

STATE OF NEW MEXICO  
THIRTEENTH JUDICIAL DISTRICT  
COUNTY OF VALENCIA

THE SOCORRO ELECTRIC COOPERATIVE, INC.  
Plaintiff,

v.

CHARLENE WEST, et al  
Defendants.  
And

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

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 PLAINTIFFS' MOTION TO DISMISS FOR LACK OF STANDING**

Carol Auffrey and Herbert Myers,<sup>1</sup> individually and as class representatives, ("Defendants"), file this Response to Plaintiffs' Motion to Dismiss for Lack of Standing and show the following:

**ARGUMENT**

1. On January 25, 2012, Socorro Electric Cooperative, Inc., et al. ("SEC" and "Plaintiffs") filed, among other motions, a Plaintiffs' Motion to Dismiss for Lack of Standing ("Motion").

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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.

2. At the outset, as to Charles Wagner's standing to bring this cause, the issue is moot assuming the Court permits the Defendants to file its Amended Cross-Claim. Mr. Wagner is not a named party in the lawsuit as amended.

3. Mr. Wagner's standing aside, it appears that Plaintiffs contend that a member/owner of the SEC never has standing to sue a member of the board of trustees for wrongful or illegal conduct. That contention is unsupportable.

4. Similarly, the Plaintiffs' allegations that the SEC trustees have no contractual relationship with members of the SEC is also moot. Defendants Amended Cross-Claim contains no such claim.

5. Moreover, the SEC by-laws and the Rural Electric Cooperative Act ("Act") anticipate the member/owners having standing in a suit against the board and cooperative by providing explicit detail for when a suit is properly brought by a member/owner against the board. Specifically, section 62-15-9.2(A)(1)-(2) of the Act states that a trustee is personally liable to a member when that trustee breached or failed to perform their duties and when that breach constituted willful misconduct or recklessness. SEC's by-laws echo this language in article 14 section 1. The Act and SEC's by-laws confirm that member/owners have standing to sue the board and SEC and under what conditions liability can be established.

6. Plaintiffs also assert that Defendants do not owe a fiduciary duty to the member/owners. This is untrue. The Defendants are seeking redress for injury to them individually (and to each individual member of the class). For example, the Defendants' suit seeks the refund of their accrued individual patronage capital. The failure of the Plaintiffs to retire patronage capital as required by law is injurious to each individual member.


7. Further, Plaintiffs state that trustees do not owe a “duty of care directly to the membership in relation to their actions as corporate trustees”. See, Motion, 8. Plaintiffs mistakenly rely on section 9.1 of the Act which outlines the duties of the trustees. However, the Act goes on to state in the next section that a trustee can be personally liable to the member/owners if they have acted with willful misconduct or recklessness. The Act and the SEC by-laws, moreover, establish the trustees’ duty of care owed to the members in clear and unequivocal language. To suggest no such duty exists ignores the plain language of the Act and SEC by-laws.

8. Lastly, Defendants did not, nor intend to, bring their Cross-Claim as a derivative action. Generally, it is commonly understood that a derivative action is a procedural device created by statute. It provides a means for a shareholder to bring a claim (which the corporation has) against the corporation’s board and/or management. In effect it is a fiction created by statute to redress wrongs which would not be pursued by the corporation’s board or management. On the other hand, a derivative action is different from and governed by rules other than a class action. This suit is brought as a class action by individuals who are members of the SEC on their own behalves and as class representatives of other similarly situated members of SEC. The Plaintiffs’ contentions concerning applicability of derivative actions are wholly without merit.

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,

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

William Ikard  
State Bar No. 10385500  
Carrie Helmcamp  
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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.

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Date: \_\_\_\_\_

2.23.12

*Kimberly S. S. S. S.*