

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE 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., )**

**Respondent. )**

**RESPONDENT'S REPLY BRIEF**

COMES NOW Respondent, by and through Respondent's undersigned counsel, and respectfully submits this Reply Brief to the Missouri Public Service Commission.

**I. Introductory Statement**

The Respondent's initial brief in this matter contained arguments concerning both the facts of this case and the law governing this case. The Complainant's initial brief, however, focused almost exclusively on the factual aspects of this case and argued very little concerning the legal issues before the Commission. Therefore, because this is a reply brief, this brief will focus primarily on the factual issues and the fact based arguments contained in the Complainant's initial brief.

**II. Reply to Complainant's Fact -Based Arguments**

**A. Burden of Proof.**

The Respondent reminds the Commission that the burden of proof in this case is on the Complainant. It appears that there is a disagreement over the precise burden of proof (i.e., whether the Complainant is required to prove the Complainant's case beyond a reasonable doubt, as Respondent contends, or whether the Complainant merely must prove the Complainant's case by a preponderance of the evidence). However, there can be no doubt, disagreement or argument that the burden to prove each element of the Complainant's case is on the Complainant. It is not up to the Respondent to prove any affirmative facts.

Because the burden of proof in this case on all issues is on the Complainant, the Commission should disregard all portions of the Complainant's brief in which the Complainant suggests that the Respondent is somehow at fault for failing to come forth with certain evidence. Those types of suggestions are misleading and disingenuous. For example, on pages 17 and 18 of the Complainant's initial brief, the Complainant faults the Respondent for not producing any documentation concerning the terms of the agreement concerning the sale of the Higginbotham Home. It was suggested in that part of the brief that the failure by the Respondent to produce those documents somehow puts the Respondent at "fault" in this case. That is simply incorrect. To take that position is irresponsible because the burden of proof to prove the Complainant's case and all elements thereof is on the Complainant.

B. The Complainant appears to have conceded that A & G Commercial Trucking, Inc. was the actual seller of the Higginbotham Home.

The Complainant's initial brief in this case speaks volumes because of what it does not say on a critical point. There appears to be no argument in the Complainant's initial brief with the position that A & G Commercial Trucking, Inc. ("A & G") was the actual seller of the Higginbotham Home to the

Higginbothams. Nowhere in the Complainant's initial brief is it disputed that the Higginbotham Home was actually sold to Mr. and Mrs. Higginbotham by A & G and not by Respondent.

This really should come as no surprise to the Commission. The reason that the Complainant appears to have abandoned the argument that Respondent was the seller of the home is that there simply was not any evidence, direct or circumstantial, that Respondent was the seller of the Higginbotham Home. All of the evidence was that A & G was the entity that sold the Higginbotham Home to the Higginbothams.

Complainant appears to have conceded this point. As a result, this issue should no longer be considered a disputed issue in this case.

C. The Complaint in this case does not allege that Respondent offered the Higginbotham Home for sale and does not seek a finding that the Higginbotham Home was offered for sale.

A fair reading of the Complaint in this case leads firmly to the conclusion that the Complainant never alleged that the Higginbotham Home was "offered" for sale in violation of the law. The Complaint does not seek a finding from the Commission that the Higginbotham Home was offered for sale in violation of the law. In fact, the last paragraph of the Complaint specifically requests that the Commission find that the Respondent "sold a manufactured home to Don Higginbotham" in violation of several provisions of law. The Complainant does not request or seek any finding that the home was offered for sale.

Now, however, the Complainant appears to be trying to change the Complainant's pleadings and apparently is asking the Commission to find that the Higginbotham Home was offered for sale (See pages 20 and 22 of the Complainant's initial brief). Respondent objects to this attempt. Respondent objects to any attempt by the Complainant, express or implied, to seek to amend or modify the Complainant's pleadings in this case.

The Complainant has apparently realized that the Complainant failed to prove that the Higginbotham Home was sold by Respondent. Now, in an attempt to rescue his case, the Complainant apparently wants the Commission to find that a home was "offered" for sale to the Higginbothams in violation of the law.

The Complaint in this case did not fairly put the Respondent on notice that the issue of whether or not a home was offered for sale was in dispute in this case. The case was not tried on that basis. The Complainant's allegations were only that the Respondent actually sold the Higginbotham Home. Accordingly, the Complainant's attempts to modify the Complainant's pleadings as the Complainant is apparently trying to do should fail.

D. The testimony of Lynn Hanks does nothing to prove any aspects of Complainant's case.

In the Complainant's brief, Complainant argues that the testimony of Lynn Hanks was somehow relevant and somehow advanced the Complainant's case. Respondent disagrees. First, the testimony from Mr. Hanks was that on May 21, 2002, he was to perform the first part of an appraisal without even seeing the home that the Higginbothams were attempting to purchase. He testified that on May 21, 2002, the Form 500 that was admitted into evidence as Exhibit 1 was faxed to him. He did not testify that he saw the home on May 21, 2002. If this initial appraisal was done by Mr. Hanks without having even seen the home, it proves nothing other than what the Respondent is arguing. In May of 2002, Mr. and Mrs. Higginbotham were interested in purchasing a new home and had, apparently, signed a contract to purchase a new home. The undisputed testimony presented at the hearing, primarily from Greg DeLine, was that shortly thereafter, the Higginbothams' credit problems came to light, which meant that they could not and did not qualify for the purchase of the new home that they wanted to purchase. It was after that (and after May 21, 2002) that the Higginbothams necessarily had to change their focus and settled upon a used home

which they ultimately purchased. In other words, the new home transaction represented by Exhibit 1 (the Form 500) which described a different home than the home the Higginbothams purchased never came to fruition because of the Higginbothams' credit problems.

Second, the Complainant's initial brief erroneously stated on page 8 that on August 14, 2002, Mr. Hanks made a "secondary inspection" of the home. That is not the case and that is not what the evidence stated. The evidence was that Mr. Hanks did not even see the home for the first time until August of 2002 at the very earliest. The Complainant's brief on page 8 suggests that Mr. Hanks had made a prior inspection of the actual home before August 14, 2002, which is not the case and was not supported by the evidence.

E. The credible evidence was that the Higginbothams initially wanted to purchase a new manufactured home, but after their credit problems came to light they could only qualify for a used home.

On this point, the Complainant takes a simple, straightforward point about which there was very little disputed testimony and attempts to twist it into something sinister or suspicious.

Both Mr. Higginbotham and Mr. DeLine testified that the Higginbothams initially wanted to purchase a new manufactured home. There was no dispute in the evidence on that point. That fact is further evidence that the Form 500 in evidence as Exhibit 1 was for a home other than the used home that the Higginbothams ultimately purchased and that the Form 500 was actually for a new home which the Higginbothams wanted to purchase.

Mr. DeLine became personally involved in the Higginbotham transaction when the credit problems of the Higginbothams became apparent. Used homes do not cost as much as new homes. A customer does not have to borrow as much money to purchase a used home as the customer would to purchase a

new home. After these developments occurred, Mr. DeLine began discussing the used Higginbotham Home with the Higginbothams, and ultimately they purchased that home.

The sequence of events which the Complainant imagines occurred as described on page 16 of the Complainant's brief is fiction. That version is not supported by the evidence. What is supported by the evidence is that it became apparent to the Higginbothams that they could not afford a new home. Then they looked at used homes and settled on the home that they actually purchased. The Complainant's argument on pages 15 and 16 of his initial brief consists of nothing but speculation and conjecture. Certainly the Commission is allowed to consider reasonable inferences from the evidence, but the guess work which Complainant engages in his initial brief cannot be called a collection of reasonable inferences.

F. Purchase price and sales taxes with respect to the Higginbotham Home.

On pages 18 through 20 of the Complainant's initial brief, the Complainant again manipulates the evidence and suggests unreasonable inferences that the Commission should draw from the evidence concerning the purchase price paid by the Higginbothams for the Higginbotham Home.

It was uncontroverted that the Higginbothams paid \$38,321.63 for the Higginbotham Home. Apparently, the Complainant does not dispute that.

The testimony from Mr. DeLine was that in the summer of 2002, the Higginbothams paid \$40,900.00 to A & G. When the stipulation of settlement was entered into in March of 2003, the Higginbothams received a credit for \$2,578.37, which resulted in the Higginbothams paying a net of \$38,321.63 for the Higginbotham Home. Mr. DeLine testified that he allowed the \$2,578.37 refund to be characterized as a sales tax refund as a matter of expediency.

Should Mr. DeLine have referred to the refund as a sales tax refund if that was not the case? Probably not. Mr. DeLine was very candid with the Commission on this point in his testimony. The bottom line, however, is that the Higginbothams paid a fair price and a reasonable price for what they purchased and that the purchase price of \$38,321.63 was arrived at by negotiation and through a reasonable method.

The Complainant's brief on pages 19 and 20 suggests that the numbers were being manipulated by the Respondent. There is absolutely no factual basis for that argument. First, the Complainant states without citing any authority in the record whatsoever that the sales taxes on a manufactured home being purchased for \$66,478.37 would be \$2,578.37. The Complainant points to no authority in the record for that assertion because there is no such authority. That was simply not part of the evidence.

Next, the Complainant suggests that there is something sinister about the fact that \$40,900.00 less \$2,578.37 equals \$38,321.63. There is nothing sinister or odd about this whatsoever. That is exactly what the parties intended. The Higginbothams paid \$40,900.00 previously. They were given a credit of \$2,578.37, which meant that the "bottom line" in terms of the price that the Higginbothams paid to A & G for the Higginbotham Home was \$38,321.63.

Complainant is guilty of suggesting wrongdoing on the part of Respondent when there was none.

G. Mr. Higginbotham conclusively testified that the Higginbotham Home was not a new home.

The Complainant misleads the Commission on page 10 of the Complainant's brief in which the Complainant states (without citing any authority in the record) that Mr. Higginbotham stated that he purchased a "new" manufactured home from Respondent on May 2, 2002.

Fortunately, there is a record to rely on. Mr. Higginbotham was asked about this during his testimony before the Commission. He testified clearly and unequivocally that the home that he purchased was a used home (Tr. 222-23).

The Respondent cannot imagine any clearer testimony on this point. The Complainant's incorrect and misleading assertions should be disregarded.

H. Despite the Complainant's assertions, Exhibit 1 does not describe or relate to the Higginbotham Home.

There is no question that Exhibit 1 on its face does not describe the Higginbotham Home. It does not list any serial number. It describes a model year 2001 home, and the Higginbotham Home is a model year 2000 home. Both the model year and the serial number of the Higginbotham Home were clearly ascertainable in May of 2002, and the omission of those indicators on the Form 500 strongly suggests that the Form 500 describes a different home.

The purchase price shown on the Form 500 is nowhere close to the purchase price that was actually paid by the Higginbothams. The Form 500 overstates the purchase price that the Higginbothams actually paid by a factor of almost two.



Mr. Higginbotham testified that the Form 500 does not describe the home that he actually purchased (Tr. 229).

Complainant attempts to argue circumstantially that the Form 500 describes the Higginbotham Home. Respondent submits that no circumstantial evidence or argument is necessary because the express terms of that document clearly refer to another home.

I. The Complainant's brief makes no mention of the presence or absence of a Public Service Commission seal on the Higginbotham Home.

The Respondent pointed out on pages 9 through 10 and 18 through 20 of its initial brief that the Complainant failed to prove the absence of a "seal" on the Higginbotham Home, which is a necessary element to success in the Complainant's case.

Again, Section 700.010(13) RSMo. contains the statutory definition of a "seal" which is:

""Seal", a device, label or insignia issued by the public service commission, U.S. Department of Housing and Urban Development, or its agent, to be displayed on the exterior of the manufactured home, or modular unit to evidence compliance with the code."

This definition clearly provides that the requirement of "seal" can be satisfied by affixing a "device, label or insignia" issued by the Commission or by the U.S. Department of Housing and Urban Development on a manufactured home.

One of the main problems with the Complainant's case now before the Commission is that the Complainant did not offer any evidence about the absence of a Public Service Commission seal on the manufactured home in question. There simply is no way and no basis for the Commission to conclude that the Higginbotham Home lacked a Public Service Commission seal. There was no evidence on that point.

Any finding that the Commission would make that such a seal was not present on the home would not be supported by the evidence.

The Complainant had no choice but to avoid this issue in the Complainant's initial brief because it is a losing issue for the Complainant. Again, the absence of any mention of this issue in the Complainant's brief speaks volumes about the weakness of the Complainant's case.

J. The Higginbothams are satisfied with the transaction in all respects, and there is no consumer in need of protection or restitution in this case.

One of the most important facts that was introduced into evidence in this case (and a fact that cannot be disputed by the Complainant) is that the consumers in this case, the Higginbothams, were and are absolutely satisfied with the transaction in issue before the Commission now. Their testimony made it abundantly clear that they have no disputes with Respondent or A & G on any matter. Both Mr. Higginbotham's live testimony at the hearing and the deposition testimony of Mr. Higginbotham and Mrs. Higginbotham clearly and conclusively demonstrated that they are fully satisfied.

There is no consumer or group of consumers in this case who need any protection or restitution. The following question can fairly be raised in this case: if Respondent or A & G had done something wrong, why did Mr. and Mrs. Higginbotham clearly state that they were satisfied and saw no reason for this action to be brought against Respondent? The answer is simply that neither Respondent nor A & G did anything wrong in this case.

### **III. Conclusion**

For the reasons stated in the Respondent's initial brief and in this Reply Brief, the Commission should make a finding for Respondent and against Complainant on the Complainant's Complaint in this case.

/s/ Thomas M. Harrison

Thomas M. Harrison, Missouri Bar Number: 36617

**VAN MATRE AND HARRISON, P.C.**

1103 East Broadway, Suite 101

P.O. Box 1017

Columbia, MO 65205

Telephone: (573) 874-7777

Telecopier: (573) 875-0017

[tom@vanmatre.com](mailto:tom@vanmatre.com)

Attorneys for Respondent

The undersigned certifies that a complete and conformed copy of the foregoing document was 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 on the July 22, 2004.

/s/ Thomas M. Harrison