SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
1 THE CIRCLE, SUITE 2
GEORGETOWN, DELAWARE 19947
TELEPHONE (302) 856-5264

November 7, 2016

Valerie Satterfield Edge, Esquire
Ralph K. Durstein, III, Esquire
Department of Justice
102 W. Water Street, 3rd Floor
Dover, DE 19904

Richard L. Abbott, Esquire
Abbott Law Firm
724 Yorklyn Road, Suite 240
Hockessin, DE 19707

RE: *Stevenson, et al. v. Delaware Department of Natural Resources & Environmental Control, et al.,* C.A. No. S13C-12-025 RFS

DATE SUBMITTED: September 9, 2016

Dear Counsel:

Pending before the Court are interrelated motions: defendants' motion for summary judgment; plaintiffs' motion to vacate this Court's order dated August 19, 2016, denying their motion to amend in order to correct a misnomer of a plaintiff; and plaintiffs' requests to submit affidavits of John A. Moore and R. Christian Hudson. This is my decision on the pending matters.

The action at hand is one for a declaratory judgment which plaintiffs David T. Stevenson

("Stevenson"), R. Christian Hudson ("Hudson"), John W. Moore, and Jack Peterman ("Peterman"), collectively referred to as "plaintiffs", filed against the Department of Natural Resources and Environmental Control ("DNREC") and David S. Small, Secretary of the DNREC ("Secretary"), collectively referred to as "defendants". Plaintiffs seek relief with regard to the amendment of regulations[1] originally enacted pursuant to Delaware's Regional Greenhouse Gas Initiative and CO_2 Emission Trading Program Act ("Delaware's RGGI Act").[2]

When the action initially was filed, defendants moved to dismiss the complaint on the ground plaintiffs lacked standing to pursue the action. The Court, employing the more liberal standard applicable to a motion to dismiss, accepted plaintiffs' contentions that the amended regulations would result in increased CO_2 costs which the utilities would pass on to them by way of increased electric bills, and thus, granted standing for purposes of the motion to dismiss.[3]

After a brief amount of discovery, plaintiffs moved for summary judgment. This motion put plaintiffs' standing squarely at issue under the more stringent summary judgment standard. Defendants submitted the affidavit of Susan F. Tierney, Ph. D. ("Tierney"), an expert on the RGGI and its effects. Defendants presented Tierney's affidavit in support of their contention that the standing issue prevented the granting of summary judgment in plaintiffs' favor. To clarify, defendants were not themselves seeking summary judgment. The basic take from Tierney's

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[1]7 DE Admin. Code 1147.

[2]7 *Del. C.* §§ 6043-47. A review of Delaware's RGGI Act may be found in this Court's April 5, 2016, decision denying plaintiffs' motion for summary judgment, *Stevenson v. Delaware Department of Natural Resources and Environmental Control*, 2016 WL 1613281 (Del. Super. April 5, 2016) ("*Stevenson* Summary Judgment Decision").

[3]*Stevenson v. Delaware Department of Natural Resources and Environmental Control*, 2014 WL 4937023 (Del. Super. Sept. 22, 2014) ("*Stevenson* Motion to Dismiss Decision").

affidavit is that Electric Generating Units[4] will incur increased costs associated with the amended regulations; however, other RGGI effects offset those increased costs, and consumers' electric bills will actually decrease rather than increase. Tierney's affidavit disputed plaintiffs' assertions that they will suffer financial harm as a result of the amended regulations.

In response, plaintiffs submitted an affidavit of plaintiff Stevenson, which attempted to undermine Tierney's affidavit. The Court concluded that Stevenson's affidavit did not establish he is an expert in the field of electricity and costs. Thus, Tierney's conclusions were undisputed.

The Court found Tierney to be extremely qualified to answer the question at hand and to provide an explanation that shows the plaintiffs were not harmed and will not be harmed as a result of the amended regulations.[5] At that point, plaintiffs had offered nothing in response to Tierney's opinion. However, as the Court explained in its decision, it could not grant summary judgment against plaintiffs at that time based solely on Tierney's affidavit; instead, the Court explained that it needed to observe Tierney and that Tierney needed to be subject to cross-examination.[6] The Court denied plaintiffs' summary judgment motion.

After the decision on plaintiffs' summary judgment motion issued, **defendants** moved for summary judgment. Their motion addresses the plaintiffs' case as a whole and, alternatively, it singles out the standing of plaintiffs Moore and Hudson.

First, defendants argue that plaintiffs are not harmed by the amendments to Delaware's

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[4]This term references large coal and other fossil fuel fired electric generating units producing more than 25 megawatts of electricity.

[5]*Stevenson* Summary Judgment Decision, 2016 WL 1613281 at *8.

[6]*Id.*

RGGI Act and thus, lack standing. Defendants bolster their argument with an additional affidavit of Tierney. The affidavit details the results of two studies Tierney and others have conducted which focused on the economic impacts of the RGGI program. The first study covered 2009-2011 while the second covered 2012-2014. The upshot of both studies and her overall conclusion is "that the RGGI program has provided positive economic benefits to Delaware's electricity customers (and to the economy of the State of Delaware), including since the change in program rules that occurred in 2013."[7] Plaintiffs responded to this argument by producing affidavits of Stevenson and John E. Stapleford, Ph.D. They dispute Tierney's opinion.

In the alternative, defendants filed for summary judgment with regards to two of the plaintiffs, Moore and Hudson. Unfortunately, the procedural posture regarding these two plaintiffs is convoluted. However, that posture must be set forth in order to render rulings.

I begin with the arguments concerning John Moore.

The caption of the complaint includes "John W. Moore" as a plaintiff. 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" (until recently) 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.
>
> 2. I am a commercial electrical service customer of Delmarva Power & Light Company ("Delmarva").

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[7]June 7, 2016 Affidavit of Susan F. Tierney at 4 and 16, located at Exhibit 9 of Appendix to Defendants' Opening Brief in Support of Their Motion for Summary Judgment.

> 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 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 established fact regarding John A. Moore's standing was that he made payments for electricity "through his ownership" of Acorn Energy, Inc.

In their summary judgment briefing, defendants presented the following argument in support of their contention that John Moore, whether he was "John W. Moore" or "John A. Moore", could not be a plaintiff. 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. Defendants argue that the claim brought by John W. Moore must be dismissed because he was deceased at the time the complaint was filed and his estate did not file the complaint. Upon information and belief, John A. Moore, who submitted the above-referenced affidavit dated May 13, 2015, is the son of John W. Moore. As of the time defendants were submitting their summary judgment brief, plaintiffs had made no effort to substitute John A. Moore as the party plaintiff. Defendants argued, in the alternative, that if the true plaintiff was "John A. Moore", the case should be dismissed against him because "John A. Moore" is not an electric power customer of any Delaware utility. 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.'"[8] 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.

Defendant advanced this argument in their June 14, 2016 Opening Brief in Support of their Motion for Summary Judgment. Plaintiffs were on notice at that time that defendants were arguing John A. Moore could not be a named plaintiff.

I now turn to the arguments concerning R. Christian Hudson. In their June 14, 2016 Opening Brief, defendants argue Hudson has no standing because his affidavit in support of defendants' summary judgment motion establishes he was not a direct customer of a Delaware electric company. Instead, his "harm" is through his ownership interest in Hudson Management, LLC and Sam Yoder & Son, LLC, which are entities separate from him. As is the case with John A. Moore and Acorn Energy, Inc., this "harm" is insufficient to establish standing.

On August 5, 2016, in partial response to defendants' motion for summary judgment,

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

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'...."[9]

Plaintiffs concede that John W. Moore was deceased at the time the complaint was filed and that John A. Moore always was the intended plaintiff. Plaintiffs argue no prejudice would result to defendants if the amendment is allowed. Plaintiffs also 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.

In their motion to amend, plaintiffs do not in any way address the standing situation of John A. Moore - the harm he allegedly suffers. However, plaintiffs do address this issue in their August 12, 2016, Answering Brief in Opposition to Defendants' Motion for Summary Judgment on Standing Grounds. 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 corporation which pays a higher electric bill to Delmarva due to the New RGGI Regulations. Therefore, the Defendants' argument is unfounded.[10]

Plaintiffs then argue that the Court may amend the complaint to name Acorn Energy, Inc.

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

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

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 as a party plaintiff.

In their Answering Brief in Opposition to Defendants' Motion for Summary Judgment on Standing Grounds, plaintiffs make the same arguments with regard to Hudson. They argue he is aggrieved as "an owner of a business that loses profit as a result of detrimental impacts on electric bills paid by entities that he owns."[11] Alternatively, plaintiffs argued that the complaint could be amended to add the entities Hudson owns.

After plaintiffs' 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. The Court was confused by this position in light of defendants' arguments in their summary judgment briefing that John A. Moore has no standing. Thus, the Court required the parties to address the motion to amend in open court.

The Court denied the motion to amend on the ground it would be futile to allow such an amendment.[12] The Court ruled as follows:

> 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. FN 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 that they have no objection to that amendment. FN 9

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

[12]These rulings were memorialized in its August 19, 2016 Order, *Stevenson v. Delaware Department of Natural Resources and Environmental Control,* 2016 WL 4473145 (Del. Super. Aug. 19, 2016) ("*Stevenson* Motion to Amend Order").

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

FN 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).

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

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

FN 11 *Id.*

FN 12 *Id.* at 5.

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.
>
> ... 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.*: FN 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).
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> FN 13 611 A.2d 12, 15 (Del. Ch. 1992).

Furthermore, a derivative action must be filed in Chancery Court, even if the action would be one the corporation could bring at law. FN14

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

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.[13]

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[13] *Stevenson* Motion to Amend Order at **3-4.

Thereafter, on August 24, 2016, plaintiffs filed two pleadings.[14] The first was an affidavit of Hudson and the other was a motion for reargument and/or relief from the Court's August 19, 2016 order.

In the Affidavit of R. Christian Hudson, dated August 23, 2016, Hudson states as follows:

> 2. I am personally a customer of Delmarva Power ("Delmarva") for electricity service provided to my home in Lewes, Delaware.
> 3. Attached as Exhibit A is a copy of a recent electric bill from Delmarva which confirms that the account is held in my personal name.
> 4. The monthly Delmarva bill is paid by me from a joint bank account in the name of me and my wife.
> 5. I have been a Delmarva customer for the entire period of residence at my home in Lewes, Delaware, which has been approximately 3 years.

In their motion to reargue, plaintiffs' counsel explains as follows. He was unaware that the Court would address the futility aspect of the motion to amend and "[t[hus, no check into Mr. Moore's status as a customer of Delmarva in his personal capacity was undertaken."[15] After the Court's August 19, 2016, Order was sent to Moore, Moore notified counsel that he was a customer and paid the bill personally. Moore submitted an affidavit that stated:

> 2. I reside at 101 Brookmeadow Road, Greenville, DE 19807, where I have lived since 1997.
> 3. I am a customer of Delmarva Power ("Delmarva") and pay the monthly bill.
> 4. Attached as Exhibit A is a recent Delmarva bill in my name, as the customer of Delmarva for electricity service.
> 5. To the best of my recollection, I have been the Delmarva customer regarding electric service at my residence for more than 18 years and have paid the monthly bills mailed to me by Delmarva during that time period.

Plaintiffs argue that clarification of a fact may be a ground to seek reargument pursuant to

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[14]Plaintiffs argue in their Motion to Strike Defendants' Opposition to Plaintiffs' Motion for Reargument that they filed their Motion for Reargument on August 26, 2016. It was efiled on August 24, 2016.

[15]Plaintiffs' Motion for Reargument and/or Relief from Order at 2.

Superior Court Civil Rule 59(e)[16] and/or that the Court may modify an order based upon mistake, inadvertence, surprise, or excusable neglect or for any reason justifying relief pursuant to Superior Court Civil Rule 60(b)(1) and (6).[17] Plaintiffs further argue as follows:

> 8. Under the circumstances, the Plaintiffs reasonably assumed that the Court would grant the Motion to Amend as submitted; it was unopposed and the normal custom and practice of the Superior Court is to grant such motions. In addition, the Court did not signal any concern with the issue of futility or the possibility that it might deny the Motion prior to the Motion hearing being conducted on the morning of August 19th. Thus, the subsequent clarification of the fact that John A. Moore is in fact a Delmarva Power customer in his personal capacity was not delved into until after the Order was entered.
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> 9. The Rule 60(b) standards have been easily met under the circumstances: John A. Moore is a Delmarva customer who may have Standing (depending on the outcome of the pending Motion for Summary Judgment), which warrants an amendment of the caption so as to properly indicate that the middle initial of Plaintiff John Moore is "A."[18]

Consequently, plaintiffs request that the Court grant the original motion to amend to correct the middle initial of John Moore from a "W" to an "A."

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[16]Superior Court Civil Rule 59(e) provides in pertinent part:

> *Reargument*s. A motion for reargument shall be served and filed within 5 days after the filing of the Court's opinion or decision. The motion shall briefly and distinctly state the grounds therefor. Within 5 days after service of such motion, the opposing party may serve and file a brief answer to each ground asserted in the motion. The Court will determine from the motion and answer whether reargument will be granted.

[17]Superior Court Civil Rule 60(b) provides in pertinent part:

> (b) *Mistake; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the Court may relieve a party or a party's legal representative from final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect; ... or (6) any other reason justifying relief from the operation of the judgment.

[18]Plaintiffs' Motion for Reargument and/or Relief from Order at 3.

Defendants respond as follows in Defendants' Opposition to Plaintiff's [sic] Motion [sic] Reargument and/or Relief from Order, filed on September 6, 2016. First, defendants, through their summary judgment briefing, put plaintiffs on notice of the futility problem when they noted that John A. Moore had made no allegation of harm other than indirectly through Acorn Energy, Inc. They contend plaintiffs should have addressed the issue when they filed their brief on the summary judgment motion and thus, they have waived the right to argue that Moore paid for residential service. They also assert: "[U]pon information and belief, John A. Moore's wife owns the residence in question and it would legally be her responsibility to pay the electric service for the residence."[19] Defendants also argue that it would be prejudicial to them if the Court grants the motion to amend at this stage; however, they do not support this conclusory contention of prejudice. Finally, defendants argue plaintiffs should have addressed this issue before the motion to amend was filed.

In response, plaintiffs filed a motion to strike defendants' opposition because the document was not filed within 5 days after service of the motion.

Defendants counter there is no 5 day time limit on responding to a motion filed pursuant to Superior Court Civil Rule 60(b).

In the midst of all of the back and forth regarding the motion to reargue and the filing of the affidavits, defendants filed their reply brief on the motion for summary judgment. Therein, they repeat their argument they should be entitled to summary judgment against all plaintiffs based upon the expert's affidavit. They argue that if the Court does not grant summary judgment

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[19]Defendants' Opposition to Plaintiff's [sic] Motion [sic] Reargument and/or Relief from Order at ¶4.

as to all plaintiffs, then it should grant summary judgment as to plaintiffs Moore and Hudson. As to John W. Moore, defendants argue he is deceased. As to John A. Moore, defendants argue he has not shown he has paid an electric bill. Defendants argue that Moore missed the opportunity to argue a different theory of harm and the late-filed affidavit and alternative theory of the case should not be considered. As to Hudson, defendants argue his potential injury rests on his ownership interest in two companies which pay electric bills and that ownership interest is too indirect so support a standing claim.

In a letter dated September 13, 2016, defendants argue Hudson's affidavit filed on August 24, 2016, was untimely filed and should not be considered in connection with the summary judgment motion.[20]

Plaintiffs, in response to defendants' September 13, 2016, letter argue that defendants are improperly seeking the striking of pleadings and they request that the Court disregard that letter.[21] They further argue that Hudson's affidavit was filed in response to the Court's ruling on August 19, 2016, because plaintiffs apparently were unaware, before August 19, 2016, that being individually obligated to pay an electrical bill was a threshold requirement for standing. Plaintiffs then request that the Court deem their September 13, 2016, letter to be a request to amend the briefing deadline to be able to include the affidavits of Moore and Hudson.

I now address the following issues: whether Moore and Hudson's affidavits should be allowed; whether the Court's August 19, 2016 ruling should be vacated; and if so, whether the motion to amend to correct Moore's name should be granted.

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[20]September 13, 2016 Letter from Valerie S. Edge, Esquire.

[21]September 13, 2016 Letter from Richard L. Abbott, Esquire.

The Court agrees with defendants' contentions that Moore and Hudson should have filed their affidavits establishing they were personally responsible for the payment of their electric bills long ago. Personal liability for the electric bills is an obvious threshold requirement for standing when you are alleging that you are harmed by an increased costs in those electrical bills. Moore and Hudson's argument that they were harmed by paying their companies' bills is an unreasonable and legally meritless argument. However, defendants have not argued how they would be in any way prejudiced by allowing parties whom they have considered to be plaintiffs from the start to continue being plaintiffs. Justice would not be served in disallowing the filing of the affidavits. For that reason, the Court allows the affidavits to be filed.

Although I am allowing the filing of the affidavits, I am not ruling in any way that Moore and Hudson have established standing. They have not established standing. Discovery may show that plaintiffs were not paying electric bills during pertinent times and thus may not be harmed. Discovery also may show that they have not incurred any increase in any costs of electric bills. All that the allowance of the affidavits does is preclude defendants' summary judgment motion against Moore and Hudson as a matter of law.

Now that Moore's affidavit has been submitted, the amendment of the complaint to correct the name of plaintiff to "John A. Moore" would not be futile. The inclusion of the middle initial "W." rather than "A." was a typographical error. Defendants have not explained what prejudice they would suffer from an allowance of the amendment and the Court cannot discern any prejudice. Thus, the Court VACATES its August 19, 2016, decision and grants the motion to amend to correct the name of the plaintiff to "John A. Moore".

I now turn to defendants' summary judgment motion as to all plaintiffs. Plaintiffs have

now submitted two affidavits of Tierney which conclude that affected electric consumers have received financial benefits from the amended regulations. As this Court previously ruled in its decision on plaintiffs' summary judgment motion, the Court cannot rule upon this issue based upon Tierney's opinion without her testifying and being subject to cross-examination.[22] Thus, defendants have not met their burden on summary judgment on this issue and defendants' motion for summary judgment is denied.

In conclusion, the following rulings are made. The affidavits of Moore and Hudson are allowed. The Court's order of August 19, 2016 is VACATED. The plaintiffs' motion to amend to change the name of "John W. Moore" to "John A. Moore" is granted and the caption shall be amended to reflect that amendment. Finally, defendants' motion for summary judgment is DENIED.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office

[22] *Stevenson* Summary Judgment Decision, 2016 WL 1613281 at *8.