**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 LACK OF STANDING

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 Lack of Standing. By and through the instant Motion, Cross Claim Defendants ask the Court to dismiss the suit in its entirety because the Cross Claim Plaintiff lacks standing to assert causes of action which can only be brought by the Cross Claim Defendant Socorro Electric Cooperative, Inc., and because the Cross Claim Plaintiff has not complied with the clearly established statutory

requirements for bringing a derivative action.[1] In support of this Motion, Defendants state as follows:

## 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 Defendants' various Motions, 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.[2] 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 patron's capital, and have operated the Board under improper voting requirements.

While the Defendants continue to assert that the various claims made by Plaintiff Wagner are unsubstantiated, improperly plead and exceedingly vague, a review of the current Cross Claim reveals that, even if these claims were properly plead, Plaintiff Wagner has no standing to bring them before this Court. This is true even if the factual assertions contained in the Cross Claim are reviewed in the light most favorable to Plaintiff Wagner. Plaintiff lacks the standing to

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[1] 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".

[2] Defendants hereby adopt and incorporate, as if fully stated herein, all statements and arguments of fact and of law presented in the Motion to Dismiss for Lack of Subject Matter Jurisdiction, Motion to Dismiss based on Failure to Properly Plead under Rule 1-009(b), a Motion to Dismiss for Failure to Join an Indispensible Party, and a Motion for Partial Summary Judgment as to Claims Based on Denial of Voting Rights, filed concurrently with this Motion.

bring any cause of action based on breach of fiduciary duty, and there is no contract between Plaintiff and Defendants upon which a breach of contract claim may rest. Similarly, Plaintiff Wagner has no standing to bring a claim for negligence.

## II. Standard of Review.

Defendants have brought the current Motion as a motion to dismiss under Rule 1-012(c), NMRA 2011. However, a challenge to standing addresses the Court's lack of subject matter jurisdiction is typically addressed under Rule 1-012(B)(1). The distinction between motions brought under these two separate Rules is simply one of timing. Motions under Rule 1-012(c) for judgment on the pleadings are properly brought after the close of the pleadings. The standard of review remains the same in both situations. The Court is required to test the legal sufficiency of Plaintiff's claims, and not the factual allegations contained in the complaint, to determine if subject matter jurisdiction exists. *Healthsource, Inc. v. X-Ray Assoc. of New Mexico*, 2005-NMCA-097, ¶16. If, based on this analysis, the Court determines at any time during the litigation that it lacks subject matter jurisdiction, then the Court "shall dismiss the action." See, Rule 1-012(H)(3), NMRA 2011.

## III. Statements and Arguments of Law:

### A. ***Standing to Bring Suit is a Jurisdictional Matter***.

New Mexico Courts have long recognized that when a lawsuit alleges a wrong committed against a corporate entity by one of its directors, that suit must be brought by the corporation itself, in the corporate name. See generally, *Porter v. Mesilla Valley Cotton Products Co.,* 42 N.M. 217, 76 P.2d 937 (1937), citing *Hawes v. Oakland,* 104 U.S. 450 (1881). Unless and until

explicit pleading requirements are satisfied, such a suit cannot be maintained by an individual shareholder. *Id*. This rule exists, in large part, because corporate officers and directors owe a fiduciary duty to the corporation, not to the individual shareholders. *Las Luminarias of the N.M. Council of the Blind v. Isengard*, 92 N.M. 297, 302, 587 P.2d 444, 449 (N.M. App. 1978). This black letter law has been recognized by the United States since the Supreme Court case of *Dodge v. Woolsey*, 59 U.S. 331(1855), yet it is a fundamental principle which Plaintiff Wagner has completely failed to comprehend.

The rule has traditionally been used to prevent a multiplicity of suits in actions where the corporation is an indispensible party to litigation, and where any final judgment would be binding to all shareholders. The rule also prevents "strike suits," such as the current suit, which are brought by a small group of shareholders (or, in this case a single Trustee/member against his fellow Trustee/members) with questionable claims seeking to change corporate policy and challenge corporate business decisions. *Petty v. Bank of New Mexico Holding Co.,* 109 N.M. 524, 533, 787 P.2d 443, 452 (1990). While typically framed in broad terms so as to include corporate entities generally, the rule of corporate standing applies equally to cooperative corporations and to shareholder-owned corporations. See, eg *Hargrave v. Canadian Valley Elec. Coop.,* Inc., 792 P.2d 50, (Okl. 1990) (trustees' breach of fiduciary duty brought in derivative action on behalf of corporation); *Kiam v. Park & 66th Corp.,* 87 A.D.3d 887,888, 929 N.Y.S.2d 240, 241 (N.Y.A.D. 1st Dept. 2011) (equating cooperative members with "shareholders").

As will be discussed below, Plaintiff Wagner lacks the standing to bring claims against the Trustees and officers of the Socorro Electric Cooperative for claims that belong to the Cooperative itself. Standing is an element of subject matter jurisdiction. See, *Disabled American Veterans v. Lakeside Veterans Club, Inc.,* 2011-NMCA-099, ¶14.

In order to possess standing to bring a suit in New Mexico courts, a plaintiff must, at a minimum, asset that he has suffered an "injury in fact" based on a legal right belonging to himself ***personally***. *Does I – III v. Roman Catholic Church of Archdiocese of Santa Fe, Inc.*, 1996-NMCA-094, ¶¶28-29. This traditional rule of standing may only be waived where the litigation addresses "a constitutional question of fundamental importance to the people of New Mexico." *Baca v. N.M. Dept. of Public Safety*, 2002-NMSC-017, ¶4. There is no constitutional or fundamental matter raised in Plaintiff Wagner's Cross Claim.

Except in the limited context of a closely-held corporation (which is not relevant to the current litigation), a shareholder who wishes to bring a direct action against a corporation and its directors must allege that he or she has sustained an injury which is distinct from any injury which may have been suffered by the corporation itself. *Clark v. Sims*, 2009-NMCA-118, ¶¶13-14. This "special injury" must be "separate and distinct from that suffered by other shareholders." *Rael v. Page*, 2009-NMCA-123, ¶12. In the current matter, Plaintiff Wagner cannot establish a legal right belonging to him, nor can he demonstrate a distinct, personal harm. Even broadly and generously interpreting the few alleged facts in favor of Plaintiff Wagner, it is clear that the claims being asserted are claims which belong to the Cooperative itself, not to the individual members.

***B. Trustees Owe Fiduciary Duty to Corporation.***

Throughout his Cross Claim, Plaintiff Wagner repeatedly asserts that his claims are based on the Defendants' breach of their fiduciary duties, which Plaintiff Wagner mistakenly believes are owed to himself and to the class he seeks to have recognized by this Court. This claim of breach of fiduciary duty underlies the allegations contained in Count 2, 5, 9 and 13. However,

none of these claims actually establish any type of fiduciary duty owed to Plaintiff Wagner or the members individually. As discussed above, the only fiduciary duty at issue is that which flows from the Trustees to the Cooperative (and which Plaintiff/Trustee Wagner appears to have broken by bringing a spurious, expensive and wasteful lawsuit against his fellow Trustees). To the extent that neither the Trustees nor the Cooperative manger owed a fiduciary duty to Plaintiff Wagner, there can be no logical claim that he has suffered any personal injury, as opposed to an injury suffered by the Cooperative itself. In such cases, where the corporation *itself* is the only entity capable of suffering a *direct* injury, the fact that a shareholder might be *indirectly* injured is legally irrelevant. *Clark v. Sims*, 2009-NMCA-118, ¶¶8-9. Plaintiff Wagner lacks standing to bring a suit based on an indirect injury, and he has failed to meet the pleadings requirements necessary for the Court to allow this matter to proceed as a derivative action. Therefore, Counts 2, 5, 9 and 13 must be dismissed.

***C. No Contract Exists Between Trustees and Members.***

In Counts 3, 6, 10, and 14, Plaintiff Wagner alters his theory of duty as to his same basic claims. In these Counts, Plaintiff Wagner asserts that a contract exists between each of the named corporate and individual Defendants and himself, and that such a contract exists between the Defendants and each member of the Cooperative. At ¶51 of the Cross Claim, Plaintiff asserts that "the SEC By-laws, by their explicit terms, constitute a valid, enforceable contract. The SEC Articles also, according to the common law of this state, constitute a contract between the SEC (and the Cross Claim Defendants) and its members…." However, these statements are entirely unsupported, and a cursory examination of the relevant documents demonstrates that the legal claims asserted in Cross Claim as to the existence of a contract are patently false.

As a preliminary matter, this Court has no obligation to assume the correctness of any arguments of law contained in the Cross Claim. At this stage of the litigation, the Court must accept all well pleaded facts as true, but the Court is not required to presume the correctness of a plaintiff's arguments of law. See, eg., *Groedyke Transport, Inc. v. N.M. State Corp. Commission*, 85 N.M. 718, 721516 P.2d 689, 692 (1973). Thus, while the Court must properly accept that the Bylaws and Articles exist, the Court need not blindly accept Plaintiff's legal conclusions, particularly when these conclusions are contradicted by the plain language of the documents themselves.

As to the Cooperative's Bylaws, Article VII, Sec. 2, expressly states that "the terms and conditions of the Articles of Incorporation and By-Laws shall constitute and be a contract between the ***Cooperative and each patron***, and both the Cooperative and each patron are bound by such contract…." (Emphasis added).[3] Plaintiff's assertions aside, the plain language of the Bylaws establishes that the contractual relationship is only between the Cooperative and the members. It does not address or concern the Trustees.

Where there is no contract between Plaintiff and the individual Defendants, Plaintiff is unable to meet the basic requirements for standing; ie, he cannot establish a legal right, nor can he establish any injury. For these reasons, Plaintiff's Counts 3, 6, 10, and 14 must be dismissed as against each of the individual Defendants.

***D. Trustees Owe Duty of Care to Corporation.***

Plaintiff's final theory of liability rests on common law theories of negligence. By and through Counts 4, 7, 11, and 15, Plaintiff Wagner asserts that Defendants have breached their

[3] The Cooperative maintains a full and complete set of the current Bylaws on its website. These are available to the public at: http://www.socorroelectric.com/content/laws.

duty of care as to himself and the membership. Yet, Plaintiff has failed to recognize that the individual Defendants owe no duty of care directly to the membership in relation to their actions as corporate trustees. For all of the reasons discussed above, any duty which these individual Defendants may have to conduct themselves in a reasonable and prudent manner as trustees flows to the Cooperative itself, and not to the individual members. Furthermore, the Rural Electric Cooperative Act itself establishes the "Duties of Trustees." See, RECA, §62-15-9.1. In relevant portion, RECA states that a trustee has a duty to act "in a manner the trustee believes to be in or not opposed to the ***best interests of the cooperative*** and with such care as an ordinarily prudent person would use under similar circumstances in a like position." See, RECA, §62-15-9.1(A) (emphasis added). The plain language of RECA thus establishes that a trustee has a duty to act in the best interests of the cooperative, not the individual members of the cooperative. Where a trustee complies with the "prudent person" standard and acts in the best interests of the cooperative, that trustee "shall have no liability to the cooperative or to its members." See, RECA, §62-15-9.1(D).

Where the individual Defendants owe no duty of care directly to Plaintiff Wagner or the members, there can be no direct claim for negligence. The claims flowing from a trustee's or director's negligence or mismanagement of a company may only be asserted in *a derivative action*, and even a derivative claim must be based on actions which occurred while the shareholder owned stock in the particular corporation. See, *Bank of Santa Fe v. Petty*, 116 N.M. 761, 763-64, 867 P.2d 431, 433-34 (N.M.App. 1993) (discussing contemporaneous ownership doctrine).

In the current matter, this means that Plaintiff Wagner does not have standing to bring a direct action against the individual Defendants for any negligence which may have occurred

during their management of the Cooperative. Additionally, Plaintiff Wagner does not have standing to bring even a derivative suit based on any acts of negligence or mismanagement that may have occurred before he became a member of the Cooperative.[4]

For these reasons, Counts 4, 7, 11, and 15 of the Cross Complaint must be dismissed as to the individual Defendants.

### *E. Plaintiff has Not Brought Shareholder Derivative Action Under Rule 1-023.1 and §53-11-47.*

As has been discussed above, only corporations have the right and ability to bring direct legal action against Trustees or other corporate officers to preserve the corporation's interests. However, under limited circumstances, shareholders or members of a corporation may bring a derivative suit, intended to enforce a right of the corporation itself. Such derivative actions are governed by Rule 1-023.1, NMRA 2011, which contains numerous express requirements for the pleading of such matters. These same pleading conditions are imposed by New Mexico statute. See, §53-11-47(A), NMSA 1978. Together, Rule 1-023.1 and §53-11-47(A) establish a series of preliminary actions which must occur before a shareholder can bring suit, and which must be specifically plead in the shareholder's complaint. Additionally, §53-11-47(B) explicitly provides for the award of reasonable expenses and attorney's fees where claims contained in shareholder derivative suits are brought without reasonable cause.

A review of the current Cross Claim reveals that Plaintiff Wagner has not sought to assert a derivative action. The Cross Claim does not state that it is a derivative action, does not cite the proper rules and statutes related to derivative actions, and does not contain the particularized factual pleadings required for a derivative action. For example, under Rule 1-023.1, a plaintiff

[4] Defendants would respectfully point out that, even if Plaintiff Wagner had established proper standing to bring a derivative action, the affirmative defense established by RECA, §62-15-9.1 would still be applicable.

must plead with particularity the efforts he has made to obtain the action he desires from the directors or the comparable authority and from the shareholders or members. Plaintiff Wagner's Cross Claim contains no such particularized pleadings.

For these reasons, even if Plaintiff Wagner now belatedly attempts to characterize his Cross Claim as a derivative action, such an attempt is fruitless. Even as a derivative action, Plaintiff's Cross Claim would be subject to immediate dismissal for failure to satisfy the basic, black letter pleading requirements of Rule 1-023.1 and §53-11-47(A).

WHEREFORE, premises considered, Defendants Socorro Electric Cooperative, *et al*, ask that the Court FIND that Plaintiff Charles Wagner lacks standing to directly assert claims belonging to the Cooperative itself, and that Plaintiff Wagner's current Cross Claim fails to meet the pleading requirements that would be needed to bring a derivative action. Based on these findings, Defendants request that this Court ORDER all claims and counts contained in Plaintiff's Cross Claim to be dismissed with prejudice as to each of the individual Cross Claim Defendants, that the Court award any and all costs and fees for which Defendants may show themselves to be entitled, and that the Court grant any such other and further relief as it may find to be in the interests of justice.

Respectfully submitted,

KENNEDY & HAN, P.C.

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**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 1st Class U.S. mail.*

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