IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

DAVID T. STEVENSON, R. CHRISTIAN HUDSON, JOHN W. MOORE, AND JACK PETERMAN,	:	C.A. No. S13C-12-025 RFS
Plaintiffs,	:	
v.	:	
DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL AND DAVID S. SMALL, IN HIS CAPACITY AS SECRETARY OF THE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL,	:	
Defendants.	:	

ORDER ON PLAINTIFFS' MOTION TO AMEND COMPLAINT

MOTION DENIED

1) Pending before the Court is a motion to amend which plaintiffs have filed to correct the spelling of a plaintiff's name from "John W. Moore" to "John A. Moore". Because the motion to amend would be futile, it is denied.

2) Plaintiffs filed this declaratory judgment action on December 20, 2013, over two and a half years ago. The action seeks relief regarding amended regulations which originally were enacted pursuant to Delaware's Regional Greenhouse Gas Initiative and CO_2 Emission Trading Program Act. The complaint had to be filed within thirty days of December 1, 2013, which is the

date when the amended regulations were published in the Register of Regulations.[1] It was timely filed within that time frame.

Plaintiffs argue they have standing to pursue this matter because they are paying higher electric bills as a direct result of the amended regulations. The plaintiffs named in the complaint are: David T. Stevenson, R. Christian Hudson, John W. Moore, and Jack Peterman.

At paragraph 3 of the complaint, the following allegation is made regarding John W. Moore: "John W. Moore ("Moore") is a New Castle County, Delaware resident. Moore is an electric power customer of Delmarva Power." The only other information about a "John Moore" is contained in the affidavit of "John A. Moore" dated May 13, 2015, which was filed in connection with plaintiffs' motion for summary judgment. In this affidavit, "John A. Moore" states as follows:

> 1. I am a Plaintiff in the above-captioned action.
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> 2. I am a commercial electrical service customer of Delmarva Power & Light Company ("Delmarva").
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> 3. I have been a commercial ratepayer through my ownership of Acorn Energy, Inc., located at 3844 Kennett Pike, Suite 2044, Wilmington, DE 19807.
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> ***
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> 7. As a direct result of the 2013 RGGI Regulations, my electric rates will

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[1] 29 *Del. C.* § 10141(d), provides in pertinent part: "[N]o judicial review of a regulation is available unless a complaint therefor is filed in the Court within 30 days of the day the agency order with respect to the regulation was published in the Register of Regulations." *See American Auto. Mfrs. Ass'n v. Public Service Com'n of State of Delaware*, 1997 WL 718656, * 1 (Del Super. July 23, 1997) (where a document labeled "Notice of Appeal" was filed within the 30 day period which 29 *Del. C.* § 10141(d) mandates, Superior Court was willing to allow an amendment to label the matter an "action for declaratory relief" after concluding, "[t]his is not a case where the court lacks jurisdiction because of any failure of AAMA to file within the 30 day statutory period.").

> ultimately be caused to increases [sic] pursuant to the provisions of Delaware Public Service Commission rate-making procedures which guarantee that Delmarva will be provided a reasonable rate of return in order to cover increased costs such as those attributable to the higher prices that must be paid for the CO_2 Allowances at auctions.

Thus, the only specific information regarding John A. Moore's standing is that he makes payments for electricity "through his ownership" of Acorn Energy, Inc.

3) Whether the plaintiffs had standing to file this action has been in question since the filing of this lawsuit. The general allegations they were electric customers of either Delmarva Power or Delaware Electric Cooperative, Inc. propelled plaintiffs forward in connection with the defendants' original motion to dismiss on standing grounds. However, the standard for a motion to dismiss is very different from the standard for a motion for summary judgment. In June, 2016, defendants moved for summary judgment, arguing plaintiffs do not have standing to pursue their challenge to the amended regulations. It was defendants' motion for summary judgment which provoked plaintiffs' pending motion to amend.

Defendants' argument in their summary judgment motion directly addressing plaintiff John W. Moore is summarized hereinafter. Records show that John W. Moore of New Castle died on October 21, 2012, which was over a year before this action was filed. Upon information and belief, an estate was opened for John W. Moore, and his wife was the executrix. A suit on his behalf would have to have been filed by the executrix. Upon information and belief, John A. Moore, who submitted the above-referenced affidavit dated May 13, 2015, is the son of John W. Moore. Defendants noted that at that time, plaintiffs had made no effort to substitute John A. Moore as the party plaintiff. Defendants argue that the claim brought by John W. Moore must be dismissed because he was dead at the time the complaint was filed and his estate did not file the

complaint.

Defendants, in anticipating plaintiffs' to-be-filed motion to amend, argued as follows in their summary judgment motion. Even if a motion to amend was filed, John A. Moore cannot show standing on the theory advanced in this case. That is because, upon information and belief, John A. Moore personally does not own any "real estate in Delaware through which he would have a direct obligation to pay an electric bill. Rather, Moore's affidavit asserts he has 'been a commercial ratepayer through my ownership of Acorn Energy, Inc., located at 3844 Kennett Pike, Suite 2044 Wilmington, DE 19807.'"[2] Corporations are separate legal entities, and absent certain circumstances, which are not present here, the corporation itself must pursue the action. Here, Acorn Energy, Inc. is the entity which should have filed suit; merely having an ownership interest in Acorn Energy, Inc. does not confer standing on John A. Moore to bring this suit. If John A. Moore cannot substantiate his claim that he is directly impacted by the amended regulations because he has to pay higher electric bills, then summary judgment must be granted against him for lack of standing.

4) On August 5, 2016, plaintiffs filed a motion to amend the complaint. The basis of the motion is "to correct a typographical error regarding the middle initial of Plaintiff John Moore, from 'John W. Moore' to 'John A. Moore'...."[3]

Plaintiffs argue no prejudice would result to defendants if the amendment is allowed. They argue that on May 13, 2015, nearly one and half years after the complaint was filed,

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[2]Defendants' Opening Brief in Support of their Motion for Summary Judgment dated June 14, 2016 at 6-7.

[3]Plaintiffs' Motion to Amend Complaint filed on August 5, 2016, at 1.

plaintiffs filed the affidavit of John A. Moore; thus, for the past fifteen months, defendants have known that John A. Moore was the correct party. Plaintiffs do not argue that during the 30 day period when the complaint was required to be filed defendants were aware that the correct party was "John A. Moore" and not "John W. Moore".

Plaintiffs argue that the amendment should relate back to the initial filing because the amendment does not modify the claim asserted by John Moore or change the name. Plaintiffs argue: "At all times, the intent was to name the John Moore who is alive and is well-known to the Plaintiffs' counsel from social circles and his wife being a prior colleague of the wife of the undersigned counsel in the office of then Governor Michael N. Castle some 25 years ago."[4] Plaintiffs concede that John W. Moore was deceased at the time the complaint was filed and that John A. Moore always was the intended defendant. In an unsupported statement, plaintiffs state: "The Defendants knew full well that John A. Moore was the intended Plaintiff in this action."[5]

In their motion to amend, plaintiffs do not in any way deal with the standing situation of John A. Moore - the harm he allegedly suffers. However, plaintiffs do address this issue in their answering brief to defendants' motion for summary judgment. Therein, plaintiffs argue:

> Next, the Defendants suggest that John A. Moore cannot claim to be affected by higher electric rates paid by a corporation that he owns. [Citation omitted]. But the Defendants do not explain how the uncontested fact that he suffers a harm resulting from negative effects on the power bill that the corporation he owns must pay divests him of the ability to prosecute a challenge to the New RGGI Regulations. Obviously, Mr. Moore has a direct pecuniary interest in maximizing the profit of his corporation, which profit is either reduced or is not as optimally high as a direct and proximate result of the New RGGI Regulations. The Defendants have not rebutted the assertion by Moore that he is an owner of the

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[4]Plaintiffs' Motion to Amend Complaint filed on August 5, 2016, at 2-3.

[5]*Id.* at 3.

> corporation which pays a higher electric bill to Delmarva due to the New RGGI Regulations. Therefore, the Defendants' argument is unfounded.[6]

Plaintiffs thereafter argue that the Court may amend the complaint to name Acorn Energy, Inc. as a plaintiff. They argue the amendment would relate back because **Acorn Energy, Inc**. should have been on notice of the action and would not be prejudiced by being named and "each entity should have known that but for a mistake in naming their agents, the entities would have been named."[7] Plaintiffs do not address the timeliness issue nor whether **defendants** are prejudiced. Also, and most significantly, Acorn Energy, Inc. has not filed a motion to amend to be added as a plaintiff.

5) After this pending motion to amend was scheduled for presentation, defendants orally informed the Court that they had no opposition to the granting of the motion to amend. This position is baffling in light of defendants' arguments in its summary judgment briefing that John A. Moore has no standing, arguments to which plaintiffs have responded. Thus, the Court required the parties to address the motion in open court.

6) As is discussed below, John A. Moore cannot be a plaintiff in this action. A motion to amend should not be granted if doing so would be futile.[8] This Court determines whether leave to amend should be allowed at this stage of the proceedings. It manages its docket in a judicially economical way. Consequently, it will not sign off on a futile amendment even if defendants say

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[6]Plaintiffs' Answering Brief in Opposition to Defendants' Motion for Summary Judgment on Standing Grounds filed August 12, 2016, at 27.

[7]Plaintiffs' Answering Brief in Opposition to Defendants' Motion for Summary Judgment on Standing Grounds filed August 12, 2016, at 28.

[8]*Clark v. State Farm Mut. Auto. Ins. Co.*, 131 A.3d 806 (Del. 2016).

that they have no objection to that amendment.[9]

7) As the Court previously noted, it "will not consider the merits of plaintiffs' arguments unless they have standing."[10] The basis for this position is to avoid rendering advisory opinions to intermeddlers.[11] This Court previously ruled that absent harm, the action will not proceed.[12]

8) In the case at hand, John A. Moore has produced nothing to show that he has suffered or will suffer harm from the Amended Regulations. He advances an untenable argument that as an owner of the corporation (i.e., a shareholder), he is entitled to bring this suit.

As explained in 9 Fletcher Cyc. Corp. § 4231 (April 2016):

> The courts recognize a significant distinction between the corporation and its shareholders or members in allowing actions between a corporation and its shareholders or members. The corporation and shareholders or members are separate entities. The capacity of suing and being sued in its own name is one of the basic corporate attributes. Corporate rights of action are distinct from those of the members or shareholders.
>
> The shareholder must sue on rights belonging to that shareholder as an individual, while the corporation must sue on those rights belonging to it as a corporation. An exception to this rule is made when in equity or to prevent a crime or wrongdoing the separate corporate entity is disregarded. The corporate entity will be disregarded and the acts of members treated as corporate acts where one corporation is merely an instrumentality, agency, conduit or adjunct of another corporation, or in case of fraud, or to prevent evasion of the law or a legal obligation or duty, or in case of internal dealings between the corporation and its members.

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[9] *See State Highway Department v. Buzzoto*, 264 A.2d 347, 351 (Del. 1970) (the Court's function is to make rulings, despite a party not objecting, in order to insure the rules of practice are applied).

[10] *Stevenson v. Delaware D.N.R.E.C.*, 2016 WL 1613281, * 4 (Del. Super. April 5, 2016).

[11] *Id.*

[12] *Id.* at 5.

> ... The corporation, and it alone, may sue to recover property of the corporation or to recover damages for injuries done to it. [Footnotes and citations omitted].

As explained in *Litman v. Prudential-Bache Properties, Inc.*:[13]

> "The distinction between derivative and individual actions rests upon the party being *directly* injured by the alleged wrongdoing. *Kramer v. Western Pac. Indus., Inc.*, Del. Supr., 546 A.2d 348, 351 (1988) (emphasis in original). In a derivative suit, a shareholder sues on behalf of the corporation for harm done to the corporation. *See Kramer*, 546 A.2d at 351. On the other hand, a shareholder may bring a direct action for injuries done to him in his individual capacity if he has "an injury which is separate and distinct from that suffered by other shareholders, or a wrong involving a contractual right of a shareholder, such as the right to vote, or to assert majority control, which exists independently of any right of the corporation." *Moran v. Household Int'l, Inc.*, Del. Ch., 490 A.2d 1059, 1070 (1985) (citations omitted), *aff'd*, Del. Supr., 500 A.2d 1346 (1985).

Furthermore, a derivative action must be filed in Chancery Court, even if the action would be one the corporation could bring at law.[14]

9) In this case, John A. Moore claims he will not receive maximum profit for his ownership interest due to Acorn Energy, Inc. allegedly paying increased electric bills. This is not a direct injury. Instead, the injury, if there is one, belongs to Acorn Energy, Inc., and it, not John A. Moore, should have filed this suit as a plaintiff. Because John A. Moore has no direct claim, it would be futile to allow the amendment of the complaint. The motion to amend is DENIED.

10) The next issue is whether Acorn Energy, Inc. may be added as a plaintiff. At this point, Acorn Energy, Inc. has not filed a motion to be added as a party plaintiff. Absent the filing of such a motion, the Court cannot rule plaintiffs may add Acorn Energy, Inc. as a plaintiff.

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[13]611 A.2d 12, 15 (Del. Ch. 1992).

[14]*Rizzo ex rel. JJ&B, LLC v. Joseph Rizzo and Sons Const. Co.*, 2007 WL 1114079, *2 (Del. Ch. April 10, 2007).

11) For the foregoing reasons, the motion to amend is DENIED.

IT IS SO ORDERED THIS 19 DAY OF AUGUST, 2016.

JUDGE

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cc: Prothonotary's Office
Counsel