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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

SUSAN BISHOP and MARK SKOFIELD,
as Class Representatives in their capacities as
Personal Representatives of the Estate of
RICHARD H. SKOFIELD,

Plaintiffs/Appellants,

v. Court App. No. 25,510

THE EVANGELICAL GOOD SAMARITAN SOCIETY,
a foreign corporation, d/b/a
MANZANO DEL SOL GOOD SAMARITAN VILLAGE,

Defendants/Cross-Appellants.

APPELLANTS' ANSWER BRIEF

On Appeal From the Second Judicial District Court

The Honorable Wendy S. York (presiding until appeal)
The Honorable Linda M. Vanzi (currently presiding)

JEFFRIES, RUGGE, ROSALES, PC

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ADDITIONAL SUMMARY OF PROCEEDINGS

In addition to those facts presented in the Plaintiffs' Brief in Chief summarizing the case as well as the findings and conclusions entered by the District Court, the Plaintiffs submit the following information is pertinent to the consideration of the appeal.

Findings Not Challenged and Additional Record

The District Court entered a number of findings of fact which are not subject to proper attack by the Defendant on appeal. These findings include the following findings. The Defendant did not consider whether increases it proposed to impose complied with the Continuing Care Act ("CCA") prior to doing so. Record Proper ("RP") 4715 ¶ 13. It increased fees throughout the class period, except for 1999. RP 3388 ¶ 12; RP 4715 ¶ 12. Consequent to those increases, and in part based on those increases, the Defendant experienced long-term, extraordinary rates of return. RP 3391 ¶¶ 17-18; RP 4716 ¶¶ 17-18. In doing so, the Defendant accumulated substantial resources, in part, measured in its equity in the facility. RP 4717 ¶ 24; see also TR Vol. 7 at 169-170. Manzano del Sol was one of the most profitable facilities within the network. Transcript of Record ("TR") Vol. 6 at 44; Vol. 7 at 27 and 77; Vol. 8 at 122.

The chief auditor for Good Samaritan, in reviewing the statistical performance of Manzano del Sol, found that "the normal investor would require return on his investment of somewhere between 12 and 15%," RP 4717 ¶ 22(b), and an administrator at Manzano del Sol, who opposed, but was overruled in the context of increases, stated at the time that 12.7% of revenue as a return, "seemed like a very healthy figure." RP 4717 ¶ 22(a); *see also* TR Vol. 8 at 215-220. Bruce Malott testified that, in his experience as a Certified Public Accountant, return on investment is a commonly used term with a generally accepted meaning. RP 4715 ¶ 14. He found that a reasonable rate of return was approximately 12.35%. RP 4716 ¶ 21. The Defendant

did not introduce testimony, from an expert or otherwise, supporting the conclusion that, had it analyzed its rates under the Continuing Care Act, the rates of return would have been reasonable. RP 4717 ¶ 23. The only effort to distinguish Stene's analysis from the statutory analysis was found to be not worthy of credence. RP 4717 ¶ 22(b).

While Katherine Brod testified that the Defendant was "prudent," RP 4717 ¶ 25, she did not testify that the rates of return were reasonable. The Defendant is, itself, a non-profit operation. RP 4713 ¶ 2. This status allows the Defendant to receive two significant competitive advantages over for-profit facilities: "it is able to accept and record charitable donations," and "it is largely, but not entirely, exempt from taxation." *Id.* The only charitable purposes apparently recognized by Manzano del Sol were "Medicaid" and payments on behalf of residents who are out of money. TR Vol. 7 at 51-52. The exemption from taxation permits the Defendant to avoid approximately $300,000 in annual property taxes alone. RP 4718 ¶ 27. Accordingly, for-profit facilities are not comparable, RP 4718 ¶ 28. Dan Hanson, regional director for Good Samaritan emphasized the point: "We don't have stockholders to satisfy. We don't have to return money to anybody." TR Vol. 7 at 176: 16-24.

The Defendant "obtained an unreasonably high rate of return on its investment in Manzano del Sol, given the particular financial picture of the Defendant." RP 4718 ¶ 29. In obtaining that return, and in failing to conduct the appropriate analysis, the Defendant violated the CCA and materially breached the contracts with residents at Manzano del Sol. RP 4719 ¶¶ 33-35. The Defendant also approached Richard Skofield with some cynicism, an approach that infected capital improvements, *see* TR Vol. 7 at 104-05 and Plaintiffs' Exhibit 22, as well as alleged planning for an assisted living operation. TR Vol. 7 at 130 and Court Exhibit 45.

Although the Defendant discusses in its "factual" presentation a recitation of what it recalls of the pattern of offers and responses, it does not fully describe those facts. *See* RP 3525-33. Throughout the litigation, the Defendant's offers to settle for $50,000 in costs, or $100,000 in attorneys fees, or direct payments to the Plaintiff (but nothing to the class) were perceived as motivated to either separate the Class Representative from the Plaintiff Class, the Class Counsel from the Plaintiff Class, or the Plaintiff Class from their legal rights. Under those circumstances, the District Court found that prejudgment interest was properly awarded. RP 4590-92.

Notice to the Class in Advance of Trial

Prior to the 2002 trial, the Plaintiffs received notice of the pendency of the action through a series of efforts to identify the Plaintiffs' current addresses and homes. The Notice was of a form approved by the District Court's Special Master, Briggs F. Cheney, Esq., and then affirmed by the District Court with modifications. The Defendant appears to suggest that notice was provided by a single mailing known to be inadequate, contrary to the evidence and testimony provided to the District Court.

As detailed in the Report to the Court Regarding Notice, RP 2794-2847, the Plaintiffs provided extensive notice to potential members of the class. While the Defendant asserts that notice was first mailed to all classmembers at Manzano del Sol, this is incorrect, RP 2795, although most identifiable members of the class first received notice by mailing at Manzano del Sol, RP 2796. If envelopes from the first mailing were returned as undeliverable, then efforts to identify potential addresses for the individuals were undertaken. Then, staff began making computerized searches for contact information, which allowed the identification of an additional 28 addresses for classmembers. These mailings were made by certified mail, return receipt requested. RP 2797.

In addition, the Plaintiffs provided notice by publication and posting. The published notice was made by publishing notices, approved by the Court, in three separate papers of general circulation in the Albuquerque and New Mexico regions, on their respective highest days of circulation. The Plaintiffs published in the Albuquerque Journal (on Sunday), the Albuquerque Tribune (on Saturday) and the Rio Rancho Observer (on Friday). RP 2798; RP 2830-2835. A copy of the notice was posted in Manzano del Sol, apparently on August 30, 2002. RP 2799. It is not clear why the Defendant delayed in providing the notice, however, there was no evidence submitted suggesting that the delay in posting notice somehow prejudiced any person who might have wanted to opt out, especially as the District Court accepted "opt out" forms until judgment was entered.

ARGUMENT

As best can be determined, the Defendant does not directly challenge any finding of fact drawn by the District Court in her Amended Findings of Fact and Conclusions law.[1] *Griffin v. Guadalupe Medical Center, Inc.*, 1997-NMCA-012 ¶ 4, 123 N.M. 60, 933 P.2d 859 ("Unchallenged findings of fact are binding on appeal."); *Winrock Enterprises, Inc. v. House of Fabrics of New Mexico, Inc.*, 91 N.M. 661, 579 P.2d 787 (1978) ("Findings that are not challenged are binding upon this Court on appeal."). The Plaintiffs will not recite each fact that is binding on appeal, however, the findings entered by the Court govern this appeal in all regards, the Defendant's occasional suggestions to the contrary notwithstanding.

[1] There are, however, other challenges, those are addressed below.

I. The Continuing Care Act is Constitutional and the Defendant's Arguments that it Could Not Conform its Conduct to the Continuing Care Act (and its own contracts) is Erroneous.

A. Introduction and Standard of Review.

The Defendant asserts that it could not conform its conduct to the Continuing Care Act or its contracts with individual residents. The Defendant tenders no evidence whatsoever showing that it attempted to understand the language of the Act or the contracts; that it sought legal guidance in complying with the language; or that it even sought an explanation from the State of New Mexico to guide its conduct. Put simply, the Defendant's response to the four elements in each contract with every resident was to ignore them and to blithely assume that the Continuing Care Act did not really apply to it.

The Defendant may have preserved its argument for appeal, but it understates the applicable standard of review. While the Court technically applies a *de novo* standard, it is a mixed question of law and fact. *See State v. Flores*, 1996-NMCA-059 ¶ 6, 122 N.M. 84, 920 P.2d 1038. As a preliminary matter, the Defendant may only challenge the statute as applied to it, and not more broadly, when challenging a statute based on alleged vagueness. *Garcia v. Village of Tijeras*, 108 N.M. 116, 118, 767 P.2d 355, 357 (Ct. App. 1988). The Defendant cites to no evidence in support of its claim that it could not understand the CCA or its contracts with residents. Nor does it cite to any evidence that it took reasonable steps calculated to understand the CCA or the residents' contracts.

In the context of constitutionality, the threshold test is notice. *State v. Laguna*, 1999-NMCA-152, ¶ 25, 128 N.M. 345, 992 P.2d 896. Mere differences of opinion as to the construction of a statute or whether specific conduct meets the statutory test do not render a statute unconstitutionally vague. *State ex rel. Health & Social Servs. Dep't v. Natural Father*, 93

N.M. 222, 225, 598 P.2d 1182, 1185 (Ct.App. 1979). The Defendant here understood and accepted that the Continuing Care Act applied to its operations in New Mexico, and even purported to comply with it.

In the context of constitutional challenges, statutory provisions presumptively entitled to enforcement, *see Espanola Housing Authority v. Atencio*, 90 N.M. 787, 788, 568 P.2d 1233, 1234 (1977) ("It is well settled that there is a presumption of the validity and regularity of legislative enactments."). This presumption is bolstered handsomely by the judicial recognition that "we must uphold such enactments unless we are satisfied beyond all reasonable doubt that the Legislature went outside the bounds fixed by the Constitution in enacting the challenged legislation." *State ex rel. Udall v. Public Employees Retirement Bd.*, 120 N.M. 786, 788, 907 P.2d 190, 192 (1995); *see also Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982) ("the complainant must demonstrate that the law is impermissibly vague in all of its applications.").

Finally, in the context of non-criminal statutes – those arising out of the Legislative power to regulate for the public morals, health, safety, and general welfare – our courts have recognized the need for flexibility, even imprecision, in statutory and regulatory language. *State ex rel. Sofeico v. Heffernan*, 41 N.M. 219, 67 P.2d 240 (1936) ("It is also well settled that it is not always necessary that statutes and ordinances prescribe a specific rule of action, but on the other hand, some situations require the vesting of some discretion in public officials, as, for instance, where it is difficult or impracticable to lay down a definite, comprehensive rule, or the discretion relates to the administration of a police regulation..."). The reason for such flexibility is precisely because commercial relations cannot invariably be predicted by the legislature or administrative agencies. *See Climax Chemical Co. v. N.M. Envir. Imp. Bd.*, 106 N.M. 14, 17,

738 P.2d 132, 136 (Ct. App. 1987). Here, the CCA specifically empowers the residents of a continuing care facility to take steps to enforce the CCA and their individual contracts through judicial action.

B. The Defendant Did Not Carry its Burden of Proof in Demonstrating, Beyond All Reasonable Doubt, that the phrase "Reasonable Return on Investment" Was Unconstitutionally Vague.

The Legislature has commanded that in construing statutes, that courts and parties should "(1) give effect to its objective and purpose; (2) give effect to its entire text; and (3) avoid an unconstitutional, absurd or unachievable result." NMSA § 12-2A-18(A). In construing the language of a statute, the Court must apply the plain language of the statute, *Fleming v. Town of Silver City*, 1999-NMCA-149, 128 N.M. 295, 992 P.2d 308, *certiorari denied*,128 N.M. 148, 990 P.2d 822, and only when doing so would lead to a absurd result should other means be employed. The only recognized routine exception to this rule is that the intention of the statute should prevail over its specific language, where the specific language leads to inconsistent results. *Draper v. Mountain States Mut. Cas. Co.*, 1994, 116 N.M. 775, 867 P.2d 1157. Nor are all statutory ambiguities unconstitutional.

Here, the Defendant seizes on the word "reasonable" as a component of the phrase "reasonable return on investment," and contends that the word and the phrase are unconstitutionally vague. The basis of the argument appears to be that (1) because regulations did not interpret the phrase, it could not tell what it meant; (2) because a Court had not construed the phrase, it could not tell what it applied to; and (3) because the State of New Mexico did not notify the facility that its increases were illegal, the Plaintiffs should not be permitted to recover, because the Defendant "had no notice," prior to the assessment of liability and damages. These arguments fail, as well they should.

As a matter of law, this Court has previously interpreted the word "reasonable," and found no intrinsic ambiguity. Indeed, it is perhaps with unexpected irony that the standard for unconstitutional vagueness has routinely been measured by a yardstick that invokes "reasonable" as a component. *See, e.g., State v. James M.*, 111 N.M. 473, 477, 806 P.2d 1063, 1067 (Ct. App. 1990) ("A statute is not void for vagueness if a *reasonable* and practical construction can be given to its language;" emphasis added); *State v. Gattis*, 105 N.M. 194, 197, 730 P.2d 497, 500 (Ct. App. 1986) ("A statute is unconstitutionally vague, and thus offends due process, if it does not give a person of ordinary intelligence a *reasonable* opportunity to know what is prohibited...."; emphasis added). Even in rate-setting cases, a similar standard is generally applied. *In re Application of Timberon Water Co., Inc.*, 114 N.M. 154, 161, 836 P.2d 73, 80 (1992) (recognizing that "There is a significant zone of reasonableness, then, between utility confiscation and ratepayer extortion.").

Courts of this State for over 50 years have accepted the word "reasonable" or "reasonably" as a constitutionally-acceptable word in a statutory provision. *See State ex rel. Bliss v. Dority*, 55 N.M. 12, 225 P.2d 1007 (1950) ("The use of such terms as 'reasonable' or 'unreasonable' in defining standards of conduct or in prescribing charges, allowances and the like, ... have been held not to render a statute invalid for uncertainty and indefiniteness.") (*quoting* 50 Am. Jur., Statutes § 473). To be sure, the definition of reasonable is case-specific and fact-specific, but it is far from unconstitutional. *See also United States v. Hsu*, 40 F.Supp.2d 623 (E.D. Pa. 1999) (statute is not void for vagueness because it uses the word "reasonable").

To suggest that the Defendant could not comprehend a reasonable return on investment seems to offend the Defendant's credibility. Through our Uniform Jury Instructions, members of juries are routinely requested to apply the word "reasonable" in considering claims asserting

various duties and obligations. NM UJI § 13-1601, NMRA ("a *reasonably* prudent person"); NM UJI § 13-1632, NMRA ("no *reasonable* ground"); *see also* NM UJI § 13-1642, NMRA ("*reasonably* apparent"); NM UJI § 13-1644, NMRA ("as a reasonably prudent person"); NM UJI § 13-1646, NMRA ("*unreasonable* risk of harm"); NM UJI § 13-1651, NMRA ("without a *reasonable* explanation"). In the context of liability for violation of statutes or ordinances, reasonableness is employed, *see* NM UJI § 13-1502 ("that which might *reasonably* be expected"), and again in the context of duties to trespassers, NM UJI § 13-1301, NMRA ("that which the owner might *reasonably* expect"). As an owner of occupier of land, the Defendant itself is potentially liable for claims relating to occupancy of land, those claims are defined in part by legal standards that no fewer than nine times reference reasonableness in one manner or another. It would be difficult to imagine that a fair defense to liability as a landlord would be that the tort duty is void for unconstitutional vagueness.

Outside of the generic use of the word "reasonable," our Courts routinely use phrases analogous to "reasonable" or "reasonable return on investment." In the context of price-setting statutes, just in 2000, the Supreme Court applied the legal standard of "a reasonable rate of return" to the Public Service Company of New Mexico, *In re: Petition of PNM Gas Services*, 2000-NMSC-012 ¶ 8, 129 N.M. 1, 1 P.3d 383, and disallowed, in part, a rate increase, on the basis that PNM failed to show that rate increase was reasonable. One can only imagine that the Supreme Court did not consider itself unconstitutionally vague in its ruling.

Historically, the Supreme Court has applied a "reasonableness" standard to rate-setting cases, and considered it to be a threshold of constitutionality. *Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Comm'n*, 90 N.M. 325, 335, 563 P.2d 588, 598 (1977). A "reasonable rate of return" has been defined by this Court as the statutory interest rate for the computation of

damages, *see Naranjo v. Paull*, 111 N.M. 165, 174, 803 P.2d 254, 263 (Ct. App. 1990) ("a *reasonable* rate of return – that is, a *reasonable* amount of interest."; emphasis added). Each of these courts at least implicitly, considered, as did the District Court here, the question of reasonableness to be fact-specific. The Defendant's bitter complaints that there are several possible definitions to the phrase "reasonable return on investment" is not, however, license to disregard all of them, and rings especially hollow when the Defendant's own accountant determined that a reasonable rate of return was between 12-15%, *see* TR Vol. 7 at 85; Vol. 8 at 218. The State Department of Aging and Long-Term Services defined the phrase to mean "a ratio that is statistically equivalent to the return on investment for a for-profit corporation." 9 N.M.A.C. 2.24.7(L); *see also* 9 N.M.A.C. 2.24.13 (further refining the definition of reasonable return on investment).

The vast majority of the cases genuinely applying the doctrine of void for vagueness arise from challenges to criminal statutes by defendants. It seems apparent that in commercial contexts, far more flexible standards of constitutionality are applied. Courts may uphold administrative decisions based on morality, *see Dick v. City of Portales*, 116 N.M. 472, 863 P.2d 1093 (Ct. App. 1993), *rev'd on other grounds*, 118 N.M. 541, 883 P.2d 127 (1994). A licensing agent may properly strip a license to dispense medicine for "conduct detrimental to the public," *McDaniel v. New Mexico Bd. of Medical Examiners*, 86 N.M. 447, 525 P.2d 374 (1974), and a license to serve as a veterinarian, for "failure to maintain clean and sanitary conditions," *Willoughby v. Board of Veterinary Examiners*, 82 N.M. 443, 483 P.2d 498 (1971).

Although our courts have not directly addressed it, economic legislation is held to the most deferential standard, even when read in the context of an argument of unconstitutional vagueness. *Flipside*, 455 U.S. at 498, 102 S.Ct. at 1193, 71 L.Ed.2d at 371; *State v. Cameron*,

498 A.2d 1217, 1220 (N.J. 1985) ("Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process."). The Defendant's speculation about what might have been done, could have been done, or what it would have done simply is insufficient to carry its burden under the rational basis standard. Nor should the Defendant be heard to complain that various methods might have been employed, or that the Legislature should be more specific: these claims are not proof of a constitutional claim, they are hind-sight second-guessing by a litigant that was unsuccessful at trial. If the Defendant had a genuine argument along these lines, the Defendant always had the freedom to take steps to clarify the language before its illegal actions, not after.

As the Supreme Court noted, in rate setting cases, not significantly distinguishable from determining whether an unreasonable return on investment had been recouped by the Defendant here,

> The Commission was not bound to the use of any single formula or combination of formulae in determining rates. The rate-making function involves the making of pragmatic adjustments. It is the result reached, not the method employed, which is controlling.

Mountain States, 90 N.M. at 338, 563 P.2d at 601. It is not unconstitutionally vague to leave the methodology open, especially where the evidence shows that the Defendant carefully chose none.

Finally, in its footnote on page 15, the Defendant suggests that because the Legislature required regulations be drafted by a date certain, "the statute was vague to begin with." This seems both inconsistent with the statute as written, *see* NMSA § 24-17-17 (authorizing preparation of appropriate regulations), and misstates the more recent legislative action.[2] In any event, the Defendant cites no authority for its proposition regarding legislative history (and the

[2] For the first time, the Legislature actually funded the preparation of the regulations. Not unsurprisingly, a deadline for the accomplishment of the task was set as well.

notion that a legislature that requires regulations has drafted an unconstitutionally vague statute), and the Court should decline to review the issue. *See In re Adoption of Doe*, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984).

II. The Defendant's Argument Regarding "Correct Interpretation" is a Mistaken Application of a Substantial Evidence Challenge to the Findings of the District Court.

A. The Defendant's Argument That the District Court Erroneously Applied the Contracts of the Residents Relies Upon a Mistaken Standard of Review.

The Defendant challenges the District Court's analysis of the contracts formed between residents and Manzano del Sol and claims that the matter is a question of interpreting statutory language. The question of applying the four prongs of the Continuing Care Act, NMSA § 24-17-11(B) to the facts of a case, is quintessentially a factual analysis and not one of construing the law or a contract. Accordingly, the applicable standard of review is substantial evidence. *See, e.g., Public Service Co. of New Mexico v. Diamond D Const. Co., Inc.*, 2001-NMCA-082 ¶ 16, 131 N.M. 100, 33 P.3d 651 (contrasting the two stages of analysis). While the Defendant here suggests that it is strictly a legal matter, the facts and the weight of evidence supporting the findings of the District Court determine the outcome, and this Court should apply an appropriate standard of review. *C.R. Anthony Co. v. Loretto Mall Partners*, 112 N.M. 504, 509-10, 817 P.2d 238, 243-44 (1991).

The Defendant's Brief in Chief does not specify in Point II, what findings, if any, it feels are erroneous. Although there is occasional reference made to presentation (and preservation) of its arguments to the District Court, the Defendant does not once reference a finding that it contends was not supported by substantial evidence. This does not meet the well-settled standard for such appeals. *See Maloof v. San Juan County Valuation Protests Bd.*, 114 N.M.

755, 759, 845 P.2d 849, 853 (Ct. App. 1992). This Court should find that the implicit attacks on several findings have been abandoned for failure to comply with Rule 12-213, NMRA.

It is well-settled that the findings of fact adopted below, if supported by substantial evidence, are controlling on appeal. *See Montano v. Saavedra*, 70 N.M. 332, 373 P.2d 824 (1962); *Roybal v. Morris*, 100 N.M. 305, 669 P.2d 1100 (Ct. App. 1983). The function of an appellate court is to review the evidence presented below, not to reweigh conflicting evidence, and "the reviewing court must view the evidence in the light most favorable to support the finding and all reasonable inferences in support of the court's decision will be indulged." *Tyrpak v. Lee*, 108 N.M. 153, 768 P.2d 352 (1989). The Defendant's effort to construe facts as law, and to stand on a less deferential standard of review are unavailing.

B. The Contracts with Residents Do Not Allow for Unlimited Increases Provided "Market Rates" or Inflationary Indices are Higher.

The Defendant argues now, as it did to the District Court, that the contracts with residents are not breached as long as the increases only matched inflation. As it was in the District Court, this argument should be rejected. In support of the proposition that the rates of inflation or the rates of increase of operating costs should define increases, the Defendant cites no controlling legal authority. In fact, the only "authority" cited appears to derive from foreign regulations implementing foreign statutory schemes dissimilar from the Continuing Care Act. Under these circumstances, the Court should disregard the argument as unsupported by law. *See In re Adoption of Doe*, 100 N.M. at 765, 676 P.2d at 1330 ("Issues raised in appellate briefs which are unsupported by cited authority will not be reviewed by us on appeal."); *see also Pincheira v. Allstate Ins. Co.*, 2004-NMCA-030 ¶ 10, 135 N.M. 220, 86 P.3d 645 ("Further, the rules of appellate procedure require counsel to cite New Mexico decisions. See Rule 12-213(A)(4)

NMRA 2003.... In the future, counsel is directed to address New Mexico law on the issues raised on appeal.").

Were this Court to consider the unsupported arguments of the Defendant regarding inflationary indices or "market rates," these arguments fly squarely in the face of the structure and purpose of the Continuing Care Act. Compounding the problem, considering market rates is inherently deceptive where, as here, the facility is a non-profit. As the Plaintiffs showed at trial, through careful application of its non-profit status, the Defendant reaped hundreds of thousands of dollars in benefits from the citizens of New Mexico. RP 4740 ¶¶ 27-28. The notion that the Defendant – an allegedly non-profit entity – should be compared to fully-taxed for-profit entities simply defies belief, and the District Court did not commit reversible error in rejecting the claim.

While the Defendant claims that it does not return money to investors, the evidence at trial revealed that the Defendant sent tens of thousands of dollars to "home office," that it was one of the single-most profitable facilities in the 210+ facility network operated by Good Samaritan, and that it accrued these revenues from elderly, frail, residents of a nursing home complex. The central irony is that in a for-profit facility, the investors would at least require some form of accountability; in the go-go 1990's, there was no one at Manzano del Sol who was willing to say "no" to an increase and prevent it from happening. *See* RP 4739 ¶ 22(a).

It is beyond reasonable doubt that the Continuing Care Act is a remedial statute intended to protect residents of continuing care facilities. *See* NMSA § 24-17-2(B) ("The purpose of the Continuing Care Act is ... to provide protection for residents and communities."). When presented with a remedial statute, appellate courts are called upon not to narrowly construe them, but to "broadly construe the statute 'to suppress the mischief and advance the remedy.'" *Michael v. Anglo-American Auto Auctions, Inc.*, 117 N.M. 91, 869 P.2d 279 (1994).

Here, the Defendant tenders the argument that an increase matching either market rates or national statistics defeats the four separate prongs of the contractual prerequisites for increases. The argument for the consideration of these expenses is inconsistent with the interpretation given the four prongs by the District Court and inconsistent with the regulations recently drafted relating to the Continuing Care Act, *see* 9 N.M.A.C. 2.24.7(B) (defining cost of care to mean "the direct cost of providing care to residents"), and 9 N.M.A.C. 2.24.8(E) ("A continuing care community may contractually base rate and fee increases on published federal economic data used for the purpose of cost of living and inflation adjustments provided that such increases do not exceed what would otherwise be allowable under this rule."). The Defendant would ask this Court to read out from its judicial logic the second requirement – that increases be also limited to those allowing for a reasonable rate of return.

To be sure, the regulations only became effective on January 31, 2006, however the construction of the four contractual requirements is entirely consonant with well-settled principles of statutory construction. *State ex rel. Clinton Realty Co. v. Scarborough*, 78 N.M. 132, 429 P.2d 330 (1967) ("Statutes are enacted as a whole and consequently each section or part should be construed in connection with every other part or section so as to produce a harmonious whole.... where possible, effect must be given to every part of a statute."). Moreover, the regulations are entirely consistent with the District Court's own application of those contractual terms to the facts of this case. To the extent those regulations are a guide, they confirm the good sense in evaluating the Plaintiffs' damages as a threshold decision process -- put simply, only if the threshold is met can rates be increased or does a historic increase become valid.

The obligations and burdens imposed by the contracts and the Continuing Care Act require facilities to consider costs, as one factor, but not as the *only* factor. The Defendant's

argument that the national inflationary average or other similar statistics should constitute the only ceiling for increases misses the point further because monthly service fees are only one source of revenue at Manzano del Sol. Manzano del Sol develops assets through a plethora of means – it imposes monthly service fees, it provides ancillary services (beauty and gift shops), it takes substantial entrance fees from residents (as high as $25,000 in the class period), it receives charitable donations (from residents and others), and it invests its assets in a private mutual fund. RP 4718 ¶ 27 (discussing not-for-profit advantages to Manzano del Sol). To suggest that increases in monthly service fees should be limited solely to one component of the four-pronged analysis would all but read out of the statute the other prongs of the contractual test, and would render those provisions without effect.

C. The Defendant's Argument Regarding Rate-Setting Cases Fails to Refer to Record Evidence and is Mistaken in Any Event.

The Defendant argues that the District Court should have applied rate-setting cases and complains that the District Court refused to do so. This argument, as with others on this point, is evidently an argument that relates to substantial weight of evidence. *See* Defendant's Brief in Chief at 20 (claiming "it is clear that Skofield did not come close to carrying his burden of proof in showing..."). This argument should be disregarded for the lack of citation to record evidence showing either a) that there was not substantial evidence supporting the District Court's findings, or b) that there was substantial evidence supporting proposed findings that were rejected.[3] *Maloof,* 114 N.M. at 759, 845 P.2d at 853.

[3] The Defendant did not tender findings of fact or conclusions of law on this point. The failure to do so condemns the argument. *Cockrell v. Cockrell,* 117 N.M. 321, 871 P.2d 977 (1994).

The Defendant appears to question the District Court's methodology, but in turn offers no clear analysis that would support a contrary conclusion. As the Defendant admits, in rate-setting cases, while there is a "significant zone of reasonableness," as to rates, *see PNM Gas*, 2000-NMSC-012 ¶ 8, 129 N.M. at 9, 1 P.3d at 391, those same rate-setting principles emphasize that it is not the means, but the ends, that determine reasonableness. *Mountain States*, 90 N.M. at 338, 563 P.2d at 601 ("It is the result reached, not the method employed, which is controlling."). The Defendant simply did not carry its burden of proof – at the District Court or in its briefing – of showing that the rates were unreasonable. Indeed, the Defendant tendered no evidence whatsoever at trial that had another mode of analysis been applied, the rates of return would be reasonable. Instead, the Defendant complained, there as here, that the Plaintiffs did not apply their preferred methodology, and now criticize the District Court for declining to demand it.

The Defendant's commentary about retrospective ratesetting, while citing to one opinion, misses the mark, not because *Mountain States* is mistaken, but because the Plaintiffs did not base their claims on rate-setting doctrines. The bases of the Plaintiffs' claims (that the District Court found to be proven) were breach of contract and breach of the Continuing Care Act. The contracts with residents included the same four-pronged test for increases in fees as the Act, the Defendant was precluded from increasing "monthly service fees" except as necessary, and on the basis of "economic necessity, the reasonable cost of operating the community, the cost of care and a reasonable return on investment." NMSA § 24-17-5(B)(11). A right of action under the CCA is vested by the Legislative grant that:

> Residents, as a class or otherwise, may bring an action in a court of competent jurisdiction to recover actual and punitive damages for injury resulting from a violation of the Continuing Care Act.

NMSA § 24-17-15. Notably, continuing care facilities were not given a right of enforcement, especially as against residents in either the CCA, nor was the Defendant in its contracts with residents.[4]

In essence, the Defendant's argument that the rate-setting cases should be applied (notwithstanding the fact that they do not prescribe a specific mode of analysis) and the Plaintiffs' theory of damages should be rejected amounts to a substantial weight of evidence challenge to the Plaintiffs' damages claim, which, as referenced above, the Defendant has not properly made. Were the Court of a mind to consider it, it is well settled that an award of damages has been held to be subject to a low level of scrutiny, when challenged on the basis of substantial weight of evidence. *Baxter v. Gannaway*, 113 N.M. 45, 822 P.2d 1128 (Ct. App. 1991) ("In light of the above, whether it is the plaintiff or the defendant who challenges the decision of the trial court, the evidence on damages is viewed in the light most favorable to upholding that judgment.").

The Defendant's argument as to the methodology of evaluating of those damages seems inconsistent with long-standing law. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 565-68 (1981) ("it does not 'come with very good grace' for the wrongdoer to insist on specific and certain proof of the injury which itself has inflicted."); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). The calculation of damages in a contract claim has been settled in New Mexico as well. *See, e.g., Torrance County Mental Health Program, Inc. v. N.M. Health and Environment Dept.*, 113 N.M. 593, 830 P.2d 145 (1992) ("The general rule for the measure of damages in a breach-of-contract action permits the nonbreaching party to recover the loss in value of the performance promised by the breaching party, less any cost or other loss

[4] This point is precisely why "credits" for 1998 and 1999 are improper. The retrospective rate-setting cases merely confirm the point.

that the nonbreaching party has avoided by not having to perform."). Here, the damages simply are those fees that would not have been imposed had the Defendant complied with its contracts, and nowhere in those contracts do the residents agree that Manzano del Sol may impose annual increases based on federal inflationary rates, irrespective of the profits experienced by Manzano del Sol.

D. Bruce Malott's Testimony Was Tendered as an Accountant and Not as a Legal Conclusion, and, in any event, The District Court did not consider his Opinion as Legal in Nature.

In the Defendant's nearly final passing complaint in its second issue, it challenges the admission of Bruce Malott's testimony.[5] While the Defendant does seem to address the applicable standard of appellate review, it does underplay the nature of the review. As the Supreme Court reemphasized in *Alberico*, the "rule in this State has consistently been that the admission of expert testimony or other scientific evidence is peculiarly within the sound discretion of the trial court and will not be reversed absent a showing of abuse of that discretion." *State v. Alberico*, 116 N.M. 156, 169, 861 P.2d 192, 204-05 (1993).

The Defendant is somewhat correct, in that an expert cannot testify as to the "ultimate" legal conclusion, or instruct the jury as to the meaning of legal phrases. However, an expert can testify about the expert's own application of a word or phrase to specific facts. *See, e.g., State v. Danek*, 117 N.M. 471, 476, 872 P.2d 889, 894 (Ct. App. 1993); *see also North American Specialty Ins. Co. v. Myers*, 111 F.3d 1273, 1281 (6th Cir. 1997) (expert testimony may properly interpret terms of art); *Thor Power Tool Co. v. Comm'r of Internal Revenue*, 439 U.S. 522, 544 (1979); *U.S. v. Hanna Nickel Smelting Co.*, 253 F.Supp. 784 (D. Or. 1966). The Defendant does not substantively argue that Malott did anything other than apply his expertise to specific facts.

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[5] In connection with this sub-sub-issue, the Defendant provided no references to testimony of Malott that it contended should have been stricken or disregarded. Rule 12-213, NMRA.

Finally, it should not pass without note that of the cases cited by the Defendant, not one related to an expert in a bench trial; Judge York, an experienced, skilled jurist was more than capable of herself mitigating the effects of any testimony that might, however slightly, usurp her role as instructing on the law. That she asked questions and emphasized precisely how she considered Malott's testimony only confirms that Judge York was aware of, and attended to, the Defendant's complaints. TR Vol. 7 at 189: 8-10 ("I am going to accept Mr. Malott as an expert in accounting practices."); id. at 197:18-23 ("But I'm not going to accept it as a legal conclusion, and I am not going to accept it as a conclusion that the – if the testimony is that the defendants had a different rate of return than Mr. Malott indicated was reasonable, it does not, in my opinion, mean therefo0re there was a violation of the Continuing Care Act."); id. at 216:23-25 ("And I am not, as I said earlier, I'm not taking it as [a legal conclusion]. I'm taking it as an accountant speaking, and then I'll make the legal conclusions.").

The last suggestion by the Defendant appears to constitute another challenge to substantial evidence. In connection with discussing this fact, the Defendant cites to no evidence in the record; it cites no authority for the propositions it forwards in bolstering the claim; and it does not show a tendered finding of fact that should have been, but was not, accepted. As with other unsupported legal and factual arguments of the Defendant, the Court should refuse to consider it.

III. The District Court Properly Reopened the Case, but Improperly Imposed the Burden of Proof of Turnover on the Plaintiffs.

The Defendant asserts that the District Court abused its discretion in reopening the trial for evidence of turnover. The Plaintiffs do not dispute that this alleged error was adequately preserved, insofar as both parties objected to reopening the record, and the Plaintiffs introduced evidence of turnover when the Court only after the Court indicated that she would enter

judgment for the Defendant in the absence of such evidence. TR Vol. 17 at 4. The Defendant does not fully address the standard of review applicable. *See State v. Harrison*, 2000-NMSC-022 ¶ 56, 129 N.M. 328, 342, 7 P.3d 478, 492 ("Two factors which appellate courts consider in this context are the extent to which the movant used due diligence to obtain the testimony and the probable value of that testimony.") (*citing State v. Padilla*, 118 N.M. 189, 198, 879 P.2d 1208, 1217 (Ct. App. 1994)). The District Court's letter ruling plainly considered these two prongs, and within the *Harrison/Padilla* rubric, did not exceed the District Court's ample discretion.

However, the District Court's decision to reopen the evidence and place the burden of proof on the Plaintiffs was error as a matter of law. As addressed in the Plaintiffs' appeal briefing, the District Court erred in placing the burden of proof of turnover on the Plaintiffs as the Plaintiffs themselves did not stand to benefit from the proof of the positive proposition of turnover. *J. A. Silversmith, Inc. v. Marchiondo*, 75 N.M. 290, 294, 404 P.2d 122, 125 (1965); *Kuchan v. Strong*, 39 N.M. 281, 46 P.2d 55, 56 (1935) ("Generally the question of burden of proof will be tested by inquiring which party had the affirmative of the issue, as determined by the pleadings.").

Here, although the Defendants suggest it constitutes some sort of deficit in the evidence on the Plaintiffs' part, the choice to present their claim for damages in the aggregate is hardly improper. *See, e.g., Romero v. Phillip Morris*, 2005-NMCA-035, 137 N.M. 229, 109 P.3d 768. In the context of class actions, courts around the country have affirmed this method of proof, for a wide variety of reasons. *In re: Cardizem CD Antitrust Litigation*, 200 F.R.D. 297, 324 (E.D. Mich. 2001) ("Moreover, despite Defendants' claims to the contrary, the use of an aggregate approach to measure class-wide damage is appropriate."); 2 Newberg on Class Actions, § 10.05

(3rd ed.1992) ("Aggregate computation of class monetary relief is lawful and proper."): *In re: Sugar Industry Antitrust Litigation*, 73 F.R.D. 322, 351 (E.D. Pa. 1976) ("the most suitable procedure for the determination of damages sustained by the proposed consumer classes in this litigation, if any, is either by an aggregate class-wide approach or through individualized evidence based on proven and accepted statistical methods"); *In re: NASDAQ Market-Makers Antitrust Litigation*, 169 F.R.D. 493, 525 (S.D. N.Y. 1996) ("The aggregate class damage approach has obvious case management advantages. By eliminating individual damage proofs at trial, the length, complexity and attendant costs of litigation are greatly reduced.").

To be sure, many of the opinions discussing aggregate proof arise in the context of certification, and not of trial. The principles at issue are indistinguishable, because the question of individualized proof is, at its heart, a mechanical application of individualized proofs of claim after entry of the aggregate judgment. In this particular case, the claims administration process has been stayed (along with the judgment), as well as the individualized specification of damages.

What compounded the District Court's error was the source of the "turnover" issue. As the Court recognized, "turnover" was only assessed after the entry of her initial findings of fact and conclusions of law. At no point in the 2002 trial did the Defendant argue that turnover should be imposed, and if so, to what amount. The Defendant closed its case without tendering evidence of turnover as to any particular resident.

The only document referencing turnover was one of several industry reports, not specific to New Mexico, submitted through the Defendant's expert, tendered for other purposes, and not discussed in the context of turnover. The District Court seized on a reference in that one document and imposed a turnover statistic wholly disconnected from any record evidence. Then,

after the entry of the original findings, the Defendant seized on the reference and demanded that the one-time (and unsupported) rate of 29% turnover be imposed not once, but six more times. The Defendant bolstered its argument, not with evidence (either evidence presented at trial, or new evidence not previously available to it), but with argument of counsel. That the Court's eventual conclusion on the issue resulted in deductions of over $330,000 confirms that it was in the Defendant's – not the Plaintiffs – interest to prove the assertion.[6]

The Defendant argues that the Plaintiffs "knew" that Defendant intended to raise turnover "as a problem" with damages. Whether the Plaintiffs knew of Defendant's arguments about damages is simply not relevant to the issue of burdens of proof and obligations. While the Defendant has, rather consistently, maintained that the Plaintiffs have some sort of an obligation to factor in every argument offered by the Defendant, this argument seems to have absolutely no support in the law.

Our courts routinely have imposed upon defendants the obligation to discredit the damages asserted by a plaintiff. *See, e.g., First Nat. Bank in Albuquerque v. Sanchez*, 112 N.M. 317, 815 P.2d 613 (1991) (provided evidence of damages is competent to prove damages, then burden to rebut shifts to Defendant); *Yates Petroleum Corp. v. Kennedy*, 108 N.M. 564, 567, 775 P.2d 1281, 1284 (1989) (in condemnation case, condemnor "has three options: (1) under appropriate circumstances, it can move for a directed verdict; (2) it can go forward to discredit the landowner's evidence; and (3) it can offer to prove affirmatively by a preponderance an alternative amount of damages."); *Acme Cigarette Servs., Inc. v. Gallegos*, 91 N.M. 577, 580,

[6] Nor should it pass without mention that the Defendant advocated an aggregate 178% turnover in the facility when the evidence, had the Defendant tendered it, supported only an aggregate turnover of less than a third of that. The Defendant's post-trial motion played fast and loose with the actual evidence in the Defendant's possession.

577 P.2d 885, 888 (Ct.App.1978) (defendant bears burden when claiming an affirmative defense).

Where the Defendant raises arguments in support of lower damages, it bears the burden of proof. *See Spencer v. Gross Kelly & Co.,* 22 N.M. 426, 163 P. 1087 (1917). The same is evidently true when a defendant raises an issue as to whether damages are improperly the product of emotion on the part of the jury, *see Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013 ¶53, 127 N.M. 47, 976 P.2d 999 ("At trial, the Appellees presented evidence of compensatory damages using an economic expert along with their own testimony. Wal-Mart did not dispute the damage figures. ... Wal-Mart has not shown anything in the record to prove that the compensatory damage awards were excessive. "), or whether damages in contract should be reduced for failure to mitigate or by offset, *see Bd. of Educ. v. Jennings*, 102 N.M. 762, 764, 701 P.2d 361, 363 (1985); *Allsup v. Space*, 69 N.M. 353, 367 P.2d 531 (1961) ("Since we regard defendant's claims as offsets, ... we must invoke the fundamental rule necessarily underlying all our procedure that the party alleging and seeking affirmative relief has the burden of proof.") (citations omitted).

The Defendant's arguments that judgment should be entered for it, on the basis of the Court's reopening of the record, where the Plaintiffs were obliged to prove the Defendant's proposition misses the point at the core of the question. It is not, and has never been, the Plaintiffs' obligation to account for every niggling dispute the Defendant might raise to the Plaintiffs' claim for damages.

Finally, even were the District Court correct in imposing the burden of proof (or disproof) of the Defendant's argument on the Plaintiffs, the District Court would not have committed an abuse of discretion in reopening trial to consider such evidence. *Foreman v.*

Myers, 79 N.M. 404, 408, 444 P.2d 589, 593 (1968) ("we have consistently held that such a determination is within the sound discretion of the trial court and will not be lightly overturned."); *see also Riggs v. Gardikas*, 78 N.M. 5, 427 P.2d 890 (1967) ("a motion to re-open a case to permit the taking of additional testimony is addressed to the sound discretion of the trial court. This court is always loath to interfere with that discretion") (citations omitted). The District Court here amply explained the basis of her exercise of that discretion, and the Defendant should not be heard to complain of its exercise, precisely when it invited the District Court to impose a turnover rate 128% higher than was supported by the evidence that Defendant had in its possession at trial.

IV. The District Court's Error in Granting Prejudgment Interest Was Not In Granting it at all, But In Failing To Grant Sufficient Prejudgment Interest to Fully Compensate the Plaintiffs.

As discussed in the Plaintiffs' appeal, the District Court erred in failing to fully compensate the Plaintiffs for the lost use of their money.[7] Though the District Court did award prejudgment interest, by limiting the interest to post-filing time periods, the District Court effectively permitted the Defendant to use the Plaintiffs' money for twelve years since 1993, while allowing the Plaintiffs to recover for only six years' time. Because of the stay of the judgment, the Defendant has, effectively been allowed to retain and use the Plaintiffs' money for twice as long as the Plaintiffs. This cannot reasonably be said to be a fair allocation of the damages in the case, since the Plaintiffs did not participate in the decision to raise monthly service fees.

[7] Because this issue was briefed at greater length in the Plaintiffs' appeal, the Plaintiffs do not repeat the argument, but respectfully request that the Court consider that argument in connection with considering the Defendant's argument here.

As a preliminary matter, the award to the Plaintiffs should fully compensate them for the injury they suffered. *Camino Real Mobile Home Park Partnership v. Wolfe*, 119 N.M. 436, 443, 891 P.2d 1190, 1197 (1995); *Hood v. Fulkerson*, 102 N.M. 677, 680, 699 P.2d 608, 611 (1985) (the "general theory of damages is to make the injured party whole."). Where the issue raised is money damages derived from the wrongful taking of money (as opposed to a breach of contract for failure to provide services or goods as contracted), the lost use of money is a central aspect of damages. *Economy Rentals, Inc. v. Garcia,* 112 N.M. 748, 819 P.2d 1306 (1991) (such damages are necessary "to compensate a plaintiff for injuries resulting from the defendant's failure to pay and the loss of use and earning power of plaintiff's funds wrongfully taken as a result of the defendant's breach.").

Though there is a reference in the title to the section, the Defendant does not directly address what standard of review applies to an award of prejudgment interest. Rule 12-213(A)(4), NMRA. It seems apparent that, to the extent that interest is limited to NMSA § 56-8-4, the award is reviewed as an abuse of discretion. *Lucero v. Aladdin Beauty Colleges, Inc.*, 117 N.M. 269, 871 P.2d 365 (1994). Here, the Defendant claims that the nature of its offers plainly reflect that there was no unreasonable offer by the Defendant to settle (and relatedly, that there never was an offer the Plaintiffs might have accepted that would be reasonable). However, the argument misses the point.

As the Plaintiffs present in their factual presentation regarding the offers above, the Plaintiffs' accrued costs (costs subsequently awarded, for the most part) were in excess of $180,000. The Plaintiffs' accrued attorneys fees (an issue presently reserved for post-remand processes) through the 2002 trial were approximately $465,000, while the Defendant's were in excess of $730,000 for the same time period. The District Court awarded a total of $178,000 in

costs, and although subject to amendment, awarded the Plaintiffs over $278,000 in attorneys fees. RP 3735-48 The highest amount referenced in the Defendant's discussion of its offers for just costs and fees, is $50,000, slightly less than 11% of the awarded fees and costs of the case.

In the context of relief to the classmembers themselves, the Defendant's discussion raises the Plaintiffs' point for them. The highest offer referenced by the Defendant – its offer to spend $2 million on current construction at Manzano del Sol – was not an offer to the Plaintiffs themselves at all, but to residents who lived, in some instances, at the facility 10 years after the classmembers did. As the evidence would subsequently show, Manzano del Sol's turnover through the class period was slightly more than 8.3% per year. What it proposed to do was give the Plaintiffs – all residents between 1993 and 1999 no relief whatsoever – but would do something for individuals generally not classmembers. Although the Defendant proposed to spend money (generally, money previously budgeted and planned to be spent, in any event) the Defendant proposed to return not a dime to residents between 1993 and 1999: the victims of the breach of contract would receive nothing.[8]

Although the Defendant does refer to its affidavit regarding the context of the offers, the Defendant carefully avoids referring to the competing affidavits on the issue of settlement. *See* RP 3525-33. The pattern of conduct by the Defendant either reflected efforts to pay attorneys fees and costs (in some measure) and provide no relief to the Plaintiffs as individuals; to provide some minimal relief to Plaintiffs as individuals, but nothing to their attorneys; or to provide relief to itself in the form of investments with no relief whatsoever to the actual injured parties who no longer resided at Manzano del Sol. The District Court's decision cannot be said to have failed to

[8] The evidence supports the conclusion that the initial offer to make capital improvements was an effort to appease Skofield and prevent him from filing suit. See TR Vol. 7 at 104-05 and Exhibit 22. It is unsurprising that the pattern of offers during the litigation was perceived as not motivated by a genuine intention to settle on terms that fairly compensated the Plaintiffs for all of their aggregated legal rights.

consider these factors, and in so doing, cannot be said to have abused the Court's discretion under NMSA § 56-8-4. *Bustamante v. City of Las Cruces*, 114 N.M. 179, 836 P.2d 98 (Ct. App. 1992) ("'[A]n abuse of discretion is an erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn from such facts and circumstances.'") (*quoting Zamora v. CDK Contracting Co. Inc.*, 106 N.M. 309, 314, 742 P.2d 521, 526 (Ct. App. 1987)).

To the extent that the District Court relied on § 56-8-4 and could have relied upon § 56-8-3 as the damages asserted were those consequentially flowing from the breach of contract, the District Court would be correct, in part, in awarding at least those damages. *See, e.g., Kennedy v. Moutray*, 91 N.M. 205, 206, 572 P.2d 933, 934 (1977); *Trujillo v. Beaty Elec. Co.*, 91 N.M. 533, 538, 577 P.2d 431, 436 (Ct.App.1978). In such a circumstance, this Court is obliged to "view all the evidence in the light most favorable to the district court's findings to make that determination," *Hudson v. Village Inn Pancake House of Albuquerque, Inc.*, 2001-NMCA-104, 131 N.M. 308, 35 P.3d 313, a standard that evidently applies in reviewing a finding of damages. *Moody v. Stribling*, 1999-NMCA-094 ¶¶ 41-43, 127 N.M. 630, 985 P.2d 1210; *Sierra Life Ins. Co. v. First Nat'l Life Ins. Co.*, 85 N.M. 409, 414, 512 P.2d 1245, 1250 (1973) ("This Court will not attempt to second guess the trial court's determination of the proper measure to be applied for damages if the trial court had several alternatives before it supported by substantial evidence.").

Respectfully, the Plaintiffs submit there is no legal error in awarding the prejudgment interest awarded; the prejudgment-interest-related error was in not awarding interest dating to the time of the improper overcharges of the elderly residents of the Manzano del Sol Good Samaritan Village.

V. The Judgment Entered in this Matter is Insufficient As a Matter of Law as relates to Damages, but Not for the Grounds Argued by the Defendant.

In its final argument, the Defendant asserts that the District Court erred in failing to decertify the class because the judgment did not include names of classmembers. While the judgment does not specifically identify, by name, the members of the class not opting out, there is apparently, no authority anywhere, for the proposition that the class should be decertified, and mixed precedent on the "lesser included" argument that the judgment, in any event, should specifically name classmembers not opting out.

It appears that the appropriate standard of review is not at all clear in the law, as a motion to decertify may not even be permitted by the analogous federal rule. *See Tinman v. Blue Cross and Blue Shield of Michigan*, 692 N.W.2d 58, 63-66 (Mich. Ct. App 1998) (noting federal rules do not permit a motion to decertify a certified class as a matter of law of the case, and under Michigan rules, ruling that "we review the trial court's decision to deny a motion to decertify a class action for clear error."). Other courts have found the standard to be abuse of discretion, *see Key v. Gillette Co.* 782 F.2d 5 (1st Cir. 1986); *Muise v. GPU, Inc.*, 851 A.2d 799 (N.J. Super. 2004), while one other court bifurcates the appellate review into factual and legal analyses, applying different standards to the respective steps, *see Mire v. Eatelcorp., Inc.*, --- So.2d ----, 2005 WL 3489547 (La. Ct. App. 2005). Finally, it appears that in the Tenth Circuit (contrary to the intimation in the Defendant's brief) the applicable standard is also abuse of discretion. *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095 (10th Cir. 2001) ("We review for abuse of discretion a district court's decision to certify or decertify a class under the ADEA. Under an abuse of discretion standard, we will not disturb the underlying decision unless we

have a definite and firm conviction that the district court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.") (citations omitted).

As the Defendant suggests, there are absolutely no cases even suggesting that a motion to decertify has been filed, much less granted, on the basis of whether a judgment does or does not name individual plaintiffs. The legal authorities are far from clear; even the authorities tendered by the Defendant do not unequivocally take one position or another and seem to support the view that the form of judgment is entirely proper.

The Rule 1-023(C)(3) does not mandate the naming of all classmembers, contrary to the representations by the Defendant. As the Rule provides, the judgment "shall include and specify or describe" those who received notice and the Court finds to be members of the class. Rule 1-023(C)(3), NMRA. The advisory notes to the federal rule quoted by the Defendant evidently permit the description of classmembers. Fed.R.Civ.P. 23, Advisory Committee Notes ¶ (c)(3). Other commentators have suggested that description is entirely appropriate, as opposed to listing. *See, e.g.,* Cohn, The New Federal Rules of Civil Procedure, 54 Geo.L.J. 1198, 1226 (1966) (the court need only "abstractly describe"). The judgment evidently includes the classmembers by describing them.

The Defendant's implication that failing to individually name classmembers would somehow impair adjudication of their interests is simply not an accurate statement of the law. *See* Wright & Miller, Federal Practice and Procedure § 1789 (Rule 23's requirement for a description is merely "an aid to a court called upon to determine the binding effect of a judgment, rather than as prescribing any particular adjudicatory effect to it..."). This is true, in part, because of the function of class action judgments. *Sperling v. Hoffman La-Roche, Inc.*, 24 F.3d 463, 470 (3rd Cir. 1994) (in context of membership in a class: "members of a Rule 23(c)(3)

class are automatically included ... unless they make a timely election to opt out..."). While the Defendant complains that, for reasons that remain elusive, it is at continuing risk that an unspecified resident (between 1993 and 1997) might appear and make a claim, this risk exists irrespective of listing in a judgment, and does not constitute legal error in any event. *Cf Johnson v. General Motors Corp.*, 598 F.2d 432 (5th Cir. 1979) (failure to even describe the class does not prevent application of res judicata); *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 447 (5th Cir. 1973). Finally, the Defendant cites to *Market-Makers*, which appears to be the only published opinion discussing whether all classmembers must be specifically identified, and finds that they need not. The *Market-Makers* Court based its ruling on a straightforward reading of Rule 23(c)(3), *see In re NASDAQ Market-Makers Antitrust Litigation*, 184 F.R.D. 506, 511 (S.D. N.Y. 1999) ("In fact, Rule 23(c)(3) does not require a list of every single class member."), and there is reason to do likewise here.

Finally, the Defendant raises a complaint about the notice served on members of the class.[9] With regard to this issue, the Defendant simply mischaracterizes the efforts the Plaintiffs went to in their efforts to provide notice to the classmembers. As described in the report on class notice, the Plaintiffs went to significant efforts to specifically identify individuals in New Mexico who no longer resided at Manzano del Sol. RP 2794-2803.

While the Defendant claims that only a single mailing occurred, this is simply false, as the Plaintiffs mailed notice, to the same individual, sometimes to three or four addresses as well as efforts to contact individuals to confirm that they were, in actuality, the same person. RP 2805-06. To be sure, not all of the individuals received in-hand notice via registered mail; this was likely rendered impossible because of the Defendant's failure to keep forwarding

[9] The Defendant does not address how this issue was preserved, what standard of review applies, or what New Mexico authority it cites to in support of its implicit proposition.

information, survivors' information and emergency contact information, if the Defendant ever retained such information. In any event, the Plaintiffs also published notice in three separate newspapers (the Albuquerque Journal, the Albuquerque Tribune, and the Rio Rancho Observer) on the three days of their highest distribution, as well as posting notice in Manzano del Sol. RP 2830-35. Under these circumstances, the Plaintiffs notified the class using "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Rule 1-023(B), NMRA.

The Defendant argues strenuously, and incorrectly, that Rule 1-023(C) requires anything in a judgment other than what the District Court placed in the judgment. The Defendant suggests that notice was improper, but basis this suggestion on a mischaracterization of the efforts the Plaintiffs went to provide notice to the class in advance of the 2002 trial. While the Plaintiffs respectfully submit that the judgment is incorrect, in that the damages awarded are far less than they feel should be awarded, the judgment is not improper on any other grounds.

CONCLUSION

The Plaintiffs respectfully request that this Court refuse the relief requested by the Defendant, remand the matter for entry of the full judgment as requested by the Plaintiffs in their appeal, and award the Plaintiffs their Attorneys Fees and Costs in prosecuting this appeal.

Respectfully submitted,

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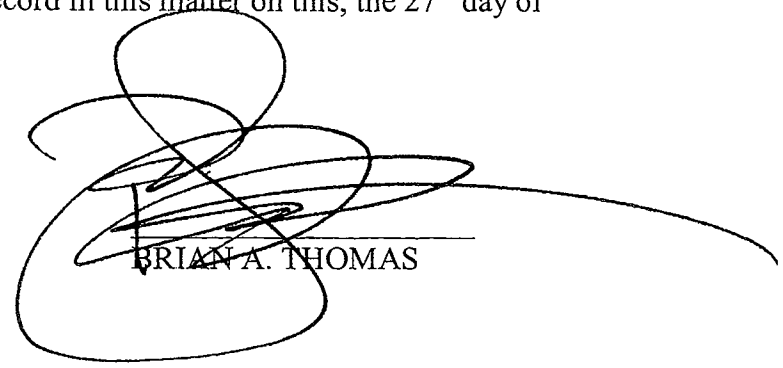
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief in Chief was transmitted by First Class Mail to all counsel of record in this matter on this, the 27th day of February 2006.



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