing summary judgment, "the requirements of notice and opportunity to respond are designed to protect the right of the party opposing the motion." *Id.* at ¶ 88. The Court concluded that the district court erred in granting partial summary judgment to the plaintiffs because the defendant was not given an adequate opportunity to address the elements of the claims against it. *Id.* Likewise, the Court should reverse the district court's grant of partial summary judgment to all Plaintiffs and unnamed individuals in the case at bar because Defendant was not given a meaningful opportunity to be heard and to refute the facts alleged in the motion.

This Court has opined that granting a summary judgment motion based on a failure to respond requires notice and an opportunity to be heard. *See Lujan*, at ¶ 19, 134 N.M. 207, 75 P.3d 423. These, of course, are the fundamental principles of due process. Another fundamental tenet of due process is that the "right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). In the instant

case, allowing a response to the summary judgment motion on legal issues only was tantamount to not allowing a response at all. Defendant was not given a meaningful opportunity to be heard before he was sanctioned with the acceptance of Plaintiffs' version of the facts when discovery had barely begun.

This Court has stated that "depriving parties of their day in court is a penalty that should be avoided." *Lopez*, 108 N.M. at 262, 771 P.2d at 195. The effect of the district court's arbitrary and unfair ruling was to deprive Defendant of his day in court. This Court should not condone that result.

II. The District Court Misinterpreted the Unfair Practices Act in Concluding that Defendant Violated the Act and that He Did So "Willfully."

In construing a statute, the Court's charge is to ascertain and give effect to the Legislature's intent. *Marbob Energy Corp. v. NM Oil Conserv. Comm.*, 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.3d 135. In discerning legislative intent, the Court looks first to the plain language of the statute, giving the words their ordinary meanings. *Id.* The district court's interpretation of the Act is insupportable.

A. Defendant Did Not Engage in Unfair or Deceptive Trade Practices Within the Meaning of the Act.

An "'unfair or deceptive trade practice' means an act specifically declared

unlawful pursuant to the Unfair Practices Act, a false or misleading oral or written statement, visual description or other representation of any kind knowingly made in connection with the sale, lease, rental or loan of goods or services or in the extension of credit or in the collection of debts by a person in the regular course of the person's trade or commerce, that may, tends to or does deceive or mislead any person." NMSA 1978, § 57-12-2 (D). "The gravamen of an unfair trade practice is a misleading, false, or deceptive statement made knowingly in connection with the sale of goods or services." *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 5, 142 N.M. 437, 166 P.3d 1091. The elements of a UPA claim are as follows: "(1) the defendant made an oral or written statement, a visual description or a representation of any kind that was either false or misleading; (2) the false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant's business; and (3) the representation was of the type that may, tends to, or does deceive or mislead any person." *Id.* "The subjective belief of the party receiving the information is not sufficient to establish a violation of the Act." *Eckhardt v. Charter Hosp. of Albuquerque, Inc.*, 1998-NMCA-017, ¶ 60, 124 N.M. 549, 953 P.2d 722 (1997).

The Court recently rejected a UPA challenge to attorney advertising. *See*

Encinias v. Whitener Law Firm, 2013-NMCA-003, ___ P.3d ___ (2012), *cert. granted*, No. 33,874 (Dec. 6, 2012). In *Encinias*, the district court had found that the UPA does not apply to attorneys. *Id.* at ¶ 25. This Court assumed, without deciding, that the UPA applies to attorneys and their advertising. *Id.* The Court nevertheless affirmed summary judgment against the plaintiff, concluding that "no hypothetical fair-minded fact finder would find the[] advertisements misleading or false." *Id.* at ¶ 28. The Court rested its decision on its view that "[t]he advertisements do not deceive the audience with guarantees or promises." *Id.* Likewise, the advertisements in the instant case were neither false nor misleading, nor did they deceive with guarantees or promises. [RP 118-24]. The district court's order granting partial summary judgment on Plaintiffs' UPA claim offers no explanation of how a hypothetical fact finder could find Defendant's advertisements misleading or false. [RP 315].

The district court found that Defendant's advertisements were false and misleading because they offered a free initial consultation and did not disclose his jurisdictional limitation. [RP 2033-35; 2041]. However, the district court also found that all settlement agreements were signed by a New Mexico licensed attorney. [RP 2034]. Furthermore, the evidence at trial is undisputed that all clients in the Las Cruces office were represented by New Mexico licensed

attorneys.

On top of the fact that Plaintiffs failed to establish the essential elements, their UPA claim is also barred by the Act's exemption, which states: "[n]othing in the Unfair Practices Act shall apply to actions or transactions expressly permitted under laws administered by a regulatory body of New Mexico or the United States, but all actions or transactions forbidden by the regulatory body, and about which the regulatory body remains silent, are subject to" the UPA. NMSA 1978, § 57-12-7. The exemption "creates an exception to the general protections of the UPA." *Quynh Truong*, 2010-NMSC-009, at ¶ 31, 147 N.M. 583, 227 P.3d 73. The exemption embodies two important purposes. *Id.* at ¶ 32. First, courts must "give deference to the expertise of the relevant regulatory body." *Id.* Second, "it would be fundamentally unfair to penalize regulated entities [that] have conformed their conduct to the express directives of their governing regulatory body." *Id.*

In the instant case, Defendant has operated his firm consistent with correspondence that he received from the New Mexico Disciplinary Board. The Board wrote to Defendant, stating that initially it had intended to dismiss a complaint because his firm letterhead indicated the jurisdiction where each attorney is admitted to practice. [RP 396]. The letter continued: "We did have some concerns regarding your website which is not as clear as we would like." *Id.*

The letter advised Defendant to update his website. The letter went on to inform that "there did not appear to be any disciplinary action warranted." *Id.*

Defendant did in fact update his website. *Id.* The Disciplinary Board then sent a letter to the complaining party, stating: "The Office of Disciplinary Counsel has looked into your complaint against Mr. Gopin but has found insufficient evidence to support allegations that Respondent has violated the Rules of Professional Conduct." [RP 400]. The letter informed that the Board would take no further action and the file would be closed. *Id.* The foregoing facts demonstrate Defendant's intent to comply and his understanding that he was in fact operating his firm in compliance with New Mexico law. It would therefore be fundamentally unfair to penalize him. *See Valdez v. State*, 2002-NMSC-028, 132 N.M. 667, 54 P.3d 71 (where practices are expressly permitted by governing regulatory body, no violation of UPA); *but see Azar*, 2003-NMCA-062, at ¶ 69, 133 N.M. 669, 68 P.3d 909 (approval of policy by regulatory body does not conclusively establish validity of policy or shield it from review by courts).

B. The District Court Erred in Awarding Treble Damages and Civil Penalties Because Defendant Did Not Act "Willfully" Within the Meaning of the Unfair Practices Act.

1. The District Court Misinterpreted the Term "Willfully" to Mean "Knowingly"

"Where the trier of fact finds that the party charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the trade practice, the court may award up to three times actual damages or three hundred dollars ($300), whichever is greater, to the party complaining of the practice." NMSA 1978, § 57-12-10(B). An award of treble damages under the UPA is discretionary, not mandatory. *See Teague-Strebeck Motors, Inc. v. Chrysler Ins. Co.*, 1999-NMCA-109, ¶ 69, 127 N.M. 603, 985 P.2d 1183, *overruled on other grounds, Sloan v. State Farm Mut. Auto. Ins. Co.*, 2004-NMSC-004, 135 N.M. 106, 85 P.3d 230; *see also Woodworker's Supply, Inc. v. Princ. Mut. Life Ins. Co.*, 170 F.3d 985, 996 (10th Cir. 1999) (concluding that district court did not abuse discretion in refusing to award treble damages even where jury expressly found that defendant's conduct was willful).

The UPA also provides that the Attorney General may collect civil penalties if a defendant acts "willfully" within the meaning of the Act: "if the court finds that a person is willfully using or has willfully used a method, act or practice

declared unlawful by the Unfair Practices Act, the attorney general, upon petition to the court, may recover, on behalf of the state of New Mexico, a civil penalty of not exceeding five thousand dollars ($5,000) per violation." NMSA 1978, § 57-12-11.

The district court adopted an incorrect interpretation of the term "willfully" by concluding that "[a]ll of the actions were *known* by and under the direction of [Defendant] and are *therefore willful* and deliberate." [RP 2043 (emphases added)]. The court also concluded that Plaintiffs should receive treble damages "because of the willful and deliberate nature" of Defendant's actions. [RP 2043-44]. The district court improperly treated the standard for treble damages and civil penalties as identical to the standard for finding a violation of the Act itself.

The Act reflects a legislative intent to require something more than knowing action if treble damages and civil penalties are to be imposed. *Compare* NMSA 1978, § 57-12-2(D) ("'unfair or deceptive trade practice' means . . . a false or misleading oral or written statement, visual description or other representation of any kind *knowingly* made") *with id.* at § 57-12-10(B) ("[w]here the trier of fact finds that the party charged with an unfair or deceptive trade practice . . . has *willfully* engaged in the . . . practice, the court may award up to three times actual damages); *and id.* at § 57-12-11 ("if the court finds that a person . . . has *willfully*

used a method, act or practice declared unlawful by the [UPA], the attorney general . . . may recover . . . a civil penalty") (emphases added). Thus, the Act specifically distinguishes between a representation "knowingly made" – which is enough to impose liability – and "willfully" engaging in a certain practice – which is required for treble damages and civil penalties.

Willfulness involves an "actual or deliberate intention to injure or harm another." *Matthews v. State*, 113 N.M. 291, 297, 825 P.2d 224, 230 (Ct. App. 1991); *see also* N.M. UJI § 13-1827 ("Willful conduct is the intentional doing of an act with knowledge that harm may result."). This Court has also recognized that willful conduct encompasses intentional acts performed without regard for the consequences. *See Rivero v. Lovington Country Club, Inc.*, 1997-NMCA-114, ¶¶ 9-11, 124 N.M. 273, 949 P.2d 287.

In the UPA, the legislature contemplated that some statements may not be made intentionally but might still be false or misleading; intent to deceive is not an essential element of the offense. *See Ashlock v. Sunwest Bank*, 107 N.M. 100, 101-02, 753 P.2d 346, 347-48 (1988), *overruled on other grounds, Gonzales v. Surgidev Corp.*, 120 N.M. 133, 899 P.2d 576 (1995). An intent to deceive or harm is, however, necessary for the imposition of treble damages. *Id.*, 107 N.M. at 101, 753 P.2d at 347.

Ashlock is important because it demonstrates that statements in advertising can be knowingly made without treble damages being warranted. Notably, the actual damages in *Ashlock* were not trebled based on a bank's knowing statements. *Id.*, 107 N.M. at 101-02, 753 P.2d at 347-48. Under *Ashlock*, the district court in the case at bar erred in concluding that the actions taken by Defendant in advertising and operating his firm warranted treble damages because they were "known by" him and were under his direction. [RP 2043].

Treble damages are a form of punitive damages. *McLelland v. United Wisconsin Life Ins. Co.*, 1999-NMCA-055, ¶ 10, 127 N.M. 303, 980 P.2d 86. The purpose of punitive damages is to punish a wrongdoer. *Clay v. Ferrellgas, Inc.*, 118 N.M. 266, 269, 881 P.2d 11, 14 (1994). In order to be liable for punitive damages, the defendant must demonstrate the requisite culpable mental state, i.e. his "conduct must rise to a willful, wanton, malicious, reckless, oppressive, or fraudulent level." *Id.* The record contains evidence that Defendant knew of his firm's advertising and operational practices, but the record is entirely devoid of evidence that Defendant undertook those practices with a willful intent to harm. Especially given Defendant's reliance on correspondence from the Office of Disciplinary Counsel, as well as Advisory Opinion 1983-4, a finding of a willful violation of the Act is foreclosed. [RP 1672-73; 1948]. Because Defendant did

not engage in any purposeful act with an intent to harm, the awards of treble damages and civil penalties cannot stand.

2. *Another New Mexico Statute, as Well as Consumer Protection Law From Other Jurisdictions, Support the Argument that the District Court Erred in Imposing Treble Damages and Civil Penalties*

If our Legislature had intended to penalize a defendant for knowing conduct, it could easily have done so. The Legislature did just that in the Oil and Gas Act, which provides that "[a]ny person who *knowingly and willfully* violates any provision" of the Act "shall be subject to a civil penalty." NMSA 1978, § 70-2-31(A) (emphasis added); *see also Marbob*, 2009-NMSC-013, at ¶ 11, 146 N.M. 24, 206 P.3d 135. Just as in the UPA, the Oil and Gas Act empowers the Attorney General to bring suit to recover civil penalties. Unlike the UPA, however, the Oil and Gas Act includes knowing conduct as a basis for civil penalties. Because the UPA does not permit imposition of civil penalties for knowing conduct, the district court erred.

The district court also erred in awarding treble damages based on Defendant's knowing conduct. Other jurisdictions have passed statutes analogous to New Mexico's UPA, and they have made the policy choice to allow for the

imposition of treble damages for knowing conduct.[2] Our Legislature could have provided that treble damages may be imposed for knowing conduct, but it did not.

C. The District Court Erred in Granting Partial Summary Judgment to the Attorney General on the Issue of Willfulness.

On the second grant of partial summary judgment to the Attorney General, the district court found that there were no genuine issues of material fact concerning whether Defendant willfully violated the Act for purposes of awarding civil penalties. [Tr. 9/13/11 at 42; RP 1777-78]. The court, however, denied the individual Plaintiffs' second motion for partial summary judgment on the issue of willfulness. In the court's view, the standard of willfulness for the Attorney General to be entitled to civil penalties is different than the standard of willfulness for a private plaintiff to be entitled to treble damages. [Tr. 9/13/11 at 39-41]. The district court erred in at least three respects.

First, the standard of willfulness is the same for awarding both treble damages and civil penalties. *See* NMSA 1978, §§ 57-12-10(B) and -11. Second,

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[2]*See* Texas Deceptive Trade Practices Act, TEX. BUS. & COM. CODE § 17.50(b)(1) (2011) (authorizing treble damages where conduct committed knowingly); Tennessee Consumer Protection Act, TENN. CODE ANN. § 47-18-109(a)(3) (2012) (same); New Hampshire Consumer Protection Act § 10, N.H. REV. STAT. ANN. § 358-A:10 (2012) (same); Massachusetts Consumer Protection Statute, MASS. GEN. L. ch. 93A § 11 (2012) (same); South Carolina Unfair Trade Practices Act, S.C. CODE ANN. § 39-5-140(a) (2012) (same).

as discussed, the district court misinterpreted the term "willfully" in the Act. The court stated: "I don't think there's a requirement that it be done with intent to harm." [Tr. 9/13/11 at 41]. The district court is incorrect because intent to harm is a hallmark of willfulness. Third, the question of willfulness is fact-bound, and there were no facts to support a finding of willfulness, much less to grant summary judgment.

It is telling that when Defendant moved for partial summary judgment on the issue of willfulness, Plaintiffs argued that there are material facts in dispute. [RP 1309-11; 1386]. Yet when Plaintiffs filed their own motions for partial summary judgment on the issue of willfulness, they necessarily had to argue that there are no genuine issues of material fact. [RP 1563-75; 1648]. This discrepancy alone shows the impropriety of granting partial summary judgment on a fact-intensive issue such as willfulness – all the more so when one considers that this grant of summary judgment was applied to hundreds of individuals who are not parties to the litigation.

D. The District Court Erred in Awarding Pre-Judgment Interest at a Rate of 15% Based On Its Finding of Willfulness.

Under the governing statute, judgment interest shall be calculated at a rate of eight and three-fourths percent per year unless "the judgment is based on

tortious conduct, bad faith or intentional or willful acts, in which case interest shall be computed at the rate of fifteen percent." NMSA 1978, § 56-8-4(A). The district court ruled that Plaintiffs are entitled to interest at the rate of 15% "based upon willful acts." [RP 2044]. Although the higher interest rate may be applied based on a finding of willful conduct, the legislature did not intend to impose a higher rate in all cases in which a defendant acts with a culpable mental state. *See Pub. Svc. Co. of NM v. Diamond D Const. Co.*, 2001-NMCA-082, ¶ 57, 131 N.M. 100, 33 P.3d 651. Where evidence shows that a defendant has acted only with wantonness, the basic interest rate must apply. *See id.* at ¶ 59. As demonstrated above, Defendant did not act willfully within the meaning of the UPA. Accordingly, the district court erred in awarding interest at a rate of 15%.

E. The Amount of Civil Penalties and Restitution Awarded to the Attorney General is Excessive and Arbitrary, Violating Defendant's Right to Due Process of Law.

1. The Award of Civil Penalties is Excessive and Arbitrary

Even if the Court decides that the district court properly granted summary judgment to the Attorney General and properly imposed civil penalties and treble damages for willful conduct, the amount awarded infringes Defendant's constitutional rights. "The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a

tortfeasor." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). One of the most common indications of an excessive punitive damages award is its ratio to the actual harm inflicted. *See BMW v. Gore*, 517 U.S. 559, 580 (1996); *see also id.* at 575 (enumerating three guideposts that courts should use to review punitive damages awards).

In the instant case the district court multiplied 314, the number of Defendant's former clients, by $5,000.00 to award the Attorney General $1,570,000 in civil penalties. [RP 1778-79; *and see* Tr. 9/13/11 at 43]. When this number is piled onto the likewise improper (and punitive) treble damages that the district court awarded, the punishment to Defendant is at a ratio of 1:24. In other words, the punitive damages in this case are almost 24 times the amount of actual damages.[3] That ratio becomes even greater when one considers that as an element of compensatory damages, Defendant was improperly ordered to pay his clients the amounts charged by their chiropractor.[4] *See, e.g.*, RP 1805; Ex. AG-3, Column K. While there is no bright-line mathematical formula, few awards exceeding a

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[3]Compensatory damages amounted to $72,074.19. The amount added when trebling those damages is $144,148.38. The civil penalties are $1,570,000. Adding $144,148.38 to the civil penalties equals $1,714,148.38, which is almost 24 times the compensatory damages.

[4]Defendant reserves the right to address this topic in his reply brief if necessary.

single digit ratio will satisfy due process. *See State Farm*, 538 U.S. at 425.

It should be noted that a district court is empowered to award civil penalties in an amount "not exceeding" $5,000 "per violation." NMSA 1978, § 57-12-11. To multiply the statute's upper limit by the number of Defendant's former clients is outrageous and should shock the judicial conscience. The district court offered no justification for randomly taking the maximum per-violation amount and multiplying it by every client. Even assuming *arguendo* that civil penalties are warranted, the multiplier should not have been the number of clients but the number of false or misleading advertisements – i.e., the number of "violations" – if any.

As one court has noted, even where a statute allows for damages on a per consumer basis, there is "the potential for a devastatingly large damages award, out of all reasonable proportion to the actual harm suffered." *Parker v. Time Warner Enter. Co.*, 331 F.3d 13, 22 (2d Cir. 2003). In such a case, the Due Process Clause may be invoked "to nullify that effect and reduce the aggregate damage award." *Id.*

In *People v. Beaumont*, 3 Cal. Rptr. 3d 429, 459 (2003), the court noted that the maximum penalty authorized by the unfair practices statute would exceed $35 million ($2,500 multiplied by 14,000 violations). The court recognized that

such a penalty would be so disproportionate to the actual harm as to constitute an excessive fine. *Id.*; *see also State ex rel. Morrison v. Oshman Sporting Goods Co.*, 69 P.3d 1087, 1096 (Kan. 2003) (reversing $50,000 fine as "excessive" and "shocking" where 25 violations amounted to $142.64 in actual damages).

The Supreme Court has countenanced "exacting appellate review" to ensure that an award of punitive damages is based on law rather than on "a decisionmaker's caprice." *State Farm*, 538 U.S. at 418. Where a punitive damages award is neither reasonable nor proportionate to any wrong committed, it constitutes an irrational and arbitrary deprivation of property in violation of a defendant's due process rights. *Id.* at 429. That is the case here. The Court should reverse the award of civil penalties.

2. The Award of Restitution is Excessive and Arbitrary

The Court should also reverse the award of restitution as arbitrary and excessive. At a pre-trial hearing, the Attorney General argued that if Defendant is not subject to civil penalties for willfulness, then the only issue left would be "if there's restitution, what that amount is, and who does it go to." [Tr. 10/7/10 at 17]. The district court awarded the Attorney General $757,358.56 in restitution for 110 consumers. [RP 2026].

There does not appear to be any case law in New Mexico interpreting § 57-

12-8(B), which allows an award of restitution to the Attorney General. As a general matter, "[r]estitution is measured by the benefit realized by the defendant." *Romero v. Bank of the Southwest*, 2003-NMCA-124, ¶ 31, 135 N.M. 1, 83 P.3d 288; *see also* Carter & Sheldon at § 13.3.2.4.3 (restitution measured by benefit to defendant, not by damage to plaintiff). The purpose of restitution is to prevent unjust enrichment by requiring a defendant to return the gains that he secured in a transaction. *See id.*

The restitution award is purportedly based on Attorney General Exhibit AG-3, Columns C & D. [Tr. 1/5/12 at 10]. However, there is no evidence to support the proposition that Defendant realized a benefit of $757,358.56 to which he was not entitled or that he was unjustly enriched by that amount. The award is random, arbitrary, and violates Defendant's right to due process of law.

F. If the Court Reverses the Judgment on Plaintiffs' UPA Claims, There is No Longer Any Legal Basis for an Award of Attorney Fees or For the Issuance of a Writ of Ne Exeat.

According to the UPA, "[t]he court shall award attorney fees and costs to the party complaining of an unfair or deceptive trade practice or unconscionable trade practice if the party prevails." NMSA 1978, § 57-12-10(C); *see also Hale v. Basin Motor*, 110 N.M. 314, 321, 795 P.2d 1006, 1013 (1990). Defendant stipulated to awards of attorney fees for the joined Plaintiffs and the original

names Plaintiffs. [RP 2088; 2090; 2110]. Defendant's stipulation was based on Plaintiffs' status as prevailing parties under the Act.

If this Court reverses the judgment, Plaintiffs are no longer the prevailing parties. Accordingly there would no longer be a source of law to support an award of attorney fees. In that event, the Court should remand with instructions to set aside the stipulated orders awarding attorney fees and the writ of ne exeat. [RP 2088; 2090; 2110; 2120]; *and see generally* Tr. 1/5/12 and 2/16/12.

III. The District Court Erred in Allowing a Double Recovery in the Form of Gross Receipts Tax.

When setting amounts of damages for the named Plaintiffs as well as the unnamed individuals, the district court included gross receipts taxes. [RP 2041 ("The amount of damages suffered by each client . . . includes . . . all gross receipts taxes paid on fees."); *see also* Ex. AG-3, Column I. Inclusion of gross receipts tax in the damages award effects a double recovery. Defendant paid gross receipts tax in connection with the representation of his clients. [Tr. 1/4/12 at 195]. Now Plaintiffs have been awarded those same amounts of gross receipts tax.

Such a double recovery is unfair and is unwarranted under the law. *See Washington v. Atchison, Topeka, and Santa Fe Rwy Co.*, 114 N.M. 56, 61, 834 P.2d 433, 438 (Ct. App. 1992) (noting unfairness of double recovery). "New

Mexico does not allow duplication of damages or double recovery for injuries received." *Hale*, 110 N.M. at 320, 795 P.2d at 1012; *see also Hood v. Fulkerson*, 102 N.M. 677, 680, 699 P.2d 608, 611 (1985) (holding that double recovery is impermissible). Accordingly, even if the Court affirms the judgment against Defendant, it should not permit a damages award to include amounts paid as gross receipts tax.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 12-213(A)(6), Appellant states that oral argument would be helpful to a resolution of the issues because this appeal is complex and involves a constitutional error as well as errors committed by the district court under the governing rules and statutes.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of February 2013, I caused to be delivered a true and correct copy of the foregoing on the following by first class U.S. mail, postage prepaid:

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