IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

SUNNYLAND FARMS, INC.

Plaintiff, Appellee and Cross-Appellant,

vs.

Ct. App. No. 28,807

CENTRAL NEW MEXICO ELECTRIC COOPERATIVE, INC.,

Defendants, Appellant and Cross-Appellee.

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

CROSS-APPELLANT'S BRIEF-IN-CHIEF

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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 8827 words, as determined by the word count program of the word processor used, WordPerfect, Version 12.

Appellee and Cross-Appellant, Sunnyland Farms, Inc. ("Sunnyland"), respectfully submits its Brief in Chief in support of its cross-appeal. Sunnyland raises three issues on its cross-appeal: (1) whether the district court erred in not awarding Sunnyland post-judgment interest at the rate of 15% per annum, as provided by NMSA 1978 § 56-8-4(A)(2); (2) whether the district court abused its discretion in not awarding Sunnyland pre-judgment interest; and (3) whether the district court erred in permitting Cross-Appellee Central New Mexico Electric Cooperative, Inc. ("CNMEC") a set off of $3,212,415.69 (less reasonable attorneys' fees and costs; yet to be determined by the district court) pursuant to a subrogation lien that CNMEC purchased from Sunnyland's casualty insurer.

STATEMENT OF FACTS

Sunnyland relies upon and incorporates by reference its Counterstatement of Facts set out in its contemporaneously-filed Answer Brief in response to CNMEC's appeal. Additional facts and procedural history relevant to the three issues raised in Sunnyland's cross-appeal will be set out, as necessary, within the discussion of those issues, below.

STATEMENT OF THE CASE

This action was initiated by Complaint, filed on August 2, 2005, in which Plaintiff Sunnyland asserted counts sounding in breach of contract, breach of the implied obligation of good faith and fair dealing, breach of statutory obligations,

defamation and unfair trade practices against Defendant CNMEC. R.P.0026A. CNMEC answered on September 22, 2005. R.P.0044. On CNMEC's motion (R.P.0143) and the parties' stipulation, Sunnyland's casualty insurer Ohio Casualty, was ordered joined as Plaintiff. R.P. 0240.

The operative First Amended Complaint, asserting counts in breach of contract, breach of the implied duty, breach of statutory obligations, defamation, unfair trade practices and negligence was filed on September 14, 2006. R.P. 0761. The case was tried to the Honorable John W. Pope, without jury, on October 18-28, 2006. On May 31, 2007, Judge Pope entered his Findings of Fact and Conclusions of Law. R.P. 1120. After briefing by the parties, the district court entered Judgment on June 5, 2008. R.P. 1303. CNMEC filed timely Notice of Appeal on July 3, 2008 (R.P. 1345) and Sunnyland filed timely Notice of Cross-appeal on July 10, 2008. R.P. 1406. Amended Judgment was entered on September 19, 2008. R.P. 1556. CNMEC filed Amended Notice of Cross-appeal on September 23, 2008 (R.P. 1563) and Sunnyland filed its Amended Notice of Cross-appeal on September 29, 2008. R.P. 1607.[1]

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[1] The Amended Judgment at ¶ 7, provides a set-off in favor of CNMEC in the amount of $3,212,415.69, less reasonable attorneys' fees and costs. R.P. 1557. While the appropriateness of the set-off itself is a subject of Sunnyland's instant Cross-appeal, the question of apportionment of the attorneys' fees and costs is still before the district court.

ARGUMENT

I. The district court erred in not awarding Sunnyland post-judgment interest at the rate of 15% per annum on damages awarded under the contract causes of action as provided by NMSA 1978 §56-8-4(A)(2).

Sunnyland here argues that because CNMEC intentionally, willfully and maliciously breached its contract with Sunnyland, Sunnyland is entitled to post-judgment interest under NMSA 1978 §56-8-4(A)(2) at the statutory rate of 15%. Sunnyland so argued to the district court (and thus preserved the issue) in its post-trial motion on the form of the judgment. R.P. 1223-1225.

Because the district court had no discretion, but was required to set post-judgment interest at 15% if CNMEC's conduct causing Sunnyland's injuries was willful, intentional or in bad faith, this Court does not review on an abuse of discretion standard. Rather, the issue here is whether CNMEC's conduct was intentional, willful or in bad faith as contemplated by section §56-8-4(A)(2), and the Court's review is *de novo*. *Public Service Co. of New Mexico* v. *Diamond D Const. Co., Inc.,* 2001-NMCA-082, ¶48, 131 N.M. 100, 115, 33 P.3d 651, 666; *State* v. *Rowell,* 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995).

A. CNMEC intentionally and willfully breaches its contract with Sunnyland in disconnecting Sunnyland's electric service without notice.

The district court concluded that CNMEC acted maliciously, recklessly,

wantonly, fraudulently and in bad faith toward Sunnyland generally, and in refusing to reconnect electric power to the Sunnyland facility so that firefighters could have access to more water to fight the fire unless fire chief Wayne Granger agreed to accept liability. Conclusions Nos. 5, 7.[2] The Amended Judgment is specific: CNMEC's conduct was "willful, malicious, wanton and reckless ... in impeding firefighters with the threat of liability in energizing the electricity" and the district court specifically noted that "[t]his conduct was a breach of [CNMEC's] duty under its contract with Sunnyland and also constituted willful, malicious, wanton and reckless negligent behavior." Amended Judgment at ¶ 5; R.P. 1556. Based on that conduct, the district court awarded Sunnyland punitive damages, on both the contract theory and the tort theory (although appropriately specifying that Sunnyland would have to elect which theory of punitive damages it will proceed on after the time for appeal expires). *Id.*

While the district court predicated its punitive damages for breach of contract on the willful refusal of CNMEC to reconnect the wrongfully disconnected power, in the face of the firefighters' request that the power be reconnected and knowing that the reconnection was necessary to fight the fire, the district court's

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[2] Notations marked "Finding" or "Conclusion" are to the district court's Findings of Fact and Conclusions of Law, respectively. R.P. 1120-1145.

findings of fact, fully supported by the evidence, show two other willful breaches of contract by CNMEC: (1) the original disconnection of the power without any lawful basis; and (2) the failure of CNMEC to provide Sunnyland with proper advance notice of the disconnection, as required by the contract:

1. CNMEC willfully and improperly disconnects Sunnyland's power without notice.

CNMEC's bylaws, which incorporate applicable State regulations, formed the contract between CNMEC and Sunnyland. Findings Nos. 2-4. Among the terms of that contract are the requirement that power cannot be disconnected to a customer for non-payment unless the customer first has received fifteen days advanced written notice, and a prohibition on disconnecting power to a customer for failure to pay the bill of another customer. Findings Nos. 6, 9-10,15. On August 9, 2003, CNMEC tendered a bill on one of the accounts of Sunnyland's predecessor, Agstar, which mistakenly showed a balance due of $10,750 (which actually was the amount of Sunnyland's deposit); and stating that payment would be past due on September 2. Findings Nos. 15, 18, 23-24. Even before September 2, however, on August 27, 2003, CNMEC's Director of Administrative Services, Birchie West, directed that the process for disconnecting Sunnyland's electricity be initiated. Finding No. 25. West admitted at trial that he did not disconnect the

electricity at Sunnyland because of any amount Sunnyland owed, but rather for amounts that he claims Agstar owed (Finding No. 59) and he admitted that the "15-day" notice required by the contract had not been provided to Sunnyland in connection with his August 27th order. Finding No. 29. Instead, on Friday, August 29, West instructed CNMEC dispatcher Pat Taylor to call Sunnyland and advise it that the power would be disconnected, even though he knew that the "15-day" written notice was required pursuant to State regulation and the contract. Finding No. 32. Taylor testified that her attempts to reach Sunnyland by phone after 3:00pm that Friday afternoon before Labor Day were unavailing. Finding No. 66; Tr. 1:110:1-14.[3]

West therefore instructed Taylor to hand write a disconnect notice on August 29th and to commence disconnect procedures, but because of the holiday, the hand-written notice did not go into the mail until September 2; showing a disconnect date (on an Agstar account that was not the one disconnected) of September 17th.

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[3] 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.

Findings Nos. 33-34.[4] By ordering Taylor to send the hand-written notices, West was deliberately by-passing CNMEC's computer system which was set up to insure compliance with the notice required by the contract. Findings Nos. 36, 38-39.

It was undisputed that Sunnyland's electricity was disconnected on September 8th, prior to Sunnyland receiving any notice of the disconnect. Finding No. 35. Of the four Sunnyland accounts, only the account that served the tomato production facility was disconnected, that account not being the one identified in the written notice, though not yet received by Sunnyland. Findings Nos. 46-51.

2. CNMEC willfully, intentionally and maliciously refuses to reconnect power even though it knows that Fire Chief Granger needs electricity to get at available water to fight the fire.

Estancia Fire Department personnel arrived at the scene around 10:15am, on September 9th, within minutes of a fire being discovered by Sunnyland employees Ernesto Acosta and Juan Mirabel. Finding No. 81. Ivan Riley, a CNMEC employee who had the tools and skill to reconnect the electricity previously had

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[4] The district court found that while the handwritten notice is on a duplicate form, CNMEC was unable to produce a duplicate of any handwritten disconnect notices it claims to have sent to Sunnyland, nor could it produce a log of any such notices being sent to Sunnyland even though its practice was to maintain such a log and a computer back-up. Findings Nos. 42-44. The notices Sunnyland received indicated a disconnect date of September 17. Tr.5:68:4-7.

arrived at the scene at about 10:00am. Paul Chavez and Leroy Lopez, two CNMEC linemen, also were sent to Sunnyland on the morning of September 9th, specifically to reconnect electric power to the Sunnyland facility, after CNMEC had determined that all Sunnyland's account obligations had been made current. Tr., 2:89:4-23; 5:99:20 - 101:16.[5] They never approached the building or spoke with any firefighters, but while they remained at the scene for between 45 and 60 minutes, within the first 15 minutes they determined not to reconnect the electric service. Findings Nos. 167, 170-174, 185. Reconnecting the power involved arming three switches with an extended stick – a process that took minutes. Finding No. 169.

Within 15 to 20 minutes after arriving at the fire scene and while the CNMEC linemen still were at the fire scene, Chief Wayne Granger called dispatch and requested that the power be turned back on. He was told that CNMEC would

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[5] The latter transcript citation is to the tape recording of the September 8th telephone conversations between Debbie Bodley, Sunnyland's bookkeeper, and various individuals at the CNMEC, in which Bodley tried to determine what needed to be done to reconnect the electricity that had been disconnected that morning. Bodley determined the amount allegedly owed, had checks drawn and established the most expeditious way to get the checks to the CNMEC offices. She was told that once the payment was verified, the electric service could be reconnected the same day. *See, generally*, Tr. 5:91:9 - 5:107:12. Bodley testified at trial that the checks were sent to CNMEC on September 8th via overnight mail, after CNMEC refused Sunnyland's offer to deposit the funds directly into CNMEC's bank account. Tr. 5:75:4 - 76:12.

not reconnect the power to the facility unless he, Granger, agreed to assume liability. Incredulous, Granger asked dispatch to call back and ask what liability Granger was to assume. Dispatch called Granger back and repeated CNMEC's insistence that it would not reconnect the power unless Granger assumed liability. Findings Nos. 88, 152. Chief Granger and other firefighters testified that if electricity had been restored, they could have used the pumps to gain access to the substantial quantity of water on the greenhouse property, and the fire could have been controlled and extinguished before it spread out of control and therefore would not have destroyed Sunnyland's facility. The district court so found. Findings Nos. 106, 116-120, 135-136, 140, 156, 158-159.

B. The circumstances of willful and malicious breach of contract, which caused the destruction of Sunnyland's facility and its profound consequential damages, require that post-judgment interest on those damages be set at fifteen percent.

NMSA 1978 §56-8-4(A) requires imposition of post-judgment interest at the rate of eight and three-quarters percent "unless: ... (2) the judgment is based on tortious conduct, bad faith or intentional or willful acts, in which case interest *shall be computed at the rate of fifteen percent.*" (Emphasis added.) The list is disjunctive; interest *shall be* computed at the rate of fifteen percent if the defendants conduct was tortious, *or* in bad faith, *or* intentional or willful. Under the wording of the statute, this is not a matter of discretion with the trial court. As

this Court has noted, "[w]hen a judgment is based on tortious conduct, bad faith, or a finding that the defendant acted intentionally or willfully, a court *must* award [post-judgment] interest at the higher rate of 15 percent." *Diamond D*, 2001-NMCA-082, ¶55 (emphasis added). *See also*, *Teague-Strebeck Motors, Inc.* v. *Chrysler Ins. Co.*, 1999-NMCA-109, ¶63, 127 N.M. 603, 620, 985 P.2d 1183, 1200 (overruled on a different point)("[T]he statute unambiguously *requires* that interest on the portion of the judgment awarded for bad faith be computed at fifteen percent" (emphasis added)); *Chapman* v. *Varela*, 2008-NMCA-108, ¶61, 144 N.M. 709, 729, 191 P.3d 567, 587, *cert. granted,* 145 N.M. 255.

As noted, *supra*, the district court made specific conclusions that with respect to the initial contract breach of disconnecting electric service because of the amounts allegedly owed by Agstar, Sunnyland's predecessor and a separate corporate entity and separate CNMEC customer, and by disconnecting the electricity without providing Sunnyland with the written 15-day warning as required by the contract and PRC regulation, CNMEC acted intentionally, willfully and in bad faith. Conclusions Nos. 1, 9, 10. Separately, the district court found that, even though it knew the power had been mistakenly and wrongfully disconnected, and even though it knew that firefighters needed power to gain access to substantial water available on the site, and even though CNMEC had

linemen present at the fire scene who could have reconnected the power to Sunnyland's facility in minutes with the simple flip of a switch, CNMEC intentionally, willfully and in bad faith in refusing to turn on the power. The court below concluded that CNMEC did act "... maliciously, willfully, recklessly, wantonly, fraudulently, or in bad faith toward Sunnyland Farms . . . . " Conclusion No. 5. Separately, the district court concluded that CNMEC was –

> wilful, reckless, wanton and in bad faith entitling Plaintiff to punitive damages when it threatened Wayne Granger with "liability" twice before turning on the power to the facility after Wayne Granger requested the assistance of the electric Cooperative to reenergize the facility to allow firefighters access to more water to fight the fire.

Conclusion No. 7.

CNMEC urged the court below to address the internal inconsistency of Conclusion No. 5 by inserting the word "not" so that it would read "The Cooperative did not act maliciously ...." CNMEC's Motion to Amend and Clarify Findings of Fact and Conclusions of Law at pp. 1-2; R.P. 1174-1175. The district court did not alter its Findings of Fact and Conclusions of Law in any respect. Rather, the district court addressed this concern in its Amended Judgment, clarifying that it intended to award punitive damages only on account of the CNMEC's willful, malicious, wanton and reckless conduct in impeding the firefighters with the threat of liability as a precondition to reenergizing

Sunnyland's facility. Thus, the Amended Judgment provides –

> 4. The cooperative did not act maliciously, wilfully, wantonly, fraudulently or in bad faith toward Sunnyland Farms prior to the fire thereby barring any claims for punitive damages for conduct prior to the fire.
>
> 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 and also constituted willful, malicious, wanton and reckless negligent behavior. Plaintiff has a duty to elect which theory of punitive damages it will proceed after the time for appeal expires. Punitive damages is awarded in the total amount of $100,000.

Amended Judgment; R.P. 1556-1557. So, the district court made clear that its conclusion was that only CNMEC's malicious, willful, wanton and reckless conduct in declining to reenergize the facility after the firefighters had called for power so that they could fight the fire warranted imposition of punitive damages. But this Court already has established that post-judgment interest and punitive damages serve different purposes, and whether or not punitive damages are awarded does not determine whether post-judgment interest should be assessed at the higher fifteen percent rate. *Diamond D*, 2001-NMCA-082, ¶56. Thus, neither the fact that the court below awarded punitive damages for CNMEC's post-fire willful and intentional breaches of contract nor the fact that it declined to award

punitive damages for CNMEC's pre-fire willful and intentional conduct breaching the contract is determinative of whether post-judgment interest should be awarded at the fifteen percent rate because of CNMECs willful and intentional bad faith.

Significantly, the court below declined to alter its findings of fact with respect to CNMEC's conduct in disconnecting the electricity or its conduct in refusing to reconnect power unless Chief Granger agreed to assume liability. And those findings are that CNMEC acted intentionally and willfully in bad faith, both in disconnecting Sunnyland's electricity and in refusing to reconnect power. Those findings are amply supported by the record evidence.[6]

Bills sent to Agstar and Sunnyland on August 9th stated that the accounts would be past due on September 2nd. But CNMEC administrative director West didn't even wait that long. Even though the contract prohibited cutting off one member's electricity because another member has failed to pay a bill (Findings Nos 9-10; R.P. 1121); on August 27th, West specifically directed that Agstar's balance

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[6] As noted, *supra*, at point I.A.2, on the morning of September 9th, CNMEC had determined that Sunnyland's accounts were current. Under the terms of the contract then, CNMEC was obligated to provide electric power to Sunnyland and indeed, had dispatched linemen to reconnect the electricity. The refusal to do so was a breach of the contract, willful and malicious in light of the fact that CNMEC's linemen were at the scene of the fire, witnessing firefighters' struggle to control the blaze and aware that Fire Chief Granger was calling for power. The inevitable devastating outcome of that breach was readily apparent to CNMEC's linemen at the time of that refusal.

be transferred to Sunnyland's account and that cut off procedures be initiated. Finding No. 25; R.P. 1123. This was certainly willful conduct. And even though the contract provided that electric service could be cut off only after the customer had been provided fifteen days written notice (Finding No. 6; R.P. 1121), two days later, on August 29th, West ordered that Sunnyland's electricity be cut off. Finding No. 32. West directed that CNMEC clerk Pat Taylor send Sunnyland a handwritten disconnect notice, intentionally bypassing CNMEC's computer system which was set up to follow the notice periods required by CNMEC's contract with its customer-members. Findings Nos. 33, 36; R.P. 1124. This also is willful conduct.

Surely CNMEC breached the contract deliberately, intentionally and willfully in disconnecting Sunnyland's electric service. It knowingly transferred Agstar's unpaid balance to Sunnyland's account and cut off Sunnyland's electricity because of the Agstar balance in violation of PRC regulation and the contract. It further deliberately and willfully by-passed the CNMEC computer system thus avoiding the built-in safeguards designed to insure that Sunnyland received the contractually required written notice. If CNMEC provided notice at all, it only did so on September 2nd, four days after West ordered the cut-off, and CNMEC didn't adhere to its own notice and actually discontinued Sunnyland's electric service on September 8th, nine days before the announced cut off date of September 17th.

And even though it had promised Bodley that Sunnyland's power would be reconnected upon payment of the bills, the CNMEC linemen, sent to the facility on September 9th to do just that once the bills had been paid, refused to do so even though they could see firefighters failing to contain the spread of the fire without the water that would have been available if the power had been reconnected and even though the fire chief specifically asked that power be turned back on.[7]

In *Diamond D*, (2001-NMCA-082, ¶59) this Court explained the distinction between willful, reckless and wanton conduct.

> Two characteristics distinguish these three terms: (1) the intention of the actor and (2) the degree of knowledge of the possible consequences of an action possessed by the actor at the time of the act. If a defendant is found to have acted willfully, clearly the higher post-judgment interest rate applies. [Citations.] If, on the other hand, the evidence shows only wantonness, the basic interest must apply because a finding of wantonness does not include a finding of either willfulness or intention. When the evidence shows recklessness, however, it is for the trial court to determine whether the defendant's conduct is more like willfulness or more like wantonness, and to award the appropriate interest rate based on that finding.

In *Diamond D*, this Court determined that post-judgment interest could not

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[7] The linemen, Messrs. Chavez and Lopez, were acting as CNMEC's agents at the time, and thus their conduct is attributable to CNMEC. The evidence at trial was that when Fire Chief Granger called dispatch to request that the power be reconnected, the CNMEC dispatcher left it to Lopez and Chavez, the men on the scene, to decide. Tr., 2:89:4-23.

be awarded at the rate of 15% because, unlike here, there was no evidence "sufficient to support a finding that PNM intended to breach the contract and thereby harm Diamond D" (2001 NMCA-082, ¶61) and there had been no specific fact findings of intention or willfulness. *Id.*, ¶62. Here there is just such evidence and just such findings of fact. The district court erred in not awarding Sunnyland post-judgment interest at the fifteen percent rate.

II. The district court abused its discretion in not awarding Sunnyland pre-judgment interest.

Section 56-8-4(B) of the New Mexico Code gives the trial court discretion to award prejudgment interest after considering "among other things" whether one party had been the cause of unreasonable delay in adjudicating the claims or whether one party had made reasonable and timely settlement offers that the other had unreasonably rejected. As the Supreme Court has explained, ""[t]he purpose of awarding prejudgment interest under Section 56-8-4(B) is to foster settlement and prevent delay." *Lucero* v. *Aladdin Beauty Colleges, Inc.*, 117 N.M. 269, 272, 871 P.2d 365, 368 (1994).[8] As this Court explained, the basis for this is clear:

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[8] Sunnyland raised this issue in the district court (and thus, preserved it for appeal to this Court) in its post-trial pleadings on the form of the judgment. R.P. 1229-1232. This Court reviews the denial of prejudgment interest on the abuse of discretion standard. *State Farm Fire & Cas. Co.* v. *Farmers Alliance Mut. Ins. Co.*, 2004-NMCA-101, ¶17, 136 N.M. 259, 265, 96 P.3d 1179, 1185. In making this determination, the ground for granting or denying prejudgment interest need

"Section 56-8-4(B) is a tool whereby the trial court may 'ensure[] that the compensation due to a plaintiff is not unduly delayed by a defendant's dilatory practices,'" (*Bird* v. *State Farm Mut. Auto. Ins. Co.*, 2007-NMCA-088, ¶33, 142 N.M. 346, 355, 165 P.3d 343, 352, quoting *Diamond D*, 2001-NMCA-082, ¶52) and "helps ease the burden on our crowded court system by fostering settlement and preventing delay." *Id.* The Court explained –

> The trial court is instructed to consider, among other things, whether the defendant previously made a timely and reasonable settlement offer and whether the plaintiff was the cause of unreasonable delay. Section 56-8-4(B). However, these two factors are not exclusive; the "court should take into account all relevant equitable considerations that further the goals of Section 56-8-4(B)."

Bird, 2007-NMCA-088, ¶33, quoting *Gonzales*, 120 N.M. at 150.

The record before the district court demonstrates that early-on, Sunnyland, anxious to get back in business, made numerous, reasonable settlement offers; that CNMEC rejected them all, and that CNMEC itself never made a reasonable offer to resolve Sunnyland's claims. Rather, CNMEC was blunt; stubbornly insisting that Sunnyland would have to sue it to recover its losses. Further, the record

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not be based on specific findings of fact, but need only be "ascertainable from the record and not contrary to logic or reason." *Gonzales* v. *Surgidev Corp.*, 120 N.M. 133, 150, 899 P.2d 576, 593 (1995).

reflects equitable factors demonstrating that awarding Sunnyland prejudgment interest would further the goals of Section 56-8-4(B).

A. Sunnyland's early and repeated offers to settle are rebuffed by CNMEC. CNMEC's late-breaking settlement offers clearly are inadequate and not made in good faith.

After the district court made its Findings of Fact and Conclusions of Law, the parties proposed forms for the judgment. Plaintiff's Memorandum in Support of Proposed Final Judgment (R.P. 1211-1256) argued that prejudgment interest was warranted and appropriate because its earnest and repeated efforts to resolve the matter consistently had been rejected by CNMEC. Sunnyland argued that the award of prejudgment interest in such cases furthers the objectives of the statute in fostering settlement and preventing delay and burdening the judicial system. Plaintiff's Memorandum, pp 15-19; R.P. 1225-1229. CNMEC's "sue us" attitude underscores the need for encouraging parties to resolve claims promptly. In support of that argument, Plaintiff put before the trial court the declaration of one of its attorneys and the documentation of Sunnyland's repeated settlement efforts in September, 2004, September and October, 2005, and in May 2006. Declaration of Joseph Goldberg and Exhibits A through F, thereto; R.P. 1243-1256.[9]

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[9] The case was tried to the district judge, the Honorable John W. Pope, as both finder of fact and of law. The district court made no findings of fact with respect to Sunnyland's protracted efforts to settle the case and CNMEC's

That evidence was that Sunnyland's principal, John Stockwell met with CNMEC General Manager John Wheeler on September 15, 2004 to discuss resolution and Wheeler advised at that time that "Sunnyland will probably have to sue to obtain compensation for its losses ...." Exh. A; R.P. 1245. Sunnyland met again with Wheeler, West and CNMEC's outside counsel on September 23, 2004 and followed up with a letter with an initial estimate that its losses were $19 million and a demand for settlement in that amount. Exh. B; R.P. 1246-1249. CNMEC's newly retained counsel responded in November, 2004, more than a year after the fire, that he needed time to investigate the matter. Exh. C at pp. 1-2; R.P. 1250-1251. On October 17, 2005, Sunnyland informed CNMEC counsel Greg Pelton that because it had lost equipment in the Estancia fire that was essential to operating the other Sunnyland greenhouse at Grants, and because it had not yet resolved its claims growing out of the Estancia fire, it was forced to close down the Grants facility as well. Exh. C at p. 1; R.P. 1250. At that time, Sunnyland provided a detailed documentation of its losses, totaling $24,216,581, and renewed an offer to settle for an advance payment of $2 million, on the understanding that

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resistance to settlement because evidence regarding settlement efforts are inappropriately raised at trial. A party is not required to plead factual allegations regarding interest as prejudgment interest is an element of damages. *Taylor* v. *Allegretto, D.M.D.*, 118 N.M. 85, 87, 879 P.2d 86, 88 (1994).

it would drop its punitive damages claim and all claims for compensatory damages incurred after January 1, 2005 if the parties agreed to submit the remaining claims to binding arbitration. CNMEC rejected this proposal. On May 1, 2006, Sunnyland proposed a policy limit settlement ($12 million). Exh. E; R.P. 1254. CNMEC failed to respond to this offer and Sunnyland withdrew it. On September 6, 2006, on the eve of trial, CNMEC made an offer of judgment in the amount of $531,000. Exh. F; R.P. 1255.

B. Other circumstances, not of Sunnyland's making, provide additional equitable grounds for granting Sunnyland prejudgment interest.

In June, 2003, less than three months before the devastating fire, Sunnyland had purchased two greenhouse operations from Agstar, the one at Estancia, and one at Grants, New Mexico. Destroyed in the Estancia fire was equipment, which the district court valued at $500,000, necessary for operation of the Grants greenhouse. Findings Nos. 230, 232, 247; R.P. 1142, 1144. After the fire, a financial backer withdrew a 1.5 Million Euro line of credit, putting additional financial pressure on Sunnyland's ability to operate the Grants facility. Findings Nos. 234, 236; R.P. 1142. Because of that, and CNMEC's continuing, stubborn refusal even to consider Sunnyland's reasonable settlement proposals for the Estancia losses, Sunnyland was denied the ability to satisfy its creditors and also to operate Grants. On October 19, 2005, Sunnyland closed the Grants greenhouse

as well, and so informed CNMEC. Goldberg Decl., Exh. C; R.P. 1250. The losses to Sunnyland from the closure of the Grants facility, of course, go uncompensated in this proceeding.

CNMEC's "fight-every-battle/leave no stone unturned" litigation strategy here (undoubtedly its right) certainly contributed to the inordinate delay to Sunnyland in achieving justice. This brief will be filed toward the end of April, 2009, more than five and one-half years after the fire that devastated Sunnyland's business and more than four and one-half years after Sunnyland's first offer of settlement on September 24, 2004. The trial ended on October 28, 2006. The district court entered its Findings of Fact and Conclusions of Law on May 31, 2007, seven months later. Judgment was not entered until June 5, 2008, more than a year after the Findings and Conclusions had been entered. This appeal ensued. None of these delays were the result of Sunnyland dragging its heels, yet Sunnyland has had to confront massive debt incurred to start up a business that never really started up, and ultimately has lost that business. None of these losses (except the loss of $500,000 of Grants equipment destroyed in the fire in Estancia) is compensated by the judgment.[10]

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[10] *See, Mascarenas* v. *Jaramillo*, 111 N.M. 410, 414, 806 P.2d 59, 63 (1991), holding error to deny plaintiff prejudgment interest. Construction contractor breached contract and plaintiff who had secured construction loan and

This is precisely the circumstance that prejudgment interest is intended to address. "[T]he obligation to pay prejudgment interest ... arises by operation of law and consists of damages 'to compensate a plaintiff for injuries resulting from the defendant's failure to pay and the loss of use and earning power of plaintiff's funds expended as a result of the defendant's breach,'" *Economy Rentals, Inc.* v. *Garcia*, 112 N.M. 748, 762, 819 P.2d 1306, 1320 (1991), quoting *Kueffer* v. *Kueffer*, 110 N.M. 10, 12, 791 P.2d 461 (1990).[11]

C. In these circumstances the award of prejudgment interest would have advanced the objectives of Section 56-8-4(B) and the district court abused its discretion in not awarding Sunnyland prejudgment interest.

In circumstances paralleling those of this case, in *Trego* v. *Scott*, 1998-NMCA-080, ¶24, 125 N.M. 323, 329, 961 P.2d 168, 174, this Court held that the

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had to continue paying interest sought prejudgment interest as compensatory damages. "Jaramillo's breach prevented Mascarenas from discharging a construction loan. In addition, she lost the use of the loan proceeds paid to Jaramillo."

[11] While the CNMEC undoubtedly will argue that it should not be assessed prejudgment interest because the trial judge delayed 19 months after trial before entering judgment, if CNMEC had accepted any of Sunnyland's reasonable settlement proposals, the trial wouldn't have been necessary and the delay in entering judgment not a factor further injuring Sunnyland. It is possible that the district court rejected prejudgment interest here because it felt some responsibility for the delay. Even if that were not the case, that does not constitute a valid ground for the discretionary decision and Sunnyland respectfully suggests constitutes an abuse of discretion.

trial court was within its discretion in assessing prejudgment interest where "Wife had made offers of settlement to Husband, which he rejected" and "Husband had delayed proceedings." In *State Farm* v. *Farmers*, this Court affirmed the award of prejudgment interest. 2004-NMCA-101, ¶18. If prejudgment interest was appropriate there, it surely is appropriate in the instant case. There the plaintiff had attempted, unsuccessfully, to settle the case for six months prior to filing suit. Here, Sunnyland made numerous attempts to settle for nearly a year prior to initiating litigation. There, the Court pointed to litigation delays that were not the fault of the plaintiff. Here, there was a nineteen month delay between the end of trial and the entry of judgment that similarly, was not the fault of Sunnyland. There, the Court noted, Section 56-8-4 put the onus on the defendant to make a settlement offer and one was never made. Here, CNMEC stonewalled all of Sunnyland's settlement proposals and only on the eve of trial made an Offer of Settlement pursuant to Rule 1-068 in the amount of $531,001, less than 2.5% of the damages found by the district court.

CNMEC's eleventh-hour and manifestly insufficient Offer of Settlement pursuant to Rule 1-068 should, by itself, be grounds for the award of prejudgment interest. As is the objective of Section 56-8-4, the objective of Rule 1-068 is to encourage prompt settlement of claims. *Delta Air Lines, Inc.* v. *August*, 450 U.S.

346, 352, 101 S.Ct. 1146, 1150, 67 L.Ed.2d 287 (1981).[12] CNMEC stonewalled Sunnyland's settlement offers over a nearly two-year period and made Sunnyland sue it. And on the eve of trial, after discovery was virtually complete, after CNMEC had obtained evidence of the extent of Sunnyland's damages and had deposed Sunnyland's expert, Dr. Bauerle (Certificate of Completion, R.P. 0810), CNMEC's stingy offer, calculated to be rejected, was hardly in good faith. Such gaming of the system should subject CNMEC to prejudgment interest; and assessing prejudgment interest against CNMEC on these facts would encourage parties to take their responsibilities under Section 56-8-4(B) and Rule 1-068 seriously and to approach settlement (both the making of offers and the response to the opponent's offers) realistically and with sincerity. Prejudgment interest in this case and on these facts would further the objective of both the statute and the rule.

Finally, that the amount of Sunnyland's damages had not yet been determined does not excuse CNMEC's rigid failure to consider settlement and cannot be grounds for justifying the trial court's abuse of discretion. Through

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[12] New Mexico Rule 1-068 is, of course, patterned on FED. R. CIV.P. 68. Because of that, this Court has observed that in interpreting Rule 1-068, New Mexico courts may look to federal court interpretation of the Federal Rule. *Pope* v. *Gap, Inc.*, 1998-NMCA-103, ¶10, 125 N.M. 376, 961 P.2d 1283.

discovery, including deposing Plaintiff's expert, CNMEC had obtained evidence of the extent of Sunnyland's damages, and those damages readily were ascertainable. But the Supreme Court has made clear that application of "Section 56-8-4(B) is not ... limited by whether damages are fixed or ascertainable." *Lucero*, 117 N.M. at 272 (affirming award of prejudgment interest where – unlike here – parties did engage in settlement negotiations, but the Court determined that the defendant's final offer of $1500 [less than 2.2% of the jury's compensatory damages award of $69,100] was "unreasonable").[13] And this Court had noted that whether or not a defendant was "fairly able to 'ascertain' the damages" goes directly to the question of "determining the 'reasonableness' of settlement offers under Section 56-8-4(B)." *Southard* v. *Fox*, 113 N.M. 774, 777, 833 P.2d 251, 254 (1992). As noted, here, discovery was virtually complete, CNMEC had Sunnyland's damage figures and the supporting evidence and had deposed Sunnyland's expert before making its clearly inadequate and unreasonable settlement proposal. CNMEC was well able by then to ascertain the extent of

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[13] This has long been the law of New Mexico. "Courts are more and more coming to recognize that a rule forbidding an allowance for interest upon unliquidated damages is one well calculated to defeat that purpose in many cases, and that no right reason exists for drawing an arbitrary distinction between liquidated and unliquidated damages." *State Trust & Savings Bank* v. *Hermosa Land & Cattle Co.*, 30 N.M. 566, 597, 240 P. 469, 481 (1925), quoting *Bernhard* v. *Rochester German Ins. Co.*, 79 Conn. 388, 65 A. 134 (1906).

Sunnyland's damages. The trial court did, only weeks later, and found that those damages were more than forty times what CNMEC had offered. It was just to prevent the parties from acting unreasonably in approaching their obligations toward affecting settlement that Section 56-8-4(B) was designed.

The conduct here is the classic example of grounds for imposing prejudgment interest. In determining not to assess prejudgment interest, the district court robbed the statute of meaning, and abused its discretion.

D. New Mexico law requires that prejudgment interest on the negligence claim be assessed at the rate of ten percent and that prejudgment interest on the contract claim be assessed at the rate of fifteen percent.

Section 56-8-4(B) prescribes the circumstances in which prejudgment interest is warranted and invests the trial court with discretion to award prejudgment interest "of up to ten percent" where the outcome of the litigation has been delayed because the non-prevailing party has failed to make reasonable settlement offers or has rebuffed reasonable settlement offers or otherwise has caused delay in the final adjudication. Section 56-8-4(B) establishes the maximum rate of prejudgment interest on Sunnyland's negligence claim – 10%. But where, as here, the plaintiff's injuries are the result of a contract breach, NMSA 1978 §56-8-3 determines the rate at which prejudgment interest shall be set, and authorizes prejudgment interest at the rate of "not more than fifteen

percent annually" unless there is a written contract between the parties that fixes a different rate of interest. The contract between CNMEC and Sunnyland does not fix a rate of interest. That the contract does not call for the paying of interest is not ground to deny prejudgment interest. As noted, *supra*, the Supreme Court has long-ago underscored that the obligation to pay prejudgment interest arises by operation of law; it is not a creature of the contract. *Economy Rentals* v. *Garcia*, 112 N.M. at 762, 819 P.2d at 1320. There, the Supreme Court affirmed the award of prejudgment interest at 15% in a contract breach case where the contract itself specified no interest rate; indeed, where, as in the instant case, the contract was silent on the question of interest. The Supreme Court explained why holding the breaching party liable for prejudgment interest pursuant to Section 56-8-3 is appropriate.

> 'Interest as damages' is allowed by law, in the absence of any promise to pay it, as compensation for delay in the payment of a fixed sum *or delay in the assessment and payment of damages*.

Id. at 762, 819 P.2d at 1320, quoting C. McCormick, *Handbook on the Law of Damages* § 50 (1935) (emphasis added).

> The fact that Section 56-8-3(A) fixes a statutory rate of 15 percent for interest "on money due by contract" does not preclude use of that rate in computing prejudgment interest as damages; the same rate is fixed for interest "on money received to the use of another and retained

> without the owner's consent expressed or implied." Interest as damages is compelled at the statutory rate and finding an implied contract to pay interest is not necessary in order to apply Section 56-8-3(B).

Id. at 762, 819 P.2d at 1320 (internal citations deleted). Thus, where one party's contract breach causes the other contracting party injury, even if that injury does not involve the breaching party retaining money that is due to the nonbreaching party, prejudgment interest at the maximum rate of 15% pursuant to Section 56-8-3 is available.

It is well established in New Mexico law that Section 56-8-3 establishes the rate of prejudgment interest where the damages result from a contract breach. And, as the Supreme Court has stressed –

> With respect to the rate of interest on an award of prejudgment interest under Section 56-8-3, we hold that the statute fixes the maximum rate (fifteen percent per annum), but does not specify the rate to be awarded in all cases. In many – perhaps most – cases, the claimant will be entitled to prejudgment interest at the fifteen percent rate; and many of our cases have held that prejudgment interest, in the particular cases, was to be awarded "at the statutory rate." [Citations.]

Sunwest Bank of Albuquerque, N.A. v. *Colucci*, 117 N.M. 373, 379, 872 P.2d 346, 352 (1994) (reversing trial court on denial of prejudgment interest)

The rate of prejudgment interest on Sunnyland's contract claim is governed by Section 56-8-3. Since the contract does not specify another rate, the maximum

rate of 15% pursuant to that section is appropriate. As demonstrated, the circumstances of this case warrant the assessment of prejudgment interest, and if that award is to fulfill the purpose of addressing Sunnyland's damages uncompensated by the Judgment, prejudgment interest should be assessed at the rate of fifteen percent.

III. The district court erred in awarding CNMEC a set-off on account of the subrogation lien that it had bought from Sunnyland's casualty insurer.

This issue was raised in the district court in post-trial pleadings on the form of the judgment. CNMEC moved for an offset, based on the subrogation lien that it had purchased from Sunnyland's casualty insurer. R.P. 1158-1168. Sunnyland's opposition (R.P. 1200-1210) argued that such an offset violated the collateral source rule and was contrary to public policy. The issue involves an interpretation of law which the Court reviews *de novo*. *Summit Properties, Inc.* v. *Public Service Co. of New Mexico*, 2005-NMCA-090, ¶7, 138 N.M. 208, 213, 118 P.3d 716, 721.

A. Background.

Sunnyland had arranged insurance on its property, but because it had not yet put in its crops, it had no crop insurance. After the fire, Sunnyland's insurer, Ohio Casualty paid a total of $3,212,415.69 in property damage and $40,000 in miscellaneous damage expenses. Accordingly, Ohio Casualty was a party plaintiff

in this action to protect its subrogation lien. First Amended Complaint, ¶¶ 2, 53-54; R.P. 0761-0762, 0767-0768. On the first day of trial, CNMEC's counsel announced to the court that it had reached a settlement with Ohio Casualty, and would be submitting an order and motion for dismissal. Tr. 1:1:18-25. CNMEC's "settlement" with Ohio Casualty took the form of CNMEC's acquisition of Ohio Casualty's subrogation lien. CNMEC purchased the $3,212,415.69 lien at a steep discount for $1,300,000. Exh. 2 to Defendant's Motion for Offset Based Upon Assignment of Subrogation Interest (herein, "Offset Motion"); R.P. 1166-1168. Over Sunnyland's opposition, the Amended Judgment provides:

> 7. The Defendant ... is entitled to a set off of the judgment in the amount of $3,212,415,69. CNMEC is entitled to a set off in this amount based on their subrogation rights purchased from Ohio Casualty Insurance Company, less reasonable attorneys' fees and costs.

Amended Judgment; R.P. 1557. The district court has not yet determined the costs and attorneys' fees to be allocated to the set-off.

B. Permitting CNMEC a set-off on account of a subrogation lien it purchased from Sunnyland's casualty insurer violates the collateral source rule.

The collateral source rule is well established in New Mexico law. *Trujillo* v. *Chavez*, 76 N.M. 703, 417 P.2d 893 (1966). There, the court held that it was error to admit evidence that the plaintiff received sick pay from her employer

while she was recovering from the injuries which were the basis of the suit. The evidence was irrelevant. "Compensation from a collateral source does not operate to reduce damages recoverable from a wrongdoer." *Id.* at 708. *See also, Martinez* v. *Knowlton*, 88 N.M. 42, 44, 536 P.2d 1098, 1100 (Ct.App. 1975) (same, error to admit evidence that injured worker received sick pay. "Such evidence violates the collateral source rule.")

The Supreme Court has explained that while it is "a correct statement of the general rule" that a plaintiff cannot recover more than his actual losses,

> an exception is the collateral source rule. The collateral source rule allows a plaintiff to recover his full losses from the responsible defendant even though he may have recovered part of his losses from a collateral source.

McConal Aviation, Inc. v. *Commercial Aviation Ins. Co.*, 110 N.M. 697, 700, 799 P.2d 133, 136 (1990). The rule is compatible with the principle that wrongdoers should pay for the injuries that their wrongdoing causes, and "if a collateral source is to benefit a party, it should better benefit the injured party than the wrongdoer." *Id.*

> As a general rule, benefits received by the plaintiff from a source collateral to the tortfeasor or contract breaker may not be used to reduce the defendant's liability for damages. This rule holds even though *the benefits are payable to the plaintiff because of the defendant's actionable conduct and even though the benefits are measured by the plaintiff's losses.*

Id. The emphasized language perfectly describes insurance payments for casualty losses, such as those received by Sunnyland.

In *McConal*, the plaintiff arranged through his insurance broker for insurance coverage for his airplane. The broker negligently permitted the policy to lapse, and the insurance company declined the plaintiff's claim when his airplane was damaged in a crash. The plaintiff sued the broker for negligence and the insurance company for breach of contract. Plaintiff settled with the broker before trial and the jury awarded damages against the insurer for breach of contract. The Supreme Court held that the collateral source rule precluded applying the settlement amount against the jury's damage award.

In *Sanchez* v. *Clayton*, 117 N.M. 761, 766, 877 P.2d 567, 572 (1994), the Supreme Court limited *McConal* as holding "that the collateral source rule applies to the prejudgment settlement of a claim involving neither a joint tortfeasor nor a joint obligor under a contract." That, of course, is precisely the situation that exists here. CNMEC and Ohio Casualty are not joint tortfeasors; Ohio Casualty is not a tortfeasor at all. And they are not joint obligors on the same contract.[14] CNMEC is liable because it breached its contract under which it provided electric

[14] It has long been acknowledged that the collateral source rule is not limited to tort actions, but also applies in contract actions. *See*, *McConal*, 110 N.M. at 702, n.1 (Montgomery, J., concurring).

service to Sunnyland. Ohio Casualty honored its insurance contract; an entirely separate contract than that breached by CNMEC. The contractual obligations at issue here – CNMEC's governing the provision of electric service and Ohio Casualty's to provide Sunnyland with casualty insurance – are several, not joint. *C.f.*, *Summit Properties*, 2005-NMCA-090, ¶46 (PNM entitled to a set-off on account of the plaintiff's settlement with the city because the city and PNM were jointly liable under the contract, distinguishing *McConal*). Because the payments that Sunnyland received from its casualty insurer were the result of a completely separate set of obligations than those that gave rise to CNMEC's liability, they clearly are a collateral source, and the collateral source rule applies. There is no possibility that CNMEC and Ohio Casualty could have been jointly liable on these facts.

C. Permitting CNMEC a set-off on account of a subrogation lien it purchased from Sunnyland's casualty insurer violates public policy.

Ohio Casualty, Sunnyland's insurer, paid Sunnyland's claim and thus had a subrogation right – that is, the right to recover what it had paid to Sunnyland under the policy from the entity that caused Sunnyland's loss, here, CNMEC. By purchasing Ohio Casualty's subrogation right, CNMEC attempted to reverse the direction of the liability. It stands in the insurer's shoes, but now, instead of prosecuting that subrogation right against the perpetrator of Sunnyland's injuries,

it is attempting to prosecute that subrogation right against the victim of its own negligence. CNMEC, through this subterfuge seeks to create the litigation equivalent of the credit default swap.

In effect, by seeking to put itself in Ohio Casualty's shoes, CNMEC is attempting to assert Ohio Casualty's subrogation rights against Sunnyland, Ohio Casualty's insured. But our Supreme Court has firmly established that an insurer may not assert a subrogation claim against its own insured. *State ex rel. Regents of New Mexico State University* v. *Siplast, Inc.*, 117 N.M. 738, 741-743, 877 P.2d 38, 41-53 (1994) ("With agreements to insure, the risk of loss is not intended to be shifted to one of the parties; it is intended to be shifted to an insurance company in exchange for a premium payment." *Id.* at 742, 877 P.2d at 42.) The Court explained the policy reasons that underscore this rule, to which the majority of the states considering the issue adhere.

- Permitting an insurer to subrogate against its insured runs counter to the fundamental concept of the insurance contract which is an agreement, *inter alia* to protect the insured even from its own negligence. *Id.* at 741-742, 877 P.2d at 41-42. How can an insurer insure the insured against its own negligence and then seek to recover from the same insured based on its negligence? That would render the insurance contract meaningless.

- Permitting an insurer to subrogate against its insured sets up an internal conflict of interest. The insured is obligated under the insurance contract to cooperate with the insurance company in investigating claims. If the insurer then uses the information obtained from the insured pursuant to this contractual duty of cooperation to assert its subrogation claim against its own insured, the stability of insurance contracts is imperiled. *Id.* at 742-743, 877 P.2d at 42-43.
- Permitting an insurer to subrogate against its insured will encourage litigation. *Id.* at 743, 877 P2d at 43.

Certainly CNMEC, standing in the shoes of Ohio Casualty, can have no greater rights than can Ohio Casualty itself. If Ohio Casualty cannot assert its subrogation claim against its own insured, Sunnyland, neither can CNMEC. CNMEC simply bought Ohio Casualty's rights, it didn't create a whole new investment vehicle. By buying Ohio Casualty's rights, CNMEC could not create a whole new set of rights.

Other policy considerations auger against permitting an insurer to subrogate against its insured. Public policy and the need for economic stability encourage individuals and businesses to secure insurance against certain risks. The ability of a wrongdoer to acquire the insurer's subrogation lien (especially where that lien is

obtained at a substantial discount, as here) and then use that lien to reduce its liability to the insured, its victim, hardly encourages businesses and individuals to secure insurance coverage.[15]

Finally, permitting the defendant to purchase the plaintiff's insurer's subrogation lien as a hedge against the defendant's own liability affects the integrity of the litigation process. CNMEC, in effect, has an interest not only in the success of its defense, but also in the success of Sunnyland's prosecution of the case. CNMEC, in effect, bought a $1,300,000 lottery ticket which can only pay off if CNMEC's defense is insufficient. A lawsuit where one of the litigants has a pecuniary interest on both sides of the "v." is hardly a lawsuit calculated to get at the ultimate truth.

CNMEC's purchase of Ohio Casualty's subrogation lien (at 30 cents on the dollar) in order to reduce its liability to the victim of its wrongdoing is the height of cynicism. The district court erred in permitting this mischievous set-off. Such a precedent can only destabilize litigation and the insurance markets. This Court should reverse the allowance of this set-off.

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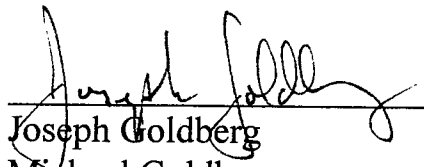
[15] Even worse, CNMEC's insurer purchased Ohio Casualty's lien and then deducted the amount paid for the lien, $1,300,000 from CNMEC's policy limit; in effect using funds allocated to pay Sunnyland's losses to purchase the lien that it would assert to reduce its liability to Sunnyland, thus further reducing the amount available to pay Sunnyland's losses.

CONCLUSION

The district court erred as a matter of law in assessing post-judgment interest at 8 3/4 % rather than 15%, and in granting CNMEC a set-off on account of the subrogation lien that it purchased from Sunnyland's casualty insurer. This Court should reverse those erroneous rulings. The circumstances of this case are those for which prejudgment interest was intended, and this Court also should determine that the district court abused its discretion in not awarding prejudgment interest to Sunnyland, and the Court should remand this case to the district court with instructions that the judgment be amended to award Sunnyland prejudgment interest at the rate of 15% per annum.

Dated: April 30, 2009

Respectfully submitted,



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