

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

The Staff of the Missouri Public Service Commission,	)	
	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. WC-2010-0227
	)	
Aspen Woods Apartment Associates, LLC,	)	
Barry Howard, Aspen Woods Apartments,	)	
Sapal Associates, Sachs Investing Co.,	)	
Michael Palin, Jerome Sachs, and	)	
National Water & Power, Inc.,	)	
	)	
Respondents.	)	

**MOTION TO DISMISS WITH SUGGESTIONS IN SUPPORT**

COMES NOW Respondent Barry Howard, (“Respondent” or “Howard”), through counsel, and pursuant to 4 CSR 240-2.070(6) moves to dismiss the Complaint in the above-captioned matter for failure to state a claim on which relief may be granted. The Complaint alleges no facts that, if true, would establish liability attaching to this Respondent. In support of his motion, Respondent states the following:

1. Howard is named as a Respondent in the above-captioned matter in paragraph 4 of the Complaint.
2. Paragraph 4 alleges that Howard is listed as the organizer of Respondent Aspen Woods Apartment Associates, LLC in the Articles of Incorporation filed with the Missouri Secretary of State on September 7, 2006.
3. Other than his name appearing on paperwork filed over three years ago as alleged in paragraph 4, Complainant alleges no other facts connecting Howard to the allegations in this case.

4. Complainant is not entitled to an inference that the organizer of a limited liability company respondent is somehow connected to the alleged subsequent acts of that company. Missouri is a fact pleading state. Doyle v. Crane, 200 S.W.3d 581 (Mo. App. W.D. 2007). To state a civil cause of action, a petition must aver substantive principles of law that entitle the plaintiff to relief, and it must aver ultimate facts sufficient to inform the defendant of the underlying events that the plaintiff contends give rise to the cause of action. Taylor v. Richland Motors, 159 S.W.3d 492 (Mo. App. W.D. 2005). Missouri rules of civil procedure demand more than mere conclusions that the pleader alleges without supporting facts. Pikey v. Bryant, 203 S.W.3d 817 (Mo. App. S.D. 2006).

5. “A member, manager, employee, or agent of a limited liability company is not a proper party to proceedings by or against a limited liability company, except where the object is to enforce such person's right against or duty or liability to the limited liability company.” § 347.069 RSMo. An “organizer” is defined as “any of the signers of the articles of organization[.]” § 347.015 RSMo. An organizer is not even required to be a member or agent of the limited liability company. § 347.037.1 RSMo.

6. The Complaint contains no allegations connecting Howard to this regulatory matter. The only basis for his inclusion as a party to these proceedings is that he is listed as the organizer of one of the other respondent’s filings with the Missouri Secretary of State. A person’s status as a member, employee or agent of a limited liability company is not a sufficient basis to include that person as a party. § 347.069 RSMo. Howard should therefore be dismissed from these proceedings.

WHEREFORE, Respondent Barry Howard prays that the Commission dismiss the Complaint with prejudice, award all attorneys fees and costs associated with defending

this matter to Respondent, and for such other relief as may be just and proper in the circumstances.

Respectfully submitted,

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COUNSEL FOR BARRY HOWARD

## **CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was served by hand-delivery, facsimile transmission, certified mail, electronic mail and/or United States mail, postage prepaid, to the following parties of record this 4<sup>th</sup> day of March, 2010:

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