

**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 RESPONSE TO MOTION FOR ATTORNEY'S FEES**

Plaintiff Socorro Electric Cooperative, Inc. hereby brings this, its Response to Defendants' Motion for Attorney's Fees filed by Defendants Fitch and Tausch on June 29, 2011.

In support of this Response, Plaintiff states as follows:

**I. Attorney's Fees Not Recoverable Under Declaratory Judgment Act or Exception to "American Rule".**

"The rule in New Mexico is that absent a statute or contractual provision allowing them, attorney's fees are not recoverable....The only exceptions to this rule are narrowly defined."

*McKinney v. Gannett Co., Inc.* 660 F.Supp. 984, 1025 (D.N.M. 1981) (citations omitted). In the current matter, there is no statute or contractual provision which provides for the awarding of attorney's fees, and there is no applicable exception to New Mexico's general rule.

In Plaintiff's Response to Motion for Attorney's Fees, filed with this Court on July 1, 2011, Plaintiff addressed numerous issues related to the granting of attorney's fees under New Mexico law. Plaintiff hereby restates, and re-affirms as if fully stated herein, all statements of fact and arguments of law contained in the July 1, 2011 filing. Specifically, Plaintiff would reiterate that the Declaratory Judgment Act does not provide for the awarding of attorney's fees, and Defendants have presented no exception to the "American rule" that would allow for a grant of attorney's fees in the current suit. In fact, Defendants Fitch and Tausch have presented *no* statements or arguments of law, whether in the form of case law or statute, which would support their request for attorney's fees. For these reasons alone, Defendants' Motion should be denied.

## **II. Pro Se Litigants Not Awarded Attorney's Fees.**

In addition to Defendants' failure to present any arguments of law justifying an award of attorney's fees, Defendants have also failed to address the general rule of law which holds that pro se litigants are not entitled to an award of attorney's fees. This is true even when those litigants happen to be licensed attorneys. Even where a statute expressly provides for the award of attorney's fees, the Supreme Court has determined that, as a matter of public policy, an award of attorney's fees only serves its purpose when there is a paying relationship between client and attorney. See, *Kay v. Ehrler*, 499 U.S. 432,435, 111S.Ct. 1435, 1436 (1991). When litigation is conducted on a pro se basis, there is obviously no substantive distinction between the client and the attorney. Various state courts have discussed the extent and justification for this general rule.

Arizona state courts have argued that fees are not appropriate because there is no clear attorney-client relationship to be protected. See, *Hunt Invest. Co. v. Eliot*, 742 P.2d 858, 154 Ariz 357 (Ariz App. 1987). The Utah Supreme Court reached a similar conclusion, holding that pro se litigants could not recover attorney's fees, regardless of their professional status. See, *Smith v. Batchelor* (832 P.2d 467 (Utah, 1992). In a case which seems to be almost directly on point with the current suit, the California Supreme Court ruled that a law firm could not recover attorney's fees when one of its attorneys appeared pro se in a breach of contract suit. See, *Trope v. Katz*, 11 Cal.4th 274, 902 P.2d 259, (Cal., 1995). Focusing on the ordinary meaning of the words "attorney fees" the Court reasoned that any award of attorney's fees included only the amounts "a litigant actually pays or becomes liable to pay in exchange for legal representation." *Id.* at 280. Based on this definition, an attorney representing himself simply does not "actually pay" or "become liable to pay" himself (or herself) for legal representation.

Plaintiff does note that the State of Colorado allows an attorney appearing pro se to receive an award of attorney's fees under certain limited conditions. Colorado state courts have awarded attorney's fees on behalf of a pro se attorney who successfully defended himself against a lawsuit which was "frivolous, groundless and vexatious." See, *Wimmershoff v. Finger*, 74 P.3d 529, 530 (Colo.App. 2003). There have been no accusations that the current suit is frivolous or groundless.

In the current case, on or about July 23, 2010 Defendants Fitch and Tausch filed a Special Entry of Appearance and Rule 12B Defenses. In this entry of appearance, the two Defendants affirmatively stated that they were entering the suit on a pro se basis. There is no entry of appearance by the law firm of Fitch & Tausch, LLC, nor did the Defendants represent to Plaintiff or the Court that they were practicing attorneys. Defendants continued to file pleadings as pro se

litigants during the course of this dispute. See, eg, *Motion to Strike*, filed on August 16, 2010; *Reply in Response to Entry of Special Appearance*, filed on August 20, 2010. Certificates of Service filed by Plaintiff expressly stated that documents were being sent to Defendants Fitch and Tausch as pro se litigants. See, eg, Certificate of Service, attached to *Plaintiff's Brief on Primary Issues of Relief*, filed March 30, 2011. While Defendants now assert that they engaged in the current litigation to protect various unnamed member/owners from defaulting, there is no dispute that Defendants themselves are member/owners of the Socorro Electric Cooperative, and that they participated in the litigation for their own benefit.

Because Defendants Fitch and Tausch voluntarily elected to participate in the current litigation on a pro se basis, they are not entitled to an award of attorney's fees. This is true even though both Defendants appear to be licensed, practicing attorneys.

### **III. Lack of Evidence as to Reasonableness of Requested Fees.**

As argued above, Plaintiff believes that this Court should deny Defendants' current Motion in its entirety as a matter of law. However, Plaintiff would additionally point out that Defendants' request fails to provide any factual evidence upon which this Court could make a determination as to the reasonableness of the attorney's fees requested. Neither Mr. Fitch nor Ms. Tausch have provided this Court with an affidavit stating their billable hourly rates in the current matter.

Similarly, neither Mr. Fitch nor Ms. Tausch has shown that their "customary" fee of \$200 per hour is a *reasonable* hourly rate or that the time spent on the litigation of this matter has been reasonable. Counsel simply assert that this is their "normal hourly fee." Defendants have presented no supporting information or affidavits establishing the "average" reasonable rate for

litigation in the 13<sup>th</sup> Judicial District or the overall reasonableness of the amount of time expended effectively sitting “second chair” in this case. Without some objective evidence as to these issues, this Court cannot make an objective determination as to the overall reasonableness of Defendants’ request for attorney’s fees.

#### **IV. Limitation in Time.**

Additionally, a review of the docket demonstrates that the law firm of Kennedy & Han, P.C. entered their appearance in the current matter on September 10, 2010. See, *Entry of Appearance*, filed 9/10/2010.<sup>1</sup> Having reviewed the scope and context of the suit, attorneys at Kennedy & Han, acting on behalf of Plaintiff, voluntarily dismissed the vast bulk of the “unnamed members” who were originally named as Defendants in this matter. Even before September 2010, Plaintiff was actively attempting to dismiss its claims and to minimize the overall costs of the current litigation. Two other Defendants, John R. Gerbracht and Mountain Mail Newspaper, were dismissed by the end of November 2010. During this time period Plaintiff’s counsel indicated to all Defendants and their counsel that Plaintiff would voluntarily dismiss the suit. In the end, only the Defendants represented by the Deschamps & Kortemeier Law Offices, and Defendants Fitch and Tausch, refused to allow voluntary dismissal of the suit. A balancing of the equities suggests that these Defendants should not be rewarded for refusing to minimize costs and continuing litigation which Plaintiff voluntarily sought to have dismissed.

For this additional reason, based on Defendants’ intentional refusal to allow dismissal of the suit, Plaintiffs would request that the Court deny Defendants’ request for attorney’s fees, or,

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<sup>1</sup> Plaintiff notes that in the Response to Motion for Attorney’s Fees filed on July 1, 2011, Plaintiff incorrectly stated that Kennedy & Han entered its appearance on November 9, 2010. This was a clerical error, which does not affect the substance of Plaintiff’s Response.

in the alternative, limit any recovery to fees which were billed or paid before November 30, 2010.

**V. No Basis for Award Against Attorney or Trustees**

By their Motion, and through their conduct during this litigation, Defendants Fitch and Tausch have made it clear that they are genuinely concerned about the source of any funds that might be awarded as attorney's fees. Defendants correctly note that any award of attorney's fees against Plaintiff Socorro Electric Cooperative would in effect be a charge against the member/owners of said Cooperative. However, Defendants then go on to suggest that any potential award of attorney's fees should be imposed directly on Plaintiff's counsel, or the Trustees themselves, despite the fact that they are not parties to this litigation. Such suggestions are entirely inappropriate, and Defendants provide no statements of law which would support the granting of such an award. Defendants are in effect asking this Court to issue a severe sanction against counsel and/or the Trustees for bringing suit. There is nothing equitable in this suggestion, and Plaintiff urges the Court to disregard Defendants' request.

**VI. Existence of SEC Members Legal Defense Fund.**

As a final matter, Defendants Fitch and Tausch themselves draw the Court's attention to the "SEC Member Legal Defense Fund" established and managed by Deschamps & Kortemeier Law Offices. As discussed at length in Plaintiff's earlier Response to Motion for Attorney's Fees (filed July 1, 2011), even if the Court were inclined to award any attorney's fees in this matter, the Court could not make any reasoned and balanced award of attorney's fees unless and until the Court first investigated the alleged "Legal Defense Fund" to determine the assets held by the

fund, the contributors to the fund, the representations made to those individuals in relation to the use of contributed funds, and the ability of the fund to pay the attorney's fees now being requested by Defendants.

### **CONCLUSION:**

Plaintiff has demonstrated that Defendants have no contractual, statutory or common law basis for seeking to recover attorney's fees in the current matter. Additionally, even if there were a basis for the award of attorney's fees in this matter, as pro se litigants Defendants Fitch and Tausch would not be entitled to any such award. Finally, Defendants' counsel have not presented sufficient factual evidence to support their actual hourly rates, the reasonableness of those rates, or the scope of services which underpin the award they are requesting. WHEREFORE, Plaintiff requests that this Court DENY Defendants' Motion for Attorney's Fees in its entirety.

Respectfully submitted,

KENNEDY & HAN, P.C.

"Electronically Filed"  
/s/ Darin Foster, Attorney at Law  
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and

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*Counsel for Plaintiff*

**CERTIFICATE OF SERVICE:**

I certify that a copy of this  
Response was served by the Court's  
electronic filing system to the following  
counsel of record on this 14th day of July, 2011.

s/s Darin Foster

Darin M. Foster

ALL PARTIES ENTITLED TO NOTICE (D1314-CV-2010-0849)

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