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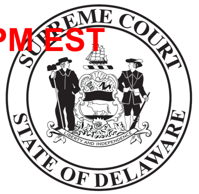

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TESLA INC.,	:	
	:	
Appellant,	:	No. 375, 2022
v.	:	
	:	CASE BELOW
THE DELAWARE DIVISION OF	:	
MOTOR VEHICLES,	:	SUPERIOR COURT OF THE
	:	STATE OF DELAWARE
Appellee.	:	C.A. No. N21A-09-001 CLS

CORRECTED ANSWERING BRIEF OF APPELLEE THE DELAWARE DIVISION OF MOTOR VEHICLES

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

George T. Lees III, I.D. No. 3647
Deputy Attorney General for DelDOT
Department of Transportation
800 South Bay Road
Dover, DE 19901
(302) 760-2022
George.Lees@Delaware.Gov
Attorney for Appellee, The Delaware Division of Motor Vehicles

Dated: December 20, 2022

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NATURE AND STAGE OF THE PROCEEDINGS

Tesla, Inc. ("Tesla"), a manufacturer of electric motor vehicles applied to the Division of Motor Vehicles (the "DMV") for a retail motor vehicle dealer's license in January 2019 (the "Initial Application"). (A324). DMV did not issue a determination on the application at that time as Tesla was instead permitted to open a "Gallery" at the Christiana Mall. (Id.)

Tesla then submitted a second application, dated December 21, 2020, seeking to become a Retail Motor Vehicle dealer in the state, received by DMV in February 2021 (the "Second Application"). (A325). Included in the Second Application was a manufacturer letter issued by Tesla to itself authoring Tesla to sell the motor vehicles which it manufactured. (A15). Karen Carson, Chief of Compliance and Investigations for DMV issued a letter denying Tesla a Dealer's license. (A30-31). DMV reviewed Tesla's application against the provisions of 21 *Del. C.* §6301, et seq. and issued a letter denying the Second Application.

Tesla then requested a hearing to challenge the decision of DMV in denying the Second Application. (A32-36). The DMV hearing was then held on June 23, 2021. Following the hearing, the hearing officer found that Tesla was a manufacturer of motor vehicles and as such was prohibited from operating a retail

motor vehicle dealership. (A392-403). Via letter dated August 9, 2021, DMV Director Jana Simpler affirmed the hearing officer's decision. (A404-405).

Tesla then appealed the hearing officer's and Director Simpler's decision to the Superior Court via Notice of Appeal filed September 3, 2021. (A406-409). On December 22, 2021, the Superior Court issued the briefing schedule. The parties then stipulated to amend the Briefing Schedule, with the Opening Brief being due February 4, 2021. Tesla filed its Opening Brief on February 4, 2021. (A410-452). DMV then filed its Answering Brief on March 7, 2022. (B1-306). Appellant filed its Reply Brief on March 22, 2021 and requested Oral Argument via letter submitted March 25, 2022.

The Court heard oral argument on June 16, 2021, reserving ruling. The Superior Court issued its Decision on September 23, 2022. (A551-571). The Superior Court's decision affirmed the hearing officer's and Director Simpler's decision denying Tesla a retail motor vehicle dealer's license.

The Superior Court considered the records submitted and arguments made by DMV in reaching its decision in this matter. The Court's decision noted that Tesla was aware as of January 2019 of the existence of 6 *Del. C.* §4913 ("MVFPA"), "which prohibits a manufacturer from directly or indirectly owning an interest in a dealer or dealership, to operate or control a dealership, or to act in the capacity of a dealership." (A553). The Superior Court also noted DMV's contention that the

appropriate method to challenge the prohibitions of the MVFPA was a declaratory judgment action and/or through legislative amendment. The Superior Court indicated that its review of the administrative decision was limited to whether the decision, "'is based on clearly unreasonable or capricious grounds' or 'exceeds the bounds of reason in view of the circumstances and had ignored recognized rules of law or practice so as to produce injustice.'" The Superior Court found DMV Director Jana Simpler's decision in denying the license to be free from legal error. (A562). Director Simpler's decision was that granting a license would violate the requirements of 21 *Del. C.* §6312, which requires dealers to comply with the laws of the State.

The Superior Court found it appropriate for DMV to consider the MVFPA in making a determination as that is a law of the State of Delaware. The Court also rejected Tesla's argument that it is exempt from the MVFPA, as the legislature did not legislatively create the carve out that Tesla sought to create for itself. The Superior Court also found that Tesla owning and operating a retail dealership would be a violation of 6 *Del. C.* §4913(b)(14), and therefore a violation of Title 21, such that there was no legal error in denying a license. The Superior Court also found that there was no abuse of discretion by Director Simpler, as the granting of a license

would be "a violation of Delaware law." (A568). Lastly, the Court rejected Tesla's procedural due process claim.

Appellant filed its Notice of Appeal on October 7, 2022, Opening Brief on November 4, 2022, and Corrected Opening Brief on November 16, 2022, seeking reversal of the Superior Court's affirmance of the hearing officer's and Director Simpler's decisions.

After Tesla filed their Opening Brief, certain Legal and Economic Scholars filed a Motion and putative *Amici Curiae* Brief in support of Tesla. DMV filed its opposition to the Motion of the putative *Amici* on November 21, 2022. A decision on that *Amici* application is pending. This is DMV's Answering Brief to the Opening Brief of Tesla.

SUMMARY OF ARGUMENT

I. Denied. The DMV and Superior Court did not err in holding that MVFPA prohibits Tesla from owning and operating a Dealership in the State of Delaware. The Court did not err when it refused to create the carve out that Tesla sought for the self-defined "non-franchising manufacturers" when the legislature did not carve out the exception that Tesla seeks in the statute. The Court did not err when it refused to change the language of the MVFPA to include the definition of motor vehicle Tesla advanced, when the Legislature did not include the proposed language in the statute. The Court did not err when it rejected Tesla's interpretation of the MVFPA as only applying to manufacturers who also had franchise dealerships. The Court correctly concluded that granting Tesla a license to own and operate a dealership would be a violation of Title 21, because it would be a violation of the laws of the State of Delaware, specifically 6 *Del. C.* §4913(b)(14).

II. Denied. The Superior Court did not err when it held that DMV properly considered all of the laws of the State, including the MVFPA, as it is required to do under 21 *Del. C.* §6312, when considering licensing applications. The Court did not err when it held that it would be a violation of Delaware Law for Tesla to "directly or indirectly own an interest in a dealer or dealership; or operate or control a dealer or dealership; or acting in the capacity of a dealer." (A567). The Court did not err when it held that DMV Director Jana Simpler committed no legal error in her

decision denying a license. The Court correctly held that the denial was proper and within the authority granted DMV by the legislature. The Court correctly held that it would have been a violation of Delaware law for DMV to issue Tesla a dealer's license.

STATEMENT OF FACTS

Tesla, much as it has admitted in its prior filings, again admits in its Opening Brief it is a manufacturer of electric vehicles. (D.I. 15, P. 5). While Tesla's Opening Brief discusses Tesla's marketing strategy, Tesla again overlooks the undisputed fact that Tesla has created wholly owned subsidiaries with whom it has entered into agreements to sell Tesla EV's in states where Tesla itself is prohibited from selling motor vehicles. *See e.g. Tesla Motors UT, Inc. v. Utah Tax Comm*, 398 P.3d 55 (Utah 2017). Tesla's Senior Policy Advisor for the Northeast, Zachary Kahn, testified that Tesla does have "agreements" with wholly owned subsidiaries to operate dealerships and sell Tesla vehicles. (A345). Upon follow up questioning, Mr. Kahn stated that Tesla, "does not have any agreements with third-party, independent, non-Tesla franchisees." (A346). Despite acknowledging that Tesla does contract with other entities to operate dealerships and sell Tesla vehicles, Tesla seeks to differentiate these wholly owned franchises from independent franchise dealers inserting the word "independent" into the discussion, a word, which the legislature has not included within the provisions of the MVFPA.

Tesla's Opening Brief discusses the Gallery at the Christiana Mall and also the service center in Wilmington available to Tesla customers. The brief overlooks that potential customers can not only view vehicles at the Gallery, but test drive them and engage in the process of completing an online order for a vehicle. It is only the

delivery of the vehicle which must occur in another state as Tesla has not been licensed to operate a dealership in Delaware.

After Tesla's Initial Application was submitted (A168-255), the Delaware Automobile and Dealer's Truck Association ("DATDA") lodged an objection to Tesla being granted a retail motor vehicle dealer's license. (A256-259). DATDA's objection was that the issuance of a retail motor vehicle dealer's license to Tesla would be a violation of 6 *Del. C.* §4913(b)(14). (Id.) Tesla's January 2019 response contesting the applicability of §4913(b)(14) was submitted to DMV, evidencing that Tesla had actual knowledge of a dispute in 2019 over Tesla's ability to obtain licensing as a dealer. (A260-262). After opening the Gallery, Tesla took no further action to obtain a retail motor vehicle license until submitting the Second Application to DMV on February 4, 2021. (A264-288).

As noted above, Tesla was advised by DMV Chief of Compliance and Investigations, Karen Carson, that its application was denied, as issuing a license would not be in compliance with the laws of the State of Delaware. (A289-291). Tesla, through its Managing Counsel, Kevin Auerbacher, Esq. requested a hearing to challenge the decision. (A298-303). Tesla then requested that it be afforded more than the normal two (2) hours DMV allocates for hearings (B42), as well as other concessions on how the hearing would be held. (Id.). Tesla was afforded double the time afforded other dealerships who received adverse licensing decisions. (B43).

Tesla was also permitted to call a witness, Professor Daniel A. Crane virtually, a practice not normally permitted in DMV hearings. (B45).

On June 23, 2021, the hearing proceeded in Dover, Delaware. (A314-391). Tesla was represented at the hearing by Mr. Auerbacher as well as Catherine Cho, Esquire, who attended telephonically, (B53) and Zachary Kahn, Esquire.

Mrs. Carson testified about her understanding of Tesla's application history and the opening of the Gallery at the Christiana Mall in 2019. (A324). Mrs. Carson reviewed the 2021 Application by Tesla and also reviewed 6 *Del. C.* §4913(b)(14) and the prohibition contained therein on manufacturers owning retail dealerships. (Id.). Mrs. Carson reviewed Tesla's letter response and argument as to why it believed it was entitled to a license and that did not change Mrs. Carson's decision that they were barred by statute from holding a license. (A325). Mrs. Carson was aware of the introduction of HB 239 which she believed supported her decision that a license could not properly be issued to Tesla based upon the language of §4913(b)(14). (Id.).

On cross-examination, Mrs. Carson advised that under 21 *Del. C.* §6312, she reviews a dealership application to determine, in her discretion, whether an applicant being granted a dealer's license and/or operating a dealership would be in compliance with the laws of the State of Delaware. (A327). She testified that based upon her review of the materials submitted and the provisions of §4913(b)(14) Tesla

being granted a license would not be in compliance with the laws of the State. (Id.). In response to counsel's questions, Mrs. Carson testified that because of the decision to deny the license, certain other portions of the investigation were not completed as they were unnecessary at the time. (A328). The license review process would still need to be completed if §4913(b)(14) were found not to bar the issuance of a retail dealer's license. (Id.).

Tesla's witness, Prof. Crane, testified about the litigation Tesla initiated in Michigan, admitting that despite the challenge by Tesla to Michigan's franchise statute, Tesla remained unable to operate a dealership and conduct sales in Michigan. (A334). Prof. Crane testified that the FTC commission has not issued guidance regarding the licensing of EV manufacturers as retail dealers. (Id.). Further, he was unaware of the FTC initiating litigation over the denial of a retail dealer's license to an EV manufacturer. (A335). Prof. Crane, in answering questions about his article, *Tesla, Dealer Franchise Laws, and the Politics of Crony Capitalism*, again agreed that where state laws have served as a bar to Tesla obtaining a motor vehicle dealer's license, Tesla has sought legislative amendment to allow the issuance of a license. (A335-336). *See also*, 101 Iowa L. Rev. 573 (2016).

DMV posited in closing that the correct method for Tesla to seek review of the application of §4913(b)(14) was to file a Declaratory Judgment Action pursuant to 10 *Del. C.* §6501, et seq. (A360). DMV further argued that the Legislature, who

was seeking to amend §4913 and the statutory framework, was the proper entity to resolve the issue, both in the statutes as written and the proposed amendment, HB 239, as the Legislature's intent was clear and barred manufacturers from operating retail dealerships. (Id.).

The Hearing Officer's decision, in the Discussion and Order, begins by discussing 21 *Del. C.* §6312, and the requirement therein that all applicants, "will comply with, the laws of this and other states." (A402). The Hearing Officer correctly noted that §6312 does not identify which specific laws or code sections are to be considered and instead held that "it is a general statement of compliance with all laws of the State of Delaware." (Id.). The Hearing Officer then discussed that 6 *Del. C.* §4913(b)(14) is a law of the State of Delaware and as such was a requirement DMV should consider in making its determination. (Id.). The Hearing Officer noted that Tesla does have contracts with wholly owned subsidiaries to market and sell Tesla vehicles. (Id.). The Hearing Officer then concluded that based upon the evidence presented to her, that Tesla is a "'manufacturer' as contemplated by Delaware law." (Id.). The Hearing Officer then, in reviewing the express prohibitions on a manufacturer owning or operating a motor vehicle dealership contained in §4913(b)(14), would be in violation of the laws of the State of Delaware if it were to be afforded a retail motor vehicle dealer's license. (A403). Accordingly, the denial of a license "was proper." (Id.).

Via letter dated August 9, 2021, Director Simpler, exercising the discretion afforded her in §6315(a), held that it would be a violation of §4913(b)(14) for Tesla to be issued a retail motor vehicle dealer's license and therefore a violation of the laws of the State as expressed by §6312. (A404). Director Simpler also noted that the interests of encouraging the use of electric vehicles, such as those manufactured by Tesla, did not outweigh the requirements that the mandatory laws of the state prohibited licensing. (Id.).

Tesla's appeal to the Superior Court alleged the following errors warranting reversal: that §6312 does not allow DMV to consider Title 6, Chapter 49 in making its determination; that DMV erred as a matter of law in determining that Tesla may not own or operate a dealership pursuant to §4913(b)(14); that DMV violated the due process clause; that the decision was not based on substantial or competent evidence; and any additional grounds which may exist. (A407-409). At oral argument, Tesla admitted that while it is a manufacturer, Tesla asserts it is not a manufacturer under the MVFPA. (A490). Tesla then admitted that the MVFPA was enacted by the Legislature prior to Tesla's existence, when motor vehicle manufacturers had franchise dealerships. (A495). In response to the Court's questions, Tesla responded that Tesla can qualify as a "dealer" under Title 21, Chapter 63 while not being a "dealer" under the MVFPA. (A496-497). That response however ignored that Tesla does contract with other companies, albeit

wholly owned companies, in other jurisdictions to market and sell their vehicles. (A515).

The Court also questioned why Legislative change was not required or sought. A500). Tesla noted that legislative amendment had been proposed, an amendment which specifically addressed the questions raised by the Court on defining what constitutes a "non-franchised" dealer in the electric vehicle context. (A501). That legislation, introduced on June 10, 2021, after the denial of Tesla's license and on the eve of the DMV Hearing, would have created the exact carve out for Tesla that the Court discussed. (A305-306). House Bill 239 begins by defining the phrase that Tesla claims it satisfies which is not included in the MVFPA, "non-franchised" manufacturer. (Id.). The Legislature also sought to carve out from the prohibitions of the MVFPA on certain manufacturers, such as Tesla, who had not previously sold or leased vehicles in the State through a franchise dealership. The proposed legislation also addressed the issue of what percentage of ownership a manufacturer such as Tesla could transfer and yet still retain its non-franchised manufacturer status. (Id.). Lastly, the Legislature capped the number of dealerships a non-franchised manufacturer could have owned and operated in the State at two (2). (Id.). That legislation did not advance prior to the end of the legislative session in 2021 or during the 2022 legislative session.

In addressing the Court's questions, DMV noted the declared purpose of Title 6, Chapter 49, and that "the distribution and sale of vehicles in the State vitally affects the general economy if the State and the public interest and the public welfare." 6 *Del. C.* §4901. To accomplish that express purpose, the Legislature sought "to regulate vehicle manufacturers, distributors or wholesalers." *Id.* The desire to protect the citizens of the State from usury practices and being beholden to a single stream or supply was a Legislative judgment that DMV contends is beyond the purview of the Court. (A521). As such, DMV asserted, as it has throughout the process, that Tesla is prohibited by the MVFPA from operating a dealership in Delaware absent legislative amendment. At argument, DMV again addressed Tesla's contention that it met the definition of a dealer under Title 21, arguing that Tesla is prohibited from becoming a dealer pursuant to §6301(3)(f).

The Superior Court's decision begins by noting that the standard of review to be applied to the DMV's and Director Simpler's decision is an abuse of discretion standard. (A561, *citing, Funk v. UIAB*, 591 A.2d 222, 225 (Del. 1991)). The Court correctly noted that "[a]bsent an abuse of discretion, the Court must affirm the judgment of the Director if it did not otherwise commit an error of law." (A562). The Court relied upon the express language of 21 *Del. C.* §6315(a) which gives the DMV Director discretion to refuse to approve Tesla's application.

The Court then undertook to review and determine if Director Simpler's decision was free from legal error, starting with her review of the record and finding that issuing a license would be a violation of §4913(b)(14). (Id.). The Court began by evaluating the plain language of §6312, which permits DMV to "enquire regarding Tesla's compliance with the laws of this State" (A564) as §6313(6) provides as a reason for denial that an applicant "no longer meets the standard set forth in §6312 of this title." (A565).

Having found that DMV and Director Simpler could consider all the laws of the State, including Title 6, Chapter 49, in making a decision, the Court then explained why Tesla's argument that they did not need to comply with the MVFPA fails. The Court's decision, as was discussed at argument, again focused on Tesla's use of an undefined term in the existing legislation, "non-franchising manufacturers." (A566). The Court refused to create the exact legislative carve out for Tesla that the Legislature sought to create when it proposed House Bill 239. That Legislative change is the exact "political discussion" that Prof. Crane testified that Tesla was involved in in New Jersey and Pennsylvania, which lead to their ability to become licensed in those states. (A336, *See also*, Pennsylvania Statute 63 P.S. §818.310 and New Jersey Statute N.J.S.A. §56:10-27.1). Mr. Kahn similarly testified to an awareness of the legislative changes that occurred with the result being

that Tesla could open four (4) dealerships in New Jersey and five (5) dealerships in Pennsylvania. (A347).

The Court's Opinion then discusses Tesla's application to become a "new" motor vehicle dealer (A170) and that new motor vehicles may only be sold in the State if they meet the definition of new motor vehicles under Delaware law. The Court correctly identified that Title 21 is silent on the issue, new motor vehicle not being defined in 21 *Del. C.* §305, the general definitions section of Title 21, or within Chapter 63. (A566). As such, the Court was compelled to look to the MVFPA, where new motor vehicle is defined. Accepting Tesla's argument that its vehicles do not meet the definition of new motor vehicle within the MVFPA, the Court held that because Tesla vehicles do not meet the definition of "new motor vehicle", Tesla could not obtain a new motor vehicle dealer's license under Title 21. (Id.). The Court would not re-write the statute in the manner Tesla proposed to include a statutory definition which the Legislature did not include in either Title 21 or Title 6, which would include Tesla's vehicles. (Id.).

The Court then discussed that while Tesla does contract with wholly owned subsidiaries to sell its vehicles, the Hearing Officer found Tesla not to be a "new motor vehicle dealer." On the issue of franchises, Prof. Crane admitted that it is possible for a manufacturer to enter into a franchise agreement with a wholly owned subsidiary. (A336). Neither Prof. Crane (A337) nor Mr. Kahn (A345-346) could

state whether the contracts that Tesla entered into with its wholly owned subsidiaries in states where the subsidiary's operated dealerships were or were not franchise agreements as contemplated by the MVFPA. The Hearing Officer did however find Tesla to be a "manufacturer" and as such was prohibited by §4913(b)(14) from owning a dealership. Granting a license to Tesla under Title 21, Chapter 63 would result in "a violation of the law of [this] State" and as such, the denial of a license by Director Simpler was not legal error. (A567). The Court also reviewed the decision of Director Simpler finding that the decision was "not based on unreasonable or capricious grounds nor did it ignore recognized rules of law." (A568). The Court agreed with the position DMV has taken throughout this process, that "a violation of Delaware law would be present if the dealer license was granted." (Id.). Accordingly, there was no abuse of discretion.

The Court then addressed, in the alternative, that even if the standard to be applied was substantial evidence and not abuse of discretion, DMV's denial was proper. Lastly, the Court addressed Tesla's Due Process claim, the Court held that because Tesla did not receive a license, it merely had an expectation of receiving a license and as such, there was no due process claim. The record on Tesla's claim relating to due process was that Tesla received a four (4) hour hearing, which is twice as long as other dealer hearings. (A527). Tesla had an opportunity to call witnesses, including one remotely, a first for DMV administrative hearings. Tesla is heard to

complain about not being able to conduct discovery, but as the record reveals, Tesla never asked the Hearing Officer whether discovery would be permitted and did nothing after the Requests for Admission were objected to by the DMV. (A528). Moreover, the Court agreed that the proposed discovery Tesla claims it needed was wholly irrelevant to the limited issue the hearing officer was required to decide. (Id.). Tesla's counter was that it was prejudiced because it wanted to present evidence over an entire day, evidence which the Hearing Officer and Court found irrelevant to the issue at bar. (A539). What Tesla has and continues to ignore is, "it is well-settled under Delaware law that, '[i]n an administrative hearing, due process does not require formal discovery.'" *Purnell v. Department of Insurance*, 2017 WL 3980539, at *7 (Del. Super. Sept. 7, 2017).

ARGUMENT

I. THE FRANCHISE ACT PROHIBITS TESLA FROM OPERATING A MOTOR VEHICLE DEALERSHIP IN DELAWARE

a. Question Presented

The DMV, Director Simpler and the Superior Court correctly decided that the MVFPA prohibited Tesla from being licensed as a motor vehicle dealer and there was no abuse of discretion in denying the license.

b. Standard and scope of review

When considering an appeal from an agency administrative decision, the Supreme Court "examines the agency's decision directly." *DelMarsh v. Environmental App. Bd.*, 277 A.2d 281, 288 (Del. 2022). The scope of review is limited to correcting errors of law and determining whether substantial evidence of record exists to support the findings of fact and conclusions of law." *Eskridge v. Voshell*, 593 A.2d 589, 1991 WL 78471, at *2 (Del. 1991) (citing *Levitt v. Bouvier*, 287 A.2d 671 (Del. 1972)). The Delaware Supreme Court has found that "[f]indings of fact will not be overturned on appeal as long as they are sufficiently supported by the record and are the product of an orderly and logical deductive process." *Id.* (citations omitted). If there is substantial evidence in the record, the "court may not reweigh it and substitute its own judgment" for that of the agency. *Janaman v. New Castle County Bd. of Adjustment*, 364 A.2d 1241, 1242 (Del. 1976).

"[W]hen the facts have been established, the hearing officer's evaluation of their legal significance may be scrutinized upon appeal." *Voshell v. Attix*, 574 A.2d 264, 1990 WL 40028 at *2 (Del. 1990). "The Division's understanding of what transpired," however, "is entitled to deference, since the hearing officer is in the best position to evaluate the credibility of witnesses and the probative value of real evidence." *Id*. Further, "due weight may be afforded an agency's interpretation of the statutes it administers, and the weight may be substantial given the statute, particular case, and relevant facts." *DelMarsh v. Environmental App. Bd.*, 277 A.2d 281, 288 (Del. 2022). "Absent any abuse of discretion, 'the decision of the agency must be affirmed.'" *Id. see also, Public Water Supply Co. v. DiPasquale*, 735 A.2d 378, 381 (Del. 1999).

The Superior Court correctly concluded that Director Simpler's decision, affirming the denial of a license by the Hearing Officer was subject to review under the abuse of discretion standard as the clear language of 21 *Del. C.* §6315(a) includes the word "may" in the Director's decision-making authority. Further, Tesla's reliance upon the word "shall" within §6312 as removing discretion, ignores the remaining language within the section, which requires DMV to evaluate and make a determination "as far as can be ascertained, the applicant has complied with and will comply with, the laws of this and other states." The clear language of §6312 contemplates DMV exercising discretion in making a

determination prior to issuing a dealer's license. As there was no abuse of discretion, the decision to deny Tesla a license should be upheld.

c. Merits of the argument

The Superior Court did not err when it held that the MVFPA prohibited Tesla from owning and operating a motor vehicle dealership in the State.

Tesla again selectively cites to certain provisions of the MVFPA yet ignores the clear language of 6 *Del. C.* §4901 which denotes that the Legislature's declared purpose is in promulgating the statutory scheme was to "regulate vehicle manufacturers, distributors or wholesalers … and to regulate franchises issued by the aforementioned." The statutory provisions apply to manufacturers regardless of their entering into franchise agreements as the MVFPA is also specifically intended to regulate manufacturers, which Tesla has admitted it is.

That legislative intent to regulate manufacturers is further specified in § 4913, entitled "Unlawful acts by manufacturers", which provides that it is a violation of this chapter for any manufacturer:

> (14) To directly or indirectly own an interest in a dealer or dealership; or operate or control a dealer or dealership; or act in the capacity of a dealer except as provided by this section.

§ 4913(b)(14). The subsections then provide that a manufacturer may control a dealership for no more than 24 months if the dealership is for sale; or the manufacturer's ownership of a partial interest is for a reasonable time while the

operating entity is executing a plan to acquire full ownership. This statutory provision would appear to prohibit a motor vehicle manufacturer from obtaining a license as a motor vehicle dealer. There are no cases in Delaware interpreting the MVFPA which specifically address the issues Tesla attempts to raise herein. However, subsequent to the denial of Tesla's license by DMV, the Legislature spoke when House Bill 239 was proposed. (A305-306). That proposed legislation specifically addressed the very issue Tesla states does not exist by allowing EV manufacturers such as Tesla the ability to own and operate up to two (2) dealerships in the state. The introduction of legislation on June 10, 2021, simultaneous with Tesla's being denied a license cannot and should not be ignored by this Court. The Legislature has spoken and indicated that the method for Tesla to be granted a license is via the legislative process and not the Court acting as some super legislature and crafting public policy. The legislature's actions in proposing a work around for EV manufacturers such as Tesla owning a dealership is irrefutable evidence that the Legislature interprets the MVPFA as written as prohibiting manufacturers such as Tesla from owning retail dealerships.

"Courts should be suspicious of statutory interpretations that suggest the legislature enacted a meaningless provision." *Farmers for Fairness v. Kent County*, 940 A.2d 947, 961 (Del. Ch. Feb. 5, 2008) *citing*, *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.,* 636 A.2d 892, 900 (Del. 1994). (Words in a statute

should not be construed as surplusage). The Legislature has confirmed that not only should the words in the statute which prohibited manufacturers from owning dealerships not be treated as surplusage, but that the manner of permitting the relief that Tesla seeks is legislative not judicial action.

Tesla argues their interpretation of manufacturer requires that they be exempted from the restrictions of the MVFPA on manufacturers because, they argue that they are not a manufacturer of new motor vehicles. The Superior Court however correctly pointed out that if Tesla's electric vehicles are not new motor vehicles as defined within the MVFPA, then as the phrase new motor vehicle is not defined elsewhere in the Delaware Code, Tesla would not qualify for a new motor vehicle dealer's license. Tesla on the one hand would have the Court ignore the Legislature's intent to regulate manufacturers as expressed in §4901, focusing on a definition crafted prior to Tesla's existence, and at the same time have the Court add a definition of both non-franchising manufacturer and new motor vehicle into the Delaware Code that would enable Tesla to circumvent the Legislature's express intent to protect the citizens and regulate motor vehicle manufacturers. This Court has ruled that where results of statutory interpretation are "undesirable as a matter of public policy, the Legislature is the proper forum to seek a change." *Whalen v. On Deck, Inc.*, 514 A.2d 1072, 1073 (Del. 1986); *Prices Corner Liquors, Inc. v. Delaware Alcoholic Beverage Control Comm'n*, 1995 WL 716802, at *2 (Del.

Super. Nov. 13, 1995) (holding that certain judgments of the legislature "are beyond the reach of the Courts."). The Legislature in 2021, on the eve of Tesla's hearing expressed its clear intention that a change to the MVPFA must come through them and not the Courts. Further, to the extent that Tesla seeks to argue that the Legislature has not formulated a policy that prohibits manufacturers from operating retail dealerships, based upon the ruling in *Whalen*, this Court should defer to the Legislature on the issue of whether such a license is contemplated and permitted. *Id.* at 1074. This Court has repeatedly held that judicial restraint requires that the Court defer to the Legislature and legislative judgment in matters and not act as a super legislature and decide what is or is not legislative policy. *Helman v. State*, 784 A.2d 1058 (Del. 2001). The Hearing Officer did not err, nor did Director Simpler abuse her discretion, when they both held that Tesla, considering the express intent of the Legislature when the MVFPA was enacted, was prohibited from owning and operating a dealership.

DMV is not alone in its position that legislative action is required as opposed to a judicial solution to Tesla's prohibition on owning a dealership as this has been similarly recognized by other states: Pennsylvania, when it amended 63 P.S. §818.310 in 2014, to allow EV manufacturers to own no more than five (5) dealerships; North Carolina, when it amended NC ST §20-305.2 in 2019, which allowed EV manufactures to own or control a maximum of five (5) dealerships in

the State; New Jersey, when it amended N.J.S.A. §56:10-27.1 in 2015, allowing zero emission vehicle manufacturers to operate no more than four (4) dealerships at the same time prevented EV manufacturers who came into existence after 2015 from ever obtaining a dealer's license in the state; and Maryland , when it amended MD Code Trans. §15-305 in 2015, to allow electric vehicle manufacturers to own and operate no more than four (4) dealerships. While Tesla is heard to tout the dealerships it operates in the states adjacent to Delaware, in each instance the relief from the legislative prohibitions on Tesla owning and operating a retail dealership came from the Legislature and not the Courts. This Court should proceed similarly and require Tesla to obtain relief, in the form of HB 239 or some other legislation which the Legislature sees fit to enact, as opposed to this Court.

Tesla again tries to have the Court ignore that it does have franchises in other states, wholly owned subsidiaries. So even to the extent the Court were to adopt Tesla's arguments that the DMV and the Superior Court's interpretations and application of the MVFPA were wrong, Tesla is a manufacturer as it does have wholly owned subsidiaries, franchises, through which it does or has sought to do business in states like Utah and Massachusetts, among others. As such, DMV contends that reliance upon the MVFPA is appropriate and the decision proper.

As noted above, Tesla in the first instance argues that it is not a manufacturer under the MVFPA and hence that Chapter of the Delaware Code does not apply to

it. However, "new motor vehicle" is not defined anywhere in the Delaware Code other than in the MVFPA. Specifically, new motor vehicle is not defined within Title 21, and as such, since Tesla has only applied for a new motor vehicle dealer's license, Tesla, by its own argument does not qualify for the issuance of a license. As the Superior Court correctly noted, a "it is impossible for a new vehicle license to be granted to sell new cars without Tesla's vehicles meeting the definition of new motor vehicle." (A566).

Tesla next avers that the Superior Court erred when it addressed the issue of whether, if Tesla's argument was accepted, Tesla could not obtain a new motor vehicle dealer's license as its vehicles were not "new motor vehicles." As DMV determined that Tesla is a manufacturer and thus precluded from owning a dealership by the MVFPA, DMV, as testified to by Mrs. Carson, did not complete its review of Tesla's license. DMV did not resolve the issue of whether Tesla could otherwise qualify for a license and whether it met all other statutory requirements as the clear language of the MVFPA prohibited Tesla's owning a dealership as Tesla is a manufacturer. As such, if the Court were to determine that the MVFPA does not apply to Tesla as it is not a manufacturer and its vehicles are not new motor vehicles as Tesla argues below and herein, then DMV may not issue Tesla a new motor vehicle dealer's license as Tesla has requested because the Court would have ruled that the MVFPA, the only place where new motor vehicles are defined, does not

cover Tesla. While correct in the first instance that the Court may not affirm by supplying a new rationale, here the agency's review was not complete and the very ruling Tesla seeks by its nature would disqualify Tesla if the matter were remanded with a finding from this Court that MVFPA does not apply to Tesla. Then, having that decision in hand, DMV would in all likelihood determine that Tesla cannot obtain a new dealer's license as their vehicles are not, per the Court's decision, new motor vehicles, as the MVFPA does not apply to Tesla. As the argument only kicks the proverbial can down the road, judicial economy is served by reviewing the issue now. *State v. McCoy*, 143 A.3d 7 (Del. 2016). Here, addressing the issue, as the Superior Court did, that Tesla's argument that the MVFPA does not apply to it, as its vehicles are not new motor vehicles and therefore Tesla does not otherwise qualify to be a new motor vehicle dealer "will promote judicial economy because it will avoid the necessity of reconsidering the [issue]" in the event the issue is remanded to the DMV for a further hearing limited to that singular issue. *Id. at 16.*

Tesla cites three cases, seeking to challenge the Superior Court's decision, which reviewed and determined an argument advanced by Tesla throughout the pendency of this matter, to wit, that its electric vehicles are not "new motor vehicles" under Title 6. *Delaware Alcoholic Beverage Comm'n. v. Mitchell.* is inapposite as in that case, the Court heard and accepted additional evidence beyond that considered at the administrative board level. 196 A.2d 410 (Del. 1963). In this

matter, the Superior Court did not take additional evidence and instead, looked at the record before it and the arguments advanced by Tesla to the Hearing Officer and Court that its vehicles are not "new motor vehicles" as contemplated by the MVFPA. (A424). Tesla cannot now be heard to complain that the very argument it advanced to the Superior Court was considered by the Court, when the end result of the argument Tesla itself advanced is that Tesla could not therefore qualify to operate a new motor vehicle dealership. The Superior Court did not request or consider new evidence and as such, the *Delaware Alcoholic Beverage Comm'n* decision is distinguishable.

Further, the Hearing Officer's decision found that Tesla did not meet the definition of new motor vehicle dealer under the MVFPA. Unlike in *JNK, LLC v. Kent. Cnty. Reg'l Plan. Comm'n*, the reasons for denying Tesla's application are in the record from the administrative hearing and the legal arguments presented at the Superior Court. 2007 WL 1653508 (Del. Super. May 9, 2007). Moreover, the issue in *JNK* was a zoning determination, which this Court noted are treated differently than other matters. As the Court in JNK stated, "[o]ur courts are often forgiving when it comes to the sufficiency of the record on appeal." *JNK*, at *6. To the extent that this Court believes that DMV must specifically enunciate the decision that Tesla's vehicles do not qualify as new motor vehicles under Title 21 or Title 6 and therefore cannot qualify for a new motor vehicles, the clear result of adopting Tesla's

argument is not the granting of a license to Tesla, but instead remand for further hearing on that limited legal issue. *See Delaware Alcoholic Beverage Comm'n* (case remanded for further hearing), *JNK,* (case remanded for further hearing at the administrative level), *Burlington Truck Lines v. U.S.*, 371 U.S. 156 (1962) (matter remanded for further proceedings at the administrative level). So even if the Court were to accept Tesla's arguments that the Superior Court improperly found that Tesla was disqualified from obtaining a new motor vehicle dealer's license because its electric vehicles are not "new motor vehicles" under Delaware law, then at best, the matter would be remanded for an additional decision and then hearing before the DMV Hearing Officer on that limited issue. Judicial economy and efficiency are not served in this instance by such a remand where the record below, both at the administrative level and the Superior Court level are sufficiently developed for the Court to review the issue.

Tesla's argument that its vehicles meet the definition of a "vehicle" under Title 21 ignores the fact that what constitutes a new motor vehicle is not defined by Title 21. While Tesla's electric vehicles may meet the definition of "vehicle" in title 21, Tesla seeks to be a "new" motor vehicle dealer (A8), an undefined phrase in Title 21. The Superior Court refused to interpret Title 21 and Title 6 in the manner that Tesla seeks, creating new definitions which the Legislature did not create. Tesla cannot have it both ways, it cannot be excluded from the definitions of "new motor

vehicle" under the only Delaware Code section to define that phrase and then also argue that because Title 21 does not define "new motor vehicle" it is entitled to a license to sell vehicles which are otherwise not considered by the Delaware Code to be new motor vehicles. Tesla is not entitled to a new motor vehicle dealer's license and the issue is one that, as DMV has advanced throughout, is properly vested in the hands of the Legislature.

Tesla then argues that the Court need look no further than the title of Chapter 49 to reach a determination that it is inapplicable to Tesla. This Court however, when confronted with two possible statutory interpretations, must adopt the interpretation which will uphold a statute's validity. *State v. Hobson*, 83 A.2d 846, 851 (Del. 1951). *Hobson* also rejected Tesla's argument that the title of a statutory section is limiting to the effect of the statutory language. *Id.* at 855. Moreover, in Delaware, the title of a bill is not required "to be an index of its details or a synopsis of its contents." *Opinion of the Justices of the Supreme Court*, 315 A.2d 580, 583 (Del. 1974). The intent is to put parties on inquiry notice of the contents as the Legislature did in the MVFPA. The legislative intent of the MVFPA, as specified in §4901, is an intent to regulate manufacturers to prevent "impositions and other abuses upon" citizens of the State. Tesla cites to a number of decisions which addressed challenges by existing motor vehicle dealers against manufacturers seeking to prohibit or curtail the opening of new or additional motor vehicle

dealerships as somehow constraining the legislative intent to protect the citizens of the state to just the fact patterns identified in the cited cases. What none of the cited cases specifically address is the fact pattern created by Tesla seeking to open and operate the first Tesla dealership in the state. The clear language of §4913(b)(14) prohibits Tesla's opening a dealership and none of the cases cited by Tesla hold to the contrary as none of those cases addressed the issues presented by Tesla's application and denial. As such, the decision by DMV, premised upon the MVFPA should be upheld.

Tesla further cites decisions from the Fourth Circuit as well as decisions rejecting challenges by certain Dealer Associations to their respective states, under those states' statutory frameworks, from granting Tesla a license. The present matter is not however a challenge by existing licensed dealerships to Tesla being granted a license but is instead a review of a denial of a license by the agency granted authority by the Legislature to review and in its discretion approve or deny licenses. Tesla would have the Court ignore the resolution of Tesla's identical claim in Michigan where Tesla's licensing denial was "objective and follow[s] the plain, ordinary meaning of the language chosen by the Legislature." *Tesla v. Benson*, U.S.D.C. W.D. Mich., C.A. No. 16-CV-1158. (A308-313).

While in the context of a dormant commerce clause challenge to a state statutory prohibition[1] on a vehicle manufacturer from owning a retail used vehicle dealership, the Fifth Circuit Court of Appeals refused to "second-guess the empirical judgments of lawmakers concerning the utility of legislation." *International Truck and Engine Corp. v. Bray*, 372 F.3d 717, 728 (5th Cir, 2004) *rehearing en banc denied*, 380 F.3d 231 (5th Cir. 2004), *citing*, *CTS Corp. v. Dynamics Corp. of Am.,* 481 U.S. 69, 92 (1987). The Court noted that preventing "vertically integrated companies from taking advantage of their market position" and "to prevent frauds, unfair practices, discrimination, impositions, and other abuses" are legitimate interests. *Id.* It is the legitimate interests expressed by the Legislature which Tesla seeks to have this Court ignore.

The plain language chosen by the Legislature is to prohibit manufacturers from owning or operating dealerships in the State. The Legislature's intent, as evidence both by the language of the statute itself, combined with the legislative interpretation encapsulated in HB 239 that legislative amendment was required to allow that which Tesla seeks should not and cannot be ignored.

[1] A challenge which Prof. Crane writes Tesla has not pursued because of the precedential winner takes all effect of a decision. *Tesla, Dealer Franchise Laws,* at 585.

II. THE DMV PROPERLY DENIED TESLA'S LICENSE APPLICATION AS GRANTING A MOTOR VEHICLE DEALER'S LICENSE WOULD NOT BE IN COMPLAINCE WITH THE LAWS OF THE STATE OF DELAWARE

a. Question Presented

The DMV, Director Simpler and the Superior Court correctly decided that the DMV was statutorily required and obligated to consider all of the laws of the State of Delaware as required by §6312 in making a decision on Tesla's license application.

b. Standard and scope of review

When considering an appeal from an agency administrative decision, the Supreme Court "examines the agency's decision directly." *DelMarsh v. Environmental App. Bd.*, 277 A.2d 281, 288 (Del. 2022). "The Division's understanding of what transpired," however, "is entitled to deference, since the hearing officer is in the best position to evaluate the credibility of witnesses and the probative value of real evidence." *Id*. Further, "due weight may be afforded an agency's interpretation of the statutes it administers, and the weight may be substantial given the statute, particular case, and relevant facts." *DelMarsh v. Environmental App. Bd.*, 277 A.2d 281, 288 (Del. 2022). "Absent any abuse of discretion, 'the decision of the agency must be affirmed.'" *Id. see also, Public Water Supply Co. v. DiPasquale*, 735 A.2d 378, 381 (Del. 1999).

The Superior Court correctly concluded that DMV did not commit legal error or an abuse of discretion when DMV considered all of the laws of the State, including the MVFPA, in determining a license would not be issued.

a. Merits of the argument

A close reading of the licensing statutes and in particular §6312 makes it clear that a dealer's license issued by DMV must comply in all ways with the laws of Delaware. The clear expressed legislative intent is that DMV, in reviewing license applications is not constrained in its review to just one set of statutes or an applicant's actions in Delaware. The DMV, in making licensing determinations is required to consider all possible statutory impacts and whether the granting of the license would violate a statute of the State of Delaware. Tesla seeks to have the Court ignore the fact that it is a manufacturer and the prohibitions contained within the MVFPA on Tesla or any other manufacturer owning and operating a dealership in the State. It would be improper for DMV, and in fact a violation of DMV's statutory obligations, for DMV to knowingly ignore a statute promulgated by the legislature which directly impacts an area of licensing governed by DMV. That is the position that Tesla advances which the Superior Court rejected. The Superior Court's holding that DMV is required to and properly considered the laws of the State when it considered the language of the MVFPA in making a determination should be affirmed on appeal.

Tesla's argument that DMV is constrained by the language in §6301, et seq. and must ignore the language in §6312 is the exact statutory interpretation argument the Court is to reject as it would have the Court render other statutory provisions enacted by the Legislature meaningless. *Farmers, supra*. Taking Tesla's argument to its conclusion would have DMV ignore entirely the provisions in 6 *Del. C.* §4901, et seq. and issue a dealer's license without regard to the prohibitions in the MVFPA. DMV does not disagree that statutes should be construed in a way that avoids absurd results. *See Chase Alexa, LLC v. Kent Cty. Levy Ct*, 991 A.2d 1148, 1152 (Del. 2010). That does not however make a result absurd when the Legislature has spoken and expressed its policy and legislative intent. *Whalen, supra*. Tesla would prefer to pick and choose which statutory provisions to apply to it, so that it may affect the *fait accompli* it desires and avoid the legislative process it has been compelled to undertake in New Jersey, Pennsylvania, and Maryland, among others. Tesla's argument that the Legislature chose its language in 21 *Del. C.* Chapter 63 to avoid the purported "surplusage" of the provisions of the MVFPA ignores *ab initio* the Legislature's clear cognizance of the non-surplus nature of the MVFPA provisions which resulted in the propounding of HB 239.

Tesla would have the Court narrowly interpret one statutory provision to the exclusion of other statutory provisions amounting to the nullification of an express act of the Legislature. That is the exact type of limiting interpretation this Court has

expressly rejected in *Prices Corner Liquors* and should be rejected herein. Here, the interpretation of §6312 by the DMV follows the express language of the statute and considers all of the laws of the state.

The Delaware Supreme Court has stated that it will "accord due weight" to the decision of an agency's interpretation of a statute it is empowered to administer. *Public Water Supply Co.* at 382. Tesla's arguments would have the Court substitute its judgment not only for that of the Legislature, but also for that of DMV, the agency who the Legislature has tasked with making licensing decisions based upon whether an applicant will comply with the laws of Delaware and other states. The Court should not overturn or reverse the decision of the DMV when same is premised upon the unequivocal mandates of the Legislature and where the decision is clearly supported by the laws of the State.

Tesla's challenge of DMV's application of §4913(b)(14)'s prohibitions on Tesla operating a dealership asserting that the language of §6312 is somehow superseded in its entirety by §6313. In furtherance of that argument, Tesla cites *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, a decision which reversed a regulation which otherwise impacted, and the Court found violated, a constitutional right under both the United States and Delaware constitutions. 176 A.3d 632 (Del. 2017). *Bridgeville* does not however provide the all-encompassing umbrella that Tesla would have the Court impose that DMV may not consider any statute of the State

which would affect licensing when §6313, requires DMV to follow all of the requirements of Title 21, which includes those contained within §6312. The Legislature granted DMV the authority to consider the MVFPA and confirmed that the authority had been granted when the Legislature sought to amend not Title 21 but instead the MVFPA to grant Tesla relief to operate a dealership in the State. Tesla also ignores in its discussion of criminal offenses under §6313(5) the very next sentence which again directs DMV to consider the standards set forth in §6312, which is the compliance with the law of the State standard. §6313(6).

Tesla would further have the Court render the language chosen by the Legislature in §6312, §6313(9), and the MVFPA meaningless and without any import when the agency tasked with making dealer license determinations conducts its review. Tesla's argument that the Court is constrained by the language in §6313(4) to the exclusion of §6313(9) and §6312 would violate the holding that " words in a statute should not be construed as surplusage if there is a reasonable construction which will give them meaning." *A.W. Fin. Servs., S.A. v. Empire* Resources, 981 A.2d 1114, 1131 (Del. 2009). DMV has followed the specific statutory guidance of the Legislature in §6313(9) when it considered §6312, and the reference and requirement therein that DMV consider the laws of the State, including the MVFPA, in naming its decision to deny Tesla, a manufacturer a retail dealer's license. As DMV's decision is premised upon the mandate given it by the

Legislature or considering compliance with all laws of the State, and the Court should grant DMV's decision due weight and affirm the license denial.

Tesla's Opening Brief cites to the provisions of §6312, discussing the requirements in the statutory section that Tesla be of "good character" and also the language that requires DMV to exercise its discretion in determining that Tesla will comply with the laws of other states as being the only dispositive factors to be considered. Tesla's argument however fails to afford the precise language chosen by the Legislature of requiring DMV to consider the impact of the laws of the state, surplusage and otherwise of no effect. That interpretation, making the language of both §6312 and §6313(9) surplusage, is the type of interpretation that this Court has and should reject.

Tesla cites to *Bayou Lawn & Landscape Servs. v. Secretary of Labor*, 713 F.3d 1080 (11th Cir.) and *Union Pac. R.R. Co. v. Surface Transp. Bd.*, 863 F.3d 816 (8th Cir. 2017) as being dispositive of whether DMV may consider statutes principally administered by another state agency. That reliance is misplaced as a close reading of the cases denote that in each instance it was not an interpretation of a statute that was impermissible, but one agency's improper promulgation of rules and regulations when the statutory authority to promulgate those rules and regulations rested within another agency. DMV did not promulgate rules or regulations and instead simply interpreted a statute enacted by the Legislature where

Tesla, despite repeated invitation to seek the Public Service Commission's interpretation by the filing of a declaratory judgment action, has not done so and the time to do so has now run. 10 *Del. C.* §8106. Neither of the decisions cited by Tesla, which at best may be considered persuasive authority by this Court if they were relevant to the issue at bar, support Tesla's argument that DMV may not consider the language of an existing statute where the agency did not impermissibly intrude into rule making or promulgating regulations.

Tesla next cites to *Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Mem'l Hosp., Inc.* for the proposition that DMV, Director Simpler and the Superior Court's interpretation of §6312 which requires the agency to consider all of the laws of the State renders an absurd result. 36 A.3d 336 (Del. 2012). That argument, rejected by the Superior Court, ignores the clear mandate "to give effect to the whole statute, and leave no part superfluous." *Id.* at 343-344. The Legislature, "is presumed to have inserted every provision into a legislative enactment for some useful purpose and construction." *Id.* The Court herein, as it did in the *Doroshow* case, should reaffirm "the canon of statutory construction that every word chosen by the legislature (and often bargained for by interested constituent groups) must have meaning." *Id.* The DMV's reliance upon the clear mandates of the Legislature in considering the laws of the State, including the MVFPA, is not an absurd result. It may be a result Tesla does not like, but their disagreement over the result does not

make it absurd in the context of DMV's denial of a license to a manufacturer to own and operate a dealership in the State.

CONCLUSION

For the above reasons Appellee, the Delaware Division of Motor Vehicles, respectfully requests that the Court affirm the decision of the Superior Court below affirming the denial of a Retail Motor Vehicle License to Tesla.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ George T. Lees III
George T. Lees III, I.D. No. 3647
Deputy Attorney General for DelDOT
Department of Transportation
800 South Bay Road
Dover, DE 19901
(302) 760-2022
George.Lees@Delaware.Gov
Attorney for Appellee, The Delaware Division of Motor Vehicles

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