IN THE SUPREME COURT THE STATE OF NEW MEXICO

KYLE SALAS, VICKY ISLAS, STEPHANIE ORTIZ, ALBERTO ROYBAL, RHONDA D. SANCHEZ, JESSICA SIETERS MARTINEZ, and LORI SIETERS,
On behalf of themselves and others similarly situated,

Plaintiffs-Respondents,

v. S-1-SC-39641

GUADALUPE CREDIT UNION,
Defendant-Petitioner.

DEFENDANT-PETITIONER'S BRIEF-IN-CHIEF

(ORAL ARGUMENT REQUESTED)

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STATEMENT REGARDING THE TRANSCRIPT

The transcript was digitally recorded. The citations to the transcript of the hearing in this Brief-in-Chief are taken from the Court of Appeals' *Memorandum Opinion* in *Salas et al. v. Guadalupe Credit Union*, A-1-CA-39021 (10/11/2022).

STATEMENT OF COMPLIANCE

Undersigned counsel certifies that this *Defendant-Petitioner's Brief-in-Chief* complies with Rule 12-502 D (3) NMRA in that the body of the brief and footnotes are prepared in Times New Roman typeface and contain 8,758 words. This word count was obtained using Microsoft Office Word 2016 software.

I. SUMMARY OF PROCEEDINGS

A. Nature of the case.

This case arises from a *Class Action Complaint for Damages, Declaratory Relief and Injunctive Relief* filed by Respondents on October 7, 2019 (the "Complaint). **[RP 1-8]** The Complaint brings a claim against Petitioner, Guadalupe Credit Union ("GCU") for alleged violation of the Unfair Practices Act ("UPA") NMSA 1978 §§ 57-12-1 *et seq.* and/or NMSA, 1978, § 36-2-28.1 based upon GCU's alleged unauthorized practice of law ("UPL"). **[RP 6-7 ¶¶ 39-46]** The claim(s) arises solely from allegations that GCU, appearing *pro se* through an authorized Member/employee, filed collections actions against Respondents in New Mexico magistrate courts. **[RP 1-8, ¶18 and *passim*]** Respondents seek alleged damages and declaratory and injunctive relief. **[RP 7-8, ¶¶ A-J]** Respondents purport to be adequate class representatives of a putative class defined in paragraph 31 of the Complaint.[1]

The Complaint asserts that GCU engaged in the UPL by appearing *pro se* in magistrate court purportedly in violation of NMRA 2-107 (B)(3) and NMSA, 1978,

[1] "The class consists of all persons (1) who were named as Defendants in a collection lawsuit filed by [GCU] in any Magistrate Court; (2) where pleadings were signed by Gabriela Duran, Michael Sandoval and/or Juan Treto, or anyone other than a New Mexico licensed attorney; and (3) where the collection lawsuit was filed on or after four years before the filing of this Complaint through the date of class certification." **[RP 4, ¶31]**

§ 36-2-28.1. **[RP 6, ¶¶39-41]** The claimed UPL is the foundation upon which Respondents seek class certification and class-wide relief and their request for injunctive relief and damages under the UPA and/or § 36-2-28.1.[2] **[RP 6-7, ¶¶42-46]**

B. The Course of Proceedings and Disposition in the Lower Courts.

The District Court. On October 7, 2019 Respondents filed the Complaint. **[RP 1-8]** On November 22, 2019, GCU filed a *Motion and Supporting Memorandum to Dismiss Plaintiffs' Complaint* under Rule 1-012 (B)(6) (the "*Motion*"). **[RP 17-59, 62-72, 77-100]** The district court held a hearing on the *Motion* on April 8, 2020. On April 14, 2020 an *Order Granting Defendant's Motion to Dismiss with Prejudice* was entered (the "*Order*"). **[RP 111-112]**

The Court of Appeals. On May 13, 2020 Respondents filed *Plaintiffs' Notice of Appeal*. **[RP 115-118]** On October 11, 2022 the Court of Appeals ("CoA") entered a *Memorandum Opinion* (the "*Opinion*") holding that Respondents have standing to pursue a claim under the UPA and § 36-2-28.1 for the alleged UPL in violation of Rule 2-107 (B)(3) and § 36-2-27. See, *Salas et al. v. Guadalupe Credit Union*, A-1-CA-39021 (10/11/2022). The CoA did not decide whether GCU had

[2] A person cannot violate § 36-2-28.1. Rather, that provision provides a remedy for a proved violation of § 36-2-27. The Complaint does not allege GCU violated § 36-2-27.

engaged in the UPL or had violated the UPA. The *Opinion* reversed the *Order* and remanded to the district court for further proceedings.

II. STATEMENT OF MATERIAL FACTS

GCU is a New Mexico non-profit credit union authorized to do business in New Mexico and organized under NMSA, Sections 58-11-1 *et seq.* GCU was established in 1947 pursuant to federal and state legislation and is regulated by New Mexico's Regulation and Licensing, Financial Institutions Division and the National Credit Union Administration, a federal regulatory agency. GCU operates by and through its Members. **[Complaint, RP 2, ¶¶9-13]**

Respondents are, or were, among GCU's Members. Respondents had obtained loans from GCU and defaulted on the loans. **[Complaint, RP 3, ¶18]** GCU, through a Member-employee using court-approved forms, filed actions *pro se* in magistrate court against each Respondent. **[*Motion*, *RP*, ¶20; RP 28-59, Exhibits A-F]** GCU did not represent any Respondent or any putative class member and the Complaint does not allege it did. The Complaint makes clear that GCU only represented itself in magistrate court. The alleged UPL is the sole basis for the relief Respondents seek in the Complaint for an alleged violation of the UPA and/or § 36-2-28.1. **[Complaint, RP 6-7, ¶¶42-46]**

The Complaint alleges that GCU "sought, collected or received monies from each Plaintiff" **[Complaint, *RP 4*, ¶29].** However, the Complaint does not allege

that GCU represented Respondents or any putative class member, nor does it allege that GCU "sought, collected or received" compensation, fees, expenses, or court costs from Respondents for services rendered to them by GCU. The Complaint and record evidence establish that: (1) GCU represented itself in magistrate court *pro se*, (2) GCU did not provide legal services to Respondents, and (3) money, if any, received by GCU was owed by Respondents under the defaulted loans. Further, the Complaint does not allege that GCU prepared any pleadings or charged or collected a fee from Respondents. The record evidence establishes that GCU only used magistrate court-approved forms and filled in the blanks. **[*Motion*, RP 28-59, Exhibits A-F, magistrate court forms used by GCU.]** [3]

Significantly, the Complaint did not seek relief under § 36-2-27, but rather under Rule 2-107 (B)(3) and § 36-2-28.1. **[Complaint, RP6, ¶39]** However, Respondents admit there is no private right of action under Rule 2-107. Rather, Respondents assert that a violation of Rule 2-107 (B)(3) constitutes a violation of § 36-2-27 and, thus, Respondents have a claim under the UPA and § 36-2-28.1 based upon the alleged UPL.[4]

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[3] These exhibits are the "record evidence" and are copies of the magistrate court form pleadings completed and filed by GCU in magistrate court. In the *Order* the district court stated that its review of the exhibits did not convert the *Motion* to a motion for summary judgment. **[RP 111-112, ¶3 and ¶C]**

[4] *Opposition to Motion to Dismiss*, nt. 2 **[RP 68]** ("GCU argues that there is not a private right of action under NMRA 2-107. [Respondents] do not claim a private

In the *Motion*, GCU sought and obtained dismissal of the Complaint under Rule 1-012 (B)(6) due to Respondents' lack of standing. One factor the district considered when granting the *Motion* was that GCU only represented itself and did not provide representation to Respondents. *Opinion*, p. 3 (quoting from hearing transcript) As the Complaint makes clear, GCU and Respondents were adversaries. **[RP 1-8]** There was no "attorney-client" relationship at all between GCU and Respondents. The district court concluded that because GCU did "not [render] a service to [Respondents]", Respondents lacked standing. See, *Opinion* pp. 3 and 7 ("[The district court's conclusion] essentially implicates Plaintiffs' standing to bring their claims.") *Opinion*, p. 7. Accordingly, the district court dismissed the Complaint.

To the district court "… the bottom line … is that I think the motion is well taken". Further, the district court noted that this case presents a situation where the New Mexico Supreme Court may want to revisit Rule 2-107 and the Legislature may want to revisit § 36-2-27. See, *Opinion*, p. 3 (quoting from hearing transcript).

III. SUMMARY OF ARGUMENT

This case raises an important issue concerning the interpretation and application of NMRA Rule 2-107 of the Rules of Civil Procedure for the Magistrate

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right of action under this rule. [Respondents] claim a violation of NMSA § 36-2-27, as interpreted by the Supreme Court in light of its rules.")

Courts,[5] addressing the practice of law by *pro se* litigants, and the relationship between Rule 2-107 and NMSA § 36-2-27 permitting *pro se* appearances in New Mexico's magistrate courts and § 36-2-28.1 providing a remedy for a violation of § 36-2-27. Related issues are: (1) whether Respondents have standing under Rule 2-107 to pursue claims against GCU under the UPA and § 36-2-28.1 based upon the assertion that GCU engaged in UPL in violation of § 36-2-27 (or § 36-2-28.1), and (2) whether the district court has subject matter jurisdiction over Respondents' UPA claims. See, *Gandydancer, LLC. v. Rock House CGM, LLC. and Karl G. Pergola*, 2019-NMSC-021, 453 P.3d. 434.

The core issue presented is whether Rule 2-107 is this Court's interpretation of, or places limitations on, NMSA 1978 § 36-2-27 and, if so, whether a violation of Rule 2-107 is actionable under the UPA and/or § 36-2-28.1. Related issues are whether the Complaint states a claim under the UPA upon which relief can be granted for the alleged UPL in violation of Rule 2-107 (B)(3) or § 36-2-27 (or § 36-2-28.1) and whether Respondents (1) have standing under the UPA to bring such a claim, and (2) whether they have standing under § 36-2-28.1 when in the Complaint Respondents did not allege a loss or injury and brought no claim under § 37-2-27.

[5] The analog in the Metropolitan Court is NMRA, Rule 3-107.

The district court dismissed the Complaint because Respondents lacked standing to bring an action under the UPA for the UPL allegedly in violation of Rule 2-107 or § 36-2-27. Further, because the Complaint did not bring a claim under § 36-2-27, but rather Rule 2-107 (B)(3), it did not state a claim upon which relief can be granted under § 36-2-28.1. The district court also reasoned that the issues raised in the Complaint directly implicate Constitutional Separation of Powers and the interplay between the New Mexico Legislature's jurisdiction and statutory powers and the New Mexico Supreme Court's jurisdiction and rule-making powers. Under § 36-2-27 the Legislature expressly authorizes a person, and thus a corporation, including non-profit credit unions such as GCU, to appear *pro se* in magistrate courts. By virtue of that statute, it is not the UPL, and, thus, not a violation of the UPA or § 36-2-27 (or § 36-2-28.1) for GCU to do so. Similarly, under Rule 2-107 this Court authorizes *pro se* appearances in magistrate court. In the district court, and on appeal, Respondents failed to establish that they have a justiciable claim and standing under the UPA, § 36-2-27 or § 36-2-28.1 for an alleged violation of Rule 2-107. The *Opinion* errs by holding that such standing exists.

The district court also correctly dismissed the Complaint for other reasons, including that: (1) the Complaint seeks no relief for a violation of § 36-2-27, but rather for an alleged violation of Rule 2-107 (B)(3); (2) Respondents admit that they have no private right of action or remedy under Rule 2-107 (B)(3) for an alleged

violation of that Rule; (3) under § 36-2-27 and Rule 2-107 appearing *pro se* in magistrate court is lawful conduct, not unlawful or prohibited conduct, that constitutes a violation of the UPA or § 36-2-28.1, (4) Respondents lack standing because the Complaint does not allege they are "likely to be damaged by an [UPL]" or that they suffered a "loss of money or other property" as required by § 36-2-28.1 (A) and (B); (5) Respondents lack standing to bring a claim under the UPA for the UPL; (6) the Complaint fails to allege facts necessary to state a claim for a violation of the UPA; and, (7) the factual allegations in the Complaint and the record evidence establish that GCU appeared *pro se* only in magistrate court, that GCU represented only itself and not Respondents or others, GCU did not seek, and did not receive, a fee or compensation from Respondents, and GCU only used, completed, and filed magistrate court forms, all of which were approved by this Court.

The *Opinion* misconstrues Respondents' Complaint and the operative well-pleaded facts and misapplies or fails to apply the controlling law applicable to Respondents' claims under the UPA. See, e.g., *Opinion*, p. 6 ("[W]e hold that Plaintiffs have stated actionable claims that GCU was engaged in the unauthorized practice of law **in violation of Rule 2-107(B)(3) and Section 36-2-27**.") (emphasis added); *Opinion* p. 9 ("GCU has not, however, shown that Plaintiffs or their cause of action do not fall within [§ 36-2-27 and § 36-2-28.1(B)'s] ambit simply because the legal services at issue were rendered to GCU and not Plaintiffs.")

The *Opinion* also errs because it (1) concludes that Rule 2-107 is a limitation on § 36-2-27 and that a violation of Rule 2-107 is actionable under the UPA and § 36-2-28.1, and, (2) concludes that § 36-2-27 and § 36-2-28.1, and the UPA, do not "require a predicate representative relationship to create standing to sue for the unauthorized practice of law". *Opinion*, pp. 6 and 8-9.

Significantly, the Complaint brings no claim under the UPA for an alleged violation of § 36-2-27. Rather, the Complaint seeks relief under the UPA and § 36-2-28.1 for an alleged violation of Rule 2-107, not § 36-2-27. **[RP 6-7, ¶¶39-46]** Further, Respondents admit they claim no private right of action under Rule 2-107. **[RP 68, nt. 2]** The *Opinion's* holding that an alleged violation of Rule 2-107 constitutes a violation of § 36-2-27 and, thus, states a claim for relief under the UPA or § 36-2-28.1 is not supported by law and is erroneous. *Opinion*, p. 6. So, too, is the conclusion that Respondents have standing to bring a claim under the UPA for the alleged UPL in violation of Rule 2-107 (B)(3) and/or § 36-2-27. *Opinion*, pp. 3, 7 and 9.

GCU established that, as a matter of law, the Complaint failed to state a claim upon which relief can be granted. The district court properly dismissed the Complaint under Rule 1-012 (B)(6). The *Opinion* should be reversed and the *Order* should be affirmed.

IV. ARGUMENT

1. Standard of Review

"A district court's decision to dismiss a complaint for failure to state a claim under Rule 1-012 (B)(6) is reviewed *de novo.*" *Delfino v. Griffo*, 2011-NMSC-015, ¶ 9, 150 N.M. 97.

Statutory construction is a matter of law that is reviewed *de novo*. *State v Rivera*, 2004-NMSC-001, ¶ 9, 134 N.M. 768.

The foregoing standards of review apply to the issues and arguments raised herein.

2. Preservation

Each issue raised herein was preserved in: 1) *Defendants' Motion and Supporting Memorandum to Dismiss Plaintiff's Complaint* **[RP 17-59]**, 2) *Plaintiffs' Opposition to Motion to Dismiss* **[RP 62-72]**, 3) *Reply in Support of Defendant's Motion to Dismiss* **[RP 77-100]**, 4) at the hearing held on April 8, 2020, and 5) in the parties' briefs filed in the CoA.

A. The *Opinion* Errs By Holding That Respondents Have Standing To Pursue Claims Under The UPA And § 36-2-28.1 For The Alleged UPL In Violation Of Rule 2-107 And § 36-2-27

The *Opinion's* holding that Respondents have standing to pursue a UPA claim for the UPL under Rule 2-107 (B)(3) and § 36-2-27 is erroneous. The Complaint includes no claim under § 36-2-27, only under § 36-2-28.1 and Rule 2-107 (B)(3).

[RP 6, ¶¶39-41] Section 36-2-27 permits GCU to appear *pro se* in magistrate court. The Complaint did not plead a claim asserting a violation of the UPA based upon a violation of § 36-2-27. **[RP 6-7, ¶¶39-46]** The conclusion that Rule 2-107 (B)(3) is this Court's interpretation of, or places limitations on, *pro se* appearances under § 36-2-27 is not clearly established law, lacks clear legal precedent and authority, and does not necessarily follow from New Mexico jurisprudence. The *Opinion* errs by holding Respondents have standing under the UPA and § 36-2-28.1 for an alleged violation of Rule 2-107 (B)(3); especially since Respondents admit they have no such private right of action under Rule 2-107. **[RP 68, nt 2]**

This Court has never held that a violation of Rule 2-107 (B)(3) constitutes a violation of § 36-2-27, much less that any alleged violation of that Rule supports a claim and provides standing under the UPA and § 36-2-28.1. The *Opinion* gives an expansive and unsupported interpretation of, and reach to, Rule 2-107 (B)(3), is not supported by law and is, thus, erroneous. Further, given that the Legislature provided a remedy under § 36-2-28.1 for a violation of § 36-2-27, it follows that the Legislature did not intend that the UPA would apply to an alleged violation of § 36-2-27—and much less so to an alleged violation of Rule 2-107 (B)(3).

Because the Complaint does not allege a violation of § 36-2-27, and because Respondents have no private right of action under Rule 2-107, the *Order* dismissing the Complaint was correct. The *Opinion* errs by holding that Respondents have

standing and that the Complaint states a claim under the UPA and § 36-2-27 (or § 36-2-28.1).

B. Under Section 36-2-27 GCU Is Authorized To Represent Itself *Pro Se* In Magistrate Court And GCU Did Not Engage In The Unauthorized Practice Of Law By Doing So

Section 36-2-27, NMSA (1978), entitled "Practice without admission; contempt of court; foreign attorneys" provides in pertinent part that: "No person shall practice law in a court of this state, **except a magistrate court**, nor shall a person commence, conduct or defend an action or proceeding unless he has been granted a certificate [to practice law in New Mexico]." (emphasis added). This statute is clear and unambiguous. As a non-profit corporation GCU is a "person". There is no exception or exclusion in § 36-2-27 for corporations and the Complaint does not allege there is. Under this statute, the Legislature expressed its clear intention that a person, which as a matter of law includes a non-profit credit union, can appear *pro se* in a magistrate court without a license to practice law. The Complaint alleges that GCU did just that—appeared *pro se* in magistrate court. **[RP 1-8 *passim* and ¶ 18]** The Complaint does not allege that GCU violated § 36-2-27 by doing so.[6]

[6] The Complaint only alleges that GCU violated § 36-2-28.1 and Rule 2-107 (B)(3). **[RP 6, ¶ ¶ 39-41]** The claim or conclusion that the Complaint alleged GCU violated § 36-2-27 is simply inaccurate.

"The prime purpose of licensing attorneys and in making them the exclusive practitioners in their field is to protect the public from the evils occasioned from unqualified persons performing legal services." The "prime purpose" being to "protect the unwary and the uninformed from injury at the hands of persons unskilled or unlearned in the law." See, *The State Bar of New Mexico v. Guardian Abstract and Title Co.,* 1978-NMSC-016, ¶20, 91 N.M. 434 (*Guardian Abstract I*) (internal citations omitted).

In *Guardian Abstract I*, a corporate title company completed documents related to the sale and transfer of real estate. The State and a Local Bar Association, not private third-parties, filed suit seeking to enjoin that conduct. In *Guardian Abstract I* this Court held that it is not the unauthorized practice of law for a non-lawyer to fill in the blanks on forms prepared by an attorney, where filling in the blanks requires only the use of common knowledge regarding the information to be inserted and where no legal advice is given to others. *Id*, ¶35. See, also, *The State Bar of New Mexico v. Guardian Abstract and Title Co.,* 1978-NMSC-096, ¶ 3, 92 N.M. 327 (reiterating this Court's holding in *Guardian Abstract I* that it is not the unauthorized practice of law for a person to fill in the blanks on legal forms).

This Court also held in *Guardian Abstract I* that "when filling in of the blanks affects substantial legal rights, **and if the reasonable protection of such rights requires legal skill and knowledge greater than that possessed by the average**

citizen, then such practice is restricted to members of the legal profession." *Id*, ¶35. (emphasis added) However, under Rule 2-107 this Court has determined that circumstances exists under which it is not the UPL for non-lawyers to represent themselves *pro se* in magistrate court. Under the facts and circumstance alleged in the Complaint and established by the record evidence, CGU is, and should be held to be, entitled to appear *pro se* in collection actions filed in magistrate court. The reasonable protection of the rights of Respondents or GCU do not require denying GCU the right to appear *pro se* in magistrate court in collection actions. Thus, no considerations which naturally and reasonably arise from the "prime purpose" apply here to support the conclusion that GCU's appearance *pro se* in magistrate court constitutes the UPL. *Guardian Abstract I,* ¶20.

C. The Complaint Alleged That GCU Violated NMRA 2-107 (B)(3) And NMSA § 36-2-28.1, Not That GCU Violated NMSA § 36-2-27

In the Complaint, under the first claim for relief (Unauthorized Practice of Law), Respondents assert that GCU violated both § 36-2-28.1 (sic) and Rule 2-107 (B) (3) and that GCU engaged in the UPL by appearing *pro se* in magistrate court. **[RP 6, ¶¶ 39-41]** In turn, Respondents rely exclusively on GCU's alleged UPL to support the claim that GCU violated the UPA. **[RP 6-7, ¶¶ 42-46]** The inextricable connection between the UPL claim and the UPA claim is clear on the face of the Complaint. Respondents' reliance on §36-2-28.1 and/or Rule 2-107 is misplaced.

Significantly, Respondents admit there is no private right of action under Rule 2-107 and admit they do not claim any such right. ("[GCU] argues that there is not a private right of action under NMRA 2-107. [Respondents] do not claim a private right of action under this rule. [Respondents] claim a violation of NMSA § 36-2-27, as interpreted by the Supreme Court in light of its rules.")] **[RP 68, nt. 2]** (emphasis added)[7] That admission is fatal to the Complaint and to the *Opinion*; as it compels the conclusion that the *Order* granting the *Motion* is correct, both as a matter of fact and law.

Knowing that to have a private right and remedy under § 36-2-28.1 there must be allegations and proof of a violation of § 36-2-27, Respondents erroneously contend that a violation of Rule 2-107 constitutes a violation of § 36-2-27, and that a violation of Rule 2-107 provides a remedy under § 36-2-28.1 and the UPA. **[Respondents' COA-BIC, pp. 1, 4, 11, 15-16]** The *Opinion* errs by accepting Respondents' erroneous contention regarding the effect of Rule 2-107 on § 36-2-27. *Opinion*, p. 6 ("And, by extension, a violation of Section 36-2-27 *as limited by Rule 2-107* is actionable under Section 36-2-28.1") (emphasis in original) Because, as Respondents concede, Rule 2-107 provides no private right of action or private remedy only the alleged violation of § 36-2-28.1 remains as the basis for the UPA

[7] Respondents did not explain the basis for their claim that Rule 2-107 is this Court's interpretation of § 36-2-27 and failed to provide any supporting authority.

claim asserted in the Compliant. **[RP 6-7, ¶¶39-46]** But, because § 36-2-28.1 is a remedy and not a right GCU did not, and could not, violate § 36-2-28.1. The Complaint, therefore, failed to state a claim.

As the district court recognized, and the *Opinion* fails to recognize, the Legislature has expressly determined that there is a remedy under § 36-2-28.1 if, and only if, there has been a proved violation of § 36-2-27. But, by appearing *pro se* in magistrate court GCU did not violate § 36-2-27 and the Complaint does not, and in good faith cannot, allege that it did.

D. Because GCU Did Not Violate Section 36-2-27 It Likewise Did Not Violate Section 36-2-28.1 And Respondents Have No Standing, Claim Or Remedy Under Section 36-2-28.1

Respondents erroneously assert that GCU violated § 36-2-28.1. **[RP 6, Complaint, ¶¶ 39-41]** That statute is titled: "Unauthorized practice of law; private remedies." It is clear from the language of § 36-2-28.1 that it provides a private remedy if, and only if, there is a violation of § 36-2-27. Under § 36-2-28.1 A. "[a] person **likely to be damaged by an unauthorized practice of law in violation of Section 36-2-27 NMSA 1978** may bring an action for an injunction against the **alleged violator**." (emphasis added) Under § 36-2-28.1 B "[a] person **who suffers a loss of money or other property** as a result of an unauthorized practice of law **in violation of Section 36-2-27 NMSA 1978** may bring an action for [damages]." (emphasis added)

Importantly, the Complaint does not allege that Respondents are "likely to be damaged by an unauthorized practice of law in violation of Section 36-2-27", nor that Respondents "[suffered] a loss of money or other property" or are likely to suffer such a loss in violation of § 36-2-27. Respondents, thus, lack standing. See, e.g., *ACLU of New Mexico v. City of Albuquerque*, 2008-NMSC-045, 144 N.M. 471. ("In [*De Vargas Sav. & Loan Ass'n v. Campbell*] this Court established the contours of the modern injury in fact standard that has since guided New Mexico courts. We noted that, though 'New Mexico has always required allegations of direct injury to the complaint to confer standing,... once the party seeking review alleges he himself is among the injured, the extend of injury can be very slight.'") *Id.*, ¶11 (citing and quoting from *De Vargas Sav. & Loan Ass'n v. Campbell*, 1975-NMSC-026, 87 N.M. 469.) The Complaint does not allege injury or any potential injury. Respondents are thus "improper plaintiffs" and lack standing. *Id.*, and *DeVargas*, 1975-NMSC-026, ¶6 (noting that the purpose of standing is to protect against improper plaintiffs).

Because GCU only filed actions *pro se* in magistrate court, which is expressly authorized by § 36-2-27, GCU is not an "alleged violator" of § 36-2-27. Because GCU did not violate § 36-2-27, as a matter of law, Respondents have no standing, claim, right or remedy under § 36-2-28.1. The district court, thus, correctly concluded that the Complaint fails to state a claim for a violation of § 36-2-28.1 (or § 36-2-27). The *Opinion* errs by holding otherwise.

E. Rule 2-107 Does Not Provide A Private Right Of Action Or Remedy For The Alleged Unauthorized Practice Of Law

In the first claim for relief, Respondents also assert that GCU violated Rule 2-107 (B) (3). **[RP 6, ¶¶ 39-41]** However, Rule 2-107 is a rule of this Court. On its face and as a matter of law, Rule 2-107 does not provide a private right or remedy for an alleged violation of that Rule. And, as established herein, Respondents freely admit they do not claim a private right or remedy under Rule 2-107 (B)(3). Because of this, and even absent Respondents' admission, the conclusion is inescapable: Respondents have no private right or remedy at all under Rule 2-107. Accordingly, the district court correctly dismissed the Complaint and the *Opinion* errs by reversing the *Order*.

Respondents also failed to establish that GCU's appearance in magistrate court is contrary to or in violation of Rule 2-107. As established and defined in NMSA 1978 § § 58-11-1 *et seq*., as a credit union GCU serves its Members and operates through its Members. See, e.g., § § 58-11-21, 58-11-24, 58-11-26 and 58-11-27. As alleged in the Complaint, Respondents and the putative class are, or were, among GCU's Members. It was GCU's Member/employees who filled in the blanks on the Court-approved forms and filed the *pro se* complaints in magistrate court. Persons who are not Members are not affected by GCU's practices and policies. Thus, GCU's *pro se* appearances in magistrate court do not address the market generally, but only GCU Members. Neither Rule 2-107 nor § 36-2-27 clearly

establish, expressly or implicitly, that it is prohibited for a credit union to represent itself *pro se* in magistrate court through its Member/employees.

The Complaint provided no well-pleaded facts that GCU's *pro se* appearances in magistrate court threaten the "prime purpose" of "protect[ing] the unwary and the uninformed from injury at the hands of persons unskilled or unlearned in the law." See, *The State Bar of New Mexico v. Guardian Abstract and Title Co.*, 1978-NMSC-016, ¶ 20. By holding the Respondents have standing the *Opinion* gives an unwarranted expansive reach to Rule 2-107 that is contrary to the public policy behind the Rule and that does not protect the interests of GCU's Members or the public.

F. The Complaint Fails To Make Necessary Allegations Of Fact Establishing That The UPA Applies And That GCU Violated The UPA

In the second claim for relief the Complaint asserts that GCU violated the UPA. **[RP 6-7, ¶¶42-46]** The UPA claim also fails to state a claim upon which relief can be granted and the district court correctly dismissed that claim. The *Opinion* errs by reversing the *Order*.

The UPA claim is predicated entirely on the assertion that GCU engaged in the UPL by appearing *pro se* in magistrate court. All facts in the Complaint (as opposed to legal conclusions and the parroting of certain statutory elements of the UPA) which are alleged to support the UPA claim are the same facts alleged to support the UPL claim. Further, a review of the UPA claim demonstrates that even

independent of the allegations regarding the UPL claim (of which there are none), the Complaint fails to state a claim for a violation of the UPA.

This Court long-ago determined that four elements must be established to state a claim under the UPA. These are: (1) the plaintiff must show that the defendant made an oral or written statement, visual presentation or other representation that was false or misleading, (2) the false or misleading statement was knowingly made by the defendant, (3) in the regular course of the defendant's trade, and (4) the defendant's representation must have been of the type that "may, tends to or does, deceive or mislead any person." All four elements must be met. See, *Ashlock v. Sunwest Bank of Roswell*, 1988-NMSC-026, ¶ 4, 107 N.M. 100 (citing NMSA 1978, § 57-12-2-(C) (Repl. Pamp. 1987)); *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶ 13, 112 N.M. 97 (citing *Ashlock*) "The gravamen of an unfair trade practice is a misleading, false, or deceptive statement made knowingly in connection with the sale of goods or services." See, *Diversey Corp. v. Chem-Source Corp.*, 1998-NMCA-112, ¶ 17, 125 N.M. 748. This Court has determined that the "knowingly made" or "made knowingly" requirement is satisfied only if it occurs in connection with making a false, misleading or deceptive statement of which the defendant was actually aware or should have been aware was false or misleading. *Stevenson,* supra, ¶ 17.

The Complaint does not allege that GCU knowingly made any false, misleading or deceptive statements "in connection with the sale of goods or services" to Respondents or in the text of any court-approved documents it completed and filed in magistrate courts. **[RP 1-8]** There are no allegations at all that GCU's pleadings contained any false or misleading statements and that Respondents, or any other persons, were deceived in any way. Nor does the Complaint allege who was deceived and in what way. Further, the Complaint fails to allege any facts establishing that by appearing *pro se* in magistrate court and filling in the blanks on, and filing, court-approved forms on its own behalf, that GCU knowingly made a false, misleading or deceptive statement in connection with GCU's trade that "may, tends to or does, deceive or mislead any person." At best, the Complaint alleges that GCU willfully appeared *pro se* in magistrate court to collect a debt. **[Complaint, RP 6-7, ¶¶40, 44-45]**

The *Opinion* errs by accepting Respondents' contention that GCU's appearance *pro se* in magistrate court is actionable under the UPA; regardless of whether a false or misleading statement that tends to deceive any person is contained in any of the court-approved forms completed and filed by GCU.

G. The *Opinion* Erroneously Concludes That Respondents Have Standing Under The UPA To Pursue A Class Action Against GCU For A Purported Violation Of Rule 2-107 (B)(3) And Section 36-2-27

The gravamen of Respondents' position is that even though they admittedly have no right or remedy under Rule 2-107 (B)(3), GCU's alleged violation of that Rule equates to a violation of § 36-2-27 which, in turn, constitutes a "violation" of §36-2-28.1, which in turn, is a violation of the UPA. The *Opinion* adopted this flawed logic and in doing so ignored the express and specific remedy the Legislature provided in § 36-2-28.1 for a proven violation of § 36-2-27.

New Mexico jurisprudence provides no support for the proposition that an alleged violation of a Rule of this Court, here Rule 2-107, constitutes or may constitute a violation of a statute promulgated by the Legislature, here the UPA or § 36-2-27 (or § 36-2-28.1). The *Opinion* errs by reaching the opposite conclusion. *Opinion*, p. 6 ("[W]e hold that Plaintiffs have stated actionable claims that GCU was engaged in the unauthorized practice of law in violation of Rule 2-107 (B)(3) and Section 36-2-27."); ("And, by extension, a violation of Section 36-2-27 *as limited by Rule 2-107* is actionable under Section 36-2-28.1") (italics in original).

As established herein, the factual allegations in the Complaint at their core rely exclusively on GCU's purported violation of Rule 2-107 (B)(3) as the foundation for the claim that GCU violated the UPA or § 36-2-27 (or § 36-2-28.1). Respondents admittedly have no private right of action or remedy under that Rule.

Given that admission, coupled with GCU establishing that it did not violate § 36-2-27, the district court properly dismissed the Complaint. The *Opinion* errs by reversing the *Order*.

H. Appearing *Pro Se* In Magistrate Court Under The Authority Of § 36-2-27 Is Not Prohibited Conduct The Legislature Intended To Or Did Declare Unlawful Under The UPA And The *Opinion* Errs By Holding That Respondents Have Standing Under The UPA

The UPL allegedly arising from GCU's *pro se* appearance in magistrate court pursuant to § 36-2-27 is not conduct expressly or implicitly declared unlawful by the Legislature under the UPA. By holding that Respondents have standing the *Opinion* erroneously holds that what the Legislature expressly declared lawful under §36-2-27 is implicitly declared unlawful under the UPA. The *Opinion* also renders §36-2 28.1 a nullity in favor of a claim under the UPA. Such results are contrary to the Legislature's intent and to the rules of statutory interpretation, construction and application.

"A statute must be construed so that no part of the statute is rendered surplusage or superfluous." See, *Katz v. N.M. Dept. of Human Servs.*, 1981-NMSC-012, ¶18, 95 N.M. 530. New Mexico courts are duty bound to construe statutes harmoniously. *See, e.g., State ex rel. Brandenburg v. Sanchez,* 2014-NMSC-022, ¶ 11, 329 P.3d 654 ("[w]e are charged with the responsibility of construing statutes harmoniously when possible."); *Luboyski v. Hill*, 1994-NMSC-032, ¶ 10, 117 N.M. 380 ("Whenever possible, we must read different legislative enactments as

harmonious instead of contradicting one another."); *Quintana v. N.M. Dept. of Corrections*, 1983-NMSC-066, ¶11, 100 N.M. 224, 227 ("When interpreting a statute we presume that the Legislature was informed as to existing law, and that the Legislature did not intend to enact a law inconsistent with existing law."); NMSA 1978, 12-2A-10 (A) (1997) ("If statutes appear to conflict, they must be construed, if possible, to give effect to each.")

The *Opinion* renders the phrase "except a magistrate court" found in § 36-2-27 surplusage or superfluous and nullifies GCU's right to appear *pro se* in magistrate court. To obtain that result the *Opinion* conflated or fused together Rule 2-107 and § 36-2-27. The *Opinion* cites no persuasive or controlling authority that supports conflating a Rule of this Court with a statute promulgated by the Legislature in order to provide Respondents standing under the UPA, and a remedy under the UPA or § 36-2-28.1.

Further, there is no conflict between § 36-2-27 or Rule 2-107 and any of the provisions of the UPA. Section 36-2-27 and Rule 2-107 are harmonious with the UPA. The UPA does not expressly, nor by implication, declare that a person, whether an individual who or a non-profit corporation that appears *pro se* in magistrate court contrary to Rule 2-107 or § 36-2-27 violates the UPA . Further, § 36-2-28.1 harmonizes with the UPA because it provides the same remedies as that

provided by the UPA in cases where there has been a proved violation of the UPA.[8] The present case, however, is not such as case.

The Legislature did not intend, and could not have intended, it to be "prohibited conduct" within the meaning of the UPA for a person to appear *pro se* in magistrate court under the "lawful conduct" authorized by § 36-2-27. Such a result is contrary to the clear language of § 36-2-27 and legislative intent. Similarly, the Legislature did not, and has no power to, intrude on this Court's prerogative by making a claimed violation of Rule 2-107 "prohibited conduct" under the UPA. Likewise, this Court has no Constitutional power to intrude on the Legislature's prerogative by declaring that a violation of Rule 2-107 is "prohibited conduct" within the meaning of the UPA. Yet, by holding that Respondents have standing, this is precisely the effect of the *Opinion*.

The *Opinion* should be reversed because it erroneously expands the protection under the UPA and thereby displaces the express and specific statutorily-created protections provided to consumers under § 36-2-27 and § 36-2-28.1.

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[8] The Complaint seeks injunctive relief, damages, treble damages, attorney's fees and costs. **[RP 1-8 *passim*, and RP 7-8, A-J]** The private remedy available under § 36-2-28.1 for a violation of § 36-2-27 is substantively identical to, and duplicates, the remedy Respondents seek under the UPA. See, § 36-2-28.1 A. (injunction); B. (restitution, damages and treble damages) and C. (fees and costs); and see § 57-12-10 A (injunction); B. (damages and treble damages) and C. (fees and costs).

I. An Alleged Violation Of Rule 2-107 Does Not Provide Respondents Standing Under The UPA Or Rule 2-107 And The Opinion Errs By Holding That Respondents Have Standing

Respondents lack standing to bring a claim under the UPA for the alleged UPL and the *Opinion* errs by holding otherwise. See, *Gandydancer*, 2019-NMSC-021, ¶ 7 ("However, '[w]here the Legislature has granted specific persons a cause of action by statute, the statute governs who has standing to sue.' *** 'Standing then becomes a jurisdictional prerequisite to an action' because standing is interwoven with subject matter jurisdiction.") (internal citations omitted.) See, also, *Guardian Abstract I,* 1978-NMSC-016, ¶¶ 14-15 (noting that the State Bar Association or Local Bar Associations are "the best informed, most responsible, and most interested party to initiate [alleged unauthorized practice of law] actions" and are "better equipped to combat unauthorized practice.")

As established herein Respondents lack standing to bring a claim under Rule 2-107. This is so for at least the following reasons: (1) Respondents have no private right of action or remedy under Rule 2-107; (2) the purported violation of Rule 2-107 is the basis for the (un-alleged) violation of § 36-2-27, and (3) the claims asserting violations of § 36-2-28.1 and the UPA depend on Respondents having a right and remedy under Rule 2-107—which they do not have. Further, this Court has never held that Rule 2-107 is this Court's interpretation of § 36-2-27 or that a private right of action exists under Rule 2-107.

These circumstances are fatal to Respondents' Complaint and further establish that Respondents lack standing to bring a claim for the alleged UPL under Rule 2-107 and, in turn, parlay that claim into an alleged violation of the UPA (or § 36-2-27) and § 36-2-28.1. Accordingly, the *Opinion* errs by reversing the *Order*.

J. Respondents' Claims Are Not Within The Zone Of Interest The Legislature Intended To Declare Unlawful Or To Protect Under The UPA, As The Legislature Intended To, And Did, Protect That Zone Of Interest Under § § 36-2-27 And 36-2-28.1 Not The UPA

Lack of standing is a potential jurisdictional defect which may not be waived and may be raised at any stage of the proceedings, even *sua sponte* by the appellate court. *Gandydancer,* 2019-NMSC-021 ¶ 7; *Bank of New York v. Romero,* 2014-NMSC-007, ¶ 15, 320 P.3d 1 (citing *Gunaji v. Macias*, 2001-NMSC-028, ¶ 20, 130 N.M. 734.) In *Gandydancer*, *supra*, this Court analyzed standing in the context of the UPA against the backdrop of legislation that provided a specific remedy for the alleged wrongful conduct for which relief was sought under the UPA. The plaintiff in *Gandydancer* relied on the defendant's lack of a construction license as the basis for the UPA claim. Here, Respondents rely on GCU's lack of a law license. However, because the Legislature provided a statutory remedy under the Construction Industries Licensing Act (CILA) this Court held that plaintiff had no standing and thus no claim under UPA for an alleged violation of CILA. That conclusion is likewise compelled here. The Legislature provided a statutory remedy for the UPL under § 36-2-28.1 for a proved violation of § 36-2-27.

In *Gandydancer* this Court reversed the CoA's opinion in *Gandydancer, LLC. v. Rock House CGM, LLC. and Karl G. Pergola*, 2018-NMCA-064, 429 P.3d 338, in which the CoA held that based upon a plain reading of the UPA a business had standing to sue another business for competitive injury. *Gandydancer,* 2019-NMSC at ¶¶ 1, 10, 42. This Court's analysis and holding in *Gandydancer* is controlling and applicable here. *Gandydancer* compels the conclusion that Respondents lack standing to sue GCU under the UPA on the theory that GCU violated the UPA by engaging in the UPL in violation of Rule 2-107 (or § 36-2-27) and § 36-2-28.1.

Applying *Gandydancer*, the conclusion is inescapable that a claim for practicing law without a license arising from a purported violation of Rule 2-107 or § 36-2-28.1 is not within the "zone of interest" the Legislature intended to protect or regulate by the UPA. The Legislature intended to protect that zone of interest under the express and specific statutorily-created cause of action in § 36-2-27 and remedy in § 36-2-28.1, not the UPA. See, *Gandydancer,* 2019-NMSC-021, ¶18 ("Although we acknowledge that the broad language of the UPA suggests that any person meeting the minimum requirement of injury may bring a claim (no matter the type or how remote) the zone of interest bars such an expansive interpretation of [the UPA]."") (citing *Key v. Chrysler Motors Corp*, 1996-NMSC-038, ¶¶ 29-35, 121 N.M. 764) In light of §§ 36-2-27 and 36-2-28.1, the UPA has no application here.

This Court further stated that the "zone of interest is a tool of statutory construction and a requirement of general application . . . The zone of interest applies to all statutorily created causes of action and limits who may assert a statutorily created cause of action, and we presume the Legislature legislates consistent with this background limitation and consistent with our current jurisprudence." *Gandydancer*, ¶16 (internal citations omitted.) Further, whether an asserted right is within the zone of interest to be protected or regulated by the UPA requires a court to determine the Legislature's intent "as expressed in the [UPA] or other relevant authority…" *Id.*, ¶16. Here, the *Opinion* fails to determine and carry-out the Legislature's intent as expressed in the UPA, § 36-2-27 and § 36-2-28.1, or other relevant authority.

In *Gandydancer* this Court quoted with approval the CoA's observation in *City of Sunland Park v. Santa Teresa Services Co.*, 2003-NMCA-106, ¶40, 134 N.M. 243, where the CoA said "[e]ven where a party demonstrates [injury], standing may be denied if the interest the complainant seeks to protect is not within the 'zone of interest' protected or regulated by the statute or constitutional provision the party is relying upon. The concepts of injury and zone of interest are thus intertwined" *Gandydancer.*, ¶ 17. "The statute must provide protection against the injury alleged." *Id.* (citing *Sunland Park* at ¶ 41) "And the identification of the interests protected by the statute allows a court to determine whether a plaintiff has

demonstrated that the asserted interest falls within the zone of interest protected." *Id.* (citing *Sunland Park* at ¶ 42) In this case, the CoA failed to adhere to this Court's controlling precedent in *Gandydancer,* as well as the CoA's opinion in *Sunland Park*.

Applying the zone of interest analysis here, the "zone of interest" the Legislature intended to protect or regulate in connection with the UPL is found in § 36-2-28.1 for a violation of § 36-2-27. The Legislature did not create a zone of interest under the UPA for a violation of § 36-2-27. Nor could it do so for an alleged violation of Rule 2-107. As the district court recognized, and the *Opinion* fails to recognize, the relationship, if any, of Rule 2-107 to § 36-2-27 falls under the purview and jurisdiction of this Court, not the district court, nor the CoA. Only this Court has the power to resolve the question of the contours of the relationship, if any, between Rule 2-107 and § 36-2-27. The contours and any relationship when applied to New Mexico credit unions such as GCU, and their Members, have not been clearly established and have not been unambiguously delineated. Certainly not in a way that supports the *Opinion's* holding that Respondents have standing to seek individual or class-wide relief against GCU under the UPA or otherwise.

Further, applying the UPA to an alleged violation of Rule 2-107 (or § 36-2-27) would displace the remedy the Legislature expressly and specifically created under § 36-2-28.1 for a violation of § 36-2-27 in favor of a generalized and

inapplicable claim under the UPA and, thereby, undermine the consumer protection specifically and expressly afforded by § 36-2-27 and § 36-2-28.1. This is precisely the broad expansion of the UPA this Court rejected. *Gandydancer*, ¶ 18 (stating that the zone of interest bars an expansive interpretation of the UPA). "It is within the purview of the Legislature to expand the zone of interest protected by the UPA to include [a specific claim] if that is a policy that the Legislature decides to pursue, but this Court should refrain from creating policy." *Id.*, ¶ 23 (internal citation and quote omitted)

In *Gandydancer* this Court concluded that "[it] presume[d] the Legislature is mindful of the tension between the UPA and CILA and has limited the zone of interest protected under the UPA to harmonize the acts in advancement of the public policy of protecting innocent consumers, and we decline to expand the zone of interest under the UPA without express direction from the Legislature." *Gandydancer*. *Id.*, ¶ 28. The same conclusion is compelled here. The CoA could neither resolve the question of the relationship, if any, of Rule 2-107 to § 36-2-27 nor "expand the zone of interest under the UPA without express direction from the Legislature." But, that is precisely the effect of the *Opinion*. The *Opinion* errs by failing to follow and apply well-established and controlling case law governing statutory interpretation and construction and by holding that Respondents have standing under the UPA for alleged violations of Rule 2-107 (B)(3) or § 36-2-27.

Finally, as this Court stated in *Gandydancer*: "[d]espite the broad language of Section 57-12-10 (B), the UPA limits who may bring a cause of action because it links the right to bring a cause of action to **prohibited conduct** and defines unlawful conduct in specific terms." *Gandydancer*, ¶21. (emphasis added) As a matter of law, appearing *pro se* in magistrate court is by virtue of § 36-2-27 (or Rule 2-107) not "prohibited conduct"; rather it is lawful conduct. The *Opinion* expands the UPA and thereby displaced the private remedy the Legislature created under § 36-2-28.1 for a proved violation of § 36-2-27. At a minimum, this Court's decision in *Gandydancer* forecloses such a result. Thus, the *Opinion* should be reversed and the *Order* should be reinstated.

K. New Mexico Jurisprudence Does Not Support The Conclusion That Rule 2-107 or § 36-2-27 Create A Cause Of Action Under The UPA For Practicing Law Without A License

The *Opinion's* holding or conclusion that Respondents have standing even though GCU did not represent them and they were not GCU's "client", and that they do not lack standing "simply because the legal services at issue were rendered to GCU and not Plaintiffs", is not supported by New Mexico jurisprudence and conflicts with controlling decisions of this Court. *Opinion, pp.* 3-4 and 9, and pp. 5-6, citing *The State Bar of New Mexico v. Guardian Abstract and Title Co.*, 1978-NMSC-016, 91 N.M. 434; *State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.*, 1973-NMSC-087, 85 N.M. 54; and *State of New Mexico v. Rivera*, 2012-

NMSC-003, 268 P. 3d 40. None of these cases support the *Opinion's* holding that Respondents have standing to pursue a claim for the UPL under the UPA, § 36-2-27 (or § 36-2-28.1).

The facts of these cases are entirely distinguishable. Among other things, GCU represented only itself in magistrate court and only by using and filling in the blanks on court-approved forms. GCU never represented the named Respondents, any putative class member, or any other third parties. Unlike the defendant in *Norvell*, GCU did not seek or receive an assignment of claims from a third party and it did not split any recovery with third parties. *Norvell*, 1973-NMSC-087, ¶9. Further, GCU gave no legal advice to anyone, it did not represent third parties in court, and it did not seek or collect a fee.

In the decisions cited in the *Opinion* the party charged with the UPL was not representing itself *pro se* in magistrate court, but rather represented others, usually for a fee. Additionally, in these cases an agency or entity of the State of New Mexico, or a local Bar Association, was the party with standing to seek to enjoin the unauthorized practice of law, not a private citizen to whom no services were rendered. Nothing in these cases can be interpreted to confer standing on Respondents to seek to enjoin the UPL or to bring a claim under the UPA for an alleged violation of Rule 2-107 or § 36-2-27.

These cases cannot be interpreted to confer standing on Respondents to seek relief under the UPA for the alleged UPL. In contrast, GCU has shown that no such standing exits. Further, none of these cases, nor any other New Mexico case, hold that appearing *pro se* in magistrate court is a "transaction" under the UPA. Also, these cases did not involve a claim by a plaintiff brought under Rule 2-107, § 36-2-27 or § 36-2-28.1 seeking to pursue a private action and remedy for an alleged violation of the UPA based upon the alleged UPL.

Rivera was decided in 2012, prior to the 2013 amendment to Rule 2-107 (B)(3). See, Rule 2-107, *Compiler Amendment Notes*. The 2013 amendment provided for the appearance of non-attorneys and authorized shareholders, members of corporations and limited liability companies to appear in magistrate court. By virtue of the 2013 amendment, the application of *Norvell* and *Rivera* to the facts of this case is doubtful. In *Rivera* this Court stated that: "Our holding in *Norvell*, later supplemented by rule, could not be clearer." *Rivera*, ¶12. However, after *Rivera* was decided, this Court again "supplemented" Rule 2-107 by amendment to permit what was not permissible when *Norvell* and *Rivera* were decided. In light of this amendment, the issue arises whether appearances *pro se* in magistrate court by non-profit corporation/credit unions, such as GCU, which have no shareholders, but which are composed of and operates through its Members, is permissible under Rule

2-107 (B) (3). It is certainly not clearly impermissible. In contrast, it is permissible under § 36-2-27.

Additionally, no case involved a lawsuit seeking to certify a class under Rule 1-023 for an alleged violation of the UPA based upon the alleged UPL in violation of Rule 2-107 (B) (3) or § 36-2-27. Even if GCU arguably violated Rule 2-107 (B) (3), which the *Opinion* did not so find or hold, it does not follow that Respondents have standing under the UPA to seek statutory damages for themselves or that the putative class can seek actual damages.[9] As established herein, as a matter of law, they do not have such standing.

The *Opinion* conflicts with prior decisions of this Court, expands the zone of interest under the UPA without express direction from the Legislature, and permits a private right of action under Rule 2-107 where none exists. The *Opinion* is thus erroneous and should be reversed.

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[9] In the district court Respondents contended that "Proof of damages is not required to recover under the UPA." **[RP 69]** Under the UPA that may be true for the named Respondents (if they had a viable claim, which they do not), but under the UPA that is not true for the putative class. Had the Complaint not been dismissed Respondents intended to seek certification of a class. **[RP 1-8]** While, NMSA 1978, § 57-12-10 (B) allows an award of statutory damages to a named plaintiff, § 57-12-10 (E) limits any award to a class member to "actual damages." *See, also, Brooks v. Norwest Corp.*, 2004-NMCA-134, ¶ 37, 136 N.M. 599 (citing § 57-12-10 (B) and (E)) (cert. denied).

VII. CONCLUSION

For the reasons set forth herein, GCU respectfully requests that this Court reverse the *Opinion* and reinstate the *Order* dismissing the Complaint, with prejudice.

Respectfully submitted,

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