IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

SUNNYLAND FARMS, INC.

Plaintiff-Appellee/Cross-Appellant,

vs. Ct. App. No. 28,807

CENTRAL NEW MEXICO
ELECTRIC COOPERATIVE,
INC.,

Defendant-Appellant/Cross-Appellee.

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

DEFENDANT-APPELLANT'S REPLY BRIEF

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STATEMENT OF COMPLIANCE

As required by Rule 12-213(G), undersigned counsel hereby certifies that this brief was prepared in 14-point Times New Roman typeface using Microsoft Word, and that the body of the brief contains 4,392 words.

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ARGUMENT

I. THE CONSEQUENTIAL DAMAGES AWARDED IN THIS CASE WERE NOT FORESEEABLE TO THE PARTIES AT THE TIME THEY ENTERED INTO THE CONTRACT

Despite Sunnyland's intimations to the contrary, foreseeability does not exist in a vacuum.[1] As recognized by Professor Dan B. Dobbs, *Kenford Co. v. County of Erie*, 73 N.Y.2d 312 (1989), illustrates this point well. *See* 3 Dan B. Dobbs, *Law of Remedies* § 12.4(6), at 94 (2d ed. 1993). In that case, the County of Erie planned to build a domed sports stadium on land owned by Kenford. *Kenford Co.*, 73 N.Y.2d at 316. The parties eventually came to an agreement in which Kenford would lease land to the County for the stadium, the County would construct the stadium, and a management company formed by Kenford's president would manage the stadium facilities. *Id.* Significantly, both Kenford and the County expected that the construction of the stadium facility would increase land values in the area. *Id.* at 316-17, 319. Eventually, however, the County was unable to obtain the necessary financing to build the stadium and Kenford sued the County for breach of contract. *Id.* at 317.

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[1] Sunnyland's attempt to make this issue a substantial evidence question should be rejected by this Court. The issue is whether the district court applied the correct standard in determining foreseeability. Under such circumstances, the proper standard of review may be viewed as *de novo* or as a mixed question of law and fact. *See Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000-NMSC-033, ¶¶ 6-7, 129 N.M. 698, 12 P.3d 960; *Montoya v. Pearson*, 2006-NMCA-097, ¶ 5, 140 N.M. 243, 142 P.3d 11.

In its suit, Kenford sought damages for, among other things, "its lost appreciation in the value on its property located on the periphery of the proposed stadium site." *Id.* According to Professor Dobbs, "[a]s a simple fact, foreseeability seemed indisputable." 3 Dobbs, *supra*, § 12.4(6), at 95. The New York Court of Appeals agreed: "[I]t is beyond dispute that at the time the contract was executed, all parties thereto harbored an expectation and anticipation that the proposed domed stadium facility would . . . result in increased land values[.]" *Kenford Co.*, 73 N.Y.2d at 319. Nonetheless, the court refused to conclude "that this hope or expectation of increased property values and taxes necessarily or logically leads to the conclusion that the parties contemplated that the County would assume liability for Kenford's loss of anticipated appreciation in the value of its peripheral lands if the stadium was not built." *Id.* at 319-20. Relying on *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. 1854), the court held there was simply no evidence to suggest that the County reasonably contemplated that it was to assume liability for such losses if the stadium was not built. *Kenford Co.*, 73 N.Y.2d at 322.

The facts in *Hadley* similarly illustrate this principle. In that case, an engine shaft in the plaintiffs' mill broke. Plaintiffs then hired the defendants to transport a replacement shaft from the manufacturer to the mill. The defendants failed to deliver the shaft within the time promised, causing the mill to remain shut down

for an extended period. Subsequently, the plaintiffs' sued the defendants for consequential damages resulting from the mill's closure. The court held that the defendants were not liable for consequential damages:

> [I]n the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences (the stoppage of the mill and resulting loss of profits) would not, in all probability have occurred; and there special circumstances were here never communicated by the plaintiffs to the defendants.

Hadley, 156 Eng. Rep. at 151. Indeed, according to one scholar, "[t]he resulting loss of the miller's profits could not then have been in the contemplation of the carrier since, for all the carrier knew, the miller might have had a spare crankshaft as a replacement, or the machinery might have been defective in other respects[.]" 3 E. Allen Farnsworth, *Farnsworth on Contracts* § 12.14, at 257 (3d ed. 2004). In other words, the particular facts of a case and the parties' own understanding of such facts are central to any foreseeability analysis in breach of contract cases.

Professor Dobbs instructs that the question of foreseeability in breach of contract cases, as opposed to its application in tort cases, must be "understood in a special sense, as shorthand for more complex ideas about the scope of the parties' bargain." 3 Dobbs, *supra*, § 12.4(6), at 95. In *Camino Real Mobile Home Park Partnership v. Wolfe*, 119 N.M. 436, 446, 891 P.2d 1190, 1200 (1995), for example, the Supreme Court defined the concept of foreseeability in breach of contract cases as requiring "an explicit or tacit agreement by the defendant to

respond in damages for the particular damages understood to be likely in the event of a breach."

In that sense, it cannot seriously be contended that the Cooperative reasonably contemplated that by entering into a contract with Sunnyland for the provision of electricity it was assuming liability for consequential damages arising from a fire caused solely by the negligence of Sunnyland's employees. As demonstrated by the above cases, it is simply not enough to argue, as Sunnyland does in its brief, that it was generally foreseeable that Sunnyland may lose money if the power was disconnected. This is because "general foreseeability, which is present in virtually every case, does not justify an award of consequential damages." *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951, 959 (7th Cir. 1982). Instead, this Court must examine whether the Cooperative reasonably contemplated that it would be liable for consequential damages under the facts and circumstances present in the instant case.

Notably, "[s]ome kinds of contracts almost never warrant special damages in the absence of some clear indication in the contract or in the business culture." 3 Dobbs, *supra*, § 12.4(7), at 101. For example, "[s]tandard rates for the supply of water, based on a price per unit, suggests that the promising defendant is merely making a price guarantee and not that he is liable for the value of the plaintiff's house which burns down when water is not available to extinguish a fire." *Id.* If

water utilities were expecting to guarantee customers against loss by fire, "then the price of the water would vary in the same way other insurance varies—with the value of the house and its contents." *Id.*; *see also Lowenschuss v. So. Cal. Gas Co.*, 11 Cal.App.4th 496, 500 (1992); *Libbey v. Hampton Water Works Co.*, 389 A.2d 434, 502-03 (N.H. 1978). The same is true for electric utilities.

Sunnyland's attempts to distinguish cases directly on point in this regard are unavailing. [*See* AB 21 n.11] While the trial court in *Coker v. Southwestern Bell Telephone Company*, 580 P.2d 151, 152-53 (Okla. 1978) did rely on tariffs limiting liability in making its decision, the appellate court expressly declined to decide the case on that basis. Rather, the court in Coker relied on *Hadley* to affirm the dismissal of the plaintiff's claims on the grounds that damages alleged under the customer's contract claim were "too remote and speculative to permit recovery." *Coker*, 580 P.2d at 153.

Likewise, Sunnyland's attempt to distinguish *Foss v. Pacific Telephone and Telegraph Co.*, 173 P.2d 144 (Wash. 1946) on the grounds that the telephone was not essential to the plaintiff's business has no basis in the facts or the opinion rendered in that case. The question of whether or not the telephone was essential to the business was not examined by the court in its opinion. Rather, relying on *Hadley*, the court held that the plaintiff could not recover against a telephone company for damages caused by a fire that destroyed his business because such

damages "were not in the contemplation of the parties at the time they made the contract for telephone service." *Foss*, 173 P.2d at 149.

Significantly, whether decided on summary judgment or otherwise, *Willie v. AG Vantage F.S., Inc.*, No. 04-1548, 2005 WL 1253974, at *1 (Iowa Ct. App. May 25, 2005) (unpublished), *Cannon v. Commonwealth Edison Co.*, 621 N.E.2d 52, 54, 57 (Ill. Ct. App. 1993), and *Riojas v. Lone Star Gas Co.*, 637 S.W.2d 956, 959-60 (Tex. App. 1982) all stand for the simple proposition that utilities do not act as insurers for their customers. To apply the concept of foreseeability as urged by Sunnyland—in a vacuum with no consideration of what the parties actually reasonably contemplated—is in effect to hold that utilities throughout the State "must foresee every accident that may arise every time electric power is lost." *Cannon*, 621 N.E.2d at 56. This is an impossible burden and not one contemplated by the concept of foreseeability as applied in contract cases. *See id.*

II. THIS COURT MAY CONSIDER THE DISPROPORTIONALITY OF THE DAMAGES AWARD IN DETERMINING WHETHER THE CONSEQUENTIAL DAMAGES AWARDED IN THIS CASE WERE EXCESSIVE AND NOT FORESEEABLE

While the Cooperative did not explicitly mention the term "disproportionality" below, it did point out to the court that the contract at issue was a "simple contract" that involved the payment of money in exchange for electricity. [Tr. (Aug. 24, 2007) 29] Significantly, the Cooperative also pointed out that the court needed to consider the terms of this contract in determining

whether the parties tacitly agreed that the Cooperative would be liable the consequential damages at issue in this case. [*Id.* at 27-29] The Cooperative also pointed out that a more reasonable and foreseeable measure of damages would be $87,000, which was the value of the tomato plants purchased that Sunnyland was unable to accept delivery of due to the fire. [*Id.* at 35]

To the extent that disproportionality was not expressly discussed below, this Court may nonetheless consider the issue because the damages award in this case is a matter of general public interest. *See* Rule 12-216(B)(1) NMRA. As pointed out by *Amicus* New Mexico Rural Electric Cooperative Association ("NMRECA") in its brief, this decision impacts the interests and functioning of 16 rural electric cooperatives and 450,000 consumers throughout New Mexico, as well as other types of utilities and utility customers within the State. The judgment, which fundamentally alters the scope of contractual liability for utilities, threatens to set a dangerous precedent and should be fully examined by this Court.

This Court has already recognized that "some limit could be placed on recovery for particularly large lost profits" to "avoid disproportionate compensation." *Manouchehri v. Heim*, 1997-NMCA-052, ¶ 25, 123 N.M. 439, 941 P.2d 978 (citing *Restatement (Second) of Contracts* § 351(3) (1981)). In *Manouchehri*, this Court compared the consequential damages award ($2500) with the contract price ($1900) and concluded that the award "was within proper

bounds." *Id.* Other courts have engaged in a similar analysis. *See, e.g.*, *Alaska Tae Woong Venture, Inc. v. Westward Seafoods, Inc.*, 963 P.2d 1055, 1063-64 (Alaska 1998); *Postal Instant Press, Inc. v. Sealy*, 51 Cal.Rptr.2d 365, 372-73 (Cal. Ct. App. 1996); *Foster v. Bartolomeo*, 581 N.E.2d 1033, 1035 (Mass. App. Ct. 1991).

Amicus New Mexico Trial Lawyers Association's ("NMTLA") concerns regarding the role of the jury and language in jury instructions need not be addressed by this Court. The instant case was tried as a bench trial and as such, none of these concerns are properly before this Court. *See State v. Wyrostek*, 117 N.M. 514, 523, 873 P.2d 260, 269 (1994) (holding that the Supreme Court will not issue an advisory opinion on issues not before the court). In any event, district courts are empowered to order remittitur or a new trial in instances where the jury's verdict is excessive, *see Ennis v. Kmart Corp.*, 2001-NMCA-068, ¶ 27, 131 N.M. 32, 33 P.3d 32—disproportionality may simply be one factor for a district court to consider in examining the excessiveness of a verdict.

More importantly, however, the Cooperative's and NMRECA's arguments regarding disproportionality focus less on the adoption of Section 351(3) of the *Restatement (Second) of Contracts*, and more on how other courts have considered disproportionality in the context of determining foreseeability. As discussed in the Cooperative's and NMRECA's briefs, a number of courts have concluded "the

great disparity between the fee charged . . . and the damages sought . . . is strong evidence that such a result was not intended by the parties." *Sundance Cruises Corp. v. American Bureau of Shipping*, 7 F.3d 1077, 1084 (2d Cir. 1993); *see also Maine Rubber Int'l v. Environmental Mgmt. Group*, 324 F. Supp. 2d 32, 37 (D. Maine 2004); *Robotic Vision Sys., Inc. v. Cybo Sys., Inc.*, 17 F. Supp. 2d 151, 160 (E.D.N.Y. 1998). While NMTLA quibbles that this is not a true application of Section 351(3) of the *Restatement (Second) of Contracts*, it offers no reason why disproportionality cannot be considered in determining whether a consequential damages award was reasonably contemplated by the parties at the time they entered into the contract. The disproportionality between the contract price and the damages is yet another factor demonstrating that the result in the case at bar was not foreseeable.

III. THE AWARD OF PUNITIVE DAMAGES SHOULD BE REVERSED BECAUSE NO CONDUCT RELATING TO THE BREACH OF CONTRACT SUPPORTED THE IMPOSITION OF PUNITIVE DAMAGES AND BECAUSE THERE WAS NO FACTUAL OR LEGAL BASIS TO AWARD PUNITIVE DAMAGES AGAINST THE CORPORATE DEFENDANT

Relying on cases in which an appellate court has reviewed a district court's decision *not* to award punitive damages, Sunnyland erroneously urges this Court to review the punitive damages award in this case under an abuse of discretion standard. In reality, this Court reviews the factual basis for a punitive damages award under a substantial evidence standard and reviews any questions of law

regarding the award *de novo*. *See Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 2002-NMSC-021, ¶ 17, 132 N.M. 401, 49 P.3d 662; *Littel v. Allstate Ins. Co.*, 2008-NMCA-012, ¶ 59, 143 N.M. 506, 177 P.3d 1080. In this case, the Cooperative attacks the factual and legal bases for the district court's two punitive damages awards.

a. The punitive damages award for Sunnyland's breach of contract claim is based on different conduct than that supporting the compensatory damages award and should therefore be reversed.

Below, the court concluded that the Cooperative's failure "to provide advance notice of the disconnect of electrical serve to Sunnyland Farms was the cause of contractual damages." [RP 1144, COL 1] Significantly, the court also specifically found that this breach could not form the basis for an award of punitive damages because the Cooperative did not act maliciously, willfully, wantonly, fraudulently or in bad faith toward Sunnyland Farms prior to the fire." [RP 1556, ¶ 4]

Although the district court did not make any findings regarding how the Cooperative lineman's reluctance to reconnect the electricity during the fire constituted a breach of contract, it nonetheless awarded punitive damages for such conduct under a breach of contract theory. [RP 1556, ¶ 5] The district court's conclusion that the source of compensatory damages for Sunnyland's breach of contract claim was the Cooperative's failure to provide advance notice prior to

disconnecting electricity, and the court's award of punitive damages for entirely different conduct, is contrary to New Mexico law and should be reversed by this Court.

Notwithstanding Sunnyland's misreading of *Gonzales v. Sansoy*, 103 N.M. 127, 703 P.2d 904 (Ct. App. 1984) in an attempt to distinguish it, the case is directly applicable to the instant matter. In *Gonzales*, a physician treated a patient on three different dates, September 17-18, and 23. *See id.* at 129, 703 P.2d at 906; *see also Gonzales v. Sansoy*, 102 N.M. 136, 137, 692 P.2d 522, 523 (1984) ("*Gonzales I*"). Significantly, "[t]he damages claims submitted to the jury were based on defendant's conduct on September 17 and 18 . . . no damage claim was submitted on the basis of defendant's conduct on September 23." *Gonzales*, 103 N.M. at 129, 703 P.2d at 906. In considering the propriety of the punitive damages award, the court noted that "[t]he conduct giving rise to the punitive damages claim must be the *same conduct* for which actual or compensatory damages were allowed." *Id.* (emphasis added and internal quotation marks and citation omitted). Accordingly, the court concluded that because no compensatory damages were awarded for defendant's conduct on September 23, the punitive damages award had to be based solely on the conduct on September 17-18. *Id.*

Likewise, in the present case, given that the only breach of contract found by the district court concerned the advance-notice requirement before disconnection

of electricity, the court's award of punitive damages for an apparent breach of contract in declining to reconnect the electricity during the fire is unsupported by an award of compensatory damages, and accordingly, fails under *Gonzales*.

Seemingly cognizant of the problems with the district court's punitive damages award, Sunnyland now proffers new theories as to how the punitive damages award could possibly be supported by an award of compensatory damages. For example, Sunnyland now argues that "an integral part of the contract between Sunnyland and CNMEC was that CNMEC would provide power to Sunnyland as long as Sunnyland's accounts were current, and that it would restore power once delinquent accounts were paid." [AB 34] While Sunnyland presented evidence below that it paid the delinquent amounts, it presented no evidence that CNMEC was contractually obligated to restore power within a particular amount of time after that. Further, while Sunnyland asserts that its bookkeeper was told that the electricity would be reconnected as soon as the payment was verified, Sunnyland does not suggest—and did not argue below—that whoever spoke to the bookkeeper was authorized to contractually bind the Cooperative. *See Romero v. Mervyn's*, 109 N.M. 249, 253, 784 P.2d 992, 996 (1989). Finally, while Sunnyland maintains that the restoration of power was an "integral part of the contract," it fails to provide a record cite to the pertinent contractual provision. As such, this Court need not consider Sunnyland's arguments in this regard. *See*

Santa Fe Exploration Co. v. Oil Conservation Comm'n, 114 N.M. 103, 108, 835 P.2d 819, 824 (1992).

Moreover, the district court's failure to make findings in support of Sunnyland's newly-conceived breach of contract theory precludes the affirmance of the punitive damages awards on such grounds. *See Sunwest Bank, N.A. v. Daskalos*, 120 N.M. 637, 639, 904 P.2d 1062, 1064 (Ct. App. 1995) (observing that the district court made no findings of fact regarding the conduct of Sunwest and concluding that "[i]t would be inappropriate for this Court to affirm based on findings of fact the trial court did not make").

Sunnyland's assertion that the Cooperative lineman's reluctance to reconnect the electricity was a continuation of the conduct giving rise to the compensatory damages—the failure to provide advance notice of the disconnect—is without merit. The facts of this case indicate that the conduct on both days was entirely different. Indeed, the reasons why the lineman was unwilling to reconnect the electricity unless someone assumed responsibility for the safety of the firefighters had nothing to do with the reasons why electricity was disconnected in the first instance. Moreover, the conduct on both days involved different actors. Sunnyland's latest attempts to characterize the conduct on September 8th and on 9th as the "same conduct" should be rejected by this court.

In the absence of a compensatory damages award for the conduct that the punitive damages were awarded for, the punitive damages award must be reversed as a matter of law. *See Gonzales*, 103 N.M. at 129, 703 P.2d at 906.

b. Sunnyland's belated "cumulative conduct" punitive damages theory should be rejected by this Court.

The award of punitive damages under breach of contract and negligence theories should be reversed because the court's findings do not support an award of punitive damages against the Cooperative for the acts of its employees. As outlined in *Chavarria v. Fleetwood Retail Corp.*, 2006-NMSC-046, ¶ 21, 140 N.M. 478, 143 P.3d 717, there are three possible bases for awarding punitive damages against a corporation for the conduct of its employees: "(1) corporate employees possessing managerial capacity engage in conduct warranting punitive damages; (2) the corporation authorizes, ratifies, or participates in conduct that warrants punitive damages; or (3) under certain circumstances, the cumulative effects of the conduct of corporate employees demonstrate a culpable mental state warranting punitive damages." The absence of any of these three bases in the present case mandates reversal of the district court's punitive damages award.

Below, Sunnyland requested findings as to the first two bases for a punitive damages award, i.e., managerial capacity and authorization or ratification. [RP 1045, ¶ 268; RP 1046, ¶¶ 270-73] The court declined to include such findings in its own findings of fact and conclusions of law. As such, the punitive damages

award cannot be affirmed on either theory. *See Western Bank v. Franklin Dev. Corp.*, 111 N.M. 259, 260, 804 P.2d 1078, 1079 (1991) ("The refusal by the court to accept a requested finding is regarded on appeal as a finding against the party bearing the burden of proof on the issue at trial."). The punitive damages awards in this case are therefore wholly dependent on whether the third basis, known as the "cumulative effects" theory, is applicable.

The evidence in this case does not support the punitive damages awards under a "cumulative effects" theory. Importantly, the district court found that no Cooperative employee acted in a manner warranting an award of punitive damages prior to the fire. Thus, the only conduct at issue is the Cooperative lineman's reluctance to reconnect electricity during the fire. Even assuming that the "cumulative effects" of one employee's conduct can be properly attributed to a corporation under the "cumulative effects" theory, the conduct at issue does not rise to the level of culpability necessary for an award of punitive damages. As expressed by the lineman at trial, his reluctance stemmed from the fear that reconnecting electricity during the fire could have killed or seriously injured someone. [Tr. (Day 2) 103-05] Such caution should be encouraged by our courts, and not punished through an award of punitive damages.

More importantly, however, Sunnyland did not try its case on such a theory below. It did not request findings regarding the "cumulative effects" theory and

certainly did not argue for the application of the theory before the district court. Under such circumstances, it would be inappropriate for this Court to affirm the award of punitive damages based on application of the "cumulative effects" theory. *See Sunwest Bank, N.A.*, 120 N.M. at 639, 904 P.2d at 1064. Sunnyland's punitive damages award should therefore be reversed by this Court.

IV. THE CROP LOSS DAMAGES AWARD SHOULD BE REVERSED BECAUSE SUNNYLAND'S EXPERT'S PROFFERED CROP PRODUCTION LEVELS WERE SPECULATIVE, OVERWHELMINGLY CONTRADICTED BY OTHER EVIDENCE, AND UNWORTHY OF BELIEF

Substantial evidence review should not amount to little more than a rubber stamping of the judgment below. *Kuhn v. Dep't of Gen. Servs.*, 29 Cal.Rptr.2d 191, 193 (Cal. Ct. App. 1994) (observing that the substantial evidence standard of review "does not mean that [the appellate court] must blindly seize any evidence in support of the respondent in order to affirm the judgment"). Indeed, "if the word 'substantial' [is to mean] anything at all, it clearly implies that such evidence must be of ponderable legal significance." *Id.* at 194. Significantly, "[e]vidence is insubstantial if it is overwhelmingly contradicted by other evidence." *O'Dell v. Shalala*, 44 F.3d 855, 858 (10th Cir. 1994).

Although the substantial evidence standard requires this Court to "review all evidence in the light most favorable to the verdict and resolve all conflicts in the light most favorable to the prevailing party," Sunnyland's crop loss damages lack

the requisite evidentiary support to justify the approximately $13 million award. *Weststar Mortgage Corp. v. Jackson*, 2003-NMSC-002, ¶ 8, 133 N.M. 114, 61 P.3d 823 (internal quotation marks and citation omitted). As argued in the Cooperative's Brief in Chief, Dr. Bauerle's estimated production levels for the Sunnyland facility are almost double the USDA range for tomato greenhouses in the Southwest and, significantly, have not been achieved by any other known greenhouse.

Sunnyland correctly observes that Dr. Bauerle visited the facility after the fire and apparently observed Sunnyland's successor's planting operations, which did not include tomatoes or hydroponics. [AB 40] Dr. Bauerle's crop loss estimates, however, clearly belie any assertion that his observations played any role in his calculations. [Tr. (Day 4) 20-25] By way of contrast, the Cooperative's expert based his estimates on recognized "real world" factors such as diseases, insects, intercropping, skill of grower, and equipment failure, etc. [Tr. (Day 8) 128-29, 130-33] Quite simply, while Sunnyland asserts that Dr. Bauerle did incorporate these factors in his analysis, it cannot point to any testimony in the record that supports such an assertion.

Even more damning is Dr. Bauerle's failure to consider the USDA's Economic Report from the Economic Research Service entitled "Greenhouse Tomato Changes: The Dynamics of the North American Fresh Tomato Industry."

[Tr. (Day 4) 48-49, 70] That article, which Dr. Bauerle conceded to be authoritative, indicated that similar facilities were producing average yields between 50 and 53.4 kilograms per square meter. [Tr. (Day 4) 58-61, 64-66] Additionally, the article indicated that the average production level for the southwestern United States was 53 kilograms per square meter. [Tr. (Day 8) 150] At trial, Dr. Bauerle could not explain how his estimate, which approximated 95 kilograms per square meter, could be reconciled with the real-world values reported by the USDA.

Contrary to Sunnyland's assertions and the district court's own erroneous finding of fact, Kenneth Gerhart, the Cooperative's crop loss expert, did not acknowledge that Dr. Bauerle's estimates were more accurate than his own. [AB 42, RP 1142 FOF 239] Significantly, the testimony that Sunnyland cites in its Answer Brief fails to support this assertion. Rather, the pertinent testimony involved a discussion about production values in brochures, which apparently lent support to Dr. Bauerle's estimates. [Tr. (Day 8) 158-59] Importantly, throughout his testimony, Mr. Gerhart disputed Dr. Bauerle's calculations. [Tr. (Day 8) 127, 133, 143-50]

Because Dr. Bauerle's crop loss estimates were purely speculative, unworthy of belief, and overwhelmingly contradicted by other evidence, the crop loss damages should be reversed by this Court.

CONCLUSION

For the foregoing reasons, and those discussed in the Brief in Chief, the Cooperative respectfully requests that the Court reverse the district court's judgment.

Respectfully submitted,

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I hereby certify that on June 15, 2009, I caused a true and correct copy of Defendant-Appellant's Reply Brief to be served via U.S. Mail, postage prepaid, to the following:

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