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' REPLY BRIEF

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INTRODUCTION

GD's UPA claim is predicated solely on allegations that Defendants failed to disclose lack of a CILA license[1] to BNSF and to former GD employees.[2] Defendants' opening brief demonstrates: (1) under New Mexico law, "any person" entitled to assert a UPA claim must be a buyer of goods or services sold by defendant; (2) GD cannot establish UPA standing, and cannot state a viable UPA claim, where it does not and cannot allege that it bought anything sold by Defendants; (3) a ruling that GD has UPA standing would require abandoning the Supreme Court's longstanding interpretation of the UPA 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

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[1]GD notes "the litany of alleged regulatory violations of Defendants" (AB24) and characterizes its UPA claim as "based only incidentally" on a CILA violation (AB23). The UPA claim is based on Defendants' alleged lack of CILA licensure to perform contracting services. RP13¶¶51-54. GD has made no argument based on violation of any statute or regulation other than CILA. BIC5. Regardless of the number of alleged violations, GD's UPA claim is based on alleged omissions/failures to disclose and, as Defendants have shown, GD has not and cannot demonstrate the materiality of any allegedly undisclosed information, as required to establish a legally viable UPA claim. BIC29-32

[2]GD refers to "poaching" of its employees (AB21), a characterization contrary to the complaint's statement that "most of such employees [allegedly solicited by Defendants] had been terminated for cause." RP10¶34; *see* RP72 ("Defendants hired numerous former employees of [GD] (many of whom were terminated for drug and alcohol violations"). GD made no argument below, and makes none here, that allegations about its former employees establish a UPA claim. GD cannot allege any misrepresentation in connection with a sale, or loss from alleged deception, or that allegedly omitted information was material to the ex-employees' decision to work for Defendants, as required to establish a viable UPA claim.

defendants; (4) a ruling that GD has UPA standing based on alleged licensing violations would not serve the UPA's consumer-protection purposes but would (i) improperly allow competitor-plaintiffs like GD to reap windfalls in the form of benefits meant to enable consumers to sue where they otherwise might not be able to do so, (ii) provide a powerful statutory weapon to drive out competitors, (iii) improperly enable GD to usurp governmental authority to enforce statutes and regulations containing no private right of action or private remedy, and (iv) end-run CID's prior resolution of the CILA violation grounding the UPA claim; and (5) GD has not and cannot state a viable UPA claim based on the conduct alleged.

GD's arguments are largely unresponsive. Its principal argument—"any person" must be read in isolation and construed as an unambiguous legislative declaration that the UPA authorizes competitor standing—is contrary to statutory-construction principles. And GD fails to address the fact that a ruling that GD has UPA standing cannot be squared with New Mexico appellate decisions interpreting the UPA, based on its text, as a consumer-protection statute affording standing only to buyers of goods or services sold by defendants. It is obvious that no New Mexico appellate court has determined whether the UPA authorizes a claim against a competitor alleging loss of business resulting from misrepresentations made to another. It is equally clear, however, that a categorical holding that the UPA authorizes competitor claims must be reconciled with the decisions cited by Defendants, and that GD has not done this.

Even assuming that the UPA's text does not preclude the possibility of a competitor suit in *some case*, it cannot be construed to afford standing to GD, and GD cannot state a viable UPA claim in *this* case, where GD attempts to arrogate to itself the enforcement authority of a government agency to drive out a competitor and collect (possibly treble) damages and attorneys' fees. There is no evidence that the legislature intended this kind of UPA claim. And New Mexico cannot afford an interpretation of the UPA that would enable businesses to use it to obtain monopolies by killing competition. Nor is such an interpretation authorized by appeals to public-safety concerns. The UPA's intended purpose is clearly the protection of buyers in consumer transactions. There is no indication that the legislature intended the UPA to protect public safety, or to provide a means for private parties to enforce safety-related regulations policed by state agencies, and collect damages and fees. The Court should follow prior New Mexico appellate decisions and reverse the district court's order denying Defendants' motion to dismiss the UPA claim, with instructions to dismiss the UPA claim with prejudice.[3]

REPLY

A. GD's Plain-Language Argument Fails.

The UPA 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

[3]GD mischaracterizes the order denying the motion to dismiss as "upholding GD's standing to assert a UPA claim against Defendants" (AB15) and finding "in favor of competitor standing under the UPA" (AB17). There is no such ruling or finding.

of a method, act or practice declared unlawful by the [UPA]." NMSA 1978 §57-12-10(B). What the UPA declares to be unlawful are "[u]nfair or deceptive trade practices," §57-12-3, explicitly defined to be "false or misleading" statements "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). A claim that does not meet all UPA requirements fails as a matter of law.

GD's argument, focusing almost exclusively on the words "any person," is contrary to principles of statutory construction requiring courts to consider "thoughts," not just words, *see State v. Office of Pub. Defender*, 2012-NMSC-029, ¶54, and the context of the statutory scheme as a whole, *State v. Rivera*, 2004-NMSC-001, ¶13, 134 N.M. 768, to determine legislative intent and "to facilitate and promote the legislature's accomplishment of its purpose," *Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶29, 147 N.M. 583. The UPA contains no textual proscription against "unfair competition." Nor is there any indication that providing a claim for loss of business to a competitor is "the object sought to be accomplished and the wrong to be remedied" by the UPA. *State Bd. of Educ. v. Board of Educ. of Alamogordo*, 1981-NMSC-031, ¶14, 95 N.M. 588. GD asserts, without citation, that it "has alleged specific UPA violations by Defendants that caused it harm." AB8. It says that "'any person' . . . is meant to include aggrieved competitors" because the UPA "defines an 'unfair or deceptive trade practice' as including 'disparaging the goods, services or business of another by false or misleading representations.'" *Id.* Three problems are immediately apparent.

First, the complaint contains no such allegations and no citation to any Section 57-12-2(D) subsection describing particular "act[s] specifically declared unlawful." It alleges only that "[a]s defined under §57-12-2(D) . . . , Defendants knowingly made false and misleading statements to [GD] employees that Defendants solicited and to BNSF by failing to disclose that" Defendants were not properly licensed to do contracting work. RP13¶¶51-54. Second, GD made no argument below based on Section 57-12-2(D)(8). Third, GD's argument assumes that this provision requires the conclusion that the legislature intended the UPA to authorize competitor claims. This is a logical fallacy. While a competitor might engage in some conduct described in the Section 57-12-2(D) subsections, the conclusion that *only* a competitor could engage in such acts is false: these acts could be committed by a non-competitor seller and harm a non-competitor buyer.

Consider a furniture store's sales representative who makes false/misleading statements disparaging furniture made by one company to persuade a consumer who wanted to buy that company's furniture to buy instead more expensive furniture made by another company, yielding a higher commission for the representative. Surely such a practice harms members of the consuming public who, based on such false/misleading statements about one company's product, pay more for another company's product. The furniture companies are competitors, but the UPA claimant can only be the consumer/buyer. This scenario describes conduct proscribed by Section 57-12-2(D)(8). But it could illustrate practices made unlawful by other Section 57-12-2(D) subsections as well, and with the same

result: that conduct meets the description in a Section 57-12-2(D) subsection does not compel the conclusion that only a competitor could engage in such conduct, or that the legislature intended to authorize competitor UPA claims.

A company's allegation that it lost business to a competitor because of the competitor's misrepresentations in connection with a sale also does not demonstrate legislative intent to authorize the allegedly harmed company to bring a UPA claim against the competitor, even if the conduct is unlawful under a Section 57-12-2(D) subsection. Consider a circumstance in which a cable provider (Company A) falsely advertises that its competitor, Company B, charges five times as much as Company A for the same type of service and provides service inferior to Company A's service. Assume that Company A sells a consumer a $100/month cable package and the consumer later learns that Company B charges $20.00/month for the same package and service quality. The consumer may bring a UPA claim against Company A (for $80, along with attorneys' fees and possibly treble damages); Company B may sue Company A for, say, tortious interference.

The point is this: that Company A's conduct meets the description of a Section 57-12-2(D) subsection does not demonstrate legislative intent to authorize UPA claims against competitors: the UPA claimant still must be consumer. As the *Fisher* Court stated in rejecting the contention that "some provisions of the UPA are logical only if a non-consumer brings the claim," such as the disparagement provision, "it is clear that the UPA [as interpreted by New Mexico courts] is intended as a sword for consumers, and the disparagement provision merely

provides another weapon in a consumer's arsenal to remedy unfair practices." *Fisher Sand & Gravel Co. v. FNF Constr., Inc.*, No. 10-cv-0635, 2013 WL 12121876, at *9 (D.N.M. March 27, 2013); *see also Guidance Endodontics, LLC v. Dentsply Int'l, Inc.*, 708 F.Supp. 2d 1209, 1256 (D.N.M. 2010) ("A review of the specific instances of conduct that the New Mexico UPA explicitly includes as unlawful shows that they are largely conduct in which only a seller could reasonably engage. . . . [T]he very nature of the legislation . . ., to protect consumers, implies that only a consumer should be able to take advantage of its protections.").

GD, moreover, has not and cannot satisfy the unequivocal textual requirement of a "false or misleading" statement "knowingly made in connection with the sale . . . of goods or services . . . in the regular course of the person's trade or commerce, that may, tends to or does deceive or mislead any person." §57-12-2(D). *See Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶¶13-14, 112 N.M. 97. As noted, the only false or misleading" statement alleged is the failure to disclose lack of CILA licensure, and the only person purportedly deceived or misled is BNSF. RP13¶¶51-54. GD says here that the complaint alleges that Defendants misrepresented to BNSF that "they were licensed and otherwise qualified to perform railroad contracting services in connection with their sale of those services to [BNSF]," and that this constitutes a violation of §57-12-2(5), which proscribes "representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that

a person has a sponsorship, approval, status, affiliation or connection that the person does not have." AB9. But the complaint did not make this allegation or cite Section 57-12-2(5). And GD does not address the fact that it has not pleaded facts necessary to establish a UPA claim based on non-disclosure in any event.

As Defendants have shown (BIC29-32), such misrepresentations are not actionable under the UPA as a matter of law absent allegations that the omitted information was material, which New Mexico courts have held to mean, for UPA purposes, information that plaintiff had no reasonable opportunity to ascertain and that would have induced a reasonable consumer in plaintiff's shoes to enter into the transaction at issue. *Azar v. Prudential Ins. Co.*, 2003-NMCA-062, ¶¶72-73, 133 N.M. 669. There is no legally cognizable basis for a UPA claim based on failure to disclose information to the *plaintiff* in this case, which is *not* a consumer/buyer as to the transactions alleged to ground the UPA claim, but rather a seller-competitor as to which Defendants could not possibly have a disclosure duty.

GD's theory assumes that BNSF gave work to Defendants only because it was deceived by Defendants' alleged failure to mention lack of CILA licensure—*i.e.*, that BNSF gave Defendants work necessarily means that Defendants deceived BNSF. As discussed (BIC31-32), CILA license status is public information, and it is inconceivable that a large, well-established railroad company like BNSF, which has long operated in New Mexico, could possibly have been deceived by failure to mention lack of a CILA license. GD, moreover, has conceded the immateriality of this alleged omission, stating that BNSF "learned that Defendants were unlicensed

but continued to provide construction contracting projects to Defendants despite actual knowledge of the lack of[4] appropriate licensure (or any licensure)." RP93. In these circumstances, any allegedly non-disclosed information concerning lack of proper licensure is immaterial as a matter of law, requiring dismissal of the UPA claim with prejudice. *Vilar v. Equifax Info. Servs., LLC*, No. CIV 14-0226 JB/KBM, 2014 WL 7474082, at *27-30 (D.N.M. Dec. 17, 2014).

GD appears to believe that Defendants' argument that GD has not and cannot plead facts establishing the required UPA elements is beyond the scope of this appeal. AB2,23. The question whether GD's complaint states a viable UPA claim was briefed below. RP53,121-24,131-36. Defendants argued in their interlocutory-appeal application that the UPA should not be interpreted to authorize the claim GD asserts (RP211,218-19), and asked the Court to review the substantive merits if it granted the application (RP206,222). Defendants submit that the legal viability of the UPA claim is properly before the Court.

There is no clear division in this case between the questions of standing and failure to satisfy the UPA's requirements for asserting a claim. *See Phoenix Funding, LLC v. Aurora Servs., LLC*, 2017-NMSC-010, ¶19 ("Where a cause of action is created by statute, the Legislature empowers the courts to adjudicate a new kind of claim and, thus, the Legislature may condition the exercise of that power on the plaintiff's satisfaction of certain prerequisites."). Here, even a categorical rule that the UPA affords competitor standing would not mean that GD

[4]The words "lack of" were inadvertently omitted in the opening brief (BIC12,31).

satisfied all UPA prerequisites. GD's assertion that "'any person' harmed by conduct that violates the UPA can bring a claim" (AB6) demonstrates this, begging the question whether GD has standing based on allegations of "conduct that violates the UPA." *See also* AB8 ("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—.").

In any event, the question whether GD has met all the UPA's requirements is closely related to the question whether GD is legally authorized to request adjudication of the UPA claim alleged and, even if deemed separate, may be considered. *Armijo v. Wal-Mart Stores, Inc.*, 2007-NMCA-120, ¶19, 142 N.M. 557 (declining request that Court not consider an additional issue "not specifically identified by the district court when it permitted Defendants to apply for interlocutory appeal"; stating that the additional issue was not "wholly unrelated to the issues identified by the district court" and that interlocutory review "may extend beyond the question posed"); *see also* Rule 12-321(B)(2) NMRA. There is nothing hypothetical or speculative about a ruling determining the legal viability of the UPA claim. The law and factual allegations necessary to reach this determination are known. A remand on this issue would needlessly consume the resources of the parties and the courts while serving no useful purpose. As the district court recognized, "the UPA claim drives the entire case." RP201. The Court can and should decide whether the UPA claim must be dismissed with

prejudice because GD has not and cannot satisfy the statutory requirements necessary to bring it under the circumstances presented.

B. GD's Case Analysis Fails.

GD asserts that "New Mexico is without binding precedent other than the clear, broad and unrestricted language of the UPA itself" (AB5) and that Defendants' cited cases are "readily-distinguishable" (AB15). According to GD, *SFCS* and *Hicks* hold only that a seller cannot bring a UPA claim against a buyer of the seller's goods/services: the buyer-only standing rule is "unsupported," "inartful" and "unnecessary" dicta. AB10,15-16. Defendants' cited federal decisions should be ignored entirely, GD contends, because those courts "found themselves bound by 'principles of federalism' to accept the existing New Mexico state appellate courts' dicta in *Hicks* and *SFCS*." AB17-18. If the Court considers cases ("any person" ends the inquiry as far as GD is concerned (AB6)), it should consider only *Solomon*'s mention of competitors;[5] *Alley*'s *Solomon*-based "*Erie* guess"; *Lohman*'s statement that the UPA "does not require the plaintiff to acquire goods or services from the defendant"; and the initial UPA ruling in *Navajo I*, notwithstanding its subsequent reversal based on *SFCS* and *Hicks*. AB10-20. Defendants rely on their case analysis (BIC13-24) and emphasize the following:

[5]GD says it relies on "the supporting policy laid out, albeit in dicta, in favor of competitor standing by" *Solomon*. AB5. As noted (BIC18-20), that dicta speculated about relief that "might be had" and cited (without analysis), not New Mexico's UPA, but cases involving other state statutes with different language.

1. New Mexico decisions interpreting the UPA cannot be reconciled with a construction that would permit the claim GD asserts here.

The maxim that the UPA is interpreted broadly is limited by the legislature's intent, which the New Mexico Supreme Court has determined to be protection of "innocent consumers." *Stevenson*, 1991-NMSC-051, ¶12. The buyer-standing rule is expressly based on this binding interpretation and the UPA's text:

> 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 . . . recognize a claim against Home Depot as a buyer . . . . 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.

SFCS v. Home Depot, 2005-NMCA-051, ¶17, 137 N.M. 524 (citations omitted).

Lohman confirmed this interpretation. 2007-NMCA-100, ¶32. *See Hicks v. Eller*, 2012-NMCA-061, ¶20 ("*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."). *Lohman*'s conclusion that the UPA does not require a transaction between claimant and defendant means only that "the plaintiff does not necessarily have to purchase the product from the defendant." *Hicks*, 2012-NMCA-061, ¶20. But "somewhere along the purchasing chain, the claimant [must have] purchase[d] an item that was at some point sold by the defendant." *Id.*

While it is true that the UPA's text does not explicitly state that only a "buyer" may sue, this Court's construction of that text as limiting standing to buyers fully comports with the Supreme Court's longstanding interpretation of the UPA's intended purpose as consumer protection. GD's assertion that *SFCS* and

Hicks held only that a seller cannot bring a UPA claim against a buyer of the seller's goods/services lacks merit; the language in those cases is not so limited. *SFCS*, 2005-NMCA-051, ¶17. Courts obviously decide issues based on the circumstances in which they arise. But this hardly means that no case is relevant to the consideration of another unless the facts are identical. The reality is that these decisions cannot be reconciled with a ruling that the UPA authorizes competitor claims. If these courts had read the UPA's text as evidencing legislative intent to afford standing to a non-buyer, they would not have said that the UPA is intended to protect "innocent consumers" and that, consistent with that purpose, the UPA affords standing only to buyers. And if it were possible to harmonize these decisions with a ruling that the UPA affords standing to non-buyers/competitors, the overwhelming majority of the New Mexico federal courts that have addressed a UPA claim brought by a competitor (or non-buyer) would not have concluded, as they have (*see* BIC16-21), that a ruling that the UPA affords standing to such plaintiffs does not comport with New Mexico appellate decisions.

2. GD's reliance on *Alley* and *Navajo I* is misplaced, and GD fails the "any person" test relied on in *Navajo I*.

As noted (BIC23-24), *Alley* and *Navajo* involved representations made and good/services sold to "the consuming public." The parties here do not sell services to the general public but to a large company, and no misrepresentations to "the consuming public" are at issue. GD's reliance on *Navajo I* is especially misplaced, because the court later dismissed the UPA claim for lack of standing based on

SFCS and *Hicks*, *see Navajo Nation v. Urban Outfitters, Inc.*, 2013 WL 12161826, at *8-9 (D.N.M. Nov. 6, 2013), and because GD fails the test for "any person" under Colorado's UPA (CCPA), which *Navajo I* found "compelling."

As adopted in *Hall v. Walter*, 969 P.2d 224 (Colo. 1998) (en banc), that test requires that "the challenged practice must significantly impact the public as actual or potential consumers of the defendant's goods, services, or property." *Id.* at 234. If New Mexico had the test, GD would fail it. The requirement was met in *Hall*, where the "deceptive practices implicated the public as consumers because the misrepresentations were directed to the market generally, taking the form of widespread advertisement and deception of actual and prospective purchasers." *Id.* at 235. It is not met where the challenged actions constitute a "purely private wrong," as held in *Martinez v. Lewis*, 969 P.2d 213 (Colo. 1998) (en banc).

Martinez explained that considerations relevant to the determination of whether this requirement is met include "the number of consumers directly affected by the challenged practice, the relative sophistication and bargaining power of the consumers affected by the challenged practice, and evidence that the challenged practice previously has impacted other consumers or has significant potential to do so in the future." *Id.* at 222. In holding that a claim based on a doctor's misrepresentations to an insurer did not meet this requirement, *Martinez* reasoned that the insurer was "the sole consumer of Dr. Lewis's services," and as "a large insurance provider" is "not the type of consumer that the CCPA generally contemplates requiring protection." *Id.* The CCPA "protect[s] the public as

consumers . . . where consumers do not have and cannot reasonably gain access to truthful information relevant to a contemplated transaction unless it comes from the person offering the good, service, or property." *Id.* "State Farm has ample access to information . . . and . . . extensive experience as a consumer of this type of service." *Id.* "As a large organization with substantial resources, it is in a position of relative bargaining strength when it solicits the services of experts to assist with insurance coverage decisions." *Id.*

So too here. The only unfair practice at issue is failure to disclose lack of a CILA license, a matter of public record, to one buyer—BNSF, a large railroad company long operating in New Mexico, which GD says continued to award work to Defendants while knowing of the lack of CILA licensure. RP93. The "challenged practice" does not "significantly impact the public as actual or potential consumers of" Defendants' services. *Hall*, 969 P.2d at 234. GD's invocation of the need to protect public safety is unavailing. As discussed (BIC26-29), the legislature has addressed this issue in CILA, which contains no private right of action or private remedy. Public safety is not a purpose for which the UPA is intended. GD's UPA claim should be dismissed with prejudice.

CONCLUSION

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

Respectfully submitted,

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