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Attorneys for Respondents Leon H. Saunders; Landmark Plaza Associates; Parley's Creek, Ltd.; Parley's Lane, Ltd.; Parley's Park; Stuart A. Knowles; Trilogy Limited, L.P.; Trilogy Asset Management, Inc.; Land & Water Resources, Inc.; Lawrence R. Knowles Irrevocable Trust; Leon H. Saunders, Stuart A. Knowles, and Trilogy Limited, L.P., dba SK Resources.

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

Bear Hollow Restoration, LLC, Applicant/Complainant, vs. Leon H. Saunders, et al., Respondents.	**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS BEAR HOLLOW RESTORATION, LLC'S COMPLAINT AND REQUEST FOR AGENCY ACTION** Docket No. 09-015-01

Respondents Leon H. Saunders; Landmark Plaza Associates; Parley's Creek, Ltd.; Parley's Lane, Ltd.; Parley's Park; Stuart A. Knowles; Trilogy Limited, L.P.; Trilogy Asset Management, Inc.; Land & Water Resources, Inc.; Lawrence R. Knowles Irrevocable Trust; Leon H. Saunders, Stuart A. Knowles, and Trilogy Limited, L.P., dba SK Resources (collectively "the Individual Shareholders") hereby file this Memorandum in Support of their Motion to Dismiss Bear Hollow Restoration, LLC's ("Petitioner's") Complaint and Request for Agency Action.[1]

[1] The Individual Shareholders understand that Summit Water Distribution Co. has filed or will be filing a motion to dismiss. The Individual Shareholders hereby join in that motion and incorporate the arguments of that motion here.

INTRODUCTION

Petitioner asks this Commission to exercise jurisdiction not only over Summit Water Distribution Co. ("Summit Water")—an entity that this Commission repeatedly has declared to be exempt from this Commission's control—but also the Class A shareholders in that company (save, of course, Petitioners themselves, who are also Class A shareholders). Petitioner makes this demand without regard to the fact that the Individual Shareholders are not "Public Utilities," do not own or provide any water (let alone provide water to the public generally) as contemplated by the relevant statutes and regulations, and do not own operate or control any water system (let alone a system for public service). Petitioner's request is entirely inappropriate.

By Bear Hollow's own account, the Individual Shareholders have only been sued because they are "shareholder[s] of Respondent Summit Water." [*See Complaint* ¶¶ 1-7, 9-13, 15]. Even putting aside the fact that Summit Water itself does not own, control, operate, or manage any water system for public service and is exempt from the Commission's jurisdiction—a fact this Commission repeatedly has declared—Petitioner's assertion of jurisdiction over the Individual Shareholders is completely unfounded. The Individual Shareholders (like Petitioner) own shares of a company and nothing more. They do not own any water system operated for public service, even if one existed, and they are not public utilities. Accordingly, there is no basis for asserting jurisdiction over these Individual Shareholders.

BACKGROUND

Petitioner, like the Individual Shareholders, is a Class "A" shareholder of Summit Water. [Complaint ¶ 1]. Petitioner acquired its shares when they were sold as part of the bankruptcy proceedings of an unrelated party who had acquired the shares in anticipation of developing certain real property. Both before and after Petitioner's acquisition of these Class A shares, the

share were required to be appurtenant to the development project and inseparable from the development property. In this respect, the Class A shares Petitioner obtained were treated no differently than any other Class A shares.[2] Nevertheless, in May, 2009, Petitioner sought to obtain special treatment from Summit Water to strip its Class A shares from the development property and sell them to a third-party. When its request was refused, Petitioner initiated the current action, naming both Summit Water and the Individual Shareholders. Although the Commission does not have jurisdiction to resolve a purely contractual dispute, Petition apparently hoped that this action would force Summit Water to grant Petitioner's request for preferential treatment.

Summit Water is a non-profit company that does not provide water to the public generally, but rather is a mutual water company that only provides water to its shareholders. Because of its nature, "[t]he Division [of Public Utilities] feels that regulation of [Summit Water] would be superfluous and [repeatedly has] recommend[ed] that the Commission take no action . . . regarding [Summit Water]." [*See* Prior Investigations Regarding Summit Water, Attached as Ex. A].

The Individual Shareholders in this case allegedly are, like Petitioner, "'Class A' shareholder[s] of Respondent Summit Water." [Complaint ¶¶ 1-7, 9-13, 15]. Those individuals, however, do not personally own, control or manage any property whatsoever that is used "to facilitate the diversion, development, storage, supply, distribution, sale, [etc.] . . . of water." *See* Utah Code Ann. 54-2-1(28)(a). Rather, their only connection to the current dispute is that they (like Petitioner) own shares of Summit Water and some of the shareholders, allegedly, have sold those shares to others. [*See, e.g.,* Complaint ¶¶ 15, 30]. These allegations do not provide a legal

[2] For example, respondents Parley's Lane, Parley's Creek, and Landmark Plaza are all specific developments to which shares are attached and made appurtenant. The shares of Summit Water stock held by these entities are appurtenant to those projects in precisely the same way as the shares originally held by Bear Hollow Restoration and its predecessor. In fact, the Bylaws of Summit Water dictate the manner in which Class "A" shares are treated, including appurtenancy requirements for Class A shares. [*See generally* Memorandum in Support of Summit Water's Motion to Dismiss].

basis for the Commission to assert jurisdiction over the Individual Shareholders, for purposes of investigation or regulation.

ARGUMENT

I. THE COMMISSION DOES NOT HAVE JURISDICTION OVER INDIVIDUAL SHAREHOLDERS OF A COMPANY.

Petitioner's entire jurisdictional basis for including the Individual Shareholders in this action is that they are "'Class A' shareholder[s] of [Summit Water]," [Complaint ¶¶ 3-15], and therefore, Petitioner argues, they "constitute a 'public utility' . . . as th[at] term [is] defined in Utah Code," [Complaint ¶ 16].[3] Petitioner's bald assertion, without much more, is insufficient.

This Commission only has jurisdiction over "public utilit[ies]." *See* Utah Code Ann. § 54-4-1. There is nothing in the Utah Code that extends the Commission's jurisdiction to *shareholders* of a public utility.[4] Rather, the Commission's jurisdiction must be based on independent ownership or control of a "water system [operated] for public service within this state." *Id.* § 54-2-1(29). Here, the allegations in the Complaint are insufficient to invoke this Commission's jurisdiction for at least two reasons.

First, there are no allegations nor is there any support for the proposition that the Individual Shareholders own or control a water system.[5] Rather, Petitioner named the Individual

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[3] Curiously, the Complaint later alleges that Class A shares "do not entitle the holder thereof to water delivery." [Complaint ¶ 78]. In other words, Petitioner argues that the Individual Shareholders are "public utilities" because they own stock that does not entitle them to water delivery. Under this argument, the shareholder of almost any company would be subject to Commission jurisdiction.

[4] In fact, such a statute would drastically alter the scope of this Commission's jurisdiction. For example, PacifiCorp—a company that is subject to the Commission's jurisdiction—ultimately is owned by Berkshire Hathaway, a publicly traded company with more than 1.5 million shares outstanding. Thus, if the Commission exercised jurisdiction over mere shareholders of a public utility, every Berkshire shareholder, including Warren Buffet, would be subject to this Court's jurisdiction any time they attempted either to sell or purchase additional shares of that company from the New York Stock Exchange.

[5] A "[w]ater corporation" is defined by Utah Code as "every corporation and person" . . . owning, controlling . . . any water system for public service within this state." Utah Code Ann. § 54-2-1(27). A "[w]ater system" is in turn

Shareholders in the Complaint solely because they are shareholders of Summit Water. That limited relationship is insufficient to convey jurisdiction. Even assuming (incorrectly) that Summit Water owns or controls a water system for public service and therefore qualifies as a public utility, it would be wholly improper to find that the Individual Shareholders also own or control that same system. Indeed, it is a fundamental principle of corporate law that while a shareholder has an interest in the company itself, he has no interest in or control over the specific assets of that company. *See generally Dansie v. City of Herriman*, 134 P.3d 1139, 1142-43 (Utah 2006) (determining shareholders in non-profit water corporation had "no ownership interest in the Company assets").[6] In fact, that legal distinction is an obvious part of daily life: An individual may own many shares of The Walt Disney Company, but that does not entitle him to storm Cinderella's castle. Likewise, the Individual Shareholders in this case may own shares of Summit Water, but that does not entitle them to personally claim ownership, control or management of Summit Water's water system. Rather, like Cinderella's castle, those assets remain the sole property of Summit Water, and the management and control of those assets is exercised solely by that company.[7] As such, the Individual Shareholders are not public utilities merely by their

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described as the physical assets necessary to distribute water, including "reservoirs, tunnels, shafts, dams, dikes, headgates, pipes, flumes," etc. *Id.* § 54-2-1(28)(a).

[6] *See also Klein v. Board of Tax*, 282 U.S. 19, 24 (1930) ("The corporation is a person and its ownership is a nonconductor that makes it impossible to attribute an interest in its property to its members."); *Owens v. C.I.R.*, 568 F.2d 1233, 1238-39 (6th Cir. 1977) ("[S]tock in a corporation represents an ownership interest in a going business organization; the stockholders do not own the corporation's property. . . . When a stockholder sells his stock, he is selling his proprietary interest in a going concern and not an interest in the corporate assets."); 18A Am. Jur. 2d Corporations § 630 (2009) ("[T]he shareholders of a corporation do not own the property of a corporation; the corporation does. Thus, a purchase of stock . . . is not a purchase of the corporate assets, just as a sale of stock . . . is not a sale of the property and assets of the corporation itself. . . . A shareholder may not transfer or assign the properties or assets of the corporation . . . .").

[7] Although a company must act through authorized representatives, it would be wrong to aver that those representatives actually have personal control of a company's assets. A company's representatives are bound by strict fiduciary duties that require them to act solely in *the company's* best interest and forbid them from acting on their own personal interests. *See generally* 18B Am. Jur. 2d Corporations § 1480 ("As part of their fiduciary role, directors and

interest in Summit Water, and, lacking any allegations that the Individual Shareholders each own a water system independent of Summit Water, the Complaint fails to establish this Commission's jurisdiction.[8]

Second, even if each of the Individual Shareholders did independently own and operate a water system (and they do not), there is absolutely no allegation or support for the proposition that the Individual Shareholders do so for "the public generally." *See, e.g.*, Utah Code Ann. § 54-2-1(16)(a) ("'Public Utility' includes . . . [a] water corporation . . . where the service is performed for, or the commodity delivered to, *the public generally* . . . ." (emphasis added)); *id.*§ 54-2-1(29) (limiting the definition of "water corporation" to entities that own or operate "water systems for *public service* within the state" (emphasis added)); ; *see generally State v. Nelson*, 238 P. 237, 239 (Utah 1925) ("[I]f the business or concern is not public service . . . it is not subject to the jurisdiction or regulation of the commission."). The test for determining whether a utility serves "the public generally" is "whether the public has the legal right to use which cannot be gainsaid, or denied, or withdrawn, at the pleasure of the owner." *Garkane Power Co. v. Public Service Comm'n*. 100 P.2d 571, 573 (Utah 1940).[9] In other words, "[t]he essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public." *Id.* (internal quotation marks omitted). On the other hand, if "membership in the association [is required] before service is given" the entity does not constitute a public utility, even if such "membership

officers must remain loyal to the corporation . . . whose interests must take precedence over any self-interest . . . . The duty of loyalty extends to nonprofit corporations as well as to ordinary business corporations.").

[8] Petitioner is not really in a position to dispute this conclusion. To do so, Petitioner would have to argue the internally inconsistent (and entirely hypocritical) position that (1) the Individual Shareholders are all public utilities because they own Class A shares and, allegedly, some of those individuals have attempted to sell their shares, but (2) Petitioner is not a public utility even though it also is a Class A shareholder seeking to sell its shares.

[9] *Garkane* was superseded by statute on other grounds. *See Cottonwood Mall Shopping Center, Inc. v. Public Service Comm'n.*, 558 P.2d 1331, 1332 (Utah 1977).

may be easily obtained." *Medic-Call, Inc. v. Public Service Comm'n.*, 470 P.2d 258, 276-77 (Utah 1970). In this case, Petitioner has not alleged and cannot demonstrate that the Individual Shareholders (or Summit Water for that matter) are providing water to the indefinite public.

As demonstrated by the very allegations in Petitioner's complaint, the Individual Shareholders have not sold water to the public generally. Rather, Petitioner alleges that Individual Shareholders have sold "Class A shares" of the company to a few individuals at negotiated prices. [*See* Complaint ¶¶ 28-38 (alleging ten such agreements over an approximately nine-year period)]. The Individual Shareholders have not offered their shares to the public at large, and they have absolutely no obligation to do so. Likewise, the Individual Shareholders are free to reject any offers to purchase their shares that may arise. Additionally, as noted in Petitioner's Complaint, there may be strict restrictions on a shareholder's efforts to sell their shares at all. [*See* Complaint ¶ 109-117 (recognizing that Class A shares were contractually inseparable from development property, and that the Company refused to authorize a transfer of certain Class A shares)]. Moreover, the Articles of Incorporation declare that "membership [in Summit Water]" is not open to the public, but "shall be maintained only through the acquisition and holding of stock in the corporation." [Articles of Inc., p. 6, Art. V (attached as Ex. U to the Complaint)]. Under such circumstances, it can hardly be argued that the Individual Shareholders are operating a water system for the public at large. Accordingly, there is no basis for finding the Individual Shareholders serve "the public generally," and no basis for asserting jurisdiction over those respondents.[10] *See, e.g.*, *Medic-Call, Inc.*, 470 P.2d at 276 ("[I]f the business or concern is not

[10] The Individual Shareholders also join in Summit Water's motion to dismiss which also sets forth the legal and other arguments that Summit Water also does not serve the public generally.

public service . . . it is not subject to the jurisdiction or regulation of the commission."); *accord* Utah Code Ann. § 54-4-1 (providing Commission with authority to regulate *public* utilities).

CONCLUSION

This Commission has no jurisdiction over the Individual Shareholders. Their ownership interest in Summit Water is different from and insufficient to establish ownership of or control over a water system. Moreover, even if that obstacle did not exist, there is no basis for finding the Individual Shareholders (or Summit Water) provided a utility to the public generally. For these reasons, this Commission lacks jurisdiction over the Individual Shareholders, *see* Utah Code Ann. § 54-4-1, and all of the claims against them must be dismissed. As the Petitioner's motion was brought with no basis in law or fact, the Individual Shareholders seek an award of their fees and costs against Petitioner for having to bring this motion to dismiss.

DATED this 12th day of October, 2009.

HATCH, JAMES & DODGE, PC

By: /s/ Brent O. Hatch
Brent O. Hatch
Mitchell A. Stephens

Attorneys for the Individual Shareholders

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of October, 2009, I did cause to be sent, in the manner indicated below, a true and correct copy of the foregoing **MOTION TO DISMISS BEAR HOLLOW RESTORATION, LLC'S COMPLAINT AND REQUEST FOR AGENCY ACTION** to the following:

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/s/ Brent O. Hatch