STATE OF ILLINOIS

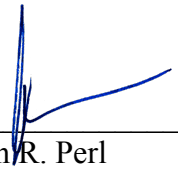
ILLINOIS COMMERCE COMMISSION

In re the matter of:	:	
	:	
Protective Parking Service Corporation d/b/a	:	
Lincoln Towing Service,	:	92 RTV-R Sub 17
Respondent.	:	100139 MC
	:	
Hearing on fitness to hold a Commercial Vehicle	:	Honorable Latrice Kirkland-Montaque
Relocator's License pursuant to Section 401 of	:	
the Illinois Commercial Relocation of	:	
Trespassing Vehicles Law, 625 ILCS 5/18a-401.	:	

NOTICE OF FILING

To: See attached service list.

PLEASE TAKE NOTICE that on the **23rd day of July, 2018**, the Respondent, PROTECTIVE PARKING SERVICE CORPORATION D/B/A LINCOLN TOWING SERVICE, by and through its attorneys, PERL & GOODSNYDER, LTD., filed its **Respondent Protective Parking Service Corporation d/b/a Lincoln Towing Service's Brief in Reply to Exceptions**, with the Office of the Processing and Information Section by mailing a copy to 527 East Capitol Avenue, Springfield, Illinois 62701 pursuant to 83 Ill. Adm. Code 200.70, a true and accurate copy of which is attached hereto, and served upon all counsel of record as set forth in the Certificate of Service which follows.



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CERTIFICATE OF SERVICE

TO: See attached Service List.

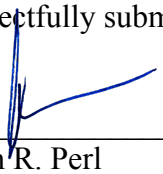
I, an attorney under oath, hereby certify under penalties as provided by law pursuant to §1-109 of the Illinois Code of Civil Procedure, that I caused the following documents of the Defendant, **PROTECTIVE PARKING SERVICE CORPORATION, an Illinois Corporation d/b/a LINCOLN TOWING SERVICE**:

(1) Notice of Filing
(2) Certificate of Service
(3) Service List
(4) Respondent Protective Parking Service Corporation d/b/a Lincoln Towing Service's Brief in Reply to Exceptions

to be served upon each attorney to whom directed at their respective addresses via:

__X__ **Via Electronic Mail**, by transmitting a copy in PDF format to the email addresses listed herein with consent of the recipient where permissible under 83 Ill. Adm. Code 200.1050, before 11:59 P.M. on the **23rd day of July, 2018.**

Respectfully submitted,



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ADMINISTRATIVE LAW JUDGE

Honorable Judge Latrice Kirkland-Montaque
Chief Administrative Law Judge
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CLERK OF THE ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission
Processing and Information Section
527 East Capitol Avenue
Springfield, Illinois 62701
via U.S. MAIL ONLY

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

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RESPONDENT PROTECTIVE PARKING SERVICE CORPORATION D/B/A LINCOLN TOWING SERVICE'S BRIEF IN REPLY TO EXCEPTIONS

NOW COMES the Respondent, PROTECTIVE PARKING SERVICE CORPORATION d/b/a LINCOLN TOWING SERVICE (hereinafter referred to as "Respondent") by and through its attorneys, PERL & GOODSNYDER, LTD., and pursuant the Illinois Commerce Commission (hereinafter referred to as the "Commission") Rules of Practice (hereinafter referred to as the "Rules"), 83 Ill. Adm. Code 200.10 *et seq*., the order and direction of the Administrative Law Judge (hereinafter referred to as the "ALJ"), and 83 Ill. Adm. Code 200.830, respectfully responds to the Brief on Exceptions of the Staff of the Illinois Commerce Commission (hereinafter referred to as the "BOE" and/or "Staff's Brief") filed by attorneys for the Staff of the Illinois Commerce Commission (hereinafter referred to as the "Staff"). In support thereof, Respondent argues as follows:

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STAFF'S BRIEF EXCEEDS THE SCOPE OF 83 ILL. ADM. CODE 200.830 AND IMPERMISSIBLY SEEKS A RECONSIDERATION OF THE ALJ'S DECISION IN ITS ENTIRETY, AND FAILS TO SEEK SPECIFIC EXCEPTIONS TO THE ORDER

The Rules of Practice were designed to afford due process and were expressly intended "not be construed to abrogate, modify or limit any rights, privileges or immunities granted or protected by the Constitution or laws of the State of Illinois or the United States." 83 Ill. Adm. Code 200.20. The Rules provide a mechanism for a party or Staff to file "exceptions" to a proposed order. 83 Ill. Adm. Code 200.830. The rule is written as follows:

> a) Within 14 days after service of the Hearing Examiner's proposed order, or such other time as is fixed by the Hearing Examiner, any party or Staff witness may file exceptions to the proposed order in a brief designated "Brief on Exceptions" and within 7 days after the time for filing "Briefs on Exceptions" or such other time as is set by the Hearing Examiner, any party or Staff witness may file as a reply, "Brief in Reply to Exceptions."
> b) Exceptions and replies thereto with respect to statements, findings of fact or rulings of law must be specific and must be stated and numbered separately in the brief. When exception is taken or reply thereto is made as to a statement or finding of fact, a suggested replacement statement or finding must be incorporated. Exceptions and replies thereto may contain written arguments in support of the position taken by the party or Staff witnesses filing such exceptions or reply. When exceptions contain such written arguments in support of the position taken, the arguments and exceptions may be filed:
>
> 1) together in one "Brief on Exceptions"; or
>
> 2) in two separate documents designated "Brief on Exceptions," containing arguments, and "Exceptions," containing the suggested replacement statements or findings.
>
> c) Arguments in briefs on exception and replies to exceptions shall be concise, and, if in excess of 30 pages, shall contain:
>
> 1) A table of contents; and
>
> 2) A summary of the position of the party filing.
>
> d) Parties and Staff shall not raise an argument in their replies to briefs on exception that is not responsive to any argument raised in any other party's or Staff's brief on exception.
> e) Statements of fact in briefs on exception and replies to briefs on exception should be supported by citation to the record.
> f) The Hearing Examiner, upon his or her own motion, or the motion of any party or Staff representative, may establish reasonable page limitations applicable to arguments included in briefs on exception and replies to briefs on exception.

Ill. Admin. Code tit. 83, § 200.830.

However, instead of suggesting specific "exceptions" to the ALJ's Proposed Order (hereinafter referred to as the "ALJPO"), Staff seeks reconsideration of the ultimate outcome of the hearing, and improperly attempts to re-litigate the entire matter. As highlighted even in the "Summary of Exceptions," Staff's objective is not to propose "exceptions" to the order, but to seek a complete reversal of the ALJPO. Staff's Brief summarizes its "exceptions" as follows:

> The ALJPO fails to consider the full record and applicable law in this proceeding. The ALJPO limits its consideration of the record to testimonial evidence and fails to consider Staff's exhibits as supplements to the testimonial evidence as well as independent sources of evidence. The ALJPO incompletely identifies the issue presented in the hearing and incompletely identifies the applicable law and Administrative Rules. Consequently, the ALJPO's legal analysis fails to address a significant number of issues in this proceeding. Finally, the conclusions reached in the ALJPO are erroneous and unsupported by the record.

Staff's Brief, p. 4.

Aside from attacking the ALJPO as incomplete, claiming it fails to consider applicable law, Staff's Brief contains no actual, specific exceptions founded upon actual law or facts adduced at the trial that, in good faith, should alter or modify the ALJPO. As such, Staff's purported "exceptions" should be rejected in their entirety as wholly inconsistent with the ALJ's decision in this matter.

ISSUE PRESENTED [I.]

Staff's Brief claims that the "ALJPO does not accurately reflect the directive of the Commission's Order initiating this proceeding in accordance with the Illinois Commercial Relocation of Trespassing Vehicles Law ("ICRTVL")." Further, Staff asks that the issue presented be amended to state, in its entirety, as follows:

> This case concerns the fitness of Lincoln to hold a relocator's license in the State of Illinois under the Illinois Commercial Relocation of Trespassing Vehicles Law ("ICRTVL"), 625 ILCS 5/ et seq., and the Commission's Administrative Rules ("Rules"), 92 Ill. Adm. Code 1710.10 et seq. Pursuant to Section 401 of

> ICRTVL, the Commission may at any time during the term of the license make inquiry into the management, conduct of business, or otherwise determine that the provisions of the ICRTVL and the Rules are being observed.

Staff's Brief, p. 6.

Staff suggests the modified language be used exclusively, in lieu of the ALJPO's language, "in order to fully identify the issue and the Commission's statutory authority." However, the ALJPO accurately cites the Commission's statutory authority, verbatim, in the ALJPO's subsequent Applicable Law section. In addition, the Commission's February 24, 2016 Order identifies the issues presented in the hearing almost exactly verbatim as the ALJPO accurately stated it: "A fitness hearing should be held to inquire into Lincoln's relocation towing operations to determine whether it is fit, willing, and able properly to perform the service of a commercial vehicle relocator and to conform to the provisions of the ICRTVL and the Commission's Administrative Rules, 92 Ill. Adm. Code 1710.10 *et seq*." See February 24, 2016 Commission Order. In fact, Staff even concedes on p. 18 of its Brief on Exceptions that this is the issue presented by the Commission's Order. Therefore, Staff's argument that the Issue Presented must be changed is not actually founded upon the actual text of the Order, or any other law or fact adduced at the hearing, and must be completely disregarded.

In addition, Respondent has never throughout the course of this hearing disputed that the Commission has the authority to inquire into Respondent's operations. Staff's proposed "Issue Presented," is a nonissue. However, Respondent did argue throughout the hearing, and continues to maintain its position, that due process requires that Respondent be put on notice of any alleged violations, and a hearing be held, prior to the revocation of Respondent's license. As such, Staff's purported "exceptions" should be rejected in their entirety as there is no basis in law or in fact for the exceptions to be made to the ALJPO with respect to the Issues Presented.

APPLICABLE LAW [I.A. AND I.B.]

Next, Staff's Brief purports to argue that the ALJPO "excludes a significant number of statutory provisions, administrative rules, and case law necessary for the Commission to inquire into Respondent's business and determine whether it has observed the ICRTVL and Administrative Rules."

In addition, Staff's Brief suggests through various syllogisms, that the "Applicable Law" section of the ALJPO should include conclusory statements and arguments that are not actually contained anywhere in any such "necessary" statutory provisions or administrative rules. Staff's conclusory and unfounded arguments have no place in the Applicable Law section of the ALJPO. Had the proposed language been "necessary," it would have been included by Congress, with no need for Staff to "necessarily" imply such language in Staff's Brief. For instance, Staff suggests the following language to be included in the "Applicable Law" section:

> Section 401 of the ICRTVL provides that "the Commission may at any time during the term of the license make inquiry into the management, conduct of business, or otherwise determine that the provisions of the ICRTVL and the Commission's Administrative Rules, 92 Ill. Adm. Code 1710.10 *et seq*., are being observed." 625 ILCS 5/18a-401. The plain language of section 401 grants the Commission the authority to determine whether evidence concerning the management and conduct of business of a relocator establishes that the relocator violated the ICRTVL and the Commission's Rules. The authority to make inquiry into the management. conduct of business, or otherwise determine that the provisions of the ICRTVL and the Commission's Rules are being observed necessarily includes the authority to actually make that determination. Not only is this plain in the statutory language, but without the necessary implication that the Commission is authorized to find that a violation occurred, the section would be meaningless. In other words, since the Commission. "an administrative agency, has the authority to revoke a professional license, it is axiomatic that the agency may determine whether grounds for revocation exist." *Raskv v. Dep't of Registration & Ed.*, 87 III.App.3d 580, 585, 410 N.E.2d 69, 75 (1st Dist. 1980). Accordingly, the Commission has the authority to weigh the evidence adduced at a fitness hearing and make a determination whether the evidence establishes violations of the ICRTVL and the Commission's Administrative Rules.

Staff's Brief, p. 7. (emphasis added).

Staff purports to argue that its mere suggestion of what Staff claims is necessarily included or necessarily implied should be included in the Applicable Law section, although it is not actual "Applicable Law," but merely Staff's argument and proposition. This is yet another example of Staff using its Brief on Exceptions to attempt to re-litigate its position in this already decided matter.

Although Staff's Brief repeatedly cites the statute, it fails to mention the portions of the statute that mandate that once an inquiry is initiated, and an investigation is completed, a complaint must be filed in order for a Respondent to adequately protect its property rights and be afforded due process of law, as mandated by the Constitution. The very same statute relied upon by Staff, 625 ILCS 5/18a-401, expressly mandates as follows:

> If the Commission has information of cause not to renew such license, it shall so notify the applicant, and shall hold a hearing as provided for in Section 18a-400.

625 ILCS 5/18a-401 (emphasis added).

The statute itself commands that the Commission must notify Respondent of the cause not to renew such license. Despite the clear and unambiguous language of the statute, Staff maintained throughout this entire hearing that it could simply "inquire" into the business of Respondent, then proceed to a hearing without disclosing what "cause" it has to revoke Respondent's license, what charges it has against Respondent, or why it believes Respondent does not deserve to hold its license, and then without due process, revoke Respondent's license. Throughout the course of this proceeding, and during the hearing, Staff presented no authority to support this proposition in its closing argument, on the record at the hearing, in any pleading filed in this cause, or in any other format, oral or written.

As set forth in Respondent's Closing Argument, and orally at the hearing, Respondent is entitled to due process. There has never been a dispute that the Commission has the authority to

inquire into Respondent's business operations. However, a commercial vehicle relocation towing license constitutes a property right that cannot be deprived without due process of law. *Pioneer Towing, Inc. v. Illinois Commerce Comm'n*, 99 Ill. App. 3d 403, 404 (1st Dist. 1981). Even Staff's own case law cited in Staff's Brief, and which Staff claims to be "necessary" for the Applicable Law section, supports Respondent's argument that Respondent is entitled to due process. The *Rasky* court held that a Complaint must be filed containing charges "drawn sufficiently so that the alleged wrongdoer is reasonably apprised of the case against him to intelligently prepare his defense." *Rasky v. Dep't of Registration & Ed.*, 87 Ill. App. 3d 580, 585 (1980). In addition, in *Rasky*, "the complaint listed in considerable detail the conditions which were allegedly in violation of the code and stated that the charges were brought under section 15 of the Act. It appears clear to us that the complaint reasonably apprised plaintiff of the charges against him." *Id*. at 586.

In this case, Staff failed to file a formal complaint as required by 83 Ill. Adm. Code 200.170, or as required by 625 ILCS 5/18a-401. Once Staff completed its inquiry into Respondent's business practices, this proceeding was set for a hearing, without any formal charges or allegations being filed. Despite Respondent's persistent continuous demands through June of 2018, this hearing was allowed to proceed without any formal notice to Respondent of any wrongdoing.

To the extent that Staff believes the case law is part of the relevant Applicable Law, the section should accurately describe the holding in the case, acknowledging that Respondent is entitled to be reasonably appraised of specific charges against it, and further entitled to a hearing on those charges. Ultimately, the only document purporting to be a "complaint" against Respondent is the Commission's Order, which initiated an inquiry, but not a hearing on any

allegations of any violation, and which was on the issue of whether Respondent is fit, willing, and able properly to perform the service of a commercial vehicle relocator and to conform to the provisions of the ICRTVL and the Commission's Administrative Rules, 92 Ill. Adm. Code 1710.10 *et seq*. No specific allegations of wrongdoing were ever presented.

In a proceeding where life, liberty or property is affected, due process requires that that a Respondent be served with notice and an opportunity to defend that interest in a fair and impartial hearing. *In re Abandonment of Wells Located in Illinois*, 343 Ill.App.3d 303, 305 (2003). "[D]ue process of law extends to every governmental proceeding that may interfere with personal or property rights or interests, whether that process is executive, legislative, judicial, or administrative." *Abandonment of Wells*, 343 Ill.App.3d at 306. "An administrative hearing must be conducted in accordance with the due process requirements under the fourteenth amendment to the United States Constitution and article I, section 2, of the Illinois Constitution." *Id*. In Illinois, due process protection extends to licenses. *Petersen v. Plan Comm'n*, 302 Ill.App.3d 461, 467 (1998). An administrative proceeding satisfies due process when the involved party has the "opportunity to be heard in an orderly proceeding which is adapted to the nature and circumstances of the dispute." *Lamm v. McRaith*, 2012 IL App (1st) 112123, ¶ 27.

At no time throughout the entire proceeding was Respondent ever presented with any constitutionally mandated notice of any allegations of wrongdoing nor was Respondent afforded a meaningful opportunity to respond to any such allegations, by way of admitting or denying the allegations. As such, this proceeding should never have been allowed to proceed.

Accordingly, Staff's proposed "exceptions" which seem to claim that the Commission can merely revoke Respondent's license with no allegations of any violation, no evidence to support that any violation occurred, and with no hearing on the allegations, should be rejected in

their entirety as there is no basis in law or in fact for the exceptions to be made a part of the ALJPO.

ONLY THE RECORD AND THE EVIDENCE ADDUCED AT TRIAL MAY BE CONSIDERED BY THE ALJ: STAFF'S ARGUMENTS MUST BE COMPLETELY EXCLUDED AND DISREGARDED

Staff's Brief inaccurately argues that the ALJPO failed to "consider the entirety of the record" and listed various "errors and omissions." However, Staff's Brief assumes that Staff's oral and written arguments made by Staff attorneys somehow constitute "evidence" at the hearing, and should be considered to purportedly contradict the actual testimonial evidence adduced at the hearing.

However, as a matter of law, an attorney's arguments are not to be considered by a trier of fact. The Illinois Pattern Civil Jury Instructions expressly provide, "An opening statement is what an attorney expects the evidence will be. A closing argument is given at the conclusion of the case and is a summary of what an attorney contends the evidence has shown. If any statement or argument of an attorney is not supported by the law or the evidence, you should disregard that statement or argument." IPI 1.01 [14].

A lawyer's argument is never to be considered, as argument is not evidence, and furthermore, is not admissible as a valid opinion, but rather constitutes merely legal analysis of the facts adduced at a hearing. In the context of administrative law proceedings, a recent opinion specifically discussed an attorney's arguments, finding that "This is recognized by the Illinois Rules of Evidence, which permit opinion testimony to be considered as evidence, but exclude a lawyer's arguments." *Illinois State Bar Association v. Illinois Department of Financial and Professional Regulation, et al.*, 2017 CH 09418 (a true and accurate copy of which is attached hereto as Exhibit 1.)(citing Ill. R. Evid. 701, 702; *People v. Henderson*, 142 Ill. 2d. 258, 425 (1990).

As clearly set forth in the ALJPO, there was no testimony which compared "the information in Exhibits A and B to 16 addresses in Exhibits J and K cited in Staff's post hearing brief, and therefore, did not establish any inconsistencies for these addresses: 1041 N. Harding; 1919 N. Cicero; 2002 S. Wentworth; 2734 S. Wentworth; 4000 W. Grand; 4032 W. Armitage; 4645 W. Belmont; 5000 W. Madison; 5200 W. North; 223 N. Custer; 1415 W. Morse; 2245 N. Halsted; 2454 W. Peterson; 2828 N. Broadway; 4420 N. Winchester; and 5853 W. Artesian." Staff's Brief claims that the ALJPO "fails to include" tows from these addresses, but provides no citation to the record, but merely to citations to Staff's Exhibit J. As stated in the ALJPO, "There were no citations written or other action to initiate a hearing process on these items and therefore no disposition, no hearing, no finding of violation or finding of no violation, and no disposition by plea agreement." ALJPO, p. 18. To be clear, Staff's Exhibit J was Respondent's handwritten 24-Hour tow records containing 9470 addresses for 9470 tows, which Staff's Brief claims that the ALJPO "fails to include." It is unclear how Staff expects a trier of fact to adduce which addresses were inconsistent without any facts adduced at trial to show that any violation actually occurred. There is nothing on the 24-Hour tow records, which were admitted, which prove by any burden of proof, that Respondent is liable of any violation. Consequently, Staff's proposed "exceptions" should be rejected.

THE ALJ ACCURATELY DETERMINED THE CREDIBILITY OF WITNESSES AND THE WEIGHT OF THE EVIDENCE ADDUCED AT TRIAL

"It is the Commission's province to judge the credibility of witnesses, to draw reasonable inferences from the testimony, and to determine what weight the testimony is to be given." *Ingersoll Mill. Mach. Co. v. Indus. Comm'n*, 253 Ill. App. 3d 462, 467 (1993). Courts have held that "The proponent of a public record lays an adequate foundation for admission of the evidence when he or she establishes that the document is reliable and accurate." *Village of Arlington*

Heights v. Anderson, 2011 IL App (1st) 110748, ¶ 14. However, the testimony adduced at trial, by Staff's only witness, Sergeant Sulikowski, was that the documents are not reliable and not accurate. Sergeant Sulikowski repeatedly testified that there were inconsistencies in the Commission's records and the exhibits presented were not accurate. Specifically, the words "not accurate" were used throughout, including on pages 1337, 1350, 1351, 1352, 1353, 1354, and 1471 of the transcript of the hearing. In addition, although the documents were purportedly dated May 10, 2017 on the face of the documents, nothing was proffered by Staff to show that the documents were actually compiled on that day, even pertain to the relevant time period, or that the records are a complete set of all of the MCIS records as of the date of the each tow.

In fact, the Administrative Law Judge specifically noted, "Here is the problem—not problem. The issue that came up as the officer was testifying and that, to me, is what if there's another—is there another—how do we know this is all that there is regarding these?" Transcript, p. 852, ¶ 8-12. The Administrative Law Judge also later ruled that "the certification doesn't necessarily address that issue of whether this is the complete and total accurate record of RTO numbers." Transcript, p. 854, ¶ 5-8. In addition, Staff failed to lay a foundation as to the credibility of the documents, failing to present a single witness to even testify as to who compiled the records, who printed the records, when they were printed, what query was entered into the database to obtain the records, or anything else about the records.

Notwithstanding the aforementioned, even Staff conceded that although public records may be admissible, they do not necessarily hold weight as credible. Staff stated on the record on this issue that, "I think counsel's argument goes maybe to the weight of the evidence that he can explore on cross-examination. I don't think it goes to admissibility of the evidence." Transcript, p. 209, ¶ 13-16. Later in the hearing, Staff again conceded that the documents may not be

accurate, arguing, "That's not saying that they're accurate, there may be but some factual inaccuracies, but they're saying what's printed on those records is what's contained in MCIS." Transcript, p. 1365, ¶ 12-14. Finally, the Administrative Law Judge put the issue to rest conclusively, stating just because a document is admissible does not mean it is inherently reliable. See Transcript, p. 1389-1390.

Interestingly, although Staff argued vehemently that the documents should be admitted regardless of their credibility, and argued that the ALJ would later describe the weight, now Staff curiously argues that the ALJ's decision should be reversed as the ALJPO purportedly failed to "consider the entirety of the aforementioned evidence," as it "relates" to other exhibits, despite no credible evidence adduced to show any violations occurred.

Despite the existence of the documents in the record, the evidence actually adduced at trial, which consisted of the sworn testimony of the Commission's officers and various printouts that the officers testified to, did not reflect that any of the alleged 831 violations actually occurred. Sergeant Sulikowski clearly testified under oath that he "only testified to the inconsistencies," and "not violations or anything else." Transcript, p. 1429, ¶ 9-13. The testimony adduced at trial was that the testifying officer did not complete an investigation, did not write a citation, did not testify at a hearing on a citation, and no violation was determined by an administrative law judge. The sworn testimony was that the records were not accurate, and at most, represented only inaccuracies between handwritten tow logs of Respondent and the Commission's electronic database.

In fact, Sergeant Sulikowski testified under oath at the hearing that he had no knowledge of whether Respondent did or did not have a contract for any of the lots or that any of the purported inconsistencies in Staff's Brief and Closing Argument were tantamount to a violation.

Sergeant Sulikowski was clear that he had no idea who created any of the exhibits, when they were created, how they were created, or if, in fact, they were even accurate. Despite Staff's purported "syllogisms," the only testimony in the record regarding the inconsistent documents simply does not surmount the burden to prove that any violations occurred.

In addition, as a part of the instant hearing, Staff and Respondent stipulated that Respondent meets each and every requirement of the required Fitness Test, which renders Respondent fit to hold a Commercial Vehicle Relocator's License. The Stipulation specifically references each and every requirement set forth in the Fitness Test, and as stipulated and executed by the Staff of the Commission, concedes that Respondent does, in fact, meet each requirement in its entirety without any dispute.

Clearly, the ALJPO reviews the evidence adduced at trial (including evidence adduced that Staff failed to mention in its closing argument) and renders a decision based upon the weight of the evidence and the credibility, as the trier of fact, finding that Respondent is fit, willing, and able to hold a Commercial Vehicle Relocator's license. Staff's claims that the Commission has an "independent authority to make determinations of fact and law in this proceeding," that contradict evidence adduced at trial is not based upon any valid legal basis or lawful authority. Consequently, Staff's exceptions should be rejected.

PARTIES' POSITIONS [IV.]

Staff's proposed "exceptions" to the ALJPO request that the ALJPO make findings that Respondent allegedly had repeated violations and noncompliance, based upon conclusions made by Staff attorneys from Staff's Exhibits A, B, F, J, and K. However, at the trial, no violations were actually adduced in evidence. The exhibits are merely lists of addresses from which Respondent towed vehicles from, which only conclusively establishes that Respondent relocates vehicles. The exhibits consist also of lists compiled on an unknown date which purport to reflect

the Commission's records of certain electronically filed lots that were determined at the hearing to be unreliable and inaccurate. See Transcript, p. 1337, 1350, 1351, 1352, 1353, 1354, and 1471. These exhibits establish that Respondent electronically filed its contracts with the Commission. However, no evidence was adduced at the hearing to establish that Respondent violated any statute or administrative rules. Staff's arguments to that effect are not to be considered, as Staff attorneys did not testify and are not expert witnesses, and thus cannot give opinions or testimony, but merely proffer legal theories as to facts actually adduced. See Ill. R. Evid. 701, 702; *People v. Henderson*, 142 Ill. 2d. 258, 425 (1990).

The evidence adduced at trial showed resoundingly that Respondent is fit, willing, and able to provide relocation towing services, in accordance with Chapter 625 of Illinois Compiled Statutes, Section 5/18a-400 through 5/18a-501. As set forth in the Stipulation and the facts read into the record, there is no dispute as to whether or not Respondent meets the criteria set forth in the Fitness Test. In addition, none of the evidence presented at trial by Staff showed any contrary evidence.

The evidence adduced at the hearing showed that Respondent relocated 9,470 vehicles during the relevant time period, based upon the bates stamped 24-hour tow sheets that were admitted into the record and based upon the trial testimony adduced at trial. See Transcript, p. 1606, ¶ 12-19. Consequently, Staff's "exceptions" should be rejected.

ANALYSIS AND CONCLUSION [V.]

Staff's Brief boldly claims that the ALJPO "fails to recognize the Commission's independent statutory authority to determine questions of fact and law within the context of an inquiry pursuant to Section 401." However, it has never been disputed that the Commission has the authority to inquire into Respondent's operations. In fact, Respondent complied with each request for documents in this hearing and in other hearings, and continually works with the

Commission to facilitate the Commission's requests. In addition, Respondent has never objected to the Commission's jurisdiction to adjudicate matters pending before it, nor has Respondent ever denied the Commission's independent statutory authority to determine questions of fact and law.

Notwithstanding the aforementioned, "An administrative hearing must be conducted in accordance with the due process requirements under the fourteenth amendment to the United States Constitution and article I, section 2, of the Illinois Constitution." *Id*. The Commission's "independent authority," does not give the Commission authority to revoke Respondent's license without due process of law. In this case, and pursuant to the Commission's statutory authority to determine questions of fact and law, a hearing was held at which evidence was adduced. Based upon the evidence adduced at trial, the Administrative Law Judge ruled, "I mean, I know how things work. I'm not saying that predisposes me to make any type of decision, but I know that having a screen shot is entirely different from presenting a citation and having a hearing on a citation." Transcript, p. 774, ¶ 20-24. The Administrative Law Judge later determined conclusively that "Because something is admitted doesn't mean it's accurate. That's the whole purpose of the trial." Transcript, p. 1284, ¶ 3-5. However, despite the Administrative Law Judge's ruling, Staff proceeded to argue in its Staff's Brief on Exceptions that the "inconsistencies" should have been considered violations, despite no evidence to that effect that was adduced at the trial, and Respondent should lose its license as a result.

As conceded by Staff in Staff's Post Hearing Brief, "the Commission has the authority to weigh the evidence adduced at a fitness hearing and make a determination whether the evidence establishes violations of the ICRTVL and the Commission's Administrative Rules." Staff's Post-Hearing Brief, p. 5. At the hearing, Sergeant Sulikowski testified under oath about investigations

not being violations. Thereafter, Sergeant Sulikowski specifically testified that "Not every complaint results in a citation." Transcript, p. 1246, ¶ 13-14. At the hearing, Sergeant Sulikowski was unable to identify any single inconsistency on his own in the documents, and claimed to know nothing about the accuracy of the documents. Throughout the entire hearing, Staff presented no witnesses or evidence that had any actual knowledge that Respondent did not have a contract for any lot during the relevant time period, or any actual knowledge that any of Respondent's operators and/or dispatchers did not have valid licenses during the relevant time period for any of the alleged 831 violations argued in Staff's Post-Hearing Brief and Closing Argument. In addition, Staff proffered no documents that conclusively showed that Respondent did not have a contract to tow from any of the lots contained in the purported printouts from MCIS. The screenshots merely showed inconsistencies, as testified to *ad nauseum* by Sergeant Sulikowski. In fact, Staff's own witness, qualified as an expert witness, gave the opinion that Respondent was, in fact, fit to hold a Commercial Vehicle Relocator's license during the relevant time period.

Consequently, although the Commission has the authority to inquire into the business practices of Respondent, and has the authority to determine questions of fact and law, the evidence adduced at trial does not support Staff's conclusions that Respondent violated the statute or the rules. A statement in closing argument regarding facts not in evidence is improper and constitutes reversible error if so prejudicial as to deprive a party of a fair trial. *Watkins v. Am. Serv. Ins. Co.*, 260 Ill. App. 3d 1054, 1067 (1st Dist. 1994)(Emphasis added). An attorney in his final argument is permitted only to make reasonable comments upon evidence. *Id*.

On May 2, 2018, Staff filed their written closing argument, purporting to comport with Section 200.800 of the Rules, yet riddled with inaccuracies and improper conclusory allegations,

which are not only wholly unsupported by anything in the record, but which are also directly contradicted by the evidence contained in the record and the hearing testimony.

Although early in Staff's Brief and Closing Argument, Staff acknowledged that "the Commission has the authority to weigh the evidence adduced at a fitness hearing and make a determination whether the evidence establishes violations of the ICRTVL and the Commission's Administrative Rules," (See Staff's Brief and Closing Argument, p. 5) Staff now argues that the Commission has an "independent statutory authority" to adopt Staff's conclusions that are unfounded in evidence adduced at the hearing. Furthermore, despite acknowledging that the Commission may only take into account evidence "adduced at a fitness hearing," Staff relies upon the "logical syllogism [which] leads to the inevitable conclusion that a violation of the ICRTVL and Administrative Rules occurred in each instance."

Clearly, logical syllogisms are not evidence. Furthermore, the actual evidence adduced at trial did not show that these violations occurred. The allegations were mere inconsistencies disclosed for the first time at trial, for which Respondent had no opportunity to conduct any discovery as to the veracity of the inconsistencies, and ones which Staff's own witnesses admitted under oath were not accurate records of the Commission. The allegations contained in Staff's Brief and Closing Argument were actually proven to not be violations at the hearing. Despite the sworn testimony that no citations were written, no hearings were held, no due process lead to a finding of violations, Staff improperly referred to each alleged inconsistency as a violation all throughout the hearing, Staff's Closing Argument, and Staff's Brief on Exceptions. The only witness that Staff presented at the hearing regarding the alleged 831 "violations" identified in Staff's Brief and Closing Argument was Sergeant Sulikowski. However, contrary to the contentions in Staff's Brief and Closing Argument, Sergeant

Sulikowski testified under oath that none of the 831 alleged "inconsistencies" were actually a violation of either the ICRTVL or Commission regulations. Even the Administrative Law Judge ruled that Staff cannot claim there was a violation until there is a hearing on a citation for that alleged inaccuracy, which to date has never occurred. See Transcript, p. 799. More to the point, on the first day of the hearing, the Administrative Law Judge sustained Respondent's counsel's objection, and held that "No one has adjudicated whether or not this is a violation." See Hearing Transcript, p. 200, lines 3-4. The Administrative Law Judge continued to say that making any claims that there were violations would require a hearing, saying, "But that would require me to evaluate whether or not the proposed violations are actually violations, which is an administrative citation hearing. There's been no administrative citation issues(sic)." See Hearing Transcript, p. 201, lines 8-12. Despite the aforementioned rulings, and the continued sustained objection to Staff's reference throughout the entire hearing of "violations," Staff repeatedly used the term, "violation," in its closing argument without even so much as specifying that any such claims are mere allegations for which no investigations were ever conducted, no citations were ever written, no hearings were ever held, and no adjudications were ever made by a tribunal having jurisdiction over the matter.

Despite Staff's claims to the contrary, the ALJPO thoroughly weighed the evidence adduced at the hearing, and pursuant to the Commission's authority to determine questions of fact and law, rendered findings and a decision. Staff argues that it would be "unworkable as a practical matter" for the Commission to issue administrative citations, open investigations, and determine liability for violations. However, every citation proceeds in that manner, as due process requires notice and a hearing. Every alleged violation is always discovered after the time of the violation, as the Commission surely could not foresee and/or predict a violation that would

take place in the future. Any time an investigation is completed, a citation may be written and a hearing may be had. The Commission cannot simply revoke Respondent's license without providing notice of the allegations brought against Respondent. Accordingly, Staff's proposed "exceptions" should be rejected.

Next, Staff argues that the Respondent should be found guilty of alleged violations because it would create a "dangerous precedent" for the Commission to not rely on its own records. However, despite Staff's claims, Courts have held that "The proponent of a public record lays an adequate foundation for admission of the evidence when he or she establishes that the document is reliable and accurate." *Village of Arlington Heights v. Anderson*, 2011 IL App (1st) 110748, ¶ 14. In all trials, public records must still be authenticated and deemed to be reliable. In this case, Staff's only witness, Sergeant Sulikowski, testified that the documents were not reliable and not accurate. Sergeant Sulikowski repeatedly testified that there were inconsistencies in the Commission's records and the exhibits presented were not accurate. Specifically, the words "not accurate" were used throughout, including on pages 1337, 1350, 1351, 1352, 1353, 1354, and 1471 of the transcript of the hearing.

In fact, the Administrative Law Judge specifically noted, "Here is the problem—not problem. The issue that came up as the officer was testifying and that, to me, is what if there's another—is there another—how do we know this is all that there is regarding these?" Transcript, p. 852, ¶ 8-12. The Administrative Law Judge also later ruled that "the certification doesn't necessarily address that issue of whether this is the complete and total accurate record of RTO numbers." Transcript, p. 854, ¶ 5-8. In addition, Staff failed to lay a foundation as to the credibility of the documents, failing to present a single witness to even testify as to who compiled the records, who printed the records, when they were printed, what query was entered

into the database to obtain the records, or anything else about the records. Consequently, Staff's proposed "exceptions" should be rejected in their entirety.

PROPOSED ORDER [VI.]

As noted by Staff's Brief, the ALJPO was served upon the Parties on July 2, 2018. Respondent has no objection to this exception.

FINDINGS AND ORDERING PARAGRAPHS [VII.]

Staff's Brief proposes as "exceptions" that the ALJ strike the findings made after the hearing, and instead adopt Staff's argument as the ALJPO's findings of fact. However, for the reasons set forth herein, the reasons set forth in the ALJPO, and the constitutional due process that Respondent is entitled to, Staff's conclusions reached through mere syllogisms are simply not supported by the evidence adduced at trial. Consequently, Staff's proposed "exceptions" should be rejected in their entirety.

LICENSE EXPIRATION DATE

On July 8, 2015, the Commission entered an order in which it found that "The evidence shows that [Lincoln Towing] is fit, willing, and able to provide relocation towing services, in accordance with Chapter 625 of Illinois Compiled Statutes, Section 5/18a-400 through 5/18a-501." See Commission Order dated July 8, 2015. The renewal statute, cited *ad nauseum* by Staff in Staff's Brief, Staff's Closing Argument, and throughout this matter, provides that upon filing of a written application for renewal, the Commission shall renew the license. 625 ILCS 5/18a-401. The statute, in its entirety, mandates as follows:

> All relocator's licenses shall expire 2 years from the date of issuance by the Commission. The Commission may temporarily extend the duration of a license for the pendency of a renewal application until formally approved or denied. Upon filing, no earlier than 90 days nor later than 45 days prior to such expiration, of written application for renewal, verified under oath, in such form and containing such information as the Commission shall by regulation require, and accompanied by the required application fee and proof of security, the

> Commission shall, unless it has received information of cause not to do so, renew the license. If the Commission has information of cause not to renew such license, it shall so notify the applicant, and shall hold a hearing as provided for in Section 18a-400. The Commission may at any time during the term of the license make inquiry into the management, conduct of business, or otherwise to determine that the provisions of this Chapter 18A and the regulations of the Commission promulgated thereunder are being observed.

625 ILCS 5/18a-401 (emphasis added).

As conceded by Staff, Respondent has a pending renewal application in Docket No. 92 RTV-R Sub 19. The Commission has provided no notice to Respondent, the applicant, that it has any information of cause not to renew such license. Accordingly, the Commission must renew the license, pursuant to the statute. It would have been improper to consolidate Docket No. 92 RTV-R Sub 19 into the instant case, as this case has a limited scope. Accordingly, Staff's proposed "exception" should be rejected.

TECHNICAL CORRECTIONS

The second technical correction proposed by Staff, on Page 5, 5th paragraph: "Different tows sheets are maintained," is actually located in the second full paragraph on page 5. In addition, the IRCTVL errors are located in the first full paragraph of page 17 and the third full paragraph of page 18. Respondent has no objection to these exceptions, nor the other exceptions described in Staff's Technical Corrections section.

CONCLUSION

WHEREFORE, Respondent, Protective Parking Service Corporation d/b/a Lincoln Towing Service (heretofore referred to as "Respondent"), by and through its attorneys, PERL & GOODSNYDER, LTD., respectfully requests that the Administrative Law Judge reject Staff's proposed exceptions, and tender to the Commission the original Proposed Order, finding that Respondent was fit, willing, and able to provide relocation towing services, in accordance with Chapter 625 of Illinois Compiled Statutes, Section 5/18a-400 through 5/18a-501; and any such other and further relief as the Administrative Law Judge deems just and proper.

Respectfully submitted,

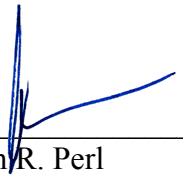

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EXHIBIT 1

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

ILLINOIS STATE BAR ASSOCIATION,

Plaintiff,

v.

ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION; BRYAN A. SCHNEIDER, in his official capacity as Secretary of the Illinois Department of Financial and Professional Regulation; and KREG T. ALLISON, in his official capacity as Director of the Division of Real Estate of the Illinois Department of Financial and Professional Regulation,

Defendants.

Case No. 2017 CH 09418

Calendar 2
Courtroom 2601

Judge Raymond W. Mitchell

ORDER

This case is before the Court on Defendants Illinois Department of Financial and Professional Regulation, Bryan A. Schneider, and Kreg T. Allison's motion to dismiss and Plaintiff Illinois State Bar Association's motion for summary judgment. The motions present the following legal question: Does an attorney representing a client in a property tax proceeding violate the Appraisal Act and function as an unlicensed appraiser when he or she includes an analysis of comparable property valuations in a legal brief? This Court concludes that the answer to this question is "No" in light of Supreme Court precedent, the attorney's professional role in a property tax proceeding, and the text of the Appraisal Act.

I.

According to the facts alleged in the complaint, Plaintiff Illinois State Bar Association is a voluntary association of approximately 30,000 members, mostly lawyers, dedicated to promoting the interests of the legal profession. Approximately 400 ISBA members focus their practices on state and local taxation, including handling property tax matters. Defendant Illinois Department of Financial & Professional Regulation is an Illinois administrative agency with the statutory authority to regulate a number of professions, including real estate appraisers. Defendant Bryan A. Schneider is the Secretary of IDFPR and Defendant Kreg T. Allison is the Director of IDFPR's Division of Real Estate.

On April 3, 2017, IDFPR's Real Estate Division filed a complaint against ISBA member and Illinois licensed lawyer G. Terence Nader. The complaint was filed on the grounds that Nader had engaged in the unlicensed appraisal of real estate. It alleged that when filing a brief during a real estate tax assessment appeal to the Property Tax Appeals Board, Nader completed an appraisal by comparing the value of property at issue to other similar properties. Section 1910.65(c) of the Appeals Board Regulation states:

> Proof of the market value of the subject property may consist of the following:
>
> 1) an appraisal of the subject property as of the assessment date at issue;
> 2) a recent sale of the subject property;
> 3) documentation evidencing cost of construction . . . ; or
> 4) documentation of not fewer than three recent sales of suggested comparable properties together with documentation of the similarity, proximity, and lack of distinguishing characteristics of the sales comparables to the subject property.

86 Ill. Admin. Code § 1910.65(c). Nader provided information regarding seven properties and argued that the property at issue should receive a lower assessed valuation based on the comparisons.

On April 20, 2017, IDFPR's Real Estate Division filed a complaint against ISBA member and Illinois licensed lawyer David Robert Bass alleging that Bass had engaged in an unlicensed appraisal when filing a brief during a real estate assessment proceeding that used an income approach valuation to estimate a property value. Rule 9 of the DuPage Board of Review requires the party seeking a modification of their income-producing property to submit "three concurrent years of operating statements, current leases and rent rolls." Rule 10 states that the party "[b]e prepared to discuss the fair cash value of the property as of January 1, of the assessment year in question." In both cases, the information contained within the briefs did not claim to be established by an appraiser nor did the briefs claim to contain an appraisal. Neither attorney claimed to be a licensed appraiser.

The IDFPR charged both attorneys with violating section 5-5 of the Appraisal Act, which states in part:

> (a) It is unlawful for a person to (i) act [or] offer services . . . as a State certified general real estate appraiser, State certified residential real estate appraiser, or associate real estate trainee appraiser, (ii) develop a real estate appraisal, [or] (iii) practice as

> a real estate appraiser . . . without a license issued under this Act.

225 ILCS 458/5-5. "Appraiser" is defined as "a person who performs real estate or real property appraisals." 225 ILCS 458/1-10. "Appraisal" is defined as "(noun) the act or process of developing an opinion of value; an opinion of value (adjective) of or pertaining to appraising and related functions, such as appraisal practice or appraisal services." *Id.*

ISBA filed the instant case to enjoin IDFPR from prosecuting Illinois lawyers for such activities completed in connection with real estate tax assessment proceedings. Specifically, ISBA seeks declaratory judgment (Count I), injunctive relief (Count II), and a writ of prohibition against IDFPR (Count III). Defendants move for dismissal pursuant to 735 ILSC 5/2-619.1 and ISBA seeks summary judgment.

II.

A. Defendants' Motion to Dismiss

Combined motions to dismiss under 735 ILCS 5/2-615 and 735 ILCS 5/2-619 are permitted pursuant to 735 ILCS 5/2-619.1 of the Illinois Code of Civil Procedure. A motion to dismiss pursuant to 735 ILCS 5/2-619 admits the legal sufficiency of the complaint, but raises defects, defenses, or some other affirmative matter that defeats the plaintiff's claim. *Ball v. County of Cook*, 385 Ill. App. 3d 103, 107 (1st Dist. 2008). Section 2-619 permits the dismissal of an action where "the claim asserted against the defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9). "Other affirmative matter" is something in the nature of a defense that completely negates the cause of action or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained or inferred from the complaint. *Bucci v. Rustin*, 227 Ill. App. 3d 779, 782 (1st Dist. 1992). The movant bears the burden of proving the affirmative defense. *Luise, Inc. v. Village of Skokie*, 335 Ill. App. 3d 672, 685 (1st Dist. 2008).

An aggrieved party is generally required to exhaust available administrative remedies before resorting to the courts. *Poindexter v. State, ex rel. Ill. Dep't of. Human Servs.*, 229 Ill. 2d 194, 207 (2008). However, an aggrieved party may seek judicial review without exhausting administrative remedies where a statute is attacked as unconstitutional on its face, where the agency cannot provide an adequate remedy or where it is patently futile to seek relief before the agency, where no issues of fact are presented or agency expertise is not involved, where irreparable harm will result from further pursuit of administrative remedies, or

where the agency's jurisdiction is attacked because it is not authorized by statute. *Castaneda v. Illinois Human Rights Comm'n*, 132 Ill. 2d 304, 308-09 (1989).

A motion to dismiss pursuant to 735 ILCS 5/2-615 challenges the legal sufficiency of a complaint based upon defects apparent on its face. *Beacham v. Walker*, 231 Ill. 2d 51, 57 (2008). The critical inquiry is whether the well-pleaded facts of the complaint, taken as true and construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Loman v. Freeman*, 229 Ill. 2d 104, 109 (2008). The complaint need only set forth the ultimate facts to be proved—not the evidentiary facts tending to prove such ultimate facts. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 369 (2004).

Defendants contend that the instant case must be dismissed because the ISBA members subject to IDFPR's administrative proceedings have not exhausted their administrative remedies, thus their claims—and the ISBA's—are not ripe. However, when a claimant challenges an administrative agency's jurisdiction, they create a question of law for the court, not the agency. *County of Knox ex rel. Masterson v. Highlands*, 188 Ill. 2d 546, 555 (1999). ISBA contends IDFPR lacked the jurisdiction to prosecute the ISBA members because the members were engaged in the practice of law, not an appraisal. "Only the supreme court has the authority to 'regulate and define the practice of law.'" *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d. 814, 820 (1st Dist 2009), citing *People ex. rel. Chicago Bar. Ass'n v. Goodman*, 366 Ill. 346, 349 (1937). Persons authorized by their client to act professionally in legal formalities, negotiations, or proceedings are engaged in the practice of law. *Goodman*, 366 Ill. at 351. Because ISBA asserts that IDFPR lacks jurisdiction over the conduct at issue, ISBA's claims are ripe for adjudication.

Defendants also assert that the complaint should be dismissed pursuant to section 2-615, because the IDFPR has jurisdiction to prosecute the attorneys and the Illinois Supreme Court's exclusive power is not infringed upon. A declaratory judgment action has three requirements: (1) a plaintiff with a legal tangible interest; (2) a defendant with an opposing interest; and (3) an actual controversy between the parties concerning those interests. *Bearinger v. Page*, 204 Ill. 2d 363, 372 (2003). The ISBA has a tangible legal interest in preventing the prosecution of their members, defendants have an opposing interest, and the current and future risk of prosecutions present an actual controversy. Count I, for declaratory relief, stands.

Defendants seek dismissal of the claim for injunctive relief (Count II), arguing that there is an adequate remedy at law and no irreparable harm because ISBA members can proceed through Defendants' administrative process, which is subject to review pursuant to the Administrative Review Act. *Bio-Medical Laboratories, Inc. v. Trainor*, 68 Ill. 2d 540, 549 (1977); *Baugher v. Walker*, 47 Ill. App. 3d 573, 577 (4th Dist. 1977) (finding an adequate remedy at law in

administrative proceedings that were reviewable under the Administrative Review Act). A party seeking a permanent injunction must demonstrate: (1) a clear and ascertainable right in need of protection; (2) that the party will suffer irreparable harm if the injunction is not granted; and (3) that there is no adequate remedy at law. *Kopchar v. City of Chicago*, 395 Ill. App. 3d 762, 772 (1st Dist. 2009). Where a proposed remedy would come from an agency that has no jurisdiction to engage in such review, a plaintiff has no adequate remedy as a matter of law. *Office of Lake County State's Att'y v. Illinois Human Rights Comm'n*, 200 Ill. App. 3d 151, 156 (1990). ISBA has alleged that IDFPR lacks jurisdiction, thus it has demonstrated the lack of an adequate remedy at law. The threat of prosecution of ISBA members constitutes an irreparable harm. *See Harper v. Missouri Pac. R.R.*, 264 Ill. App. 3d 238, 251-52 (5th Dist. 1994) (finding the threat of ethical charges sufficient to limit the practice of law by attorneys and constituting an irreparable harm).

Defendants seek dismissal of the claim for a writ of prohibition (Count III) on the grounds that ISBA has an adequate remedy available through the administrative review process. For the reasons stated above, administrative review is an inadequate remedy at law. *Office of Lake County State Att'y*, 200 Ill. App. at 157.

B. Plaintiff's Motion for Summary Judgment

Summary judgment is appropriate when the pleadings, depositions, admissions, and affidavits, viewed in a light most favorable to the nonmovant, fail to establish a genuine issue of material fact, thereby entitling the moving party to judgment as a matter of law. 735 ILCS 5/2-1005; *Progressive Universal Ins. Co. v. Liberty Mut. Fire Ins. Co.*, 215 Ill. 2d 121, 127-28 (2005). The purpose of summary judgment is not to try a question fact, but simply to determine whether one exists. *Jackson v. TLC Assoc., Inc.*, 185 Ill. 2d 418, 423 (1998). A trial court is required to construe the record against the moving party and may only grant summary judgment if the record shows that the movant's right to relief is clear and free from doubt. *Id.* If disputes as to material facts exist or if reasonable minds may differ with respect to the inferences drawn from the evidence, summary judgment may not be granted. *Assoc. Underwriters of Am. Agency, Inc. v. McCarthy*, 356 Ill. App. 3d 1010, 1016-17 (1st Dist. 2005).

ISBA contends that it is entitled to summary judgment because an attorney's submission within a brief of a comparison of property values or income approach valuation constitutes a legal argument that does not meet the Appraisal Act's definition of appraisal. Defendants contend that it is irrelevant that lawyers do not hold themselves out as appraisers or call their work appraisals—by comparing the values of properties or using the income approach valuation model, the attorneys have created an opinion of value.

Does an attorney's reference to comparable valuations in a property tax proceeding constitute an appraisal? The answer to this question is made easier by the Illinois Supreme Court's decision in *In re Yamaguchi,* 118 Ill. 2d 417, 426 (1987). There, the Supreme Court concluded that the activity of representing a client in a property tax proceeding constituted the practice of law. *Id.* The Court characterized the valuation analysis at the core of those proceedings as "legal analysis of the facts which . . . justified a tax reevaluation." *Id.* Indeed, the Court's holding is consistent with longstanding precedent that recognizes whenever an attorney is engaged by a client to represent them during a legal proceeding, the attorney is engaged in the practice of law. *Goodman,* 366 Ill. at 351.

The *Yamaguchi* holding finds further support in a real world recognition of what attorneys actually do in property tax proceedings. Lawyers argue. Appraisers opine. A lawyer's argument is *not* evidence. *See* IPI 1.01 [14]. Argument is *not* an opinion. Instead, the attorney offers "legal analysis of the facts" in order to advocate for their client. This difference is recognized by the Illinois Rules of Evidence, which permit opinion testimony to be considered as evidence, but exclude a lawyer's arguments. Ill. Rs. Evid., Rules 701, 702; *People v. Henderson,* 142 Ill. 2d 258, 425 (1990).

The distinct roles of attorney and appraiser are mirrored in their respective professional standards. The appraisal standards define an appraiser as someone "who is expected to perform valuation services competently and in a manner that is independent, impartial, and objective." Appraisal Standards Board, Appraisal Foundation, 2014-15 Uniform Standards of Professional Appraisal Practice p. U-1 (2014). In stark contrast, a lawyer is obligated to act as an advocate for a client and pursue that client's interests zealously. Ill. R. Prof. Conduct, Preamble. The distinct professional obligations of a lawyer and an appraiser suggest that when a lawyer produces a legal argument, it is not an opinion of value that meets an appraisal's definition. Rather, it is an attorney's argument or "legal analysis of the facts."

Against this backdrop, there is nothing in the text and structure of the Appraisal Act that suggests that the General Assembly intended its prohibition on unlicensed appraisers to extend to what is the traditional practice of law in the property tax context. Indeed, the Supreme Court has recognized that in light of its own extensive regulation of the legal profession, it expects that if the legislature intends a statute to apply to the legal profession, the legislature "would have stated that intention with specificity." *Cripe v. Leiter,* 184 Ill. 2d 185, 197 (1998). In short, an attorney's reference to comparable valuations in a property tax proceeding constitutes the practice of law, which is regulated exclusively by the Illinois Supreme Court. This activity falls outside of the Appraisal Act and is plainly beyond the reach of the IDFPR.

III.

Therefore, it is hereby ORDERED:

(1) Defendants' motion to dismiss is DENIED.

(2) Plaintiff's motion for summary judgment is GRANTED.

(3) Judgment is entered on Plaintiff's Complaint in favor of Plaintiff Illinois State Bar Association and against Defendants Illinois Department of Financial and Professional Regulation, Bryan A. Schneider, and Kreg T. Allison.

(4) The Court finds that the comparison of properties or an income approach valuation presented by a licensed Illinois attorney on behalf of a client in real estate tax assessment proceedings does not entail the development or submission of an appraisal or constitute the unlicensed practice of real estate appraisal in violation of Section 5-5(a) of the Appraisal Act, 225, ILCS 458/5-5(a). (Count I).

(5) The Court hereby enjoins Defendants, their officials, agents, and employees, and all persons acting in concert with them, from instituting or maintaining an action against a licensed Illinois attorney for engaging in the submission of a comparison of properties or income approach valuation by a property tax attorney in a real estate tax assessment proceeding. (Count II).

(6) The Court issues a writ of prohibition against Defendants preventing them from initiating, maintaining, or threatening a prosecution of an attorney licensed to practice in the State of Illinois for engaging in the submission of a comparison of properties or income approach valuation by a property tax attorney in a real estate tax assessment proceeding. (Count III).

(7) This is a final order that disposes of the case in its entirety.

Judge Raymond W. Mitchell

JUN 20 2018

Circuit Court – 1992

ENTERED,

Judge Raymond W. Mitchell, No. 1992