COPY

IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

NO. 35,930

GANDYDANCER, LLC,

Plaintiff-Appellee

vs.

ROCK HOUSE CGM, LLC and KARL G. PERGOLA

Defendants-Appellants.

(INTERLOCUTORY) APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT, THE HONORABLE CLAY CAMPBELL, DISTRICT JUDGE

APPELLEE'S ANSWER BRIEF

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SUMMARY OF PROCEEDINGS

A. Nature of the Case

Plaintiff GandyDancer, LLC ("GD"), a New Mexico company that provides railroad services to the BNSF Railway Company (the "Railroad"), brought suit [**RP 1-22**] against Defendants Rock House CGM, LLC, and its owner, Karl G. Pergola ("Defendants"), its competitors in such industry, for, among other causes of action, damages suffered as a result of Defendants' violations of the New Mexico Unfair Practices Act, NMSA 1978, Sections 57-12-1 to -26 (the "UPA") [**RP 13-14 ¶¶ 49-55**). Defendants responded with a Motion to Dismiss all causes of action on the grounds of lack of standing and failure to state a claim upon which relief can be granted. [**RP 40 ¶ 1**]. With respect to the UPA claim, Defendants asserted (a) GD lacks standing to bring a claim under the UPA, (b) Defendants have no duty to disclose illegal activity to GD, and (c) pre-emption of the UPA by the Construction Industries Licensing Act. [**RP 52-56 ¶ III**]. After response against such Motion by GD [**RP 69-102**] and reply by Defendants [**RP 121-162**], the District Court denied the Motion as to the UPA claim and certified the issue of competitor standing under the UPA for interlocutory appeal [**RP 200 ¶ 2**]. This interlocutory appeal followed. [**RP 344**].

ARGUMENT

A. Statement of applicable standard of review.

There is only one issue raised in this interlocutory appeal: Whether GD has standing to assert a claim for damages under the UPA against Defendants.[1] For purposes of this issue, the factual allegations of GD's Complaint are to be taken as true. *Healthsource,Inc. v. X-Ray Associates of New Mexico*, 2005-NMCA-097, ¶16, 138 N.M. 70. ("[A] motion to dismiss tests the legal sufficiency of the complaint, not the factual allegations of the pleadings which, for the purposes of ruling on the motion, the [appellate] court must accept as true").

The aforesaid issue underlying this appeal is to be addressed by a review and construction of the language of the UPA itself. The District Court determined [**RP 199-201 ¶ 2**] that the UPA provides that "any person", not just a direct party to a

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[1] Defendants acknowledge that this appeal deals solely with GandyDancer's standing to assert its UPA claims. [**BIC 1-2**]. Similarly, Defendants' Application for Interlocutory Appeal seeks review limited to whether the UPA "affords private-party standing to business competitors". [**RP 205**]. Still, they also ask this Court to review the merits of the UPA claims, arguing that "[e]ven if [GD] did have standing, the UPA claim must be dismissed" for other reasons. [**BIC 29-32**]. These arguments exceed the scope of this appeal. *See* Brief in Chief at 6 (discussing the district court's decision to certify its order denying the motion to dismiss GD's UPA claims for potential interlocutory appeal solely with respect to whether "the [UPA] affords private-party standing to business competitors who are---sellers of services, or only to buyers of goods and services"). [**BIC 6**]. This Court should disregard the entirety of sub-section "C" of the "Argument" section in the Brief in Chief [**BIC 29-32 ¶ C**] as unrelated to the question presented of competitor standing under the UPA.

transaction involving the sale of goods or services, "who suffers as a result of any--- method, act or practice declared unlawful by the Unfair Practices Act [may] bring an action to recover actual damages". NMSA 1978, § 57-12-10(B) (2005). The Court of Appeals reviews *de novo* decisions of the lower court dealing with statutory construction (*Truong v. Allstate Ins. Co.,* 2010-NMSC-009, ¶22); whether a party has standing (*ACLU of New Mexico v. City of Albuquerque,* 2008-NMSC-045, ¶6); and NMRA Rule 1-012(B)(6) decisions (see *Valdez v. State*, 2002-NMSC-028, ¶4).

B. Factual Background

As set forth in its Complaint [**RP 2-5 ¶¶ 5, 8, 16**] GD is a competitor of Defendants in providing railroad services (i.e., rail repair, bridge and road maintenance, derailing accident repair, etc.). At times relevant to the Complaint, GD and Defendants primarily served one principal client, the Railroad. The Railroad owns the majority of track in the State of New Mexico and therefore is the primary buyer of railroad construction and repair services within the State. Thus, the area of commerce in which the parties conduct business (as well as the overall clientele base) is already severely restricted and therefore highly competitive. Moreover, in order to render railroad construction services in this State, a provider must be licensed under New Mexico law. During the operative period in this case, Defendants were unabashedly unlicensed under the Construction Industries Licensing Act ("CILA") [**RP 3-4 ¶¶ 8, 14**] but wrongfully misrepresented to the

Railroad that they were licensed, in compliance with applicable laws and regulations, and qualified to undertake the often dangerous contracting services the Railroad required. As a result of these misrepresentations, and other alleged wrongdoing, Defendants diverted and usurped substantial and valuable service contracts that in all historical probability would have been otherwise awarded to GD, thus significantly and directly impairing the years-long relationship between GD and the Railroad. [**RP 9-14 ¶¶ 33-34, 36-38, 51-54**]

C. Argument and Authorities

i) Issue presented for appeal

The issue of standing of one competitor to sue another under the UPA (or stated more broadly, the standing of anyone other than a buyer of goods and services) is a matter of first impression; no New Mexico state appellate court has yet been presented with or ruled upon a fact pattern directly raising that question. All state cases cited by Defendants in their Brief-in-Chief in support of their contention involved factual transactions between buyers and sellers; no state law case in New Mexico to date in which this issue has been raised involved claims by one industry competitor against another (or by any person other than a buyer or seller injured by an alleged UPA violation). Judicial statements in the cases Defendants cite to in support of their lack-of-standing argument are thus all *dicta*, and have no binding precedential authority. Although there are rulings on both sides of the issue from

other jurisdictions, as will be shown below, New Mexico is without binding precedent other than the clear, broad and unrestricted language of the UPA itself.

GD primarily relies on the plain language of the UPA (which imposes no restrictions on standing at all) and the supporting policy laid out, albeit in dicta, in favor of competitor standing by the Supreme Court of New Mexico nearly thirty years ago in *Page & Wirtz Const. Co. v. Solomon*, 1990-NMSC-063, 110 N.M. 206 ("*Solomon*"). In opposition, Defendants' lead case against competitor standing is *Santa Fe Custom Shutters & Doors, Inc. v. Home Depot U.S.A, Inc.*, 2005-NMCA-051, 137 N.M. 524 ("*SFCS*"), a case which did not address or even mention the question of competitor standing, having before it only a buyer and seller of goods as litigants, but nevertheless ventured beyond such fact-limited universe to gratuitously opine that the UPA may *only* be enforced by a "buyer" of goods and services, notwithstanding that no one in the case had asked for such a declaration and that no such restriction exists in the statute itself. *SFCS,* 2005-NMCA-051, ¶ 17. Defendants here, hypnotically following such pied piper's tune, argue that a competitor is not a "buyer" and therefore does not have standing to present a claim under the UPA, despite suffering harm from the wrongful and prohibited commercial actions and conduct that the UPA was designed to remedy.

ii) The plain language of UPA Section 57-12-10(B) does not restrict standing.

Statutory construction begins with the statute. The plain language of the UPA – which is the best (and only) controlling authority here – authorizes "any person who suffers as a result of any ... method, act or practice declared unlawful by the Unfair Practices Act [to] bring an action to recover actual damages". NMSA 1978, Section 57-12-10(B) (2005). The definition of "any person" for purposes of the UPA includes GandyDancer, as the term is not circumscribed in any manner. There is no statutory requirement that a plaintiff be a buyer of goods or services. Most importantly, nothing in the UPA excludes from the definition of "any person" a business competitor that suffers economic injury at the hands of a seller acting in violation of the UPA.

The focus of the UPA is not the classification of the person injured, but whether the claimant, any claimant, has suffered injury as a result of a defendant's violation of the UPA. Accordingly, the plain language of the UPA (alone) warrants rejection of Defendants' strained attempt at a patently-contradictory statutory construction. *State ex rel. Heiman v. Gallegos,* 1994-NMSC-023, ¶18, 117 N.M. 346, 351: ("[I]f a statute contains language which is clear and unambiguous, (the Court) must give effect to that language and refrain from further statutory interpretation.") As the UPA says that "any person" harmed by conduct that violates the UPA can bring a claim, this Court's inquiry should end there.

Again, the only issue on appeal is whether GandyDancer has standing, not whether GandyDancer was harmed or whether Defendants' conduct as currently alleged constitutes a UPA violation. These allegations are to be taken as true for present purposes. *Healthsource, Inc.*, 2005-NMCA-097, ¶ 16, 138 N.M. 70. Thus, the issue presented is whether a businessperson has the right to sue a competitor under the UPA. The statute itself clearly allows it. If the State's legislature meant to limit the application of the UPA to buyers of goods and services only, or to exclude competitors or any others however classified from obtaining its remedies with respect to harm they suffer, the legislature easily could have done so. By employing the phrase "any person" rather than some delimiting term, such as "any consumer" or "any buyer", the legislature clearly and unequivocally intended to make this extremely important social and commercial remedy available universally to combat and condemn conduct inherently destructive of the very fabric of public commerce.

Still, Defendants argue that only "buyers of goods and services" have standing to seek a remedy under the UPA and therefore an injured competitor, who although harmed by the conduct did not buy any goods or services from the wrongdoer, lacks standing. [**BIC 11-12**]. This simply runs counter to common sense. Defendants' piecing together of various sections of the UPA in an attempt to convince this Court to adopt its position relies on a fundamental misreading of the statute itself. The

UPA clearly and unequivocally states that "any person who suffers any loss of money or property---as a result of any employment by another person of a method, act or practice declared unlawful by the [UPA] may bring an action to recover actual damages---." NMSA 1978, § 57-12-10(B) (2005).

GD has alleged specific UPA violations by Defendants that caused it harm. The UPA defines an "unfair or deceptive trade practice" as including "disparaging the goods, services or business of another by false or misleading representations." See NMSA 1978, §57-12-2(D)(8) (2009). This suggests competitors have the right to sue under the UPA for false or misleading representations disparaging their goods or services. If competitors have no standing to bring a claim under the UPA, why does NMSA 1978, §57-12-2(D)(8), (2009) prohibit "disparaging goods and services of *another*"? Clearly, the "any person" language is meant to include aggrieved competitors.

Defendants point to NMSA 1978, Section 57-12-10(B)'s provision noting that standing under the UPA exists with respect to any "method, act or practice declared unlawful by the [UPA]" [**BIC 12**], but then try to limit those unlawful methods, acts, or practices to unfair or deceptive trade practices (which include false or misleading misrepresentations "made in connection with the sale---of goods or services.") [**BIC 12**]. Defendants fail to recognize that this very provision does not limit standing solely to a buyer of goods or services but merely notes that the unlawful conduct

must occur "in connection with the sale". Here, as alleged in the Complaint [**RP 13 ¶ 51**], Defendants misrepresented (a UPA violation---NMSA 1978, §57-12-2 (5), (2009)) to the Railroad that they were licensed and otherwise qualified to perform railroad contracting services in connection with their sale of those services to the Railroad.

Defendants further ignore this fact in citing to *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶ 12, and listing the four elements required for asserting a UPA claim premised upon false, misleading, or deceptive statements – none of which require that such statement(s) even be made directly to a buyer of goods or services to be actionable, but instead noting that "the representation must have been of the type that may, tends to or does, deceive or mislead *any person*." [**BIC 13 ¶ 1**]. In other words, a false, deceptive, or misleading statement made to *any person* in connection with the sale of goods or services can give rise to a UPA claim by *any person* harmed thereby, including competitors like GD. This is supported by the findings of the court in *Lohman v. Daimler-Chrysler Corp.,* 2007-NMCA-100 ("*Lohman*"):

> "The definition of "unfair or deceptive trade practice" makes no mention of transactions between a claimant and a defendant. Nor does it require a misrepresentation *in the course of* a sale between plaintiff and defendant; it merely requires that a misrepresentation be 'made *in connection with* the sale ... of goods' generally." 2007-NMCA-100, ¶ 30 (Emphasis added; internal citations omitted.)

iii) The most pertinent caselaw and public policy support a determination that GD has standing to sue under the UPA.

There are four primary decisions GD advances in further support of its reading of the plain language of the UPA in favor of competitor standing: (i) *First National Bancorp Inc. v. Alley,* 76 F.Supp.3d 1261 (D.N.M. 2014) ("*Alley*"); (ii) *Solomon,* 1990-NMSC-063; (iii) *Lohman,* 2007-NMCA-100; and (iv) *Navajo Nation v. Urban Outfitters, Inc.*, 935 F. Supp. 2d 1147 (D.N.M. March 25, 2013) ("*Navajo I*"), In each case, the courts analyzed and discussed the issue of competitor standing under the UPA and all determined that the broad language of the UPA should be – or upon proper analyses would be – interpreted to extend standing under the UPA to third-party competitors.

In *Alley* the United States District Court of New Mexico addressed the fact that the Court in *SFCS* – the primary decision relied upon by Defendants in arguing against competitor standing under the UPA [**BIC 13-16**] – did not involve competitor standing at all.[2] 76 F. Supp. 3d 1261, 1263 (D.N.M. 2014) (calling this

[2] The *SFCS* court focused solely on the question of whether in a transaction between a buyer and seller, the party deemed to be the seller has standing under the UPA against the buyer. *SFCS,* 2005-NMCA-051, 137 NM 524, 113 P.3d 347, ¶ 17. This appeal does not involve a claim by a seller against a buyer of its services. The *SFCS* court's statement, quoted and relied extensively upon by Defendants, that "the UPA gives standing *only* to buyers of goods or services" is obviously unsupported dicta, used inartfully and unnecessarily to support the holding in that case that a seller did not have standing to assert UPA violations against a buyer of those same goods or services. The opinion did not consider or discuss hypothetical scenarios outside the specific transaction there. Indeed, *SFCS* does not once mention or address the

distinction "crucial" to understanding *SFCS* and noting further that "[n]either [*SFCS*] nor any other New Mexico appellate decision, has turned upon and decided the issue of competitor standing under the [UPA]"). (*Id.* at 1263.)

Having made that distinction, the *Alley* court noted that *Solomon* was the only state appellate-level decision that even "mentions competitor standing under the [UPA]" and concludes, based on its analysis, that "when the issue comes before the New Mexico Supreme Court, that court, ... will construe the unambiguous language of the [UPA] as authorizing competitor standing". *Alley*, 76 F. Supp. 3d at 1263, 1266 (citing *Solomon)*, 1990-NMSC-063, 119 NM 206 at 211 (suggesting that competitors of a defendant would have standing to obtain an injunction against deceptive advertising and that both consumers and a competitor of an enterprise engaged in deceptive practices could recover damages upon a showing of "loss of money or property.")

In reaching this conclusion, the *Alley* court points to the *Solomon* court's statement that "[a] *competitor* might complain that their company could suffer loss of market share and profits because the public might be deceived," and thus seek relief under the UPA. *Solomon*, 1990-NMSC-063, ¶ 21; see also *Alley*, 76 F. Supp. 3d at 1263, 1266 (implying competitor standing under the UPA is appropriate). The

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standing of third parties such as business competitors who are harmed as a result of a seller's unlawful conduct under the UPA.

Solomon court further noted that a *competitor* could seek monetary relief under the UPA in such situations by proving "[s]uch damages [were] suffered---by---the commercial competitor of an enterprise engaged in deceptive trade practices." *Solomon*, 1990-NMSC-063 at ¶22. This reading of the UPA is consistent with the plain language of UPA NMSA 1978, §57-12-10(B) as discussed above.

Lohman is another New Mexico Court of Appeals decision which concluded that "both the plain language of the [UPA] and the underlying policies suggest that a commercial transaction between a claimant and a defendant need not be alleged in order to sustain a UPA claim." *Lohman,* 2007-NMCA-100, ¶ 32, 142 N.M. 437 (affirming the denial of a motion seeking to dismiss certain UPA claims brought by plaintiff). The *Lohman* court did not stop there, however, further emphasizing the breadth of standing under the UPA and finding that its provisions "appear to be crafted so as to ensure that the UPA has a broad scope - arguably broad enough to encompass [wrongdoing] ... between third parties." *Id.* at ¶ 30 (referencing the "remedial purpose of the UPA and the principle favoring liberal application" of its provisions). Finally, the *Lohman* court once again rejected defendants' reliance on *SFCS*, noting that the "pertinent language (of the UPA) does not require the plaintiff to acquire goods or services from the defendant" for standing to exist as Defendants allege. *Id.* at ¶ 32. This teaching wholly undercuts Defendants' reliance on *SFCS's* dicta and cases relying thereon. [**BIC 13-16**].

In *Navajo I*, the Federal court considered competitor standing under the UPA in a case involving trademark infringement by the defendant in the sale of goods bearing the Navajo trademark. The Navajo court noted:

> "In this case, even though the suit is brought to remedy alleged harms to the competitor, Plaintiffs have alleged that Defendants are making false representations to the consuming public, and thus, this suit serves the purposes of the legislation as a consumer protection statute, albeit indirectly." *Navajo,* 935 F. Supp. 2d at 1173.

The *Navajo I* court continued its analysis of competitor standing under the UPA by analogy to other similar state statutes as follows:

> "In Hall v. Walter, the Colorado Supreme Court held that a non-consumer plaintiff had standing to bring a claim under the Colorado Consumer Protection Act ("CCPA"), sections 6–1–101 to –511, 2 C.R.S. (1998). Hall, 969 P.2d at 227, 230. The CCPA, like the NMUPA, is broadly worded to allow "any person" to have a civil action for any claim against any person who has engaged in or caused another to engage in any deceptive trade practice. Id. (quoting § 6–1–113, 2 C.R.S. (1998)). The Colorado Supreme Court rejected a reading of the statute that would limit the meaning of "any person" to "any consumer," given that the statute chose the expansive term "person" rather than "consumer." Id. at 231. After examining how courts in New York, Massachusetts, Illinois, and Washington construed similarly broadly worded "any person" language in their respective states' consumer protection acts, the Colorado Supreme Court adopted the Washington Supreme Court's five-factor test to establish a private right of action under the Washington Act. See id. at 232–34. The Colorado Supreme held that "any person" under the CCPA, means a person who establishes (1) that the defendant engaged in an unfair or deceptive trade practice; (2) that the challenged practice occurred in the course of defendant's business, vocation, or occupation; (3) that it significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property; (4) that the plaintiff suffered injury in fact to a legally protected interest; and (5) that the challenged practice caused the plaintiff's injury. Id. at 235 (emphasis added). As to the third

> "public interest component," the Colorado Supreme Court explained that it comported with the court's consistent characterization of the CCPA as addressing consumer concerns. Id. at 234." *Id.* at 1174.

Following thorough analysis of both New Mexico law and guiding authority from other states, as referenced above, the court in *Navajo I* determined that the New Mexico UPA should also provide standing to business competitors, stating that:

> "[g]iven the broad statutory language in the NMUPA, the consumer protection policy underlying the NMUPA, and the compelling authority from other states with similar statutes as New Mexico's that allow business competitor standing where the deceptive act affects the public interest, this Court finds that ***there are good reasons to conclude that the New Mexico appellate courts, when viewing the particular legal issue of business competitor standing, may adopt the reasoning of the courts in those states that allow business competitor standing*** where the deceptive act affects the interest of the consuming public."

Navajo I, 935 F. Supp. 2d at 1173-74 (emphasis added). The Court likewise noted that "the plain language of the statute supports" competitor standing, as "[u]nder the NMUPA 'any person' injured may sue and the statute broadly defines 'person' to include corporations and other business entities." *Id.* at 1173-74.

In *Navajo I* the Court specifically invited the parties to certify the issue of competitor standing to the New Mexico Supreme Court for clarification. When the parties did not elect to certify the issue, the Court revisited the issue (*See Navajo II*, 2013 WL 12161826, at *8) and determined it was obligated to abide by the then-existing New Mexico state appellate court decisions that held (even though clearly only in dicta) that UPA standing extends only to buyers of goods and services.

Navajo Nation v. Urban Outfitters, Inc., 2013 WL 12161826 (Nov. 6, 2013) ("*Navajo II*") at *8-9, 17 (acknowledging that, because it was sitting in diversity, it was not allowed to "expand state law without clear guidance from the state's higher courts" even if it believed [which it did] that doing so would constitute the proper interpretation of the law).

iii) The cases cited by Defendants are factually and legally distinguishable from the instant case.

The decisions and analysis in *Alley*, *Solomon*, *Lohman* and *Navajo I* provide strong support for the UPA's plain and clearly-written language extending standing to "any person", which would include injured competitors like GD as well as other categories of persons injured directly or proximately by a UPA violation. Faced with this fact, Defendants cite to a series of readily-distinguishable cases in their attempt to convince this Court that it should reverse the well-reasoned decision of the District Court below, upholding GD's standing to assert a UPA claim against Defendants. [**RP 200-201 ¶ 2**].

First, Defendants' preemptively attack GD's reliance on *Solomon* asserting that (i) it did not involve an actual instance of competitor standing; and (ii) the relied-upon holding is simply dicta. [**BIC 19-20**]. This argument is ironic given that nearly all of the cases relied upon by Defendants (most notably *SFCS* and *Hicks v. Eller*[3])

[3] 2012-NMCA-061, 280 P.3d 304 ("*Hicks*"). As was the case in *SFCS*, the *Hicks* Court was merely faced with the question of whether a *seller* had standing under the

have nothing to do with competitor standing either, yet they are cited by Defendants for the proposition that such standing does not exist. [**BIC 13-14**].[4] The additional cases cited by Defendants as apparently undermining *Solomon* are equally unpersuasive and their holdings are nothing more than dicta themselves. (*See* [**BIC 18-20**], citing to various New Mexico United States District Court decisions which declined to follow *Solomon* but which provide no declarative support that the *Solomon* dicta is any less persuasive).

The Court in *Navajo I* opined that "the true holding" in *SFCS* is that "a *seller* of goods cannot sue the *buyer* of its goods" and that *SFCS* does not address the situation, as presented here, "of a competitor who is suing a seller of goods for misrepresentations made to other buyers that caused harm to the competitor". *Id.* at

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UPA to assert a claim against *buyers* of goods/services - competitor standing was (again) not even mentioned or addressed. *Id.* at 308 (affirming district court ruling of lack of standing where plaintiff failed to show that defendant "made a misrepresentation in connection with the *sale* of his services"). The applicability of the holding in *Hicks* – as with *SFCS* – should not be extended to deny UPA standing to anyone other than *sellers* of goods or services and definitely not third party business competitors harmed as a result of a UPA violation.

[4] Later in the Brief in Chief, Defendants argue that the lack of citation to *Solomon* in subsequent decisions concerning UPA standing is an indication that it should not be given any weight. [**BIC 22**]. It is not the number of citations to a given case or proposition that matters in the final analysis, but the persuasiveness thereof. Moreover, Defendants acknowledge that *SFCS* and *Hicks* – the cases on which they primarily rely in the Brief in Chief and to which the other cases cited primarily point for authority – do not themselves address or mention competitor standing, while *Solomon* does. [**BIC 22**].

1173. The *Navajo I* Court further agreed with the reasoning of *Lohman* with respect to competitor standing finding that it "is a far more persuasive guide to how the New Mexico courts would view business competitor standing" than *SFCS* and holding that:

> "[j]ust as the *Lohman* court rejected an expansive reading of *Santa Fe Custom Shutters*, so too does this Court. . . . [as] in none of those cases was the Court of Appeals presented with the issue of business competitor standing (citations omitted). Nor does this Court believe that the Court of Appeals was contemplating foreclosing such a suit by a business competitor when utilizing that language." *Id.* at 1175-76.

To date, and despite the importance of the issue, no New Mexico state appellate court has directly addressed the question of competitor standing under the UPA – a fact highlighted by the court in *Alley*, 76 F. Supp. 3d at 1263 (noting that "[n]either [SFCS], nor any other New Mexico appellate decision, has turned upon and decided the issue of competitor standing under the [UPA]"). Had the *Navajo* court been presented with the decisions in *Alley* or *Solomon* (neither of which is cited in *Navajo II*) or had it been a New Mexico State Court not sitting in diversity, it appears virtually certain that, like the District Court in the instant case, it would have found in favor of competitor standing under the UPA.

As for the other cases advanced by Defendants, they (i) rely exclusively on *Hicks*, *SFCS*, and/or their progeny (none of which dealt with competitor standing and which have already been distinguished above) without any real analysis or discussion; and/or (ii) have facts similar to *Navajo II* wherein the courts found

themselves bound by "principles of federalism" to accept the existing New Mexico state appellate courts' dicta in *Hicks* and *SFCS* with respect to UPA standing without necessarily supporting such a questionable interpretation of the UPA's plain language. *See Williams v. Foremost Ins. Co.*, 102 F. Supp. 3d 1230, 1240 (D.N.M. 2015) ("*Williams*") ("Because New Mexico law currently restricts UPA claims to actual consumers of goods and services, there is no basis to expand the UPA to give standing to a non-consumer third-party claimant like Plaintiff."); *Trademarks Holding, LLC v. Am. Prop. Mgmt. Corp.*, No. CIV 07-167, 2008 WL 10879330, at *3 (D.N.M. Jan. 17, 2008) (the court relied on *SFCS* noting that "it is not the providence of the federal courts to expand state statutory remedies" and that "[r]ecent authoritative state court opinions as to the meaning of state law are---to be honored in diversity cases"); *Amco Ins. Co. v. SimplexGrinnell LP*, No. 14-CV-890 GBW/CG, 2016 WL 4425095, at *8 (D.N.M. Feb. 29, 2016) (a non-competitor action summarily relying, in just one paragraph, on *Hicks* and *Williams* and otherwise distinguishable due to the existence of a contract provision which expressly prevented plaintiff in that case from suing on behalf of the actual buyer of goods and services); *Guidance Endodontics, LLC v. Dentsply Int'l, Inc.*, 708 F. Supp. 2d 1209, 1254–55 (D.N.M. 2010) (summarily relying on *SFCS*); *Mak Towing, Inc. v. Danlar Collision Inc.*, 2012 WL 12830003, at *1–2 (D.N.M. Oct. 26, 2012) (summarily relying on *Guidance Endodontics*, *SFCS*, and *Hicks*); *TSA Corp. Servs.*,

Inc. v. Hayden Constr., Inc., No. CIV 05-1115 BB/KBM, 2006 WL 8199251, at *4-5 (D.N.M. Sept. 27, 2006 (relying summarily on *SFCS*).

Defendants' extensive reliance [**BIC 17-20**] on the unpublished opinion in *Fisher Sand & Gravel Co. v. FNF Constr., Inc., No. 10-cv-0635, 2013 WL 12121876, at *9 (D.N.M. March 27, 2013)* ("*Fisher*") is also misplaced. In *Fisher*, the United States District Court for the State of New Mexico was sitting in diversity and opined that it was limited in its ability to expand on existing precedent, like the court in *Navajo II,* despite admitting that the plain language of the UPA did not limit or prohibit third-party standing. 2013 WL 12121876, *8 ("While the language of the statute does not [limit standing to buyers], the applicability of the statute has been curtailed by controlling precedent --- *[a]s it has been interpreted in New Mexico*" [*emphasis added]*).

The *Fisher* Court felt that its hands were tied as it proceeded to adopt and apply the holdings in *SFCS* and *Hicks*. *Id.* (discussing *SFCS* as though it dealt with competitor standing, finding "under *Santa Fe Custom Shutters*, the UPA does not provide standing to [a party]--against its competitor" and relying on *Hicks'* language interpreting *Lohman* but failing to address either *Solomon* or *Alley*). The *Fisher* Court acknowledges this fact in its closing paragraph, stating that "although the Court agrees that the language of the statute does not foreclose" competitor standing to bring a UPA claim, "the controlling interpretations of the statute do" and as a

Court sitting in diversity, it reflected that it had no power to expand on the statutory interpretations and was thus bound to rely on the precedent it was provided – even if it did not truly believe that it was an accurate reflection of the statutory language, and even though such "precedent" and "controlling interpretations" were all dicta. *Id.*

This Court, however, can (and should) rectify and disregard all such misconstructions of New Mexico "precedents", and blow the smoke away from the clear and compelling language of the UPA to confirm that it means what it says, that its force and application are available to all classes of victims of its violation, including injured competitors.

v) Public Policy supports competitor standing

The remainder of the Brief in Chief focuses on various public policy reasons to deny competitors standing under the UPA. [**BIC 26-29**]. Public policy arguments are sometimes a last resort of litigants faced with clear and unequivocal statutory words standing in the way of their positions, but where the law is clear (as is the statutory language at issue), public policy arguments are better made to the legislature to change it. Nonetheless, in this particular case, where public safety is endangered by failure of contractors to meet government (i.e., CILA) mandates of licensure, financial security and competency (one of the underlying conditions giving rise to Defendants' alleged violations of the UPA), GD does not shrink from

demonstrating that public policy arguments favor competitor standing under the UPA.

Unimpeded access to the courts by injured third-parties under the UPA will improve compliance with the UPA and serve to chill and deter unfair and deceptive trade practices that directly affect jobs, companies and livelihoods, as in this case. Such access by competitors of UPA violators will not lead to runaway litigation, as competitors will still need to prove causation and damages, as well as demonstrate that there has been conduct giving rise to a UPA violation. Here, Defendants are alleged to have operated a significant construction business (in an already-highly-competitively-restricted marketplace) generating millions of dollars in revenue and employing dozens of people operating heavy machinery in potentially dangerous conditions, all without contractor's licenses or permits, without statutorily-required bonding, without paying proper taxes and insurance, without obtaining workers compensation insurance, truck permits, and making false representations to the Railroad (as the industry's sole source owner-contractor with whom all competitors had pre-restricted access) regarding its qualifications as a licensed contractor in compliance with local laws and regulations, all while poaching GD's employees and stealing its trade secrets as alleged in the Complaint. **[RP 2-11 ¶¶ 5-39]**. GD alleges loss of substantial business and related damage as a

proximate result of Defendants' unlawful conduct under the UPA. [**RP 13-14 ¶¶ 54-55**].

Railroad construction services have a significant impact on the general public who rely on the railroad for passenger travel or freight transportation. Substandard construction services provided by unlicensed contractors increases the risk of death, injury and/or loss of property through derailments, washouts, and other construction defects. Illegally cutting corners to underbid (by an unlicensed vendor who can underbid its competitors in an already-artificially-competitively-restrained environment because it has freed itself from the cost burdens of statutory and regulatory compliance) and thereby win construction jobs is an unfair business practice under the UPA. [**RP 11 ¶ 43**]. To disallow a claim under the UPA for the loss of business suffered by GD offends the public interest in assuring honesty and fair dealing in business and commercial dealings – particularly where the UPA does not impose such a restriction, and where laws like CILA are unarguably enacted and enforced for reasons of the public's safety and welfare.

As stated in *Lohman, supra:*

> "Turning to policy, the Court is reminded of the remedial purpose of the UPA and the principle favoring liberal application. See *State ex rel Stratton v. Gurley Motor Co.,* 105 NM 803, 737 P.2d 1180, 1185 (Ct. App, 1987) ("Because the Unfair Practices Act constitutes remedial legislation, we interpret the provisions of the Act liberally to facilitate and accomplish its purposes and intent."). *Lohman,* 2007-NMCA-100, ¶ 31.

vi) Failure to comply with CILA is unlawful and unfair, but this is only one example of UPA violations by Defendants, and in any event not relevant in this appeal to the question of standing.

Defendants make the irrelevant argument that allowing competitor standing to assert UPA claims should not be permitted on the basis that it undermines the Construction Industries Licensing Act ("CILA") and the enforcement powers of the Construction Industries Division ("CID") to ensure CILA compliance. [**BIC 26-29**]. This argument is nothing more than an attempt to divert the Court's attention from the actual issue – whether the UPA allows for competitor standing.

The UPA is an entirely separate statute from CILA and neither statute cross-references the other. To argue that an interpretation of one statute (the UPA) should be influenced by the mere existence of the other (CILA) does not make sense in this case. The issue in this appeal is not whether failure to comply with CILA gives rise to a UPA claim *but only* whether a third-party competitor like GD can assert a claim for damages suffered as a result of a UPA violation (based only incidentally in this case on violation of CILA). Accordingly, all of the arguments in Section C of the Brief in Chief [**BIC 29-32**] about the CID and CILA, the nature of the harm, whether a duty was owed, the other actions and conduct of Defendants with respect to employees and taxes, etc. [**BIC 26-29 ¶ 5**] should be disregarded as irrelevant and outside the scope of this limited interlocutory appeal.

That said, it is widely known that competitors across many industries and segments of commerce have long suffered from scofflaw businesses that unfairly steal customers and business by avoiding the costs associated with playing by the rules, such as paying minimum wage, maintaining insurance, paying sales or income taxes, obtaining permits, maintaining licenses and bonds, maintaining continuing education obligations, and other legal and regulatory compliance requirements. If such transgressions rise to the level of unfair and deceptive business practices, then the UPA should (and does) provide a remedy to "any person" suffering injury thereby.

In this case, the litany of alleged regulatory violations of Defendants [**RP 3-8 ¶¶ 8-28**] (even without more) are numerous and severe and ultimately led to (i) their obtaining a lucrative competitive advantage over GD; (ii) putting the public at risk; and (iii) deceiving their primary customer, the Railroad, to divert business to Defendants, all to GD's detriment. Defendants' lack of licensure to perform construction services was not a minor issue or a technical noncompliance. Obtaining a license for railroad construction services requires education and training, passing an exam, and posting a bond. [**RP 3 ¶ 9**]. Defendant Pergola allegedly operated an unlicensed construction business for many years before making an effort to get licensed, at which time he failed the exam, and then continued to operate his substantial railroad construction business without a license for many years thereafter

until he was finally "caught" by the CID. [**RP 3 ¶ 9**]. The CID is not tasked with reimbursing others for damages caused by unlicensed contracting services; that agency is merely authorized to enforce the licensing requirements for the protection of the State and its citizens.

CONCLUSION

For all of the foregoing reasons, the Court should (1) affirm the District Court's Order denying Defendants' Motion to Dismiss Plaintiff's UPA claims, (2) expressly determine that a competitor injured by conduct that is unlawful under the UPA has standing to assert a claim under the UPA, and (3) provide such other and further relief as the Court may determine is just and proper.

ORAL ARGUMENT REQUEST

Pursuant to NMRA Rule 12-319(B), GandyDancer respectfully requests oral argument by reason of the important issue in the case which is of first impression in New Mexico, the resolution of which will, it is believed, have a substantial impact on business and commerce in terms of expanding or contracting the use of the UPA by those suffering as a result of a defendant's UPA violation.

Respectfully submitted,

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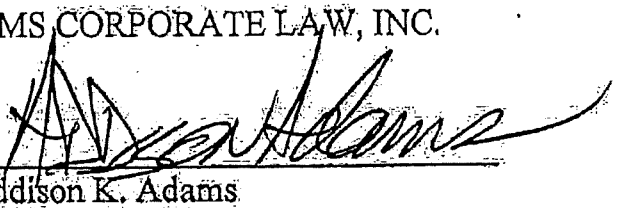
BY 

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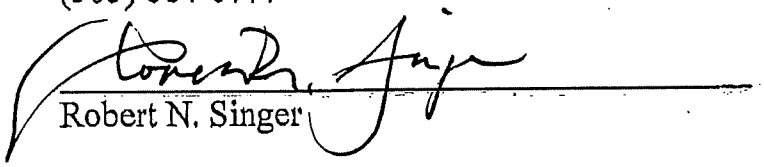

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