

**BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI**

Director of the Manufactured Housing)	
and Modular Units Program of the)	
Public Service Commission,)	
)	
Complainant,)	
)	
v.)	Case No. MC-2004-0079
)	
Amega Sales, Inc.,)	JURY TRIAL DEMANDED
)	
Respondent.)	

MOTION TO DISMISS OR ALTERNATIVE MOTION TO STRIKE

COMES NOW Respondent Amega Sales, Inc., by and through counsel, and for its Motion to Dismiss or Alternative Motion to Strike respectfully states the following:

1. This Motion is directed to the portions of the Complaint in this case which seek findings that Respondent violated §§700.045 and 407.020 RSMo. and request that the Commission take action against Respondent based on those statutes.

2. Section 700.045 is a criminal statute. It states that the commission of any of the acts enumerated in the section constitutes a misdemeanor. In relevant part, §700.045 RSMo. reads as follows:

"It shall be a misdemeanor: To rent, lease, sell, or offer to sell any new manufactured home or new modular unit or used modular unit used for educational purposes manufactured after January 1, 1974, which does not bear a seal as required by sections 700.010 to 700.115."

3. Section 556.016 RSMo. defines the term "misdemeanor." Specifically, §556.016.3 states that a crime is a misdemeanor "if it is so designated or if persons convicted thereof may be sentenced to imprisonment for a term of which the maximum is one (1) year or less."

4. The Complaint in this case seeks a finding from the Public Service Commission (the "Commission") that Respondent violated §700.045 RSMo. Specifically, paragraph 9 of the Complaint references §700.045, and the last paragraph of the Complaint specifically requests a finding from the Commission that Respondent "sold a manufactured home" in violation of §700.045 RSMo. Respondent, of course, denies all such allegations and continues to deny all such allegations.

5. It is well established that the Commission is a creature of the legislature and only has the powers which are expressly conferred upon it by statute and those powers reasonably incident thereto. State of Missouri ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, 596 SW 2d 466 (Mo. App. 1980). The Commission "may not perform the judicial function." Id. at 468. The Commission has no power to determine damages, award pecuniary relief, or declare or enforce any principle of law or equity. Id.; Straube v. Bowling Green Gas Company, 227 SW 2d 666 (Mo. 1950).

6. The Commission has no statutory authority or other legal authority to make a finding of a violation of §700.045. There is no statute which gives the Commission that authority. Furthermore, there is no statute which gives the Director the authority to prosecute an action under §700.045 RSMo. Only the Missouri Attorney General or the county prosecutor has authority to prosecute a misdemeanor.

7. The power to adjudicate a misdemeanor rests solely in the circuit courts of Missouri. State ex. rel. Martin v. Berrey, 560 SW 2d 54 (Mo. App. 1977). A party accused of a misdemeanor has a constitutional and statutory right to a trial by jury. Section 546.040 RSMo.; State v. McClinton, 418

S.W.2d 55 (Mo. banc 1967). Respondent has not waived the right to jury trial concerning the alleged violation of Section 700.045 RSMo. or any other provision of law in this case; in fact, Respondent has demanded a jury trial on all issues in this case and hereby renews that demand.

8. The state has the burden of proving each and every element of a criminal offense beyond a reasonable doubt. State v. Todd, 805 S.W.2d 204 (Mo. App. 1991).

9. The Commission has no authority to adjudicate and determine individual or personal rights because under the Missouri Constitution, the legislature has no power or authority to vest the Commission with judicial powers. Katz Drug Company v. Kansas City Power and Light Company, 303 SW 2d 672 (Mo. App. 1957).

10. Section 407.020 RSMo. declares certain acts to be unlawful practices. Nothing in §407.020 or any other Missouri statute gives the Commission jurisdiction, power or authority to determine violations of §407.020. In fact, if the Commission were to determine that a violation of § 407.020 occurred, that would constitute an exercise of judicial function, and based on the authority cited above, the Commission has no authority to exercise the judicial function. The judicial function is vested in and rests solely with courts of the state of Missouri.

11. The Complaint in this case seeks a finding by the Commission that Respondent has violated §407.020 RSMo. Specifically, paragraph 7 of the Complaint refers to §407.020, and the last paragraph of the Complaint specifically requests a finding from the Commission that the Respondent "sold a manufactured home" in violation of §407.020 RSMo. Respondent denies all such allegations.

12. Nothing in the Missouri Revised Statutes grants the Director the authority to bring any action under §407.020 before either the Commission or any court in the state of Missouri. In fact, only the

Missouri Attorney General, a county prosecutor or a private civil litigant has a cause of action under §407.020.

13. Moreover, Respondent informs the Commission that the Missouri Attorney General has initiated a civil action against Amega Sales, Inc. and others in the Circuit Court of Boone County, Missouri in case number 04CV165070 (the "Boone County Lawsuit"). The Boone County Lawsuit alleges violations of §407.020 by Respondent. Attached to this motion and incorporated herein by reference is a Declaration filed by the Missouri Attorney General in the Boone County Lawsuit on May 26, 2004, which Declaration directly addresses and concerns the Higginbotham home which is the subject of the action before the Commission in this case. Respondent respectfully draws the Commission's attention to paragraph 9 of the Declaration, in which the Missouri Attorney General admits that after attending Mr. Higginbotham's deposition and reviewing the evidence concerning the Higginbotham case, the Higginbotham complaint "could not be sufficiently proved for inclusion in the group of consumer complaints" that form the basis of the Attorney General's action in the Boone County Lawsuit pursuant to §407.020. The undersigned respectfully suggests that this judicial admission by the Attorney General conclusively establishes that no violation of §407.020 RSMo. occurred with respect to the Higginbotham home which is the subject of this action before the Commission.

14. Nothing contained herein constitutes a waiver or abandonment of any other motions made by Respondent or any other defenses or theories advanced by Respondent in this case. All defenses, motions and requests previously filed by Respondent in this cause remain in effect, and no such motions shall be deemed waived or abandoned by the filing of this Motion.

15. Respondent requests and demands a trial by jury with respect to all claims, actions, controversies and disputed facts in this case.

WHEREFORE, Respondent requests the following relief:

- a. That the Commission dismiss those portions of the Complaint in this case dealing with or seeking relief under or seeking findings of violations of sections 407.020 and 700.045 RSMo. and prohibit the Director from presenting evidence regarding alleged violations of sections 407.020 and 700.045 RSMo.
- b. In the alternative, for an order from the Commission striking those portions of the Complaint referring to, alleging violations of and seeking the Commissions finding of violations of §§407.020 and 700.045 RSMo.
- c. Such other and further relief as the Commission deems just and proper.

/s/ Thomas M. Harrison

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The undersigned certifies that a complete and conformed copy of the foregoing document was faxed and mailed to each attorney who represents any party to the foregoing action, by U.S. Mail, postage prepaid in the proper amount, at said attorney's business address.

/s/ Thomas M. Harrison

Dated: May 27, 2004

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MO ATTORNEY GEN

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IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

**STATE OF MISSOURI, ex rel.
JEREMIAH W. (JAY) NIXON,
Attorney General,**

Plaintiff,

v.

GREG DELINE, et al.

Defendants.

Case No. 04-CV165070

**PLAINTIFF'S DECLARATION WITHDRAWING
CERTAIN COMPLAINANT FROM THIS ACTION**

COMES NOW Jeremiah W. (Jay) Nixon, by and through his assistants, Peter Lyskowski and Zora Mulligan, and states as follows:

1. This Court has before it a civil suit initiated by Plaintiff alleging violations of Chapters 407 and 700 RSMo 2000 in the sale and servicing of manufactured homes;
2. The Missouri Public Service Commission ("Commission") is given authority in Chapter 700 RSMo to issue registrations to manufacturers of, and dealers in, manufactured housing;
3. Pursuant to this authority, the Commission is also vested with the power to enforce the registration scheme by assessing civil penalties and taking adverse action against registered manufactured home dealers;
4. The Commission has before it a complaint brought by the Director of the Manufactured Housing and Modular Units Program ("Director") relating to a transaction involving consumer Don Higginbotham and Defendant Amega Sales, Inc.;

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MO ATTORNEY GEN

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5. The action before the Commission seeks civil penalties pursuant to § 700.115.2 RSMo 2000 and suspension of Amega Sales, Inc.'s registration pursuant to § 700.100.3 RSMo 2000 for the conduct alleged in the Director's Complaint;

6. Plaintiff's suit before this Court seeks, *inter alia*, civil penalties pursuant to § 407.100.6 RSMo 2000 and revocation of all Defendants' registrations, where applicable, pursuant to § 700.115.1 RSMo 2000;

7. By order of the Commission dated March 25, 2004, Plaintiff was made a party to the Director's complaint regarding Mr. Higginbotham now pending before the Commission;

8. Pursuant to Plaintiff's nominal involvement in the Commission's proceeding, Plaintiff was given notice of and attended the deposition of Mr. Higginbotham on May 20, 2004;

9. After attending Mr. Higginbotham's deposition and reviewing the evidence in the Plaintiff's possession regarding Mr. Higginbotham's complaint, Plaintiff determined that Mr. Higginbotham's complaint could not be sufficiently proved for inclusion in the group of consumer complaints that form the basis of the Plaintiff's action in this Court;

NOW THEREFORE Plaintiff declares that the action before this Court will be prosecuted on the basis of the other complaints received by Plaintiff, and none of the allegations made by Mr. Higginbotham will be used as a basis for relief sought by Plaintiff; further, that Plaintiff will, in all relevant pleadings henceforth, make note of this declaration.

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MO ATTORNEY GEN

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Respectfully Submitted,
JEREMIAH W. (JAY) NIXON
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ATTORNEYS FOR PLAINTIFF

MAY-26-2004 16:44

MO ATTORNEY GEN

573 751 0924 P.06/06

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered, via facsimile on this 25th day of May, 2004, to:

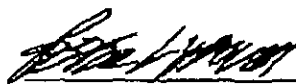
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