

BEFORE THE STATE BOARD OF EQUALIZATION

FOR THE STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF)
TAG AVIATION LLC FROM A DECISION) Docket No. **2015-66**
BY THE DEPARTMENT OF REVENUE)
(Best Information Assessment))

IN THE MATTER OF THE APPEAL OF)
TAG AVIATION LLC FROM A DECISION) Docket No. **2016-02**
BY THE DEPARTMENT OF REVENUE)
(Best Information Assessment))

ORDER DENYING MOTIONS TO DISMISS

THESE MATTERS came before the Wyoming State Board of Equalization (State Board) on the Wyoming Department of Revenue’s (Department) Motions to Dismiss, filed on March 31, 2016. The State Board reviewed the Motions to Dismiss, TAG Aviation LLC’s Responses, the Department’s Replies, and heard oral argument on May 23, 2016. The State Board denies the Department’s motions, but finds the taxability issue raised in TAG Aviation LLC’s appeals is final and not subject to consideration by the State Board in the present actions.

Introduction

State Board Docket Number 2015-66 is an appeal of the Department’s “Best Information Assessments,” both issued November 30, 2015, and related to TAG Aviation LLC’s (TAG) purchase of two aircraft. The two Best Information Assessments assessed the amount of tax TAG owed on the aircraft purchases. TAG filed a timely Case Notice For Review with the State Board in this action on December 30, 2015.

State Board Docket Number 2016-02 is TAG’s appeal of the Department’s “Monthly Account Statement” issued December 28, 2015, also related to TAG’s earlier aircraft purchases. TAG filed a timely Case Notice For Review from the Monthly Account Statement on January 25, 2016. The Monthly Account Statement assessed interest and penalties for TAG’s failure to pay taxes the Department claimed were due and owing on the aircraft purchases.

Both Case Notices question the underlying issue of taxability of the two aircraft purchased by TAG. The question of taxability was first determined in a Taxability

Determination issued by the Department on October 15, 2015. TAG did not appeal that Department decision.

The Department requests dismissal of both appeals, questioning the State Board's jurisdiction to hear either matter. The Department argues that its previously issued Taxability Determination, in which it concluded that TAG's aircraft purchases were not exempt from use tax, was a final appealable determination. The Taxability Determination was issued October 15, 2015, requiring TAG to appeal within thirty (30) days of that decision. TAG's failure to timely appeal the Taxability Determination, according to the Department, prevents the State Board from hearing either appeal currently before it.

Whether the State Board has subject matter jurisdiction over an appeal is a matter of law. *See Cantrell v. Sweetwater Cty. Sch. Dist. No. 2*, 2006 WY 57, ¶ 6, 133 P.3d 983, 985 (Wyo. 2006). In reviewing the Department's motions to dismiss, the State Board accepts the facts as alleged in TAG's pleadings as true, and must view them in the light most favorable to TAG. *Nulle v. Gillette-Campbell County Joint Powers Fire Bd.*, 797 P.2d 1171 (Wyo.1990). The State Board construes TAG's pleadings liberally, and will sustain a dismissal of the case only if TAG "cannot assert any fact which would entitle [it] to relief." *Apodaca v. Safeway, Inc.*, 2015 WY 51, ¶ 8, 346 P.3d 21, 23 (Wyo. 2015) (quoting *In re Estate of Scherer*, 2014 WY 129, ¶ 5, 336 P.3d 129, 131 (Wyo. 2014)).¹

TAG's Factual Allegations and Appeals

Because the State Board will only dismiss this action if TAG "cannot assert any fact which would entitle [it] to relief[.]" *supra*, the Board recites the following factual allegations from TAG's case notices of appeal, filed December 30, 2015:²

¹ The State Board is aware that, generally, when matters outside the pleadings are submitted and considered without objection from either party, case law indicates that the motions to dismiss are automatically converted to motions for summary judgment. *Stalkup v. State Dep't of Env'tl. Quality (DEQ)*, 838 P.2d 705, 709 (Wyo. 1992) (finding that because affidavits were submitted and considered by the district court, conversion occurred automatically). However, because there is also authority that state agencies cannot consider summary judgment motions absent express statutory authority to do so (*see Jackson v. State, ex rel., Wyo. Workers' Comp. Div.*, 786 P.2d 874, 878-80 (Wyo. 1990)), the State Board will not convert the motions to motions for summary judgment, recognizing however, that the State Board's decision would be the same under either standard of review.

² The State Board also provides the individual cites to the factual allegations because there are some differences between the two documents.

1. TAG was formed as a Wyoming limited liability company in 2012. TAG leases aircraft for commercial operation. (TAG Case Notice, Docket No. 2015-66 at 2; TAG Case Notice, Docket No. 2016-02 at 2).
2. On or about April 23, 2015, TAG purchased a 2005 Bell 407 rotorcraft (Serial No. 53664, U.S. Registration No. N407TF) (the “Helicopter”) from Three Forks Aviation and obtained possession and title in Billings, Montana before flying it to Wyoming. TAG subsequently leased the Helicopter to Black Hills Helicopters and Charters, Inc. (TAG Case Notice, Docket No. 2015-66 at 2; TAG Case Notice, Docket No. 2016-02 at 2).
3. On or about May 8, 2015, TAG procured a 1978 Cessna 172N fixed wing single-engine aircraft (Serial No. 17271041, U.S. Registration No. N1544E) (the “Cessna”) from Roger J. Oquist. TAG later leased the Cessna to Business Aviators, Inc. (TAG Case Notice, Docket No. 2015-66 at 2; TAG Case Notice, Docket No. 2016-02 at 2-3).
4. TAG is not a licensed vendor in the State of Wyoming. (TAG Case Notice, Docket No. 2015-66 at 3; TAG Case Notice, Docket No. 2016-02 at 3).
5. Based on information the Department obtained from the Federal Aviation Administration (FAA), it issued a use tax assessment to TAG for the Helicopter on May 11, 2015, and a use tax assessment for the Cessna on June 2, 2015. (TAG Case Notice, Docket No. 2015-66 at 3).
6. On May 11, 2015, the Department also sent TAG a Consumer Use FAA Notice, which requested information regarding the Helicopter and which the Department later misrepresented as a use tax assessment in the Department’s July 9, 2015 correspondence to TAG. (TAG Case Notice, Docket No. 2016-02 at 3).³
7. The Department represents that it sent TAG a Consumer Use FAA Notice regarding the Cessna on June 2, 2015. (TAG Case Notice, Docket No. 2016-02 at 3).
8. TAG responded to both assessments on June 29, 2015, providing exemption certificates stating that the aircraft were exempt under the Commercial Aviation Exemption at Wyoming Statutes section 39-15-105(a)(viii)(P) (2015). (TAG Case Notice, Docket No. 2015-66 at 3; TAG Case Notice, Docket No. 2016-02 at 3).

³ It is not clear to the State Board whether the Consumer Use FAA Notice, *supra* ¶¶ 6 & 7, that TAG refers to in one Case Notice is also the use tax assessment TAG also claims to have received from the Department in its earlier Case Notice. For that reason, the State Board includes both the claim regarding the Consumer Use FAA Notice and the use tax assessment in the above facts as if they were independent of each other.

9. On July 9, 2015, the Department requested TAG provide documentation showing that the Helicopter and Cessna were used in commercial operation, and that it provide that information on or before August 31, 2015. (TAG Case Notice, Docket No. 2015-66 at 3; TAG Case Notice, Docket No. 2016-02 at 3).
10. On October 15, 2015, the Department sent TAG a Taxability Determination explaining that it did not view the Helicopter or the Cessna as exempt from sales/use tax. (TAG Case Notice, Docket No. 2015-66 at 3; TAG Case Notice, Docket No. 2016-02 at 3). This Taxability Determination did not indicate the Department had prepared a use tax return for TAG pursuant to Wyoming Statutes sections 39-15-107 and 39-16-107 (2015). The Taxability Determination also did not state that the Department had assessed tax deficiencies, interest, or penalties against TAG. (TAG Case Notice, Docket No. 2016-02 at 3).
11. On November 30, 2015, the Department mailed the Best Information Assessments assessing TAG use tax for the Cessna and Helicopter acquisitions. (TAG Case Notice, Docket No. 2015-66 at 3; TAG Case Notice, Docket No. 2016-02 at 3-4). These Assessments stated that the Department had prepared use tax returns for TAG and that the Department had assessed tax deficiencies against TAG totaling \$102,500 and \$1,900. (TAG Case Notice, Docket No. 2015-66 at Ex. A; TAG Case Notice, Docket No. 2016-02 at 3-4).
12. Initially, TAG did not pay sales or use tax on the Helicopter or Cessna based on its reasonable, good faith belief that such purchases and use were exempt from tax. (TAG Case Notice, Docket No. 2016-02 at 4).
13. TAG did pay the assessed use tax on December 7, 2015, to avoid the accrual of interest and penalties. (TAG Case Notice, Docket No. 2016-02 at 4).
14. TAG filed its Case Notice For Review with the State Board, challenging the Best Information Assessments, on December 30, 2015, *In re Appeal of TAG Aviation LLC from a Decision by the Excise Tax Division of the Department of Revenue*, Docket No. 2015-66. (TAG Case Notice, Docket No. 2016-02 at 4).
15. On December 28, 2015, the Department mailed the Monthly Account Statement, which assessed penalties and interest against TAG in connection with unpaid use tax. (TAG Case Notice, Docket No. 2016-02 at 4, Ex. A).
16. TAG filed its Case Notice For Review with the Board, challenging the Monthly Account Statement, on January 25, 2016, *In re Appeal of TAG Aviation LLC from a Decision by the Excise Tax Division of the Department of Revenue*, Docket No. 2016-02. (TAG Case Notice, Docket No. 2016-02 at 4).

TAG's Appeals and the Department's Motions to Dismiss

17. TAG's Case Notice in Docket Number 2015-66 alleges: 1) TAG's purchase of the aircraft is not subject to sales tax because transfer of title occurred in Montana; 2) TAG purchased the aircraft for subsequent resale (i.e. lease), rather than as part of a retail sale; 3) The Department erred in denying the resale exemption because TAG did not have a vendor's license; and 4) TAG is entitled to a refund of erroneously paid use tax on the aircraft purchased for resale. (TAG Case Notice, Docket No. 2015-66 at 3-6).

18. TAG's Case Notice in Docket Number 2016-02 alleges: 1) No underlying tax was due because the purchase was for re-leasing; 2) Even if use tax applies, TAG is not liable for penalties because it did not act with negligence or intentional disregard of Wyoming's revenue laws; and 3) TAG is entitled to a refund of erroneously paid interest and penalties arising from tax on the aircraft purchased for resale. (TAG Case Notice, Docket No. 2016-02 at 4-7).

19. In response, the Department moved to dismiss both appeals based on TAG's failure to appeal the Department's October 15, 2015, Taxability Determination which concluded that "[t]he purchases of the . . . aircraft are not exempt from sales/use tax." (Dep't Mot. to Dismiss, 2015-66, Attachment C; Dep't Mot. to Dismiss, 2016-02, Attachment C). The Taxability Determination clearly gave notice that it was a final appealable determination, stating: "This is a final administrative decision of the Department of Revenue and is subject to appeal. Appeals must be filed with the State Board of Equalization within thirty (30) days of the final administrative decision at issue or of the date of mailing of the final administrative decision[.]" *Id.* TAG did not appeal the October 15, 2015, Department decision to the State Board.

Analysis

Because TAG did not appeal the initial October 15, 2015, Taxability Determination addressing the basic taxability question, the Department asserts the State Board lacks jurisdiction over TAG's subsequent timely appeals of the Best Information Assessments and Monthly Account Statement. The Department further argues the doctrine of collateral estoppel applies to prevent the State Board from addressing the taxability issue. (Dep't Mot. to Dismiss, Docket No. 2015-66 at 5-7; Dep't Mot. to Dismiss, Docket No. 2016-02 at 5-7). *See Merit Energy Co. v. Dep't of Revenue*, 2013 WY 145, 313 P.3d 1257 (Wyo. 2013).

TAG responds that the Department's October 15, 2015, Taxability Determination was not a final administrative decision because it did not end the proceedings and "leave nothing further to be accomplished." *Merit Energy Co.*, ¶ 16 [sic ¶ 26], 313 P.3d at 1262. (TAG Resp. to Dep't Mot. To Dismiss, 2016-02 at 5). TAG explains that the October 15, 2015, Taxability Determination was not a final decision because two matters remained

undecided—the tax basis and the imposition of interest and penalties. TAG asserts the Department did not establish the tax liability until it issued the November 30, 2015, Best Information Assessments, or the interest and penalties until it issued its Monthly Account Statement on December 28, 2015. (TAG Resps. to Dep’t Mots. to Dismiss, 2015-66 & 2016-02).

As an initial matter, the State Board finds that TAG timely appealed the November 30, 2015, Notices of Assessment in Docket No. 2015-66 and, to the extent it is an appealable order, which the State Board does not decide in this Order, TAG also timely appealed the Monthly Account Statement in Docket No. 2016-02. The State Board finds that both appeals were filed within a thirty (30) day time period and thus, are timely. The State Board has jurisdiction to hear those appeals. The actual issue for the State Board’s decision is whether TAG may present evidence and/or argument at the hearing on these appeals concerning the underlying taxability of its two aircraft purchases.

Both parties cite to *Merit* in support of their arguments. In *Merit*, the Department identified volume discrepancies between Merit’s tax return, filed as a take-in-kind interest owner in natural gas wells, and the reports filed by operators of the wells in question. When the discrepancies were not resolved, the Department issued multiple take-in-kind assessments notifying Merit of the increase in taxable value of production taken in-kind. Merit did not appeal the assessment letters. Subsequently, the Department issued a notice of valuation change (NOVC) to the assessors in affected counties, notifying them of the increased taxable values. Merit appealed the NOVC to the State Board; the State Board ultimately dismissed the appeals as untimely. *Id.* at ¶¶ 4-8, 313 P.3d at 1258-59.

In affirming the State Board’s dismissal, the Wyoming Supreme Court found the take-in-kind assessment letters were final administrative decisions and that Merit’s appeal of the subsequent NOVC, predicated on the earlier take-in-kind assessments, was untimely. The Court further concluded that the doctrine of collateral estoppel precluded Merit from appealing the NOVC issued to the county which, in effect, challenged the earlier assessments. *Id.* at ¶ 31, 313 P.3d at 1263. The Court explained:

The preclusion doctrines of collateral estoppel and res judicata apply in the administrative context, although we have stated that the issue preclusion associated with collateral estoppel is more appropriate in the administrative setting than the claim preclusion doctrine of res judicata. *Jacobs v. State ex rel. Wyoming Workers’ Safety and Comp. Div.*, 2009 WY 118, ¶ 12, 216 P.3d 1128, 1132 (Wyo. 2009); *Slavens v. Board of County Commissioners for Uinta County*, 854 P.2d 683, 685-86 (Wyo. 1993). The factors considered in determining whether collateral estoppel applies are:

(1) Whether the issue decided on in the prior adjudication was **identical** with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.

Wilkinson v. State ex rel. Wyo. Workers Safety and Comp. Div., 991 P.2d 1228, 1234 (Wyo. 1999) (emphasis in original) (quoting *Slavens*, 854 P.2d at 686).

Jacobs, ¶ 12, 216 P.3d at 1132. *See also, Hemme v. State ex rel. Wyoming Workers' Comp. Div.*, 914 P.2d 824 (Wyo. 1996) (**ruling made in previous agency order could not be challenged in a subsequent case because the first order was not appealed**).

Merit, supra, ¶ 29, 313 P.3d at 1263 (emphasis in original) (quoting *Taylor v. State, ex rel., Wyo. Workers' Safety and Comp. Div.*, 2010 WY 76, ¶ 15, 233 P.3d 583, 586-87 (Wyo. 2010) (citations omitted)).

Applying this same analysis to the present case, the Department issued a final decision in its Taxability Determination that the aircraft purchases were subject to taxation. TAG was notified that the Determination was final and appealable; it did not appeal. The State Board concludes, therefore, that TAG is collaterally estopped from challenging the Department's denial of a sales or use tax exemption in either of the present appeals. *Id.*

Further, TAG's reliance on the State Board Rule, requiring a statement of the amount in dispute calculated by the Department, is without merit. TAG was required to timely appeal the Taxability Determination, the finality of which did not depend upon the amount of tax and interest to be assessed. The State Board Rule merely requires that notices of appeal identify taxes and interest at issue, if such is available. Rules, Wyo. State Bd. of Equalization, ch. 2 § 5(c)(iii) (2006). The Rule does not—and cannot—require that agency decisions are appealable only after tax and interest sums are assessed. That is so because the Department's tax decisions, depending upon the circumstances of the dispute, may or may not include an assessment of taxes and/or interest. *See e.g.* Wyo. Stat. Ann. §

39-14-209(a)(i), (ii) (2015) (Taxpayer entitled to a value determination or statutory interpretation.).

TAG also claims that the Department, in communications after the Taxability Determination, indicated that the thirty (30) day deadline was not a real deadline. TAG argues this representation evidenced the Department's intent to retain jurisdiction and that there was more to be done. (TAG Resp. to Dep't Mot. to Dismiss, 2015-66 at 6-7). However, TAG offered little evidence of this alleged departmental communication, and its argument lacks specific details of the circumstances surrounding such.

The Department denies that it made such a representation or that it misled TAG that the thirty (30) day deadline it clearly identified in its October 15, 2015, Taxability Determination was not an actual deadline. (Dep't Reply to TAG Resp. to Mot. To Dismiss, 2016-02 at 6-7). It further submitted sworn Affidavits from several Department employees that no such discussion took place. TAG did not object to these Affidavits, nor did it submit rebuttal affidavits.

Although it is not clear from its briefing, TAG's claim regarding this alleged Department representation appears to be one for equitable estoppel— that the Department is equitably estopped from arguing the State Board does not have jurisdiction to consider the taxability issue because of the Department's misrepresentations regarding the deadline to appeal. However, even if such a communication occurred, the Department is not equitably estopped from arguing that the taxability decision is final. *Knori v. State, ex rel., Dep't of Health, Office of Medicaid*, 2005 WY 48, ¶¶ 10-11, 109 P.3d 905, 908-909 (Wyo. 2005) (describing very limited circumstances under which equitable estoppel applies to state agency).

As traditionally viewed, equitable estoppel is embodied by the following concept:

[O]ne who by his acts or representations intentionally or through culpable negligence induces another to believe certain facts to exist, and the latter, not knowing the facts, acts on such belief to his substantial prejudice, the former is, in equity, estopped to deny the existence of such fact.

Department of Family Services v. Peterson, 957 P.2d 1307, 1311 (quoting *Seaman v. Big Horn Canal Association*, 29 Wyo. 391, 398, 218 P. 938 (1923)). In its current form, equitable estoppel requires “some misrepresentation and is generally applied to prevent fraud, either constructive or actual.” *Id.* at 1311–12 (citations omitted).

With respect to governmental agencies functioning in their governmental capacities, the standard for equitable estoppel is higher, requiring “even more egregious conduct.” *Peterson*, 957 P.2d at 1312.1. **Namely, for equitable estoppel to operate against the government, the movant must demonstrate that the inducement was made by “authorized affirmative misconduct.”** In addition to the “authorized affirmative misconduct” requirement, equitable estoppel is applied against the government only in rare and unusual circumstances, where its application would not serve to defeat public policy. *See Big Piney Oil & Gas Company v. Wyoming Oil and Gas Conservation Commission*, 715 P.2d 557, 560 (Wyo. 1986). Accordingly, for Knori to succeed under his claim of equitable estoppel against the Office, he must demonstrate: (1) authorized affirmative misconduct; (2) reliance; (3) substantial prejudice; (4) rare and unusual circumstances; and (5) a situation that will not defeat public policy.

Id. at ¶¶ 10-11, 109 P.3d at 908-909 (emphasis added).

TAG’s claim, even if it were supported by sworn statements, does not rise to the egregious level required under *Knori*. The clear language in the Taxability Determination informed TAG of its right, and obligation, to appeal if it believed the taxability decision was incorrect. Further, there was no evidence of “authorized affirmative misconduct” to trigger the application of equitable estoppel. *Knori, supra*. In other words, TAG offered no evidence, whatsoever, that statements were made to TAG to intentionally induce it to not appeal, foregoing any opportunity it may have had to challenge the taxability decision.

TAG argues that even if it may not challenge the exemption denial through these appeals, the appeals should not be dismissed because additional issues raised by its appeals were not decided in the Department’s taxability determination. Those issues include the Helicopter’s point of delivery, the amount of the tax assessment, and the imposition and amount of interest and penalties. (TAG Resp. to Dep’t Mot. to Dismiss, Docket No. 2015-66 at 11; TAG Resp. to Dep’t Mot. to Dismiss, Docket No. 2016-02 at 5, 7).

The moving party, the Department, is not entitled to judgment as a matter of law as it relates to dismissal of the current appeals. Those appeals were timely filed and, viewing the facts from TAG’s vantage point and giving TAG all the favorable inferences which may be fairly drawn, material issues of fact remain. *Wilson*, ¶ 12, 153 P.3d at 921-22.

The State Board agrees that the following issues remain for adjudication: the tax amount owed, and what, if any, interest or penalties are due. Under the facts, the Department was compelled to assess taxes and interest based on the best information available, and those assessments gave rise to separate appealable determinations. The

Department appears to concede this point. Therefore, these issues remain contested and reviewable on appeal, and the motions for summary judgment must be denied.

Conclusion

The Department's Taxability Determination issued on October 15, 2015, was a final administrative decision. The Determination is binding because TAG failed to appeal the decision within thirty (30) days. Subsequent Department decisions regarding the tax amount due and the imposition of interest and penalty are separate, and those determinations are final appealable orders notwithstanding TAG's failure to appeal the Department's Taxability Determination. The appeals of these separate issues may proceed subject to the limitations addressed herein.

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ORDER

IT IS ORDERED the Wyoming Department of Revenue's Motion to Dismiss, Docket No. 2015-66, which the State Board converted to a Motion for Summary Judgment, is **denied** as it relates to the Best Information Assessment issued on November 30, 2015, assessing tax in the amount of \$102,500.00, and as it relates to the Best Information Assessment issued on November 30, 2015, assessing tax in the amount of \$1,900.00. However, TAG may not challenge the Department's October 15, 2015, Taxability Determination addressing the underlying taxability of TAG's purchases in this action, nor may it present evidence or argument at the hearing relating to such decision; and

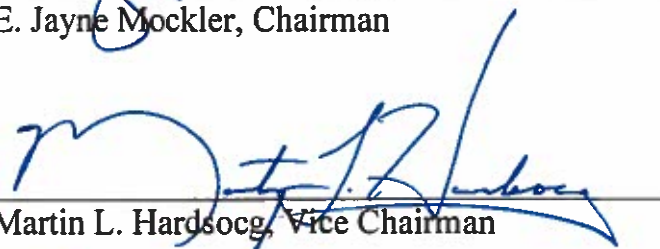
IT IS FURTHER ORDERED the Wyoming Department of Revenue's Motion to Dismiss, Docket No 2016-02, which the State Board converted to a Motion for Summary Judgment, is also denied as it relates to the Monthly Account Statement issued on December 28, 2015, assessing interest and penalties. However, TAG may not challenge the Department's October 15, 2015, Taxability Determination addressing the underlying taxability of TAG's purchases in this action, nor may it present evidence or argument at the hearing relating to such decision.

Dated this 3rd day of August, 2016.

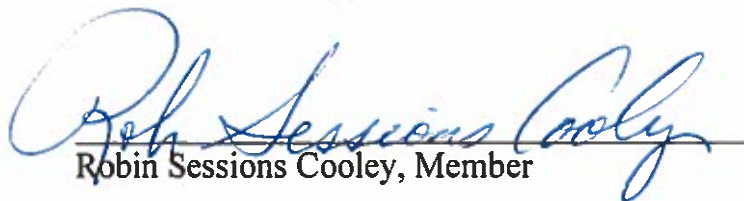
STATE BOARD OF EQUALIZATION



E. Jayne Mockler, Chairman

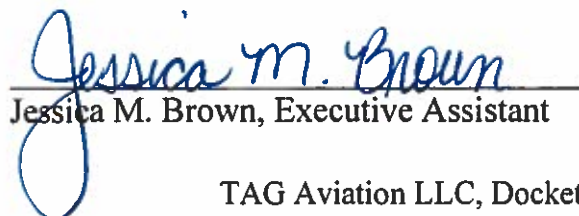


Martin L. Hardsocg, Vice Chairman



Robin Sessions Cooley, Member

ATTEST:



Jessica M. Brown, Executive Assistant

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of August, 2016, I served the foregoing **ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT** by placing a true and correct copy thereof in the United States Mail, postage prepaid, and properly addressed to the following:

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