

BEFORE THE  
ADMINISTRATIVE HEARING COMMISSION  
STATE OF MISSOURI

**FILED**

FEB 10 2017

STATE BOARD OF EMBALMERS )  
AND FUNERAL DIRECTORS, )

ADMINISTRATIVE HEARING  
COMMISSION

Petitioner, )

v. )

Case No. 16-3710

MISSOURI FUNERAL TRUST, INC. )

Respondent. )

**ANSWER AND AFFIRMATIVE DEFENSES TO**  
**FIRST AMENDED COMPLAINT**

COMES NOW Respondent Missouri Funeral Trust, Inc., (hereinafter  
“Respondent”), by and through counsel of record and for its Answer to Petitioner’s First  
Amended Complaint states as follows:

1. Respondent admits that the Board is an agency of Missouri created and established by Section 333.151, RSMo, but denies each and every other allegation contained in paragraph 1 of Petitioner’s First Amended Complaint.
2. Respondent admits Section 436.470.2, RSMo, states that the Board has authority to “conduct inspections and investigations of providers, sellers, and preneed agents and conduct financial examinations of the books and records of providers, sellers, and preneed agents and any trust or joint account to determine compliance with sections 436.400 to 436.520, or to determine whether grounds exist for disciplining a person

licensed or registered under sections 333.310 to 333.340[.]” Respondent denies that Section 436.470.2, RSMo, authorizes the Board to conduct “audits.”

3. Respondent admits the allegations contained in paragraph 3 of Petitioner’s First Amended Complaint.

4. Respondent admits the allegations contained in paragraph 4 of Petitioner’s First Amended Complaint.

5. Respondent admits the allegations contained in paragraph 5 of Petitioner’s First Amended Complaint.

6. Respondent admits the allegations contained in paragraph 6 of Petitioner’s First Amended Complaint.

7. Respondent denies the allegations contained in paragraph 7 of Petitioner’s First Amended Complaint because Petitioner’s First Amended Complaint fails to state a claim upon which relief can be granted.

8. Respondent states that the allegations of paragraph 8 paraphrase the provisions of Section 436.470. Respondent denies that the statement in Section 436.470 that the Board “shall conduct a financial examination of the books and records of each seller as authorized by this section at least once every five years, subject to available funding” is a “mandate.”

9. The information contained in paragraph 9 of Petitioner’s First Amended Complaint accurately quotes the provisions of Section 436.470.9.

10. Respondent admits that the Board sent a letter dated January 20, 2011, to Petitioner indicating that the Board had scheduled a financial examination of Petitioner’s

preneed seller business records. Respondent denies each and every other allegation contained in paragraph 10 of Petitioner's First Amended Complaint because it does not contain the date of the alleged notification.

11. Respondent admits that the Board sent a copy of an examination report on or about January 3, 2014 to MFT for response and comment and to allow MFT to provide any information to clarify or correct any portion of the first examination report.

Respondent denies each and every other allegation contained in paragraph 11 of Petitioner's First Amended Complaint.

12. Respondent denies each and every allegation contained in paragraph 12 of Petitioner's First Amended Complaint.

13. Respondent admits it met with the Board on May 29, 2014, but denies each and every other allegation contained in paragraph 13 of Petitioner's First Amended Complaint.

14. Respondent admits that the Board sent a letter dated September 23, 2014, requesting additional information from MFT. Respondent denies each and every other allegation contained in paragraph 14 of Petitioner's First Amended Complaint because the letter speaks for itself.

15. Respondent admits that it sent a letter dated October 23, 2014 to Petitioner requesting an additional 30 days to respond to the Board's letter dated September 23, 2014.

16. Respondent admits that it sent a letter dated November 24, 2014 to the Board in response to the Board's letter dated September 23, 2014.

17. Respondent admits that it did not provide further written information after November 24, 2014, but in further answer states that Petitioner did not request Respondent to provide further information.

18. Respondent denies that it did not resolve all of the exceptions noted in the Report.

19. Respondent states that Petitioner has quoted a portion of Section 333.330.2, but Respondent denies its application to the allegations in Petitioner's First Amended Complaint and denies any violation thereof.

20. Respondent states that Petitioner has quoted Section 436.465, but denies its application to any of the allegations contained in the Petitioner's First Amended Complaint.

21. Respondent states that Petitioner has quoted Section 436.021.2, RSMo 2000, but denies its application to any of the allegations contained in the Petitioner's First Amended Complaint.

22. Respondent admits that there are no regulations or statutes defining the term "adequate records," as used in Section 436.021.2, RSMo (2000). Respondent further states that to the extent Petitioner has made an agency statement of general applicability that implements or interprets the term "adequate records," such agency statement is void because Petitioner has failed to comply with the rulemaking requirements of the Missouri Administrative Procedure Act, as set forth in Chapter 536, RSMo.

23. Respondent admits that it signed a “Financial Examination Attestation” in which it attested that it provided Petitioner “full and complete *access* to all records” (emphasis added). Respondent further states that it allowed the financial examiners employed by Petitioner access to any and every record requested by the financial examiners. Respondent denies each and every other allegation contained in paragraph 23 of Petitioner’s First Amended Complaint.

24. Respondent denies each and every allegation contained in paragraph 24 of Petitioner’s First Amended Complaint.

25. Respondent denies each and every allegation contained in paragraph 25 of Petitioner’s First Amended Complaint.

26. Respondent denies each and every allegation contained in paragraph 26 of Petitioner’s First Amended Complaint, including all subparts a through c.

27. Respondent denies each and every allegation contained in paragraph 27 of Petitioner’s First Amended Complaint.

28. Respondent denies each and every allegation contained in paragraph 28 of Petitioner’s First Amended Complaint.

29. Paragraph 29 states a legal conclusion as to which no response is required. To the extent a response may be required, Respondent denies each and every allegation contained in paragraph 29 of Petitioner’s First Amended Complaint. Petitioner further denies that Section 436.456(3), RSMo is relevant to any of the allegations contained in Petitioner’s First Amended Complaint.

30. Respondent states that Petitioner has quoted a portion of Section 436.035.1, RSMo (2000), but denies its application to any allegation contained in Petitioner's First Amended Complaint.

31. Respondent denies each and every allegation contained in paragraph 31 of Petitioner's First Amended Complaint.

32. Respondent denies each and every allegation contained in paragraph 32 of Petitioner's First Amended Complaint. Respondent in further answer states that Petitioner has failed to cite any statutory or regulatory provision setting forth the requirements outlined in paragraph 32 of Petitioner's First Amended Complaint, and that to the extent there are no such statutory or regulatory provisions setting forth the requirements outlined in paragraph 32, the requirements are void because Petitioner has failed to comply with the rulemaking requirements of the Missouri Administrative Procedure Act, as set forth in Chapter 536, RSMo.

33. Respondent denies each and every allegation contained in paragraph 33 of Petitioner's First Amended Complaint.

34. Respondent denies each and every allegation contained in paragraph 34 of Petitioner's First Amended Complaint.

35. Respondent denies each and every allegation contained in paragraph 35 of Petitioner's First Amended Complaint, including all subparts (a) – (n).

36. Respondent states that Petitioner has quoted Section 436.420.4, RSMo, but denies its application to any allegation contained in Petitioner's First Amended Complaint.

37. Respondent denies each and every allegation contained in paragraph 37 of Petitioner's First Amended Complaint.

38. Respondent denies each and every allegation contained in paragraph 38 of Petitioner's First Amended Complaint.

39. Respondent denies each and every allegation contained in paragraph 39 of Petitioner's First Amended Complaint.

40. Respondent states that Petitioner has quoted a portion of Section 333.320.2, RSMo, but denies its application to any allegation contained in Petitioner's First Amended Complaint.

41. Respondent states that Petitioner has quoted a portion of Section 436.021.1, RSMo (2000), but denies its application to any allegation contained in Petitioner's First Amended Complaint.

42. Respondent states that Petitioner has quoted a portion of Section 436.021.2, RSMo (2000), but denies its application to any allegation contained in Petitioner's First Amended Complaint.

43. Respondent states that Petitioner has quoted a portion of Section 436.031, RSMo (2000), but denies its application to any allegation contained in Petitioner's First Amended Complaint.

44. Respondent denies each and every allegation contained in paragraph 44 of Petitioner's First Amended Complaint.

45. Respondent denies each and every allegation contained in paragraph 45 of Petitioner's First Amended Complaint.

46. Respondent denies each and every allegation contained in paragraph 46 of Petitioner's First Amended Complaint.

47. Respondent denies each and every allegation contained in paragraph 47 of Petitioner's First Amended Complaint. Respondent in further answer states that it is Petitioner's burden to cite the statutory and regulatory provisions it alleges Respondent has violated concerning "rollover" contracts, which Petitioner has not done.

48. Respondent denies each and every allegation contained in paragraph 48 of Petitioner's First Amended Complaint.

49. Respondent denies each and every allegation contained in paragraph 49 of Petitioner's First Amended Complaint.

50. Respondent denies each and every allegation contained in paragraph 50 of Petitioner's First Amended Complaint.

51. Respondent denies each and every allegation contained in paragraph 51 of Petitioner's First Amended Complaint.

52. Respondent denies each and every allegation contained in paragraph 52 of Petitioner's First Amended Complaint.

53. Respondent states that Petitioner has quoted a portion of Section 333.320.1, RSMo, but denies its application to any allegation contained in Petitioner's First Amended Complaint.

54. Respondent states that Petitioner has quoted a portion of 20 CSR 2120-3.200(1)(A), but denies its application to any allegation contained in Petitioner's First Amended Complaint.



55. Respondent states that Petitioner has quoted a portion of 20 CSR 2120-3.200(1)(C) (although Petitioner has cited 20 CSR 2120-3.200(1)(A)), but denies that 20 CSR 2120-3.200(1)(C) has application to any allegation contained in Petitioner's First Amended Complaint.

56. Respondent is without sufficient information to admit or deny the allegations in paragraph 56 of Petitioner's First Amended Complaint because Petitioner has failed to indicate any specific time period in paragraph 58. Respondent is also without sufficient knowledge to admit or deny what the Board's records reflect on any given date.

57. Respondent is without sufficient information to admit or deny the allegations in paragraph 57 of Petitioner's First Amended Complaint because Petitioner has not clearly identified to what document it is referring when it states "Provider Agreements," and Petitioner has otherwise failed to attach a copy of the document or documents it is referencing. It is also unclear to which licensed preneed providers Petitioner is referring (see answer to paragraph 56 above).

58. Respondent is without sufficient information to admit or deny the allegations in paragraph 58 of Petitioner's First Amended Complaint, including all subparts a through d, because Petitioner has not clearly identified to what document it is referring when it states "Provider Agreements," and Petitioner has otherwise failed to attach a copy of the document or documents it is referencing. It is also unclear to which licensed preneed providers Petitioner is referring (see answer to paragraph 56 above).

Respondent otherwise denies each and every allegation contained in paragraph 58 of Petitioner's First Amended Complaint.

59. Respondent is without sufficient information to admit or deny the allegations in paragraph 59 of Petitioner's First Amended Complaint because Petitioner has not clearly identified to what document it is referring when it states "Provider Agreements," and Petitioner has otherwise failed to attach a copy of the document or documents it is referencing. It is also unclear to which licensed preneed providers Petitioner is referring (see answer to paragraph 56 above).

60. Respondent is without sufficient information to admit or deny the allegations in paragraph 60 of Petitioner's First Amended Complaint because Petitioner has not clearly identified to what document it is referring when it states "Provider Agreements," and Petitioner has otherwise failed to attach a copy of the document or documents it is referencing. It is also unclear to which licensed preneed providers Petitioner is referring (see answer to paragraph 56 above). Respondent otherwise denies each and every allegation contained in paragraph 60 of Petitioner's First Amended Complaint, and further states the Petitioner's allegation that "[o]nly licensed sellers may sell preneed contracts through registered preneed sellers" is categorically false.

61. Respondent denies each and every allegation contained in paragraph 61 of Petitioner's First Amended Complaint.

62. Respondent denies each and every allegation contained in paragraph 62 of Petitioner's First Amended Complaint.

63. Respondent denies each and every allegation contained in paragraph 63 of Petitioner's First Amended Complaint.

64. Respondent denies each and every allegation contained in paragraph 64 of Petitioner's First Amended Complaint.

65. Respondent denies each and every allegation contained in paragraph 65 of Petitioner's First Amended Complaint.

66. Respondent denies each and every allegation contained in paragraph 66 of Petitioner's First Amended Complaint.

67. Respondent denies each and every allegation contained in paragraph 67 of Petitioner's First Amended Complaint.

68. Respondent denies each and every allegation contained in paragraph 68 of Petitioner's First Amended Complaint.

69. Respondent denies each and every allegation contained in paragraph 69 of Petitioner's First Amended Complaint.

70. Respondent denies each and every allegation contained in paragraph 70 of Petitioner's First Amended Complaint.

71. Respondent denies each and every allegation contained in paragraph 71 of Petitioner's First Amended Complaint.

72. Respondent denies each and every allegation contained in paragraph 72 of Petitioner's First Amended Complaint.

73. Respondent states that Petitioner has quoted Section 436.415.2, RSMo, but denies its application to any allegation contained in paragraph 73 of Petitioner's First Amended Complaint.

74. Respondent denies each and every allegation contained in paragraph 74 of Petitioner's First Amended Complaint.

75. Respondent denies each and every allegation contained in paragraph 75 of Petitioner's First Amended Complaint.

76. Respondent is without sufficient knowledge to admit or deny the allegations contained in paragraph 76 of Petitioner's First Amended Complaint and therefore denies same.

77. Respondent denies each and every allegation contained in paragraph 77 of Petitioner's First Amended Complaint, including subparagraphs (a) – (j) thereof.

78. Respondent denies each and every allegation contained in paragraph 78 of Petitioner's First Amended Complaint, including subparagraphs (a) – (f), thereof.

79. Respondent denies each and every allegation contained in paragraph 79 of Petitioner's First Amended Complaint.

80. Petitioner admits that there are no statutes or regulations addressing what is commonly known in the industry as "rollovers." Respondent further states that to the extent Petitioner has made an agency statement of general applicability that implements, interprets, or prescribes law or policy related to "rollovers," such agency statement is void because Petitioner has failed to comply with the rulemaking requirements of the Missouri Administrative Procedure Act, as set forth in Chapter 536, RSMo., and any such

law or policy may not be used by Petitioner to support its action against Respondent. Paragraph 80 of Petitioner's First Amended Complaint otherwise sets forth a legal conclusion as to which no response is required, but to the extent a response may be required, Respondent denies each and every allegation contained in paragraph 80 of Petitioner's First Amended Complaint.

81. Respondent denies each and every allegation contained in paragraph 81 of Petitioner's First Amended Complaint.

82. Respondent denies each and every allegation contained in paragraph 82 of Petitioner's First Amended Complaint.

83. Respondent denies each and every allegation contained in paragraph 83 of Petitioner's First Amended Complaint.

84. Respondent denies each and every allegation contained in paragraph 84 of Petitioner's First Amended Complaint.

85. Respondent is without sufficient information to admit or deny the allegations in paragraph 85 of Petitioner's First Amended Complaint because Petitioner uses the quoted phrase "provider reports" without explaining what "provider reports" means or includes.

86. Respondent denies each and every allegation contained in paragraph 86 of Petitioner's First Amended Complaint.

87. Respondent denies each and every allegation contained in paragraph 87 of Petitioner's First Amended Complaint. Respondent further states that Petitioner has failed to cite any statutory or regulatory provision setting forth a requirement that there be

a written agreement entered between Respondent and sellers of “rollovers,” and that to the extent there are no such statutory or regulatory provisions setting forth this requirement, the requirement is void because Petitioner has failed to comply with the rulemaking requirements of the Missouri Administrative Procedure Act, as set forth in Chapter 536, RSMo.

88. Respondent denies each and every allegation contained in paragraph 88 of Petitioner’s First Amended Complaint.

89. Respondent denies each and every allegation contained in paragraph 89 of Petitioner’s First Amended Complaint.

90. Respondent denies each and every allegation contained in paragraph 90 of Petitioner’s First Amended Complaint.

91. Respondent is without sufficient knowledge to admit or deny the allegations contained in paragraph 91 of Petitioner’s First Amended Complaint and therefore denies same.

92. Respondent admits that it has in the past responded to audits and inquiries by the Board directed to sellers and has provided to the Board documents and information regarding other sellers and their contracts, but Respondent is otherwise unable to admit or deny the allegations in paragraph 92 of Petitioner’s First Amended Complaint because Petitioner has failed to provide any relevant dates or other specific details about the sellers, documents, and contracts to which it is referring.

93. Respondent denies each and every allegation contained in paragraph 93 of Petitioner’s First Amended Complaint.

94. Respondent denies each and every allegation contained in paragraph 94 of Petitioner's First Amended Complaint.

95. Respondent denies each and every allegation contained in paragraph 95 of Petitioner's First Amended Complaint.

96. Respondent denies each and every allegation contained in paragraph 96 of Petitioner's First Amended Complaint.

97. Respondent denies each and every allegation contained in paragraph 97 of Petitioner's First Amended Complaint.

98. Respondent denies each and every allegation contained in paragraph 98 of Petitioner's First Amended Complaint.

99. Respondent denies each and every allegation contained in paragraph 99 of Petitioner's First Amended Complaint.

100. Respondent denies each and every allegation contained in paragraph 100 of Petitioner's First Amended Complaint.

101. Respondent denies each and every allegation contained in paragraph 101 of Petitioner's First Amended Complaint.

WHEREFORE, Respondent having fully answered, moves this Commission to dismiss Petitioner's First Amended Complaint with prejudice.

#### **Affirmative Defenses**

COMES NOW Respondent and for its Affirmative Defenses to Petitioner's First Amended Complaint states as follows:

A. Petitioner fails to state a claim upon which relief can be granted.

B. Petitioner's First Amended Complaint seeks a penalty against Respondent which is time barred under Section 516.130(2), RSMo, because Petitioner received notice of the alleged violations prior to November 2, 2013.

C. The claims and actions contained in Petitioner's First Amended Complaint are barred by Section 324.043, RSMo, because Petitioner received notice of the alleged violations prior to November 2, 2013.

D. Even assuming *arguendo* that all of the claims and actions contained in Petitioner's First Amended Complaint are not time barred under Sections 324.043 and 516.130(2) because Petitioner's examination report dated November 4, 2013 is the first notice of the alleged violations to Petitioner, the new allegations set forth in Petitioner's First Amended Complaint (filed on January 19, 2017) do not relate back to the allegations in the original Complaint. Accordingly, the allegations contained in Petitioner's First Amended Complaint that were not contained in Petitioner's original Complaint are time barred by Sections 324.043 and 516.130(2), RSMo.

E. Petitioner's First Amended Complaint fails to comply with Section 333.330.2 because the additional allegations added to the First Amended Complaint (as compared to the original Complaint) were not a part of the examination report sent on or about January 3, 2014, and, upon information and belief, the Board has not approved the additional allegations asserted against Respondent in the First Amended Complaint.

F. Petitioner's First Amended Complaint fails to provide adequate notice of the factual and legal bases for disciplining Respondent and, therefore, violates 1 CSR 15-3.350(2)(A)3 and 4, and Respondent's due process rights as set forth in the Fifth and




Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution.

WHEREFORE, Respondent having stated its Affirmative Defenses to Petitioner's First Amended Complaint moves this Commission to dismiss the Complaint for one of the aforementioned reasons stated in its Affirmative Defenses.

Respectfully submitted,

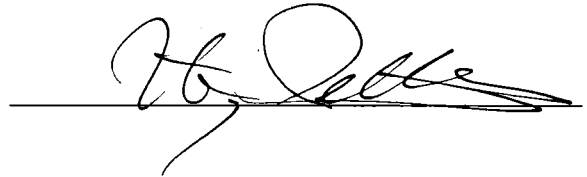
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ATTORNEYS FOR RESPONDENT

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of Respondent's Answer and Affirmative Defenses was mailed on this 10<sup>th</sup> day of February, 2017, to:

Scott A. Hamblin  
Gregory C. Mitchell  
Jamie Cox  
312 East Capitol Avenue  
P. O. Box 456  
Jefferson City, MO 65102

A handwritten signature in black ink, appearing to read "Gregory C. Mitchell", is written over a horizontal line.