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STATE OF NEW MEXICO
THIRTEENTH JUDICIAL DISTRICT
COUNTY OF VALENCIA

SOCORRO ELECTRIC COOPERATIVE, INC.,

Plaintiff,

v.

CHARLENE WEST, et al.,

No. D1314-CV-2010-0849
Judge: Mitchell

Defendants,

And

CHARLES WAGNER, individually and on behalf of those similarly situated, et al.,
Cross-Claim Plaintiff,

v.

SOCORRO ELECTRIC COOPERATIVE, INC., et al.,
Cross-Claim Defendants.

RESPONSE TO EMERGENCY MOTION FOR ORDER TO SHOW CAUSE

COMES NOW Plaintiff/Cross-Claim Defendant Socorro Electric Cooperative (herein after "SEC" or "Cooperative"), by and through its counsel of record, Foster & Moss, P.C., and hereby presents this Response to Emergency Motion for Order to Show Cause filed by Lee Deschamps on behalf of Defendant Charlene West. In Response to Defendants' Motion, Plaintiff respectfully states that the current Motion does not state a legitimate "emergency", that this Court has no duty or right to exercise continuing supervision over the business decisions of the Cooperative's Board of Trustees, and that Plaintiff (by and through the actions of its duly elected Board of Trustees and its officers and mangers) is complying with its duties under the Rural

Electric Cooperative act and with the additional duties ordered by this Court in response to Plaintiff's underlying declaratory judgment action. Based on the willful filing of frivolousness and groundless "Emergency" Motion, Plaintiff further requests that this Court exercise its discretion to sanction Defendant and her counsel as allowed by New Mexico Rule of Civil Procedure 1-011.

I. Nature of an Emergency Motion

As a basic matter, Defendant has chosen to burden this Court with consideration of an "emergency motion," without a single citation to case law or statute and without *any* evidentiary affidavits or statements. By alleging "emergency", Defendant has sought to circumvent the normal rules of civil procedure and have this Court rule on serious and substantive matters of corporate law without adequate briefing or time for thoughtful consideration.

Emergency motions are recognized as a highly limited exception to the ordinary rules of pleading, and they are intended to be used *only* when the party bringing the motion faces a substantial risk of "irreparable harm" if immediate action is not taken. See, eg. *Basis Int'l Ltd. v. Research in Motion Ltd*., 827 F.Supp. 2d 1302 (D.N.M. 2011). A review of reported cases mentioning "emergency motions" in New Mexico courts reveals that such motions are most often used in family law matters, such as child custody. See eg, *In re Patrick D.*, 2012-NMSC-17.

By and through her current Motion, Defendant has not alleged (much less has she established) *any* type of irreparable, immediate harm that would result if the upcoming annual meeting were conducted as the majority of the Cooperative's duly elected Board of Trustees has established. For this reason alone the Court should deny the current Motion.

II. Continuing Supervision of the Court

In her Motion, Defendant correctly states that the parties are currently before the Court, but Defendant fails to recognize that all matters in the original suit for declaratory action have been resolved by the Court through its *Order on Hearing on Partial Merits* issued June 24, 2011. The only active matters currently pending involve the Cross Claims brought by Trustee Charles Wagner against the Cooperative and his fellow Trustees.

In the June 24, 2011 Order, the Court addressed all issues relating to the Cooperative's request for declaratory judgment, which had focused on the applicability of certain member-approved amendments to SEC Bylaws. The Order did not provide for *any* type of continuing or ongoing supervision by the Court. While compliance with these newly amended Bylaws has been both expensive and cumbersome, the Cooperative and the Board have made all reasonable attempts to comply with the Court's specific orders, with the requirements of the Rural Electric Cooperative Act, and with the business interests of the Cooperative. Since 2011, payments to Trustees have been reduced, election districts have been revised, and the number of Trustees on the Board is currently being reduced. New counsel has been retained by the Board, and new Trustees have been elected to the Board.

Nevertheless, almost two years after the Court resolved all issues related to declaratory judgment and the Bylaws, Defendant now asks this Court (on the basis of minimal pleadings) to exercise continuing supervision of the Cooperative's business and governance decisions and to substitute the Court's determinations for those of the duly elected Board of Trustees. Defendant

and her counsel wish to have the Court take this extraordinary step without *any* allegations of fraud or misconduct of *any* type by the Cooperative or any member of the Board.

With due respect to this Court and its authority, Plaintiff SEC does not believe that the Court has the lawful ability to circumvent the normal structures of corporate governance, suppress the decisions of the democratically elected Board of Trustees, and impose a positive duty to act on a corporate party, particularly where there are no allegations of wrongdoing. As was previously presented to the Court in Plaintiff's *Memorandum Brief* filed on or about October 13, 2012, in New Mexico "if in the course of management, directors arrive at a decision, within the corporation's powers and their authority, for which there is a reasonable basis, and they act in good faith, as a result of their independent discretion and judgment, and uninfluenced by any consideration other than what they honestly believe to be the best interests of the corporation, ***a court will not interfere with the internal management and substitute its judgment for that of the directors….***" *White on Behalf of Banes Co. Derivative Action v. Banes Co.*, 116 NM 611, 615, 866 P.2d 339, 343 (1993) (emphasis added).

In the current Motion, Defendant is specifically requesting that the Court interfere with the internal management of the Cooperative by reinterpreting the language of used in the Bylaws and by voiding the procedures enacted by the Board and management to address member proposals passed at district meetings. See, *Section III* below. To the extent that such a request clearly violates established New Mexico law and precedent, Plaintiff asks that the current Motion be denied.

III. Current Procedures for Member Resolutions

In the current Motion, Defendant and her counsel, either deliberately or through gross neglect, provide this Court with neither a full discussion of the relevant Bylaws at issue, nor do they provide any discussion of the procedures now being followed by the Cooperative.

A. Relevant Socorro Electric Bylaws.

The New Mexico Rural Electric Cooperative Act (RECA) provides, at NMSA §62-15-3(N), that "a cooperative shall have the power to:…adopt, amend and repeal bylaws consistent with the [RECA]…." To put this statutory permission into effect, Article XIII, §1 of the SEC Bylaws establishes that the Bylaws can be amended "by the members at any regular or special meeting, providing that notice of such meeting shall have contained a copy of the proposed alteration, amendment or repeal."

The Bylaws then go on to provide limitations for how and when a proposal for amendment may be published for "notice" as required by Article XIII, §1. A proposal is to be included in the published meeting notice:

1) "when such proposal is approved by the majority vote of the Board of Trustees;" or,
2) "when approval by the majority vote of the members at a regular or special meeting;" or,
3) "upon petition signed by 10% of the members of each of the districts of the Cooperative." See, SEC Bylaws, Article XIII, §2.

Specifically, Article XIII, §2 does ***not*** provide a mechanism for proposals to go directly from a district meeting to presentation for vote at the general annual meeting. Rather than proceeding directly to a vote on proposals arising in district meetings, the current Bylaws

establish that any such proposal "…must be reported and submitted for consideration at the next succeeding annual meeting or special meeting [of the] members if the resolution so provides." See, SEC Bylaws, Article XIII, §12. Thus, the Bylaws themselves establish a distinction between proposals that are to be voted on at the annual meeting and those which are merely to be "considered."

B. Procedures for Consideration of Proposals.

In an attempt to give full effect to all sections of the SEC's Bylaws, the Board has established reasonable procedures for acting on proposals that arise in district meetings. First, the Board considers such proposals independently to determine if a majority of the Board of Trustees would vote in favor of providing notice of the proposal at the upcoming annual meeting. In reviewing the current proposals, the majority of the Board has declined to provide such notice, and there have been no allegations that any Trustee acted in bad faith when making this determination.

Second, the Bylaws clearly provide that notice of a proposal will be published and a vote will be held if 10% of all members of each district request such action. In relation to the current proposals, Defendant has voluntarily chosen *not* to use this "petition" method of having proposals published for notice and scheduled for vote at the upcoming annual meeting.

Thus, under Article XIII, §2, the current proposed amendments can *only* be published for notice and voted on *after* a majority of the members at a regular or special meeting of the general membership vote to in favor of such action. Since no special meeting has been held in relation to these proposed amendments, the vote for publishing and notice must occur at the upcoming annual meeting. At that point, if the membership votes for publication of the proposals, then the

proposals will be voted on at the 2014 annual meeting (or at a special meeting, should the requirements for such a meeting be met). In light of this two-step procedure, the meaning of the term "considered" becomes clear. Where a proposed Bylaw amendment arises in a district meeting, and it has the support of *neither* the majority of the Board of Trustees *nor* 10% of the membership, this proposed amendment will be presented for "consideration" at the annual meeting. If, after such consideration and discussion, the members vote in favor of formal publication and notice, then the amendment will be voted on as a formal proposed amendment a the following annual meeting.

C. Justifications for Procedures.

Plaintiff SEC recognizes that in the current circumstances, the procedure outlined above require two separate votes at two separate annual meetings in order for certain amendments to be made. However, where a proposed amendment: a) fails to have the support of the majority of the Board of Trustees; b) fails to gain the support of 10% of the members in each district; and, c) fails to gain adequate support to justify a special meeting of the membership, then such a delay is entirely appropriate, if only to give Trustees, members and management time to soberly consider the implications of a proposed amendment.

Such sober consideration is particularly necessary in the current circumstances. While Defendant and her counsel have failed to provide the Court with any discussion of the underlying proposed amendments, it is clear that at least two of the proposals are in direct conflict with the plain language requirements of the RECA. At NMSA §62-15-8 (C), the RECA specifically requires that any *three* trustees may call a special meeting of the members. One of the proposed amendments which Defendant seeks to have considered at the annual meeting would permit such

a special meeting to be called by only *two* trustees. Additionally, the same section of the RECA requires a special meeting to be held on petition by "not less than 10% of the members." One of the proposed amendments impermissibly reduces this requirement to only 6%.

In addition to these statutory prohibitions, there are procedural questions surrounding the passage of the proposals at the district meeting level. A review of the draft minutes of the district meeting indicates that certain proposals were passed after a quorum was lost, thus making the proposals invalid.

Finally, to the extent that the proposed amendments may increase costs to the Cooperative (and thus to the members) and that the proposals may additionally undermine the governance of the Cooperative, the Trustees owe a fiduciary duty to the Cooperative to engage in a full review and analysis of the proposals, present this information to the membership, and to otherwise act in the best interests of the Cooperative. Following a set of reasonable procedures which provide time for such analysis and dissemination of information is entirely reasonable and is within the sound business discretion of the Board.

IV. Reduction of Number of Trustees

At Paragraphs 11 – 14, in approximately 100 words and without *any* substantive explanation, Defendant and her counsel attempt to introduce another complex business determination into their "emergency" motion. This matter addresses the current composition and voting rights of the Board of Trustees.

As this Court may recall, when this litigation began, the Socorro Electric Board of Trustees was comprised of 11 members. Through attrition and re-election the Board has been reduced to the current 7 members, representing 5 newly re-drawn member districts. Two of the

Trustees represent areas which were eliminated during the redistricting process. Thus, each of the five present districts has one Trustee on the Board. However, the two additional Trustees were properly elected under the old district map, and under the current Bylaws (Article V, § 2) each duly elected Trustee is entitled to complete his or her term in office. When the membership voted to reduce the number of districts, the members failed to amend the Bylaws to allow for the removal of duly elected Trustees whose districts may have been eliminated. Pursuant to the current Bylaws (Article V, §5), duly elected Trustees may only be removed under certain specific circumstances, none of which are presently applicable.

Similarly, the member-enacted Bylaw amendments fail to address the issue of voting rights for Trustees, and currently all duly elected Trustees, including those whose districts have been merged or eliminated have a continuing right to vote and otherwise participate in Board affairs. (Article V, § 7). Thus, the member-enacted Bylaw amendments which were the subject of the Cooperative's original declaratory judgment action have *created* the current situation. Yet now Defendant and her counsel are attempting to blame the Trustees for the difficulties created by the 2010 amendment, and to ask this Court (without the benefit of any background or substantive briefing) to make binding determinations to alleviate those difficulties.

The Board has already accepted its duty to resolve these difficulties, and the Trustees have acted in their business judgment to stagger the reduction in the overall number of Trustees following redistricting. This procedure satisfies the conflicting requirements of the Bylaws while preserving institutional knowledge regarding Cooperative governance and easing the transition to a smaller Board.

As with the issue of proposed amendments discussed above, the Board has acted properly and within its business judgment to put into effect a reasonable procedure for addressing

conflicts with the current Bylaws, conflicts which were beyond the control of the Board or the individual Trustees. There have been no allegations to the contrary. Under these circumstances, this Court does not have the authority to set aside the business decisions of the elected Board and impose its own solutions on the Cooperative. Plaintiff SEC therefore asks that the Court deny the current "emergency" Motion as to all issues associated with voting districts and Board composition.

V. Request for Rule 1-011 Sanctions

Pursuant to N.M.R.C.P. 1-011 (2012), an attorney signing and presenting any motion to a court of this State thereby affirms that there are good grounds to support said motion. As the discussion above has established, in presenting the current "Emergency" Motion, Defendant and her Counsel had no such good grounds for support. The standards for seeking an "emergency" motion are clear, and there is no colorable argument that counsel could have reasonably believed that the issues presented in the current motion satisfied these requirements. There is simply no threat of irreparable harm to Defendant or to *any* member of the Cooperative. Similarly, there are no reasonable grounds to believe that this Court's June 2011 *Order* provides any basis for continuing oversight of the Cooperative's Board or that the findings and conclusions of that *Order* in any way address the specific issues Defendant now seeks to bring before this Court. Furthermore, the current Motion contains no allegations of any duty as between Plaintiff Socorro Electric Cooperative and Defendant, nor are there any allegations of any type of damage to Defendant or anyone else. Both of these basic pleading failures render the current motion baseless.

Defendant's Motion contains no allegations of fraud, negligence or any other wrongful act, nor are there any allegations that the Board is acting outside its lawful authority. Under these circumstances, there are no grounds to believe that the procedures and decisions of the Board are motivated by anything other than reasonable business judgment and a sincere concern for the best interests of the Cooperative.

The current "Emergency" Motion was also filed willfully, insofar as counsel for Plaintiff Socorro Electric stated clear opposition to the Motion and urged Defendant's counsel to refrain from filing a baseless, frivolous Motion.

Therefore, pursuant to Rule 1-011, Plaintiff requests that this Court strike the current Motion and order such disciplinary or other action as the Court finds to be in the interests of justice.

WHEREFORE, premises considered, Plaintiff Socorro Electric Cooperative asks that this Court FIND that the Defendant has failed to establish the existence of an emergency sufficient to justify the filing and consideration of the current Motion and that the Court has no authority to consider substitute its judgment for that of the duly elected Board of Trustees as to matters of corporate procedure and governance, including presentation of proposed Bylaw amendments and the reduction of the size of the Board itself. Plaintiff further asks that the Court FIND that the instant "Emergency" Motion was willfully filed without good grounds to support it. Based on these findings, Plaintiff asks that the Court DENY Defendant's Motion in its entirety, including Defendant's request for attorney's fees, that the Court GRANT Plaintiff's request for Rule 1-011 sanctions against Defendant and/or her counsel, and that the Court GRANT any other and further relief as this Court may find to be in the interests of justice.

Respectfully submitted,

FOSTER & MOSS, P.C.

/s/ Darin M. Foster__
Darin M. Foster
Nicole W. Moss
620 Roma Ave. NW
Albuquerque, New Mexico 87102
Counsel for Cross Claim Defendants

CERTIFICATE OF SERVICE:
I certify that a copy of this
Motion was served by the Court's
electronic filing system to the following
counsel of record on this 22nd day of April 2013.

William Ikard *I* Jordan Haedicke
Ikard Wynne LLP
2801 Via Fortuna, Bldg. 7, Ste. 501
Austin, TX 78746

Lee Deschamps
Deschamps & Kortemeier Law Offices, P.C.
P.O. Drawer 389
Socorro, NM 87801
575-835-0777
Fax 575-838-2922
Counsel for Cross Claim Plaintiff

/s/ Darin M. Foster
Darin M. Foster