

The Staff of the Missouri Public Service Commission,

Complainant,

v.

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.

**STAFF RESPONSE TO MOTION TO DISMISS RESPONDENT BARRY HOWARD**

**COMES NOW** the Staff of the Missouri Public Service Commission (Staff), by and through the undersigned counsel, and submits this *Response* to the Missouri Public Service Commission (Commission) respectfully stating the following:

1. On January 29, 2010, the Staff filed a *Complaint* against several Respondents, including Respondent Barry Howard, asserting that either individually and/or jointly, all Respondents are a water corporation and sewer corporation owning, operating, managing and/or controlling the Aspen Woods Apartment Properties' water and sewer services for gain as defined in Sections 386.020 (59) and (49), respectively, and thus public utilities as defined in Section 386.020 (43), RSMo (Supp. 2008), subject to the Commission's jurisdiction.

2. On March 4, 2010, counsel for Respondent Barry Howard filed a *Motion To Dismiss With Suggestions In Support (Motion)*. The *Motion* states that besides Paragraph 4 of the Staff's *Complaint*, "Complainant alleges no other facts connecting Howard to the allegations in this case," and requests that the Commission "dismiss the Complaint with prejudice, award all

attorney fees and costs associated with defending this matter to Respondent [Howard], and for such other relief as may be just and proper in the circumstances.”

3. As stated in *Hamid v. Kansas City Club*, 293 S.W.3d 123, 125 (Mo. App. W.D. 2009), a motion to dismiss for failure to state a claim “‘is solely a test of the adequacy of the plaintiff’s petition.’” *LeBlanc v. Research Belton Hosp.*, 278 S.W.3d 201, 204 (Mo. App. W.D. 2008), *quoting Pikey v. Bryant*, 203 S.W.3d 817, 821 (Mo.App. S.D.2006). In determining if a petition states a cause of action “its averments are given liberal construction and accorded fair and reasonable inferences from the facts stated.” *Schnabel v. Taft Broadcasting Co., Inc.*, 525 S.W.2d 819, 821 (Mo.App. K.C. 1975).

4. On August 14, 2009, the undersigned sent a certified letter to Aspen Woods Apartment Associates, LLC (Aspen Woods), c/o Barry Howard, stating the Staff’s awareness of the water and sewer billing practices of Aspen Woods and the fees associated therewith. The Staff provided a demand date of August 24, 2009, for now Respondent Aspen Woods or Respondent Howard to contact the Staff regarding this matter, otherwise the Chief Staff Counsel’s Office would proceed in filing a complaint against them.

5. On August 24, 2009, the Administrative Coordinator of Aspen Woods, Melissa Harris, called the undersigned and left a message regarding the Staff’s August 14, 2009 letter, which simply asked for a return call. The undersigned returned the phone call on three different occasions, leaving messages for Ms. Harris. The Staff received no further response from Ms. Harris, Respondent Aspen Woods, or Respondent Howard.

6. On September 24, 2009, the undersigned received a message from Mr. Michael Foote, counsel for National Water & Power, Inc., in response to the August 14, 2009 letter. In conversations of later date, Mr. Foote indicated he was responsible for answering

the Staff's questions in this matter, and for the undersigned to forward all billing questions for Respondent Aspen Woods and Respondent Howard through him.

7. Due to the lack of direct communications with Respondent Howard and Respondent Aspen Woods, the Staff was unable to determine the extent of Respondent Howard's involvement, making Respondent Howard's inclusion and formal discovery necessary.

8. During a recent phone conversation with Respondent Howard's counsel, the Staff confirmed that Respondent Howard remains involved with the management of Aspen Woods, although the extent is unknown at this time. Respondent Howard's counsel agreed to supplement the record prior to March 23, 2010, with an affidavit by Mr. Howard that outlines his involvement with Aspen Woods since 2006. Until Respondent Howard's counsel files an affidavit for the Staff's review, the Staff requests that the Commission stay its decision on the *Motion*.

9. As to Respondent Howard's request for attorney's fees and costs associated with this matter, the Missouri Supreme Court stated in *American Petroleum Exchange v. Public Service Com'n*, 172 S.W.2d 952, 955 (Mo. 1943), that the Commission "has no power to declare or enforce any principle of law or equity and as a result it cannot determine damages or award pecuniary relief." (internal citations omitted).

**WHEREFORE**, the Staff submits this *Response* and requests that the Commission (1) stay its decision on Respondent Barry Howard's *Motion To Dismiss With Suggestions In Support* until March 23, 2010, to allow time for Respondent Howard to file any affidavit, for the Staff's review of such, and any further response the Staff deems necessary based on the affidavit; and (2) deny Respondent Howard's request for the award of attorney's fees and costs associated with his defense in this matter.

Respectfully submitted,

**/s/Jennifer Hernandez**

Jennifer Hernandez

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all attorneys and/or parties of record this 15<sup>th</sup> day of March, 2010.

**/s/ Jennifer Hernandez**