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

PLAINTIFF-APPELLEE'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

NEW MEXICO CASES

OTHER STATE CASES

FEDERAL CASES

DOCKETED CASES

RULES

MISCELLANEOUS

STATEMENT OF COMPLIANCE
NMRA 12-213(G)

Pursuant to the requirements of Rule of Appellate Procedure 12-213(G), this Brief, exclusive of captions, tables, signature block and Certificate of Service, contains 10,988 words, as determined by the word count program of the word processor used, WordPerfect, Version 12.

INTRODUCTION

This case arises from the wrongful breaches of contract by Central New Mexico Electric Cooperative, a rural electric cooperative ("CNMEC"). Those wrongful breaches of contract caused devastating business losses to Sunnyland Farms, Inc. ("Sunnyland"), resulting in damages exceeding $21,000,000.

Sunnyland operated large commercial greenhouses in Estancia and Grants, New Mexico, in which it intended to grow hydroponic tomatoes. When these events occurred, Sunnyland had not yet planted its crop. CNMEC contracted to supply electric power to Sunnyland's Estancia facility. In September 2003, CNMEC willfully breached its contract to Sunnyland by disconnecting the electric power to the Estancia facility, without valid cause or the required notice. While the electricity was wrongfully disconnected, a small fire was negligently started by Sunnyland at the facility. Because power was disconnected, Sunnyland employees and the firefighters on the scene were unable to pump water to extinguish the fire. CNMEC refused the firefighters' request that CNMEC reconnect the power. Without access to water, the fire raged out of control and destroyed Sunnyland's facility.

Sunnyland sued CNMEC for breach of contract and negligence. The matter was tried to the district judge without a jury. At the trial, CNMEC sought to

defend against the breach of contract claim by presenting testimony that it had sent three hand-written notices informing Sunnyland that the power would be disconnected on September 8th. But Sunnyland testified that it had received no such notice and CNMEC could present no copies of such notices and no written record that such notices were written or sent. The only notice Sunnyland ever received was of a threatened disconnection of a different line to take effect on September 17th. In an effort to prove that the consequential business losses were not foreseeable, CNMEC introduced testimony of one of its managers that he had no idea that commercial activity was going on at the Sunnyland facility. The district judge, rejecting CNMEC's proffered testimony, found that CNMEC breached its contract with Sunnyland and that all the damages (approximately $21,000,000) were reasonably foreseeable and further awarded $100,000 in punitive damages for the breach of contract in not reconnecting the power at firefighters' request.

In its appeal, CNMEC abandons its trial strategy. While it continues to challenge the consequential damages as unforeseeable, it no longer makes any argument that it did not know that Sunnyland was operating a business on the premise. Instead, it now argues that the consequential damages cannot be foreseeable as a matter of law. It also argues that there is no substantial evidence

to support the amount of consequential damages and that the trial judge abused his discretion in awarding punitive damages. As we show, all the matters CNMEC raises in its appeal arise from fact determinations for which there is substantial evidence. CNMEC's appeal should be denied.

COUNTERSTATEMENT OF THE FACTS

I. The CNMEC/Sunnyland Contract.

CNMEC's contract with Sunnyland requires that if electric service is disconnected for nonpayment, the consumer must be provided notice of the disconnect by mail fifteen days in advance and that failure to pay the bill of another customer is not cause for discontinuing service, even if the customer whose service is proposed to be disconnected is a guarantor thereof. Findings Nos. 4-9.[1]

On June 25, 2003, Sunnyland purchased Agstar of New Mexico, Inc. ("Agstar"), which had been operating huge greenhouses, one at Grants, the other

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[1] The case was tried to the Honorable John W. Pope, without jury. Notations marked "Finding" or "Conclusion" are to the district court's Findings of Fact and Conclusions of Law, respectively. R.P., 1120-1145. The trial was recorded and the audio recordings are lodged with the Court. References marked "Tr." are to the transcription of the recordings, which the Court, by order, has permitted the parties to file and refer to in their briefs. The designations are to the day of the trial, followed by a colon, and the page number, followed by another colon, and line numbers.

at Estancia. Under the terms of the purchase, Sunnyland agreed to pay all debts of Agstar, as of June 1, 2003. Sunnyland's principal, John Stockwell, estimated the costs of acquisition at about $14 million US (exclusive of the value of his surrendered Agstar shares). Tr. 7:12:1 - 13:22; 7:61:23-25; 7:63:1-64:16; 7:77:2 - 78:4.

On that same day the deal was reached, Stockwell went to CNMEC's office to clear up Agstar's delinquent accounts. He cleared all outstanding amounts ($11,351.64) owed to CNMEC by Agstar as of that date. Finding No. 16; Tr. 7:17:1 - 19:15. CNMEC declined to switch the accounts to Sunnyland because Stockwell did not yet have Sunnyland's Articles of Incorporation. Stockwell told CNMEC that he would assume liability for Agstar's obligations. Tr. 7:19:16 - 20:4.

Stockwell returned to CNMEC on July 10, 2003, with Sunnyland's incorporation papers. He opened four accounts in Sunnyland's name, was issued a member number different than Agstar's (Findings Nos 11-13), and paid a deposit of $10,750 to secure Sunnyland's accounts. At the same time, he paid four additional Agstar bills that had been rendered on July 8th, accepting CNMEC's assertion of the amounts due. He paid a total of $14,525.70 that day. Finding No. 17. Agstar's accounts were closed, and Agstar's deposit was added to Sunnyland's

deposit. Findings Nos. 17-19; Tr., 7:20:9 - 21:24. CNMEC advised Stockwell that there would be one final Agstar billing and told Stockwell that Agstar's deposit would be applied against it. Stockwell assured CNMEC that Sunnyland would take responsibility for that billing as well. Finding Nos. 20-21; Tr. 7:22:1-13; 7:88:1-25.

II. CNMEC improperly disconnects power to Sunnyland without justification or providing required notice.

CNMEC 's improper disconnection of electricity to Sunnyland breached its contract in two fundamental respects.[2] *First*, there was no basis for the termination under the contract. *Second*, CNMEC failed to provide Sunnyland with the contractually required notice of termination. On August 27, 2003, Birchie West, CNMEC Director of Administrative Services, directed that the final Agstar bill be transferred to Sunnyland's account and that cut off procedures be initiated. Finding No. 25; Tr. 1:105:18 - 106:8.[3] Two days later, West instructed Pat Taylor, CNMEC's dispatcher, to hand write "two-day" imminent cut-off notices

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[2] In addition, as the district court concluded that in refusing to reconnect the power at the request of the firefighters so that they could extinguish the fire CNMEC breached the contract again. Amended Judgment, ¶ 5, R.P. 1556.

[3] The first bills on Sunnyland's own accounts had been rendered on August 9, 2003, and those bills specifically stated that the accounts would not become past-due until September 2. Finding No. 23. So, West ordered that electricity be disconnected even before the accounts were past-due. Finding No. 30.

(Finding Nos. 31-32), usually given after previous notices have not resulted in payment. West by-passed CNMEC computer system, which was programmed to assure that all required notices were sent and that premature cut-off did not occur. Taylor handwrote notices to be mailed on the next business day, September 2. Findings Nos. 33, 66. The notices stated that power would be disconnected on September 8th if the accounts were not paid by September 5th. Tr. 1:110:22 - 111:5.

But no copies of these notices were found, and CNMEC had no written record of two-day notices having been sent. Findings Nos. 42-44;Tr. 1:71:1-24; 1:110:17 - 113:3. Sunnyland's clerk, Debra Bodley, testified that Sunnyland had not received any disconnect notice as of September 8th, the date the electricity at Estancia was disconnected. Tr. 5:42:6-9.

Sunnyland did receive a different notice dated August 29, 2003, and mailed on September 2, 2003; a 15-day Notice requiring payment "before September 17, 2003, to avoid disconnection." Finding No. 34. Although Taylor insisted that she had written notices and issued orders to disconnect three of the Sunnyland accounts (Tr. 1:113:7-17), only one account actually was disconnected on September 8th, not the one indicated on the notice that was received by Sunnyland only after the disconnection occurred on the September 8th. Finding No. 51; Tr.

2:85:21 - 86:22; 5:10-20; Tr. 5:42:6-15.

On the morning of September 8th, CNMEC employees disconnected Sunnyland's electricity "for nonpayment." Finding No. 45. CNMEC stipulated that Sunnyland was not provided the required fifteen-day notice before the electricity was disconnected and that Sunnyland's electricity was disconnected on account of an Agstar arrearage. Findings Nos. 29, 59-60; Tr. 1:3:6-9; 1:126:17-23. These stipulations establish breaches of contract. Conclusions Nos. 1, 9-10; Amended Judgment, ¶¶ 1, 5; R.P. 1556.

On the 8th, Sunnyland's employee, Debra Bodley, learned that Estancia's power had been disconnected and called CNMEC to get power reestablished. Finding No. 55; Tr. 5:70:10-23. Bodley was told the balance due on each of the accounts and advised CNMEC that Sunnyland had not yet received any such bills. Rather than stopping the improper disconnect, CNMEC faxed the bills to Bodley. Finding No. 57; Tr. 5:95:8-14; 5:96:2-25. Later that day, Bodley told CNMEC that Sunnyland would pay, inquiring about the fastest way to make payment. CNMEC refused to let Sunnyland deposit funds directly into CNMEC's account. Sunnyland overnighted the checks and CNMEC promised that as soon as the payment was verified, electricity would be reconnected. Tr. 5:101:14-16.

III. A small fire is started at Sunnyland. Because CNMEC's wrongful disconnect and refusal to reconnect the electricity, water cannot be pumped to extinguish the fire. As a consequence, the Sunnyland facility is destroyed.

On the morning of September 9th, Sunnyland employees, Juan Mirabel and Ernesto Acosta, repaired a trailer involving welding in the packhouse.[4] Shortly after completing the task, they discovered a small fire at the welding site. Tr. 3:91:7 - 94:7; 8:53:15-22. The district court found that Sunnyland's employees had negligently started a fire. Findings Nos. 69-73. When the fire was discovered, it was quite small and Acosta and Mirabel obtained hoses to put out the fire. When they turned on the pump, there was no power. Findings Nos. 99-100, 104, 108, 113-114. Acosta testified that had there been water they could have contained and extinguished the fire easily. Finding No. 115; Tr. 3:97:2 - 98:4. Plaintiff's fire expert, Dr. Vytenis Babrauskas agreed. Finding No. 159; Tr. 5:7:25 - 8:6.

CNMEC's lineman, Ivan Riley, arrived at about that time. Tr. 8:91:8 - 93:4. Firefighters already were on the scene when Riley arrived. Firefighters arrived at

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[4] Sunnyland's Estancia facility consisted of a twenty acre glass greenhouse connected via a corridor to the two acre packhouse and support (or operations) building. The packhouse occupied roughly the eastern third of the two acre building and the western two-thirds consisted of the support or operations facility. *See*, Plaintiffs Exhibit 13.1; Tr. 9:25:5-8; 9:29:5-6.

Sunnyland at 10:15, within 15 minutes of receiving a call that there was a fire. Fire Chief Granger soon learned there was no electric power to run the pumps necessary to get water. Finding No. 151; Tr. 6:103:7 - 105:18; 6:108:3-19; 6:111:17 - 112:5. Chief Granger then called to ask that CNMEC turn the power on. Tr. 6:112:15-21. Granger was advised that CNMEC would not turn the power back on unless Granger assumed liability. Incredulous, Granger inquired what liability he was supposed to assume but was told only that CNMEC repeated its condition: that Granger agree to assume liability before it would reenergize the site. Finding No. 152; Tr. 6:112:15 - 113:5.

CNMEC employees, Paul Chavez and Leroy Lopez, were also at the Sunnyland premises at the same time the firefighters were at the scene. Tr. 2:73:12 - 74:20. In response to Chief Granger's request that power be turned back on, Chavez, the CNMEC employee authorized to make the decision, declined to reinstate the disconnected electricity unless someone else would accept responsibility. Tr. 2:105:9-11. The trial court found the refusal to reconnect to be an intentional, willful or malicious breach of the contract. Conclusion No. 7; Amended Judgment, ¶ 5, R.P. 1556.

Granger testified, and the trial court found, that if there were electricity to pump the water the fire probably could have been contained. Finding No. 158;

Tr. 6:124:4-10. Plaintiff's fire expert, Dr. Babrauskas agreed. Findings Nos. 159, 160; Tr. 5:8:7-15. As a consequence of CNMEC's breaches of contract, the firefighters did not have sufficient water, the small fire that could have been contained was not, and the entire Packhouse/control room was destroyed, rendering the greenhouse useless. Finding No. 216. The district court found that all of Sunnyland's damages were reasonably foreseeable. Finding No. 215.

ARGUMENT

I. Record evidence supports the district court's factual finding that the damages proximately caused by CNMEC's breach of contract were foreseeable. The damages awarded by the district court's Judgment must be affirmed.[5]

In New Mexico, as in most jurisdictions, consequential damages proximately caused by a defendant's breach of contract are routinely recoverable, if those consequential damages are reasonably foreseeable to the parties to the contract. *Manouchehri* v. *Heim*, 1997-NMCA-052, 123 N.M. 439, 941 P.2d 978; *Ranchers Exploration & Development Corp.* v. *Miles*, 102 N.M. 387, 389, 696

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[5] By pretending that the question of foreseeability is one of law, CNMEC misstates the standard of review. CNMEC Br., p. 19. The question of foreseeability is one of fact (*Jones* v. *Lee*, 1998-NMCA-008, ¶ 19, 126 N.M. 467, 473, 971 P.2d 858, 864), and Judge Pope found as fact that "the damages suffered by Sunnyland were foreseeable ...." Finding No. 215. Accordingly, the standard of review is whether there is substantial evidence to support the finding of fact. *Jones* v. *Lee*, 1998-NMCA-008, ¶7.

P.2d 475, 477 (1985); *Camino Real Mobile Home Park Ptnshp.* v. *Wolfe*, 119 N.M. 437, 446, 891 P.2d 1190, 1200 (1995); *Totaro, Duffy, Connova and Co., L.L.C.* v. *Lane Middleton & Co., L.L.C.*, 191 N.J. 1, 13, 921 A.2d 1100, 1107 (2007) citing RESTATEMENT (SECOND) OF CONTRACTS § 351 (1979); *Bi-Economy Market, Inc.* v. *Harleysville Ins. Co. of New York*, 10 N.Y.3d 187, 190, 886 N.E.2d 127 (2008) ("It is not necessary for the breaching party to have foreseen the breach itself or the particular way the loss occurred, rather, '[i]t is only necessary that loss from a breach is foreseeable and probable'", quoting *Ashland Management* v. *Janien*, 82 N.Y.2d, 395, 403, 604 N.Y.S.2d 912, 624 N.E.2d 1007 (1993)); *Sun-Maid Raisin Growers* v. *Victor Packing Co.*, 146 Cal.App.3d 787, 194 Cal.Rptr. 612 (1983). Whether damages are reasonably foreseeable is a question of fact determined by the fact-finder. *Jones* v. *Lee*, 1998-NMCA-008, ¶7. At the trial below, the questions of the foreseeability of the damages claimed were contested. After considering the evidence and clearly rejecting as unbelievable CNMEC's proffered evidence, Judge Pope found that "the damages suffered by Plaintiff were foreseeable and a proximate cause of Defendant's Breach of Contract ...." Finding No. 215; *see also* Finding No. 53 (West and the CNMEC linemen all acknowledged that it was well known within the community that Sunnyland was a hydroponic tomato production facility.). This finding must be affirmed if it is

supported by substantial evidence. *Jones* v. *Lee*, 1998-NMCA-008, ¶7.

In its argument to this Court, CNMEC ignores Judge Pope's fact-finding and the overwhelming record evidence supporting that finding. Instead, relying almost exclusively on its self-serving misreading of non-binding foreign cases, CNMEC asserts, as a matter of law, that it was not foreseeable that if it improperly cut off electric power Sunnyland could suffer damages from the loss of its crop. As we show below, Judge Pope's fact finding that all the damages were foreseeable is amply supported by the evidence and therefore must be affirmed. See I.A., below. The foreign cases that CNMEC cites in support of its argument that the damages were not foreseeable are distinguishable, and the two New Mexico cases relied upon by CNMEC do not support its position. See I.B, below. Finally, CNMEC and its *amicus* raise an argument never presented below, asking this Court to adopt a radical procedure to allow a trial judge to invade the province of the jury, ignore an express fact-finding and reduce or eliminate damages on the judge's determination that proximate damages were "disproportionate." This belated and unsound argument should be rejected. See I.C, below.

A. Record evidence supports the district court's finding that it was foreseeable that Sunnyland would suffer lost profits if its electric power was wrongfully disconnected.

The law in New Mexico is clear: a defendant that breaches its contract is

responsible for all damages that proximately result from that breach, including consequential damages that are reasonably foreseeable. *See*, UJI 13-843. It is equally well-settled law in New Mexico that consequential damages in the form of lost profits are considered reasonably foreseeable when it should have been known that the goods and services sold were going to be used by a business entity to make a profit.

> In cases where profit is an inducement to making a contract, loss of profits as a result of the breach is generally considered to be within the contemplation of the parties and recovery for lost profits will be allowed as damages if causation is proved with reasonable certainty.

Camino Real Mobile Home Park Partnership v. *Wolfe*, 119 N.M.436, 446, 891 P.2d 1190, 1200 (1995). The Court there explained that it was not the scope or extent of the damage that must be reasonably certain but rather the fact of damage. *Id.*, quoting *Wirth* v. *Commercial Resources, Inc.*, 96 N.M. 340, 344, 630 P.2d 292, 296 (Ct.App. 1981), *cert. denied* 96 N.M. 543 (1981).[6] In *Manouchehri v.*

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[6] *See also* 3 DOBBS, LAW OF REMEDIES (2nd Ed. 1993) §12.4(7), p. 97 (... the defendant does not avoid liability merely because he failed to foresee the precise manner in which the loss came about or its amount or magnitude"); 3 FARNSWORTH ON CONTRACTS (2nd Ed. 1998) §12.14, p. 257 ("[W]hat must be foreseeable is only that the loss would result if the breach occurred. There is no requirement that the breach itself or the particular way that the loss came about be foreseeable.") CNMEC argues that it did not foresee the "particular set of circumstances" occurring as a result of disconnecting electricity. CNMEC Br., p.

Heim, this Court held that the plaintiff was properly awarded consequential damages for lost profits when the defendant breached the contract by selling the plaintiff medical doctor an X-ray machine that had less power than represented. "Heim knew his customer and knew how the x-ray machine was to be used. Any reasonable person in his position would assume that a doctor using such a machine would charge more for its use than the cost of operation and would earn income from it." *Id.*, ¶ 24. Accordingly, the Court concluded "the district court could properly find that lost income would be a foreseeable consequence of an underpowered x-ray machine." *Id.*, ¶ 25. It is the expectation of profits that must be foreseen, not the amount. "Although Manouchehri did not tell Heim how much income he would earn from use of the machine, he did not need to do so in order to recover consequential damages so long as the consequence of lost income was reasonably foreseeable." *Id.*

The evidence supports the trial court's fact finding that the consequential damages were reasonably foreseeable. CNMEC knew that Sunnyland was in business to grow a crop and to turn a profit. CNMEC knew from the outset that

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27. The point is irrelevant. What was foreseeable was the possibility of consequential damages, which is what the law requires. The law does not require that the scope of injury or the particular sequence of circumstances by which it occurs be foreseeable.

Sunnyland was a successor to Agstar, which CNMEC knew was a commercial business using the greenhouse facility to grow crops. Findings Nos. 12, 13. CNMEC required Sunnyland to open its accounts as commercial accounts, requiring that Sunnyland provide copies of its corporate papers (Tr. 1:124:1-10; 1:125:8-16; 7:19:16 - 20:12) and that Sunnyland deposit $10,750 (well in excess of a residential deposit). Findings Nos. 17, 18, 22. CNMEC's 2003 Annual Report to the Public Regulation Commission reported that of more than 16,000 Co-op customer accounts, only 13 were "large commercial" users.[7] Sunnyland, one of the largest employers in the county,[8] was one of those 13. Virtually every local trial witness recognized that Sunnyland was in the business of growing tomatoes in its greenhouse at Estancia, which commonly was referred to as "the Tomato Factory." Finding No. 53; Tr. 2:30:21 - 31:5; 2:85:16-20. CNMEC's dispatcher referred to Sunnyland's facility as "the tomato plant." Tr., 2:89:8-11; 2:104:2-5. CNMEC's lineman Paul Chavez was aware that the facility was being used to grow crops and that the electric power was necessary to the success of that

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[7] 2003 Load Forecast Update, Energy Use by Consumer Class, dated April 24, 2003. Proposed Supplementation of the Record by *Amicus* NMRECA.

[8] CNMEC stipulated that between 32 and 40 people worked in the Sunnyland packhouse when it was in operation. Tr. 6:2:21-24. When Sunnyland's predecessor, Colorado Greenhouse, ceased operations, it was employing 110 people. Tr. 3:34:1-12.

business activity. Chavez testified that when he came to turn off the power on September 8th, he permitted Sunnyland to open the greenhouse vents (Finding No. 52), which was CNMEC's practice when disconnecting electric power in order to protect the crop. Tr. 2:70:9 - 71:20; 2:72:14-21; 2:84:2 - 85:15; 3:50:1-17; 3:83:16-23. The evidence shows that from the beginning of the relationship, CNMEC knew that Sunnyland was in business of tomato production, that a consistent electricity supply was essential to the success of that business and that interruptions in electric supply could have devastating effects on Sunnyland's crop. And that evidence amply supports the district court's conclusion that the damages suffered by Sunnyland were foreseeable at the time of contracting. Finding No. 215.[9]

B. CNMEC's attempt to rewrite the law of foreseeable consequential damages is unavailing. CNMEC should not escape the foreseeable results of its breach of contract.

New Mexico law recognizes that consequential damages in the form of lost profits are reasonably foreseeable where it should be known that goods or

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[9] Against this overwhelming evidence supporting Judge Pope's fact finding that the damages were foreseeable is the self-serving testimony of CNMEC's managers that they were unaware that this huge greenhouse facility was being used as a business to make a profit. Birchie West, CNMEC's manager, testified that he did not know what was going on at Sunnyland's facility. (Tr. 9:3:6-11; 9:7:22 - 8:14)

services sold were being used in a business enterprise to make a profit. *See Camino Real,* 119 N.M. at 446; *Manouchehri*, 1997-NMCA-052.

In arguing that Sunnyland's lost-profit damages were not foreseeable, CNMEC ignores Judge Pope's fact-finding to the contrary, the ample record evidence supporting that finding and the holdings of *Camino Real* and *Manouchehri.* Instead, CNMEC misreads *Hadley v. Baxendale,* 156 Eng. Rep. 145 (Ex. Ch. 1854) to argue that in order for damages flowing from a breach of contract to be foreseeable the parties must foresee the particular circumstances of how the damages flow from the breach. CNMEC Br. at 21. But, CNMEC's hyper-technical application of foreseeability is unsupported by New Mexico law, is expressly rejected by the most authoritative commentators and is contrary to the record evidence supporting Judge Pope's factual finding that the damages were foreseeable.

It is the fact of damage, not the amount or the precise way in which those damages were incurred that must reasonably be foreseeable. *Manouchehri*, 1997-NMCA-052, ¶ 25 ("The law does not require those who enter into contracts to disclose to other parties the profits that they expect to make from the contracts." quoting Posner, Richard A. "Economic Analysis of Law 115 (3rd Ed. 1986)); *Wirth* v. *Commercial Resources, Inc.*, 96 N.M. 340, 344, 630 P.2d 292, 296

(Ct.App. 1981) *cert. denied* 96 N.M. 543, 632 P.2d 1181 (1981) ("The lack of certainty that will prevent a recovery is uncertainty as to the fact of damages, and not as to the amount"); 3 FARNSWORTH ON CONTRACTS (2nd Ed. 1998) § 12.14, p. 259 ("The magnitude of the loss need not have been foreseeable, and a party is not disadvantaged by its failure to disclose the profits that it expected to make from the contract"). Similarly, the circumstances of the loss or the sequence of events that led to the loss need not be foreseen at the time of contracting. "As with comparable issues of proximate cause in tort law, the defendant does not avoid liability merely because he failed to foresee the precise manner in which the loss came about ...." 3 DOBBS, LAW OF REMEDIES (2nd Ed. 1993) § 12.4(7), p. 97.

CNMEC argues that as a matter of law that it was not foreseeable that it could be liable for losses due to a fire if it breached its contract to provide electricity to Sunnyland. But none of the cases relied on by CNMEC supports the conclusion that consequential damages for lost profits are not foreseeable upon entering into a contract with a commercial enterprise. The two New Mexico cases cited by CNMEC stand for no such proposition. In *E & B Specialties Co., Inc.* v. *Phillips*, 86 N.M. 331, 523 P.2d 1357 (1974) the plaintiff, a subcontractor sued the general contractor for payment. The general counterclaimed that the plaintiff's work was defective and was awarded $2450 (the liquidated amount owed pursuant

to the contract between the general and the owner because of the delay). The Supreme Court considered the liquidated damage provision of the separate contract between the general contractor and the owner a "special circumstance" within the meaning of *Hadley* v. *Baxendale* and noted that there was no evidence that the plaintiff even was aware of that provision, and thus that plaintiff could not have foreseen liability for those liquidated damages when entering into the contract. The contrast to this case is readily apparent. Here, the evidence amply supports that CNMEC was aware of the essential role of continuous electric service in Sunnyland's business operations and that interruption of electric service could have catastrophic impact on Sunnyland's crops and business. Tr. 2:84:8 - 85:13.

Jones v. *Lee*, 1998-NMCA-008, also relied on by CNMEC, stands for the unremarkable proposition that a contracting party cannot foresee damages resulting from an activity that it had no knowledge would occur. There, house sellers sued the buyers after the buyers reneged on a purchase contract. The Court there reversed the award to the sellers of the costs of architect and contractors fees in connection with a second lot on which the sellers had planned to build a new home, but could not because they were left in strained financial circumstances after the contract for the sale of their old residence fell through. The Court

disallowed those unrelated expenses because there was no evidence that the buyers were aware of the separate lot, of sellers' plan to build on it, or of the seller's fragile financial circumstances. *Id.*, ¶¶ 23-24. In *Lee* the damages were not foreseeable because they did not naturally flow from the breach of the contract and the special circumstances were totally unknown to the buyer. Here, the trial court found and there is ample evidence that CNMEC did foresee that the disconnection of power could disrupt Sunnyland's business and cause lost profits.[10]

CNMEC also cites several cases from foreign jurisdictions in which courts

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[10] CNMEC cites numerous foreign cases for the proposition that remoteness of the harm is ground for denying consequential damages. But the cases are distinguishable. In *Slattery* v. *United States*, 69 Fed.Cl. 573 (2006), an action by shareholders, the court held that lost profits damages *were properly awarded* because when the bank and the F.D.I.C. entered into a contract requiring the bank to sell 54 of its most profitable branches, it was foreseeable that the bank ultimately would fail. In *United States* v. *M/V Santa Clara I*, 887 F.Supp. 825 (D.S.C. 1995) the court found that the damage to a ship from spillage from an improperly labeled container containing hazardous materials (the failure to label the drum as containing hazardous materials was the contract breach) was too remote in both time and circumstance to have been foreseeable when the vessel owner accepted the cargo. The ship had called at several intervening ports, the cargo had been handled by numerous third party stevedores, the ship had passed through a violent storm, and the risk was unknown to the vessel owner. In contrast, in the instant case, the fire occurred within days of CNMEC's contract breach, the risk of not turning on the electricity was readily apparent to Co-op employees who were at the scene at the time of the fire and the injury to Sunnyland could have been averted by simple acts of CNMEC's own employees. *Landmark Land Co.* v. *Fed. Deposit Ins Corp.*, 256 F.3d 1365 (Fed.Cir. 2001) dealt with a different issue: reliance damages, not consequential damages.

held that the damages ultimately suffered by the plaintiffs after utility service was disconnected were too attenuated, and that the utility could not be held liable. Not only are the cases factually distinguishable,[11] but the results in those cases are inconsistent with numerous foreign cases in which the utility *was* held liable for lost profits resulting from disconnection of power. For example, in *Sager* v. *Jung & Sons, Co.*, 143 Ark. 506, 220 S.W. 801 (1920), the complaint alleged that the defendant had breached its contract to promptly deliver a carload of coal necessary to run pumps to keep plaintiff's rice crop under water during the growing season. The court held that the complaint made out a case for consequential crop loss

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[11] In *Coker* v. *Southwestern Bell Tel. Co.*, 1978 OK 85, 580 P.2d 151 (1978), in contrast to the facts of this case, the contract between the telephone company and the subscriber specifically limited the telephone company's liability and specifically assigned the risk of the injury that occurred to the subscriber. And several of the cases (*e.g., Riojas* v. *Lone Star Gas Co.*, 637 S.W.2d 956 (Tex. Ct.App. 1982) and *Cannon* v. *Commonwealth Edison Co.*, 250 Ill.App.3d 379, 621 N.E.2d 52 (1993)) did not involve the provision of utility service to commercial enterprises. In *Foss* v. *Pacific Telephone and Telegraph Co.*, 173 P.2d 144, (Wash. 1946) the utility service (telephone) was not essential to the plaintiff's business (a dance hall) and thus lost profits were not foreseeable. In *Willie* v. *AG Vantage F.S., Inc.*, No 04-1548, 2005 WL 1253974 (Iowa App. May 25, 2005) the case was dismissed on summary judgment because plaintiff had adduced no evidence of foreseeability at all. And *Davis* v. *Cindy Preferred*, 743 So.2d 772 (La.App. 1999) was not a breach of contract case. Rather, the court found that the defendants failure to deliver utility service was not a proximate cause of the fire. There was no foreseeability analysis.

damages and the defendant's demurrer had been sustained improperly.[12]

CNMEC makes an elaborate argument about how the fire was Sunnyland's fault and other claimed malfeasance on Sunnyland's part that contributed to the fire. CNMEC Br. at 27-29. But CNMEC's argument overlooks the critical point. Judge Pope's factual finding that CNMEC attacks – that the lost profit damages were foreseeable – cannot be overturned because there may be evidence in the record that CNMEC believes supports its position. As this Court has explained, "the question is not whether substantial evidence exists to support the opposite result, but rather whether such evidence supports the result reached." *Las Cruces Prof'l. Fire Fighters* v. *City of Las Cruces,* 1997-NMCA-044, ¶ 12, 123 N.M. 329, 940 P.2d 177. It was foreseeable that Sunnyland would suffer loss of profits if its electricity was interrupted. *See* discussion, *supra* at Point I.A. In *Langley* v. *Pacific Gas & Elec. Co.* 41 Cal.2d 655, 262 P.2d 846 (*en banc.* 1953) the

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[12] *See* also, *Mississippi Power Co.* v. *Cochran,* 167 Miss. 705, 147 So. 473 (1933) (electric utility disconnected power to cotton gin without providing contractually-required notice; utility liable for consequential lost profits damages on contract breach theory); *Coal District Power Co.* v. *Katy Coal Co.*, 141 Ark. 337, 217 S.W. 449 (1919) (affirming award of consequential lost profits damages due to electric utility failure to deliver consistent power over a several month period on breach of contract theory); *Kentucky Utilities Co. v. Warren Ellison Café*, 231 Ky. 558, 21 S.W.2d 976 (Ky.App. 1929) (affirming judgment including lost profits after electric utility discontinued service in breach of contract due to billing dispute).

California Supreme Court held on breach of contract theory that an electric utility was liable for the fish hatchery's loss of 78,000 fish hatchlings lost due to a power interruption where the utility (like here) knew the importance of continuous service to the hatchery's operation. *See* also, *National Food Stores, Inc.* v. *Union Elec. Co.*, 494 S.W.2d 379 (Mo.App. 1973) (electric utility liable for loss of frozen foods due to power interruption when utility was aware of food retailer's need for continuous power).[13]

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[13] Not only was CNMEC's disconnection of electricity wrongful, but CNMEC had specifically promised to reconnect the electricity when it received payment (Tr. 5:101:14-16), which it received on September 9th. Nevertheless, CNMEC refused to reconnect the power. That refusal was a second breach of contract, and was willful. Although Sunnyland had paid all that CNMEC claimed it owed, CNMEC's linemen refused to reconnect. And at the time of that breach, the consequences of not reconnecting the electricity were manifestly apparent to CNMEC. Chief Granger was calling for electricity. Tr. 6:112:15-21. CNMEC's linemen were at the scene and saw that firefighters were struggling to contain the fire and were losing the battle. The potential total destruction of the facility was obvious. CNMEC argues that foreseeability must be measured at the time of the making of the contract and not at the time of the breach. CNMEC Br. pp. 21ff. But, there is no such categorical limitation. While generally, foreseeability is determined at the time of contracting, the rule is not as rigid as CNMEC argues. Numerous courts have recognized that special circumstances allow for foreseeability to be measured at the time of the breach of contract:

> [T]here may be situations where foreseeability is more appropriately measured at the time of breach, because that is when the breaching party should be on notice of the ramifications of its actions or failures to act. "There may even be valid reason to fix the foreseeability at the time of the breach rather than at the time of the

> agreement, for it is at the breach time that the consequences of wrongdoing are more apparent and assessable, and the deterrent accordingly greater."

Southern Nuclear Operating Co. v. *United States*, 77 Fed.Cl. 396, 404 (2007), quoting *Gardner Displays Co.* v. *United States*, 171 Ct.Cl. 497, 505, 346 F.2d 585, 589 (1965). In *Southern Nuclear*, the court determined that it was appropriate to consider foreseeability at the time of the contract breach. *See also*, *Dairyland Power Cooperative* v. *United States*, 82 Fed.Cl. 379, 387 (2008); *Indiana Michigan Power Co.* v. *United States*, 422 F.3d 1369, 1373 (Fed.Cir. 2005); Samek, "The Relevant Time of Foreseeability of Damage in Contract," 38 Austl. L.J. 125 (1964)(measuring foreseeability at the time of breach where the breach is willful); *Stanish* v. *Polish Roman Catholic Union*, 484 F.2d 713 (7th Cir. 1973)(measuring foreseeability at the time of breach when the breaching party "well knew" that breach would cause consequential loss).

And there is sound rationale and policy supporting measuring foreseeability at the time of the breach:

> The existing rule requires only reason to foresee, not *actual foresight*. It does not require that the defendant should have had the resulting injury actually in contemplation or should have promised either impliedly or expressly to pay therefor in case of breach. It is erroneous, therefore, to refuse damages for an injury merely because its possibility was not in fact in contemplation of the parties at the time they made the contract.

11 CORBIN ON CONTRACTS § 1009 at 66 (Interim Ed. 1993) (emphasis added). If, as Dobbs, Farnsworth and Corbin all agree, it is the possibility of damage flowing from the breach, not necessarily the magnitude of the injury or how it comes about that must be foreseen at the time of contracting, then the reasonableness of assessing liability on the breaching party can be judged by circumstances existing at the time of breach.

Sunnyland's lost profits from destruction of crops was foreseeable to CNMEC which knew that Sunnyland was in the business of growing crops and relied on the power supplied by CNMEC in that business enterprise. The damages proximately resulting from the breach of that contract included the lost crops and profits. Those damages flowed from the breach in the ordinary course of events, thus satisfying the first *Hadley* v. *Baxendale* test. *See Nyquist v. Randall*, 819 F.2d 1014, 1017 (11th Cir. 1987)("lost profits may indeed be the quintessential example of 'consequential damages'"). But even if Sunnyland's intent to raise and sell a crop and to make a profit thereby is considered to be a "special circumstance," the evidence is that CNMEC was well aware of it, and the second *Hadley* v. *Baxendale* alternative also is met here. The Supreme Court explained –

> special damages may be allowed for items of loss more

The record here demonstrates that it was foreseeable to CNMEC at the time of contracting that Sunnyland would suffer serious damage to its agricultural enterprise if electric service was interrupted. And the circumstances make clear that at the time of the willful breach in refusing to reconnect electricity on September 9th, the scope of the damage and the means by which it would occur clearly were foreseeable to CNMEC. Its linemen were at the scene observing firefighters losing their battle with the fire without access to water and knew that if they did not reconnect the power, Sunnyland's loss would be catastrophic. For this reason as well, Judge Pope's finding that all the damages were foreseeable is fully supported by the record evidence.

> or less peculiar to the plaintiff, which may not be expected to occur regularly to other plaintiffs in similar circumstances, and are a likely loss within the contemplation of the parties at the time of contracting. [Citation.] Stated another way, special provable damages flow from the disappointment of a special purpose for the subject matter of the contract or from unusual circumstances, either or both of which were known to the parties when they contracted. In such acase , the amount permitted under the general damage formula, alone, clearly will be either inadequate or nonexistent.

Wall v. *Pate*, 104 N.M. 1, 2, 715 P.2d 449, 451 (1986), citing D. Dobbs, *Remedies*, §§ 3.2, 12.3 (1973).

Whether the interruption of electric service caused crop loss by preventing improper ventilation, or by causing lack of heat to the greenhouse, or by preventing the ability to put out a fire is a matter of the mechanism by which the damage occurs and hence is not the proper inquiry with respect to foreseeabilty. The proper inquiry is whether the fact of loss (not the precise mechanism of the loss) is foreseeable. In any event, if the Court were to inquire into the foreseeability of the precise mechanism of the loss here – the inability to pump water to put out the fire, that mechanism was reasonably foreseeable to CNMEC. First, two of Sunnyland's power lines served water wells on Sunnyland property and hence it was reasonably foreseeable to CNMEC that the power would be used to pump water. Fire Chief Granger testified that the availability of water to put out

fires was a concern in rural settings, like Sunnyland's (Tr. 6:122:10-19); and that he had worked with Sunnyland (prior to the fire) to install fittings on Sunnyland's South well pump so that firefighters could access the water. Tr. 6:102:19-103:19. *See* also, Tr. 2:131:5 - 134:21. There is ample record evidence that at all times it was reasonably foreseeable to CNMEC that electrc power would be needed at Sunnyland in the event that there was a fire. Certainly, on September 9th, CNMEC was well aware that Sunnyland needed power to pump water to put out the fire.

C. This Court should reject CNMEC's belated invitation to radically change New Mexico law to allow a judge to ignore or contradict a fact-finding that damages are foreseeable.

The trial court's factual finding that all the damages resulting from CNMEC's contract breach were foreseeable is amply supported by the evidence; and the late-breaking argument raised for the first time in this Court that the damages unforeseeable as a matter of law on the ground of an asserted disparity between the contract amount and the damages (CNMEC Br., p.30) is not supported by New Mexico law and is inconsistent with the better-reasoned views of the cases and the commentators. CNMEC points to what it now claims to be a disparity between its preliminary billings to Sunnyland (not yet in production) and the amount of the damages and argues that the disparity as a matter of law makes the damages unforeseeable. CNMEC Br., 29-31. CNMEC alludes to

RESTATEMENT (SECOND) OF CONTRACTS § 351(3) to support its argument. *Amicus* New Mexico Rural Electric Cooperative Association ("the Association") takes the argument one step farther and argues that pursuant to the Restatement, this Court should exercise the discretion, suggested as available under Restatement § 351(3) and comment f, and reverse the damage award as disproportionately excessive.

Both CNMEC and the Association improperly raise their arguments. At no time in the district court, not even during the extensive briefing after the court entered its Findings of Fact and Conclusions of Law (R.P., 1120) and before entry of judgment (R.P., 1303) did CNMEC suggest that the damages were disproportional to the contract amount and on that basis should be rejected. Nor did CNMEC present any evidence in the district court by which that court could determine that the damages were disproportional. Further demonstrating that this argument is an afterthought, CNMEC did not refer to this argument, nor did it cite the Restatement, in its Docketing Statement. Accordingly, the Court should disregard CNMEC's argument. The Association's argument is also improperly raised. "*Amicus* must accept the case on the issues as raised by the parties, and cannot assume the functions of a party." *State ex rel. Castillo Corp.* v. *New Mexico State Tax Comm.*, 79 N.M. 357, 362, 443 P.2d 850, 855 (1968) (declining

to consider a contention raised by *amicus,* but previously unraised by the parties); *Montoya* v. *Moore*, 77 N.M. 326, 330, 422 P.2d 363, 365 (1967) (same).

The arguments are, in any event, without merit. Section 351(3) provides that "[a] court may limit damages for foreseeable loss by excluding recovery for loss of profits ... if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation." Neither CNMEC nor the Association cite any New Mexico case that has reversed a damage award as excessive under the authority of Restatement Section 351(3).

Both CNMEC and the Association assert that this is such a case, suggesting that the damages awarded in the Judgment disproportionately exceed Sunnyland's electric bills that were only $2960.79 for the month before the fire. CNMEC Br. at 30-31; *Amicus* Br. at 16. But both CNMEC and the Association are being disingenuous. During that billing period Sunnyland was only setting up its operation (Tr. 2:125:22 - 126:4), so its electricity usage was far less than that necessary to operate its huge greenhouse and packing plant. Colorado Greenhouses, a previous owner, had spent as much as $50,000/month on fuel just to provide minimal heat to avoid damage to the greenhouse structure. Tr. 3:26:17 - 28:11. That CNMEC contemplated that Sunnyland would be a substantial user of electricity is evinced by the fact that CNMEC extracted a nearly $11,000

security deposit from Sunnyland. Findings Nos. 18, 22.

While, as noted, there is no New Mexico decision analyzing this subsection of the Restatement, comment f provides insight into the intent of the framers.

> There are unusual instances in which it appears from the circumstances either that the parties assumed that one of them would not bear the risk of a particular loss or that, although there was no such assumption, it would be unjust to put the risk on that party. One such circumstance is an extreme disproportion between the loss and the price charged by the party whose liability for that loss is in question. The fact that the price is relatively small suggests that it was not intended to cover the risk of such liability. Another such circumstance is the informality of dealing, including the absence of a detailed written contract, which indicates that there was no careful attempt to allocate all of the risks. The fact that the parties did not attempt to delineate with precision all of the risks justifies a court in attempting to allocate them fairly. The limitations dealt with in this Section are more likely to be imposed in connection with contracts that do not arise in a commercial setting.

Comment f underscores that this is *not* the type of situation for which such equitable adjustment of damages is appropriate. The contract between CNMEC and Sunnyland *was* a contract in a commercial setting, and so the Court must assume that the parties dealt with each other as like-minded commercial entities. Also, the contract was in fact a written one that detailed and assigned the risks. The contract requirement that CNMEC provide its customer with fifteen days

written notice before it disconnected electricity is an implicit understanding that serious consequences attend the disconnecting of electric power – especially to a commercial enterprise – and the warning is to provide the consumer with the opportunity either to square the account away or to make arrangements to protect itself against the consequences of the loss of electric power. This provision is, in fact, an assignment of the risks. It says that if the customer does not square the account away within the fifteen days, or otherwise take steps to protect itself, the customer bears the risk; but if the utility disconnects the power without providing the fifteen-day notice, the utility bears the risk of the anticipated damages.

The illustrations for this subsection further underscore that the instant case is not one contemplated as appropriate for equitable adjustment of damages. In illustration 17, a trucker is hired to deliver a machine to a factory. The delivery is late, and without the machine, the factory cannot open, suffering loss of profits. Similarly, in illustration 18, a hardware store sells an inexpensive off-the-shelf item, but because it is delayed in delivery, the customer, a farmer, cannot use his tractor at night, thus losing the opportunity to increase his crop. Under both examples, the court "may, after taking into consideration such factors as the absence of an elaborate written contract and the extreme disproportion between B's loss of profits during the delay and the price of the trucker's services (or of the

item), exclude recovery for loss of profits." But, there is a detailed written contract between Sunnyland and CNMEC. Further, in both illustrations the relationship between the parties (the trucker and the factory or the hardware store and the farmer) was a one-time, *ad hoc*, one. In contrast, the arrangement between Sunnyland and CNMEC was intended to be an ongoing and long-term one between business entities. Further, in each of these illustrations the breach was the result of matters not within the control of the breaching party – the truck broke down, and the hardware store's supplier was late in providing the item. Here, the breach was the result of a deliberate decision by CNMEC to bypass its computer system and to disconnect electricity without giving the contractually required warning.

The option to limit disproportionate damage awards suggested by Restatement Section 351(3) was not intended for the situation presented by the instant case. Here, there was a detailed written contract for an on-going commercial relationship containing provisions reflecting the assignment of the risks associated with breach.

CNMEC asks for an equitable remedy, yet it does not come to the Court with clean hands. The disconnection without notice was wrongful and willful. Further, once it knew that Sunnyland's account was not in arrears, CNMEC was

obligated to provide Sunnyland with electricity, yet it refused to do so, even knowing that its failure was depriving fire fighters of the water needed to control the blaze that ultimately destroyed Sunnyland's business. One who seeks equity, must do equity. *Wyrsch* v. *Milke*, 92 N.M. 217, 221, 585 P.2d 1098, 1102 (Ct.App. 1978). CNMEC has no right to ask this Court for equity.

CNMEC and *Amicus* suggest that CNMEC is financially thin and that paying this judgment could imperil CNMEC's ability to continue to provide electric service to rural households and farms. This kind of decision is a legislative one and should be presented there.

II. Substantial evidence underlies the district court's factual finding that CNMEC's refusal to reconnect Sunnyland's facility with electric power was a malicious breach of contract, supporting the district court's award of punitive damages.[14]

The district court found several breaches of contract by CNMEC: (1) no

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[14] CNMEC misstates the standard of review. CNMEC Br., p. 33. "Punitive damages ... are not awarded as a matter of right, but lie within the sound discretion of the trial court." *Peters Corp.* v. *N.M. Banquest Investors Corp.*, 2008-NMSC-039, ¶ 43, 144 N.M. 434, 188 P.3d 1185. While a district court's determination not to award punitive damages is reviewed, therefore, under an abuse of discretion standard, an award of punitive damages "will be upheld if substantial evidence supports the award." The evidence, of course, must satisfy the standards for award of punitive damages. *Jackson Nat. Life Ins. Co.* v. *Receconi*, 113 N.M. 403, 419, 827 P.2d 118, 134 (1992). The court reviews the question of the reasonableness of the punitive damage award *de novo*. *Chavarria v. Fleetwood Retail Corp.*, 2006-NMSC-046, ¶ 36, 140 N.M. 478, 143 P.3d 717.

basis for the decision to disconnect the electricity to the Sunnyland; (2) the failure to provide Sunnyland with advance notice of the disconnection; and (3) the refusal of CNMEC to reconnect the power when requested by the fire fighters. It was this last breach on which the district court based the award of punitive damages, finding that refusal to be malicious, wanton and reckless negligent behavior and breach of duty. Amended Judgment, ¶ 5; R.P., 1556. CNMEC argues that the punitive damage award cannot stand on its erroneous supposition that the only contractual provision at issue was the failure to give advance notice, making it "unclear how 'impeding firefighters with the threat of liability in energizing the electricity' was a breach of the Cooperative's contract with Sunnyland." CNMEC Br., p. 34-35.

This argument overlooks the evidence that an integral part of contract between Sunnyland and CNMEC was that CNMEC would provide power to Sunnyland as long as Sunnyland's accounts were current, and that it would restore power once delinquent accounts were paid. CNMEC breached both these contractual obligations. Since the disconnect itself was improper, CNMEC had a continuing obligation to provide power (and CNMEC had expressly promised Sunnyland that it would reconnect when Sunnyland paid the claimed "arrears") and its refusal to do so on September 9th constituted a breach of contract. By

September 9th, Sunnyland had done all that CNMEC required Sunnyland to do to "correct" the false "delinquency." Sunnyland paid the amount CNMEC's dispatcher required and added a reconnect fee for each account, which of course was consideration for CNMEC's new promise to reconnect power. Tr. 5:101:14-16. And on September 9th, in the exchange between CNMEC's lineman Chavez at the fire scene and CNMEC's dispatcher and supervisors on how to respond to Chief Granger's request for power, the dispatcher acknowledged that Sunnyland's account was paid in full and directed linemen at the scene to reconnect. Tr. 2:89:8-11; 2:104:2-5. The failure to reconnect the power on September 9th also was a breach of the contract. The breach in failing to reconnect on September 9th, ignoring the request of firefighters and knowing that reconnection was necessary to put out the fire, amply supports the finding that this breach was malicious, willful and wanton warranting punitive damages. Finding No. 152; Conclusion No. 7; Tr. 6:112:17 - 113:5.

CNMEC argues that punitive damages cannot be assessed against it for the conduct of its linemen in refusing to reenergize Sunnyland's facility in the absence of a specific finding by Judge Pope that (1) the conduct was engaged in by corporate employees with managerial capacity, (2) that the corporation ratified, authorized or participated in the conduct giving rise to the punitive damages, or

(3) the cumulative effects of the conduct of corporate employees demonstrated a culpable mental state. CNMEC Br., pp. 35-36.

This misstates both New Mexico law and the record evidence. In *Albuquerque Concrete Coring Co., Inc.* v. *Pan Am World Services, Inc*, 118 N.M. 140, 879 P.2d 772 (1994), the Supreme Court affirmed the assessment of punitive damages against a corporate defendant even though "[t]he district court did not make findings of fact regarding the title, responsibilities, or managerial capacity of [the company employees who had engaged in the malicious conduct]." *Id.* at 143, 879 P.2d at 775.

In assessing punitive damages against a corporate defendant a court may view "the actions of employees in the aggregate to determine whether [the corporation] had the requisite culpable mental state because of the cumulative conduct of the employees." *Clay* v. *Ferrellgas, Inc.*, 118 N.M. 266, 270, 881 P.2d 11, 15 (1994); *see* also, *Coates* v. *Wal-Mart Stores, Inc.*, 1999-NMSC-013, ¶ 48, 127 N.M. 47, 976 P.2d 999 (in addition to conduct of a single supervisor, "other managers' acts and omissions each alone may be insufficient proof of intent, [but] when viewed cumulatively, they may establish a clear and convincing inference of actual malice.") . The record is replete with evidence of a corporate attitude of active and affirmative disregard for Sunnyland's well-being and its rights under

the contract.[15]

CNMEC argues that the punitive damages must be based on the same conduct that gives rise to the compensatory damages, misciting *Gonzales* v. *Sansoy,* 103 N.M. 127, 703 P.2d 904 (Ct.App. 1984) for this proposition. CNMEC Br., p. 35. But there, the punitive damage award was reversed not because the compensatory damages were based on different conduct but, rather, because there was no evidence that the wrongful conduct was engaged in with the "requisite mental state necessary for the imposition of punitive damages." *Id.* at 131.[16]

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[15] Judge Pope made specific findings of fact that Co-op Director of Administrative Services Birchie West ordered that Sunnyland's electricity be disconnected even before payment was due (Findings Nos. 30, 32), that Sunnyland's electricity was disconnected nine days before the date specified in the disconnect notices actually received (Finding No. 35), and that West deliberately bypassed the computer system's built-in customer safeguards. Nos. 38-39. On September 9th, Co-op management delegated the decision of whether to reactivate power to Sunnyland to lineman foreman Paul Chavez, and in the context of such willful and malicious corporate disregard for the rights and well-being of Sunnyland, CNMEC management must be held responsible for Chavez's decision not to turn on electricity. *See* Finding No. 152. Such patterns of corporate disregard for the rights of the plaintiff were sufficient to warrant assessment of punitive damages against the corporate defendant in *Coates*, 1999-NMSC-013 and *Ferrellgas*, 118 N.M. 266.

[16] In any event, the district court found the failure to reconnect (on which it based punitive damages) to be a breach of contract (Amended Judgment, ¶ 5, R.P, 1556) and further that all damages were proximately caused by the breaches of contract, including this third breach. Finding No. 215. CNMEC's argument is

The jury instruction for punitive damages in contract cases, requires only that "[y[ou may consider punitive damages only if you find that _____ (*party making claim*) should recover compensatory [or nominal] damages." UJI 13-1827. The instruction does not tell jurors that the punitive damages must arise from the same breach that gives rise to the compensatory damages. Such a requirement would be inconsistent with the underlying purposes of punitive damages. The Supreme Court has observed that punitive damages in New Mexico are based on "the quality of the conduct constituting the breach itself." *Romero* v. *Mervyn's*, 109 N.M. 249, 257, 784 P.2d 992, 1000 (1989). The rigid rule that CNMEC urges is inconsistent with the rationale underlying punitive damages. Here, CNMEC's conduct was inconsistent with its contractual obligations and legitimate expectations of Sunnyland. The refusal to turn the power back on after it was clear that Sunnyland's account was current and knowing that the power was necessary to put out the fire was a continuation of the wrongful conduct that had resulted in disconnecting that power in the first place. Sunnyland received a compensatory award for actual injuries based on that course of conduct. The bases for an award of punitive damages are present here.

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predicated on a false premise.

III. The district court's award of more than $13 million in crop loss damages is based on a Finding of Fact that is supported by substantial, credible record evidence and thus, must be affirmed.

A. Standard of Review:

The determination of Sunnyland's crop loss damages is one of fact, which this Court reviews for sufficiency of the evidence. *Littell* v. *Allstate Ins. Co.*, 2008-NMCA-012, ¶ 54, 143 N.M. 506, 177 P.3d 1080. As this Court there explained,

> "In reviewing a sufficiency of evidence claim, this Court views the evidence in a light most favorable to the prevailing party and disregard[s] any inferences and evidence to the contrary." We defer to the jury's determination regarding the credibility of witnesses and the reconciliation of inconsistent or contradictory evidence. "We simply review the evidence to determine whether there is evidence that a reasonable mind would find adequate to support a conclusion."

Id., ¶ 13, quoting *Weider* v. *Big J Enters., Inc.*, 1998-NMCA-021, ¶ 30, 124 N.M. 591, 953 P.2d 1089. This Court has cautioned that "New Mexico courts 'will not find an award of damages excessive except in extreme cases.'" *Id.*, quoting *Ranchers' Exploration*, 102 N.M. at 390.

B. Substantial evidence supports the district court's determination of Sunnyland's crop loss damages.

Judge Pope determined that Sunnyland's crop loss was $21,629,127.

Finding No. 242. He also found that Sunnyland avoided $7,924,299 in expenses, and accordingly, that net crop loss damages were $13,704,828. Finding No. 244. These findings are supported by substantial evidence; namely the calculations and opinions of Sunnyland's crop loss expert, plant physiologist Dr. William Bauerle and Sunnyland's forensic accountant, Bruce Webster.

Estimating that Sunnyland could put in110,000 plants and that the growing cycle was between 8 ½ and 10 days for fully mature fruit, Dr. Bauerle estimated that four pounds of fruit could be harvested from each plant 40 times a year for a total of 160 pounds/plant/year. For his crop loss estimate, he rounded that down to 75 pounds. Tr. 4:22:1-20; 4:24:14 - 25:23.

Dr. Bauerle based his estimate of Sunnyland's potential crop yield on the height of the greenhouse, which permitted the plants to grow taller, improving yields; the varieties of tomatoes that Sunnyland intended to grow; the availability and quality of the water; the irrigation and fertilizer systems and the quality of the boilers; the presence of adequate CO2, which promotes photosynthesis, and the ventilation system that would bring it into the greenhouse; the quality of the computer system planned for the greenhouse; and, of course, the New Mexico climate (light intensities facilitating year-round growing.). Tr. 4:9:22 - 18:12. He considered Sunnyland's practice of pruning to limit the fruit to three or four per

stem, increasing fruit weight; the aggressive root system Sunnyland planned to use; and Sunnyland's intent to intercrop, which would permit year-round harvesting. Tr. 4:18:16 - 20:3; 4:25:16 - 27:3. He rounded down because Sunnyland would have commenced planting in September, as days were getting shorter, and the first harvest would have come in late November, resulting in reduced productivity. Tr. 4:35:11 - 37:3.

CNMEC argues that Dr. Bauerle's estimate is unrealistically high. CNMEC Br. at 37-41. CNMEC bases its entire argument on comparing Dr. Bauerle's estimate to historical production at other greenhouses (which did not enjoy all of the factors upon which Dr. Bauerle based his estimate).

CNMEC's argument constitutes a selective view of the record, ignoring critical elements of Dr. Bauerle's testimony which explain the basis of his opinion. Dr. Bauerle explained why he did not consider yield history at other greenhouses, operating in different circumstances. For example, he testified that when he visited Eurofresh in Arizona, it was growing cluster tomatoes, which should have a smaller yield than the tomatoes that were to be planted by Sunnyland. Tr. 4:31:19 - 32:6. Dr. Bauerle noted that the Selina/Bledsoe survey of greenhouses (Exh KK-1) averaged production from both large greenhouses (which generally are more productive) and small greenhouses and those with and without CO2 and

hot air capabilities.. Tr. 4:179:11 - 180:13. And, he explained that he did not look at Agstar's historical production because "[p]ast history is not a good indicator, because we find that it could have an insect, it could have a virus disease one year. You don't – you use the current year crop from the period of the loss." Tr. 4:55:1-11. Dr. Bauerle testified that because there is not much data on greenhouse operations in the Southwest, he relied on the quality of the operators, of the growers and of the technology. Tr. 4:71:7-21.

Dr. Bauerle explained his pricing model and how it derived from the USDA pricing data. Tr. 4:38:15 - 39:16. He explained that he excluded Mexican greenhouses from his pricing model because the tomatoes that come through Nogales are field tomatoes or the product of low tech greenhouses and that the high tech Mexican greenhouses are in the South. Tr. 4:39:19 - 40:6.

CNMEC argues that Dr. Bauerle's crop yield estimate is so improbable that no reasonable mind could find it adequate to support the Judgment's crop damage award. But not only did Judge Pope find it a rational basis to support the Judgment's award of crop loss damages, but even CNMEC's own crop loss expert, Kenneth Gerhart, acknowledged that Dr. Bauerle's crop loss estimate was more accurate than his own. Finding No. 239; Tr. 8:158:14 - 159:23.

Relying on the dissent in *Silva v. Haake*, 56 N.M. 497, 245 P.2d 835 (1952),

CNMEC (CNMEC Br. at 39) suggests that Dr. Bauerle's opinions are inherently improbable. The *Silva* case is instructive not because Justice Sadler, in dissent, found the testimony in question improbable, but because the majority of the court applying the traditional rules of appellate review of trial court findings of fact, concluded that the verdict was supported by the evidence. The *Silva* majority concluded that there was substantial evidence within the testimony of opne witness alone to support the verdict that he was acting within the scope of his employment, setting out excerpts of his testimony at trial. Thus, applying appropriate rules of appellate review, the court disregarded contrary testimony and declined to draw inferences contrary to the verdict.

Yet, that is exactly what CNMEC asks this Court to do; to credit contrary evidence and to draw adverse inferences. At trial and in his report (Exh. 95) Dr. Bauerle explained his crop loss estimate and its derivation. CNMEC asks the Court to ignore Dr. Bauerle's explanation of his crop loss estimate and its derivation, and to draw inferences adverse to the district court's judgment from the USDA report and from evidence of the production of other greenhouses, in different localities, operating under different circumstances. This the Court cannot do. Dr. Bauerle's trial testimony and report are substantial evidence. That substantial evidence supports the district court's finding that Sunnyland's net crop

loss was $13,704,828, and for those reasons, this Court must find that substantial evidence supports that finding and the Judgment.

C. The district court applied the correct measure of damages.

Sunnyland's forensic accountant, Bruce Webster, was accepted as an expert, and the tables of his report (Exh. 94) were admitted. Tr. 6:27:4-8. Webster identified the avoided expenses that he quantified (Tr. 6:10:5-20), and he testified as to the method of his calculation of avoided expenses. Webster's calculation of avoided costs ($7,924,299) exceeded that ($7,773,121) of CNMEC's expert, Mr. Gerhart.

The appropriate measure of damages is the market value of the crop at maturity minus the expenses that would have been necessary in growing and marketing the crop. *Smith* v. *Hicks*, 14 N.M. 560, 98 P. 138 (N.M. Terr. 1908). That in *Hicks*, the crop had been put in does not compel a different result. Sunnyland intent was clear. Sunnyland's workers were preparing the greenhouse for the first planting and Sunnyland had ordered the seedlings from Bevo Farms for delivery on September 24th. Tr. 7:28:5 - 30:25; Exh. 33. Because of the fire Sunnyland was unable to plant the tomatoes ordered. Finding 237. New Mexico law recognizes damages based on lost capacity for profits. In *International Service Ins. Co.* v. *Ortiz*, 75 N.M. 404, 405 P.2d 408 (1965), the Supreme Court

determined that the measure of the lost-earnings damages to a plaintiff injured in an automobile accident was based on his lost earning capacity.

> "The consideration of loss of earning capacity is not solely the comparative amount of money earned before or after an injury. The true test is whether or not there is a loss of earning power and of the ability to earn money."

Id. at 408, quoting *Baros* v. *Kazmierczwk,*, 68 N.M. 421, 429, 362 P.2d 798, 804 (1961). *See* also, *United Nuclear Corp.* v. *Allendale Mut. Ins. Co.*, 103 N.M. 480, 486, 709 P.2d 649, 655 (1985), affirming award of damages for business interruption based on value of lost production, not loss of sales.

CONCLUSION

For all the above reasons stated herein, the district court's findings and judgment on foreseeable damages, punitive damages and the amount of crop loss should be affirmed.

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