

SB 656  
SB 657

From George Badeen

3-23-16



RICK SNYDER  
GOVERNOR

STATE OF MICHIGAN  
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS  
LANSING

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DIRECTOR

### Declaratory Ruling 2015/001

PAR, Inc., d/b/a/ PAR North America (PAR) has requested a Declaratory Ruling from the Michigan Department of Licensing & Regulatory Affairs pursuant to MCL 24.263 and Rule 338.81 relative to PAR's operations.

PAR, Inc., d/b/a PAR North America ("PAR"), respectfully request that the Corporations, Securities & Commercial Licensing Bureau issue a declaratory ruling pursuant to MCL 24.263 and Michigan Administrative Code R338.1. PAR asks that the Bureau issue a declaration interpreting Article 9 of the Michigan Occupational Code dealing with Debt Collection Practices, MCL 339.901-.920, determining that PAR does not now require, and has never required, a collection agency license in the State of Michigan to engage in repossession forwarding as described herein.

I, on behalf of the Bureau, grant PAR's request and issue the following Declaratory Ruling:

#### RULE

Article 9 of the Occupational Code (P.A. 299 of 1980, as amended) provides for the regulation of collection agencies. Pursuant to MCL 339.904(1), except as otherwise provided in this article, a person shall not operate a collection agency or commence in the business of a collection agency without first applying for and obtaining a license under this article from the department for each place of business.

Section 901(b) of the Code defines a collection agency as follows:

"Collection agency" means a person directly or indirectly engaged in soliciting a claim for collection or collecting or attempting to collect a claim owed or due or asserted to be owed or due another, or repossessing or attempting to repossess a thing of value owed or due or asserted to be owed or due another arising out of an expressed or implied agreement. A collection agency shall include a person representing himself or herself as a collection or repossession agency, or a person performing the activities of a collection agency, on behalf of another, which are regulated by this act. A collection agency shall also include a person who furnishes or attempts to furnish a form or a written demand service represented to be a collection or repossession technique, device, or system to be used to collect or repossess claims, if the form contains the name of a person other than the creditor in a manner indicating that a request or demand for payment is being made by a person other than the creditor even though the form directs the debtor to make payment directly to the creditor rather than to the other person whose name appears on the form. Collection agency also includes a person who uses a fictitious name or the name of another in the collection or repossession of claims to convey to the debtor that a third person is collecting or repossessing or has been employed to collect or repossess the

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claim. Collection agency does not include a person whose collection activities are confined and are directly related to the operation of a business other than that of a collection agency such as, but not limited to, the following: (i) A regular employee when collecting amounts for 1 employer if all collection efforts are carried on in the name of the employer.

(ii) A state or nationally chartered bank when collecting its own claims.

(iii) A trust company when collecting its own claims.

(iv) A state or federally chartered savings and loan association when collecting its own claims.

(v) A state or federally chartered credit union when collecting its own claims.

(vi) A licensee under Act No. 21 of the Public Acts of 1939, as amended, being sections 493.1 to 493.26 of the Michigan Compiled Laws.

(vii) A business licensed by this state under a regulatory act in which collection activity is regulated.

(viii) An abstract company doing an escrow business.

(ix) A licensed real estate broker or salesperson if the claims being handled by the broker or salesperson

are related to or in connection with his or her real estate business.

(x) A public officer or person acting under a court order.

(xi) An attorney handling claims and collections on behalf of clients and in the attorney's own name. MCL 339.901(b).

Section 901(e) of the Code defines Creditor or Principal of as follows:

“Creditor” or “principal” means a person who offers or extends credit creating a debt or a person to whom a debt is owed or due or asserted to be owed or due. Creditor or principal shall not include a person who receives an assignment or transfer of a debt solely for the purpose of facilitating collection of the debt for the assignor or transferor. In those instances, the assignor or transferor of the debt shall continue to be considered the creditor or the principal for purposes of this article.

For purposes of the Code: “Claim” or “debt” means an obligation or alleged obligation for the payment of money or thing of value arising out of an expressed or implied agreement or contract for a purchase made primarily for personal, family, or household purposes. MCL 339.901(a).

Section 909(1) of the Code states: A collection agency shall maintain a separate trust account in which all money collected under this article by the collection agency shall be deposited within 3 banking days after receipt.

Section 909(3) of the Code states in part: The trust account shall always contain sufficient funds to pay money due or owing the client less money owed to the licensee by the client.

### ANALYSIS

A review of PAR's standard Michigan Client Repossession and Remarketing Services Agreement indicates throughout the document that PAR is responsible for the repossession and

debt collateral sales efforts through itself, its network of repossession contractors, subcontractors, and their respective subcontractors and agents, including but not limited to, the repossession, storage, repair, appearance reconditioning, and sale at auction of used vehicles. Pursuant to the Code's definition of a Collection Agency that a "Collection Agency" means a person directly or indirectly engaged in collecting or attempting to collect a claim owed or due or asserted to be due another, or repossessing or attempting to repossess a thing of value owed or due or asserted to be owed or due another arising out of an expressed or implied agreement. Collection agency includes a person representing himself or herself as a collection or repossession agency or a person performing the activities of a collection agency, on behalf of another that are regulated by this act. The Code also requires that funds collected under the article that belong to the client, be held in trust, accounted for, and remitted according to the requirements of the Code.

 Acting with Limited Power of Attorney facilitates the conversion of the debt collateral to money. The conversion of debt collateral to money owed another is an activity that is directly related to the repossession/collection of the debt. PAR has control of those funds and pursuant to the documentation submitted by PAR, Inc. is responsible to remit the client's portion of those funds to the client. The handling of money due or owing another that was a result of an obligation for the payment of money or thing of value arising out of an expressed or implied agreement or contract for a purchase made primarily for personal, family or household purposes is subject to Article 9 of the Occupational Code.

A thorough review of the documentation submitted by PAR, Inc. indicates that PAR, Inc. repossession practice does not meet the interstate communications exception.

It is my role to administer the Occupational Code according to the legislative intent, as expressed by the plain language of the statutes. It is also my role to base a Declaratory Ruling upon the plain language of the statutes, the Statement of Facts contained within the Request for Declaratory Ruling, and from the additional documents requested and received.

It is my ruling that PAR's Repossession Forwarding process does fall within the jurisdiction of Article 9 of the Occupational Code. Therefore PAR, Inc. d/b/a North America is required to hold a Michigan collection agency license.

This ruling is limited to specific Statement of Facts and information received and is binding on this agency and PAR, Inc., d/b/a PAR North America unless altered or set aside a court of competent jurisdiction. This ruling can not be retroactively changed, but may be changed prospectively by the agency at its discretion. This ruling is subject to judicial review in the same manner as an agency final decision or order as prescribed by law.

  
\_\_\_\_\_  
Alan J. Scheffler, Director

3/16/2015  
\_\_\_\_\_  
Date

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

In re PAR, Inc., d/b/a PAR North America,  
Petitioner-Appellant,

Case No. 15-380-AA

v

Honorable Clinton Canady, III

State of Michigan, Department of Licensing  
& Regulatory Affairs, Corporations, Securities  
& Commercial Licensing Bureau,  
Respondent-Appellee.

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**BRIEF OF APPELLEE DEPARTMENT OF LICENSING AND  
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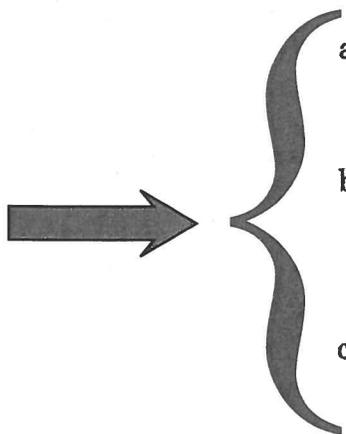
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## STATEMENT OF JURISDICTION

On November 25, 2014, PAR filed a request for declaratory ruling pursuant to section 63 of the Michigan Administrative Procedures Act, 1969 PA 306, as amended, MCL 24.101 *et seq.* On March 16, 2015, the Department of Licensing and Regulatory Affairs issued a declaratory ruling in response to that request. On May 19, 2015, PAR filed a claim of appeal of the Department's March 16, 2015 declaratory ruling with this Court. This Court has jurisdiction pursuant to Art 6, § 28 of the Michigan Constitution, MCL 24.303(1), and MCR 7.119.

## COUNTER-STATEMENT OF QUESTION PRESENTED

1. Article 9 of the Occupational Code defines a collection agency as a person directly or indirectly engaged in repossessing something of value. PAR provides repossession services to its clients. The Department's issued a declaratory ruling finding that PAR's repossession activities in the state of Michigan met the definition for a collection agency under Article 9 of the Occupational Code and as such, they were required to be licensed. Was the Department's Declaratory Ruling authorized by law?

Appellant's answer: No.

Appellee's answer: Yes.

## INTRODUCTION

The question before this Court is simple: Was the Department of Licensing and Regulatory Affairs issuance of a declaratory ruling finding that PAR needed to be licensed as a collection agency authorized by law? In its brief, PAR attempts to confuse the issue with lengthy discussions of tangential concepts, but ultimately, the Department's ruling is entitled to the most respectful consideration by this Court and should be upheld.



A collection agency includes a person that is either directly or indirectly engaged in repossession of a thing of value or a person who holds themselves out as a repossession agency. MCL 339.901(b). Despite its protests to the contrary, the Court need look no further than PAR's own service agreements to see that PAR falls squarely within that definition. PAR's Repossession and Remarketing Service Agreements clearly indicate that PAR provides services to in-state lenders including repossession, through either its own employees or its network of subcontractors and agents. Thus, they are both directly and indirectly engaged in repossessing things of value, namely vehicles. Further, based on the heading of their agreements alone, they are clearly holding themselves out as a repossession agency. Accordingly, the Department's declaratory ruling that they meet the definition for collection agency and must be licensed was the appropriate application of the Occupational Code to the facts supplied by PAR and thus should be upheld.

## COUNTER-STATEMENT OF FACTS

PAR is an Indiana corporation engaged in repossession and remarketing services. According to PAR's Client Repossession and Remarketing Services Agreement, PAR provides services to creditors throughout the United States, "both through its own employees and through its network of agents, subcontractors and others. . . including, but not limited to, the repossession, transportation, storage, repair, appearance reconditioning and sale at auction of used vehicles." (Certified Record, Exs 4-13). PAR also contracts with auction operators to arrange for the pick-up, transportation, storage, repair and sale at auction of used vehicles owned by PAR or its customers. Pursuant to PAR's Auction Service Agreements, the auction operators deduct their fees and charges from the actual sale price of each vehicle sold and then pay the net remaining price directly to PAR. (Cert Rec, Exs 15-21). Notably, PAR obtained a Michigan collection agency license in August, 2014.

On November 25, 2014, despite already holding a license, PAR filed a request for declaratory ruling pursuant to section 63 of the Michigan Administrative Procedures Act, 1969 PA 306, as amended, MCL 24.101 *et seq* asking whether PAR is required to be licensed as a collection agency in the State of Michigan pursuant to Article 9 of the Occupational Code, 1980 PA 299, MCL 339.101 *et seq*. On December 10, 2014, the Department sent PAR's counsel a letter requesting additional information, including copies of its contracts with Michigan lenders, repossession agents and auction operators. PAR provided the Department with the requested documents on January 30, 2015. Based on review of both PAR's initial request and



the additional information, on March 16, 2015, the Department Declaratory Ruling  
2015/001 finding that PAR's repossession process falls within the jurisdiction of  
Article 9, and therefore, PAR must be licensed as a Michigan collection agency  
license under the Code. On May 19, 2015, PAR filed the claim of appeal that is at  
issue before this Court.

## ARGUMENT

I. **The Department's March 16, 2015 Declaratory Ruling that PAR must be licensed as a collection agency complies with the Occupational Code and is within the Department's authority and is therefore authorized by law.**

A. **Standard of Review**

A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case. MCL 24.263. Article 6, § 28 of the Michigan Constitution provides, in part, that:

All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are *authorized by law*; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. (Emphasis added.) Const 1963, art 6, § 28.

Accordingly, in this case, where no hearing was required, the Court's review of the Department's March 16, 2015 declaratory ruling is limited to whether that decision was authorized by law. An agency's decision is authorized by law unless it "is in violation of a statute [or constitution], in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures resulting in material prejudice, or is arbitrary and capricious."

*Northwestern Nat'l Casualty Co v Comm'r of Insurance*, 231 Mich App 483, 488; 586 NW2d 563 (1998).

Furthermore, where no hearing is required, the reviewing court cannot examine the evidentiary basis of the Department's decision. *Brandon School*

*District v. Michigan Education Special Services Association*, 191 Mich App 257, 263 (1991). “Judicial review is not de novo and is limited in scope to a determination whether the action of the agency was authorized by law.” *Id.* Moreover, a reviewing court possessing limited discretion “should not substitute its opinion for that of the administrative agency where there is requisite evidence to support the administrative decision, notwithstanding the court might have reached a different result had it been sitting as the agency.” *Murphy v Oakland County Department of Health*, 95 Mich App 337, 339-340 (1980), citing *Viculin v Dep’t of Civil Service*, 386 Mich 375 (1971). Finally, an agency’s interpretation of a statute is entitled to “the most respectful consideration and ought not be overruled without cogent reasons.” *In re Complaint of Rovas*, 482 Mich 90, 754 NW2d 259, (2008), citing, *Boyer-Campbell v Fry*, 271 Mich 282, 260 NW2d 165 (1935).

## B. Analysis

Under section 63 of the APA, “[o]n request of an interested person, an agency may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency.” MCL 24.263. A request for declaratory ruling must include a complete, accurate, and concise statement of facts that are, or may be, relevant to the determination of the applicability of the statute, as well as a statement of issues presented and an analysis of those issues. Mich Admin Code, R 338.81(1)(c). In addition, before

issuing the declaratory ruling, the agency has the discretion to request submission of any additional information deemed necessary. Mich Admin Code, R 338.81(6)(b).

1. **It was within the Department's statutory authority to issue the March 16, 2015 Declaratory Ruling which accurately applied the Occupational Code to require PAR be licensed as a collection agency based on its repossession activities within the State.**

Under section 904(1) of the Code, "[e]xcept as otherwise provided in this article, a person shall not operate a collection agency or commence in the business of a collection agency without first applying for and obtaining a license under this article from the department for each place of business." MCL 339.904(1). A "collection agency" includes a person that is "directly or indirectly engaged in . . . repossessing or attempting to repossess a thing of value owed or due or asserted to be owed or due another arising out of an expressed or implied agreement." MCL 339.901(b)<sup>1</sup>. Collection agency also includes a person "representing himself or herself as a . . . repossession agency, or a person performing the activities of a collection agency, on behalf of another that are regulated by this act." *Id.* Regulated activities of a collection agency include the handling of money on behalf of a client to whom the debt is owed, including maintenance of a trust account. MCL 339.909.

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<sup>1</sup> This statute was amended effective January 15, 2015 to delete "soliciting a claim for collection." The Department acknowledges that it erroneously cites to the previous version of the statute in its March 16, 2015 declaratory ruling. However, the Department did not rely on the now omitted portion of the definition to support its conclusion. Accordingly, this amounts to harmless error and does not impact the outcome of this case.



- a. According to PAR's Repossession and Remarketing Service Agreements, they are directly and indirectly engaged in repossessing vehicles.

In its brief, PAR erroneously asserts that it is the Department's obligation to apply the statute to PAR's activities as described in PAR's statement of facts. It is clear from the administrative rule that the Department may request additional information it deems necessary before issuing its ruling and thus is not limited to the information initially provided by PAR. Mich Admin Code, R 338.81(6)(a). In this case, the Department requested additional information, namely copies of PARs contracts with lenders, agents and auction operators. Based on this information, the Department determined that PAR was clearly engaged in repossession activities that fall within the definition of a collection agency.

Specifically, according to PAR's own service agreements, PAR provides services "both through its *own employees* and through its network of agents, subcontractors and others . . . including, but not limited to, the repossession . . . and sale at auction of used vehicles." (Certified Record, 4-13). Accordingly, not only are they directly engaged in repossession through their own employees, they are indirectly engaged in repossession through their network of agents, subcontractors and others. Furthermore, looking at the service agreement as a whole, PAR clearly holds itself out as a repossession agency. In either instance, PAR falls within the definition of a collection agency and therefore must be licensed unless they meet an enumerated exception.



In fact, PAR acknowledges in its brief that "collection activities" as described in the Occupational Code consist of "collecting" consumer debts, "repossessing"

collateral securing consumer debts or “attempting” to either collect the debt or repossess the collateral. PAR then goes on to engage in an extensive discussion of statutory interpretation, which is unnecessary in this case. While the Department agrees with PAR’s assertion that the Court must interpret words of the statute in light of their ordinary meaning, the Court does not need to consult a dictionary in this case. It need only look at PAR’s own choice of words in its service agreements to clearly see that PAR engages in repossession, either through its employees or its network of agents.

PAR also claims throughout their brief that they simply refer lenders to licensed collection agencies and thus need not be licensed. However, this is inconsistent with the information they provided the Department for review. PAR does not, as they imply, simply connect a lender to the collection agency, which would require the lenders working directly with the collection agency. Instead, PAR contracts with the lender directly for services, including repossession. Then, according to their service agreement, PAR repossesses the subject vehicle, either through their own employees or through their contract with agents or subcontractors. This is not the hands-off forwarding process the Department envisioned when it filed its amicus brief with the Michigan Supreme Court in *Badeen v PAR*, 496 Mich 75, 853 NW2d 303 (2014). Thus, the Department’s position in that brief, is inapplicable to the case currently before this Court. Even more so in light of the fact that the Supreme Court ultimately disagreed with the Department’s interpretation of the Code at that time. Further, that brief was based

on a general understanding of what the forwarding companies claimed to do. In contrast, the declaratory ruling, by statute, is based on application of the Code to a specific set of facts.



- b. PAR handles client's money obtained through the repossession process and therefore is engaged in a regulated activity of a collection agency on another's behalf.

PAR seems to argue that the Department's decision is based solely on how PAR handles post-repossession proceeds and that because the Code does not regulate handling post-repossession sale proceeds, PAR need not be licensed to conduct that activity in Michigan. First, this conveniently ignores their own client service agreements which provide that PAR is both directly and indirectly engaged in repossession of vehicles. Second, while the Code does not specifically address post-repossession proceeds, it does regulate how collection agencies must handle client's monies. MCL 339.909.



Pursuant to PAR's Auction Service Agreements, PAR also contracts with auction operators to facilitate the sale of the repossessed vehicles. In those instances, the auction operators deduct their fees and charges from the actual sale price of each vehicle sold and then pay the net remaining price directly to PAR. Thus, where the money flows directly from the repossession activities outlined in PAR's service agreements with the lender, and that money is owed to the lender, PAR is taking on a regulated act of a collection agency on behalf of their clients and is thus subject to Article 9. MCL 339.901(b).



c.

The Department correctly determined PAR's repossession activities did not fall under any of Article 9's enumerated exceptions.

Section 901(b) provides that a “[c]ollection agency does not include a person whose collection activities are confined and are directly related to the operation of a business other than that of a collection agency, such as, but not limited to . . .” several enumerated examples including a state bank when collecting its own claims or a licensed real estate broker handling claims related to his or her real estate business. MCL 339.901(b). In addition, a person is not subject to the licensing requirement of Article 9, if “the person’s collection activities in this state are limited to interstate communications.” MCL 339.902(2). For purposes of the Code, “communicate” means the conveying of information regarding a debt directly or indirectly to a person through any medium. MCL 339.901(d).

The Department recognizes the list of enumerated exceptions under section 901(b) is not intended to be exhaustive. However, it is clear from both the language of the statute, as well as the nature of the businesses listed, the exceptions apply only when they are “confined and directly related to” collection activities that are secondary or stem from the primary business objective of the person. Unlike those enumerated businesses, repossession is not secondary to some other type of business for PAR; it is the primary focus of PAR’s repossession and remarketing arm. Accordingly, this exception does not apply to PAR.

The only exception which may conceivably apply to PAR is the interstate communications exception. That exception provides a person is not subject to the licensing requirements if the person's collection activities in this state are limited to

interstate communications. MCL 339.904(2). While PAR indicated in their request for declaratory ruling that they conduct business "almost exclusively" via electronic communications, they do not go so far as to say that all of their business in Michigan is limited to electronic communications. In fact, they admit to having an employee located in the state of Michigan, as well as employees who travel to Michigan to attend auctions and oversee the sale of vehicles on behalf of its clients. (Certified Record, Ex 2). In addition, PAR stated they market and promote their services both in person and via other forms of communication, including marketing representatives who make personal visits to potential clients throughout the country, including in the state of Michigan. Furthermore, and more importantly, their service agreements indicate they, through either their employees or network of subcontractors, provide repossession services. This goes well beyond simply conveying information about a debt. To the extent this involves repossessing vehicles in the state of Michigan, they fall under the jurisdiction of the Occupational Code, and the interstate communications exception does not apply.

Accordingly, the Department was well within its statutory authority when it issued a declaratory ruling finding that PAR's activities fell within the jurisdiction of Article 9 of the Code and thus required them to be licensed in Michigan. This interpretation and application of the Code must be afforded respectful consideration by this Court.

**2. The Department's Declaratory Ruling was neither arbitrary nor capricious.**

The Michigan Court of Appeals, quoting the United States Supreme Court, has defined arbitrary and capricious as follows:

Arbitrary is: " '[W]ithout adequate determining principle ... Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, ... decisive but unreasoned.' "

Capricious is: " '[A]pt to change suddenly; freakish; whimsical; humorsome.' " *Brandon School Dist v Michigan Educ Special Servs Ass'n*, 191 Mich App 257, 265; 477 NW2d 138, 142 (1991), *citing*, *United States v Carmack*, 329 US 230, 243 (1946).

The Department's declaratory ruling was based on a well-reasoned interpretation and application of the Occupational Code based on the facts and information provided by PAR. This included an extensive review of the initial request for declaratory ruling, as well as the subsequent information, including PAR's service agreements with lenders, agents and auction operators. The Department's decision was made with appropriate consideration of these documents and was neither arbitrary nor capricious.

The fact that the Department may have reached a different conclusion for other forwarding companies is of little impact on this case. If anything, it demonstrates that the Department considered each set of facts individually instead of simply making a sweeping, generalized ruling. This is anything but arbitrary and capricious. Declaratory rulings are, by statute, limited to the specific facts presented to the agency. MCL 24.263 and Mich Admin Code, R 338.81(9)(d). Furthermore, each ruling is binding on the agency and the applicant, not other

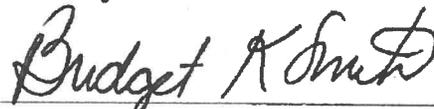
applicants for declaratory rulings. Mich Admin Code, R 338.81(e). The fact that a corporation calls itself a forwarding company does not mean that they all conduct business in the same manner. Accordingly, each declaratory ruling referenced by PAR was based on its own separate and distinct set of facts presented. Accordingly, they are irrelevant to the Court's review of the Department's declaratory ruling in this case.

## CONCLUSION AND RELIEF REQUESTED

The Department's March 16, 2015 Declaratory Ruling that PAR must be licensed as a collection agency based on their repossession activities in the state of Michigan is an appropriate application of the Occupational Code based on the facts provided. This decision was authorized by law and warrants respectful consideration by this Court.

For these reasons, the Department respectfully requests that this Court affirm the March 16, 2015 Declaratory Ruling.

Respectfully submitted,  
BILL SCHUETTE  
Attorney General



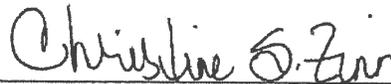
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Dated: September 16, 2015

## PROOF OF SERVICE

The undersigned certifies that on the date indicated above, a true copy of the Brief of Appellee Department of Licensing and Regulatory Affairs was served upon Larry J. Saylor, Attorney for Appellant, by mailing the same enclosed in an envelope bearing first class postage fully prepaid and plainly addressed as follows:

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