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GERI LYNN SANCHEZ

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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.

**CROSS CLAIM DEFENDANTS' RESPONSE TO  
AMENDED MOTION FOR LEAVE TO FILE AMENDED CROSS-CLAIM**

Cross Claim Defendants Socorro Electric Cooperative, Inc., et al, by and through their counsel of record, Kennedy & Han, P.C., hereby brings this, their Response to the Amended Motion for Leave to File First Amended Cross-Claim, presented to this Court by Carol Auffrey and Herbert Myers on or about March 12, 2012. Cross Claim Defendants recognize that Rule 1-015 encourages New Mexico courts to freely give leave for amendment of a pleading *when justice so requires*. However, based on the unique procedural history and factual background of the current matter, Cross Claim Defendants oppose the current Motion and assert that justice expressly *does not* require the Court to grant the requested leave to amend.

In opposition to this instant Amended Motion, Cross Claim Defendants state as follows:

### I. PROCEDURAL BACKGROUND

1. On or about June 29, 2010, Socorro Electric Cooperative (acting individually and as Plaintiff), filed suit seeking declaratory judgment as to the effect of certain amendments to the Cooperative's Bylaws. See, *Complaint for Declaratory Relief*, filed June 29, 2010.
2. The suit was brought against Defendant Charlene West, as well as all other unnamed member/owners of the Socorro Electric Cooperative, Inc. *Id.*
3. Soon after filing the initial Complaint, and in an attempt to streamline the litigation, Socorro Electric Cooperative, still acting in the capacity of sole named Plaintiff, voluntarily dismissed *all* claims against *all* unnamed member/owners who had not filed an Answer or other responsive pleading as to the underlying suit. See, *Amended Notice of Voluntary Dismissal*, filed Sept. 10, 2010.
4. Various other individual and corporate Defendants were voluntarily dismissed from the suit between September 29, 2010 and March 29, 2011. See, *Voluntary Dismissal of Defendant John R. Gerbracht*, filed Sept. 29, 2010; *Order Dismissing Don Klein, Jr.*, entered March 18, 2011; *Order Dismissing Mountain Mail*, entered March 29, 2011.
5. Mr. Herbert Myers never filed an Answer or other responsive pleading in regards to the original Complaint filed by Socorro Electric Cooperative, Inc. See generally, Case Docket.

6. Ms. Carol Auffrey never filed an Answer or other responsive pleading in regards to the original Complaint filed by Socorro Electric Cooperative, Inc. See generally, Case Docket.
7. On or about August 23, 2010, Cross Claim Plaintiff Charles Wagner filed a Cross Claim & Class Action Certification Request. See, *Cross Claim and Class Action Certification*, filed Aug. 23, 2010.
8. The August 2010 Cross Claim does not mention or discuss any claims brought by or concerning either Mr. Herbert Myers or Ms. Carol Auffrey. *Id.*
9. Almost a year and a half later, on or about February 23, 2012, Mr. Herbert Myers and Ms. Carol Auffrey filed a Motion for Leave to File an Amended Cross Claim. See, *Motion to for Leave to File an Amended Cross-Claim*, filed Feb. 23, 2012.
10. At the time of the Myers/Auffrey filing, Mr. Charles Wagner was the only named Cross Claim Defendant involved in the suit. Mr. Wagner has made no request for leave to amend his Cross Claim.
11. The February 23<sup>rd</sup> Motion was filed by Myers and Auffrey "on the assumption that the Court will grant" the Motion. See, *Motion for Leave to File an Amended Cross-Claim*, filed Feb. 23, 2012.
12. On March 12, 2012, Myers and Auffrey filed an Amended Motion for Leave to File First Amended Cross-Claim. Again, the Amended Motion was not brought by the only named Cross-Claim Plaintiff, Mr. Wagner. Again, Myers and Auffrey stated that they were bringing the Motion "on the assumption that the Court will grant" the Amended Motion. See, *Amended Motion for Leave to File First Amended Cross-Claim*, filed March 12, 2012.

13. On Thursday, March 15, 2012, the Court held a telephonic status conference, at which time the Court orally granted the dismissal of the original Cross-Claim filed in August 2010, and the Court orally granted Mr. Charles Wagner permission to attempt to file an Amended Cross-Claim.<sup>1</sup>

## II. Standard of Review

Pursuant to the relevant portions of Rule of Civil Procedure 1-015(A), NMRA 2011, a party may amend his pleading only by leave of court, and such leave shall be freely granted when justice so requires. However, granting leave to amend is an abuse of discretion when it prejudices the opposing party. *Sanchez v. Saylor*, 2000-NMCA-099, ¶30. Such prejudice is found where permitting amendment would change the nature of the claims, require additional discovery, or increase the time and costs of litigation. *Crumpacker v. DeNaples*, 1998-NMCA-169, ¶36. Similarly, the plain language of the Rule states that a party may amend *his* pleading. The Rule does not allow, or even discuss, the possibility of unknown, unrelated individuals being able to amend the pleadings of the actual named plaintiff.

Furthermore, although the current Amended Motion styled as a motion for Leave to Amend under Rule 1-015, the most critical aspect of the Motion is actually the complete substitution of new Cross Claim Plaintiffs into the suit. Substitution of Plaintiffs is governed by Rule 1-017(A), and is entirely separate from Rule 1-015. Pursuant to Rule 1-017(A), substitution of Plaintiffs will be allowed “where it appears that an action, by reason of honest mistake, is not prosecuted in the name of the real party in interest.” Under these circumstances, “the court may

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<sup>1</sup> After numerous attempts to contact Mr. Wagner’s counsel regarding a proposed draft Order addressing the issues discussed at the March 15<sup>th</sup> conference, counsel for Cross-Claim Defendants has not yet been presented with such a document. The statements contained herein represent counsel’s current understanding of the Court’s ruling.

allow a reasonable time for ratification...or joinder or substitution of, the real party in interest..." Rule 1-017(A), NMRA 2011. It is the party seeking joinder or substitution which has the burden of demonstrating to the Court that there was an honest mistake which justifies the substitution of the new real parties in interest.

As will be explained below, the current Amended Motion must be denied for numerous reasons. These include: failure to satisfy Rule 1-017(A); failure to address the requirements of Rule 1-013 as to permissive cross-claims; and the failure to demonstrate a lack of prejudice as required by Rule 1-015. The Amended Motion for Leave to Amend Cross Claim may properly be denied on each or all of these grounds.

### **III. Current Motion is Improperly Brought in Violation of Rule 1-017**

Without belaboring the point, it is self-evident that the only individual with standing to bring a Motion to Amend the Cross Claim is the current Cross Claim Plaintiff: Mr. Charles Wagner. Yet, Mr. Wagner does not bring the current Amended Motion. The Amended Motion is brought by two unknown individuals who have never participated in the current litigation: Mr. Herbert Myers and Ms. Carol Auffrey. A review of the Amended Motion demonstrates that it does not contain a single comment or affirmation from Mr. Wagner as to why the Court should permit the substitution of Mr. Myers and Ms. Auffrey. The Amended Motion does not assert that Mr. Wagner filed his Cross Claim improperly, or that it was "an honest mistake" that the Cross Claim was not originally filed in the name of Mr. Myers and Ms. Auffrey. Cross Claim Plaintiff Wagner does not affirm that Mr. Myers and Ms. Auffrey are the real parties in interest to the Cross Claim. Cross Claim Plaintiff Wagner does not state that he wishes to personally dismiss his claims against the Cross Claim Defendants and allow Mr. Myers and Ms. Auffrey to