IN THE SUPREME COURT OF 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 REPLY BRIEF

(ORAL ARGUMENT REQUESTED)

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STATEMENT OF COMPLIANCE

Undersigned counsel certifies that this *Defendant-Petitioner's Reply Brief* 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 3,021 words. This word count was obtained using Microsoft Office Word 2016 software.

I. ARGUMENT

In their Answer Brief Respondents go to some length attempting to avoid addressing what is actually at issue in this appeal. In this effort they seek to reframe or deflect the issues. To this end, Respondents invite this Court to ignore the Constitutional Separation of Powers between the New Mexico Judiciary and the New Mexico Legislature, as well the applicable New Mexico jurisprudence regarding the issues before the Court. Contrary to Respondents' contention, the issues raised in Petitioner, Guadalupe Credit Union's ("GCU"), *Brief-in-Chief* are not an exercise in hyper-technical arguments. *Answer Brief*, p. 35. To the contrary. In this appeal GCU asks the Court to recognize and apply to this case the New Mexico Constitution's separation of powers and the pertinent New Mexico statutes. This appeal also calls into issue the applicability, or not, of a Rule of this Court.

As argued in GCU's *Brief-in-Chief* and in the Court of Appeals, the core issue presented is whether Rule 2-107, NMRA, is this Court's interpretation of, or places limitations on, NMSA 1978 § 36-2-27. Rule 2-107 has no such force and effect and Respondents have not established that it does. But, should this Court decide it does, it does not follow as a matter of law that an alleged violation of Rule 2-107 is actionable under the New Mexico Unfair Practices Act, NMSA 1978 §§ 57-12-1 *et seq.* ("UPA") and/or NMSA, 1978, § 36-2-28.1. Rule 2-107 does not have such breath and scope and Respondents have not established that it does. In contrast,

GCU has established that the Complaint fails to state a claim under the UPA or § 36-2-28.1 upon which relief can be granted for the alleged unauthorized practice of law in violation of Rule 2-107 (B)(3) or § 36-2-27 (or § 36-2-28.1). GCU also established that Respondents lack standing under the UPA to bring such a claim, and that they failed to state a claim under § 36-2-28.1 when in the Complaint Respondents did not allege damages, loss or injury and brought no claim under § 37-2-27.

The *Answer Brief* either does not address, or fails to refute and counter, what actually is at issue in this appeal and what has been presented and argued in GCU's *Brief-in-Chief*. Rather, Respondents raise and discuss at length matters that are not at issue and which GCU has never challenged and put at issue. Respondents also rely on inapposite authority from this or other jurisdictions. These non-issues and corresponding inapposite authority include whether (1) Respondents are "consumers" under the UPA **[Answer Brief, pp. 6** ("Because Plaintiffs are consumers, the UPA applies.") and **9-25]**, (2) the text of certain provisions of the UPA that have no relevancy to the issue of GCU's alleged unauthorized practice of law **[Answer Brief, pp. 10-25]**, (3) the Federal Trade Commission's interpretation of consumer protection laws and case law from other jurisdictions **[Answer Brief, pp. 9-10]**, (4) whether the Complaint put GCU on notice of the claims against it **[Answer Brief, pp. 33-35]**, and (5) whether this Court has the Constitutional power

to promulgate rules governing the practice of law in New Mexico **[Answer Brief, pp. 25-26]**. None of these points and the corresponding arguments are at issue in this appeal and Respondents' reliance on them is misplaced. Consequently, all authorities cited in support of these arguments are inapposite.

Contrary to Respondents' contention otherwise, this case does not turn on Respondents' status as "consumers" under the UPA. Respondents' status as consumers and not GCU's competitors is irrelevant. What is relevant is that regardless of Respondents' status, Rule 2-107 provides no right of action under the UPA (or § 36-2-28.1) for the alleged unauthorized practice of law in violation of Rule 2-107 or § 36-2-27. The Legislature specifically intended to and did provide a right and remedy for the alleged unauthorized practice of law under § 36-2-28.1, but only for a violation of § 36-2-27, not the UPA. This is the import of the zone of interest analysis in GCU's *Brief-in-Chief.*

When the non-issues argued in the *Answer Brief* are set aside and the focus is returned to what is at issue in this appeal, it is apparent that the trial court correctly dismissed the Complaint for failure to state a claim and that the Court of Appeals' *Memorandum Opinion* (the "*Opinion*") reversing the *Order Granting Defendant's Motion to Dismiss with Prejudice* (the *"Order")* and remanding the case is erroneous. Accordingly, the *Opinion* should be reversed and the *Order* dismissing the Complaint, with prejudice, should be reinstated.

A. Respondents Admit That Rule 2-107 Does Not Provide A Private Right Of Action To Bring A Claim Under The UPA Or Section 36-2-28.1 And Therefore Whether Sections 36-2-27 and 36-2-28.1 Provide A Private Right Of Action Is Not At Issue And Is Irrelevant

In their *Answer Brief* Respondents argue that they have standing because the "statutes" governing the unauthorized practice of law provide a private right of action. The specific statutes Respondents cite are § 36-2-27 and § 36-2-28.1. **[AB, pp. 35-39]** Respondents do not argue that Rule 2-107 provides a private right of action. And, as established in the trial court and on appeal, Respondents admit they have no private right of action for an alleged violation of Rule 2-107. That admission, coupled with Respondents' acknowledgement that any private right of action for the unauthorized practice of law is solely a creature of statute under § 36-2-27 and § 36-2-28.1 establishes the merit of GCU's position on appeal. That is, Respondents do not have standing under the UPA to bring a claim against GCU for the unauthorized practice of law.

Applying Respondents' own analysis, even if (as Respondents contend without citation to authority) Rule 2-107 is this Court's interpretation of § 36-2-27, then, at best, Respondents would have standing to bring a claim under § 36-2-27 seeking relief under § 36-2-28.1. However, as GCU has established in the trial court and on appeal, nothing in Rule 2-107 can reasonably be interpreted or construed to grant Respondents standing to seek relief under the UPA for the alleged unauthorized practice of law in violation of § 36-2-27.

B. Whether Or Not Rule 2-107 Contains An Exception Applicable To GCU Is Immaterial

The arguments advanced in the *Answer Brief* regarding Rule 2-107 are devoted to discussing the text of the Rule and contending that the Rule does not include an exception applicable to GCU. **[AB, pp. 30-32]** However, GCU's arguments on appeal and a resolution of the issues before this Court do not depend on whether, or not, Rule 2-107 contains an exception applicable to GCU. The reason for this is simple and sufficient. As conceded by Respondents, they have no private right or remedy for a violation of Rule 2-107. Therefore, having no such right or remedy, Respondents lack standing to bring a claim under the UPA or § 36-2-27 (or § 36-2-28.1) for the alleged unauthorized practice of law based upon an alleged violation of Rule 2-107.

C. Respondents' Reliance On § 36-2-1 Is Unavailing

Respondents' reliance on § 36-2-1 is both curious and unavailing. **[AB, p. 26]** Section 36-2-1 does not make Rule 2-107, nor the UPA, applicable to an alleged violation of § 36-2-27 (or § 36-2-28.1). It also does not confer standing on Respondents to bring a claim under the UPA for the alleged unauthorized practice of law or establish that the Complaint states a claim upon which relief can be granted for an alleged violation of the UPA or § 36-2-27 (or § 36-2-28.1).

Section 36-2-1 is simply the Legislature's acknowledgement of this Court's constitutional authority to regulate the practice of law and to promulgate rules and

render decisions in that regard. Section 36-2-1 provides no support for Respondents' contention that Rule 2-107 is this Court's interpretation of § 36-2-27. Nor does it provide support for Respondents' contention that an alleged violation of § 36-2-27 (or § 36-2-28.1) confers standing under the UPA to bring a claim against GCU, and seek class certification, for the unauthorized practice of law.

D. GCU Has Established That Respondents Do Not Have Standing To Bring A Claim For The Alleged Unauthorized Practice Of Law Under The UPA

On appeal GCU has established that Respondents do not have standing under the UPA to pursue a claim against GCU for the unauthorized practice of law; that GCU did not violate § 36-2-27 or § 36-2-28.1; and, that the Complaint, therefore, failed to state a claim upon which relief can be granted.

Respondents' insistence that they have standing under the UPA to pursue a claim against GCU for the alleged unauthorized practice of law begs the question. Why do Respondents insist on pursuing a claim under the UPA for the unauthorized practice of law, when (as they acknowledge) the Legislature provided a remedy under § 36-2-28.1 for a proved violation of § 36-2-27? The answer appears obvious. Respondents could not base their unauthorized practice of law claim on a violation of § 36-2-27, because that statute permits *pro se* appearances in magistrate court. Further, Respondents realized that under § 36-2-28.1 they had to plead and prove damage or loss, whereas they believed that pleading and proof of actual damages, injury or loss is not required under the UPA. **[AB, p. 15]** (Quoting from NMSA §

57-12-10(A)) Notably, in contrast to the UPA, it is clear from § 36-2-27 and § 36-2-28.1 that the Legislature intended § 36-2-28.1 to apply only to a claim based upon a violation of § 36-2-27 and that proof of damage or loss is required in such a case.[1] In the Complaint Respondents sought to avoid not only pleading, but more importantly, being put to the task of proving actual damages and loss under § 36-2-28.1. The approach Respondents took in the Complaint is contrary to Legislative intent regarding what is required by a plaintiff to obtain relief for the alleged unauthorized practice of law. That intent is expressed in § 36-2-28.1, which clearly requires allegations and proof of loss and damages for the alleged unauthorized practice of law in violation of § 36-2-27.

The statutory remedy the Legislature provided in § 36-2-28.1 for a proved violation of § 36-2-27 renders the UPA unavailable as a remedy for the unauthorized practice of law. Thus, even if GCU violated § 36-2-27, which it did not, any claim for the unauthorized practice of law and any relief therefor is limited by the Legislature to § 36-2-28.1. Under no plausible theory can it reasonably be argued that the Legislature intended that a violation of § 36-2-27 (much less Rule 2-107)

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[1] 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)

gives rise to a claim under the UPA for the alleged unauthorized practice of law. Respondents' contentions otherwise are contrary to the Legislature's intent expressed in §36-2-27 and §36-2-28.1 and this Court's opinion in *Gandydancer, LLC. v. Rock House CGM, LLC. and Karl G. Pergola*, 2019-NMSC-021 (*Gandydancer*).

Finally, as Respondents note, the Legislature provided that a class action is potentially available under the UPA. **[AB, p. 15]** However, the Legislature intentionally made no express provision for a class action in § 36-2-28.1 for a proved violation of § 36-2-27. It seems clear that because of the requirement under § 36-2-28.1 for individual proof of loss and damages, the Legislature did not make a class action and class-wide relief available to a plaintiff under § 36-2-28.1. Respondents' desire to certify a class would, at a minimum, be undermined, if not denied, if Respondents' unauthorized practice of law claim was based upon § 36-2-27 and § 36-2-28.1, and not based upon or include a UPA claim.

It is reasonable to conclude that Respondents' pursuit of a claim under the UPA arises from a desire to (1) avoid the need to plead and prove loss and damages; and, (2) avoid denial of class certification. However, for the reasons set forth in GCU's *Brief-in-Chief* and in this *Reply Brief*, Respondents do not have standing under the UPA and the Complaint failed to state a claim upon which relief can be granted under the UPA and § 36-2-27 (or § 36-2-28.1).

E. GCU Correctly Applied This Court's Decision In *Gandydancer*

Respondents argue that GCU misconstrues this Court's opinion in *Gandydancer*. The gravamen of this contention is summed up in the *Answer Brief* where Respondents state "The standing analysis and the zone of interest analysis in *Gandydancer* was in recognition that the plaintiff in that lawsuit—unlike Plaintiffs here—could not be characterized as a consumer." **[AB, p. 18]** (quoting *Gandydancer* at ¶¶ 7-36) To the extent this contention has any validity, it is a distinction that has no application to this case and makes no difference to the standing (and other issues) before the Court. Respondents misconstrue or misstate GCU's argument regarding the application of *Gandydancer* to this case. Indeed, Respondents seek to do what this Court in *Gandydancer* cautioned courts against, if not foreclosed: expand the UPA beyond the zone of interests the Legislature intended to protect by the UPA. *Id.*, ¶ 18 (stating that the zone of interest bars an expansive interpretation of the UPA).

The principle that a competitor, or a person who is not a consumer within the meaning of the UPA, lacks standing to bring a claim for competitive injury is well-established in New Mexico. This principle was not first established in *Gandydancer*. See, e.g. *Gandydancer*, ¶ ¶ 29-36 (discussing and citing cases determining that the UPA does not apply to cases involving competitive injury). GCU's argument that Respondents lack standing to bring a claim under the UPA for the unauthorized

practice of law does not in any way hinge on whether Respondents are consumers within the meaning of the UPA. Rather, GCU's reliance on *Gandydancer* is based upon this Court's analysis of standing in the context of the zone of interests to be protected by the UPA. That is, GCU cites *Gandydancer* for the proposition that "[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. (citing, *City of Sunland Park v. Santa Teresa Services Co.*, 2003-NMCA-106, ¶40, 134 N.M. 243) And, continuing, "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)

Here, the statutes that provide protection against the injury alleged are § 36-2-27 and § 36-2-28.1, not the UPA. Regardless of Respondents' status as consumers they have no standing under the UPA because of the statutory right and remedy the Legislature specifically and intentionally made available under § 36-2-27 and § 36-2-28.1 for claims based upon the unauthorized practice of law in magistrate courts.

In sum, the zone of interest to be protected arising from the unauthorized practice of law is protected by § 36-2-27 and § 36-2-28.1, not by the UPA.

In *Gandydancer* this Court gleaned or determined the Legislature's intend regarding the zone of interested to be protected by the UPA from the fact that the Legislature had amended the UPA to delete competitive injury as actionable under the UPA. *Gandydancer*, ¶ ¶ 19-20. That approach is not available to the Court here because there was never any language in the UPA that referred to the unauthorized practice of law, expressly or by implication. Thus, there was nothing for the Legislature to delete. No such language was in the UPA because the Legislature intended to and did provide a right and remedy for the unauthorized practice of law in § 36-2-28.1 for a violation of § 36-2-27. The existence of a Legislative right and remedy for the alleged unauthorized practice of law in § 36-2-28.1 for a violation of § 36-2-27 renders the UPA inapplicable and beyond the zone of interests the Legislature intended to protect by the UPA.

Finally, at the risk of stating the obvious, it is worth emphasizing that Respondents do not claim that GCU would have violated the UPA had it been represented by counsel in magistrate court. Thus, it is not the act of seeking to collect a debt in magistrate court that is or can be the UPA violation. Rather, Respondents' theory is that the UPA violation is GCU's appearance *pro se* in magistrate court. But, Respondents' logic only swings us full circle back to what has been established

on appeal: (1) the zone of interest protected, and the specific remedy provided, by the Legislature is found in § 36-2-27 and § 36-2-28.1, thereby depriving Respondents of standing under the UPA; and, (2) Rule 2-107 provides no private right of action to Respondents under the UPA or § 36-2-27 and § 36-2-28.1 for the unauthorized practice of law. Consequently, the Complaint fails to state a claim upon which relief can be granted and the trial court properly dismissed the Complaint.

II. CONCLUSION

Contrary to Respondents' contention otherwise, none of the arguments in in GCU's *Brief-in-Chief* nor in this *Reply Brief* are hyper-technical. Far from it. GCU's arguments below and before this Court apply the applicable New Mexico jurisprudence, including constitutional law and rules of statutory construction and interpretation, to the facts alleged and the claims brought in the Complaint—the consequences of which Respondents seek to avoid.

For the reasons set forth in GCU's *Brief-in-Chief* and this *Reply Brief*, GCU respectfully requests that the Court reverse the *Opinion* and reinstate the *Order* dismissing the Complaint, with prejudice.

Respectfully submitted,

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