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**IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO**

SUNNYLAND FARMS, INC.

Plaintiff-Appellee,

vs. Ct. App. No. 28,807

CENTRAL NEW MEXICO
ELECTRIC COOPERATIVE,
INC.,

Defendant-Appellant.

**Appeal from the Thirteenth Judicial District, Cibola County
The Honorable John W. Pope
D-1333-CV-2005-00192**

DEFENDANT-APPELLANT'S BRIEF-IN-CHIEF

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As required by Rule 12-213(G), undersigned counsel hereby certifies that this brief was prepared in 14-point Times New Roman typeface using Microsoft Word, and that the body of the brief contains 9,727 words.

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SUMMARY OF PROCEEDINGS

I. NATURE OF THE CASE

Defendant Central New Mexico Electric Coop, Inc. ("Cooperative" or "CNMEC") appeals from the judgment of damages awarded Sunnyland Farms, Inc. ("Sunnyland") following a bench trial. [RP 1345] This action arose out of a fire that occurred at Sunnyland's hydroponic tomato greenhouse facility located outside of Estancia, New Mexico on September 9, 2003. [RP 762, ¶ 4; RP 766, ¶ 42] In its suit, Sunnyland claimed that CNMEC, an electric cooperative that provided electricity for Sunnyland's greenhouse facility, wrongfully turned off electricity to the facility for nonpayment and that because of the Cooperative's actions, there was no electricity to operate the water pump or hoses when Sunnyland's employees started a fire. [RP 763-67] As a result of the fire, Sunnyland's packing facility and the support building were destroyed but the greenhouses were undamaged. [RP 1140, FOF 216] Sunnyland's claims against the Cooperative included breach of contract, negligence, violations of the Unfair Trade Practices Act, defamation, breach of statutory duty, and breach of the implied covenant of good faith and fair dealing. [RP 768-74] Sunnyland voluntarily dismissed its defamation claim before trial. [CD 10-13-06, 9:34:02]

A bench trial was held, during which claims for breach of statutory duty and breach of the implied covenant of good faith and fair dealing were dismissed. [Tr.

(Day 7) 127-28] Following the trial, the Honorable John W. Pope entered Findings of Fact and Conclusions of Law. [RP 1120-45] In his Findings of Fact and Conclusions of Law, Judge Pope found that the negligence of Sunnyland's employees caused 80 percent of the damages and that the Cooperative was only 20 percent at fault. [RP 1145, COL 11-12] Additionally, Judge Pope found that a contract existed between the Cooperative and Sunnyland and that the Cooperative breached that contract. [RP 1144, COL 1] Judge Pope concluded that Sunnyland's Unfair Trade Practices Act failed as a matter of law. [RP 1144, COL 4]

Judge Pope found property damages totaling $7,650,000 and lost crop damages of $13,704,828. [RP 1145, COL 13] Judge Pope initially awarded Sunnyland 20 percent of those total damages. [RP 1145, COL 12] He also awarded $100,000 in punitive damages based upon the Cooperative impeding firefighters after the fire started with the threat of liability if the electricity was energized as requested. [RP 1144, COL 6, 8]

After the Cooperative filed its Motion to Amend and Clarify Findings of Fact and Conclusions of Law [RP 1174-85] and Sunnyland filed a Memorandum in Support of Proposed Final Judgment [RP 1211-33], the Court heard oral arguments and entered judgment for the full amount of damages under a breach of contract theory, concluding that comparative fault did not apply to contract claims. [RP 1303] The Court left intact the apportionment of fault under Sunnyland's

negligence claim. [*Id.*] The Court declined to award prejudgment interest and awarded post judgment interest at 8.75 percent on contract damages and 15 percent on any tort-based damages. [*Id.*]

Subsequently, Sunnyland asked the district court to modify the judgment to, among other things, make it clear that it was entitled to $100,000 in punitive damages regardless of which remedy, tort or contract, it elected. [RP 1503-06] In an Amended Judgment, the court found that the Cooperative was not liable for punitive damages for any conduct occurring prior to the fire, but nonetheless awarded Sunnyland $100,000 in punitive damages for breach of contract and $100,000 in punitive damages for negligence. [RP 1556-57]

Prior to trial, the Cooperative settled with the property insurer for Sunnyland who was asserting a subrogation claim in the litigation. [RP 1159, 1166-68] As part of the settlement, the property insurer assigned its subrogation rights to the Cooperative. [RP 1159-60, 1166] After trial, the Cooperative filed a motion for a setoff of the judgment in the amount of the subrogation interest, which Sunnyland opposed. [RP 1158-68, 1200-10, 1268-75] Sunnyland asked the court to award it attorney's fees and costs for representing the property insurer through the litigation, which the Cooperative opposed because the property insurer had its own attorney throughout the proceedings. [RP 1306-41, 1351-60, 1361-76, 1418-31, 1443-53] While the district court's amended judgment does provide that the

Cooperative will be entitled to a setoff of the judgment in the amount of the subrogation interest, less attorney's fees and costs, the court has not yet ruled on the amount of attorney's fees or costs.[1] [RP 1557] The amended judgment further provides that Sunnyland can elect its remedy, tort or contract, after the time for appeal expires. [*Id.*]

The Cooperative has appealed the district court's judgment and amended judgment. [RP 1563-65] Sunnyland has filed a cross-appeal regarding the court's determinations with respect to pre- and post-judgment interest and the subrogation setoff. [RP 1607-09]

II. SUMMARY OF BACKGROUND FACTS

A. Facts Relevant to the Relationship Between the Cooperative and Sunnyland

The Cooperative's Bylaws state:

> [T]he members of the cooperative, by dealing with the cooperative acknowledge that the terms and provisions of the Articles of Incorporation and Bylaws shall constitute a contract between the Cooperative and each member and both cooperative and the members are bound by such contract as fully as though each member has

[1] Because the district court has not finally disposed of all of the issues relating to the award of attorney's fees and costs, this issue is not final and it is premature for the Cooperative to challenge the award of fees and costs. The Cooperative will, if necessary, appeal the award of fees and costs after the district court enters on order on the request. *See Exec. Sports Club, Inc. v. First Plaza Trust*, 1998-NMSC-008, ¶ 7, 125 N.M. 78, 957 P.2d 63; *Trujillo v. Hilton of Santa Fe*, 115 N.M. 397, 398, 851 P.2d 1064, 1065 (1993); *Kelly Inn No. 102, Inc. v. Kapnison*, 113 N.M. 231, 241-42, 824 P.2d 1033, 1043-44 (1992).

> individually signed a separate instrument containing such terms and provisions.

[RP 1120, FOF 2] Section 1.02 of the Cooperative's Bylaws further provide that

> Persons and entities who are required to make application for membership where by the applicant agrees to purchase electrical power and energy from the cooperative shall be bound by the cooperatives' articles of incorporation, Bylaws, and all rules, regulations, policies, rate classifications and rate schedules established pursuant thereto, as the same then exists or may be thereafter be adopted repealed or amended.

[RP 1120, FOF 3] No language in the contract binds the Cooperative to the tariffs.

The Cooperative files tariffs with the New Mexico Public Regulation Commission. [RP 1121, FOF 4] One such tariff, Original Rule No. 11, provides that "if payment is not made within the time specified . . . a disconnect notice will be mailed to the consumer. If the bill is not paid within 15 days from the date of the delinquent disconnect notice the customer will be subject to disconnect." [RP 1121, FOF 6] Rule 560 of the Public Regulation Commission identifies reasons insufficient for denying or discontinuing service and provides that the "failure to pay the bill of another customer as guarantor thereof" is an insufficient reason to deny or discontinue service. [RP 1121, FOF 9] Rule 560 does state that an electrical cooperative may disconnect electricity "for failure of the customer to fulfill his contractual obligations for services and/or facilities subject to the regulations of the commission." [RP 1121, FOF 10]

In June 2003, Sunnyland, a newly-created corporation,[2] took over the operation of the greenhouse facility from Agstar of New Mexico Inc. ("Agstar") and agreed to assume all the debts of Agstar, including any electrical bills to the Cooperative. [RP 1141, FOF 220; Tr. (Day 7) 15, 19, 77] Agstar was delinquent with the Cooperative at the time Sunnyland took over and the electricity had been turned off for nonpayment. [Tr. (Day 7) 17] Sunnyland brought the account current and then had new accounts created under its own name. [RP 1122, FOF 18-19] Because the billing cycle was not yet complete, the Cooperative informed Sunnyland that additional bills for Agstar's accounts would be sent to Sunnyland after the meters were read. [RP 1122, FOF 20] Sunnyland agreed to pay these outstanding bills as well. [Tr. (Day 7) 22] These bills were sent out on or about July 17, 2003, were due immediately on receipt, and were delinquent after August 5, 2003. [RP 1127, FOF 61-62]

Sunnyland received its own initial electric bills on or about August 9, 2003, which were due immediately on receipt, and were delinquent after September 2, 2003. [RP 1127, FOF 63-64] Sunnyland failed to timely pay the Agstar final bills and its own initial electric bills. [RP 1127, FOF 65; Tr. (Day 7) 89-92]

[2] Sunnyland was formed by John Stockwell, a former director and shareholder of Agstar of New Mexico, Inc. [Tr. (Day 7) 4-16]

On August 27, 2003, Birchie West, who was the Manager of Administrative Services at the Cooperative, instructed the Cooperative employees to begin disconnection procedures for Sunnyland Farms for its failure to pay the outstanding Agstar bills. [RP 1123, FOF 25] In so instructing, Mr. West assumed that typical disconnection procedures had already been followed, i.e., a fifteen-day disconnection notice had already been given. [RP 1123, FOF 28] However, because the Agstar account had been closed, the Cooperative's computer system failed to generate the fifteen-day disconnection notice. [Tr. (Day 2) 10-14]

The Cooperative attempted to call Sunnyland twice on August 29, 2003, to advise them that they were going to disconnect electricity for nonpayment but no one answered the phone for Sunnyland. [RP 1123, FOF 31] The Cooperative also sent at least one handwritten disconnection notice to Sunnyland on September 2, 2003, indicating electricity would be disconnected if payment was not received by 4:30 p.m. on September 5, 2003. [RP 1124, FOF 33] Sunnyland did not pay by that deadline. [Tr. (Day 7) 89-92]

The Cooperative also sent disconnect notices to Sunnyland in early September 2003, which incorporated the Agstar delinquent amounts, and indicated electricity would be disconnected if payment was not received by September 17, 2003. [RP 1124, FOF 34]

The Cooperative disconnected electricity on the morning of September 8, 2003. [RP 1125, FOF 45] The Cooperative employee who went to Sunnyland's facility to disconnect the electricity told a Sunnyland employee that the electricity was going to be disconnected and permitted the employee to open the vents on the greenhouses before the electricity was disconnected. [RP 1126, FOF 52] Shortly thereafter, Sunnyland's owner, John Stockwell, was told that the electricity had been disconnected. [Tr. (Day 7) 95-96] The Cooperative was then contacted by telephone and Sunnyland was told electricity had been disconnected for failure to pay the Agstar final bills and that Sunnyland needed to make a payment to get the electricity turned back on. [RP 1126, FOF 54-58] Although the disconnect happened early enough in the day on September 8th that someone could have delivered payment to the Cooperative in person or Mr. Stockwell could have paid by credit card, Sunnyland instead opted to overnight a check to the Cooperative. [Tr. (Day 7) 96-98] Sunnyland's check was received at 11:13 a.m. on September 9, 2003, after the fire had already started at Sunnyland Farms. [RP 1127, FOF 65; RP 1128, FOF 81] The district court specifically found that Sunnyland failed to take any reasonable efforts to make payment to the Cooperative on September 8, 2003. [RP 1127, FOF 68]

At trial, the district court found the Cooperative failed to follow required cut-off procedures after it transferred the Agstar balances to Sunnyland's accounts.

[RP 1123, FOF 29] The court also found that the Cooperative did not give a fifteen-day notice of disconnect prior to actually disconnecting service and concluded that the failure to give the fifteen-day notice constituted a breach of contract by the Cooperative. [RP 1144, COL 1, 9] Although Mr. Stockwell and Mr. West both testified that they never foresaw this particular set of circumstances happening, the court nonetheless found that the damages sought were the foreseeable consequences of the breach of contract. [RP 1140, FOF 215; Tr. (Day 7) 107-08; Tr. (Day 9) 3-5]

B. Facts Regarding the Fire on September 9, 2003

In early September 2003, Sunnyland was not growing tomatoes at the facility and was preparing for a new crop to be planted. [Tr. (Day 2) 128, 146; Tr. (Day 7) 28] On the morning of September 9, 2003, the day after the electricity was disconnected, two Sunnyland employees used a portable generator to make welding repairs to a trailer hitch inside the packing facility building. [RP 1127, FOF 69-76; RP 1132, FOF 125; Tr. (Day 3) 91] Neither employee was a certified welder. [Tr. (Day 3) 115; Tr. (Day 8) 50] Mr. Stockwell was aware that these employees planned to repair the trailer hitch. [Tr. (Day 7) 107-08] At trial, Ken Lujan, the manager of Sunnyland's facility in Estancia, admitted that if he had been asked on September 9th whether it was okay to do some welding in the

packhouse, he would have let the employees do the welding even though the electricity had been disconnected. [Tr. (Day 3) 69]

In repairing the hitch, the Sunnyland employees violated numerous Occupational Health & Safety Administration ("OSHA") regulations, as well as other regulations, including failing to clear combustible materials from the welding area and failing to stay and monitor the welding area for thirty minutes after completing welding. [RP 1127, FOF 69-70; RP 1128, FOF 71-85] After the employees had finished welding and left the area, a number of cardboard boxes, which were being stored temporarily within a few feet of the welding area, caught fire. [RP 791; RP 1139, FOF 200] The district court found Sunnyland to be completely at fault in causing the fire. [RP 1128, FOF 76]

At trial, Sunnyland alleged that its employees attempted to obtain hoses to try to fight the fire but, because there was no electricity, there was no water. [RP 1130, FOF 99, 104; RP 1131, FOF 106] Significantly, Sunnyland had a backup generator that turned on automatically whenever the facility lost electricity but, at the time of the fire, the generator was broken and therefore inoperable. [RP 1135, FOF 156] At trial, Sunnyland contended the fire was small enough that its employees could have put out the fire had there been electricity. [RP 1132, FOF 116-20, 122]

In response, the Cooperative presented evidence that the fire was already so large when it was discovered that it could not have been extinguished by Sunnyland's employees. [Tr. (Day 9) 20-39] The Cooperative also presented evidence that there were fire extinguishers at the facility that could have been used in place of the water hoses to fight the fire and that, while aware of the extinguishers, Sunnyland's employees did not use them. [Tr. (Day 3) 97; Tr. (Day 4) 124-25; Tr. (Day 8) 78-79]

Wayne Granger, the Fire Chief for the Town of Estancia, responded to the fire. [RP 1134, FOF 148] When he arrived at the scene, he wanted to use a "dry hydrant," which was a large underground pipe leading to a large water reservoir just to the west of the facility. [Tr. (Day 6) 144-45] From that hydrant, fire department pumpers would have been able to pump the maximum amount of water to fight the fire. [*Id.*] However, Sunnyland or a predecessor had broken off the aboveground hydrant so that it could not be located or used. [Tr. (Day 6) 146] The district court found that Sunnyland was negligent in failing to maintain the dry hydrant. [RP 1128, FOF 82]

As the next alternative, the Fire Chief wanted to use an underground well that he was aware of and that had a valve his firefighting equipment could attach to. [Tr. (Day 6) 150] He believed this well was serviced by electricity from two directions and wanted the source of power turned off coming from the building but

still wanted it to be energized from the other direction to the west. [Tr. (Day 6) 150-51, 164] Notably, however, the underground well did not have two sources of electricity and the only power came from the building itself. [Tr. (Day 6) 150-51] Below, the court found that Sunnyland was negligent in having only one source of power to the underground well. [RP 1128, FOF 84]

The Fire Chief then elected to pump water out of the reservoir but there was a delay associated in setting up that pumping operation. [RP 1135, FOF 161-62] Concerns about adequate water was an issue in fighting the fire. [RP 1133-35] Ultimately, the entire packing house and support building were consumed by fire. [RP 1140, FOF 216] At trial, fire department personnel testified they might have been able to save the support building had the electricity not been turned off. [RP 1135, FOF 160]

The Cooperative's line crew arrived at the scene after fire department personnel had arrived. [RP 1129, FOF 87] Through contact with the Cooperative's home office, the line crew was advised the Fire Chief wanted the power restored. [Tr. (Day 6) 163-64] At the time, the Fire Chief thought that he was only requesting power be restored to the underground well and not to the buildings. [Tr. (Day 6) 164] One of the linemen, while observing the fire, indicated in a tape-recorded conversation with Cooperative dispatchers that "[T]here is a heck of a fire and I don't know what it is going to do when I [shove]

these jacks in [(turn the power on)] but I will not be held responsible . . . I just don't want to be responsible if anything happens." [Tr. (Day 2) 103-04] The lineman testified at trial that his main concern with reconnecting the electricity was the safety of the firefighters—he did not know where the firefighters were located and feared that turning on the electricity could have killed or seriously injured someone. [Tr. (Day 2) 105] Although the lineman did not actually speak to any of the firefighters at the scene (Fire Chief Granger's only conversation in this regard was with emergency dispatchers and not with anyone at the Cooperative), the district court interpreted the lineman's reluctance to reconnect the electricity as "threatening" the firefighters with liability if the electricity was turned back on. [RP 1134, FOF 152; RP 1135, FOF 153; RP 1137, FOF 182; Tr. (Day 6) 163-64] The court concluded that such actions constituted negligence by the Cooperative and were the basis for imposing punitive damages. [RP 1556, ¶ 5]

At trial, the Cooperative presented evidence that its line crews are regularly dispatched to fires to disconnect power for the safety of firefighters, but this was the first time that a line crew had been asked to turn power back on while the fire was being actively fought by firefighters. [Tr. (Day 2) 74, 99-101] Below, the court found that one of Sunnyland's experts, Dr. Vytenis Barbrauskas, testified that "it was inappropriate to threaten [the Fire Chief] with 'liability' based on an exaggerated threat that harm would result." [RP 1135, FOF 153] Significantly,

Dr. Barbrauskas admitted at trial that he was not testifying that the Cooperative was negligent in asking someone to assume responsibility for the firefighters if the electricity was reconnected, which he thought was appropriate, but instead that he believed that the record reflected that the Cooperative actually "threatened" the Fire Chief with liability, which was not appropriate. [Tr. (Day 5) 34-35] Dr. Barbrauskas conceded, however, that he was not retained as an expert regarding the conduct of the Cooperative in this case and that he lacked the expertise to render an opinion on such conduct. [Tr. (Day 5) 37]

The district court awarded $100,000 in punitive damages against the Cooperative regardless of which remedy Sunnyland elected, contract or negligence, because the emergency dispatcher—not the Cooperative—advised the Fire Chief that, according to communications with a Cooperative lineman, the Cooperative would not re-energize the building unless the Fire Chief "accepted liability." [RP 1134, FOF 152; RP 1144, COL 6] At trial, no evidence was presented that the Cooperative lineman possessed the requisite managerial capacity to subject the Cooperative to punitive damages or that the Cooperative otherwise authorized or ratified the lineman's alleged conduct.

The facility was not rebuilt and was sold to a third party in December 2004. [RP 1141, FOF 226] In its lawsuit against the Cooperative, Sunnyland made a

claim for the entire property damage and lost crop profits through December 2004. [RP 1143, FOF 241, 246]

C. Crop Loss Damages

The district court found all three prior operators of the greenhouse facility had goals for production of 50 kilograms per square meter per year growing beefsteak tomatoes. [RP 1140, FOF 213] The court found that Sunnyland, in its own financial plan, projected only production levels of 57 kilograms per square meter per year. [RP 1140, FOF 214] Despite these findings, the court nonetheless adopted the conclusions of Sunnyland's tomato-growing expert, Dr. William Bauerle, who projected that the crop production levels for Sunnyland had the fire not occurred would be approximately 95 kilograms per square meter. [RP 1143, FOF 240-42, 246; Tr. (Day 4) 60]

In calculating the estimated production levels of the Sunnyland facility, Dr. Bauerle multiplied the weight of a single tomato, as advertised by the seed company, by the number of tomatoes produced per plant per year and then by the number of total plants. [Tr. (Day 4) 20-25] In so doing, he came up with a value of 80 pounds of tomatoes per plant. [Tr. (Day 4) 22] This value was then reduced based on calculations Dr. Bauerle made concerning light intensity and "other parameters." [Tr. (Day 4) 24-25] His proffered production level at trial was 75 pounds per plant, which is equal to approximately 95 kilograms per square meter,

which is the unit of measurement commonly used in the industry. [Tr. (Day 4) 59-60; Tr. (Day 8) 144]

In making the above calculations, Dr. Bauerle failed to examine or consider production levels at other tomato greenhouses throughout the Southwest. [Tr. (Day 4) 73-74] He further failed to consider past production levels by Sunnyland's predecessor, Agstar. [Tr. (Day 4) 54-55] Additionally, he failed to consider a number of additional factors that may also impact production, including, diseases, insects, intercropping, skill of grower, equipment failure, etc. [Tr. (Day 4) 55-56, 67-68; Tr. (Day 8) 128-29, 130-33] Sunnyland's predecessor, Agstar, for example, lost a significant portion of its crop in 2003 when the vents to the greenhouse failed to open and greenhouse overheated. [Tr. (Day 7) 71-73] Indeed, the Cooperative's crop loss expert, Mr. Kenneth Gerhart, testified that Dr. Bauerle's calculations were not based on the "real world" practicalities of growing tomatoes. [Tr. (Day 8) 127]

Additionally, because Sunnyland was a new company, there would be a certain learning curve involved in obtaining maximum production levels—while acknowledging this to be true, Dr. Bauerle failed to consider this in his calculations. [Tr. (Day 4) 72; Tr. (Day 8) 129-30] The evidence presented below regarding Agstar's profits is illustrative of this point: During the short amount of

time that it was in operations, Agstar, which had the same director and staff as Sunnyland, lost over $5 million. [Tr. (Day 4) 54; Tr. (Day 7) 73]

At trial, Dr. Bauerle, acknowledged as "the authoritative source" and a "very good report," an article from the United States Department of Agriculture (USDA) Economic Report from the Economic Research Service entitled "Greenhouse Tomato Changes: The Dynamics of the North American Fresh Tomato Industry." [Tr. (Day 4) 48-49, 70] This article dealt with tomato production in the North America. [Tr. (Day 4) 48-49] That article indicated that similar facilities were producing average yields between 50 and 53.4 kilograms per square meter. [Tr. (Day 4) 58-61, 64-66] Additionally, the article indicated that the average production level for the southwestern United States was 53 kilograms per square meter. [Tr. (Day 8) 150]

The study further found that the very best growers were achieving 70 kilograms per square meter, which Mr. Gerhart, the Cooperative's tomato-growing expert, testified was the highest production level that he had ever heard of. [Tr. (Day 4) 58-61, 64-65; Tr. (Day 8) 146] While unable to point to any comparable greenhouses with production levels anywhere near 95 kilograms per square meter per year, Dr. Bauerle nonetheless disagreed with a statement by his esteemed colleague, Professor Merle Jensen, that it is "biologically and technologically impossible to produce 95 kilograms per square meter per year." [Tr. (Day 4) 101]

In his testimony, Mr. Gerhart estimated that Sunnyland's production levels would be approximately 58 kilograms per square meter per year, which also surpasses Sunnyland's own earlier estimates and the USDA average for the southwestern United States. [Tr. (Day 8) 147]

Dr. Bauerle also acknowledged that an article written by Mr. Selina and Mr. Bledsoe from Village Farms, one of the largest tomato growers in the United States, appeared to be written by someone who "knew what they were talking about[.]" [Tr. (Day 4) 79-80] That article indicated New Mexico greenhouse facilities averaged 57 kilograms per square meter, which was in line with surrounding states like Colorado (57 kilograms), Arizona (57 kilograms), Nevada (45 kilograms), Texas (54 kilograms), and California (54 kilograms). [Tr. (Day 4) 77-80] Dr. Bauerle disputed these values. [Tr. (Day 4) 81]

The Court adopted the calculations of Plaintiff's expert and found the equivalent of production levels of 95 kilograms per square meter per year in calculating crop loss damages. [RP 1143, FOF 240-42, 246; Tr. (Day 4) 60] Below, the Cooperative contended that the court came up with production levels almost twice what reliable and authoritative sources indicated were actually being achieved by experienced growers in the southwestern United States.

ARGUMENT

I. Whether the District Court Erred in Awarding Sunnyland Damages for Breach of Contract Where the Damages Sought by Sunnyland were Not Foreseeable to the Parties at the Time They Entered into the Contract?

A. Standard of Review

The issue being raised by the Cooperative concerns the proper standard for determining foreseeability of damages in contract cases. This is a legal issue that is reviewed *de novo*. *See Montoya v. Pearson*, 2006-NMCA-097, ¶ 5, 140 N.M. 243, 142 P.3d 11 (holding that "[t]he question of the standards pursuant to which an award of damages may be made in a particular case is a question of law that we review de novo"). Further, even if it is viewed as a mixed question of law and fact, pursuant to which the historical facts are reviewed in the light most favorable to the judgment, the application of the law to those facts is a matter that is reviewed *de novo*. *Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000-NMSC-033, ¶¶ 6-7, 129 N.M. 698, 12 P.3d 960. This is because the issue being raised concerns matters of policy that have precedential value beyond the confines of this case. *See id.* ¶ 6.

B. Preservation

This argument was preserved by the Cooperative's motion to dismiss at the close of Sunnyland's case-in-chief, CNMEC's Requested Findings of Fact and Conclusions of Law, as well as by CNMEC's Motion to Amend and Clarify Findings of Fact and Conclusions of Law. [RP 1021, FOF 63; RP 1025, COL 7;

RP 1177-81; Tr. (Day 7) 112-14; Tr. (Aug. 24, 2007) 15-38] *See* Rule 12-216(A) NMRA; *Romero v. Mervyn's*, 109 N.M. 249, 253 n.2, 784 P.2d 992, 996 n.2 (1989).

C. Points & Authorities

In breach of contract cases, it is axiomatic that a party is not entitled to damages unless such damages are foreseeable. *E & B Specialties Co. v. Phillips*, 86 N.M. 331, 333, 523 P.2d 1357, 1359 (1974); *see also* UJI 13-843 NMRA (providing that any damages from a breach of contract "must be damages which, at the time of making the contract, the parties reasonably could expect to be a consequence of any breach."). While the concept of foreseeability in tort cases is generally applied broadly, *see, e.g., P.G. & R.G. v. State*, 4 P.3d 326, 332 n.11 (Alaska 2000) ("[F]oreseeability is a broad concept and does not require that the precise harm in a given case be predictable."), in the context of breach of contract claims, foreseeability is applied much more narrowly. *See Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 840 (1996) ("[T]he requirement of foreseeability may be more stringent in the context of contract liability than it is in the context of tort liability."); *Sharma v. Skaarup Ship Mgmt. Corp.*, 916 F.2d 820, 827 (2d Cir. 1990) ("[T]he measure of damages in tort cases is more generous than in contract actions."); *Restatement (Second) of Contracts* § 351 cmt. a (1981) ("[T]he requirement of foreseeability is a more severe limitation of liability than is the

requirement of substantial or 'proximate cause' in the case of an action in tort or for breach of warranty."); Dan B. Dobbs, *Handbook on the Law of Remedies* § 12.3 (1973) ("[I]t is clear that what is 'foreseeable' in a tort case may not be foreseeable in a contract case."); 3 E. Allan Farnsworth, *Farnsworth on Contracts* § 12.14 (1990) (observing that *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. Ch. 1854), "imposes a more strict limitation on the recovery of damages for breach of contract than that applicable to actions in tort").

The seminal case of *Hadley v. Baxendale*, 156 Eng. Rep. 145, 151 (Ex. Ch. 1854) is responsible for the general rule regarding damages in breach of contract cases. Under *Hadley*, damages are considered foreseeable, and therefore recoverable, when (1) such damages flowed from the breach in the ordinary course of events; or (2) where special circumstances are present, "if [the circumstances] were communicated to or known by both parties at the time they entered into the []contract." *Specialties Co. v. Phillips*, 86 N.M. 331, 333-34, 523 P.2d 1357, 1359-60 (1974) (citing *Hadley*); *see also Jones*, 1998-NMCA-008, ¶ 18; *Restatement (Second) of Contracts* § 351 (1981). The rule in *Hadley* has been applied in numerous cases to deny damages in breach of contract cases where such damages were not foreseeable.

In the instant case, Sunnyland's argument below that the proper focus in determining whether its claimed breach of contract damages were reasonably

foreseeable to the Cooperative was whether the Cooperative foresaw that disconnecting electricity would result in damages to Sunnyland, impermissibly broadens the foreseeability analysis. [RP 1217-18] As indicated by the above authorities, the concept of foreseeability, as applied in the context of a breach of contract claim, is narrow: "The mere circumstance that some loss was foreseeable, or even that some loss of the same general kind was foreseeable, will not suffice if the loss that actually occurred was not foreseeable." *Restatement*, *supra*, at § 351 cmt. a.

Instead, "[f]oreseeability requires that both the type and the amount of damages claimed were, at the time of contract formation, foreseeable consequences in the ordinary course of events of the breach." *Slattery v. United States*, 69 Fed.Cl. 573, 582 (2006); *see also Landmark Land Co. v. Fed. Deposit Ins. Corp.*, 256 F.3d 1365, 1378 (Fed. Cir. 2001). Indeed, "[i]n determining foreseeability questions of remoteness in time and space and the number of intervening events are considered to decide whether a breaching party to a contract had reason to foresee the injury." *United States v. M/V Santa Clara I*, 887 F. Supp. 825, 834 (D.S.C. 1995) (internal quotation marks and citation omitted).

Although few of the cases cited by Sunnyland below in support of its foreseeability argument actually address the question of foreseeability, these cases are nonetheless illustrative of those damages that are considered the foreseeable

result of the disconnection of electricity by a utility. [RP 1216-17] For example, in *Mississippi Power Co. v. Cochran*, 147 So. 473, 475 (Miss. 1933), the court permitted recovery of damages for breach of contract where an electric company disconnected electricity to a cotton ginner and the loss of electricity prevented the ginner from using his electrical equipment to gin cotton.

Likewise in *Coal District Power v. Katy Coal Co.*, 217 S.W. 449, 450 (Ark. 1919), a coal company contracted with a utility for the provision of electricity to run a pump to prevent water from flooding the coal mine. The utility was fully aware of the reason why the coal company wanted electricity and assisted the company in determining the type of pump needed as well as the machinery needed to provide an electrical current. *Id.* Thereafter, the utility's provision of electricity suffered from frequent interruptions, which prevented the pump from working and consequently, resulted in flood damage to the mine. *Id.* at 451. In holding the utility liable for damages, the court held that the consequences of the utility's inability to provide adequate electrical current to the mine was foreseeable to both parties at the time the contract for electricity was entered into. *Id.*

The cases discussed above present instances where the damages resulting from the disconnection of electricity are "the natural, direct, and proximate consequence of such act or omission." 64 Am. Jur. 2d *Public Utilities* § 30. Unlike the above cases, the case at bar presents a situation in which the claimed

damages were not "natural, direct, [or] proximate," and are therefore not recoverable. The following cases highlight analogous factual scenarios involving breach of contract claims in which damages were considered not foreseeable to the contracting parties.

In *Coker v. Southwestern Bell Telephone Company*, 580 P.2d 151, 152 (Okla. 1978), a telephone customer sued a telephone company under negligence and contract theories alleging that defective telephone service prevented the customer from calling the fire department when the customer's place of business caught on fire. As to the customer's breach of contract theory, the court affirmed the district court's dismissal of the claim. *Id.* at 153. Relying on *Hadley*, the court held the damages alleged under the customer's contract claim were "too remote and speculative to permit recovery." *Coker*, 580 P.2d at 153. In so holding, the court observed,

> It cannot seriously be suggested that appellee and appellant contemplated in their contract that appellee would act as an insurer for fire damage to appellant's building in the event the telephone equipment failed to operate upon the possible occurrence of a fire. In ordinary circumstances all that is contemplated is that communications services will be provided for the subscriber's convenience in the pursuit of the subscriber's usual business and personal affairs.

Id.

A similar result was reached in *Foss v. Pacific Telephone and Telegraph Co.*, 173 P.2d 144, 145-46 (Wash. 1946), where a business owner sued a telephone

company following a fire that destroyed his business. The business owner claimed that a problem with the telephone service prevented him from calling the fire department in a timely manner—the owner asserted that had he been able to timely summon the fire department, his business would not have been destroyed. *Id.* According to the business owner, the telephone company's failure to provide adequate service constituted a breach of contract. *Id.* at 146. Relying on *Hadley*, the court rejected the business owner's claim on the grounds that his damages "did not arise naturally from a breach of [the telephone company's] contract . . . and were not in the contemplation of the parties at the time they made the contract for telephone service." *Foss*, 173 P.2d at 149.

Likewise, in *Willie v. AG Vantage F.S., Inc.*, No. 04-1548, 2005 WL 1253974, at *1 (Iowa Ct. App. May 25, 2005) (unpublished), a gas customer sued his gas company after the company failed to deliver gas needed to run heaters and the customer instead relied on a faulty woodstove, which caused a fire. The Iowa Court of Appeals affirmed the dismissal of the customer's suit, observing that with respect to the customer's breach of contract claim that "[o]nly damages as were reasonably contemplated by the parties at the time of entering into the agreement are recoverable for a breach thereof." *Id.* at *2 (internal quotation marks and citation omitted). According to the court, "[t]he district court was correct in

determining that the fire caused by a wood burning stove was not the probable, natural, or foreseeable result of a failure to provide . . . gas." *Id.*

Significantly, similar results have been found even in the context of negligence claims, where the concept of foreseeability is applied more broadly than in contract cases. *See, e.g.*, *Cannon v. Commonwealth Edison Co.*, 621 N.E.2d 52, 54, 57 (Ill. Ct. App. 1993) (holding that it was unforeseeable to electric company that blackout caused by electric company's negligence would result in customer's paralyzing injuries where customer fell down stairs while investigating the cause of the loss of power); *Roberts v. TXU Energy Retail Co.*, 171 S.W.3d 901 (Tex. App. 2005) (holding that plaintiffs could not recover damages for electric company's negligent disconnection of electricity where plaintiffs used candles to light their home after the power was disconnected and the candles started a fire that killed plaintiffs' two sons); *Foss*, 173 P.2d at 149 ("Even if we ignored the contract rule embodied in *Hadley* . . . and applied the tort rule of damages for which appellant contends, respondent's liability does not follow."); *accord Davis v. Cindy Preferred*, 743 So.2d 772, 773 (La. Ct. App. 1999); *Riojas v. Lone Star Gas Co.*, 637 S.W.2d 956, 959-60 (Tex. App. 1982).

While the facts in the cases relied on Sunnyland below would arguably support a claim for damages resulting from the disconnection of electricity where the loss of electricity prevented Sunnyland from running machinery needed to pack

tomatoes, for example, the damages incurred by Sunnyland in the instance case are far more attenuated and are therefore more in line with *Willie*, *Foss*, and *Coker*. Indeed, Mr. Stockwell and Mr. West both acknowledged at trial that they never foresaw this particular set of circumstances happening as the result of the disconnection of electricity. [Tr. (Day 7) 107-08; Tr. (Day 9) 3-4]

In the present case, the fire caused by Sunnyland's employees negligently welding a trailer hitch was not in the ordinary course of events foreseeably resulting from the Cooperative's decision to disconnect electricity at the greenhouse facility. Indeed, the lack of foreseeability of the damages in this case is particularly apparent when one considers all the events that had to occur after the disconnection of electricity before the packhouse and supporting buildings were destroyed by fire. *See M/V Santa Clara I*, 887 F. Supp. at 834 (observing that in determining foreseeability, "questions of remoteness in time and space and the number of intervening events are considered to decide whether a breaching party to a contract had reason to foresee the injury").

First, after learning that the electricity had been disconnected one day prior to the fire, the owner of Sunnyland, Mr. Stockwell, who knew that his employees planned to repair the trailer hitch, failed to halt operations at the facility or otherwise make reasonable arrangements to get the electricity reconnected in a timely manner. [RP 1127, FOF 68; Tr. (Day 7) 107-08] Significantly, the

manager at Sunnyland's Estancia facility readily admitted that although he was aware that the electricity had been disconnected, he would have permitted the employees to weld the trailer hitch if he had been asked. [Tr. (Day 3) 69]

Next, a generator that was to be used in the event that electricity was lost or disconnected, and which would have automatically turned on under these circumstances, was inoperable and thus failed to provide a backup source of electricity to Sunnyland's facilities. [RP 1135, FOF 156] Had the generator been operating properly, the backup power supply would have allowed the employees to use water hoses on the fire.

Further, despite their knowledge of numerous precautionary measures to be taken when welding, Sunnyland's employees disregarded these measures, choosing instead to weld near cardboard boxes that had been temporarily placed in the packhouse. [RP 1127, FOF 69-76; RP 1128, FOF 71-85] Moreover, although these employees were aware of fire extinguishers on the premises, they chose instead to rely unsuccessfully on water hoses in their attempt to put out the fire. [Tr. (Day 3) 97; Tr. (Day 4) 124-25; Tr. (Day 8) 78-79] Importantly, the district court concluded that these employee's actions were the sole proximate cause of the fire. [RP 1128, FOF 76] *See Outboard Marine Corp. v. Babcock Indus., Inc.*, 106 F.3d 182, 185 (7th Cir. 1997) ("The promisor who breaks his promise is liable only

for the harm that he causes . . . He is therefore not liable for the harm that occurred solely as a result of the plaintiff's acts.").

The district court further found that Sunnyland failed to maintain a dry hydrant that would have been the best source of water to fight the fire, failed to properly train its employees in fire fighting techniques and emergency actions plans, violated regulations regarding the use of a fire door, and additionally, failed to have two sources of electricity, one of which could have been used to energize the exterior well pump without also energizing the entire facility. [RP 1128, FOF 77-85]

While one may foresee that the disconnection of electricity at Sunnyland Farms may disrupt or prevent Sunnyland's employees from carrying out Sunnyland's normal course of business, there is not a similar natural or direct connection between the disconnection of electricity by the Cooperative, the fire caused by Sunnyland's employees, and the damages of the type and magnitude incurred by Sunnyland, which, according to the district court, were largely caused by Sunnyland's above-described acts and omissions. *See M/V Santa Clara I*, 887 F. Supp. at 834; *Willie*, 2005 WL 1253974, at *1; *Coker*, 580 P.2d at 153; *Foss*, 173 P.2d at 149. Under such circumstances, the district court should have found that the damages sought by Sunnyland were unforeseeable and not recoverable.

Additionally, "[a] contract price's lack of proportionality to the loss may [also] indicate whether such damages were foreseeable." *Maine Rubber Int'l v. Environmental Mgmt. Group*, 324 F. Supp. 2d 32, 37 (D. Maine 2004) (citing *Restatement (Second) Contracts* § 351 cmt. f). In *Maine Rubber*, for example, the United States District Court for the District of Maine denied the plaintiff's claim for lost profits on the grounds that "the low contract price . . . suggests that the parties never contemplated the risk of liability for lost profits." *Id.* at 36. Likewise, in *Sundance Cruises Corp. v. American Bureau of Shipping*, 7 F.3d 1077, 1084 (2d Cir. 1993), the Second Circuit observed that "the great disparity between the fee charged . . . and the damages sought . . . is strong evidence that such a result was not intended by the parties." *See also Robotic Vision Sys., Inc. v. Cybo Sys., Inc.*, 17 F. Supp. 2d 151, 160 (E.D.N.Y. 1998). This Court has similarly recognized that "some limit could be placed on recovery for particularly large lost profits" to "avoid disproportionate compensation." *Manouchehri v. Heim*, 1997-NMCA-052, ¶ 25, 123 N.M. 439, 941 P.2d 978 (citing *Restatement (Second) of Contracts* § 351(3) (1981)).

One need only look at the bills sent by the Cooperative to Sunnyland to see the disparity between the Cooperative's charges for electricity and the damages award in the instant case. Electricity bills in the record proper indicate that Sunnyland was charged $2960.79, excluding its delinquent balances, for electricity

for its four accounts over a one-month period—an amount that dwarfs the nearly $22 million in damages in this case. [RP 596-99] It cannot seriously be contemplated that the amounts paid by Sunnyland for electricity were intended to cover the risk of liability in the magnitude awarded in this case. Utility companies "could not continue to exist under such terms." *Sundance Cruises Corp.*, 7 F.3d at 1084.

Indeed, sound public policy reasons further militate against the Cooperative being held liable for over $21 million in this case. As observed in *Foss*,

> Mere breach of a contract to furnish water for the extinguishment of a fire cannot be said to be the cause of the loss, because such cause may have been the negligence of the owner, the criminal act of a stranger, the atmospheric conditions, or any one of the numerous other things which might be mentioned . . . Keeping in mind the fact that the contract of the water company is to furnish water, and not to extinguish the fire, the rule with respect to damages precludes holding the company liable. Damages must be such as were within the contemplation of the parties; and it certainly cannot be claimed that for the meager remuneration received a water company undertakes to make good the loss which would result from the destruction of a modern city by fire. And the principle applies equally to the destruction of any part of it.

173 P.2d at 148-49 (internal quotation marks and citation omitted). To hold as Sunnyland urges in this case would essentially create a situation in which in all instances that a utility contracts to provide water, gas, or electricity, the utility in effect assumes liability "as an insurer of millions of dollars worth of property upon which, either from the nature of the business conducted on the premises or the

locality in which the property is situated, an insurance company itself would not think of assuming the risk." *Lowenschuss v. So. Cal. Gas Co.*, 11 Cal.App.4th 496, 500 (1992); *see also Libbey v. Hampton Water Works Co.*, 389 A.2d 434, 502-03 (N.H. 1978) ("Water companies are in business to supply water, not to extinguish fires. Their rates reflect this assumption; they are uniform, not varying with the greater or lesser inherent danger in given areas. Water companies would have to raise their rates to compensate for the newly imposed burden or to procure insurance . . . The remaining alternative, to run the risk of paying large judgments . . . would deter many from entering such a business.").

To hold that the Cooperative—and utilities throughout the State—"must foresee every accident that may arise every time electric power is lost is to impose upon it an insuperable burden." *Cannon*, 621 N.E.2d at 56. The burden being not only the provision of electricity to its many members, but additionally, the need to insure itself heavily in the event that one of its members suffers damages due to the loss of electricity, regardless of the nature of the loss, and in the off-chance that one of its members may start a fire when the electricity is disconnected, inspect the property of its members to ensure that adequate fire prevention and fire fighting mechanisms are in place. Aside from potentially bankrupting utilities throughout the State, such a burden is patently absurd and is not supported by case law. *See Foss*, 173 P.2d at 146-47 ("Public utility corporations should, as contemplated by

law, be required to furnish a prompt and efficient service reasonably adequate to meet the just demands of the public . . . [B]ut, as also contemplated by law, they should not be required to compensate injuries for which in law they are not responsible."); *accord Coker*, 580 P.2d at 153.

For the foregoing reasons, therefore, the district court's award of damages against the Cooperative for Sunnyland's breach of contract claim should be reversed.

II. WHETHER THE DISTRICT COURT ERRED IN AWARDING PUNITIVE DAMAGES WHERE NO CONDUCT RELATING TO THE BREACH OF CONTRACT SUPPORTED THE IMPOSITION OF PUNITIVE DAMAGES AND WHERE THERE WAS NO FACTUAL OR LEGAL BASIS TO AWARD PUNITIVE DAMAGES AGAINST THE CORPORATE DEFENDANT?

A. Standard of Review

"Whether conduct arises to the level such that punitive damages are appropriate is a mixed issue of fact and law." *N.M. Banquest Investors Corp. v. Peters Corp.*, 2007-NMCA-065, ¶ 29, 141 N.M. 632, 159 P.3d 1117, *aff'd*, 2008-NMSC-039, 144 N.M. 434, 188 P.3d 1185. Under such a standard, this Court will "review any factual questions under a substantial evidence standard and [will] review the application of law to the facts de novo." *State v. Baca*, 2004-NMCA-049, ¶ 11, 135 N.M. 490, 90 P.3d 509.

B. Preservation

This argument was preserved by the Cooperative's motion to dismiss at the close of Sunnyland's case-in-chief, CNMEC's Requested Findings of Fact and Conclusions of Law, as well as by CNMEC's Motion to Amend and Clarify Findings of Fact and Conclusions of Law. [RP 1026, 1174-76, 1184; Tr. (Aug. 24, 2007) 49] *See* Rule 12-216(A) NMRA; *Romero*, 109 N.M. at 253 n.2, 784 P.2d at 996 n.2.

C. Points & Authorities

i. There is No Factual or Legal Basis for the Court's Award of Punitive Damages for Sunnyland's Breach of Contract Claim

Below, the district court awarded $100,000 in punitive damages against the Cooperative "for its willful, malicious, wanton, and reckless conduct in impeding firefighters with the threat of liability in energizing the electricity." [RP 1556, ¶ 5] According to the court, such "conduct was a breach of [the Cooperative's] duty under its contract with Sunnyland[.]" [*Id.*] Of note, the court expressly found that the Cooperative "did not act maliciously, willfully, wantonly, fraudulently or in bad faith toward Sunnyland Farms prior to the fire thereby barring any claims for punitive damages for conduct *prior* to the fire." [*Id.* ¶ 4 (emphasis added)]

As alleged by Sunnyland below, the only contractual provisions at issue were those requiring the Cooperative to provide proper notice before disconnecting

the electricity of its members and providing the grounds on which electricity could be disconnected. [RP 768, 1070-71, 1121, 1144-45] Sunnyland did not allege, and the court did not find, that there were any contractual provisions regarding the Cooperative's conduct in the event of a fire. Indeed, the court expressly found that the Cooperative "was unable to produce any written procedure of what to do at the scene of a fire." [RP 1136, FOF 177] Under such circumstances, it is unclear how "impeding firefighters with the threat of liability in energizing the electricity" was a breach of the Cooperative's contract with Sunnyland. Moreover, given that the Cooperative's failure "to provide advance notice of the disconnect of electrical serve to Sunnyland Farms was the cause of contractual damages," [RP 1144, COL 1] the award of punitive damages for different conduct by the Cooperative contravenes New Mexico case law on punitive damages. *See Gonzales v. Sansoy*, 103 N.M. 127, 129, 703 P.2d 904, 906 (Ct. App. 1984) ("An award of punitive damages must be supported by an award of compensatory damages.").

In addition, as a general rule,

> A corporation may be held liable for punitive damages for the misconduct of its employees if: (1) corporate employees possessing managerial capacity engage in conduct warranting punitive damages; (2) the corporation authorizes, ratifies, or participates in conduct that warrants punitive damages; or (3) under certain circumstances, the cumulative effects of the conduct of corporate employees demonstrate a culpable mental state warranting punitive damages.

Chavarria v. Fleetwood Retail Corp., 2006-NMSC-046, ¶ 21, 140 N.M. 478, 143 P.3d 717 (citations omitted). In awarding punitive damages for the conduct of the Cooperative's employees, the court made no findings regarding whether any of these three bases for awarding punitive damages against a corporation for the conduct of its employees were present. Notably, while Sunnyland did include such language in its proposed findings of fact and conclusions of law, the court chose not to include similar language in its findings of fact and conclusions of law. [RP 1045-46] *See Western Bank v. Franklin Dev. Corp.*, 111 N.M. 259, 260, 804 P.2d 1078, 1079 (1991) ("The refusal by the court to accept a requested finding is regarded on appeal as a finding against the party bearing the burden of proof on the issue at trial."). Further, there was no testimony at trial regarding any of these three potential bases for awarding punitive damages against the Cooperative. In the absence of such a finding, the award of punitive damages against the Cooperative for the conduct of its employees was improper. *See, e.g.*, UJI 13-1827 NMRA (requiring that a jury find that the conduct at issue can be properly attributed to the corporation before an award of punitive damages may be made).

For these reasons, the award of punitive damages against the Cooperative for breach of contract should be reversed by this Court.

ii. There is No Factual or Legal Basis for the Court's Award of Punitive Damages for Sunnyland's Negligence Claim

The district court also concluded that the apparent "threatening" of firefighters by Cooperative employees constituted negligence and that punitive damages could be awarded on that basis. [RP 1556] Again, however, as with the punitive damages award for Sunnyland's breach of contract claim, the district court failed to identify which of the three potential bases for imputing liability on the Cooperative for its employees' conduct was present and there was no evidence presented at trial regarding any of these three bases. *See Chavarria*, 2006-NMSC-046, ¶ 21. Accordingly, the award of punitive damages against the Cooperative for negligence should also be reversed by this Court.

III. WHETHER THE DISTRICT COURT PROPERLY AWARDED MORE THAN $13 MILLION IN CROP LOSS DAMAGES WHERE SUNNYLAND'S EXPERT'S PROFFERED CROP PRODUCTION LEVELS WERE NEARLY TWICE WHAT RELIABLE AND AUTHORITATIVE SOURCES INDICATE WERE ACTUALLY BEING ACHIEVED BY EXPERIENCED GROWERS IN THE SOUTHWEST?

A. Standard of Review

On appeal, an appellate court reviews the sufficiency of the evidence to support the verdict by examining whether the verdict is supported by which "such relevant evidence that a reasonable mind would find adequate to support a conclusion." *Weststar Mortgage Corp. v. Jackson*, 2003-NMSC-002, ¶ 8, 133 N.M. 114, 61 P.3d 823 (internal quotation marks and citation omitted). In so doing, the court will "review all evidence in the light most favorable to the verdict

and resolve all conflicts in the light most favorable to the prevailing party." *Id.* (citation omitted).

B. Preservation

This argument was preserved by the Cooperative's objections to the testimony of Dr. William Bauerle, the Cooperative's Requested Findings of Fact and Conclusions of Law, as well as by the Cooperative's Motion to Amend and Clarify Findings of Fact and Conclusions of Law. [RP 1021-23, 1026, 1181-84; Tr. (Aug. 24, 2007) 38-44] *See* Rule 12-216(A) NMRA; *Romero v. Mervyn's*, 109 N.M. 249, 253 n.2, 784 P.2d 992, 996 n.2 (1989).

C. Points & Authorities

The testimony of Dr. William Bauerle in support of Sunnyland's claim for lost profits failed to provide substantial evidence in support of Sunnyland's damages claim. Accordingly, the district court's award of over $13 million for lost crops should be reversed by this Court.

"Damages must be proved with reasonably certainty." *Rael v. F. & S. Co.*, 94 N.M. 507, 511, 612 P.2d 1318, 1322 (Ct. App. 1979). Although this Court must examine the evidence under a substantial evidence standard,

> [s]ubstantial evidence is . . . not merely an appellate incantation designed to conjure up an affirmance. To the contrary, it is essential to the integrity of the judicial process that a judgment be supported by evidence that is at least substantial. An appellate court need not blindly seize any evidence . . . in order to affirm the judgment.

Roddenberry v. Roddenberry, 51 Cal.Rptr.2d 907, 917 (Ct. App. 1996) (internal quotation marks and citation omitted). Significantly, evidence that is "so inherently improbable as to be unworthy of belief; or otherwise unsubstantial" cannot sustain a verdict on appeal. *Silva v. Haake*, 56 N.M. 497, 506, 245 P.2d 835, 840 (1952) (Sadler, J., dissenting).

Dr. Bauerle's estimated production levels for the Sunnyland facility, which are almost double the USDA range for tomato greenhouses in the Southwest (acknowledged as an authoritative source by Dr. Bauerle), and which the undisputed evidence indicates had not been achieved by any other known greenhouse, are so improbable as to be unworthy of belief and therefore do not constitute substantial evidence in support of Sunnyland's lost crops damages. Dr. Bauerle's failure to consider the production levels of other greenhouses in the Southwest is particularly striking, as that is the method by which courts recognize that expected crop yields are demonstrated with reasonable certainty. *See, e.g.*, *Gibbs Patrick Farms, Inc. v. R.D. Clifton Co.*, Nos. 7:06-cv-47, 7:05-cv-50, 2008 WL 2223255, at *1 (M.D.Ga. May 22, 2008) ("[E]vidence of the same crop grown on nearby land with similar soil conditions, or like crops grown on the same land in prior years may also be sufficient to demonstrate expected yields with the required reasonable certainty."). Indeed, in its own financial plan, Sunnyland projected production levels of 57 kilograms per square meter—a significant

difference from Dr. Bauerle's projected levels of 95 kilograms per square meter. [RP 1140, FOF 214]

Similarly, his failure to consider a number of additional factors that may also impact production raises doubts about his analysis. *See, e.g., Albin Elevator Co. v. Pavlica*, 649 P.2d 187,192 (Wyo. 1982) ("[T]he farmer's income from each and every planting is dependent on so many variables that every year's experience takes on the characteristics of a new venture."). Notably, the Cooperative's crop loss expert, Mr. Gerhart, testified that "real world" factors such as diseases, insects, intercropping, skill of grower, and equipment failure, etc., are important considerations in calculating potential production levels. [Tr. (Day 8) 128-29, 130-33] Indeed, Sunnyland's own predecessor, Agstar, suffered significant crop losses due to equipment failure. [Tr. (Day 7) 71-73]

Dr. Bauerle's failure to consider past production levels and profits at the Estancia facility similarly raises serious doubts about the accuracy of his calculations. *See, e.g., Ciba-Geigy Corp. v. Murphree*, 653 So.2d 857, 870 (Miss. 1994) (holding that farmers proved their lost crop damages with reasonable certainty where they produced evidence regarding past production levels at their farms); *Albin Elevator Co.*, 649 P.2d at 193 ("The courts generally require some record of profits which allows the reasonable inference to be drawn that a profit would have been experienced but for the breach of the defendant."). Again, Dr.

Bauerle's failure to consider past production levels and profits is particularly striking in this case, as the previous owner of the facility, Agstar, lost over $5 million during the short amount of time that it was in operation. [Tr. (Day 4) 54; Tr. (Day 7) 73] For these reasons, Dr. Bauerle's estimated production levels were inherently improbable as to be unworthy of belief and therefore cannot sustain the $13 million on crop loss damages awarded by the court. Accordingly, Sunnyland has failed to prove its lost profits damages with reasonable certainty and this Court should therefore reverse the damages award.

CONCLUSION

For the foregoing reasons, the Cooperative respectfully requests that the Court reverse the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2009, I caused a true and correct copy of Defendants-Appellant's Brief-in-Chief to be served via U.S. Mail, postage prepaid, to the following:

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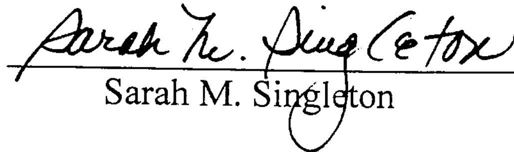

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