

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.

**PLAINTIFF'S MOTION TO DISMISS FOR FAILURE TO**

**JOIN INDISPENSIBLE PARTY**

Cross Claim Defendants Socorro Electric Cooperative, Inc., *et al*, by and through their counsel of record, Kennedy & Han, P.C., hereby bring this, their Motion to Dismiss for Failure to Join Indispensible Party pursuant to New Mexico Rule of Civil Procedure 1-019. By and through this Motion, Cross Claim Defendant seeks to dismiss the current suit based on the fact that the current Cross Claim Plaintiff, Mr. Charles Wagner, is himself an indispensable *Cross Claim Defendant* in this matter.<sup>1</sup> In support of this Motion, Defendants state as follows:

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<sup>1</sup> For purposes of simplicity and ease of reading, Cross Claim Defendants are referred to throughout this Motion as "Defendants." Cross Claim Plaintiff is similarly referred to only as "Plaintiff".

## **I. Introduction.**

On or about August 24, 2010, Plaintiff filed an unverified Cross Claim and Request for Class Action Certification in the current matter. The Cross Claim was brought against the Socorro Electric Cooperative, Inc. (hereinafter “Cooperative”) as an independent corporation, and against fourteen individuals. Thirteen of these individuals are current or past Trustees of the Cooperative, and one individual is a past general manager of the Cooperative.

As has been more thoroughly presented and discussed within Defendant’s Motion to Dismiss, Defendant Wagner has brought suit on the basis of numerous vague and broadly plead issues, each of which appears to be largely directed against the Trustees based on policies and procedures of the Board over an unspecified time period.<sup>2</sup> Without making *any* specific allegations against *any* individual, Defendant Wagner has asserted that the various Trustees have received excessive compensation, engaged in wasteful spending, improperly failed to distribute patronage capital, and have operated the Board under improper voting requirements. Yet, while Plaintiff Wagner has used his Cross Claim as an opportunity to raise and publish a long series of unsupported, general allegations against the named Trustees and the Cooperative’s former general manager, Mr. Wagner has intentionally failed to inform the Court that he, himself, has long been and remains a Trustee of the Cooperative.

While Defendants have and continue to deny any and all allegations of wrongdoing and/or breach of duty to the Cooperative and the membership, the facts presented below clearly establish that Mr. Wagner was elected into office under the same voting rules as the currently named Trustee Defendants. He received compensation under the same policies as the currently

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<sup>2</sup> Plaintiff hereby adopts and incorporates, as if fully stated herein, all statements and arguments of fact and of law presented in Defendants’ Motion to Dismiss based on Lack of Standing, a Motion to Dismiss based on Failure to Properly Plead under Rule 1-009(b), a Motion to Dismiss for Lack of Subject Matter Jurisdiction, and a Motion for Partial Summary Judgment as to Claims Based on Denial of Voting Rights., all filed concurrently with this Motion.

named Trustees. Mr. Wagner received health insurance coverage under the same policies as the currently named Trustee Defendants. He has received payments for mileage, for hotel room charges, for dinners, for training programs, and for travel, all under the same policies as the other named Trustee Defendants. Additionally, Mr. Wagner has brought a complex and expensive suit against the Cooperative which he has a fiduciary duty to serve, and which he (and his counsel) now know may directly harm the interests of the Cooperative and its membership by requiring the Cooperative to expend a considerable amount of its limited time, money and resources litigating unfounded claims at a time when the Cooperative itself is facing great financial difficulty.

Once again, Defendants deny all allegations of wrongdoing. They reasonably believe that they have complied with all requirements imposed by New Mexico statute and by the Cooperative's Bylaws. Defendants believe that any and all decisions made by the Trustees, officers and employees of the Cooperative do, and will be shown to, satisfy the requirements of the business judgment rule. However, should the Court permit the current suit to proceed beyond the pleadings stage, it is necessary that ***all trustees*** who have served on the Cooperative's Board of Trustees during the relevant time period be joined as named Defendants in this litigation. Defendants therefore request that the Court dismiss the suit entirely on the grounds that the any judgment rendered in the suit as the parties currently stand will be inadequate to resolve the issues and will unreasonably prejudice the named individual Defendants.

## **II. Material Facts in Relation to Mr. Charles Wagner.**

Defendants reasonably believe that, in the interests of justice and to render an informed judgment on the current Motion, the Court must be made aware of the following undisputed facts.

1. Mr. Charles Wagner was first elected as a Trustee of the Socorro Electric Cooperative on or about October 22, 2005. See, First Affidavit of Joseph Herrera, attached hereto as Exhibit A.
2. Mr. Wagner was elected as Trustee for the Cooperative's District Five. See, Exhibit A.
3. Mr. Wagner was properly and duly elected, following the relevant procedures established by statute and the Cooperative's Bylaws in effect at that time. See, Exhibit A.
4. In 2006, Mr. Wagner traveled to, and received compensation for attending, including per diems and travel expenses, out-of-state trips to: Orlando, Florida; San Diego, California; Washington, D.C. (twice); Snowmass, Colorado; Wyoming (twice); Denver, Colorado; and, St. Louis, Missouri. See, Exhibit A.
5. In 2006, Mr. Wagner additionally made numerous trips to Taos, Santa Fe, Albuquerque, and Moriarty, and he received compensation and per diem for each trip. See, Exhibit A.
6. In 2006, Mr. Wagner received healthcare coverage from the Cooperative, at a total cost to the Cooperative of \$13,432.61. See, Exhibit A.
7. In 2006, Mr. Wagner received total compensation from the Cooperative of \$47,393.70, of which \$31,766.28 was taxable income. See, Exhibit A.

8. In 2007, Mr. Wagner worked for 3.0 hours per week on Cooperative business. See, Exhibit A.
9. In 2007, Mr. Wagner traveled to, and received compensation for attending, including per diems and travel expenses, out-of-state trips to: San Antonio, Texas (three times); Las Vegas, Nevada (twice); Denver, Colorado (twice); Washington, D.C; and Reno, Nevada. See, Exhibit A.
10. In 2007, Mr. Wagner additionally made numerous trips to Santa Fe, Ruidoso, and Albuquerque. He received compensation and per diem for each trip. See, Exhibit A.
11. In 2007, Mr. Wagner received healthcare coverage from the Cooperative, at a total cost to the Cooperative of \$16,706.31. See, Exhibit A.
12. In 2007, Mr. Wagner received total compensation from the Cooperative of \$53,448.50, of which \$36,905.65 was taxable income. See, Exhibit A.
13. In 2007, Mr. Wagner worked for 5.25 hours per week on Cooperative business. See, Exhibit A.
14. In 2008, Mr. Wagner traveled to, and received compensation for attending, including per diems and travel expenses, out-of-state trips to: Anaheim, California (twice); and Washington, D.C. (twice). See, Exhibit A.
15. In 2008, Mr. Wagner additionally made numerous trips to Moriarty, Santa Fe, and Albuquerque. He received compensation and per diem for each trip. See, Exhibit A.
16. In 2008, Mr. Wagner received healthcare coverage from the Cooperative, at a total cost to the Cooperative of \$17,774.16. See, Exhibit A.
17. In 2008, Mr. Wagner received total compensation from the Cooperative of \$35,765.85, of which \$26,218.39 was taxable income. See, Exhibit A.

18. In 2008, Mr. Wagner claims to have worked 17.2 hours per week on Cooperative business. See, Exhibit A.
19. In 2009, Mr. Wagner traveled to, and received compensation for attending, including per diems and travel expenses, out-of-state trips to: New Orleans, Louisiana (twice); Las Vegas Nevada (twice); Washington, D.C.; Wyoming (twice); and Nashville, Tennessee. See, Exhibit A.
20. In 2009, Mr. Wagner additionally made numerous trips to Santa Fe, Pojoque, and Albuquerque. Mr. Wagner received compensation and per diem for each trip. See, Exhibit A.
21. In 2009, Mr. Wagner received healthcare coverage from the Cooperative, at a total cost to the Cooperative of \$19,870.59. See, Exhibit A.
22. In 2009, Mr. Wagner received total compensation from the Cooperative of \$54,217.99, of which \$35,244.90 was taxable income. See, Exhibit A.
23. For unknown reasons, the Cooperative's 2009 IRS tax filings show that Mr. Wagner received \$39,198 in taxable compensation in 2009. See, Exhibit A.
24. In 2009, Mr. Wagner claims to have worked 17.2 hours per week on Cooperative business. See, Exhibit A.
25. Beginning on April 17, 2010, the Cooperative instigated a new reimbursement and Trustee expenditure policy, which caps compensation to Trustees at \$10,000 (and the President at \$15,000) per 12 month period, calculated from April 17<sup>th</sup> of one year to the following April 17<sup>th</sup>. See, Exhibit A.

26. Between April 2010 and April 2011, Mr. Wagner traveled to, and received compensation for attending, including per diems and travel expenses, two out-of-state trips to New Orleans, Louisiana. See, Exhibit A.
27. In 2010, Mr. Wagner additionally made numerous trips to Santa Fe and Albuquerque. Mr. Wagner received compensation and per diem for each trip. See, Exhibit A.
28. In 2010, Mr. Wagner received total compensation from the Cooperative of \$10,000. See, Exhibit A.
29. The decline in compensation seen in 2010 and 2011 is in line with the requirements of the newly enacted Cooperative Bylaws, which were equally applicable to all the currently named Trustee Defendants. See, Exhibit A.
30. As a Trustee from 2006 to the present, Mr. Wagner operated under, and was bound by, the same fiduciary duties, contractual obligations, statutory requirements, and Bylaws provisions as each of the other currently named Trustee Defendants. See, Exhibit A.
31. As a Trustee, Mr. Wagner had full and complete access, on an equal status with all other Trustees, to the accounts, records, bylaws and all other information relevant to the operation and governance of the Cooperative since 2006. See, Exhibit A.
32. As a Trustee of the Cooperative, Mr. Wagner has received training in, and knows the difference between, “allocation” of patronage capital and “retirement” of patronage capital. Mr. Wagner also knows that the Cooperative has consistently allocated patronage capital as the financial obligations of the Cooperative have allowed, and he knows that the Cooperative has fully or partially retired patronage capital (ie, has

actually paid money back to the members) in 1997, 1998, 1999, 2001, 2003, 2004, 2007, 2008 and 2010. See, Exhibit A.

33. As a Trustee since 2006, Mr. Wagner has taken part in Board decisions regarding the allocation of patronage capital and the retirement of patronage capital each year since he was began to serve as a Trustee in 2006. Discussions related to the retirement of patronage capital occur on a regular basis at Trustee meetings, in regard to the retirement of allocated capital for the estates of deceased Cooperative members. See, Exhibit A.

### **III. Statements and Arguments of Law.**

#### ***A. Required Joinder of Parties under Rule 1-019.***

Matters of mandatory joinder of parties are controlled by Rule 1-019, NMSA 2011. Rule 1-019 establishes that a party who is subject to the service of process in New Mexico “shall be joined” as a party to an action if:

- a) In his absence complete relief cannot be accorded among those already parties; or,
- b) He claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence leave any of the persons already parties subject to a substantial risk of incurring inconsistent obligations by reason of his claimed interest. Rule 1-019(A)(1) & (2).

Rule 1-019 has been synthesized into a three-part analysis: (1) whether a party is necessary to the litigation; (2) whether a necessary party can be joined; and (3) whether the litigation can proceed if a necessary party cannot be joined. *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 39, 132 N.M. 207, 46 P.3d 668, *cert. dismissed*, 536 U.S. 990, 123 S.Ct. 32,



153 L.Ed.2d 894 (2002). If the litigation cannot proceed without a necessary party, the party is considered indispensable, and the case must be dismissed. *Little v. Gill*, 2003-NMCA-103, ¶4, 134 N.M. 321. While language and intent of Rule 1-019 is clear, application of this Rule of Civil Procedure is highly fact specific, and it requires the Court use its sound discretion to exercise “pragmatic and equitable judgment.” *Gonzalez v. Metropolitan Transp. Authority*, 174 F.3d 1016, 1019 (9<sup>th</sup> Cir.) (discussing joinder requirements of FRCP 19).

Under the specific factual circumstances of the current suit, Mr. Wagner is self-evidently subject to service, and he is an indispensable party under both or either of the requirements presented above. Specifically, Mr. Wagner is an indispensable *Defendant* in the suit, and his attempts to present himself as a Plaintiff make it impossible for the Court to render any meaningful decision in the current suit. Mr. Wagner’s actions subject the current claims to dismissal.

***B. Complete Relief Cannot Be Accorded Among Parties.***

Mr. Wagner, a Trustee himself, has brought suit against his fellow current and past Trustees for various vaguely and generally plead allegations of wrongful conduct, including fraud, fraudulent concealment, breach of fiduciary duty, and breach of contract. In bringing this suit, Mr. Wagner claims to be acting on behalf of the Cooperative’s current membership. See, Cross Claim, ¶9 & ¶16. However, by bringing the suit in this posture, Mr. Wagner himself has insured that neither the Cooperative’s members nor the Cooperative itself will or can receive complete relief. Ironically, by attempting to name himself as class representative, Mr. Wagner has ensured that the class *cannot* achieve the complete relief sought in the Cross Complaint, and that the Cooperative (which the members claim to represent through this shareholder derivative

suit) cannot fully recover for any harms it might have suffered on the basis of improper policies and procedures of the Board.<sup>3</sup>

The undisputed facts presented above establish that Mr. Wagner has been a long-standing Trustee for the Cooperative, that he received substantial compensation from the Cooperative, that he operated and conducted business for the Cooperative under the same policies, procedures, Bylaws, and statutes as the named Trustee Defendants, and that had access to the same knowledge and information as the named Trustee Defendants. If any of the policies, procedures or business decisions of the Board are ultimately found to be in violation of some duty, whether fiduciary or contractual, then this finding will necessarily implicate the actions and compensation of Mr. Wagner. If there is ultimately any finding of fraud or fraudulent concealment by members of the Board, then this too will implicate Mr. Wagner, who would necessarily be found to be complicit for not failing to bring the fraud or fraudulent concealment to light during the six years he has served as a Trustee. If there is to be an accounting and disgorgement of excessive compensation and/or wastefully spend proceeds, then *all* individuals who received compensation or who expended funds during the relevant time period could be liable. This includes Mr. Wagner.

Yet, rather than accept his responsibilities as a Trustee, Mr. Wagner has intentionally and inexplicably sought to attack his fellow Trustees. By and through his Cross Claim, Mr. Wagner has requested that the Court take the extraordinary and expansive step of removing a corporation's entire Board of Trustees, save for one individual: Mr. Wagner himself. See, Cross Complaint, ¶100. Mr. Wagner also seeks a complete accounting of the compensation and benefits paid to all of Trustee Defendants, but he fails to request that the accounting include

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<sup>3</sup> These statements are not intended to, and should not be interpreted so as to, waive any and all rights the Defendants have to challenge the appropriateness of the proposed class representative and the certification of the class at the appropriate time during the conduct of this litigation.

himself. See, Cross Complaint, ¶101. This is despite the fact that has received over \$200,000 in total compensation from the Cooperative under the same rules and procedures each of the Trustee Defendants. Mr. Wagner requests that the Court first step into the business world and determine the “reasonable” compensation for each of the Cooperative’s Trustees and then order a disgorgement of any excessive compensation and benefits. But Mr. Wagner does not wish the Court, or the membership, to examine, or make any determinations in regards to, his own compensation over the years. See, Cross Complaint, ¶102. Similarly, Mr. Wagner requests that the Court reverse the usual burden of proof in civil lawsuits and require the Trustee Defendants to prove that the Cooperative received “real and substantive value” for the compensation paid to the Trustees. See, Cross Complaint, ¶103. But Mr. Wagner does not wish to have this burden placed on himself. Finally, Mr. Wagner seeks to have the Court impose exemplary and punitive damages on the Cooperative’s Trustees, that is, all Trustees except himself. See, Cross Complaint, ¶106.

Once again, the current Defendants do not believe that *any* Trustee has engaged in fraud or fraudulent concealment, has wasted funds, received excessive compensation, or engaged in any acts which would violate their obligations under New Mexico statute or the Bylaws of the Cooperative, or which would violate the presumptions of the business judgment rule. This statement includes any actions undertaken by Mr. Wagner. If the Cooperative held such a belief, it would be bound to bring suit in its own name to protect its interests.

However, if Mr. Wagner truly seeks to give the Cooperative and the membership are to have the type of full accounting he claims to be seeking in his current lawsuit, then Mr. Wagner must be included as a Defendant in the matter, in order that his actions, his compensation, and his expenses may be subjected to the same scrutiny as each of the currently named Trustee

Defendants. Any other course of action prevents complete relief from being accorded to the Cooperative and the membership, and therefore violates the requirements of Rule 1-019.

***C. Substantial Risk of Incurring Inconsistent Obligations.***

Mr. Wagner may also properly be considered an indispensable party under Rule 1-019(a)(2)(b), which addresses the issue of inconsistent obligations. In the current posture of the case, similarly situated individuals, who operated under the same duties, followed the same policies and procedures, and who had knowledge of the same corporate information, would owe separate, inconsistent obligations to the Cooperative and to the membership. In particular, Mr. Wagner would retain possession of any compensation deemed excessive by the accounting Mr. Wagner himself is seeking, and he would not be liable for any wasteful spending he has engaged in. At the same time, as member of the Cooperative, Mr. Wagner would additionally receive any benefits which might flow from the current litigation, while the currently named Trustee Defendants would be expressly barred from doing so. See, Cross Claim, at ¶16 (defining the proposed class). The Cross Claim, on its face, deliberately seeks to create inconsistent obligations among the current and past Trustees of the Cooperative. As such, the Cross Claim violates Rule 1-019(A) to the extent that Mr. Wagner is not included among the named Trustee Defendants.

***D. Inability to be Joined and Need for Dismissal.***

The facts presented above establish that, if this case is to proceed, Mr. Charles Wagner is an indispensable *Defendant* as to all claims being made in the Cross Claim. However, there is no practical mechanism for joining Mr. Wager as a Defendant in a suit where he has already

improperly claimed to be a Plaintiff. Obviously, the same individual cannot serve as a Plaintiff and Defendant in the same suit.

It has long been the rule in New Mexico that, where an indispensable party cannot be joined to a suit, the proper remedy under Rule 1-019 is dismissal of the suit. See, eg. *Montoya v. Dept. of Fin. & Admin.*, 98 N.M. 408, 413, 649 P.2s 476, 481 (N.M. App. 1982). Dismissal is fully justified in this matter, and such dismissal will result in no prejudice or harm to the Cooperative, or the membership. Mr. Wagner retains his right, indeed his duty, to bring matters of concern before the Board. The Cooperative retains the right to investigate Mr. Wagner's concerns, and to bring litigation in its own name if it reasonably believes that there has been wrongdoing. The membership retains its collective right to pursue a derivative action, with a properly named plaintiff, if the membership believes that the Trustees are preventing the Cooperative from acting appropriately or making defensible business decisions.

Under these circumstances, Defendants ask the Court to exercise its sound discretion to dismiss all claims contained in the Counter Claim in their entirety, based on the indispensable nature of Mr. Wagner as a Defendant in the suit, and the inability of the Court to join Mr. Wagner as a Defendant in a suit where he has already claimed to be a Plaintiff. See, *G.E.W. Mech. Contractors, Inc. v. Johnston Co.*, 115 N.M. 727, 730, 858 P.2d 103, 106 (N.M.App. 1993) (discussing discretion of court in joinder matters).

WHEREFORE, premises considered, the current named Cross Claim Defendants request that the Court FIND that Mr. Charles Wagner, the current Cross Claim Plaintiff, is an indispensable Cross Claim Defendant in the current suit and that without Mr. Wagner's presence as a Cross Claim Defendant, the Court will be unable to render and adjudge a full and fair

resolution of the current dispute. Based on these findings, Cross Claim Defendants further request that the Court ORDER the dismissal of all claims made in the current Cross Claims and make any such other and further ORDER as the Court finds to be in the interests of justice.

Respectfully submitted,

KENNEDY & HAN, P.C.

/s/ Darin M. Foster  
Paul J. Kennedy  
Darin M. Foster  
201 12<sup>th</sup> Street N.W.  
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 25th day of January 2012.  
*Pro Se Litigants were served by 1<sup>st</sup> Class U.S. mail.*

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Thomas Fitch and Polly Tausch  
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*Pro Se Litigants*

/s/ Darin M. Foster  
Darin M. Foster

STATE OF NEW MEXICO  
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et al.,

Cross-Claim Defendants.

**FIRST AFFIDAVIT OF JOSEPH HERRERA**

STATE OF NEW MEXICO            )  
  ) ss.  
COUNTY OF SOCORRO            )

I, Joseph Herrera, being first duly sworn upon his oath, hereby depose and state:

- 1) I am over the age of majority and in all other ways competent to give the current testimony.
- 2) I am the current General Manager of the Socorro Electric Cooperative, Inc.
- 3) I have personally examined financial documents, Trustee *per diem* and expense reports, and Internal Revenue Service filings of the Socorro Electric Cooperative, Inc., and I have personally determined, to the best of my ability and understanding, that the following information is true and correct on the basis of these regularly kept business documents.

- 4) Mr. Charles Wagner was first elected as a Trustee of the Socorro Electric Cooperative on or about October 22, 2005.
- 5) Mr. Wagner was elected as Trustee for the Cooperative's District Five.
- 6) Mr. Wagner was properly and duly elected, following the relevant procedures established by statute and the Cooperative's Bylaws in effect at that time.
- 7) In 2006, Mr. Wagner traveled to, and received compensation for attending, including per diems and travel expenses, out-of-state trips to: Orlando, Florida; San Diego, California; Washington, D.C. (twice); Snowmass, Colorado; Wyoming (twice); Denver, Colorado; and, St. Louis, Missouri.
- 8) In 2006, Mr. Wagner additionally made numerous trips to Taos, Santa Fe, Albuquerque, and Moriarty, and he received compensation and per diem for each trip.
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- 14) In 2007, Mr. Wagner received healthcare coverage from the Cooperative, at a total cost to the Cooperative of \$16,706.31.
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- 26) The Cooperative's 2009 IRS tax filings show that Mr. Wagner received \$39,198 in taxable compensation in 2009.
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- 28) Beginning on April 17, 2010, the Cooperative instigated a new reimbursement and Trustee expenditure policy, which caps compensation to Trustees at \$10,000 (and to the President at \$15,000) per 12 month period, calculated from April 17<sup>th</sup> of one year to the following April 17<sup>th</sup>.
- 29) Between April 2010 and April 2011, Mr. Wagner traveled to, and received compensation for attending, including per diems and travel expenses, for two out-of-state trips to New Orleans, Louisiana.
- 30) In 2010, Mr. Wagner additionally made numerous trips to Santa Fe and Albuquerque. Mr. Wagner received compensation and per diem for each trip.
- 31) In 2010, Mr. Wagner received total compensation from the Cooperative of \$10,000.
- 32) The decline in compensation seen after April 2010 is in line with the requirements of the newly enacted Cooperative Bylaws, which were equally applicable to all the currently named Trustee Defendants.
- 33) As a Trustee from 2006 to the present, Mr. Wagner operated under, and was bound by, the same fiduciary duties, contractual obligations, statutory requirements, and Bylaws provisions as each of the other currently named Trustee Defendants.
- 34) As a Trustee, Mr. Wagner had full and complete access, on an equal status with all other Trustees, to the accounts, records, bylaws and all other information relevant to the operation and governance of the Cooperative since 2006.
- 35) As a Trustee of the Cooperative, Mr. Wagner has received training in, and is reasonably believed to know the difference between "allocation" of patronage capital and "retirement" of patronage capital. Mr. Wagner has also been fully informed and understands that the Cooperative has consistently allocated "patronage capital" as the financial obligations of the Cooperative have allowed. Mr. Wagner has been fully informed and understands knows that the Cooperative has retired "patronage capital" ie, has actually paid money back to the membership, in 1997, 1998, 1999, 2001, 2003, 2004, 2007, 2008 and 2010.
- 36) As a Trustee since 2006, Mr. Wagner has taken part in Board decisions regarding the allocation of patronage capital and the retirement of patronage capital each year since he was began to serve as a Trustee in 2006. Discussions related to the retirement of

patronage capital occur on a regular basis at monthly Trustee meetings, in regard to the retirement of allocated capital for the estates of deceased Cooperative members.

FURTHER AFFIANT SAYETH NAUGHT.

  
\_\_\_\_\_  
Joseph Herrera

**SUBSCRIBED AND SWORN TO** before me this 9<sup>th</sup> day of January , 2012, by  
Joseph Herrera.

  
\_\_\_\_\_  
Notary Public

My Commission Expires:

11/2/12  
\_\_\_\_\_