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## POINTS RELIED ON

**I. The Administrative Hearing Commission erred in finding the Board could not consider revocation of Kossmeyer's individual CPA license, which was stayed pending judicial review, in exercising its discretion to deny a new firm permit to IFS, because the Board's statutes and promulgated regulations require all owners who will offer professional services in this state to maintain their individual CPA license status in that Kossmeyer's revocation rendered him ineligible to be an owner of CPA firm.**

*Bachtel v. Miller Co. Nursing Home Dist.*, 110 S.W.3d 799 (Mo. 2003)

*Mo. Real Estate Comm. v. Berger*, 764 S.W.2d 706 (Mo.App. E.D. 1989)

*State Bd. of Reg. for the Healing Arts v. De Vore*,

517 S.W.2d 480 (Mo.App. W.D. 1974)

**II. The Administrative Hearing Commission erred in holding that, upon the application for a CPA permit by a newly-formed firm, the Board may consider only actions taken on behalf of the applicant, and not the fitness of individual owners, because such a finding is inconsistent with both the regulatory purpose and language of Chapter 326, RSMo, in that IFS, as an applicant, does not have a prior history with the Board and, therefore, the Board must examine the circumstances of IFS's ownership in considering the issuance or denial of a firm permit.**

*State of Mo. v. Salter*, --- S.W.3d --- (Mo. 2008) (April 15, 2008, SC88274)

*Ritter v. BJC Health Systems*, 987 S.W.2d 377 (Mo.App. E.D. 1999)

## ARGUMENT

**I. The Administrative Hearing Commission erred in finding the Board could not consider revocation of Kossmeyer’s individual CPA license, which was stayed pending judicial review, in exercising its discretion to deny a new firm permit to IFS, because the Board’s statutes and promulgated regulations require all owners who will offer professional services in this state to maintain their individual CPA license status in that Kossmeyer’s revocation rendered him ineligible to be an owner of CPA firm.**

### Standard of Review

The standard of review of an administrative decision where the Administrative Hearing Commission has interpreted the law or the application of facts to law is *de novo*. *Tendai v. Mo. State Bd. of Reg. for the Healing Arts*, 161 S.W.3d 358, 365 (Mo. 2005) (citing *State Bd. of Reg. for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 152 (Mo. banc 2003)). “To the extent that [the] conclusions of law contain statements of fact or ultimate fact, the Court defers to the commission as fact finder if the conclusions are supported by competent and substantial evidence when considering the record as a whole.” *Id.* (citing Section 536.140.2, RSMo; *McDonagh*, 123 S.W.3d at 152). “However, this Court owes no deference to the AHC’s decisions on questions of law, which are matters for this Court’s independent judgment.” *Gott v. Dir. of Revenue*, 5 S.W.3d 155 (Mo. 1999) (additional citations omitted).

## Analysis

### **A. Section 326.289, RSMo, must be read in conjunction with the other statutory provisions of Chapter 326, RSMo.**

#### **(Responding to Respondent’s Point I. A. “Construction of Section 326.289” and Point II.)**

The Board’s authority to regulate the practice of public accountancy is set forth in the Missouri Accountancy Act, Chapter 326, RSMo, which underwent substantial revisions in 2001. Included in this revision was the addition of Section 326.289, RSMo, which addressed the issue of firm ownership in statute.<sup>1</sup> (The complete language of Section 326.289 is set forth in the Board’s Appendix, pgs. A-17 to A-20.)

The intent of Section 326.289, RSMo, is to permit the Board to regulate CPA firm ownership and to set forth the minimum qualifications needed by a firm to be considered for licensure. “In construing statutes, a court ascertains the intent of the legislature from the language used and gives effect to that intent.” *Bachtel v. Miller Co. Nursing Home Dist.*, 110 S.W.3d 799, 801 (Mo. 2003) (citing *In re Beyersdorfer*, 59 S.W.3d 523, 525 (Mo. banc 2001)). The legislative intent to permit the Board to regulate firm ownership is set forth in the very first line of Section 326.289, RSMo, which states:

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<sup>1</sup> Prior to 2001, the regulation of firm ownership was included in the Board’s promulgated regulations.

1. The board may grant or renew permits to practice as a certified public accounting firm to entities that make application and demonstrate their qualifications in accordance with this section....

The use of “may” in a statute necessarily grants the Board discretion to consider the issuance or denial of a firm permit. *Rundquist v. Dir. of Rev.*, 62 S.W.3d 634, 646 (Mo.App. E.D. 2001). Despite this clear discretionary language, IFS asks this Court to mandate the Board to ignore all of its duties and functions and blindly issue a firm permit.

A CPA firm permit is significant because it allows an entity “to provide attest, review or compilation services” to the public. Section 326.289.1, RSMo. This coveted authority is the heart of the practice of public accountancy, as it permits a CPA firm to offer a professional assurance as to “the financial status or performance of commercial, noncommercial and governmental enterprises.” Section 326.253, RSMo. The safeguard of the public requires the Board to regulate the profession and requires those seeking the privilege of practicing in the profession to demonstrate that they are qualified to do so. *Id.* With this policy in mind, one can hardly say that the legislature intended the Board to regulate all aspects of the profession, yet carved an exception to the Board’s discretion in the area most fundamental to the protection of the public – attest, review, and compilation services.

IFS argues that it has no burden to demonstrate its fitness for licensure, other than simply stating it has a 51% ownership of CPAs. IFS even argues that “it makes no

difference who or what owns the minority interest.” (Resp. Sub. Brief, pg. 14.) It stands upon this argument even despite specific reference in Section 326.289, RSMo, to Section 326.280, RSMo, - the good moral character requirement for licensure. It also ignores the fundamental rules of statutory construction, in that the “provisions of a legislative act are not read in isolation but construed together”. *Bachtel*, 110 S.W.3d at 801 (additional citations omitted).

In propounding its argument that a firm is entitled to licensure if it has a simple majority of CPAs as its owners, IFS states that “Had the legislature intended that an applicant(s) for a firm permit had to comply with any other statute [besides Section 326.289, RSMo,] it would have so said.” (Resp. Sub. Brief, pg. 16.) Conveniently, IFS avoids any discussion of Section 326.310, RSMo, where the legislature very clearly stated its intention that an applicant for a firm permit is subject to the Board’s discretion. Section 326.310.1, RSMo, authorizes the Board to “refuse...any license or permit”. This authority to deny a permit is identical with the language of Section 326.289.1, RSMo, where it states: “The board may grant or renew permits...”. If the Board may grant a permit, it is certainly also within its power to refuse to issue a permit. *Mo. Real Estate Comm. v. Berger*, 764 S.W.2d 706, 709 (Mo.App. E.D. 1989). The authority to deny a professional license “obviously involves and requires the exercise of discretion.” *State Bd. of Reg. for the Healing Arts v. De Vore*, 517 S.W.2d 480, 485 (Mo.App. W.D. 1974). There can be no legitimate argument that Section 326.289, RSMo, is read in complete isolation from the other sections of the Missouri Accountancy Act. The legislature has

spoken, IFS refuses to listen.

IFS's heavy reliance upon Section 326.289.4(1)'s "notwithstanding" clause is erroneous. Section 326.289, RSMo, does not conflict with any of the provisions of the Missouri Accountancy Act. The Board's regulation over the profession is consistent throughout the sections of Chapter 326, RSMo. Each of the sections of the Act can be harmonized with the other. *Bachtel*, at 801.

By using the "notwithstanding" clause in Section 326.289.4(1), RSMo, the legislature intended this clause to avoid any conflict with Missouri's General and Business Corporation Law of Chapter 351, and specifically the law of Professional Corporations of Chapter 356. For example, Section 356.091, RSMo, states:

All of the directors of a professional corporation and all of the officers of a professional corporation other than the secretary shall be qualified persons with respect to the professional corporation.

Additionally, Section 356.111, RSMo, states in relevant part:

1. A professional corporation may issue shares, fractional shares, rights or options to purchase shares, and other securities only to the following:

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- (4) Limited liability companies in which all of the members are licensed in one of the states or territories of the United States of America to practice a professional service permitted by the articles of incorporation of the professional corporation and in which at least

one member is authorized by a licensing authority of this state to render a professional service permitted by the articles of incorporation of the corporation.

Without the “notwithstanding” clause of Section 326.289.4(1), RSMo, the statute would directly conflict with the provisions of Chapter 356. Specifically, because IFS is a Limited Liability Company, Section 356.111(4), RSMo, requires all members to be licensed. However, Section 326.289.4, RSMo, requires only a simple majority of the ownership be licensed. The “notwithstanding” clause of Section 326.289.4(1), RSMo, precludes the existence of a conflict with Section 356.111(4), RSMo. *Kiddie America, Inc. v. Dir. of Rev.*, 242 S.W.3d 709, 712 (Mo. 2008).

While IFS is partially correct in that Section 326.289, RSMo, permits a CPA firm to have a simple majority of CPAs as its owners, that provision does not abolish the Board’s overall discretion. In order for IFS to be correct that the “notwithstanding” clause mandates the issuance of a firm permit, then Section 326.289.1, RSMo, would necessarily read “The board shall grant or renew permits...” instead of the existing discretionary language in which “The board may grant or renew permits...”. *Rundquist*, 62 S.W.3d at 646. IFS’s interpretation of the “notwithstanding” clause of Section 326.289.4(1), RSMo, cannot stand when read in context of the numerous sections of the Missouri Accountancy Act which grant the Board the power to regulate all aspects of the public accounting profession.

The issue then becomes: when may the Board refuse an application for a CPA

firm permit? The factors in considering an application for licensure are set forth in Section 326.310, RSMo. It was precisely these factors that the Board used in considering whether IFS should be granted a CPA firm permit. (LF 40-42.) The Board concluded, and there is no evidence to the contrary, that the applicant's 49% shareholder, Carl Kossmeyer, had violated specific provisions of Section 326.310.2, RSMo, while he was a licensed CPA. Kossmeyer's criminal conduct and conviction fell well within this Section's tangible guidelines and are a valid measure to guide the Board's consideration process. Additionally, as a shareholder, Kossmeyer lacked good moral character, an essential requirement for licensure as set forth in Section 326.280, RSMo, – and referenced in Section 326.289, RSMo. Kossmeyer's involvement in the fraud scheme leading to his conviction was extensive and he has failed to demonstrate that he has repented or rehabilitated himself.

In considering IFS's application for licensure, the Board examined the background of the individual shareholders listed on IFS's application who are intending to practice in the profession. *See Jerry-Russell Bliss, Inc. v. Hazardous Waste Mgmt. Comm.*, 702 S.W.2d 77 (Mo. 1985). Having previously determined that Kossmeyer was not qualified to practice in the profession pursuant to Section 326.310.2, RSMo, the Board denied a CPA firm permit to IFS pursuant to its statutory authority of both Sections 326.289 and 326.310, RSMo.

**B. Section 314.200, RSMo, does not mandate the Board issue a firm permit.**

**(Responding to Respondent's Point I. C.,**

**Application of Section 314.200, RSMo)**

The Board's denial of IFS's application for a CPA firm permit was based upon Kossmeyer's prior unprofessional and dishonorable conduct, felony conviction, the recognition of the revocation of his individual CPA license, and the Board's belief as to the quality of his moral character. (LF 40-42.) All of these facts reflected adversely upon the firm as a whole and supported the Board's determination that IFS was not suitable for licensure as a CPA firm pursuant to Sections 326.289 and 326.310, RSMo. (LF 41.) While it is true that Section 314.200, RSMo, prohibits professional licensing boards from denying a license solely upon the basis of a felony or misdemeanor conviction, it also does not mandate that a license be issued under those circumstances.

The statute provides that:

... The board or other agency may consider the conviction as some evidence of an absence of good moral character, shall also consider the nature of the crime committed in relation to the license which the applicant seeks, the date of the conviction, the conduct of the applicant since the date of the conviction and other evidence as to the applicant's character.

In this case, the Board had on-going litigation regarding the discipline of Kossmeyer's individual CPA license since 1999. The Board held a lengthy disciplinary hearing regarding Kossmeyer in 2001 prior to the determination and issuance of the

revocation order. (Tr. 36.) The nature of his crime is directly related to the profession of a CPA, as it involved obtaining the trust of his customers through fraud, with the goal of financial profit from his criminal behavior. Despite Kossmeyer's criminal conviction and his involvement in the fraudulent get-rich-quick scheme, he failed to demonstrate any repentance before the Board. In fact, Kossmeyer continued to portray himself as the victim of his co-conspirator throughout the proceedings, up to and including the appeal of his individual license revocation.

Kossmeyer's criminal conviction was not the sole reason for the denial of IFS's application for a firm permit. The Board's denial letter is clear as to the reasons for the Board's action. (LF 40-42.) The testimony by the Board's Executive Director was also specific that in addition to Kossmeyer's felony conviction pursuant to Section 326.310.2(2), RSMo, the Board was concerned that Kossmeyer had held himself out as a CPA in the course of his criminal activity and his underlying conduct violated several other provisions of Section 326.310.2, including (5), (6), and (13). (Tr. 31-32, 41, 52-53, 56, 66.) For example, the Director testified regarding the misconduct assertion of Section 326.310.2(5), RSMo:

Q: What evidence do you have of misconduct in the practice of public accountancy?

A: In the felony that was committed by Mr. Kossmeyer, he did so by holding out as a CPA. Missouri's law, under the broad definition of accountancy, has many elements including consulting. And in this

particular line of business, he essentially committed fraud while holding out as a CPA. So we would consider that to violate that particular element of the law. (Tr. 31-32.)

Additionally, in regard to Kossmeyer's violation of professional trust and confidence as cited in Section 326.310.2(13), RSMo, the Board's director testified as follows:

Q: ... what evidence does the State Board have of a violation of any professional trust and confidence on the part of Carl Kossmeyer?

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A: Well, again, when an individual holds out for (sic) a CPA and does any advising or consulting, then we consider those people to be clients of him as an individual CPA. And under those circumstances those people were victims of a felony. So I think that would be the evidence that we would have considered for that matter.

Moreover, there was no evidence presented by IFS that Kossmeyer had rehabilitated himself since the conviction and revocation of his individual license. Evidence of Kossmeyer's conviction placed the burden of going forward upon IFS. *Mo. Real Estate Comm. v. Berger*, 764 S.W.2d 706, 710 (Mo.App. E.D. 1989). Kossmeyer did not testify at the hearing before the Administrative Hearing Commission, nor did he or IFS present any evidence to the Board on his behalf. (Tr. 79.) There simply is no evidence that Kossmeyer demonstrates good moral character, a requirement for licensure

under Sections 326.280 and 326.289, RSMo. Nor did the Administrative Hearing Commission make any finding concerning Kossmeyer's present character and reputation for honesty, integrity and fair dealing. (App. A-1 to A-15.) IFS did not meet its burden of demonstrating it was qualified for licensure in light of Kossmeyer's association as a shareholder who intends to practice in the profession under the firm's permit.

**C. Judicial estoppel is not applicable and should not be applied.**

**(Responding to Respondent’s Point I. E. “Judicial Estoppel”)**

IFS asserts that the Board should be estopped from denying its application for a firm permit because of a misstatement by the Missouri Attorney General’s office in its representation before the Eastern District Court of Appeals during Kossmeyer’s revocation appeal. Judicial estoppel may be applied to prevent a person who states facts under oath during the course of a trial from denying those facts in a second suit. *Kelcor, Inc. v. Nooney Realty Trust, Inc.*, 966 S.W.2d 399, 404 (Mo. App. E.D. 1998) (citations omitted). However, where prior statements were not made under oath, the doctrine may be invoked to prevent a party from playing “fast and loose with the courts.” *Id.*

Here, IFS relies upon a statement of the Board’s prior counsel before the Court of Appeals in reference to the revocation of Kossmeyer’s individual license. It was not testimony under oath, nor a directive of the Board, nor was the statement made to play “fast and loose” with the Court.

In fact, as the Administrative Hearing Commission found, the statement by the Assistant Attorney General was not a statement of fact that Kossmeyer could be an owner of a CPA firm, but a general legal discussion. (App. A-6.) Nor do the arguments presented before the Administrative Hearing Commission which are cited by IFS in its Substitute Brief demonstrate that the statements are actually inconsistent. (Resp. Sub. Brief, 27-28.) The opening and closing statements before the Administrative Hearing Commission simply reiterate the Board’s position that Kossmeyer lacks the fitness and integrity required to be part of a CPA firm.

Moreover, the Board did not obtain any benefit from counsel’s statement to

support the application of judicial estoppel. *Shockley v. Mo. Dept of Social Svcs*, 980 S.W.2d 173, 175 (Mo.App. E.D. 1998) (“Estoppel, in its basic form, applies to prevent litigants from taking a position in one judicial proceeding, thereby obtaining benefits from that position in that instance and later, in a second proceeding, taking a contrary position in order to obtain benefits from such a contrary position at that time.”) (internal citation omitted). The revocation of Kossmeyer’s individual license to practice public accountancy was upheld by the Court of Appeals upon Kossmeyer’s own conduct, that of his felony conviction, and not premised upon any concept that he could, in theory or speculation, practice the profession under a firm permit. (LF 99-106.)

Judicial estoppel should not be applied against the Board. IFS’s argument on this point is without merit.

**II. The Administrative Hearing Commission erred in holding that, upon the application for a CPA permit by a newly-formed firm, the Board may consider only actions taken on behalf of the applicant, and not the fitness of individual owners, because such a finding is inconsistent with both the regulatory purpose and language of Chapter 326, RSMo, in that IFS, as an applicant, does not have a prior history with the Board and, therefore, the Board must examine the circumstances of IFS's ownership in considering the issuance or denial of a firm permit.**

Standard of Review

The review of this case is *de novo* because it is an interpretation of law. The standard of review of an administrative decision where the Administrative Hearing Commission has interpreted the law or the application of facts to law is *de novo*. *Tendai v. Mo. State Bd. of Reg. for the Healing Arts*, 161 S.W.3d 358, 365 (Mo. 2005) (citing *State Bd. of Reg. for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 152 (Mo. banc 2003)). “To the extent that [the] conclusions of law contain statements of fact or ultimate fact, the Court defers to the commission as fact finder if the conclusions are supported by competent and substantial evidence when considering the record as a whole.” *Id.* (citing Section 536.140.2, RSMo; *McDonagh*, 123 S.W.3d at 152). “However, this Court owes no deference to the AHC’s decisions on questions of law, which are matters for this Court’s independent judgment.” *Gott v. Dir. of Revenue*, 5 S.W.3d 155 (Mo. 1999) (additional citations omitted).

### Analysis

The Board is within its statutory discretion to examine the quality and character of a corporate applicant's individual owners because a corporation acts only through individuals. *Ritter v. BJC Health Systems*, 987 S.W.2d 377 (Mo.App. E.D. 1999). Recently, this Court addressed a similar issue in *State of Mo. v. Salter*, --- S.W.3d --- (Mo. 2008) (April 15, 2008, SC88274), wherein an individual was found criminally liable for a corporation's failure to carry worker's compensation insurance. In *Salter*, this Court held: "Individuals can be liable for corporate conduct." (citing Section 562.061, RSMo). Thus, despite the corporate structure, this Court recognized that a corporation acts through its individual owners, and the individuals may be held liable for the corporate conduct.

It stands to reason that where a state board is considering a corporation's application for a professional license, the board may examine the individuals who will be acting on the corporation's behalf. This is necessarily so because the licensing board is concerned with the conduct of that corporation, and the conduct of the individuals on behalf of the corporation. (Tr. 71.) Therefore, the licensing board must have discretion to consider the individual ownership which makes up the corporate structure.

## CONCLUSION

The Missouri State Board of Accountancy is vested by the legislature to regulate all aspects of the accountancy profession. As part of its statutory authority of Section 326.310, RSMo, the Board is authorized to discipline the licenses of individual and firms practicing public accountancy. In addition, the Board is expressly authorized to deny applications for individual and firm licensure pursuant to Sections 326.310 and 326.289, RSMo. The ability to deny a professional license is the ability to exercise discretion in considering an application.

In this case, the Board denied the application for a CPA firm permit which was submitted by a corporation. In considering whether the corporation is qualified for licensure, the Board may examine the individual owners of that corporation. Where, as here, one of the corporate owners is a convicted felon and the Board has previously determined that he lacks the character and qualifications to be licensed in the profession, the Board is within its discretion to deny the corporation's application.

For all the reasons stated above, the Decision of the Administrative Hearing Commission granting IFS a firm permit must be reversed.

Respectfully submitted,

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**CERTIFICATE OF ATTORNEY**

I hereby certify that the foregoing brief complies with Mo. Ct. R. 84.06(c) and Special Rule XXXII in that:

- (A) It contains 3,514 words, as calculated by the undersigned's word-processing program;
- (B) A copy of this brief is on the attached 3½-inch diskette; and that
- (C) The diskette has been scanned for virus by the undersigned's anti-virus program and is free from any virus.

\_\_\_\_\_  
Samantha Anne Harris

**CERTIFICATE OF SERVICE**

I hereby certify that I did, on April 18, 2008, forward an electronic copy of the foregoing brief to Dennis K. Hoffert via e-mail and two true copies and a diskette of the foregoing brief by first class U.S. mail, postage prepaid, to the attorneys for Respondent:

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