

In the Missouri Public Service Commission

In the matter of

Janice Shands

Complainant )

V WC 2015-0030

MAWC

Respondent

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In the matter of

Janice Shands

Complainant )

V EC 2015-0043

Ameren

Respondent

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In the matter of

Janice Shands

Complainant )

V SC 2015-0044

MSD

Respondent

Complainant's Supplemental Opposition to Motion to Dismiss and Exhibits on Petition

Comes now Complaint and for her Supplemental Opposition and requests

The PSC take official notice of the orders of the court finding that the Assn does not have officers , and of the Secretary of State that there is no registered agent.

Complainant also notes it is wrong to contend she has filed a class action., She not only is legally responsible for a share ( as LaClede Gas has acknowledged) and has a right to enforce the rights per the Declaration but has a right as a member of the corporate association to bring a derivative action where the factors as in Rule 52.09 include there is a futility ( such as when no lawful officers and where can bring the action on behalf of other members).

It would be an anomaly and create a legal impossibility which should not be allowed that while per Rule 52.09 and other laws there is a right to a derivative action on any corporation, and where MAWC has contended have to first file with PSC, there is a contention cannot bring same at the PSC level.

For this reason as well it is submitted it is proper the PSC defer and decline jurisdiction to the circuit court where an action is pending.

This is especially so where as in ne of 37,000 shareholders, who at its peak owned less than 0.0000101 interest in a publicly traded company, recently convinced a court of appeals that it was futile to demand the corporation quit engaging in the backdating of stock options, among other alleged misdeeds and that this single shareholder with a mathimatically insignificant ownership interest could adequately represent the interests of all shareholders in a dissenting shareholder's suit. The court of appeals appeared to look at the issue as one simply of procedure over substance, looking merely to the shareholder's barest convoluted allegations to support continued jurisdiction of the action.

The court reviewed Rule 52.09 which mandates that, in order for a shareholder to maintain a derivative

action against and on behalf of a corporation, he or she must: (1) have been a shareholder at the time of the complained-of action; (2) have served demand upon the board of directors and, if necessary, the shareholders as a whole; and (3) adequately represent the interests of all shareholders.<sup>1</sup>

Thus for these reasons as well it is submitted the relief is proper , and at a minimum the PSC should find no need for any prefiling and cannot provide relief so complainant can go directly to the circuit court for relief.

By

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<sup>1</sup>This is especially so where as in *New England Carpenters Pension Fund v. Haffner, et al.*, \_\_\_ SW3d\_\_\_ Docket No. SD31320 (Mo.App.S.D. November 28, 2012) it was confirmed futility requirement can be easily met here.

While the general rule in rule 52.09 is a shareholder would show (1) have been a shareholder at the time of the complained-of action; (2) have served demand upon the board of directors and,(3) adequately represent the interests of all shareholders.

The second requirement of Rule 52.09 is met when a claimant shows “a state of facts from which it appears that such demand or effort within the corporation and through corporate channels would have been futile and unavailing.” *Id.* (emphasis in original) (quoting *Punch v. Hipolite Co.*, 340 Mo. 53, 100 S.W.2d 878, 885 (1936)). Thus, the complaining stockholder need not make these allegations in his petition if his petition alleges that the officers and directors of the corporation violated the trust committed to them by perpetrating and doing ultra vires, illegal[,], or fraudulent acts, because such acts cannot be ratified even by a majority of the stockholders. In such a situation equity will entertain an action for relief by a dissenting minority stockholder without first resorting or appealing to the stockholders as a body. *Saigh*, 396 S.W.2d at 17.

Here it is allowed they were ultra vires, namely outside any authority of the Board to allow Tower assets such as a water and credit to be given or conveyed to others and it is futile

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Attorney for Complainant

Certificate of service

A copy was sent by email to P.C. Office of General Counsel at staff [counsel@psc.mo.gov](mailto:counsel@psc.mo.gov), to  
Dustin Allen ( Public Counsel) at [opscervice@ded.mo.gov](mailto:opscervice@ded.mo.gov), and counsel for the utilities on  
September 18 2014

\_/s/ Susan H Mello