

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

**Director of the Manufactured Housing
and Modular Units Program of the
Public Service Commission,**

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Complainant,

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v.

Case No. MC-2004-0079

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Amega Sales, Inc.,

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)

Respondent.

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APPLICATION FOR REHEARING

COMES NOW Respondent, pursuant to §386.500 RSMo. and submits this application for rehearing with respect to the Commission's Report and Order dated September 2, 2004 (the "Order"), which is effective by its terms on September 12, 2004. The grounds on which this application is based and the grounds on which the Respondent considers said order to be unlawful, unjust and unreasonable are as follows:

1. The Commission improperly and erroneously denied the Respondent's demand for jury trial. The Commission in its Order determined and declared important legal rights of the Respondent and concluded that the Respondent violated provisions of Missouri law, including §700.045 RSMo., which is a misdemeanor statute. Respondent was entitled to a jury trial in this matter.

2. Both the authority of the Missouri General Assembly to establish and the authority of the Complainant and the Commission to enforce the provisions of Chapter 700 RSMo. relating to manufactured housing (and particularly Section 700.045 RSMo.) and to proceed in this case generally are preempted by 42 U.S.C. §5401 et seq., which establishes that any and all federal statutes and regulations concerning manufactured home safety and construction are supreme and supersede any state or local law which is not identical to the federal standards. The "seal" requirement of §700.010 RSMo. and the provisions of §§700.045 RSMo., 700.100 RSMo. and other provisions of Chapter 700 RSMo. (which allegedly authorize Complainant and the Commission to suspend the Respondent's dealer registration) all are beyond the scope of and are not identical to the provisions contained in 42USC §5401 et seq. and therefore are preempted by such federal statutes.

3. The Commission improperly and without legal basis denied the motion to dismiss filed by Respondent in this case on June 1, 2004. The contents of said motion are incorporated into this application by reference as if fully set forth herein.

4. There is no substantial or competent evidence before the Commission which enables the Commission to conclude as it concluded in its Order that the subject manufactured home did not have on it the required United States Department of Housing and Urban Development ("HUD") label or labels at the time that the subject manufactured home was sold to the purchasers thereof.

5. There was no evidence introduced to the Commission whatsoever indicating that the subject manufactured home did not have a "seal" issued by the Public Service Commission as contemplated in §700.010 (13) RSMo. The statutory definition of a "seal" contained in §700.010 (13) RSMo. contemplates either a seal issued by the Public Service Commission or a seal issued by HUD. There was

no evidence presented in this case that the subject manufactured home lacked a Public Service Commission seal. Therefore, there can be no finding of any violation of §700.045 RSMo.

6. The Order is not supported by substantial and competent evidence as a whole.

7. The Order finds that Respondent violated §700.045 RSMo., which by its express terms is a misdemeanor statute (i.e., a criminal statute). Nothing contained in the Order or any of the Public Service Commission's prior orders in this case indicate that the standard of proof used or employed by the Public Service Commission in this case is the proof beyond a reasonable doubt standard. Therefore, the Order is not lawful, not reasonable, and not enforceable because a lower standard of proof was used in determining that Respondent violated §700.045 RSMo.

8. The Complainant in this case alleged that Respondent violated §700.045 RSMo. The Order finds that Respondent violated §700.045 RSMo. Section 700.045 RSMo. is by its express terms a criminal statute because it makes certain acts and practices a misdemeanor. The Commission has no legal jurisdiction or authority to make a finding that Section 700.045 RSMo. was violated; such authority rests solely with the courts of the state of Missouri. There has been no court or jury finding that Respondent violated §700.045 RSMo., and unless and until that occurs, the Commission has no jurisdiction, basis or legal authority to sanction Respondent for violating that statute and has no basis for making a finding that statute was violated. Furthermore, the entire contents of the Respondent's Initial Post-Hearing Brief filed in this cause are incorporated herein by reference as if fully set forth herein.

9. The Commission in its Order found that the Respondent violated §407.020 RSMo. The Commission has no legal authority or jurisdiction to make a finding that §407.020 RSMo. was violated because the Commission does not possess the power to perform the judicial function, and only a court in

Missouri has the legal authority to perform the judicial function. Entering a finding that §407.020 RSMo. was violated constitutes exercising the judicial function. The entire contents of the Respondent's Initial Post-Hearing Brief are incorporated herein by reference as though fully set forth herein.

10. Complainant lacked the legal power and authority to bring an action seeking a finding by the Commission of a violation of §407.020 RSMo. Only the Missouri Attorney General and county prosecuting attorneys have the authority to bring criminal prosecutions under §407.020 RSMo., and only private litigants have the power and authority to bring civil causes of action under §407.025 RSMo.

11. The Complainant lacked the legal power and authority to bring a prosecution under §700.045 RSMo. Only the Missouri Attorney General and county prosecuting attorneys have the authority to bring actions seeking a finding that §700.045 RSMo. was violated.

12. The Order improperly and illegally makes findings and reaches conclusions not requested by the Complainant in the Complaint filed in this case. The Complaint alleges that the subject manufactured home was sold without HUD labels affixed to the home and that the home was sold as a new home when in fact it was a used home. However, the Order makes findings that Respondent gave the purchaser of the subject home "the impression that he was purchasing a home of better quality and of more value" than the home that the consumer actually purchased and that Respondent misrepresented a material fact regarding the value of the home. These findings are outside the scope of what was requested in the Complaint. No motion to amend the Complaint was ever filed by Complainant. The Commission had no basis or jurisdiction to make findings or enter conclusions of law on issues not fairly raised by the Complaint.

13. Complainant and Respondent entered into a binding settlement agreement settling all of their claims, disputes, and controversies in this case. The defenses of settlement, release, discharge, waiver and accord and satisfaction apply.

14. The Order erroneously concluded that Mr. and Mrs. Higginbotham were the first purchasers of the subject home for purposes other than resale. The evidence supports a conclusion that Mr. and Mrs. Higginbotham were not the first purchasers of the home for purposes other than resale.

15. The Order erroneously and improperly concludes that the subject manufactured home was a "new" manufactured home under §700.010 (8) RSMo. The evidence in the record does not support that conclusion. The evidence supports the conclusion that the subject manufactured home is not a new manufactured home. There is not substantial or competent evidence for the Commission to conclude that the subject manufactured home was or is a new manufactured home.

16. The Order concludes that Respondent was the seller of the subject manufactured home. The evidence before the Commission does not support that conclusion. That conclusion is not supported by substantial or competent evidence. All of the substantial, competent and credible evidence (including the express statements of the consumer who purchased the subject manufactured home) was that A& G Commercial Trucking, Inc. ("A & G") was the owner of the subject manufactured home and therefore was the seller of the subject manufactured home. There was no evidence that was introduced to the Commission that indicated that Respondent ever owned the subject manufactured home or any interest therein.

17. The Order finds and concludes that Respondent violated §700.100 (3) RSMo. (see page 3 of the Order) and §700.100 (4) (see page 13 of the Order). However, there are no Missouri Revised

Statutes denominated as §700.100(3) or §700.100 (4). Accordingly, the Commission's Order is illegal, unenforceable, vague and ambiguous. The Order does not put Respondent on sufficient notice as to which provisions of law the Respondent is found by the Commission to have violated. No sanctions can be imposed on Respondent for violation of a statute that does not exist.

18. The Order on page 3 finds that Respondent violated §700.100 (3) RSMo. Again, there is no Missouri Revised Statute denominated as such. However, if it was the Commission's intention to enter a finding of a violation of §700.100.3 (3) RSMo., there was absolutely no evidence in the record whatsoever to support such a finding. Section 700.100.3 (3) provides that a manufactured home dealer's registration may be suspended if it fails to file franchise or sales tax forms; there was no evidence introduced to the Commission whatsoever on this point, and there was no allegation in the Complaint seeking a violation of §700.100.3 (3) RSMo.

19. The delegation by the Commission of certain powers to the Complainant pursuant to 4C.S.R. 240-120.031 constitutes an illegal and unconstitutional delegation of powers and is therefore unenforceable and void.

20. The Complaint in this case was filed by the Director of the Missouri Housing and Modular Units Program of the Public Service Commission. There is no statutory or constitutional authority giving such official the power, authority or jurisdiction to file complaints with the Commission. Accordingly, such official does not have the authority to file or prosecute the Complaint in this case.

21. Any civil penalty, criminal penalty or license suspension or revocation imposed by the Commission or sought or authorized by the Commission in this case would constitute a taking of property

without just compensation in violation of the Missouri Constitution and the Fifth Amendment and the Fourteenth Amendment of the United States Constitution.

22. The proceedings in this cause before the Commission violate the Fourth Amendment, Fifth Amendment, and Sixth Amendment to the United States Constitution, the due process clauses contained in the Fifth and Fourteenth Amendments of the United States Constitution, and the provisions of Article I, Section 10 of the Constitution of the State of Missouri.

23. The Commission has no jurisdiction or legal authority to consider this case as any purported delegation to the Commission of the power, right or authority to consider or preside over this case constitutes an illegal and unconstitutional delegation of powers to the Commission because only courts in the state of Missouri have the power and authority to exercise the judicial function and to make findings of violations of Missouri law.

24. The civil penalties sought by Complainant in this case are actually penal in nature and therefore constitute criminal penalties, which the Commission is not authorized to impose or authorize. Furthermore, because such penalties are actual penal in nature, the Commission has no jurisdiction to consider this case and this case violates the Fourth Amendment, the Fifth Amendment, Sixth Amendment, and Fourteenth Amendment to the United States Constitution as well as Article I, Section 10 of the Constitution of the State of Missouri.

25. The Constitution of the State of Missouri provides that an administrative agency may not establish a rule which fixes a fine for violation of that rule. The Commission is an administrative agency which according to the Complaint in this case created the administrative rules on which Complainant is relying in this cause, and furthermore the Commission is purporting to sit in the position of both prosecutor

and finder of fact, which procedure violates the Constitution of the State of Missouri and the doctrine of separation of powers inherent in the Constitution of the State of Missouri.

26. The relief sought by Complainant against Respondent in suspending the Respondent's dealer registration is over broad and not warranted in that Respondent operates several manufactured home sales lots, and if the Commission suspends the Respondent's registrations in all of its locations as requested by Complainant, such penalties will be over broad and penal in nature.

27. The Complainant alleged and the Order found that Respondent sold the subject manufactured home without a HUD label. As such, the Complainant alleged and Commission found a violation by Respondent of federal statutes and regulations concerning manufactured home construction and safety, but Complainant has no jurisdiction or authority to enforce and the Commission has no jurisdiction or authority to find violation of such federal statutes or regulations.

28. The provisions of Chapter 700 RSMo. at issue in this case as applied in these circumstances is unconstitutionally over broad. The purpose sought to be achieved by the applicable federal regulations and Chapter 700, to the extent, if any, that Chapter 700 is not preempted by federal law, is to insure compliance with applicable codes for the construction of manufactured homes and therefore to promote safety. In this case there has been no showing that the subject manufactured home is unsafe.

29. The consumers involved in this transaction have not been damaged, they entered into the transaction with Respondent after being fully informed of the facts, have admitted and testified that no material facts were misrepresented to them, and they released Respondent from liability in connection with the subject transaction.

30. Introduced in evidence in this case was a declaration filed by the Missouri Attorney General in a case filed in the Circuit Court of Boone County, Missouri, involving Respondent concerning the transaction at issue in this case (the “Attorney General Declaration”). The Attorney General Declaration states that the Attorney General concluded that the transaction at issue in this case did not have sufficient basis to conclude that a violation of §407.020 RSMo. occurred. The Attorney General Declaration constitutes an admission by the Missouri Attorney General made while the Missouri Attorney General was a party to this case before the Commission.

31. The complaint filed in this case does not allege that the Respondent misrepresented the condition or value of the subject manufactured home, and therefore no finding to that effect was possible. The fact that the Commission made such a finding is not legally supportable because it is beyond the scope of the pleadings in this case, and no motion to amend the pleadings was filed or made orally. Respondent was not fairly put on notice that this issue was before the Commission in this case.

32. The Order finds on page 11 that Respondent gave the consumers the “impression” that they were purchasing a home of better quality and of more value than what they actually purchased. Such allegation is not contained in the complaint filed in this case. Therefore, the Commission had no authority or ability to make such a finding because it was beyond the scope of the pleadings. Respondent was not fairly put on notice that this issue was before the Commission in this case.

33. The finding on page 7 of the Order that Don Higginbotham’s testimony concerning the identity of the seller of the subject manufactured home is not credible is unlawful, illegal and not supported by substantial or competent evidence.

34. The Order is unlawful, invalid and unenforceable because the Order alternatively finds that Don Higginbotham's testimony was not credible and also relied and cited favorably Don Higginbotham's testimony.

35. The Order erroneously, improperly and illegally concluded on pages 8 and 9 that testimony elicited from Mr. Higginbotham on cross examination constitutes badgering and constituted Respondent putting words in Mr. Higginbotham's mouth. That testimony was elicited on cross examination, the Order admits that leading questions are admitted on cross examination.

36. The Order erroneously and illegally concludes that the subject manufactured home was sold and represented as a new manufactured home. Such finding is not supported by substantial or competent evidence on the whole in the record. The Commission's Order ignores substantial and competent evidence that the subject manufactured home was a used home.

37. The conclusion by the Commission in the Order that the Form 500 at issue in this case described the home that Mr. and Mrs. Higginbotham actually purchased is not supported by substantial or competent evidence in the record as a whole. The substantial and competent evidence supports the conclusion that the Form 500 introduced as Exhibit 1 in this case described a manufactured home which is completely different than the home that Mr. and Mrs. Higginbotham purchased.

38. On page 10 the Order erroneously concludes that Greg DeLine's testimony on page 446, line 24 of the hearing transcript constitutes an admission that the Form 500 and the Stipulation of Settlement refer to one and the same home. The quotation of that the testimony is wholly taken out of context in the Commission's Order and is illegal, unfair and not supported by substantial or competent evidence. The

Order seems to suggest that this testimony by Greg DeLine is an admission on the part of Respondent, but when read fairly and in context, that testimony does not support that conclusion.

39. On pages 12 and 13 of the Order, the Commission concludes that Respondent violated §407.020 RSMo. by misrepresenting a material fact in connection with the sale of merchandise. The Commission has no legal authority or jurisdiction to make such a finding. Such findings are exclusively the province of the courts of the State of Missouri.

40. As was illustrated on pages 12 and 13 of the Respondent's Post Hearing Brief in this case, Mr. Higginbotham testified and expressly stated that there were no misrepresentations made to him in connection with the transaction at issue in this case. Greg DeLine also testified to that effect. Accordingly, both parties to the transaction testified that no misrepresentations were made. Those parties are the only parties who could possibly know whether any misrepresentations were made because they were parties to the transaction. Furthermore, Mr. Higginbotham made it abundantly clear in his testimony that he and his wife are completely satisfied with the transaction and have no complaints whatsoever relating to it and have no reason to have this action prosecuted against the Respondent. The contents of the Respondent's Initial Post Hearing Brief are incorporated herein by reference for all purposes as if fully set forth herein. These express statements in deposition testimony that was introduced before the Commission and in live testimony heard by the Commission are completely contrary to the finding in the Order that Respondent made misrepresentations to Mr. and Mrs. Higginbotham.

41. The claim that the Respondent violated §700.045 RSMo. is barred by the applicable statute of limitations contained in §556.036 RSMo., which provides for a one year limitation period for misdemeanors. §700.045 RSMo. is a misdemeanor statute. §556.036 provides that prosecutions for

misdeemeanors must be commenced within one year. The Complainant alleges alternatively that the Higginbotham home was purchased on May 2, 2002 or July 10, 2002 and the complaint in this case was filed with the Commission on August 5, 2004.

42. The Order ignores substantial and competent evidence which clearly proved that the seller of the subject manufactured home was A & G.

43. The Commission in its Order ignored substantial and competent evidence that the Form 500 in evidence as Exhibit 1 by its express, unambiguous and undisputed terms does not describe the home which the Higginbotham purchased.

44. The Commission ignores substantial and competent evidence that the Higginbothams entered into more than one Form 500 purchase contract.

45. The Commission in its Order ignores the testimony of Tim Haden, who was and is the Complainant's agent, who expressly admitted that he does not know whether the subject manufactured home had HUD labels on it on July 10, 2002, because he did not inspect the home on that date. Mr. Haden also testified that he does not know when the HUD labels on the subject manufactured home were removed, and the Commission ignores this express admission in its Order as well.

46. The Commission ignores the substantial testimony abduced in the hearing that when A & G acquired the subject manufactured home, it did so not strictly for resale but for several other possibilities. A representative of A & G testified at that hearing that when A & G acquired title to the subject home, A & G did so contemplating possibly making an office out of it or selling it for salvage. Therefore, there was substantial and competent evidence that the subject manufactured home was not a "new" home as defined in Missouri statutes.

47. The Public Service Commission is a creature of the legislature and has only the powers which are expressly conferred upon it by statute. State of Missouri ex rel. FeeFee Trunk Sewer, Inc. v. Litz, 596 S.W.2d 466 (Mo.App. 1980). The Commission has no power to perform the “judicial function” Id. at 468. The Public Service Commission has no power to construe or enforce contracts. Katz Drug Company v. Kansas City Power & Light, 303 S.W.2d 672 (Mo.App. 1957). The Commission has no authority or power to adjudicate or determine individual or personal rights. Id. at 679. The power to adjudicate a misdemeanor rests solely in the Circuit Courts in the State of Missouri. State ex rel. Martin v. Berrey, 560 S.W.2d 54 (Mo.App. 1977). Based on these legal principles and others cited in the Respondents Initial Post Hearing Brief, the Commission lacks the jurisdiction and power to make findings Respondent violated §700.045 RSMo. and §407.020 RSMo.

48. It is the obligation of the court in each particular instance to declare whether fair dealing has been violated such that §407.020 RSMo. was violated. State ex rel. Webster v. Cornelius, 729 S.W.2d 60 (Mo.App. 1987). §407.020 RSMo. does not itself define deceptive practices. Therefore, it is the courts that must make this determination. It is the function of the judiciary and not administrative agencies to interpret this statute. Accordingly, the Commission lacked the authority to conclude that §407.020 RSMo. was violated int his case.

49. In its Order the Commission ignores substantial, competent and clear testimony from Mr. Higginbotham in which he stated that the home he purchased was not a new home.

50. The Commission in its Order ignores substantial and competent evidence that the Higginbothams were absolutely satisfied with the transaction at issue and that they have no disputes with Respondent on any matter.

51. The Commission improperly denied the following motions filed by Respondent, the full contents of each of which are reiterated herein and incorporated herein by reference as if fully set forth herein:

- a. Motion to Dismiss Complaint or Alternative Motion to Strike filed March 25, 2004.
- b. Motion to Dismiss or Alternative Motion to Strike filed May 27, 2004.
- c. Motion to Dismiss filed June 1, 2004.

52. The Commission improperly denied and gave no consideration to the affirmative defenses raised by Respondent in its Answer filed March 25, 2004. The entire contents of the Answer and the Affirmative Defenses filed by Respondent on March 25, 2004 are incorporated herein by reference as if fully set forth herein. The Commission received but overlooked or ignored substantial and competent evidence proving the affirmative defenses and denials asserted by Respondent.

53. The Respondent's Initial Post Hearing Brief and the Respondent's Reply Brief are incorporated herein by reference as if fully set forth herein. All grounds and arguments stated in the Respondent's Briefs are incorporated by reference and reiterated herein as grounds upon which this Application for Rehearing should be granted.

54. The order of the Commission is contrary to the weight of the evidence that was presented to the Commission, and therefore the Order should be set aside and this Application for Rehearing should be granted.

55. The Order improperly and incorrectly applies the facts of this case to the applicable law. Therefore, the Order should be set aside and this Application for Rehearing should be granted.

56. The Order makes improper and incorrect declarations of the law concerning §700.010 RSMo., §700.045 RSMo., §700.100 RSMo., §407.020 RSMo. Therefore, the Order should be set aside and this Application for Rehearing should be granted.

57. Given that one of the statutes at issue in this case (§ 700.045 RSMo.) is a misdemeanor statute, the Respondent was entitled to all protections afforded a criminal defendant, such as but not limited to, a right to jury trial, the right to have the State prove its case beyond a reasonable doubt, and the right to confront witnesses. None of those criminal protections were afforded to Respondent in this case.

58. The Order is arbitrary, capricious and without any reasonable basis in the record or under Missouri law.

WHEREFORE, Respondent requests that this Application for Rehearing be granted, that a rehearing of this cause be held, and for such other and further relief as the Commission deems just and proper.

/s/ Thomas M. Harrison

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PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing Application for Rehearing was served this date on counsel of record for the Complainant, via fax, via U. S. Mail, postage prepaid, and via hand delivery.

/s/ Thomas M. Harrison

Dated: September 10, 2004

