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.

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

APPELLANTS' BRIEF IN CHIEF

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SUMMARY OF PROCEEDINGS

A. Nature of the Case

This case involves business two competitors: both providers (sellers) of railroad-contracting services that compete for work from BNSF Railway (BNSF), which purchases those services, often through a bid process. Plaintiff-Appellee GandyDancer, LLC (GD), the much larger and more established contractor, has sued Defendants-Appellants Rock House CGM, LLC and its owner, Karl Pergola (Defendants), seeking to obtain money damages, injunctive relief, and attorneys' fees and, ultimately, to drive Defendants out of the railroad-contracting business. Nearly all of GD's claims are predicated primarily (many expressly) on allegations that Defendants violated statutes and regulations addressing permits and licenses—in particular, the Construction Industries Licensing Act (CILA), NMSA 1978, §§60-13-1 to-59, the only one as to which GD has offered any specific argument.

In service of these aims, GD claims entitlement to co-opt statutes and regulations that afford no private right of action or private remedy and to hijack the enforcement authority statutorily assigned to government agencies—in particular, the Construction Industries Division (CID), the state administrative body charged with CILA enforcement, which investigated and resolved the issue of Defendants' unlicensed contracting before GD sued—as well as the transactional status of BNSF, the purchaser of the services at issue and the target of the misrepresentations/omissions GD alleges in support of its claim under the New Mexico Unfair Practices Act (UPA), NMSA 1978, §§57-12-1 to -26.

The issue presented—preserved in Defendants' briefing on their motion to dismiss (Motion); certified for interlocutory appeal in the district court's order on

the Motion (Order); and discussed in Defendants' Application for Interlocutory Appeal (Application)—is whether GD is a proper plaintiff with statutory standing and otherwise has stated a claim under the UPA. RP44-47,51-55,122-24,131-36,200-01,204-36.[1] Defendants respectfully submit that the answer is and must be "no." A ruling that the UPA affords standing to business competitors cannot be reconciled with the New Mexico Supreme Court's settled interpretation of the UPA's intended purpose as protecting "innocent consumers" and this Court's construction of the UPA's text in light of that purpose as affording standing only to buyers of goods or services.

The UPA does not afford standing to GD, and GD cannot state a viable UPA claim in these circumstances, where GD does not and cannot allege that it has purchased anything sold by Defendants, and claims UPA "standing" by arrogating to itself the transactional status of BNSF and the government's authority to enforce statutes and regulations that contain no private right of action or private remedy. Under New Mexico law, the "any person" entitled to sue under the UPA must be a buyer, and GD undisputedly is *not* a buyer in this case. A ruling that GD has UPA standing would require abandoning our Supreme Court's longstanding interpretation of the UPA's purpose as a consumer-protection statute and overruling this Court's decisions interpreting the UPA's text, consistent with that purpose, as limiting standing to buyers of goods or services sold by defendants.

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[1]Defendants believe that all preservation requirements have been met and note that, while the arguments herein are within the scope of the question certified, this Court may consider related issues. *Armijo v. Wal-Mart Stores, Inc.*, 2007-NMCA-120, ¶19, 168 P.3d 129. Defendants respectfully submit that any argument the Court may deem unpreserved should be considered under Rule 12-321(B)(2) NMRA.

In addition, a ruling that GD has UPA standing based on the licensing violations it alleges would improperly allow GD to (1) reap unwarranted windfalls in the form of benefits the UPA provides to enable consumers to sue where they otherwise might not be able to do so, along with a powerful weapon to drive competitors from the market; and (2) effect an end-run around CID's enforcement authority and its prior resolution of the CILA licensure issue. The UPA authorizes no such things; nor would a ruling bestowing such rewards on GD serve the UPA's consumer-protection purpose consistent with its textual requirements and limitations. The Court should reverse the Order denying the Motion as to the UPA claim with instructions that the claim be dismissed with prejudice.

B. Factual Background

In April 2015, CID, the state agency charged with enforcing CILA, received a complaint of unlicensed contracting work by Defendants. RP4¶11,43,97,230. After conducting an investigation, CID resolved the issue by entering into a Stipulated Agreement with Defendants (Agreement), in which CID stated that the Agreement "is appropriate and in the best interests of the Division and the Respondents [*i.e.*, Defendants]," RP97,230, and imposed a significant monetary penalty and other requirements, including that Defendants cease unlicensed contracting and obtain a CILA license, RP43,98-101,231-34. Licensure is a matter of public record, and the public record shows that Defendants obtained the CILA license required to perform railroad-contracting work (GF-6) in January 2016. *See* https://public.psiexams.com/search.jsp (#387407); *see also* RP43-44,140,162,236.[2]

[2]Defendants' CILA license may be considered because the Complaint references it, alleging its non-existence, and because government licensure status may be

Apparently not satisfied with CID's resolution, GD filed its Complaint on December 9, 2015, the day after CID's Director signed the Agreement. RP1.[3]

C. Procedural Background; Preservation

Complaint. The Complaint begins with the statement that GD has provided railroad and construction services to BNSF since 2001 and a recitation of alleged regulatory violations by Defendants (RP2-10¶¶5-3), which GD says form the basis for all claims in the Complaint (*e.g.*, RP70-72). "[B]ut for" these violations, the Complaint alleges, Defendants were awarded BNSF work "that would, in all reasonable probability, have been awarded to [GD]." RP10-11¶¶37-39. Nearly all claims are *expressly* based on such allegations; in particular, the allegation that Defendants bid on and performed railroad-contracting work for BNSF without a CILA license. RP11-22 ¶¶41-43 (count one, interference with existing and prospective contracts), RP13-14¶¶51-54 (count two, UPA violation); RP14¶¶57-61 (count three, common law unfair competition);[4] RP16-17¶¶75-79 (count six,

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judicially noticed. *E.g.*, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (consideration of complaint properly includes "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice"); *Massachusetts v. Westcott*, 431 U.S. 322, 323 n.2 (1977) (fact of licensure may be ascertained from government records and judicially noticed).

[3]There is no dispute that GD was aware of the CID investigation, if not the source of the complaint to CID. In the case referenced in the Complaint at RP4¶¶12-13 (describing Defendants' petition in Bernalillo Cty. No. D-202-CV-2015-06389 to enjoin the CID investigation based on their belief that a CILA license was not required for work on federal railroad rights of way), GD moved for leave to file an amicus brief reciting information and opposing the relief sought by Defendants.

[4]Count three's allegations are unclear, but the statement that the count is pleaded as an alternative to count two indicates that it is based on the same conduct alleged in count two (the UPA claim). RP14¶¶57, 60.

declaring GD a private attorney general and demanding disgorgement based on allegations of CILA violations); RP18-19¶¶82-85 (count seven, injunctive relief).

Motion, Order, Application. Defendants moved to dismiss all claims with prejudice, arguing that GD has no private right of action or standing to enforce the statutory/regulatory requirements alleged,[5] and the Complaint otherwise fails to allege facts sufficient to state any claim for which relief may be granted. RP44-60. GD filed a response (RP69-102); Defendants replied (RP121-62).

The UPA claim is based entirely on allegations that Defendants failed to disclose to BNSF (and to former GD employees Defendants hired) that they lacked "the necessary experience or licenses to provide railroad contracting services" and failed to comply with other regulatory requirements. RP13-14¶¶51-54. "As a result of these intentional omissions, Defendants were awarded contracts and piece-meal work that would, in all reasonable probability, have gone to [GD]." RP13¶54. Defendants argued that the UPA claim must be dismissed with prejudice because GD failed to plead facts sufficient to establish all the required UPA elements—in particular, those required for a UPA claim based on alleged failure to disclose information (RP51,53,131-32); the UPA does not afford standing allowing a seller of services to sue a competitor-seller (RP51-52,132-36); and the UPA cannot be used to enable a disgruntled competitor to obtain damages and other relief for alleged violations of statutes that contain no private right of action or remedies,

[5]GD has made no argument supporting a claimed entitlement to relief based on alleged violation of any statute or regulation other than the CILA licensing violation; moreover, there is no private right of action for any statutory/regulatory violation alleged, CILA included, as shown below. RP45-46,122-24.

especially not where the principal violation alleged has been investigated and resolved by the enforcing agency (RP53-33,122-24,138). To hold that GD has UPA standing in these circumstances would allow GD to obtain through the back door what the legislature chose not to provide through the front; enabling GD and other businesses unhappy with the enforcing agency's handling of regulatory violations to end-run agency decisions and drive competitors out of business—all under the auspices of a statute intended to protect consumers in connection with the sale of goods and services, which GD is not here. RP53-54,122-24,138.

On October 5, 2016, after a September 12, 2016 hearing, the district court entered its Order granting the Motion in part and denying it in part. RP199-201. The court dismissed without prejudice and with leave to file an amended complaint within 30 days GD's first (interference with existing and prospective contracts) and third (common law unfair competition) claims. RP199-201. The court granted the Motion as to GD's fourth (breach of confidentiality agreement), sixth (disgorgement), and seventh (injunction) claims, dismissing these claims with prejudice, and denied the Motion as to GD's fifth claim (violation of the New Mexico Uniform Trade Secrets Act (UFTA), NMSA 1978, §§57-3A-1 to -7). RP202. The court also denied the Motion as to the UPA claim but, in so doing, it "certifie[d] that its order denying the Motion as to this claim is appropriate for interlocutory review by the New Mexico Court of Appeals, under NMSA 1978, §39-3-4 and Rule 12-203 NMRA, because it involves a controlling question of law as to which there is substantial ground for difference of opinion—to wit, whether the [UPA] affords private-party standing to business competitors who are . . .

sellers of services, or only to buyers of goods and services—and because an immediate appeal from the Court's order on this claim may materially advance the ultimate termination of the litigation." RP200. The court further explained:

(a) Although the UPA's text does not explicitly proscribe "unfair competition" but only "[u]nfair or deceptive trade practices and unconscionable trade practices," *see* NMSA 1978, §57-12-3, the UPA has a broad remedial purpose, and some of the UPA's provisions seem to be aimed at unfair competition.

(b) There is a conflict between, on the one hand, dicta in *Page & Wirtz Constr. Co. v. Solomon*, 1990-NMSC-063, ¶21, 794 P.2d 349, suggesting that the New Mexico Supreme Court would recognize the standing of business competitors to sue for alleged violation of the UPA, as one federal district court has concluded, *see First Nat'l Bancorp Inc. v. Alley*, 76 F.Supp.3d 1261, 1263-66 (D.N.M. 2014), and, on the other hand, decisions of the New Mexico Court of Appeals holding that "the UPA contemplates a plaintiff who seeks or acquires goods or services and a defendant who provides goods or services," *Santa Fe Custom Shutters & Doors, Inc. v. Home Depot*, 2005-NMCA-051, ¶14, 113 P.3d 347, and that, "[c]onsistent with its purpose as consumer protection legislation, the UPA gives standing only to buyers of goods or services," *id.* ¶17 (citations omitted). *See Hicks v. Eller*, 2012-NMCA-061, ¶20, 280 P.3d 304 (same; explaining that "the plaintiff does not necessarily have to purchase the product from the defendant, but that somewhere along the purchasing chain, the [plaintiff] did purchase an item that was at some point sold by the defendant"); *see also Williams v. Foremost*, 102 F.Supp.3d 1230, 1240 (D.N.M. 2015) ("there is no basis to expand the UPA to give standing to a non-consumer third-party claimant" because "New Mexico law currently restricts UPA claims to actual consumers of goods and services"); *Navajo Nation v. Urban Outfitters, Inc.*, No. Civ. 12-195, Mem. Op. & Order (Doc. 81) at 15-19 (D.N.M. Nov. 6, 2013) (dismissing non-consumer UPA claim; New Mexico opinions "clearly have stated that the UPA gives standing only to buyers of goods or services") (internal quotations and citations omitted); *MAK Towing, Inc. v. Danlar Collision, Inc.*, No. 12-CV-0487, 2012 WL 12830003, *1-*2 (D.N.M. Oct. 26, 2012) (dismissing competitor UPA claim for lack of standing; plaintiff "is indisputably not a consumer of Defendants' goods or services," leaving it outside "the category of

entities to be protected by consumer legislation" and without a UPA claim); *Guidance Endodontics, LLC v. Dentsply Int'l, Inc.*, 708 F.Supp.2d 1209, 1256 (D.N.M. 2010) (no competitor standing under UPA; concluding that "only a consumer should be able to take advantage of [the UPA]" and that "to bring a claim under the New Mexico UPA, one must be a buyer of goods or services") (footnote omitted); *Trademarks Holding, LLC v. American Prop. Mgmt.*, No. CIV 07-167, 2008 WL 10879330, *3 (D.N.M. Jan. 17, 2008) (dismissing competitor UPA claim for lack of standing).

(c) Although a decision on this issue would not immediately dispose of the case in its entirety, interlocutory review is appropriate because the UPA claim drives the entire case, and resolution of this issue on interlocutory appeal might well alter the nature and scope of this case in a manner that "may materially advance the ultimate termination of the litigation," as stated in NMSA 1978, §39-3-4(A) and Rule 12-203(B) NMRA.

RP200-01.

Defendants timely filed the Application on October 20, 2016 (RP204-36), to which GD did not respond. The Court granted the Application and assigned the appeal to the general calendar on January 17, 2016. RP343-44.

Other. As noted, the Order granted leave to amend *only two claims*: the first (interference with existing and prospective contracts) and third (common law unfair competition) claims. RP199-201. Nevertheless, GD's First Amended Complaint, filed November 10, 2016, amended *all* claims that were not dismissed with prejudice, including the UFTA claim, as to which the court denied the Motion (RP202), and the UPA claim before this Court (RP200-01). *Compare* RP1-20 with RP259-83. After GD filed the Amended Complaint, Defendants moved to stay the district court proceedings pending final disposition of the issues presented in the Application (RP284-88); GD filed a response (RP289-95); and Defendants replied (RP311-18). GD also moved to lift the discovery stay previously entered by the

district court (RP297-306) and for default judgment (RP307-09); Defendants filed responses in opposition (RP320-22,335-40). The district court returned the motion packages, citing the stay attending this Court's grant of the Application.

ARGUMENT

A. Standards of Review

Where, as here, "a statute creates a cause of action and designates who may sue," standing is "a jurisdictional prerequisite to an action." *Deutsche Bank Nat'l Trust Co. v. Johnston*, 2016-NMSC-013, ¶11, 369 P.3d 1046. Thus, for any claim as to which standing is jurisdictional, lack of standing requires dismissal under Rule 1-012(B)(1) NMRA. *AFSCME v. Bd. of Cty. Comm'rs*, 2016-NMSC-017, ¶14, 373 P.3d 989 ("If a statute creates a right and provides that only a specific class of persons may petition for judicial review of an alleged violation, then the courts lack the jurisdiction to adjudicate that alleged violation when the petition is brought by a person outside of that class.")

Under Rule 1-012(B)(6) NMRA, the question is "whether the facts as stated in a complaint state a claim for relief." *Blea v. City of Espanola*, 1994-NMCA-008, ¶2, 870 P.2d 755. The complaint must affirmatively show with sufficient detail a legal basis for recovery. *Kisella v. Dunn*, 1954-NMSC-099, ¶¶16-18, 275 P.2d 181; *Derringer v. State*, 2003-NMCA-073, ¶5, 68 P.3d 961 (complaint "must tell a story from which the essential elements prerequisite to the granting of the relief sought can be found or reasonably inferred") (alterations, internal quotations, citation omitted). Well-pleaded material allegations are deemed admitted; legal conclusions and unwarranted factual inferences are not. *C&H Constr. & Paving,*

Inc. v. Foundation Reserve Ins. Co., 1973-NMSC-076, ¶9, 512 P.2d 947. Lack of merit warranting dismissal may be "an absence of law to support a claim of the sort made or of facts sufficient to make a good claim." *Id.*; *see Wills v. Board of Regents*, 2015-NMCA-105, ¶¶11,14-15, 357 P.3d 453, *cert denied*, 2015-NMCERT-009 (breach of contract claim properly dismissed where claim not based on valid written contract; whistleblower claim properly dismissed where plaintiff failed to allege essential element) (citing *AFSCME Council 18 v. State*, 2013-NMCA-106, ¶6, 314 P.3d 674 (to withstand Rule 1-012(B)(6) pleaded facts must meet claim's essential elements)); *Milliron v. Cty. of San Juan*, 2016-NMCA-096, ¶5, 384 P.3d 1089 (affirming dismissal; explaining that "Rule 1-012(B)(6) . . . requires application of the facts pleaded in the complaint to the applicable law[,]" and that the court is "not permitted to consider facts not pleaded in order to make a plaintiff's claim provable").

The Court reviews *de novo* questions of law concerning statutory construction, *see Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶22, 227 P.3d 73; whether a plaintiff has standing, *see ACLU of NM v. City of Albuquerque*, 2008-NMSC-045, ¶6, 188 P.3d 1222; and Rule 1-012(B)(6) decisions, *see Valdez v. State*, 2002-NMSC-028, ¶4, 54 P.3d 71.

B. The UPA Claim Should Be Dismissed With Prejudice For Lack Of Standing (And, Thus, Lack Of Subject Matter Jurisdiction) Because The UPA's Text Does Not Prohibit "Unfair Competition" And Has Been Consistently Interpreted As Intended To Protect Consumers And To Afford Standing Only To Buyers Of Goods And Services.

1. Statutory text

The UPA prohibits "[u]nfair or deceptive trade practices and unconscionable trade practices." NMSA 1978, §57-12-3. In contrast to the deceptive trade practices acts of some states, the New Mexico UPA's text does not proscribe "unfair methods of competition."[6] The attorney general is charged with enforcing the UPA, NMSA 1978, §57-12-15; *see also* §57-12-8A, but "[a] person likely to be damaged by an unfair or deceptive trade practice or by an unconscionable trade practice of another may be granted an injunction," §57-12-10(A), and "[a]ny 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 or the sum of one hundred dollars ($100), whichever is greater," §57-12-10(B).

The UPA defines "person" to include "natural persons, corporations, trusts, partnerships, associations, cooperative associations, clubs, companies, firms, joint ventures or syndicates[.]" §57-12-2(A). As relevant here, the UPA defines an "unfair or deceptive trade practice" as "a false or misleading oral or written

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[6]*See Restatement (Third) of Unfair Competition* §1 cmt. g & Stat. Note (discussing the origins of state deceptive trade practices acts, noting that some prohibit "unfair methods of competition" as well as "unfair or deceptive acts or practices"; in some states competitors have standing "to seek redress . . . for harm to their commercial relations"; and application "in this latter context has thus far been generally limited to conduct falling within the traditional categories of unfair competition law").

statement, visual description or other representation of any kind knowingly made in connection with the sale . . . of goods or services . . . 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 and includes [a list of acts]." §57-12-2(D).[7]

Thus, while §57-12-10(B) permits suit by "[a]ny person who suffers any loss of money or property," the claimed loss must result from "employment by another person of a method, act or practice declared unlawful by the [UPA]," *id.* And what the UPA declares to be unlawful are "[u]nfair or deceptive trade practices," §57-12-3, which are explicitly defined as false or misleading representations "knowingly made in connection with the sale . . . of goods or services . . . by any person in the regular course of his trade or commerce," §57-12-2(D).

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[7]The UPA defines "unconscionable trade practice" as "an act or practice in connection with the sale . . . of any goods or services" that "(1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or (2) results in a gross disparity between the value received by a person and the price paid." §57-12-2(E). The Complaint does not allege an unconscionable trade practice. Nor could it, where the buyer of the services and the target of the misrepresentations alleged is BNSF (a huge North American railroad operation with a history dating back to 1849, as its website reveals (http://www.bnsf.com/about-bnsf/pdf/fact_sheet.pdf)), which cannot plausibly be alleged to have suffered a loss as a result of having been taken advantage of or having received "grossly" less than the price paid as to the transactions forming the basis for the UPA claim. GD itself has said that BNSF "*learned that Defendants were unlicensed but continued to provide construction contracting projects to Defendants despite actual knowledge of the appropriate licensure (or any licensure*)." RP93 (emphasis added). Nor is there any justification for allowing GD to assert a UPA claim based on an injury that could only have been suffered by BNSF. As to former GD employees, no sale transaction or loss can be alleged.

2. Cases

The New Mexico Supreme Court has long interpreted the UPA's intended purpose as the protection of "innocent consumers" from "misleading or deceptive statements, whether intentionally or unintentionally made." *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶12, 811 P.2d 1308 (internal quotation marks and citation omitted), and held that, to be actionable, the challenged practice (including the acts enumerated in §57-12-2(D)), must meet all the following elements: (1) defendant made an "oral or written statement, visual description or other representation that was either false or misleading"; (2) "the false or misleading representation must have been knowingly made in connection with the sale, lease, rental or loan of goods or services in the extension of credit or . . . collection of debts";[8] (3) the conduct "must have occurred in the regular course of the representer's trade or commerce"; (4) "the representation must have been of the type that may, tends to or does, deceive or mislead any person," *id.* ¶¶13-14. (internal quotation marks and citation omitted).[9]

The New Mexico Supreme Court has not been asked to determine the scope of statutory standing under the UPA, but this Court has held that, "[c]onsistent with its purpose as consumer protection legislation, the UPA gives standing only to

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[8]Although not relevant here, a proper UPA claimant could also be a lessee, renter, or borrower, as described in §57-12-2D.

[9]The false/misleading statement requirement is essential to a UPA claim. *Stevenson*, 1991-NMSC-051, ¶14 ("The conjunctive wording of the statute itself requires an interpretation that the four elements set forth in Section (D) must be present in the examples delineated in subsections (1) through (17). [T]he statute states the definition of an unfair or deceptive trade practice followed by the word 'and', not 'or.'") (internal citation omitted).

buyers of goods or services." *Santa Fe Custom Shutters & Doors, Inc. v. Home Depot*, 2005-NMCA-051, ¶17, 113 P.3d 347 (citations omitted). In *Santa Fe Custom Shutters* (*SFCS*), this Court interpreted the UPA's text defining an "unfair or deceptive trade practice," §57-12-2(D), as "contemplat[ing] a plaintiff who seeks or acquires goods or services and a defendant who provides goods or services," 2005-NMCA-051, ¶14. The Court concluded that the district court's finding that plaintiff SFCS had agreed to "produce shutters for sale through Home Depot's stores at mutually agreed-upon prices" was "consistent with the common understanding that Home Depot's role in the transaction with SFCS would have been as a buyer of goods or services, while SFCS's role was that of a seller." *Id.* ¶16 (citing NMSA 1978, §55-2-103(1)(a), (d)). The Court held as a matter of law that "Home Depot's activities in marketing SFCS's shutters and installation services to Home Depot's own customers was not a sale of marketing services to SFCS for purposes of Section 57-12-2(D)"; "with respect to the SFCS-Home Depot transactions, SFCS was a seller of goods and services, not a buyer"; and "[a]s a seller of goods and services, SFCS lacks standing to bring a UPA claim against Home Depot." 2005-NMCA-051, ¶18. The Court's holding is expressly based on its construction of the statutory text defining what constitutes an actionable "unfair or deceptive trade practice" and the UPA's purpose, and its reasoning cannot be squared with an interpretation that allows competitor standing:

> If the legislature had defined an unfair or deceptive trade practice in terms of misrepresentations made in connection with the sale *or purchase* of goods or services, we might be inclined to recognize a claim against Home Depot as a buyer of goods and services. However, the legislature has not chosen to treat sellers and buyers identically under the UPA. Consistent with its purpose as consumer

> protection legislation, the UPA gives standing only to buyers of goods or services.

2005-NMCA-051, ¶17 (citations omitted). Subsequent decisions have relied on the UPA's text and consumer-protection purpose in reaching the same conclusion—the UPA affords standing only to buyers in connection with a sale of goods or services—a construction that necessarily precludes a UPA claim by a seller of services against a competitor-seller of services, especially where the alleged misrepresentations grounding the claim were not made to the general public.

Lohman v. Daimler-Chrysler Corp., 2007-NMCA-100, 166 P.3d 1091, was a putative class action seeking recovery under the UPA based on allegations that "consumers were deceived into purchasing vehicles equipped with [allegedly defective seat belt buckles]" because of misrepresentations defendants allegedly made to dealers (that the buckles were safe) to facilitate vehicle sales to consumers. 2007-NMCA-100, ¶¶1-2,6,25-26. In addressing the legal sufficiency of the UPA claim, *Lohman* noted prior decisions stating that "[t]he gravamen of an unfair trade practice is a misleading, false, or deceptive statement made in connection with the sale of goods or services," and elucidating the elements of a UPA claim. *Id.* ¶5 (internal quotation marks and citations omitted). *Lohman* also confirmed that "the UPA contemplates a plaintiff who seeks or acquires goods or services and a defendant who provides goods or services." *Id.* ¶32 (internal quotation marks and citations omitted). But it rejected defendants' argument that plaintiff's failure to allege a transaction between plaintiff and defendants meant that plaintiff could not establish the element of a misrepresentation made in connection with the sale of goods, concluding that the UPA's text "does not

require the plaintiff to acquire goods or services *from* the defendant," *id.*, and 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," *id.* ¶33.

Lohman did not alter the requirements that a proper UPA plaintiff must have sought or acquired goods or services and that the defendant must have provided (sold) goods or services, as this Court subsequently made clear in *Hicks v. Eller*:

> While we agree that *Lohman* does not require a transaction between a claimant and a defendant, *Lohman does stand for the proposition that the plaintiff must have sought or acquired goods or services and the defendant must have provided goods or services*. We understand this to mean that the plaintiff does not necessarily have to purchase the product from the defendant, but that *somewhere along the purchasing chain, the claimant did purchase an item that was at some point sold by the defendant.*

2012-NMCA-061, ¶20, 280 P.3d 304 (internal citation omitted; emphasis added). In holding that plaintiff Hicks lacked standing to bring a UPA claim based on the transaction at issue—plaintiff's sale of paintings to defendant-purchaser—because plaintiff never purchased anything from defendant or an intermediary of defendant, *Hick*s re-affirmed that "[c]onsistent with its purpose as consumer protection legislation, the UPA gives standing only to buyers of goods and services." *Id.* (citing *SFCS*, 2005-NMCA-051, ¶17).

Federal courts nearly uniformly have followed *SFCS* and *Hicks* in holding that the UPA does not afford standing to business competitors, impliedly recognizing that an interpretation of the UPA that allows competitor standing, despite the absence of a textual ban on "unfair competition," cannot be reconciled

with our Supreme Court's interpretation of the UPA's purpose as consumer protection and this Court's construction of the UPA's text as permitting suits only by buyers of goods or services; in other words, that a competitor cannot be a consumer entitled to the UPA's protections.

For example, in *Fisher Sand & Gravel Co. v. FNF Constr., Inc.*, No. 10-cv-0635, 2013 WL 12121876, at *9 (D.N.M. March 27, 2013), the district court held that, although the statutory text does not foreclose UPA claims against business competitors, "the controlling interpretations of the statute do." In *Fisher*, plaintiff-contractor Fisher sued defendant-contractor FNF after FNF allegedly contacted government officials in New Mexico and Arizona and provided information about the purported criminal acts of plaintiff in an effort to exclude Fisher from the construction market. 2013 WL 12121876, at *1. The court dismissed plaintiff's UPA claim, explaining that the statutory text does not limit standing to consumers, but the UPA's applicability "has been curtailed by controlling precedent" interpreting the UPA as "exclusively aimed at consumer protection" and as "'giv[ing] standing only to buyers of goods or services.'" *Id.* at *8 (quoting *SFCS*; internal quotation marks and other citations omitted). The court held that "under [*SFCS*], the UPA does not provide standing to Fisher in a lawsuit against its competitor for unfair or deceptive practices because, in the commercial interaction at issue, Fisher is not a buyer of goods or services." *Id.*

The court rejected plaintiff's argument that *Lohman* authorized its UPA claim, stating that *Lohman* did not broaden the UPA's applicability to the extent urged by Fisher, citing the reaffirmation in *Hicks* that a UPA plaintiff "must be a

consumer of goods or services and a defendant must have, at some point, been a provider of those goods or services." *Id.* at *9. The court also rejected plaintiff's contention that "some provisions of the UPA are logical only if a non-consumer brings the claim," such as §57-12-2(D)(8)'s prohibition of disparagement, reasoning that, as interpreted by New Mexico courts, "it is clear that the UPA is intended as a sword for consumers, and the disparagement provision merely provides another weapon in a consumer's arsenal to remedy unfair practices." *Id.* The court concluded:

> *Fisher's complaint includes no allegation that it was a consumer of goods or services that FNF provided. Allowing UPA claims between competitors, such as the claim that Fisher has alleged, would open the UPA to uses never before contemplated in New Mexico and generate an unforeseen wave of UPA litigation.* Thus, although the Court agrees that the language of the statute does not foreclose such actions, the controlling interpretations of the statute do.

Id. (emphasis added).

Plaintiff Fisher moved for reconsideration "based on dicta" in *Page & Wirtz Constr. Co. v. Solomon*, 1990-NMSC-063, 794 P.2d 349, which the district court addressed in *Fisher Sand & Gravel Co. v. FNF Constr., Inc.*, No. 10-CV-0635 RB/SMV, 2013 WL 12122650 (D.N.M. July 1, 2013). In *Solomon*, a contractor sued a restaurant owner to recover money allegedly owed for remodeling work, and the owner counterclaimed under the UPA based on allegations that the written contract under which recovery was sought was not agreed to by the owner and had a forged signature; the contractor's invoices were deceptive and misleading; and the contractor had misrepresented costs. 1990-NMSC-063, ¶¶1,5-6. The issues on appeal were whether (1) the trial court had erred in submitting to the jury an issue

not raised in the pleadings; (2) substantial evidence supported a finding of a UPA violation; and (3) the owner's recovery was limited to the UPA's nominal amount because he failed to establish actual damages. *Id.* ¶8.

In discussing the last issue, the *Solomon* Court speculated that injunctive relief "might be had" under §57-12-10(A) "by one commercial enterprise from the deceptive advertising campaign of another. A competitor might complain that their company could suffer loss of market share and profits because the public might be deceived." 1990-NMSC-063, ¶21 (citing *Anheuser-Bush, Inc. v. Florist's Ass'n of Greater Cleveland, Inc.*, 603 F. Supp. 35 (N.D. Ohio 1984) (brewer denied an injunction against florist's promotional campaign under Ohio Deceptive Trade Practices Act), and *Claybourne v. Imsland*, 414 N.W.2d 449 (Minn. Ct. App. 1987) (operator of computer sales and service business granted an injunction against competitor's use of deceptive trade name under Minnesota Deceptive Trade Practices Act)). "In contrast," damages under §57-12-10(B) "might be suffered either by a consumer of goods or services, or the commercial competitor of an enterprise engaged in deceptive trade practices." 1990-NMSC-063, ¶22.

Solomon had nothing at all to do with competitor standing and, thus, its statements on that issue are dicta, "not binding as a rule of law." *Kent Nowlin Constr. Co. v. Gutierrez*, 1982-NMSC-123, ¶8, 658 P.2d 1116; *Pincheira v. Allstate Ins. Co.*, 2007-NMCA-094, ¶51, 164 P.3d 982 (dicta is "without the binding force of law"). *Solomon*, moreover, *does not cite the New Mexico UPA's text as authority for these statements* but only cases involving *other* states'

deceptive practices acts with different language. And it does so only in discussing potential availability of injunctive relief, not damages. 1990-NMSC-063, ¶21.

In denying plaintiff's reconsideration motion in *Fisher*, the district court stated that the language in *Solomon* on which plaintiff relied "arose in the court's discussion of the meaning of actual damages under the UPA" and that *Solomon* "did not involve business competitors and, as such, the cited language is dicta." 2013 WL 12122650, at *1. The court affirmed its order dismissing Fisher's UPA claim for lack of standing, holding that "the decisions by the New Mexico[] appellate courts, which limit standing under the UPA to buyers of goods and services, are controlling," and noting that the *SFCS* Court's limitation on UPA standing "has been reaffirmed time and time again by both federal and state courts in New Mexico." *Id.* at *2 (citing *M[AK] Towing, Inc. v. Danlar Collision Inc.*, No. 12-CV-487 WJ/LFG, Doc. 47 at 2-3 (D.N.M. Oct. 26, 2012); *Guidance Endodontics, LLC v. Dentsply Int'l, Inc.*, 708 F.Supp.2d 1209, 1254 (D.N.M. 2010); *Hicks*, 280 P.3d at 309).

The court reasoned that "the *M[AK] Towing* and *Guidance Endodontics* Courts directly faced UPA claims between competitors and rejected them, employing similar reasoning to that of this Court" and that "[t]he fact that such cases have not been brought in New Mexico's state courts strongly indicates a general understanding that such claims are not viable." *Id.* at *2. While acknowledging that dicta from a state's highest court is to be considered, the court explained that the *Solomon* dicta has not been relied on since 1990 and "is greatly outweighed by the strong authority demonstrating that business competitors lack

standing under the UPA," and that no other "persuasive data" indicated that the New Mexico Supreme Court would reverse the *SFCS* rule. *Id.*

Other federal district courts have held to similar effect. *See Amco Ins. Co. v. SimplexGrinnell LP*, No. 14-CV-890 GBW/CG, 2016 WL 4425095, at *8 (D.N.M. Feb. 29, 2016) (dismissing UPA claim where plaintiff did not purchase fire-suppression system and so had no standing as a consumer of defendant's goods or services); *Williams v. Foremost*, 102 F.Supp.3d 1230, 1240 (D.N.M. 2015) ("there is no basis to expand the UPA to give standing to a non-consumer third-party claimant" because "New Mexico law currently restricts UPA claims to actual consumers of goods and services"); *Navajo Nation v. Urban Outfitters, Inc.*, No. Civ. 12-195, Mem. Op. & Order (Doc. 81) at 15-19, 2013 WL 12161826, at *8-9 (D.N.M. Nov. 6, 2013) (D.N.M. Nov. 6, 2013) (dismissing non-consumer UPA claim; New Mexico opinions "clearly have stated that the UPA gives standing only to buyers of goods or services") (internal quotations and citations omitted);[10] *Trademarks Holding, LLC v. American Prop. Mgmt. Corp.*, No. CIV 07-167, 2008 WL 10879330, *3 (D.N.M. Jan. 17, 2008) (dismissing competitor UPA claim for lack of standing); *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) (dismissing UPA claim, stating that "[a]s a seller, rather than a purchaser, the UPA does not confer standing on Hayden Construction").

[10]A copy of this decision is at RP142-60.

3. GD cannot demonstrate standing under the UPA.

GD's UPA standing argument relies on *Lohman*, the *Solomon* dicta discussed above, and *First Nat'l Bancorp Inc. v. Alley*, 76 F.Supp.3d 1261 (D.N.M. 2014). RP78-80. None of these cases, nor any part of GD's argument, requires a ruling that GD has standing to bring a UPA claim on the facts alleged.

As discussed, *Lohman* did not alter the requirements that a proper UPA plaintiff must have sought or acquired goods or services and that the defendant must have provided (sold) goods or services, as *Hicks* made clear. As also discussed, *Solomon*'s speculative references to UPA claims that "might be" asserted by a competitor are dicta, without the force of law. This Court is well aware that it has "no authority to decline to follow precedent established by our superior courts." *Hoffman v. Sandia Resort & Casino*, 2010-NMCA-034, ¶5, 232 P.3d 901 (internal quotation marks and citation omitted). That this Court has not cited *Solomon* in any decision addressing UPA standing strongly supports the conclusion that the *Solomon* dicta is not binding precedent that must be considered in analyzing UPA standing. While it is true that neither *SFCS* nor *Hicks* addressed competitor standing, their holdings that the UPA affords standing only to buyers of goods and services were expressly based on the Supreme Court's interpretation of the UPA's intended purpose of protecting innocent consumers and this Court's construction of the UPA's text.[11] And this construction cannot be reconciled with an interpretation that would permit a seller of services to bring a UPA claim

[11]GD's contention that "[t]he applicability of these holdings cannot be generalized to extend to non-sellers," RP78, is unavailing and based on a false assumption: GD obviously does not provide its services to BNSF for free but sells them for a price.

against a competitor-seller of services. Accordingly, if the *Solomon* dicta were binding precedent, this Court would have had to consider its impact on the scope of UPA standing, even if the case before it did not involve competitor standing.

In *Alley*, a federal district court made an "*Erie* guess" that the New Mexico Supreme Court would rule that the UPA "recognize[s] a claim by a competitor-plaintiff against a competitor-defendant, both of whom are engaged in the sale of services to consumers[.]" 76 F.Supp.3d at 1262. In so doing, the court relied on the *Solomon* dicta; a statement made by another federal district court in a *Navajo Nation* decision (which decision was reversed after supplemental briefing, as *Alley* acknowledged); and a purported plain-meaning analysis that did not consider the UPA's lack of any textual ban on unfair competition methods or the impact of this Court's construction of the UPA's plain text on competitor standing. *Id.* 1263-66.

Alley did not acknowledge that, in holding that the UPA affords standing only to buyers of goods and services, consistent with the Supreme Court's interpretation of the UPA's purpose as protecting consumers, this Court has done the work of interpreting the UPA's plain text in determining standing. And it failed to address how a statutory construction that requires a plaintiff buyer and a defendant seller can be reconciled with a construction that allows a seller of services to bring a UPA claim against a competitor-seller of services. It should also be noted that, in contrast to this case, *Alley* involved a plaintiff and a defendant that both sold investment services *to consumers*. 76 F.Supp.3d at 1262. Similarly, the plaintiffs in the *Navajo Nation* decision discussed in *Alley* alleged that defendants made false representations "*to the consuming public*." *Id.* at 1265. No such

allegations are here; nor can there be any such allegation. The parties do not sell services to the general public but to a large and long-established North American railroad operation. Moreover, the allegations on which GD's UPA claim is based concern conduct that has been investigated and resolved by the government agency the legislature has charged with enforcement of the statute GD claims was violated.

4. Neither the broad-interpretation maxim nor the UPA's "any person" language authorizes UPA standing to GD.

Although the UPA is to be interpreted broadly, that maxim is properly understood as limited by the UPA's intended purpose—to protect "innocent consumers." *Stevenson*, 1991-NMSC-051, ¶12 ("By recognizing that the Act applies to all misleading or deceptive statements, whether intentionally or unintentionally made, we insure that the [UPA] *lends the protection of its broad application to innocent consumers.*") (internal quotation marks and citation omitted; emphasis added); *see Truong*, 2010-NMSC-009, ¶30 (quoting this proposition and stating that "we interpret the provisions of th[e UPA] liberally *to facilitate and accomplish its purposes and intent*") (internal quotation marks and citation omitted; emphasis added). In other words, the broad-interpretation maxim neither requires nor justifies a construction that expands the UPA's application beyond its intended purpose of protecting consumers.

The legislature's use of "any person" in the UPA provisions authorizing private suits, *see* §57-12-10, cannot properly be understood to authorize suits by "any person," as if those words, were self-executing and sufficient, without more, to confer standing to bring a UPA claim. Rather, the UPA, like any statute, must be construed so as to further legislative intent by considering "thoughts," not just

words, in the context of the statutory scheme. *E.g.*, *State v. Office of Pub. Defender*, 2012-NMSC-029, ¶44, 285 P.3d 622 (in interpreting statutes, "[w]ords are the beginning, not the end; they serve as portals into the thoughts behind the words"); *Jordan v. Allstate Ins. Co.*, 2010-NMSC-051, ¶15, 245 P.3d 1214 (the "primary goal when interpreting statutes is to further legislative intent"); *Truong*, 2010-NMSC-009, ¶29 ("It is the high duty and responsibility of the judicial branch of government to facilitate and promote the legislature's accomplishment of its purpose.") (brackets omitted); *State v. Rivera*, 2004-NMSC-001, ¶13, 82 P.3d 939 (courts must analyze a "statute's function within a comprehensive legislative scheme" and may not consider subsections "in a vacuum"); *State Bd. of Educ. v. Board of Educ. of Alamogordo*, 1981-NMSC-031, ¶14, 624 P.2d 530 ("In ascertaining the legislative intent, we look not only to the language used in [a] statute, but also to the object sought to be accomplished and the wrong to be remedied."); *Atchison, T. & S. F. Ry. Co. v. Town of Silver City*, 1936-NMSC-036, ¶13, 59 P.2d 351 ("Canons of construction are but aids in determining legislative intent and are not controlling if they lead to a conclusion, which by the terms or character of the legislation manifestly was not intended.") (citation omitted).

As noted, §57-12-10(B) permits suit by "[a]ny person who suffers any loss of money or property," but the claimed loss must result from "employment by another person of a method, act or practice declared unlawful by the [UPA]," *id.* The UPA declares unlawful "[u]nfair or deceptive trade practices," §57-12-3, which are defined as false or misleading representations "knowingly made in connection with the sale . . . of goods or services . . . by any person in the regular

course of his trade or commerce," §57-12-2(D). Read in context, then, the "any person" entitled to sue under the UPA is expressly limited to a person who purchased goods or services and who suffered a loss as a result of a misrepresentation made by a seller in connection with the sale. And, as construed by this Court, this means that only buyers have UPA standing. *Hicks v. Eller*, 2012-NMCA-061, ¶20; *SFCS*, 2005-NMCA-051, ¶14. This limitation is rooted in the UPA's text and fully comports with our Supreme Court's longstanding interpretation of the UPA's intended purpose as protecting consumers. *Stevenson*, 1991-NMSC-051, ¶12.

It is beyond dispute that GD has not alleged and cannot allege that it was a buyer of services provided (sold) by Defendants—*i.e.*, it has not and cannot allege that it was a consumer in the transactions alleged to form the basis of its UPA claim. A competitor is not a consumer. A ruling that GD has UPA standing in this case would require jettisoning our Supreme Court's longstanding interpretation of the UPA's purpose as a consumer-protection statute and overruling this Court's decisions interpreting the UPA's text as limiting standing to buyers of services sold by defendants. GD's UPA claim must be dismissed with prejudice for lack of standing and, thus, for lack of subject matter jurisdiction.

5. GD cannot establish standing by usurping the transactional status of BNSF, the buyer of the services at issue, or the government's authority to enforce the statutes GD alleges were violated.

As discussed, GD is not a consumer of railway services and does not (and cannot) allege that it has purchased anything sold by Defendants. No authority or public policy allows GD to predicate standing on a usurpation of the status of

BNSF as the buyer of services in the transactions at issue and of the enforcement authority the legislature assigned to the government. GD's UPA claim should be seen for what it is—an attempt to enforce a statute that provides no private right of action or private remedy and to end-run CID's resolution of the CILA violations alleged in the Complaint in order to obtain damages and other relief for itself, and to drive Defendants from the railroad-contracting market.

CILA was enacted to "promote the general welfare of the people of New Mexico by providing for the protection of life and property by adopting and enforcing codes and standards for construction." §60-13-1.1. While it is plain that New Mexico law reflects a strong public policy against unlicensed contractors, *e.g.*, *Little v. Baigas*, 2017-NMCA-027, ¶30, 390 P.3d 201, it is also plain that the legislature chose to implement that policy to protect consumers of construction services, *not* competitor contractors, and that it neither intended to nor did create a private right of action for competitors to recover damages. Far from creating the competitor rights GD asserts, CILA gives CID (and the Construction Industries Commission (CIC)) exclusive enforcement power, *see* §60-13-53, and limits the consequences for CILA violations to license suspension/revocation, §60-13-23; payment of "administrative penalties," §60-13-23.1; criminal liability, §60-13-52; and a ban on the right to file an action or lien to recover compensation for unlicensed work, §60-13-30. *See also Preferred Builders, Sw., Inc. v. Gaffari*, No. 29,326, 2011 WL 1935479, at *5 (N.M. Ct. App. Mar. 31, 2011) (unpublished) (CILA violation "does not render a general contractor personally liable" but "simply provides the basis for the imposition of certain internal administrative

penalties, including, but not limited to, license suspension or revocation"). As the Motion shows, there also is no private right of action for any other violation alleged in the Complaint. RP45-46,122-24. There is no basis for a court to allow a cause of action or remedy the legislature chose not to provide. *E.g.*, *Eisert v. Archdiocese of Santa Fe*, 2009-NMCA-042, ¶29, 207 P.3d 1156.

Nor should GD be allowed to recover for alleged regulatory violations under the guise of other causes of action, including—indeed, especially—the UPA, with its relaxed proof requirements and availability of treble damages and attorneys' fees. There are sound reasons for this. Interpreting the UPA to afford GD standing in the circumstances alleged would enable GD to recover through the back door what it cannot through the front, and to reap benefits the legislature intended for consumers who might otherwise not be able to bring suit. The CID has investigated unlicensed contracting by Defendants and imposed requirements and sanctions as it saw fit. The relief the law provides has been obtained, and CID is obviously free to act again if it deems further action to be necessary. Defendants' competitors should not be allowed to assert claims for private damages, injunctive relief, and attorneys' fees based on unlicensed contracting activity, especially given that CILA provides no such private remedies. Allowing such suits would undermine the authority and purpose of the CID/CIC to enforce compliance and would threaten the uniform application and enforcement of CILA the legislature intended. *See* NMSA 1978, §60-13-1.1 (CILA seeks to be, "to the maximum extent possible, uniform in application, procedure and enforcement"). Such competitor suits also

could result in conflicting judgments and reduce the incentive to enter into voluntary settlements with CID.

In sum, it is one thing to protect consumers by denying unlicensed contractors the right to sue or file a lien to recover money from consumers of their services, *see* §60-13-30, or the benefit of a statute of repose in lawsuits brought by consumers of their services, *see Little v. Jacobs*, 2014-NMCA-105, 336 P.3d 398. It is another thing entirely to allow competitors the right to recover damages from other contractors based on alleged regulatory violations and to usurp enforcement powers statutorily assigned to a government entity. The legislature obviously knows how to create such rights. It clearly has chosen not to. For these reasons too, the UPA should not be interpreted to afford GD standing to bring the claim it asserts against Defendants here, and the claim should be dismissed with prejudice.

C. The UPA Claim Should Be Dismissed With Prejudice Because GD Has Not Pleaded And Cannot Plead A Viable UPA Claim.

Even if GD did have standing, the UPA claim must be dismissed with prejudice because GD has not and cannot plead facts sufficient to state a viable UPA claim, as Defendants demonstrated below. RP51,53,131-32. As noted, the UPA claim is based entirely on allegations that Defendants failed to disclose to BNSF (and to former GD employees Defendants hired) that they lacked "the necessary experience or licenses to provide railroad contracting services" and failed to comply with other regulatory requirements. RP13-14¶¶51-54. "As a result of these intentional omissions, Defendants were awarded contracts and piece-meal work that would, in all reasonable probability, have gone to [GD]." RP13¶54. The UPA claim fails as a matter of law because there is no allegation and can be no

allegation that Defendants had a duty to disclose the information GD claims they did not disclose, as required to state a UPA claim based on non-disclosure.

As this Court has explained, a plaintiff asserting a UPA claim based on an alleged failure to disclose information must prove that the defendant "had a duty to disclose material facts reasonably necessary to prevent any statements from being misleading." *Brooks v. Norwest Corp.*, 2004-NMCA-134, ¶37, 103 P.3d 39. "[T]he duty to disclose only arises in relation to some *other* representation which would otherwise tend to mislead in the absence of the disclosure." *Lohman*, 2007-NMCA-100, ¶40. And "[t]he existence of a duty is dependent on the materiality of the facts." *Smoot v. Physicians Life Ins. Co.*, 2004-NMCA-027, ¶15, 269, 87 P.3d 545 (citing *Azar v. Prudential Ins. Co.*, 2003-NMCA-062, ¶64, 68 P.3d 909; §57-12-2(D)(14) ("using exaggeration, innuendo or ambiguity as to a material fact or *failing to state a material fact if doing so deceives or tends to deceive*")) (emphasis added). New Mexico courts have held information to be material for UPA purposes where (1) plaintiff has no reasonable opportunity to ascertain it; and (2) it would have induced a reasonable consumer in plaintiff's shoes to enter into the transaction at issue. *Azar*, 2003-NMCA-062, ¶¶72-73.

The requirement that plaintiff must allege the existence of a disclosure duty based on factual allegations establishing the materiality of the information purportedly not disclosed takes on enhanced significance in this case, where there can be no legally cognizable basis for a theory of deception by omission based on failure to disclose information *to plaintiff*, which is not only *not* a consumer as to

the transactions alleged to form the basis for the UPA claim but also a competitor as to which Defendants could not possibly have had a disclosure duty.

To the extent GD's UPA claim is predicated on failure to disclose information to former GD employees Defendants hired, GD has not and cannot allege facts showing that any representations or omissions occurred in connection with any sale transaction, or any loss resulting from any alleged deception, or that the allegedly omitted information was in any way material to the ex-employees' decision to work for Defendants. To the extent GD's UPA claim is predicated on failure to disclose information to BNSF, the information allegedly not disclosed (lack of licensure) is immaterial as a matter of law because (1) licensure status is a matter of public record and, even if not disclosed by GD, could not possibly have been concealed from BNSF, an established railroad operation that would have known and/or easily could have ascertained the information; and (2) GD itself has conceded the immateriality of the allegedly omitted information to BNSF's decision to purchase services from Defendants, rather than from GD, asserting that BNSF "learned that Defendants were unlicensed but *continued to provide construction contracting projects to Defendants despite actual knowledge of the appropriate licensure (or any licensure).*" RP93 (emphasis added). In these circumstances, any allegedly non-disclosed information concerning lack of required licenses is immaterial as a matter of law and, therefore, the UPA claim must be dismissed for failure to state an essential element of the claim. *See Vilar v. Equifax Info. Servs., LLC*, No. CIV 14-0226 JB/KBM, 2014 WL 7474082, at *27-

30 (D.N.M. Dec. 17, 2014) (dismissing UPA claim based on non-disclosure, *inter alia*, because plaintiff was aware of allegedly omitted information).

In sum, the UPA claim should be dismissed with prejudice for the additional reason that, even if GD had standing, it has not and cannot plead facts sufficient to state all the required elements of a UPA claim. *See C&H Constr. & Paving*, 1973-NMSC-076, ¶9 (lack of merit warranting dismissal may be "an absence of law to support a claim of the sort made or of facts sufficient to make a good claim"); *Wills*, 2015-NMCA-105, ¶¶11,14-15 (whistleblower claim properly dismissed where plaintiff failed to allege essential element); *AFSCME Council 18*, 2013-NMCA-106, ¶6 (to withstand Rule 1-012(B)(6) pleaded facts must meet claim's essential elements).

CONCLUSION

For the foregoing reasons, this Court should (1) reverse the district court's order denying Defendants' motion to dismiss GD's UPA claim; (2) order that GD's UPA claim be dismissed with prejudice; and (3) order such other, further relief that the Court deems just and proper.

ORAL ARGUMENT REQUEST

Pursuant to Rule 12-319(B) NMRA, Defendants request oral argument based on the respectful contention that this appeal concerns an issue of law affecting and of great significance to New Mexico law and businesses.

DATED this 21st day of April 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of Appellants' Brief in Chief to be sent by first-class mail to the following counsel of record this 21st day of April 2017:

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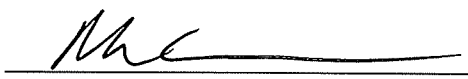

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