IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

SUNNYLAND FARMS, INC.

Plaintiff-Cross-Appellant,

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-CROSS-APPELLANT'S REPLY BRIEF ON CROSS APPEAL

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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 4382 words, as determined by the word count program of the word processor used, WordPerfect, Version 12.

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ARGUMENT

I. CNMEC has failed to counter Sunnyland's demonstration that the district court erred in not assessing post-judgment interest at the rate of 15%.

Post-judgement interest in New Mexico is governed by statute, § 56-8-4(A), NMSA 1978, which *requires* post-judgment interest at 15 % where the conduct was found to be "tortious . . . , bad faith or intentional or willful acts . . . ." The district court found that CNMEC breached its contract with Sunnyland and that the breach of contract proximately caused Sunnyland devastating losses in excess of $20,000,000. Correctly applying a standard very similar to the statutory language requiring 15 % post-judgment interest – "willful, malicious, wanton and reckless"[1] – the district court held that CNMEC's breach of contract was sufficiently willful and wrongful to justify the award of punitive damages. The district court's award of punitive damages for CNMEC's breach of contract is

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[1] The language of Amended Judgment para. 5 ("Punitive damages will be assessed as against the Cooperative for its willful, malicious, wanton and reckless conduct in impeding firefighters with the threat of liability in energizing the electricity. This conduct was a breach of its duty under its contract with Sunnyland ..." is derived from Uniform Jury Instructions on awarding punitive damages. NMUJI 13-861; 13-1827. The Amended Judgment was entered more than a year after the initial findings and conclusions were issued by the district court and after CNMEC explicitly sought to convince the district court that it had not intended to award punitive damages for breach of contract, making many of the same arguments CNMEC makes here.

fully justified by the record, which shows that CNMEC's multiple breaches of contract, including its continuing breach in refusing to re-energize Sunnyland's facility at the request of the firefighters so that they could put out the fire, were willful.[2] The conduct that justified the award of punitive damages requires post-judgment interest at 15 %. Quite simply, any breach of contract warranting punitive damages (as here) requires post-judgment interest at 15 % under Sec. 56-8-4(A) and the district court committed legal error in not awarding post-judgment interest at that rate.

The district court's holding that CNMEC's breach of contract in refusing to re-energize the building (having wrongfully disconnected the electricity in the first place) was sufficiently willful to warrant punitive damages was fully supported by the law and the record evidence. The refusal to re-energize clearly constituted a breach of contract independent of the initial breach of contract in disconnecting the electricity. See, *e.g., Singer* v. *Baltimore Gas & Elec. Co.*, 79 Md. App. 473-75, 558 A.2d 419, 425 (Md. Sp. App. 1989)(holding that electric utility's contract obligation to provide electricity was continuing so that each wrongful refusal was

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[2] The district court expressly found (supported by voluminous evidence) that had CNMEC reconnected the electricity at the Sunnyland facility as required by the contract and requested by the firefighters, the devastating fire damage to the facility would have been contained and the $ 20,000,000 in losses would not have occurred. Findings 135-136, 140, 156, 158-159.

a separate breach for statute of limitations purposes); *Ancala Holdings* v. *Price*, 220 Fed. Appx. 569, 572 (9th Cir. 2007)(same; citing numerous cases and secondary authorities); *Florida Mun. Power Agency* v. *Florida Power & Light Co.*, 81 F.Supp. 2d 1313, 1321 (M.D. Fla. 1999). Here, Sunnyland's contract called for CNMEC to provide electricity to Sunnyland except under circumstances warranting disconnection (which the district court expressly found were not present). Therefore, CNMEC had a *continuing* duty under the contract to provide Sunnyland with electric power. The record evidence shows that the firemen expressly requested CNMEC's lineman on the scene to re-energize the facility so that firefighters could put out the fire. CNMEC refused, conditioning re-energizing the facility on CNMEC being indemnified for any harm. Findings 88, 152. This refusal, without more, constituted a breach of contract.

But, there is more. In addition to the refusal to re-energize constituting a breach of CNMEC's *continuing* duty to provide electricity to Sunnyland, the refusal constituted a breach of CNMEC's separate express agreement to re-energize on Sunnyland's payment to CNMEC, which occurred that morning before the fire started. CNMEC advised Sunnyland that electric service would be reconnected the same day it received payment, and CNMEC received payment on September 9th, but refused to reconnect even though it had sent a lineman to

Sunnyland to re-energize the facility. Finding 167; Tr. 2:73:12-23; 5:101:14-16.[3] CNMEC imposed, and Sunnyland paid, a reconnect fee, constituting additional consideration for this separate promise to re-energize Sunnyland's facility. Finding 58; Tr. 5:99:20 - 100:5. CNMEC's linemen were at the scene and observed firemen struggling to contain the fire without access to water, yet refused to reinstate electric service even after Chief Granger specifically requested that service be restored. Findings 167, 172, 174; Tr. 2:73:12 - 74:20; Tr. 2:105:9-11.

The record also establishes that CNMEC's initial breach of contract in originally disconnecting the electricity at Sunnyland also was willful. The district court found that CNMEC's contract with Sunnyland included a requirement that customers be given fifteen days written notice before electric service can be disconnected. Findings 2-6. And the district court found that CNMEC disconnected Sunnyland's electric service on September 8, 2003, without having provided the required fifteen-day written notice. Findings 28-29. CNMEC does not challenge these findings.

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[3] Because the contract required it to maintain electrical service as long as the account was current, CNMEC's argument that there was no evidence that its dispatcher was authorized to promise on behalf of CNMEC that power would be turned on the same day the account was cleared (Answer Brief, 15-16) is irrelevant. That that was CNMEC's understanding of its obligation is evinced by the fact that it had sent its linemen out to Sunnyland to reenergize the facility on September 9th.

CNMEC argues that the disconnect without notice was non-intentional, suggesting that West was unaware that fifteen-day notice had not been provided to Sunnyland when on August 29th he ordered that Sunnyland be disconnected. Answer Brief, 10-11. But that argument is contrary to the district court's fact findings, unchallenged by CNMEC and amply supported by the evidence. The last bill sent to Sunnyland prior to August 29th was sent on August 9th and provided that the bill would not be past due until September 2nd. Finding 23. Under the contract, a fifteen day notice would not have been sent until after September 2nd, if the bill had not been paid by then. Finding 6; Rule 11.4 (Exh. 97). And West knew that pursuant to CNMEC procedures, no 15 day notice could be sent to Agstar because its accounts had been closed. Tr. 2:13:17-19. Notwithstanding, West ordered the cut-off, intentionally denying Sunnyland the contractually-mandated fifteen-day notice. The district court's findings are supported by the evidence:

- CNMEC's August 9, 2003 bills to Sunnyland indicated that the accounts would be past-due on September 2nd, but even before that date, on August 27th, CNMEC's manager West ordered that Agstar's balance be transferred to Sunnyland's account and on August 29th, West ordered that cut-off

procedures be initiated. Findings 25, 32; Tr. 1:105:12 - 106:8.

- West directed CNMEC dispatcher Pat Taylor to hand-write a disconnect notice, intentionally bypassing CNMEC's computer system, which was programmed to comply with all notice requirements and written procedures. Findings 33, 38-39; Tr. 1:108:1-8; 1:129:12 - 130:1.
- The only notice Sunnyland actually received before the electricity was disconnected stated that power would be disconnected if the bill was not paid by September 17th. Notwithstanding, Sunnyland's power was disconnected on September 8th, 9 days prior to the date provided by that notice. Findings 34, 45; Exh. 48.[4]

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[4] CNMEC's Taylor testified that on afternoon of Friday August 29th (the Friday before Labor Day weekend) she attempted to reach Sunnyland by telephone to advise of the imminent disconnection, but that she was unsuccessful in reaching anyone. Of course, Sunnyland was open for business on Tuesday through Friday, September 2-5, but there was no evidence that Taylor called on any of those days to warn Sunnyland of the imminent cut-off. CNMEC claims that it sent a handwritten cut-off notice to Sunnyland, dated August 29 and mailed on September 2, advising that power would be disconnected if the account was not paid by September 5th. Answer Brief, 11. CNMEC cites Finding 33 for this assertion, but that finding (and the succeeding Finding 34) refer to the fifteen day notice dated September 2nd that advised that electricity would be cut off if payment was not received by September 17th. Sunnyland acknowledged receiving that (the September 17th) notice, but prior to the electricity being disconnected on September 8th, Sunnyland never received a notice that its electricity would be cut off if it didn't pay by September 5th (Tr. 5:42:6-9), and West acknowledged that

CNMEC acknowledges that the statutory requirement that post-judgment interest be assessed at the rate of 15% where the judgment "is based on tortious conduct, bad faith, intentional or willful acts" is mandatory, and because CNMEC fails to counter Sunnyland's demonstration that the evidence was clear and the district court found that both the original termination of electric service and the subsequent refusal to reconnect that service were "tortious conduct, bad faith, intentional or willful acts" the district court erred as a matter of law in not awarding post-judgment interest at the higher rate.

II. CNMEC has failed to counter Sunnyland's demonstration that the district court abused its discretion in not awarding Sunnyland pre-judgment interest.

Prejudgment interest is authorized where one party has caused unreasonable delay in adjudication. Our Supreme Court has explained: "[t]he purpose of awarding prejudgment interest ... is to foster settlement and prevent delay."

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the CNMEC computer would not show a 15 day notice sent to Sunnyland before September 8th. Tr. 2:12:2-4. The handwritten notice that Taylor claims to have sent was on a duplicate form that CNMEC used at that time, but CNMEC produced no duplicate copy. Similarly, while its practice at that time was to keep a log of handwritten notices, CNMEC could not produce a copy of a log showing any such notice. Findings 42-43. The Court can conclude that no such written notice of the cut-off on September 8th was sent to Sunnyland. As CNMEC acknowledges, Sunnyland received no oral notice either.

Lucero v. *Aladdin Beauty Colleges, Inc.*, 117 N.M. 269, 272 (1994). As this Court has noted in addition to delay, "the court should take into account all relevant equitable considerations that further the goals of Section 56-8-4(B)." *Bird* v. *State Farm Mut. Auto, Ins. Co.*, 2007-NMCA-088, ¶33. In addition to CNMEC's intransigent settlement posture, those "equitable considerations" here warrant the award of prejudgment interest. In addition to the substantial damages resulting from the destruction of the Estancia greenhouse, the inordinate delay in resolving this matter put enormous financial pressure on Sunnyland, causing the collapse of its entire business and closure of the Grants greenhouse as well. None of these other injuries suffered by Sunnyland are compensated by the judgment.

Sunnyland demonstrated that because CNMEC had failed to approach its settlement obligations in good faith, the factual circumstances of this case justified award of prejudgment interest to Sunnyland pursuant to NMSA 1978 § 56-8-4. Brief-in-Chief, 16-29 Starting in September, 2004, and continuing for years, Sunnyland made numerous, reasonable settlement offers, which CNMEC rebuffed. Only on the eve of trial, did CNMEC make a settlement offer of less than 2.5% of the damages ultimately found, which offer was calculated to be rejected. *Id.*, 18-20. In its Answer Brief, CNMEC does not deny that it rejected all of Sunnyland's

reasonable settlement proposals,[5] nor does it deny that its own 11th hour offer was inadequate and calculated to be rejected. Thus CNMEC concedes these points.

CNMEC argues that supposed serious questions of law and fact excused its failure to respond to Sunnyland's settlement proposals or to make realistic counterproposals. Answer Brief, 19-21. But CNMEC does not dispute that Sunnyland's offers were reasonable or that its late-breaking counteroffer was unreasonable. The idea that the presence of "difficult legal issues" warrants refusal even to consider reasonable settlement offers is mischievious. Under such reasoning, any party could justify its refusal to approach settlement in good faith *post hoc* merely by taking an appeal. There is no indication on the record that the district court determined not to award prejudgment interest on this ground, and this Court should not either, as that would eviscerate § 56-8-4.

CNMEC's argument that there were other grounds for the district court to deny Sunnyland prejudgment interest similarly is bereft of merit. CNMEC cites

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[5] CNMEC observes that Sunnyland's settlement offers increased as the litigation progressed, and that Sunnyland's last offer was $22 million. Answer Brief, 20. CNMEC fails to mention, however, that Sunnyland's final settlement offer was made *after* the trial and *after* the district court had entered its Findings and Conclusions, finding that Sunnyland's damages were $21,354,828 (Finding 247), and had assessed punitive damages of $100,000. Conclusions 6, 8.

no decisional authority for its suggestion that the court could have considered the question of prejudgment interest in light of the comparative fault ultimately assigned to Sunnyland. Answer Brief, 20. First, the law was clear that there would be no comparative fault on the breach of contract claims. *Allsup's Convenience Stores, Inc.* v. *North River Ins. Co.*, 1999-NMSC-006, ¶23. Further, this argument also smacks of *post hoc* rationalization as CNMEC would have had no idea what that assignment would be before trial when it was rebuffing Sunnyland's reasonable settlement proposals. And, while CNMEC argues that the amount of and measure of damages was "hotly debated" (Answer Brief, 20), as Sunnyland demonstrated (Brief-in-Chief, 19-20, 24) Sunnyland had provided a detailed accounting of its losses, and by the time CNMEC made its only, grossly inadequate, eleventh-hour settlement offer, it had deposed Sunnyland's damage expert. In any event this cannot be ground for denying prejudgment interest. "A mere difference of opinion as to the amount owed will not relieve the breaching party from liability for prejudgment interest." *Kueffer* v. *Kueffer*, 110 N.M. 10, 12 (1990).

Sunnyland cited several reasons why the district court abused its discretion in not awarding prejudgment interest that was appropriate in this case. In addition

to CNMEC's bad faith settlement posture, Sunnyland pointed out that other delays in the resolution of the case, not of its making, presented additional equitable considerations warranting award of prejudgment interest; namely the 19 months between the end of the trial and the entry of judgment, and that as a result of CNMEC's unnecessarily protracting resolution of the dispute, Sunnyland suffered other injury not compensated in the lawsuit – specifically, financial pressures that caused it to close down its other greenhouse at Grants. Brief-in-Chief, 20-22.

CNMEC argues that Sunnyland offers no case authority for the proposition that the district court "cannot consider other causes of delay [such as the 19 month delay in entering judgment] aside from the actions of the litigants in determining the appropriateness of an award of pre-judgment interest." Answer Brief, 21. The argument mischaracterizes Sunnyland's position, which was not that the Court could not consider factors external to the parties' conduct, but rather that the Court *could and should* consider factors other than the conduct of the parties in determining whether prejudgment interest is appropriate. Brief-in-Chief, 20-22. And CNMEC's assertion that Sunnyland cites no case authority for its position and thus that this Court cannot consider it (Answer Brief, 21) overlooks Sunnyland's citation to *Bird*, 2007-NMCA-088, ¶33 ("the 'court should take into

account all relevant equitable considerations that further the goals of Section 56-8-4(B),'" quoting *Gonzales* v. *Surgidev Corp*, 120 N.M. 133, 150 (1995)). Brief-in-Chief, 16-17.

CNMEC argues that the Court need not consider Sunnyland's argument that factors other than the conduct of the parties themselves justify award of prejudgment interest because "these factors were not raised below" and thus were waived. Answer Brief, 18-19. Clearly, Sunnyland put its case for prejudgment interest to the district court. Sunnyland's Memorandum in Support of Proposed Final Judgment at 15-22; R.P. at 001211-47. Sunnyland's argument focused on the parties' settlement conduct as that is the focus of Section 56-8-4. And Sunnyland demonstrated that either CNMEC's refusal to consider Sunnyland's repeated, reasonable settlement offers or CNMEC's cynical, bad faith, eleventh hour, niggardly settlement offer by itself would be sufficient ground for the district court to award Sunnyland prejudgment interest. Sunnyland merely suggests in this Court that the hardship it suffered as a result of the additional delay of more than 18 months between the end of trial and entry of judgment is yet further reason why this Court can determine that the district court abused its discretion in not awarding prejudgment interest. While CNMEC argues that this Court cannot

consider this additional reason because Sunnyland did not cite it to the district court, clearly until the district court actually entered judgment, Sunnyland had no way of knowing that the district court's entry of judgment would be so inordinately delayed.

CNMEC notes that it posed several arguments in the district court as to why prejudgment interest should not be awarded, and asserts that "agreeing with the Cooperative's position, the district court declined to award prejudgment interest." Answer Brief, 5. This misstates the record; the district court cited no ground for denying prejudgment interest, merely asserting that "[n]o prejudgment interest will attach." Amended Judgment at ¶ 6. Indeed, it was the district court's failure to assign reasons for its refusal to award prejudgment interest that provided the basis for reversal in *Mascarenas* v. *Jaramillo*, 111 N.M. 410 (1991).

> In this case, it does not appear that the trial court weighed the equities involved. We conclude that, without findings to justify a denial of the prejudgment interest award, the denial thereof was error.

Id. at 414-415.

CNMEC's excursion into the differences between NMSA 1978 § 56-8-3 and § 56-8-4, and its argument that Plaintiff is not entitled to prejudgment interest

under § 56-8-3 (Answer Brief, 24-28) springs from a deliberate misreading of Sunnyland's argument and is irrelevant. Sunnyland does not argue that it is entitled to prejudgment interest pursuant to § 56-8-3. Rather, it argues that the district court had discretion to award it prejudgment interest pursuant to § 56-8-4 (and abused that discretion by failing to award prejudgment interest in the circumstances of this case); but that because § 56-8-4 does not specify the rate of prejudgment interest for judgments based on breach of contract, the Court should look to § 56-8-3 to determine the appropriate interest rate.

III. CNMEC fails to explain why its assertion of Sunnyland's insurer's subrogation lien does not violate the collateral source rule or public policy.

Sunnyland demonstrated that CNMEC's assertion of the subrogation lien that it purchased at steep discount from Sunnyland's casualty insurer violates the collateral source rule (Brief-in-Chief, 30-33) and was contrary to established public policy. *Id.* at 33-36. In its Answer Brief, CNMEC denies neither that the collateral source rule is well-established in New Mexico law, nor that New Mexico public policy precludes an insurer from subrogating against its own insured.

While CNMEC does not dispute that the collateral source rule is well-

established in New Mexico law, relying primarily on non-controlling, foreign law, CNMEC argues that payment to Sunnyland of its casualty losses by its casualty insurer was not a payment from a collateral source.[6] CNMEC attempts to distinguish *McConal Aviation, Inc.* v. *Commercial Aviation Ins. Co.*, 110 N.M. 697 (1990) and *Sanchez* v. *Clayton*, 117 N.M. 761 (1994) on the ground that, in both those cases, the plaintiff had sued multiple defendants and had settled with fewer than all of them, while here, plaintiff sued only CNMEC. Answer Brief, 31. CNMEC does not explain why this would make a difference; and it does not. The collateral source rule applies where the prejudgment settlement involved neither a joint tortfeasor nor a joint contract obligor – precisely the case here. Brief-in-Chief, 32-33. It is the nature of the relationship between the sources of the payments (or more precisely, the lack of a relationship between them) that controls whether the collateral source rule applies; not the number of defendants.

New Mexico jurisprudence clearly establishes that the wrongdoer is entitled

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[6] CNMEC's speculation (Answer Brief, 29-30), based on *Quinn* v. *Warnes*, 144 Cal.App.3d 309 (1983) – that whether the set-off applied or not, the result would be the same – is misplaced. That speculation in *Quinn* was based on established California law protecting the employer's (or the employer's insurer's) subrogation rights as against third party tortfeasors. *Id.* at 317-18. CNMEC cites no New Mexico statutory or decisional law establishing the same safeguard of workers' compensation subrogation rights.

to set-off where the plaintiff has received payment for the injury from a source *provided by the wrongdoer*, and by contrast, the collateral source rule provides that the wrongdoer is not entitled to set-off of benefits secured by the plaintiff herself or through third parties.

> The collateral source rule is designed to preclude an alleged tort-feasor from setting up in mitigation or reduction of damages that the plaintiff has been compensated by insurance in whole or in part, where such insurance was not procured by the alleged wrongdoer.

Yardman v. *San Juan Downs, Inc.,* 120 N.M. 751, 762 (Ct.App. 1995) (permitting set-off of insurance payments made to plaintiff from insurance secured by defendant).

Thus, in *Smith* v. *FDC Corp.*, 109 N.M. 514, 521 (1990), a wrongful termination case, the court held that the employer was not entitled to set off public assistance and Social Security benefits paid to the employee after termination. Similarly, in *Cress* v. *Scott*, 117 N.M. 3 (1994), the plaintiff sued because of improper repairs to his car. Our Supreme Court held that the plaintiff could seek damages for the loss of use of his car while the extensive repairs were being accomplished even though he had been provided the use of his daughter's car, and

thus incurred no expense. "If the substitute vehicle is provided gratuitously by a third party, however, the wrongdoer should not benefit by such gratuitous aid." *Id.* at 7, citing *McConal.* Compare to *Washington* v. *Atcheson, Topeka and Santa Fe Ry. Co.,* 114 N.M. 56 (Ct.App. 1992), a FELA case where this Court permitted the employer a set-off of the plaintiff's recovery for railroad retirement benefits and sickness benefits *paid by the employer* pursuant to the collective bargaining agreement. Clearly, where, as here, *the payment received by the Plaintiff was from a source provided by the Plaintiff itself,* and not from a source provided by the Defendant, the payment is a collateral source and the set-off is improper.

CNMEC does not dispute this verity either.[7] Instead it points to non-controlling, foreign decisional law that is at least at odds with the distinctions well established in New Mexico law, as described above. CNMEC acknowledges (Answer Brief, 34) that two cases it relies on, *Brinkerhoff* v. *Swearingen Aviation Corp.*, 663 P.2d 937 (Alaska 1983) and *Great West Cas. Co.* v. *State ex rel.*

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[7] CNMEC notes that a defendant is entitled to set-off of benefits "that derive from the defendant himself ..." (Answer Brief, 31, citing *Aragon* v. *Brown,* 93 N.M. 646 (Ct.App. 1979). But clearly, here, Sunnyland's benefits were provided by Sunnyland's own insurer from a policy that Sunnyland secured. CNMEC did not provide the benefit; it merely bought the insurer's lien. And CNMEC offers no explanation of how that could be considered a benefit provided by CNMEC.

Dep't. of Transp. & Dev., 960 So.2d 973 (La.App. 2007) do not address the collateral source rule. And while both *Hayes Sight & Sound, Inc.* v. *ONEOK.* 136 P.3d 428 (Kan. 2006) and *Yeiser* v. *Ferrellgas, Inc.*, No. 06CA0494, 2008 WL 4330265 (Colo.App. Sept. 18, 2008) mention the collateral source rule, it is clear that those cases derive from decisional authority that is quite unlike New Mexico's and that puts far greater stress on avoiding the so-called "double recovery." Interestingly though, both *Hayes* and *Yeiser* permit the defendant to set off only the amount that it paid to purchase the plaintiffs' insurers' subrogation lien, not the amount of the lien itself; clearly a results-oriented outcome that ignores the collateral source rule rather than applies it. By permitting the defendant who purchased the plaintiffs' insurers' subrogation liens set-offs only in the amount that the defendants paid for those liens instead of the amounts of the liens themselves, those courts essentially were **not** permitting the defendants a set-off in the amount the plaintiffs received from the collateral source.

CNMEC's reliance (Answer Brief, 34-35) on *Jaramillo* v. *Fisher Controls Company, Inc.*, 102 N.M. 614 (Ct.App. 1985) – which dealt with allocation of the judgment among joint tortfeasors and how to credit the subrogation lien of the plaintiff's insurer against the liability of one of the defendants – is misplaced.

There, by the parties' agreement, the collateral source rule was not in issue. *Id.* at 628. But, interestingly, the *Jaramillo* court specifically rejected Fisher's claim that it was entitled to a set-off of the total amount the plaintiff's insurer had paid to the plaintiff – exactly the claim CNMEC makes here.

> This claim is frivolous. State Farm paid the [plaintiffs] pursuant to an insurance contract between those parties. Fisher identifies nothing indicating it was a beneficiary of the contract.

Id. at 629.

CNMEC relies exclusively on foreign cases to argue that its purchased set-off does not violate New Mexico public policy. By focusing on the prospect of over-recovery by the insured plaintiff, those cases and CNMEC avoid confronting the fundamental rationale for New Mexico's policy. The prohibition against an insurer subrogating against its own insured is to insure that the insurance subrogation lien is asserted by the insurer against the wrongdoer. CNMEC's attempt to apply that lien as a set-off reducing its own liability to Sunnyland reverses the directionality of the benefit flow; instead of the wrongdoer paying the insurer's lien, here the victim would be paying its own insurer's lien and the wrongdoer would be the beneficiary. CNMEC attempts to distinguish *State ex rel*

Regents v. *Siplast, Inc.*, 117 N.M. 738 (1994) on inconsequential bases, but leaves unaddressed *Siplast's* explanation of why reversing the directionality violates public policy, and Sunnyland's explanation (Brief-in-Chief, 34-35) of why those considerations are applicable here.

CONCLUSION

For the reasons set forth here and in its Brief-in-Chief, Sunnyland respectfully suggests that the district court be reversed on the issues subject to this Cross Appeal.

Dated: July 6, 2009

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