

STATE OF NEW MEXICO  
THIRTEENTH JUDICIAL DISTRICT  
COUNTY OF VALENCIA

THE SOCORRO ELECTRIC COOPERATIVE, INC.  
Plaintiff,

v.

CHARLENE WEST, et al  
Defendants.

And

CHARLES WAGNER, individually and on  
Behalf of those similarly situated, et al.,

Cross Claim Plaintiff,

v.

Case No: D-1314-CV-2010-849

Judge: Albert J. Mitchell, Jr.

SOCORRO ELECTRIC COOPERATIVE, INC.;  
et al.,

Cross Claim Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION  
TO RECONSIDER ORDER AWARDING ATTORNEY'S FEES

COMES NOW the Defendants, by and through the undersigned attorney and for  
their response to Plaintiff's Motion to Reconsider Order Awarding Attorney's Fees  
states the motion should be denied for the following reasons:

RESPONSE TO MOTION TO RECONSIDER ATTORNEY'S FEES AWARD

## ARGUMENT

1. Plaintiff has not sought interlocutory language<sup>1</sup> in what it calls “the underlying Order” (Plaintiff’s footnote 1). Plaintiff is making its own tactical decision regarding this litigation (“Plaintiff wishes to preserve its right to appeal this Order upon the entry of a final judgment in this matter”.) and merely wishes to be relieved of the effects of its choice.

It may be that Plaintiff felt an interlocutory appeal would not be granted; it may be that Plaintiff could not demonstrate that an immediate appeal may materially advance the ultimate termination of the underlying litigation. For whatever reason, Plaintiff did not even seek the appropriate statutory language.

Plaintiff has chosen to wait until final judgment before appealing; as a result, Plaintiff elected a position whereby it now cannot request a stay of the judgment (Indeed, Plaintiff has not requested the court to reconsider the underlying judgment). This is Plaintiff’s right and constitutes a decision regarding litigation tactics. Whatever benefits Plaintiff perceives to this decision, there is clearly a downside: i.e. payment of the fees pursuant to an order of this court.

By this Motion, Plaintiff is attempting to gain not only the benefit it perceives from an appeal from a final judgment, but is also attempting to avoid the downside of its preferred tactics.

---

<sup>1</sup> Interlocutory appeals are governed by Sec. 39-3-4, NMSA 2003, and in particular by Paragraph A.

2. The court has found that it is in the interests of justice that the fees be paid and that they be paid within a prescribed period. There is simply nothing in Plaintiff's motion which calls upon the court to reconsider the merits of payment and timing: nowhere in their "Statements and Arguments of Law" do they challenge the finding that the interests of justice require the ordered payment.

Plaintiff simply seeks to deny to defendants the fruits of their labor. Plaintiff simply does not want to make the payment as ordered. Plaintiff merely expresses dissatisfaction with the remedy it does have: repayment in the event Plaintiff's appeal from a "final order" is successful.

Since Plaintiff is not irrevocably committed to an appeal, this may be just another deny and delay tactic. Even with an appeal, it is not clear that the award of reasonable attorney's fees would be set aside:

a. An award of attorney's fees on the basis of reasonable compensation is a finding not to be disturbed unless patently erroneous as reflecting an abuse of discretion. *In re N.M. Indirect Purchasers*, 2007-NMCA-007, ¶ 6, 140 N.M. 879, 149 P.3d 976; and

b. The "abuse of discretion" standard is even more deferential in fee decisions as the district court is intimately familiar with the nuances of the case whereas an appellate court must work from a cold record. *Id.* ¶ 14 (reasoning that the district court

has a unique insight into the value of the attorney's services and may use that insight in assessing the fee award<sup>2</sup>).

3. Nothing obscures the fact that Plaintiff does have a remedy. Plaintiff fails to mention the following equally viable outcomes:

a. The class action suit may be resolved by settlement (which would not preclude consideration of the attorney's fees paid);

b. The class action suit may be resolved on terms favorable to Plaintiff (which could also include recognition of payment);

c. The class action suit may be resolved on terms favorable to the class (which could also include recognition of the attorney's fees paid);

d. An appeal by Plaintiff may be resolved in favor of Defendants and the class (which might result in additional attorney's fees to be paid); or

e. An appeal by Plaintiff may be resolved in favor of Plaintiff (which might result in an order to pay Plaintiff's attorney's fee and which could include recognition of the fees paid pursuant to the instant order).

Arguably, the least likely scenario is precisely the one which Plaintiff urges upon this court: "complicated and costly litigation at the conclusion of any future appeal". By raising this issue, the Court may now properly consider what would make a

---

<sup>2</sup> Which is precisely what the court referenced in discussing the difference in percentages.

repayment “complicated and costly” and whether that is sufficient grounds for a stay of payment.

Plaintiff, through its exercise of litigation tactics, has been instrumental in drawing out resolution of the matters before the court, and now seems intent on further litigation with the concomitant costs to the members of the co-op. Plaintiff has not agreed on proposed stipulations nor has it agreed to a proposed scheduling order, or even proposed its own scheduling order. Plaintiff did not offer anything by way of oral argument on the issues decided. Plaintiff has simply denied and delayed. Plaintiff’s conduct of this litigation raises substantial and real questions of whether the Board of Trustees is, in fact, fulfilling its fiduciary duties to the membership.

It is Plaintiff’s tactics which have created complexity and cost in this litigation. Whether future litigation would be “complicated” or “costly” seems to be a matter within the ambit of Plaintiff’s decisions.

#### CONCLUSION

Plaintiff has apparently elected to wait until the bitter end to seek appellate review. Plaintiff has chosen its litigation tactics. It now seeks approval from this Court, to eliminate the downside resulting from that choice, i.e. immediate payment of Defendants’ attorneys’ fees<sup>3</sup> There is no just reason for further delay, the attorneys’

---

<sup>3</sup> The order references thirty days, presumably from the date of entry of the order (11-3-11).

fees previously ordered should be paid, the Motion for Reconsideration should be denied and Defendants' should be awarded additional attorneys' fees for this response.

Respectfully submitted this 28<sup>th</sup> day of November, 2011.

*\_"Electronically Filed" /s/ Stephen K. Kortemeier\_ 11/28/11smp*

Stephen Karl Kortemeier  
Deschamps & Kortemeier Law Offices, P.C.  
POB 389, Socorro, NM 87801-0389  
575-835-2222 / fax: 575-838-2922  
Attorney for Charlene West, et al.

#### CERTIFICATE OF SERVICE

On the date last written above, a true and complete copy of the foregoing was electronically filed with the Court and a copy thereof was served by the Court's electronic filing system to the following counsel of record:

Darin Foster, Attorney at Law  
Kennedy & Han, P.C.  
201 Twelfth St., N.W.  
Albuquerque, NM 87102

Dennis Francish  
5400 Lomas Blvd. N.E.  
Albuquerque, NM 87110

William Ikard  
Ikard Wynne LLP  
2801 Via Fortuna, Bldg. 7, Ste. 501  
Austin, TX 78746

Thomas Fitch / Polly Tausch  
POB 1647  
Socorro, NM 87801

\_\_\_\_\_/s/ Shiloh Pallante for\_\_\_\_\_  
Stephen Karl Kortemeier

RESPONSE TO MOTION TO RECONSIDER ATTORNEY'S FEES AWARD