IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

CITY OF TUCUMCARI,
a New Mexico Corporation,

Plaintiff/Appellee,

v.

RAD WATER USERS COOPERATIVE,
a New Mexico Cooperative Association,

Defendant/Appellant.

Court of Appeals No: 34,569
Tenth Judicial District Court
No. D-1010-CV-2013-00023

Appeal from the Tenth Judicial District Court
Quay County
The Honorable Judge Gerald E. Baca
Sitting By Designation

ANSWER
BRIEF-IN-CHIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Case Authority Page

Out of State Case Authority

Statues, Rules or Other Authorities

STATEMENT OF COMPLIANCE

As required by Rule 12-213(G) NMRA, we certify that this response complies with the type-volume limitation of Rule 12-213(F)(3) NMRA. According to Microsoft Office Word 2007, the body of the *answer* brief, as defined by Rule 12-213(F)(1) NMRA, contains 9,707 words.

STATEMENT REGARDING TAPE AND COMPACT DISC RECORDED TRANSCRIPTS OF PROCEEDINGS

The proceedings in this matter were digitally recorded. Counsel for City of Tucumcari's citation to the November 13, 2014 merits hearing cites to the times found on The Record Player, (which tracts the official monitor log) with a start time of 9:46:14 AM and an end time of 4:26:30 PM.

SUMMARY OF PROCEEDINGS

Appellant, RAD Water Users Cooperative (hereinafter RAD) Summary of Proceedings, does not appear to comply with Rule 12-213A(3), NMRA, as most of the factual allegations do not cite to the transcript of proceedings or to the record proper/exhibits which support each factual representation contained therein. (Hence, the City of Tucumcari deems it necessary to file its own Summary of Proceedings).

References to the record in this proceeding shall be abbreviated as Record Proper (RP) and Tape of the Trial (TR0:00).

The Honorable Gerald E. Baca, District Judge, sitting by designation in the Tenth Judicial District Court of Quay County, New Mexico presided over a bench trial held before the District Court November 13, 2014 with the trial lasting approximately 1 full day.

The District Court entered Findings of Fact and Conclusions of Law and Order, on February 2, 2015 setting forth 48 findings and 4 conclusions of law. (RP 538-548). The facts relevant to the Court's entry of Judgment in this proceeding are set forth within the Court's Findings of Fact which Findings were largely uncontested by RAD Water Users Cooperative, ("RAD") in its Brief-In-Chief.

Plaintiff, City of Tucumcari, is a New Mexico Municipal Corporation located in Quay County, New Mexico. (RP 538 ¶ 1)

Defendant, RAD Water Users Cooperative, is a New Mexico Cooperative, established pursuant to § 53-4-1, et. seq., which operates in Quay County, New Mexico. (RP 538 ¶ 2)

RAD purchases water from the City of Tucumcari for resale to its members/customers. (RP 538 ¶ 3)

RAD owns and maintains distribution lines and meters, which it uses to distribute the water it purchases from the City to RAD's members/customers. (RP 538 ¶ 4) the City, RAD, and other water cooperatives were involved in a previous lawsuit (Liberty Mutual Domestic Water System Association, Inc., et al. v. City of Tucumcari, Quay County Cause No. CV-86-00109) in Quay County District Court, which was resolved by Final Stipulated Decision on or about June 25, 1987. (RP 539 ¶ 5)

The June 25, 1987 Decision set out the criteria that the City is to use to determine rate increases for water it sells to RAD. (RP 539 ¶6)

In conformity with the June 25, 1987 decision, the parties hereto have agreed through subsequent contracts to continue the sale and purchase of water by RAD from the City. (RP 539 ¶ 7) (TR 10:24:33) (Exhibit 1)

On January 10, 2010, the parties entered into the present Agreement for Sale and Purchase of Water between the City and RAD. (RP 539 ¶ 8) (TR 10:43:33) (Exhibit 3) Paragraph 6 of the Agreement provided that the City could charge RAD and its users $2.19 per one thousand gallons of water delivered from July 1, 2011 through June 30, 2012. (RP 539 ¶ 9) (TR 10:34:53) Paragraph 6 of the Agreement also provides that: Beginning July 1, 2012, the cost of producing water shall be calculated based on the costs for the following:

-Administration of water department (10%)

-Producing water -Distribution water

-Laboratory costs directly attributable to the water department

-Warehousing parts for the water department

-Depreciation attributable to water department only

-Interest on bond directly benefitting water department

No cost attributable to the sewer department is, nor shall be in the future, included in the calculation of the water rates.

No cost of capital improvements to the water system, is nor shall be in the future, included in the calculation of the water rate.

The basic cost amounts to be used shall be those found in the Seller's audited financial statements.

Purchaser or their agents may examine Seller's relevant records upon reasonable notice to the Seller. (RP 539 ¶ 10) (TR 10:35:38) (Exhibit 3, ¶ 6)

Paragraph 8 of the Agreement provides that "the cost of producing water shall be recomputed by the seller yearly, no earlier than sixty (60) days prior to June 30th of each year, using the formula to be given sixty (60) days before such modification shall go into effect." (RP 540 ¶ 11) (TR 10:35:58) (Exhibit 3)

In addition, paragraph 6, which is set forth in full above, provides that "the basic cost amounts to be used shall be those found in the seller's audited financial statements," which does not specify that only the prior years' records can be used to make this calculation.

On December 29, 2011, the City adopted Ordinance No. 1099. (RP 542 ¶ 22) (TR 10:27:23) Ordinance 1099 provided water rates for residential and commercial customers within the City's city limits, and it provided water rated for domestic and commercial customers outside of the City's city limits. (RP 542 ¶ 23) (TR 10:28:10-10:33:28) Ordinance 1099 provided that the schedule of rates "is not applicable to resale...services," such as RAD. (RP 542 ¶ 24) (TR 10:31:43)

On June 25th, 2012, the City gave notice to RAD of its decision to raise water rates to $2.81 per thousand gallons of water. (RP 540 ¶ 12) (TR 10:35:29) (Exhibit 4)

The increased water rate became effective September 1, 2012, sixty-four (64) days after notice of the increase in water rate was given by the City to RAD. (RP 541 ¶ 14) (TR 10:40:04)

The City calculated the increased water rate pursuant to the terms of the 2010 Agreement, using the financial information for fiscal year 2011. (RP 541 ¶ 15) (TR 1:41:25-1:41:31)

The City used financial information for fiscal year 2011 to calculate the new water rate as fiscal year 2012 had not yet come to an end. (RP 541 ¶ 16) (TR 1:41:18-1:41:30)

On July 11, 2012 RAD requested information from the City concerning the basis for the water rate. (RP 541 ¶ 17) (TR 10:42:41) (Exhibit 6)

On August 9, 2012, the City provided RAD the calculations and other information used by the City to support the rate increase. (RP 541 ¶ 18) (TR 10:44:21) (Exhibit 7)

On September 1, 2012 RAD, through its President, acknowledged that the new rate increase was due and payable by RAD as of the statement dated September 1, 2012. (RP 541 ¶ 19) (TR 10:47:22-10:48:05) (Exhibit 8)

The City in its Amended Complaint for Declaratory Judgment and for Breach of Contract filed on 3-19-2013 (RP 19-48) in Count One sought relief under the New Mexico Declaratory Judgment Act, under Count Two sought relief for breach of contract specifically requested the Court "enter Judgment in favor of the City of Tucumcari and against RAD for failure to pay such amounts of water as the City was entitled to be paid for, *plus all consequences as a result of the breach".* (RP 22 ¶ 15). In Count Three, the City requested the Court "allow it to establish new rate structures for the calendar year 2013 and thereafter, consistent with the analysis reflected in Exhibit "A". (RP 23 ¶ 20).

In the course of the proceedings the City of Tucumcari initially moved for Summary Judgment as to all claims on November 5, 2013 (RP 141) which was denied by the District Court on February 12, 2014. (RP 303).

Thereafter, the City of Tucumcari deposed RAD Water Users expert witness and water rates consultant Carl Brown (RP 312) and based upon information received from Brown, renewed its Motion for Summary Judgment before the District Court on June 24, 2014 (RP 322). In particular, Mr. Brown's deposition revealed that he had expressly recommended to RAD Water Users in writing that they should take the City's offer to pay for water at a rate of $2.81 per thousand gallons, because Brown calculated the rate should be set at least $3.43. (the City's Exhibit 14) (TR 2:20:03). Notwithstanding Mr. Brown's recommendation, RAD chose to simply ignore his advice and further went to the expense of calling Mr. Brown as a witness at the Trial on the Merits. The City of Tucumcari called Mr. Brown as an adverse witness in its case in chief (TR 2:0040).

On April 30, 2013, the City notified RAD of the annual rate increase for 2013. (RP 541 ¶ 20) (TR 10:49:24) (Exhibit 9). This amount was calculated taking into account the Contract calculation found in paragraph 6. (TR 1:57:00-1:57:25).

On May 14, 2014, the City notified RAD of the annual rate increase for 2014. (RP 541 ¶ 21) (TR 10:51:17) (Exhibit 10). This amount was calculated taking into account the Contract calculation found in paragraph 6. (TR 1:57:40-1:57:59).

At trial, the City called Olga Morales as an expert witness regarding whether or not the rate increase imposed by the City upon RAD was reasonable. (RP 542 ¶ 25) (TR 11:31:48)

Olga Morales testified that she was familiar with the annual recording of water rates within the State of New Mexico as maintained by the Construction Program Bureau of the New Mexico Environment Department. The City tendered into evidence an authenticated, certified copy of public records containing the affidavit of Jim Chiasson, Bureau Chief for the Construction Program Bureau of the New Mexico Environment Water Department. This affidavit contained the Municipal Water and Waste Water User Charge Survey Rates for 2008 through April of 2012 for New Mexico Municipal Utilities. This document was introduced into evidence as the City's Exhibit 11. (RP 542 ¶ 26) (TR 10:58:19)

The City's Exhibit 12 was the Rate Analysis Ms. Morales prepared for the USDA reflecting her analysis of the City's water rate structure. (RP 543 ¶ 27) (TR 11:12:04) The Rate Analysis had been requested by the USDA because the City approached the USDA for funding in 2010, to make improvements to its infrastructure. (RP 543 ¶ 28) (TR 11:12:30-11:13:01) In the Rate Analysis prepared by Morales, it was determined

that the City was undercharging all of its customers, including RAD. (RP 543 ¶ 29) (TR 11:17:03)

Morales further testified that the City would need to substantially increase its water rates in order to build up reserve funds, so that the City could service the debt on the money it borrowed, as well as to address emergency situations which might arise in the operation of the water utility. (RP 543 ¶ 30) (TR 11:18:19) Morales testified that the water rate being charged by the City to RAD for $2.19 per 1,000 gallons was unreasonably low, and that all of the City's municipal rates for in City residential, in City commercial, out of City residential, and out of City commercial would have to be raised significantly, in order for the City to be able to borrow money from the USDA. (RP 543 ¶ 31) (TR 11:18:26-11:20:46) Olga Morales rendered an opinion as an expert that a reasonable water rate in the State of New Mexico would be from a range of $2.00 on the low end to a high of $5.00 per 1,000 gallons. (RP 543 ¶ 32) (TR 12:18:43-12:19:09)

Dennis Dysart, Finance Director for the City, testified concerning the research and calculations he undertook to determine what the water rate would be that would be charged to RAD. (RP 544 ¶ 33) (TR 1:37:00-1:40:52) These calculations were made as of May 31, 2012 and are reflected in the City's Exhibit 5. (RP 544 ¶ 34) (TR 1:37:15) Dysart prepared the City's Exhibit 5. (RP 544 ¶ 35) (TR ID) Dysart testified that the calculations were prepared using the formula set out in paragraph 6 of the 2010 Agreement between the City and RAD. (RP 544 ¶ 36) (TR 1:39:31) Dysart testified that the City took steps to alleviate the water loss reflected in the Morales report, and the City's water loss rate decreased from 2011 to 2012 from 47% to 20%. (RP 544 ¶ 37) (TR 3:32:32-3:33:55) Dysart testified that the rate reflected the City's Exhibit No. 5

which calculated the RAD water rate at $2.81 was actually inaccurate and that the actual amount which should have been charged based on 2012 audited numbers was reflected in the City's Exhibit 7, showing a rate which should have been charged to RAD at $3.43. (RP 544 ¶ 38) (TR 1:44:14)

The 2012 audited numbers were also used by Dysart to calculate the water rate due for 2013, as reflected in the City's Exhibit 9, at $3.37 per 1,000 gallons. (RP 545 ¶ 39) (TR 3:59:13-3:59:35)

The City could have sought the higher water rate based upon the 2010 contract between the parties; however, the City only sought the amount initially requested by Doug Powers, Manager for the City of Tucumcari, in his letter dated June 25th, 2012, of $2.81 per thousand gallons. (RP 545 ¶ 40) (TR 11:44:20-11:44:30)

Carl Brown, an expert on water rates, testified that the City's Exhibit 13 was a summary statement in which he had sent to the legal assistant for RAD's attorney, dated May 4th, 2014. (RP 545 ¶ 41) (TR 2:09:29-2:09:59) The City of Tucumcari called Mr. Brown as an adverse witness in its case in chief (TR 2:00:40) to prove up that Mr. Brown felt the proposed rate increase was reasonable.

Brown's opinion that a reasonable rate for the City to charge RAD was $3.33, according to the May calculations of Dennis Dysart and $3.86 per 1,000 gallon, using the June calculations. This proposed rate also afforded an adjustment not found in the contract, which was favorable to RAD, attributing only a 10% water loss to RAD rather than the 47% water loss reflected in the Olga Morales report. (RP 545 ¶ 42) (TR 2:12:50)

Brown testified that the contract made no provision for adjusting the amounts to be paid by RAD, based upon water loss, to 10%. (RP 545 ¶ 43) (TR 2:12:00-2:12:10) Brown further testified that he had recalculated the math used by Dennis Dysart and found it to be correct. He was not aware when he prepared his report that Dennis Dysart's May calculations reflected in Exhibit 5 were based on the prior year's water production, whereas Exhibit 7 was based upon 2012 audited numbers. (RP 545 ¶ 44) (TR 2:08:36-2:09:14)

It was Carl Brown's opinion that the water increase sought by the City for 2012, at $2.81 per thousand, was reasonable since he had calculated proposed rates of $3.33 or $3.86. (RP 546 ¶ 45) (TR 2:20:03)

The Court found that the water rate of $2.81 per thousand proposed to be charged by the City for the calendar year 2012 to RAD, was reasonable and consistent with rates charged by privately owned/public utilities. (RP 546 ¶ 46) (TR 2:20:03-2:20:15)

The Court also found that the contract allowed the City to recalculate water rates annually, and the rate proposed to be charged by the City for the calendar year of 2013, of $3.37 per thousand gallons beginning July 1st, 2013, was reasonable and consistent with rates charged by privately owned/public utilities in New Mexico in 2013. (RP 546 ¶ 47) The Court further determined that the contract allowed the City to recalculate water rates annually, and the rate proposed to be charged by the City for the calendar year of 2014, of $3.82 per thousand gallons beginning July 1st, 2014, was reasonable and consistent with rates charged by privately owned/public utilities in New Mexico in 2014. (RP 546 ¶ 48)

Standard of Review

Under a substantial evidence standard of review, "substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion." *Dydek v. Dydek,* 2012-NMCA-088, 288 P.3d 872.

On issues involving an abuse of the Court's discretion, an abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case. *Sims v. Sims*, 1996 NMSC 78, 122 NM 618, 930 P.2d 153.

ARGUMENT

POINT ONE: SUBSTANTIAL EVIDENCE SUPPORTS THE DISTRICT COURT'S DETERMINATION THAT RAD WATER'S FAILURE TO MAKE PAYMENT WAS A MATERIAL BREACH OF THE PARTIES' 2010 CONTRACT WHICH EXCUSED FURTHER PERFORMANCE UNDER THE CONTRACT AND ALLOWED THE CITY OF TUCUMCARI TO ESTABLISH REASONABLE WATER RATES GOING FORWARD. (Response to RAD Water's Point A)

Defendant, RAD, at page 11 of its Brief-In-Chief asserts "neither of the parties requested the Court to terminate the Agreement." This contention, however, is incorrect.

RAD also incorrectly suggests that the City did not include any such claim for relief in its pleadings. This contention is also incorrect.

The City in its Amended Brief for Declaratory Judgment and for Breach of Contract filed on 3-19-2013 (RP 19-48) in Count One sought relief under the New Mexico Declaratory Judgment Act, and under Count Two sought relief for breach of contract specifically requested the Court "enter Judgment in favor of the City of Tucumcari and against RAD for failure to pay such amounts of water as the City was entitled to be paid for, *plus all consequences as a result of the breach".* (RP 22 ¶ 15). In Count Three of the Amended Complaint, the City requested the Court "allow it to

establish new rate structures for the calendar year 2013 and thereafter, consistent with the analysis reflected in Exhibit "A". (RP 23 ¶ 20).

In addition, the City of Tucumcari, in its Motion for Summary Judgment filed on or about November 5, 2013 (RP 342, 343) argued that RAD's failure to make the agreed upon payment under the 2010 Contract constituted a material breach of the 2010 Contract thereby excusing the City of Tucumcari from further performance under the terms of the same.

The City affirmatively asserted that it should be allowed to exercise its municipal discretion to contract for the sale of municipal water, "...upon conditions, acceptable to the municipality" pursuant to § 3-27-8, NMSA, so long as the rates established were reasonable and within the standard established in *Flemming v. Town of Silver City*, 128 NM 295, 199 NMCA-149, 992 P.2d 308.

Furthermore, the City, through its counsel's closing argument, specifically argued

> "...(t)his is the second time that these parties have come in front of a Court of law to fight about water rates. We have reached a critical juncture we think in this case, where we would ask the Court to find there has been a material breach of Contract by RAD such that we are relieved from our obligation to provide continuing services under this unworkable process (TR 4:06:23), that you have heard about. It is cumbersome, it is not reasonable, and we would ask the Court to find that the City of Tucumcari should be allowed pursuant to its statutory right to set a reasonable utility rate applicable to RAD for future water users. If they are not comfortable with that rate they can bring that issue back to the Court, but at least we won't be faced with these calculations and these innumerable things that call for expert witnesses to have to haggle about (sic)." (TR 4:06:54).

We also note that the City in its requested Findings of Fact and Conclusions of Law, requested a specific finding in Finding No. 75 that "in light of the breach of the

Agreement by the RAD Water Users, the Court should allow the City of Tucumcari to establish its water rates in such manner as the City deems appropriate, so long as the rates established are reasonable." (RP 536). The District Court, in Conclusion #4 determined the City should be allowed to establish a reasonable water rate.

The District Court, in its Conclusions of Law determined that RAD had breached the Agreement for Sale and Purchase of Water and was delinquent in its payments to Plaintiff since August 25, 2012. (RP 547 #2). The District Court next concluded that "in light of the stipulation by Defendant that the Contract between the parties, and not the terms of the Stipulated Judgment controls, Plaintiff is free to calculate a reasonable water rate for Defendant for future use and is not restricted to the prior formula specified in Quay Cause No. CV-86-00109." (Conclusion #4, ID).

We submit that the District Court's findings in these regards are supported by substantial evidence found within the record as a whole.

We submit that the determination of whether or not the trial Court's finding that RAD Water had breached the parties' 2010 Contract is reviewed under the substantial evidence standard.

Under this standard, the Court views the evidence in the light most favorable to support the fact-finders ruling, drawing all reasonable inferences and resolving all disputed facts in favor of the verdict. *Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000 NMSC 33, PP6-7, 129 N.M. 698, 12 P.3d 960. *P.S.C. v. Diamond D Constr. Co.*, 131 N.M. 100, 2001-NMCA-082, 33 P.3d 651, (Ct. App. 2001).

In this case, RAD Water did not specifically attack any of the District Court's findings in regard to the determination that a breach had occurred or that the breach was material.

Findings must be attacked on the basis that there is no substantial evidence to support them. *Petty v. Williams*, 71 N.M. 338, 378 P.2d 376. If not so attacked, the findings must be accepted as the facts in the case. *Noran v. White*, 69 N.M. 46, 363 P.2d 1038. This Court has held that it will consider only that evidence and inferences to be drawn therefrom which support the findings, and will not consider any evidence unfavorable to the findings. *Luna v. Flores*, 64 N.M. 312, 328 P.2d 82. *Nance v. Dabau*, 78 N.M. 250, 1967-NMSC-173, 430 P.2d 747, (1967).

Within the context of this particular dispute, the District Court was well aware that the parties had previously been before the Quay County District Court on an earlier dispute over the rates charged by the City to RAD Water Users, in Quay County Cause No. CV-86-00109.

In addition, the unreasonableness of RAD Water in evaluating whether or not the City's proposed increase in water rates was or was not reasonable was clearly demonstrated to the District Court in this proceeding by RAD's retention of its own independent water consultant Carl Brown, who provided RAD with an opinion that they should accept the City's proposed rate as being reasonable. (TR 2:20:03). However, RAD chose to simply ignore Mr. Brown's opinion and proceed to trial even though it had no legitimate basis to do so.

As this Court has repeatedly stated:

> "It is for the Trial Court to weigh the evidence, resolve conflicts in the testimony and determine where the truth lies.

> On appeal, this [C]ourt may not substitute its judgment for that of the Trial Court." *In re Rescue Ecoversity Petition*, 2012-NMSA-008, 27 P.3d 104 (Ct. App. 2012).

The District Court weighed the evidence presented to it, and determined that the City had met its burden of proof that RAD Water had committed a material breach of the parties' contract.

In this regard, the recognized rule is that this Court will view the facts in light most favorable to the prevailing party, and indulge all inferences arising from the District Court's factual findings. *Miller v. Tafoya*, 2003-NMCA-025, 134 NM 335, 76 P.3d 1092.

The cases cited by RAD are inapposite to this proceeding as the Court did interpret and enforce the Contract which the parties made for themselves.

At page 12 of its Answer Brief, RAD Water Users cites the Court to various New Mexico cases which stand for the well settled principle that when the language of a contract is clear and unambiguous, the Court must interpret and enforce the Contract which the parties made for themselves. *Owen v. Burn Const. Co.*, 1977-NMSC-029, 90 NM 297, 563 P.2d 91. We have no quarrel with this settled proposition and note that the Court in fact determined that the City had followed the Contract in setting rate increases for 2012, 2013 and 2014 finding that Dennis Dysart on behalf of the City of Tucumcari had correctly calculated the rate which should be charged to RAD Water for the calendar years 2012 as set forth in Finding No. 40 (RP 545) (TR 11:44:20-11:44:30). Similarly, the Court found that the rates to be imposed under the Contract formula for the calendar years 2013 (RP 546 #47) and 2014 (RP 546, Finding # 48) were both reasonable and consistent with rates charged by privately owned utilities in New Mexico.

The Court, however, concluded that going forward the City of Tucumcari should be relieved from being required to follow the formula required by Quay County Cause No. CV-86-00019. (RP 539, Finding #2, Conclusion #4, RP 547). These Findings and Conclusions were supported by substantial evidence, as the Court correctly determined RAD had breached the 2010 Contract (Exhibit 3), thereby relieving the City from any further performance under the same.

> Some courts have described a material breach as the "failure to do something that is so fundamental to the contract that the failure to perform that obligation defeats an essential purpose of the contract." Horton, 487 S.E.2d at 204. Put another way, a material breach "is one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract." Ervin Constr. Co., 874 P.2d at 510. Other courts have noted that a material breach occurs when there is a breach of "'an essential and inducing feature of the contract[].'" Lease-It, Inc. v. Massachusetts Port Auth., 33 Mass. App. Ct. 391, 600 N.E.2d 599, 602 (Mass. App. Ct. 1992) (quoting Bucholz v. Green Bros. Co., 272 Mass. 49, 172 N.E. 101, 102 (Mass. 1930)).
>
> [18] The Restatement also provides a useful framework for analyzing whether a breach of contract is material. In particular, the Restatement sets forth five factors that courts should consider [14] when deciding the materiality of a breach of contract. See Restatement, supra, § 241. One factor to examine is the extent to which the injured party will be deprived of the benefit he or she reasonably expected to receive from the contract. Another factor considers the extent to which the breaching party will suffer forfeiture if the breach is deemed material. Courts should also explore whether the injured party can be adequately compensated in damages for the breach. A fourth factor focuses on the likelihood that the breaching party will cure his or her failure to perform under the contract. And the fifth factor evaluates whether the breaching party's conduct comported with the standards of good faith and fair dealing. *Famiglietta v. Ivie-Miller Enters.*, 126 N.M. 69, 1998-NMCA-155, 966 P.2d 777.

It goes without saying, the failure to make an agreed upon payment under a contract when due constitutes a material breach of the contract. *Vidalia Outdoor Prods., Inc. v. Higgins,* 701 SE.2d 217, 219 (Ga. App. 2010); *Venture Props., Inc. v. Parker,* 195 P.3d 470, 489 (Ore. App. 2008); *Rocky Mountain Micro Systems, Inc.v. Public Safety Systems, Inc.,* 989 F.Supp. 1352 (D. Colo. 1998); *Blades v. Wells Fargo Bank,* NA 2012 WL 288 5133, (D. Nev. 2012).

In the Restatement (Second) of Contracts,§ 241, it is recognized in the official comment that the standard of materiality is necessarily imprecise and flexible and is to be applied in light of the facts in each case and in such a way as to further the purpose of securing for each party its expectations of performance. The comment also emphasizes that there are circumstances, not rules, to be considered in determining whether particular failure of performance is material.

In the instant situation, RAD Water had demonstrated just how unreasonable its Board of Directors had become in addressing nominal increases in water rates sought by the City as demonstrated by RAD's refusal to take the advice of its own retained expert water consultant Carl Brown concerning the reasonableness of the rates. In addition, the District Court also took into consideration the fact that the same parties had been before the Quay County District Court on an earlier occasion with a strong likelihood they would be back in front of the Court in future years.

In order to simplify the issue of how water rates should be calculated going forward, the Court determined that the elaborate formula required under the Quay County Stipulated Judgment, should not be controlling in making the calculation for annual water rate increases after 2014. The Court's Findings and Conclusions as a

whole should be construed in light of RAD's breach of contract which arose primarily from confusion concerning how the formula was to be calculated. Furthermore, allowing the City to establish a reasonable rate would simplify the process, provide less room for future disagreement, and would be consistent with controlling law. § 3-27-8, NMSA.

Such a simplification would still allow RAD to continue to receive water from the City of Tucumcari albeit still at a reasonable rate, but one to be established after 2014 by the City. RAD could still challenge the reasonableness of such rates and would suffer no forfeiture thereby nor would it be deprived of any other benefit which it could have reasonably expected. Lastly, the Court's Findings and Conclusions considered as a whole and in light of the facts of the case appear to demonstrate that the Court believed RAD had failed to perform the Contract in accordance with standards of good faith and fair dealing, in light of its own experts testimony that a much higher rate than that sought by the City would be reasonable. (Exhibit 14, Defendant's Exhibit "C") (TR 2:12:14-2:12:50).

In conclusion to Point One, the City of Tucumcari submits that RAD has failed to preserve its first issue as it has not properly challenged or attacked the Trial Court's findings which relate to the Court's determination. Although RAD makes a number of unsupported claims and unsupported assertions in its Summary of Proceedings, it has long been recognized that this Court is not required to search the record in an effort to find facts with which to overturn the findings made by the lower Court. *Lens Crafters, Inc. v. Kehoe,* 2012-NMSC-020 282 P.3d 758. In addition, the District Court's Findings and Conclusions are in fact fully supported by substantial evidence under the record as a whole and this Court should affirm the Court's ruling for those reasons.

POINT TWO: THE DISTRICT COURT'S FINDING #38 THAT THE CITY CALCULATED THE RAD WATER RATE FOR 2012 BASED UPON AUDITED NUMBERS AND USED THE CORRECT FINANCIAL DATA TO CALCULATE THE RATE WAS SUPPORTED BY SUBSTANTIAL EVIDENCE. (Response to RAD Water's Point B and Point D)

In regard to Point B of RAD Water's Brief-In-Chief, this Court should first be aware RAD Water did not submit any requested findings of fact or conclusions of law relating to any claim relating to the fact the City's water rate calculations were not based upon audited information (see RP 511-518). Hence, RAD Water has failed to preserve Point B and did not bring this attention to the issue of the Court. It is settled law that the Appellant must call error to the Trial Court's attention in order to preserve any error for appeal by making a request for findings of fact. Rule 1-052(A), NMRA. *Cockrell v. Cockrell*, 1994-NMSC-026, 117 NM 321, 871 P.2d, 977. At the trial on the merits, the City of Tucumcari called Dennis Dysart, who was the City's Financial Director. (TR 1:35:28). Mr. Dysart testified that he had been in the financing field for 35 years, working as a manufacturing comptroller for 25 of those years. (TR 1:35:54-1:36:00). Mr. Dysart further testified he had a Bachelor's degree in economics and a Master's in finance and that he was certified as an internal auditor. (TR 1:36:14). Although RAD asserts that, "...(t)he City alleges the New Mexico State Auditor audits the City's records (sic) however, the City has produced no evidence the figures used in their calculation for the water rate increase was from State Audited figures." (Brief-In-Chief page 16). To the contrary, Mr. Dysart testified under oath that the numbers used in the financial calculation made by him were taken from the City's audited financial statements which constituted fully audited numbers.

> Mr. Knudson: The next criteria in the contract say the basic cost amount shall be those found in the sellers audited

financial statements. Did you take these from the City's audited financial statements?
Mr. Dysart: Yes the State auditor identifies the Book of Records (TR 1:40: 38) as the basic audited statements and the Book of Records is the financial statements of the cash basis that we use in City financial statements. So, yes I did.
Mr. Knudson: So the numbers are audited numbers?
Mr. Dysart: They are audited numbers. (TR 1:40:52)
Mr. Knudson: Can you tell the Court that the numbers that you used for the May calculation, what year did they come (TR 1:40:52) from?
Mr. Dysart: The numbers of the costs themselves that because to have it 60 days prior to the end of the year, are basically actual, and projections for the budget. (TR 1:41:07). So that is the cost. Now the other numbers relating to volumes came from the 12 months period prior to the prior year 12 months period. (TR 1:41:18). These were the final numbers from the prior year.
Mr. Knudson: So the production numbers in your calculations came from 2011?
Mr. Dysart: Yes. (TR 1:42:20) (emphasis)

In addition, the City of Tucumcari under the 2010 Contract, was allowed to annually increase water rates starting in 2012, commencing on July 1, 2012. The calculation was required to be made no earlier than 60 days prior to June 30th of each year and was to be given to RAD 60 days before such modification (increase) would go into effect. (TR 10:35:58) (Exhibit 3, ¶ 8). Because the City's fiscal year ends in July, the City did not have audited financial water records for 2012, as of June 30th, which was the last date the notice of a water increase had to be sent to RAD. Hence, Dysart used the audited numbers from 2011. (TR 1:42:20). RAD in Point D, at page 18, of its Brief-In-Chief argues that Dysart actually used financial information from 2010 (rather than 2011) to calculate the rate increase, which RAD claims was contrary to the 2010 Contract. (Exhibit 3). However, this claim is a "red-herring" as the Contract does not specify that the financial information to be used in calculating the water rate could only

come from the prior years' financial statements. (emphasis). The Contract simply reads "the basic costs amounts to be used shall be those found in the Seller's audited financial statements." (Exhibit 3, page 3, clause 6). It does not state only the prior years' financial information could be used to make the calculation. However, even if the Contract did impose such a requirement, Dysart testified the financial information was taken from 2011. (TR 1:42:20).

In addition, the 2012 audited information did become available to Mr. Dysart in July of 2012, and Dysart in fact recalculated the water rates using these numbers. The water rates calculated under the 2012 audit figures were included in a letter sent to RAD Water on August 9, 2012. (TR 12:42:49-1:43:20) (Exhibit 7). When Dysart actually calculated the actual audited production numbers for 2012, the water rates calculated for RAD under the Contract (and in particular under paragraph 6) was calculated to be $3.43 per thousand gallons used. (TR 1:44:14) (Exhibit 7). The City, however, had already given notice to RAD that the rate increase sought was $2.81 and did not seek to charge RAD Water what it actually should have charged which was $3.43. (TR 1:44:20-1:44:30) (Findings of Fact #16, RP 541) (Finding #38, RP 544).

In essence, the arguments presented by RAD in both point B, page 14, and point D, page 18, make little sense since its argument that the City used incorrect financial information from prior years in calculating the 2012 water rate, even if true, (which City disputes), actually benefited RAD.

To further put the reasonableness of the City of Tucumcari's rates into the proper context, it should be noted that residential customers within the City limits in 2010 were being charged $2.76 per thousand gallons at the same time RAD was only being

charged $2.19 per thousand gallons. (TR 1:53:46-1:54:11). For residential use for users located outside of the City of Tucumcari, (who were not members of the RAD Water Cooperative), their rate in 2010 was $4.15 per thousand gallons. (TR 1:55:15).

In each instance RAD Water Users was paying substantially less than other similarly situated users in the Tucumcari community and adjacent thereto.

The foregoing testimony clearly provides substantial evidence in the record which supports Finding No. 15 and 16. (ID, RP 541). Any inconsistent testimony should be disregarded, for two reasons. First, any inconsistency in the evidence is properly left to the finder of fact.

In *Ulibarri Landscaping Material, Inc. v. Colony Materials, Inc.*, 97 N.M. 266, 1981-NMCA-148, 639 P.2d 75, this Court noted:

> The trier of fact weighs testimony and determines credibility of witnesses, reconciles inconsistent or contradictiory evidence and determines where the truth lies.Westbrook v. Lea General Hospital, 85 N.M. 191, 510 P.2d 515 (Ct.App.1973). An appellate court examines the evidence in a light most favorable to the prevailing party and does not disturb a verdict because the evidence might be in conflict. *Gonzales v. General Motors Corp.*, 89 N.M. 474, 553 P.2d 1281 (Ct.App.1976).

Secondarily, the contract did not specify that only financial information from the prior year could be used, and any such inconsistent testimony or evidence would be immaterial to the issue of whether or not the proposed rate was reasonable. For this reason the Court should reject the arguments made by RAD in Points B and D of its Brief-In-Chief for each of these reasons.

POINT THREE: SUBSTANTIAL EVIDENCE SUPPORTS A CONCLUSION THAT THE CITY HAD INSTALLED NEW WATER METERS AND CORRECTED ANY INEFFICIENCY RELATING TO WATER LOSS PRIOR TO 2012. (Response to RAD Water's Point C)

The undisputed facts in this case demonstrate that the City sought an increase in its water rate for the calendar year 2012 (Exhibit 4). Prior to the increase in water rates for 2012, the City had replaced its old water meters with smart meters. (TR 3:32:32-3:33:31). Installation of these new smart meters resulted in a decrease of the City's water loss of 47% in 2011, to 20% in 2012 and 16% by 2014. (TR 3:33:50). RAD Water Users' own expert witness Carl Brown acknowledged that the national water loss average for municipalities as established by the Environmental Protection Agency was 16%. (TR 2:14:17-2:14:59). Carl Brown further calculated a fair water rate for RAD Water Users (Exhibit 13) using the same May calculations used by Dennis Dysart (Exhibit 5), which showed that RAD should pay $3.33 per thousand gallons, while Mr. Brown's calculations (Exhibit 13) using the 2012 calculations prepared by Dysart in June of 2012 (Exhibit 7) determined that the water rate for RAD should be $3.86 per thousand gallons. (TR 2:12:14-2:12:36). In both instances, Brown had also used a 10% water loss reduction of the price to be paid (which was not provided for in the Contract) so as to completely minimize or "take-out" the 47% water loss reflected in Olga Morales' report 2011. (ID) (Exhibit 12, 13).

Ultimately Point C of RAD Water Users' Brief-In-Chief, is not supported by any citation to the evidence adduced at time of trial and this portion of the Brief is largely a collection of unfounded, unsupported and baseless statements which should be rejected in their entirely by this Court, as the District Court Findings were supported by substantial evidence. It is also questionable if RAD Water has preserved this Point for review in its request for findings of fact and conclusions of law as this argument is vaguely mentioned but not developed. (RP 511-518) Rule 1-052(A), NMRA.

POINT FOUR: THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE OPINION TESTIMONY OF OLGA MORALES (Response to RAD Water's Point E)

As a threshold matter, we once again note that RAD Water Users has not preserved this portion of its argument in its requested findings of fact and conclusions of law. See Rule 1-052(A), NMRA. (RP 511-518). At pages 21-23 of RAD Water's Brief-In-Chief, RAD presents a fifth claim or contention on appeal but it fails to provide the Court of Appeals with any actual argument whatsoever or a single reference to the trial transcript or record proper to support its unsupported references to cases taken from various Federal Circuit Courts which it apparently claims supports RAD's "half-hearted" argument.

In fact, Olga Morales' expert opinions that the proposed rate sought by the City of Tucumcari of $2.81 was a reasonable rate for 2012 (TR 11:32:48) as well as her opinion that a reasonable rate for a municipal water supplier in New Mexico would be found within a range between a $2.25 up to $5.00 per thousand gallons were both properly admitted. (TR 12:18:45-12:19:12). These two opinions were properly admitted by the District Court based upon Ms. Morales' knowledge, skill, experience, training and/or education, pursuant to Rule 11-702, NMRA.

A proper foundation for the introduction of Ms. Morales' opinions had been laid by the City of Tucumcari, which demonstrated that Morales was currently employed by the Rural Community Assistance Corporation, which is a non-profit organization serving 13 western states with a primary focus to help small municipal entities develop capacity for water and waste water utilities in rural communities serving populations under 10,000. (TR 10:57:02). Prior to working for the Rural Community Assistance

Corporation, Ms. Morales had also worked for New Mexico Environment Department Drinking Water Bureau for five years where she obtained personal knowledge that the Environment Department for the State of New Mexico compiles a survey of annual municipal water rates throughout New Mexico. The City moved into evidence Exhibit 11, which was a certified copy of municipal water and waste water user charges survey for 2008-April of 2012 which showed municipal water and waste water rates for New Mexico municipalities and other water providers. (TR 11:31:01) Ms. Morales, in part, relied upon this document in formulating her opinions, but more importantly testified that she had actually personally compiled and completed numerous water rate analysis for municipalities, private entities and public entities throughout the State of New Mexico over a number of years and that she was familiar with such rates. (TR 11:31:17-11:31:24). The District Court properly admitted Ms. Morales' testimony.

The appropriate standard of review for the district court's decision regarding the admission of expert testimony is an abuse of discretion. "[T]he admission of expert testimony or other scientific evidence is peculiarly within the sound discretion of the trial court and will not be reversed absent a showing of abuse of that discretion." *Alberico*, 116 N.M. at 169, 861 P.2d at 205. "An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." *Sims v. Sims*, 1996 NMSC 78, P 65, 122 N.M. 618, 930 P.2d 153.

In *State v. Alberico*, 116 N.M. 156, 166, 861 P.2d 192, 202 (1993), the New Mexico Supreme Court explained that Rule 11-702 establishes three prerequisites for admission of expert testimony: "(1) experts must be qualified; (2) their testimony must assist the trier of fact; and (3) their testimony must be limited to the area of scientific,

technical, or other specialized knowledge in which they are qualified." *State v. Torres*, 1999 NMSC 10, P 23, 127 N.M. 20, 976 P.2d 20. Pursuant to Rule 11-702, the district court is required to act as a "gatekeeper" to ensure that an expert's testimony rests on both a reliable foundation and is relevant to the task at hand so that speculative and unfounded opinions do not reach the jury. *State v. Downey*, 2008 NMSC 61, P 25, 145 N.M. 232, 195 P.3d 1244. The record in this case unequivocally demonstrates the District Court followed these standards in admitting Ms. Morales' opinions. (Findings 25-32 RP 542, 543).

RAD water fails to provide any grounds or basis to demonstrate how the District Court abused its discretion in admitting Ms. Morales' opinions. In the final analysis, this portion of RAD Water Users' Brief-In-Chief is completely baseless and it should not have been presented.

POINT FIVE: SUBSTANTIAL EVIDENCE SUPPORTED THE DISTRICT COURT'S DETERMINATION THAT THE RATE INCREASES FOR 2012, 2013 AND 2014 WERE REASONABLE INCREASES. (Response to RAD Water's Point F)

At page 24 of its Brief-In-Chief, RAD Water presents this Court with a question, but then it not only fails to provide the Court with any case authority, citation to the trial transcript or to the record proper, it also fails to set forth a discernible argument. It is very unclear in reading this portion of RAD Water's Brief if RAD asserts that a 4% increase should have been mandated by the District Court based upon municipal ordinance #1099, or whether a 6% increase should have been imposed as a reasonable rate based upon the statements of Counsel for the City, in response to questions by the District Court. However, we have previously noted, the District Court made specific findings of fact in support of its determination that the City of Tucumcari's water rates for

2012, 2013 and 2014 were reasonable both under the 2010 Contract as well as under applicable law. (RP 534-548). RAD Water fails to properly attack those finding of fact or demonstrate why they are not supported by substantial evidence.

Since RAD Water Users has not developed an intelligible argument in this portion of its Brief-In-Chief, City elects to not respond further other than to note once again that the rates requested by the City of Tucumcari were fully supported by the opinions of RAD's own expert witness Carl Brown. (RP 546, paragraph 45) (TR 2:20:03). Furthermore, RAD Water did not present any testimony beyond that of Carl Brown.

POINT SIX: THE DISTRICT COURT WAS ACTING WITHIN THE SCOPE OF ITS DISCRETION IN AWARDING THE CITY OF TUCUMCARI PRE-JUDGMENT INTEREST AT A RATE OF 15% PER ANNUM. (Response to RAD Water's Point G)

Once again, as a threshold matter, we note that RAD Water has failed to preserve this portion of its Brief-In-Chief for review by failing to submit or tender any requested findings of fact relating to this issue. (Rule 1-052(A), NMRA). In Point G of its Brief-In-Chief, RAD Water asserts that the District Court abused its discretion when it ordered that the City of Tucumcari recover pre-Judgment interest at the rate of 15%. RAD Water cites this Court to § 56-8-4, NMSA. However, this statute is not the controlling statute for determinations of pre-Judgment interest based upon contract damages. Rather, the New Mexico Supreme Court in the case of *United Nuclear Corp. v. Allen Dale Mut. Ins.*, 1985-NMSC-090, 103 NM 480, 709 P.2d 649, recognized that the allowance of pre-Judgment interest contract claim be awarded within the discretion of the District Court based upon § 56-8-3(A), NMSA. This same proposition was once again recognized in the case of *Aztec v. Prop. & Cas. Ins. Guar. Ass'n.*, 1993-NMSC-

023, 115 NM 475, 485, 853 P.2d 726, in the special concurrence of Justice Montgomery. Subsequent caselaw has applied this principal:

> The obligation to pay prejudgment interest under Section 56-8-3 arises by operation of law and constitutes an obligation to pay damages to compensate a claimant for the lost opportunity to use money owed the claimant and retained by the obligor between the time the claimant's claim accrues and the time of judgment (the loss of use and earning power of the claimant's funds). See Economy Rentals, Inc. v. Garcia, 112 N.M. 748, 762, 819 P.2d 1306, 1320 (1991). Section 56-8-3 is construed according to Restatement of Contracts § 337 (1932), which takes the view that prejudgment interest should be awarded as a matter of right under certain circumstances. Shaeffer v. Kelton, 95 N.M. 182, 187-88, 619 P.2d 1226, 1231-32 (1980). As we recently noted:
>
> [378] [351] Prejudgment interest is awarded as a matter of right only when a party has breached a duty to pay a definite sum of money or "the amount due under the contract can be ascertained with reasonable certainty by a mathematical standard fixed in the contract or by established market prices." Smith v. McKee, 116 N.M. 34, 36, 859 P.2d 1061, 1063 (1993) [15] (quoting Kueffer v. Kueffer, 110 N.M. 10, 12, 791 P.2d 461, 463 (1990)).
>
> [19] ***In cases falling under Section 56-8-3, where the amount owed is not fixed or readily ascertainable, the trial court may in its discretion award prejudgment interest of not more than fifteen percent.*** Aztec Well Servicing Co. v. Property & Casualty Ins. Guar. Ass'n, 115 N.M. 475, 486, 853 P.2d 726, 737 (1993); see also Smith, 116 N.M. at 36, 859 P.2d at 1063 ("An award of prejudgment interest is committed to the sound discretion of the trial court, except when such interest should be awarded as a matter of right.").
>
> [20] In past cases we have recognized that the trial court must consider the equities in each case before awarding prejudgment interest pursuant to Section 56-8-3, even when interest is otherwise awardable as a matter of right. Shaeffer, 95 N.M. at 188, 619 P.2d at 1232; see also Bellet v. Grynberg, 114 N.M. 690, 693, 845 P.2d 784, 787 (1992) (considering equities of award of prejudgment [16] interest);

> Mascarenas v. Jaramillo, 111 N.M. 410, 414-15, 806 P.2d 59, 63-64 (1991) (reversing trial court's denial of prejudgment interest because court did not make findings on equities). When a plaintiff is entitled to prejudgment interest as a matter of right, the burden rests on the defendant to demonstrate a sufficient basis for denying such an award. Ranch World of N.M., Inc. v. Berry Land & Cattle Co., 110 N.M. 402, 404, 796 P.2d 1098, 1100 (1990). However, when the amount owed is fixed or readily ascertainable, "prejudgment interest [under Section 56-8-3] generally should be awarded absent peculiar circumstances." Id. *Sunwest Bank, N.A. v. Colucci*, 117 N.M. 373, 1994-NMSC-027, 872 P.2d 346. (emphasis added)

We submit that RAD failed to demonstrate how the District Court abused its discretion in awarding prejudgment interest at a rate of 15%. The Court's decision to award the maximum amount of prejudgment interest allowed was very likely based upon the fact that RAD had no legitimate defenses to the requested water rate increase. It presented no case-in-chief in response to the City's case other than to argue with its own retained expert witness Carl Brown. (TR 2:50:37-2:51:30).

> Mr. Garrett: What do you think a fair rate would be under the contract? (TR 2:50:37)
> Mr. Brown: Under the contract?
> Mr. Garrett: Yes.
> Mr. Brown: It would be the numbers that Dysart calculated. (TR 2:50:48)
> Mr. Garrett: Fair rate?
> Mr. Brown: Not a fair rate, but under the contract is would be the correct rate. (TR 2:50:55)
> Mr. Garrrett: The $2.81? (TR 2:51:02)
> Mr. Brown: Of course it is different from the one that (TR 2:51:07) came shortly after it, but based upon the numbers that were used for the calculations, $2.81 would be the cost (TR 2:51:16) to produce.
> Mr. Garrett: Do you have any questions about the numbers?
> Mr. Knudson: Judge, he is arguing with his own witness now, (TR 2:51:24) he has testified what his number is, and
> Judge: I think it has been answered over and, I think you opened up with those questions so I already received this information, so we can move on. (TR 2:51:37)

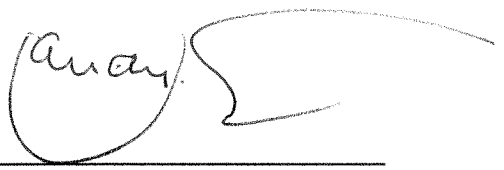
CONCLUSION

In conclusion, we submit that this appeal related to issues that primarily are addressed by the substantial evidence rule. In this particular case, RAD Water did not present any contrary evidence at the hearing and only briefly called its own expert simply for purposes of attempting to impeach his own prior opinions that the water rates of the City of Tucumcari were reasonable.

Based upon the lack of any requested findings of fact by RAD on this issue, we submit the Trial Court was well within its discretion in determining that the breach committed by RAD Water was material and sufficient to allow the City of Tucumcari to set a reasonable water rate after 2014. The Court's determination that the proposed rates for 2012, 2013 and 2014 were all based upon undisputed evidence in the record and should therefore be sustained on appeal. In addition, the award of prejudgment and post-judgment interest by the District Court was also proper and RAD Water failed to preserve this issue for review by tendering any request findings of fact or conclusions of law. For each of these reasons, the opinion of the District Court should be sustained in its entirety.

Respectfully Submitted By,

DOERR & KNUDSON, P.A.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was deposited in the U. S. Mail, first class, with postage prepaid, on the 23rd day of November, 2015, addressed to the following:

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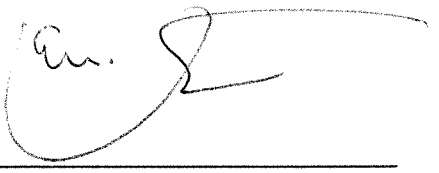

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