

**STATE OF NEW MEXICO  
THIRTEENTH JUDICIAL DISTRICT  
COUNTY OF VALENCIA**

**THE SOCORRO ELECTRIC  
COOPERATIVE, INC.**

**Plaintiff,**

**No. D1314-CV-2010-849**

**v.**

**CHARLENE WEST, et al.,**

**Defendants.**

**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.,  
PAUL BUSTAMANTE, individually and in his  
Capacities as President and Trustee of SEC;  
DAVE WADE, individually and in his  
Capacities as Vice-President and Trustee of SEC;  
LUIS AGUILAR, individually and in his  
Capacities as Secretary and Trustee of SEC;  
MILTON ULIBARRI, individually and in his  
Capacities as Treasurer and Trustee of SEC;  
LEROY ANAYA, individually and in his  
Capacity as a Trustee of SEC; JACK BRUTON,  
individually and in his Capacity as a Trustee of SEC;  
LEO CORDOVA, individually and in his Capacity  
as a Trustee of SEC; PRESCILLA MAULDIN,  
individually and in her Capacity as a Trustee of SEC;  
MANUEL MARQUEZ, individually and in his  
Capacity as a Former Trustee of SEC; DONALD  
WOLBERG, individually and in his  
Capacity as a Trustee of SEC; JUAN GONZALES,  
individually and in his Capacity as a Former Trustee  
of SEC; HAROLD BACA, individually and in his**

**Capacity as a Former Trustee of SEC; HERMAN ROMERO, individually and in his Capacity as a Former Trustee of SEC; and LEOPOLDO PINEDA, JR., individually and in his Capacity as General Manager of SEC,**

**Cross Claim Defendants**

### **HEARING BRIEF ON ISSUES OF VENUE AND CHANGE OF VENUE**

As per the request of this Court, reflected in its Order Regarding Scheduling, Plaintiff Socorro Electric Cooperative, Inc. (“SEC”) and the numerous Cross-claim Defendants, by and through their respective attorneys of record present this Hearing Brief on Issues of Venue and Change of Venue. As will be demonstrated in this Hearing Brief, venue for the current lawsuit is proper where it now rests, in Valencia County, and neither any of the remaining Defendants nor Cross Claim Plaintiff has presented any evidence that they cannot obtain a fair trial in Valencia County. Since New Mexico law does not recognize any judicial doctrines, such as *forum non conveniens*, which would allow for the intra-state transfer of venue, there are simply no grounds for a change of venue in this matter. In support of these arguments Plaintiff/Cross-claim Defendants state as follows:

#### **Establishing Venue:**

In New Mexico, issues of venue are almost entirely controlled by statute. At §38-3-1, *et seq.*, NMSA (1978), the state legislature provided express guidance as to matters of venue for civil lawsuits. The relevant portion of the statute states that “all transitory actions shall be brought in the county where either the plaintiff or defendant, or *any one of them* in case there is more than one of either, resides.” See, §38-3-1(A), NMSA (1978)(Emphasis added).

Alternatively, venue is also proper “in any county in which the defendant or either of them may be found in the judicial district where the defendant resides.” *Id.*

Applying this statutory language to the facts of the current suit, it is clear that Plaintiff has properly brought suit in the 13<sup>th</sup> Judicial District and that venue is proper in Valencia County. Plaintiff’s original suit, while somewhat expansive, did attempt to bring claims against all member/owners of the Socorro Electric Cooperative, Inc. Plaintiff’s original Complaint stated that the SEC provides residential and commercial electrical service in 5 counties in central New Mexico, including Valencia County. No party has disputed this fact. Therefore, the Court may properly presume that since these member/owner Defendants receive electrical service in Valencia County, at least some portion of them resided in the county. Alternatively, it is clear that, at the very least, a certain portion of the Defendants “may be found” in Valencia County and that these Defendants reside in the 13<sup>th</sup> Judicial District.

While Plaintiff is prepared, at the request of the Court, to present documentary evidence as to the residence of the Defendants described above, in the form of member/owner address records, Plaintiff does not believe that Cross-claim Plaintiff is disputing the original validity of venue in Valencia County. Instead, Cross-claim Plaintiff appears to simply be seeking to change venue to an alternative court where Plaintiff could have brought its original suit.

Plaintiff would point out that two Motions now pending before the Court attempt to challenge the current venue. Defendants Polly Ann Tausch and Thomas G. Fitch filed an Entry of Special Appearance and Rule 12(B) Defenses on or about July 23, 2010. Plaintiff has addressed the issues raised in Defendants Tausch and Fitch’s Entry of Appearance in a timely Response, which was filed with the Court on or about August 7, 2010. Plaintiff’s Response clearly establishes the propriety of the current venue by pointing out that even the complaining

Defendants recognize that a certain number of the original member/owner Defendants in this matter resided in Valencia County. The Tausch/Fitch lack of venue defense must therefore be denied.

Similarly, on or about August 23, 2010, Defendant Don Klein filed a Response to Plaintiff's Complaint along with numerous Motions, including a Motion to Dismiss for Mislaid Venue. Plaintiff filed a timely Consolidated Response to these various Motions on or about September 9, 2010. As Plaintiff demonstrated in the Consolidated Response, the statements and claims made in Defendant Klein's Answer and his Motions are so vague as to be incomprehensible. Defendant Klein's Motion to Dismiss for Mislaid Venue, to the best Plaintiff can understand the argument, attempts to intertwine venue with issues of debt collection and unfair trade practices. The Motion makes no substantive argument challenging the propriety of New Mexico's venue statute. Because it makes no relevant or comprehensible legal argument, Defendant Klein's Motion should also be denied.

#### **Procedure and Conditions for Change of Venue:**

As a general matter, New Mexico law continues to recognize the common law premise that a plaintiff is master of his suit. As such, determinations of venue are made solely by the plaintiff, who is limited only by the requirements presented in §38-3-1, *et seq.*, NMSA (1978) when determining where to bring suit. However, even where a plaintiff selects a statutorily proper venue, a defendant may move the Court to change venue under certain express conditions. These conditions are set out in §38-3-3, NMSA (1978). As a preliminary matter, all requests for change of venue must be presented to the Court in a proper motion which is supported by evidentiary affidavits. See, §38-3-3(B) NMSA (1978); *Dugie v. Cameron*, 1999-NMSC-002,

¶11, 126 N.M. 433, 437. The motion and supporting affidavits must establish to the satisfaction of the Court that a defendant cannot obtain a fair trial in the county in which the case is pending. *Id.*<sup>1</sup> The statute provides three express conditions which might raise a question as to the defendant's ability to obtain a fair trial. These include: 1) that the adverse party has undue influence over the minds of the inhabitants of the county; 2) the inhabitants of the county are prejudiced against the party seeking change of venue; and, 3) public sentiment or local prejudice in the county in regard to the case is such that an impartial jury cannot be obtained in the county. *Id.* The statute also allows a party to present "any other cause" which might prevent a fair trial. *Id.*

In the current suit, Cross-claim Plaintiff has not demonstrated that he or the class he seeks to represent cannot obtain a fair trial in Valencia County. There is no evidence that Plaintiff or Cross-claim Defendants have any undue influence over the minds of Valencia County residents, nor is there evidence that the residents of Valencia County are somehow prejudiced against Cross-claim Plaintiff. There is no evidence that Valencia County residents have some particular prejudice or sentiment which would prevent the formation of an impartial jury, should one ultimately be needed in this matter.

Because venue is proper in Valencia County and because neither Defendants nor Cross-claim Plaintiff will be able to demonstrate that they cannot obtain a fair trial in Valencia County, the Court has no grounds to exercise its discretion and change venue.

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<sup>1</sup> For sake of completeness, Plaintiff would note that Subsection (A) of §38-3-3 addresses change of venue where the sitting judge has a potential bias or interest in the litigation. Since no party has raised this issue in the current litigation, it is not addressed or briefed in the current document.

## **Waiver of Venue:**

Focusing specifically on Cross-claim Plaintiff Charles Wagner and the class he seeks to represent in this litigation, Cross-claim Defendants would point out that all questions of proper venue have been waived by the filing of the Cross-claim Complaint.<sup>2</sup> Cross-claims are permissive in nature, and Cross-claim Plaintiff was under no compulsion to bring his claim in the form of a cross-claim. By voluntarily bringing framing his claims as “cross-claims,” Cross-claim Plaintiff has brought himself under long-standing common law which holds that venue for a cross-claim is proper wherever venue was proper for the principal action. A cross complainant is not entitled to a change of venue even where the original suit is entirely dismissed. *Hughes v. Joe G. Maloof & Co.*, 85 N.M. 516, 518, 505 P.2d 859, 861 (1973).

Cross-claim Plaintiff had the option, and the undisputed right, to bring his claims as an independent lawsuit in any appropriate New Mexico court, which would presumably have included Socorro County. Cross-claim Plaintiff did not do so. Instead, he voluntarily brought his claims to Valencia County and submitted to the jurisdiction and venue of this County’s court. It would be an abuse of judicial discretion to allow either a direct or a cross-claim plaintiff to voluntarily bring claims before a court and then to almost immediately request a change of venue. Proper procedure would dictate that the plaintiff seeking to change venue would first need to voluntarily dismiss his suit pursuant to Rule 1-041, NMRA (2010). The claims could then, under the proper conditions, be re-filed. Should Cross-claim Plaintiff wish to have his suit heard in Socorro County, Cross-claim Defendants would suggest that voluntary dismissal and re-filing

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<sup>2</sup> Neither Plaintiff nor Cross-claim Defendants take any position at this time as to whether or not Mr. Wagner has presented a counterclaim or a cross-claim, or whether or not a group of individuals who have been dismissed from the original suit can be brought back into the litigation by way of a class. For purposes of the current Hearing Brief, Cross-claim Defendants recognize that Mr. Wagner has styled his pleading as a Cross-claim, and for purposes of this Brief only, they presume that this label is correct. Cross-claim Defendants expressly reserve the right to challenge the propriety of the “Cross-claim” characterization by and through subsequent motions.

is the proper procedure. Cross-claim Defendants take no position at this time as to whether such dismissal could be effected by stipulation, or if dismissal would require an order of this Court. Making such a determination would require the presentation of a specific proposal by Cross-claim Plaintiff.

**No *Forum Non Conveniens* Procedure:**

As demonstrated above, proper venue has been established in this matter, and the parties opposing venue have no grounds for claiming that continued proceedings in Valencia County will impact the ultimate fairness and impartiality of any future trial. Under these circumstances, Plaintiff and Cross-claim Defendants expect that Defendants and Cross-claim Plaintiff might make a request for change of venue based on matters of convenience and ease of trial. Under clearly established New Mexico law, any such request would have to be denied.

For litigation which involves out-of-state parties and evidence, New Mexico has recognized that the doctrine of *forum non conveniens* has some limited application. The doctrine allows a court which has jurisdiction over the parties and subject matter of the suit, and where venue is proper, to decline to exercise jurisdiction when trial in an alternative, out-of-state forum would be more convenient for the parties, and where the ends of justice would be served. See generally, *Marchman v. NCNB Texas Nat. Bank*, 120 N.M. 74, 898 P.2d 709 (1995).

However, undisturbed, decades-old case law clearly establishes that *forum non conveniens* does not apply to strictly intra-state litigation. See, *Torres v. Gamble*, 75 N.M. 741, 744, 410 P.2d 959, 961 (1966). Where venue is proper, and all parties are New Mexico residents, the Court lacks the requisite authority to decline jurisdiction and attempt to transfer the matter to another New Mexico state court.

Plaintiff and Cross-claim Defendants would also respectfully point out that any claim of any claim of “inconvenience” by Defendants or Cross-claim Plaintiff would be somewhat hypocritical, considering that by recusing multiple state judges these parties have created a clear case of judicial inconvenience. If the Court were inclined to consider matters of judicial convenience and conservation of scarce judicial resources, the balance of the equities would seem to favor moving venue farther from Socorro County and closer to a court within the 10<sup>th</sup> Judicial District.

### **CONCLUSION:**

Plaintiff and Cross-claim Defendants have presented this Hearing Brief at the request of the Court, in order to provide a more comprehensive discussion of matters of venue than would be practical through oral presentation. Based on the statements of law and fact presented above, Plaintiff and Cross-claim Defendants believe that the Court is now fully informed and capable of making the following determinations:

- 1) That venue is properly established in Valencia County;
- 2) That the Motions/Defenses filed by Defendants Tausch, Fitch, and Klein seeking dismissal for lack of venue are without support and should be denied;
- 3) That Cross-claim Plaintiff has not established any proper grounds for a change of venue as to his claims;
- 4) That by filing a cross-claim within the current litigation, Cross-claim Plaintiff has voluntarily waived issues relating to the propriety of venue in Valencia County;
- 5) That under current New Mexico precedent, the Court does not have authority to transfer suits or change venue based on considerations of convenience.



Respectfully submitted,

KENNEDY & HAN, P.C.

"Electronically Filed"

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**CERTIFICATE OF SERVICE:**

I hereby certify that a true and correct copy of the forgoing document was delivered by 1<sup>st</sup> Class U.S. mail, as well as by electronic notification, to the following individuals on December 30, 2010:

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