STATE OF NEW MEXICO
THIRTEENTH JUDICIAL DISTRICT
COUNTY OF VALENCIA

SOCORRO ELECTRIC COOPERATIVE, INC.,

Plaintiff,

v.

CHARLENE WEST, et al.,

Defendants,

No. D1314-CV-2010-0849
Judge: Mitchell
(sitting by designation)

And

CHARLES WAGNER, individually,
Etc, & et al.,

Cross-Claim Plaintiff,

v.

SOCORRO ELECTRIC COOPERATIVE, INC.,

Cross-Claim Defendants.

REPLY TO PLAINTIFF'S RESPONSE TO MOTION FOR ATTORNEYS' FEES

COMES NOW the Defendants, by and through the undersigned attorney and for their Reply to Plaintiff's Response, state:

1. Plaintiff's analysis of Declaratory Judgment Act is misplaced.

Defendants have not made a claim that New Mexico's Declaratory Judgment Act provides a basis for an award of attorney's fees in this matter. Plaintiff has either

misperceived Defendants' arguments or is attempting to confuse the issue by interjecting an immaterial argument.

2. Plaintiff's analysis of *Marron* misses the point.

Plaintiff's analysis of the exception to the "American Rule" approved in New Mexico by *Marron v. Wood*, 55 N.M. 367, 223 P.2d 1051 (1951) is filled with implication and argument against expansion, but ignores the square holding of *Marron* and the successive understanding of that holding as expressed in *Gregg v. Gardner,* 73 N.M. 247, 388 P.2d 68 (1963); *Carbajal v. Candelaria*, 65 N.M. 159, 333 P.2d 1058 (1958); *N.M. Right to Choose v. Johnson*, 1999-NMSC-028, 127 N.M. 654, 986 P.2d 450; and the Tax Court cases previously cited.

Defendants believe this case comes within the square holding and factual setting of *Marron*. As stated in *Marron*, it was a case involving a declaratory judgment in which a declaration of rights as stockholders and directors of the corporation was sought against officers and directors of the corporation and against the corporation itself. *Marron, supra* at 367. Rather than speculate on the "sanction" nature of the award of attorney's fees, it is more instructive to read what the New Mexico Supreme Court said about the trial court's decision to award attorney's fees: the trial court found that the plaintiffs were justified in bringing the suit in question for the protection of the interests of the corporation and were entitled to have assessed against the corporation a reasonable fee for their counsel. *Id.* at 371-72.

The instant case is a declaratory judgment action in which a declaration was sought by the corporation against its member-owners which resulted in a decision by this court declaring those rights (as expressed by the challenged by-law amendments) and protected the interests of the corporation. Thus, the result achieved herein is equal to the result of *Marron*, namely: a declaration of the rights and a protection of the interests of the corporation. It is this understanding of the holding of *Marron*, which has, in fact, been cited with approval, even in cases which did not result in an award of attorney's fees.

In 1958, the New Mexico Supreme Court reiterated it's understanding of what the trial court did in *Marron:* "Attorney's fees were allowed litigating stockholders in *Marron* (citation omitted) to be paid out of the assets of the corporation." *Carbajal v. Candelaria*, 65 N.M. 159, 161, 333 P.2d 1058 (1958). The instant request for attorneys' fees fits squarely within this understanding of *Marron*.

The state supreme court was even clearer in *Gregg v. Gardner,* 73 N.M. 347, 388 P.2d 68 (1963) in specifically referring to the *Marron* result as a recognized exception to the "American Rule": "A third exception was approved in *Marron*, where it was held that the court did not abuse its discretion in ordering an attorney fee to be paid by the corporation on behalf of the parties on each side of a declaratory judgment proceeding seeking a determination of the rights of stockholders and directors of the corporation." *Id.* at 360.

The New Mexico State Supreme Court has shown no indication of its willingness to over-rule *Marron*. In fact, it cited *Marron* with apparent support for its continued viability and application as recently as 1999: *Marron* is cited "as an example of the 'common fund' equitable exception to the American rule as applied to corporations" (where one of many parties having a common interest in a trust fund, at his or her own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he or she is entitled to reimbursement." *New Mexico Right to Choose v. Johnson,* 1999-NMSC-028, ¶¶ 19 & 20, 127 N.M. 654, 660, 986 P.2d 450.

The tax cases previously cited also understood *Marron* in a manner consistent with the above. The citations are not for the purposes of what the tax court held, but for its analysis of *Marron,* an analysis which has remained unchanged and unchallenged in New Mexico for at least forty-eight years; an analysis understood by the tax court[1] and by the federal district court for New Mexico.[2]

Not one of these cases has questioned the "third exception" to the American Rule for litigation over the internal affairs of a corporation on the grounds that such litigation was of a benefit to the corporation and that the corporation was the proper party to pay for the reasonable services of obtaining that benefit. Thus the instant case is squarely

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[1] "With few exceptions, attorney's fees and other expenses incurred by successful litigants in actions involving internal affairs of a corporation, but wherein no pecuniary benefit was sought, have been changed against the corporation". *Harris v. C.I.R., 30 T.C. 635 (1958).*

[2] *Marron* involved prosecution of an action on behalf of a corporation by stockholders of record. The result of the litigation was of some benefit to the corporation and on that ground the court awarded attorney's fees to both sides against the corporation." *McKinney v. Gannett Co,, Inc.,* 660 F.Supp. 984, 1025, (U.S.D.C. D. New Mexico, 1981).

within the facts and the rationale of *Marron*: the Socorro Electric Cooperative, Inc. has received a benefit as a result of these defendants continuing to press for a declaration of the rights of the shareholders in and to the by-law amendments duly passed by the shareholders. This litigation, to date, has specifically been about the internal affairs of the Socorro Electric Co-op., Inc.

It is merely Plaintiff's speculation that attorney's fees in *Marron* were awarded as sanctions: no court discussing *Marron* has rested its analysis on this point. It is merely Plaintiff's speculation that *Marron* is not currently good law or even controlling law. As late as 1999, the New Mexico Supreme Court was citing *Marron* with approval and continued to refer to *Marron* as an exception to the American Rule.

3. This case does not seek to broaden *Marron*.

Again Plaintiff attempts to create a question where there is none. It is true that *Turpin v. Smedinghoff*, 117 N.M. 598, 874 P.2d 1262 (1994); *Gurule v. Ault*, 103 N.M. 17, 702 P.2d 7 (App. 1985) and *Martinez v. Martinez,* 101 N.M. 88, 678 P.2d 1163 (1984) all declined to broaden the holding of *Marron*. However, this is not the case before this court. Defendants' attorneys continue to believe that this case, involving a declaration of the rights of owner/members as against the corporation and its Board of Trustees involves the internal affairs of the corporation and moreover, has conferred a benefit on the corporation, by establishing the supremacy of duly enacted by-law amendments over the self-interest of the opposing Trustees. This ratification of this exercise of

corporate democracy in the face of intransigent Trustee "paternalism" is an unqualified benefit to the cooperative. Defendants are not seeking to broaden *Marron*, they are seeking a straightforward application of its holding and its rationale, as expressed consistently in opinions by multiple courts in several jurisdictions over forty years.

4. Voluntary Dismissal.

Plaintiff, the Socorro Electric Cooperative, Inc., sought this declaratory judgment action in an effort to block the implementation of the by-law amendments. This court originally held that service on "the vast bulk of the 'unnamed members' who were originally named as Defendants in this matter" was ineffective. Since these parties were never served, there was no barrier to dismissing them. Once a party answered, this case could not be dismissed without their consent. Consent to dismissal was tantamount to allowing the question of the application of the by-law amendments to remain unanswered. Presumably, the Trustees' would have continued their unwillingness to accept the by-law amendments as binding and the rights, duties and obligations of the parties would be returned to legal limbo. Thus voluntary dismissal would not end the controversy, would not have resulted in recognition of the validity of the amendments and would not have precluded this matter being litigated in the future. It was acceptance by the Trustees of the validity of the amendments and not dismissal of Plaintiff's claim which would have minimized the overall costs of litigation.

Defendants did nothing but agree that the rights, duties and obligations of the parties needed to be declared by a court of competent jurisdiction, notwithstanding Plaintiff's maneuvers.

5. Legal Defense Fund.

Plaintiff ascribes to Deschamps & Kortemeier Law Offices, P.C. actions and activity for which it has no proof, which has not been tested in a hearing, and which, by the very exhibits Plaintiff offers is clearly the work of third parties not associated with counsel for the Defendants.

Exhibit A refers to the firm as Deschamps & Kortemeier, LLC. As indicated above, the law firm is a professional corporation and not a limited liability company. Whoever created Exhibit A was patently unfamiliar with the legal structure of Deschamps & Kortemeier and it is patently not reasonable to assume, as Plaintiff has and would have this court do, that such a document was either authored or approved by Mr. Deschamps or Mr. Kortemeier.

Plaintiff has made no showing that any individual member of the Socorro Electric Cooperative, Inc., has actually submitted such a letter to Deschamps & Kortemeier Law Offices, P.C. A small clue may be garnered from the last full paragraph, wherein Exhibit A references being informed by a named third party, who is not an attorney and is not a member of Deschamps & Kortemeier Law Offices, P.C. in any capacity. Whatever efforts a third-party not associated or controlled by Deschamps

& Kortemeier Law Offices, P.C. may make with regard to this litigation are not properly attributed to the attorneys for the defendants.

Again, whatever actions, reflected in Exhibits B & C, were taken by third-parties are not fairly attributable to Deschamps & Kortemeier Law Offices, P.C. and have no bearing on the instant request for attorney's fees based on *Marron*.

Approximately $900.00 is currently being held in trust by Deschamps & Kortemeier Law Offices, P.C. based on unsolicited (by Deschamps & Kortemeier Law Offices, P.C.) contributions to a "legal defense fund". No decision has been made regarding the disposition of these funds.

6. Conclusion.

Marron is still good and controlling law in New Mexico. *Marron* has been understood by several courts as enunciating the "third exception" to the American Rule and is grounded in the notion that the cooperative has benefited from the declaration of rights, etc. regarding the internal affairs of the Socorro Electric Cooperative, Inc., namely the by-law amendments and therefore it is proper that the cooperative should pay the reasonable value of the services provided.

WHEREFORE, Defendants respectfully request this court to award reasonable attorney's fees for the declaratory judgment portion of this litigation.

Respectfully submitted this 7th day of July 2011.

_____electronically filed ____ /s/_____
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Attorney for Charlene West, et al.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date last written above, a true and complete copy of the foregoing was mailed as follows:

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_____/s/_____
Shiloh M. Pallante