

STATE OF NEW MEXICO  
THIRTEENTH JUDICIAL DISTRICT  
COUNTY OF VALENCIA

THE SOCORRO ELECTRIC COOPERATIVE, INC.  
Plaintiff,

v.

CHARLENE WEST, et al  
Defendants.

Case No: D-1314-CV-2010-849  
Judge: Albert J. Mitchell, Jr.

And

CHARLES WAGNER, individually and as  
representative of the class of "unnamed  
Defendants", being owner/members of the  
Socorro Electric Cooperative, Inc.

Cross Claim Plaintiff,

v.

SOCORRO ELECTRIC COOPERATIVE, INC.,  
et al.,

Cross Claim Defendants.

**RESPONSE TO MOTION TO DISMISS CLAIMS AND FOR JUDGMENT ON THE  
PLEADINGS BASED ON FAILURE TO PLEAD UNDER RULE 1-009(b)**

Carol Auffrey and Herbert Myers,<sup>1</sup> individually and as class representatives,  
("Defendants"), file this Response to the Motion to Dismiss Claims and for Judgment on the  
Pleadings Based on Failure to Plead Under Rule 1-009(b) and show the following:

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<sup>1</sup> Carol Auffrey and Herbert Myers file on behalf of the member/owners on the assumption that the Court will grant Defendants' Motion for Leave to File an Amended Cross-Claim.

## ARGUMENT

1. On January 25, 2012, Socorro Electric Cooperative, Inc., et al. (“Plaintiffs”) filed, among other motions, a Motion to Dismiss Claims and for Judgment on the Pleadings Based on Failure to Plead Under Rule 1-009(b) (“Motion”).

2. The basis of Plaintiffs’ motion is that the Defendants have brought a cause of action for fraud but have failed to properly plead it as required by Rule 1-009(b), NMRA 2011. Plaintiffs are mistaken; no cause of action has been pleaded by Defendants.

3. Moreover, Plaintiffs’ motion is without merit because Defendants have not alleged a cause of action for common law or statutory “fraud”. While Defendants did allege “fraudulent concealment”, fraudulent concealment is not an independent cause of action. E.g., *Mayes v. Stewart*, 11 S.W. 3d 440, 452 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). Although “fraud” and “fraudulent concealment” are similar in some respects they are not the same. Allegations of fraudulent concealment relate solely to the tolling of the statute of limitations.

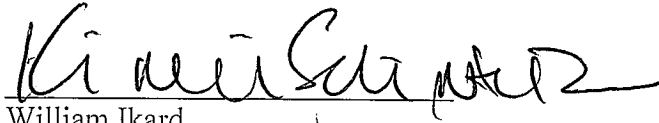
4. Defendants have not, and do not, allege a cause of action for fraud. Therefore, Rule 1-009(b) is not implicated and Plaintiffs’ reliance on it is misdirected.

5. Even if the Court were to find that Defendants failed to meet the requirements of Rule 1-009(b), proper relief would be for the Defendants to file a special exceptions motion and replead claims of fraud with specificity. However, here, because Defendants are not claiming actual fraud, but rather fraud as a procedural matter to toll the statute of limitations there is no violation of Rule 1-009(b).

WHEREFORE, Defendants request that the Court find that Plaintiffs’ Motion is without merit and grant such other and further relief to which Defendants may be justly entitled.

Respectfully submitted,

IKARD WYNNE LLP  
2801 Via Fortuna, Suite 501  
Austin, Texas 78746  
(512) 275-7880  
(512) 275-7333 [Facsimile]

A handwritten signature in black ink, appearing to read "William Ikard", written over a horizontal line.

William Ikard  
State Bar No. 10385500  
Carrie Helmcamp  
State Bar No. 00784243  
Kimberly Selinger  
State Bar No. 24072333

ATTORNEYS FOR DEFENDANTS

***Co-Counsel for Defendants:***

Lee Deschamps  
Steve Kortemeier  
Deschamps & Kortemeier Law Offices, PC  
Post Office Drawer 389  
104 Church  
Socorro, New Mexico 87801  
575.835.2222 (t)  
575.838.2922 (f)

CERTIFICATE OF SERVICE

This is to certify that the foregoing was served on the persons identified below on the date and in the manner stated.

*Via facsimile 505.842.0653*

Paul J. Kennedy  
Darin M. Foster  
201 12th Street N.W.  
Albuquerque, New Mexico 87102

*Via facsimile 575.835.0049*

Thomas Fitch  
Polly Tausch  
Post Office Box 1647  
Socorro, New Mexico 87801

Date: 2.23.12

Kimmi Senter