

OIL CONSERVATION DISTRICT

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APPLICATION OF THE NEW MEXICO OIL CONSERVATION DIVISION ("OCD") COMPLIANCE AND ENFORCEMENT MANAGER FOR A COMPLIANCE ORDER AGAINST BLUE SKY NM, INC., DIRECTORS, AND OFFICERS, JOINTLY AND SEVERALLY, FINDING THAT THE OPERATOR IS IN VIOLATION OF THE OIL AND GAS ACT, NMSA 1978, SECTIONS 70-2-1 *et seq.* AND OCD RULES, NMAC 19-15-2 *et seq.*, REQUIRING OPERATOR TO RETURN TO COMPLIANCE WITH DIVISION RULES BY A DATE CERTAIN, AND IN THE EVENT OF NON-COMPLIANCE, REQUEST FOR ADDITIONAL SANCTIONS.

CASE NO. 15277

UNOPPOSED MOTION TO DISMISS

COMES Now, Pete V. Domenici, Jr. and for his Motion states:

1. The Caption in this case requests joint and severally liability against the officers and directors of Blue Sky NM, Inc.
2. In the body of the Complaint there is only one reference against officers and directors with no statutory basis set forth. However, Pete Domenici, Jr. is included in that paragraph described as an "incorporator"
3. An incorporator of a corporation under the New Mexico Corporations Statutes and the Model Corporation Statutes is not an officer and director and is not subjected to personal liability even under the unusual circumstances where officers and directors are sued directly or there is some effort to pierce the corporate veil. 53-12-1, NMSA 1978: Model Business Corporation Act, Annotated § 2.01 (attached with commentary). In *Rand Cook Auto Sales v. Grossman*, 882 N.E.2d 607 (2007), 378 Ill. App.3d 214, the main issue was whether or not the equivalent of New Mexico Rule 11 Sanctions should be levied against a plaintiff who sued an incorporator of a corporation. The Court clearly indicated, "under Illinois case law an incorporator with no other interest or position in the corporation cannot be held liable for the actions of the corporation."

An incorporator has no control or decision making authority over the corporation.

The incorporator's only role is to present the initial corporation papers and to arrange for a Board of Directors to be appointed. A Board of Directors was timely appointed in this matter and two directors are named in this lawsuit.

4. To claim liability against an incorporator would violate longstanding corporation law under which CPA's and attorneys act as incorporators for corporations in which they have no control, ownership or decision making authority, but rather form the administrative act to set up the corporation.

5. Based on the above, Pete Domenici, Jr., incorporator, should be dismissed from this case.

6. Nothing in this motion should be interpreted as consent or agreement that a valid claim for joint and severally liability against officers and directors has been set forth or supported by statute or case law.

7. Opposing counsel has been contacted and agrees with this Motion.

WHEREFORE, Pete Domenici, Jr., incorporator, should be dismissed with prejudice from this matter.

Respectfully submitted,
Domenici Law Firm, PC
Electronically Filed

/s/ Pete V. Domenici, Jr.
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I certify that a copy of the foregoing
was served to counsel of record via
e-mail on March 18th, 2015.

/s/ Pete V. Domenici, Jr.
Pete V. Domenici, Jr., Esq.