IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

BEATRICE C. ROMERO, and MICHAEL FERREE, on behalf of themselves and all others similarly situated,

Plaintiffs-Respondents,

v.

PHILIP MORRIS INC.; R.J. REYNOLDS TOBACCO CO.; BROWN & WILLIAMSON TOBACCO CORP.

Defendants-Petitioners,

and

LORILLARD TOBACCO CO.; LIGGETT GROUP, INC.; and BROOKE GROUP, LTD.,

Defendants-Appellees.

Cause No. 8/31,433

COA Cause No. 26,993

BRIEF FOR AMICI CURIAE ASSOCIATION OF COMMERCE AND INDUSTRY OF NEW MEXICO, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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INTRODUCTION

The Association of Commerce and Industry of New Mexico ("ACI") is a state-wide business advocate and the New Mexico affiliate of the U.S. Chamber of Commerce and the National Association of Manufacturers. The organization comprises 1,200 member businesses of all types and sizes throughout New Mexico. ACI works closely with the executive and legislative branches of state government to support laws and regulations that will foster a thriving business climate in New Mexico.

Representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries, amicus the Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber advocates the interests of its members in matters before the courts, Congress, and the executive branch. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of vital concern to the nation's business community.

The National Association of Manufacturers ("the NAM") is the nation's largest industrial trade organization, representing small and large manufacturers in every industrial sector and in all 50 States. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding

among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

Members of all three amici have been involved in antitrust litigation in state and federal courts. Although such litigation often benefits both the business community and consumers nationwide when it generates enhanced competition and leads to more efficient markets, it is capable of abuse in a way that burdens the nation's economy. By diverting resources away from productive economic uses, meritless antitrust actions threaten to slow the spread of new investments, reduce the efficiency of capital markets, and limit the competitiveness of the American economy. Amici have a strong interest in ensuring that both the requirements of the substantive antitrust laws and those of the New Mexico Rules of Civil Procedure are applied in a correct and uniform manner, weeding out meritless suits as quickly and regularly as practicable.

In several respects, the Court of Appeals' decision makes it far more likely that businesses engaged in legitimate, productive, competitive economic activity in New Mexico will be threatened with crippling antitrust liability. First, the Court of Appeals departed from New Mexico precedent by holding that the summary judgment standard in this State is more stringent than the federal standard. In addition, the Court of Appeals diverged sharply from both New Mexico and federal law by holding that a jury may find conspiracy based upon nothing more

than evidence of "parallelism" in industry-wide prices where the industry at issue is "complex" and "multi-variable." That ruling substantially lowers the threshold for establishing a conspiracy to violate New Mexico's antitrust laws, making it much easier for a plaintiff to bring antitrust claims against businesses in oligopolistic industries—and virtually impossible for businesses to predict the circumstances that will give rise to such liability or to conform their conduct to the law. The decision disrupts the business climate in the State because it is likely to result in the imposition of antitrust liability, and consequently treble damages, for lawful conduct. This Court's review is warranted.

Amici adopt the statement of material facts and the questions presented in the Petition of the Defendants-Petitioners.

ARGUMENT

I. This Court's Review Is Warranted To Clarify The Summary Judgment Standard.

The decision below reflects a continuing misunderstanding among the lower courts regarding the proper application of the standard for summary judgment. Rule 1-056(C) requires the entry of summary judgment when "there is no genuine issue as to any material fact and *** the moving party is entitled to judgment as a matter of law." The operative language of the New Mexico rule is identical to that of Federal Rule of Civil Procedure 56(c). But there is a split among panels of the Court of Appeals on the question whether the New Mexico rule should be applied

differently from the federal rule. In at least one case, the Court of Appeals squarely held that "the federal and our own state's constructions of summary judgment do not differ substantively." *Wolford v. Lasater*, 1999-NMCA-24, ¶ 11, 126 N.M. 614, 617, 973 P.2d 866, 869 (1999); *see also Goradia v. Hahn Co.*, 111 N.M. 779, 781-82, 810 P.2d 798, 800-01 (1991) (citing federal cases for interpretation of state rule); *Paca v. K-Mart Corp.*, 108 N.M. 479, 480, 775 P.2d 245, 246 (1989) (same); *Bartlett v. Mirabal*, 2000-NMCA-036, ¶ 50, 128 N.M. 830, 840, 999 P.2d 1062, 1072 (2000) (Alarid, J., specially concurring) (seeking "express directive of our Supreme Court" confirming that federal and state summary judgment standards are identical).

In this case, however, the Court of Appeals held—just as squarely—that the New Mexico summary judgment standard differs from the federal one: "notwithstanding the correspondence between the operative language of Rule 1-056(C) and Federal Rule 56(c), the ethos of New Mexico courts is less favorable to disposing of cases through summary judgment than that of federal courts." Op. 13. This ruling enabled the Court of Appeals to reconcile its decision denying summary judgment with the decisions of federal courts granting and affirming summary judgment to the same defendants on the same factual record presented here. *See* Op. 10 (distinguishing *Williamson Oil Co. v. Philip Morris USA*, 346

F.3d 1287 (11th Cir. 2003) and *Holiday Wholesale Grocery Co. v. Philip Morris Inc.*, 231 F. Supp. 2d 1253 (N.D. Ga. 2002) on this basis).

The Court of Appeals appears to have applied the rule that "[i]f there is the *slightest doubt* as to the existence of material factual issues, summary judgment should be denied." *Ocana v. Am. Furniture Co.*, 2004-NMSC-018, ¶ 22, 135 N.M. 539, 549, 91 P.3d 58, 68 (2004) (cited at Op. 12) (emphasis added). When this Court had occasion to expressly consider this issue, however, it concluded that "[a] better formulation would be that the party opposing the motion is to be given the benefit of all *reasonable doubts* in determining whether a genuine issue exists." *Koenig v. Perez*, 104 N.M. 664, 666, 726 P.2d 341, 343 (1986) (quoting *Goodman v. Brock*, 83 N.M. 789, 792, 498 P.2d 676, 679 (1972)) (emphasis in *Koenig*). The continuing use of the vestigial "slightest doubt" language has sown confusion among lower courts. The Court should make clear that summary judgment must be granted if no reasonable jury could find for the non-moving party. *See Goodman*, 83 N.M. at 792, 498 P.2d at 679 (adoption of slightest doubt standard would "mean that there could hardly ever be a summary judgment, for at least a slight doubt can be developed as to practically all things human").

This Court's review is warranted both because of the potential for forum shopping and the obvious need for clarity on such a fundamental principle of civil

procedure. That need for clarity is particularly acute in antitrust cases, as the Seventh Circuit has warned.

> [n]ot only do antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work, but also *** the statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation. The ultimate determination, after trial, that an antitrust claim is unfounded may come too late to guard against the evils that occur along the way.

Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1167 (7th Cir. 1978) (citation omitted); *see also Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1966-67 (2007). Neither plaintiffs nor the Court of Appeals has offered any reason for New Mexico to subject its businesses to excessive litigation costs and settlement pressure on the basis of flimsy evidence.

II. The Decision Below Gives Rise To A Significant Risk of Liability for Lawful Conduct And Creates Great Uncertainty For Companies Doing Business In New Mexico.

A. The Court of Appeals Abandoned The Rule That A Conspiracy Cannot Be Inferred From Evidence Of Parallel Pricing.

The Court of Appeals held below that, in a "complex, multi-variable industry," a plaintiff can prove a conspiracy to violate the antitrust laws by adducing nothing more than evidence of "parallelism" in industry-wide prices. That ruling poses serious risks of liability for innocent behavior and represents a dramatic departure from established principles of substantive antitrust law. It departs sharply from federal caselaw, in defiance of the statutory requirement that "the [New Mexico] Antitrust Act shall be construed in harmony with judicial

interpretations of the federal antitrust laws." NMSA 1978, § 57-1-15 (1979); *see also Smith Mach. Corp. v. Hesston, Inc.*, 102 N.M. 245, 249, 694 P.2d 501, 505 (1985) (purpose of statute is "to achieve uniform application of the state and federal laws prohibiting restraints of trade and monopolistic practices") (quoting NMSA 1978, § 57-1-15 (1979)).

Although federal courts permit reliance on circumstantial evidence to prove a conspiracy to violate the antitrust laws, they are also careful to guard against the risk that legitimate competitive activity will be mischaracterized as illegal. *See, e.g., Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). Thus, those courts hold that evidence of parallel pricing, without more, does not support an inference of an illegal conspiracy. That is because such pricing patterns are often attributable to lawful, unilateral conduct: the "process, *not in itself unlawful*, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interest and their interdependence with respect to price and output decisions." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (emphasis added). This process is known as "conscious parallelism." *Id.* *See also* 6 AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 1433a, at 236 (2d ed. 2003) ("The courts are nearly unanimous

in saying that mere interdependent parallelism does not establish the contract, combination, or conspiracy required by Sherman Act § 1.").

Accordingly, under federal law a plaintiff must present proof of parallel conduct *plus* additional "evidence that 'tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita*, 475 U.S. at 575. *See also Bell Atl. Co.*, 127 S. Ct. at 1966 ("lawful parallel conduct fails to bespeak unlawful agreement ***. Without more, parallel conduct does not suggest conspiracy."). The latter type of evidence is referred to as a "plus factor." *See* Op. 20. Even plaintiffs conceded that "parallel pricing alone cannot create liability for price fixing." Pl. BIC at 34.

Contrary to NMSA 1978 § 57-1-15 (1979), however, the Court of Appeals explicitly refused to follow federal law. *See* Op. 19, 21. It held that in a "complex, multi-variable industry," lawful conscious parallelism is an "improbable" explanation for parallel pricing. *Id.* at 30 (citing *Brooke Group*, 509 U.S. at 239). When bringing an antitrust claim against participants in such an industry, therefore, a plaintiff can survive a defendant's motion for summary judgment—and put his conspiracy claim to the jury—simply by offering testimony from a paid expert "that the character or degree of parallelism actually exhibited by prices exceeds the parallelism that economic theory predicts would result from independent competitive behavior." Op. 27. Such testimony, the court held, "constitutes an

extremely forceful 'plus factor'" that allows the jury to infer conspiracy from parallel pricing alone. *Id*.

This ruling substantially lowers the threshold for establishing an antitrust conspiracy in New Mexico, makes it significantly more likely that liability will be imposed for lawful, competitive conduct, and dramatically increases the pressure to settle questionable cases. Conscious parallelism is almost inevitable in an industry where there are only a few firms; as the Court of Appeals recognized, parallel pricing is "inherent in the structure of an oligopoly." Op. 19. Moreover, individual businesses have no control over the degree of industry-wide parallelism. Accordingly, the rule adopted by the Court of Appeals will impose sizable costs on defendants and courts ***even where no unlawful activity occurred***. If the decision is permitted to stand, the prospect of liability based solely on industry-wide patterns that have no connection to conspiracy and over which individual businesses have no control will lead to a litigation bonanza that discourages legitimate business activity in New Mexico while doing nothing to improve competition.

B. The Court Of Appeals Failed To Establish A Legal Standard That Can Be Applied Predictably In Future Cases.

In addition to expanding the scope of antitrust liability under New Mexico law, the decision below creates two sources of tremendous uncertainty for companies doing business in New Mexico.

First, the Court of Appeals simply failed to announce a legal standard that can be applied in future cases. It held that evidence of parallel pricing suffices to show conspiracy in a "complex, multi-variable industry"—but it failed to define that term, which is broad and vague enough to apply to virtually any group of businesses. The phrase is loosely derived from the United States Supreme Court's decision in *Brooke Group*. But that decision did not hold that conspiracy may be inferred from parallel pricing; rather, it dismissed a predatory pricing claim, partly on the basis that the plaintiffs' theory of recoupment through parallel pricing was unlikely. The Court of Appeals' reference to *Brooke Group* does not provide the lower courts with any guidance as to the circumstances under which such evidence will be sufficient to prove conspiracy. Thus, whether a firm doing business in New Mexico can be subject to liability—and treble damages—based on the pricing behavior of its competitors now depends, not on any articulated rule of law, but on a standardless characterization of the industry as "complex" and "multi-variable." That approach not only engenders uncertainty but virtually ensures uneven results in practice. At a minimum, review is necessary to clarify the proper use of parallel pricing evidence.

Second, the Court of Appeals did not identify the necessary factual predicate for a finding that the degree of parallelism in an industry exceeds that which "economic theory predicts would result from independent competitive behavior."

Op. 27. The court purported to rely entirely and uncritically on the testimony of plaintiffs' economic expert, Keith Leffler, to the effect that the evidence of parallelism in this case was of such a "character or degree" as to render independent action implausible. *Id.* at 27. Moreover, based on the conclusions that it drew from Leffler's testimony, the court rejected the *rule of law* against inferring conspiracy from parallel pricing. The court noted that "evidence derived from economics *** directly engages the assumptions on which the *judicial doctrine* of conscious parallelism depends" (*id.* at 27-28 (emphasis added)) and that "[w]e are not inclined to appoint ourselves amateur economists and attempt to second guess Dr. Leffler's reasoning." *Id.* at 32. Thus, after discarding "federal precedent" requiring plus factors in favor of its own "independent and rigorous evaluation of the evidence" (*id.* at 21), the court ruled that it was "not inclined" to conduct such a review. Without clarification from this Court, trial courts may interpret this language to mean that any legal principle may be discarded on a case-by-case basis based solely on expert testimony—testimony that the Court of Appeals believed it was under no obligation to examine, and indeed accepted at face value.

Courts in other jurisdictions have repeatedly warned against unquestioning reliance on unexamined expert opinions in antitrust cases, especially to divine the existence of a conspiracy. *See, e.g.*, *Brooke Group*, 509 U.S. at 242 ("Expert

testimony is useful as a guide to interpreting market facts, but it is not a substitute for them."); *Mid-State Fertilizer Co. v. Exch. Nat'l Bank of Chicago*, 877 F.2d 1333, 1340 (7th Cir. 1989) (Easterbrook, J.) ("Judges should not be buffaloed by unreasoned expert opinions. *** [U]kase in the guise of expertise is a plague in contemporary litigation.") (citing Paul Meier, *Damned Liars and Expert Witnesses*, 81 J. AM. STATISTICAL ASS'N 269 (1986)); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1057 (8th Cir. 2000) ("An expert opinion cannot sustain a jury's verdict when it 'is not supported by sufficient facts to validate it in the eyes of the law ***. '") (quoting *Brooke Group*, 509 U.S. at 242). Many economists agree. *See* Herbert Hovenkamp, *Economic Experts in Antitrust Cases*, *in* DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE § 38-2.0, at 179 (1999) ("the discipline of economics ha[s] no competence to determine whether parallel behavior among independent actors amount[s] to a legal 'agreement,'" because "economists typically don't care whether firms have 'agreed' in the legal sense of the term"); Roger D. Blair & Jill Boylston Herndon, *Inferring Collusion from Economic Evidence*, ANTITRUST, Summer 2001, at 17, 18 ("if an expert reviews ambiguous economic evidence and concludes that it is only consistent with explicit collusion, he or she may have gone too far"); George J. Stigler (Nobel laureate in Economics), *What Does an Economist Know?*, 33 J. LEGAL EDUC. 311, 312 (1983). Economists dispute many issues within antitrust law alone; if applied generally, the

Court of Appeals' extreme deference to expert witnesses would cast the entire substantive law in doubt, rendering almost any business decision, especially in a concentrated industry, susceptible to litigation.

CONCLUSION

The Court should grant certiorari and correct the Court of Appeals' legal errors.

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