IN THE
SUPREME COURT OF FLORIDA

STATE OF FLORIDA
DEPARTMENT OF BUSINESS REGULATION
DIVISION OF ALCOHOLIC BEVERAGES
AND TOBACCO,

Petitioner

vs.

HEARING OFFICER P. MICHAEL RUFF,
DIVISION OF ADMINISTRATIVE HEARINGS,
TALLAHASSEE, FLORIDA,

Respondent.
_____/

CASE NO: 78,279

On Petition for Writ of Prohibition to the Florida Division of Administrative Hearings

RESPONSE OF INTERVENOR/RESPONDENT
TO PETITION AND ORDER NISI

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TABLE OF CONTENTS

TABLE OF CITATIONS

Statutes

Other

STATEMENT OF THE FACTS AND OF THE CASE

INTRODUCTION

Florida West Coast Beverage Distributors, Inc., a Florida corporation, f/k/a The House of Midulla, Inc., f/k/a Tampa Wholesale Liquor Co., Inc. ("Intervenor") submits this statement of the facts and the case to supplement the statement contained in the Petition of the State of Florida, Department of Business Regulation, Division of Alcoholic Beverages and Tobacco ("DABT").

STATEMENT OF THE FACTS

1. Intervenor was a licensed distributor of alcoholic beverages in the State of Florida from 1934 to 1990. As a licensed distributor, it was subject to the State's beverage tax laws.

2. On September 3, 1986, McKesson Corporation, a Delaware corporation ("McKesson") filed a lawsuit against DABT in the Second Judicial Circuit Court, in and for Leon County, Florida, challenging Florida's discriminatory alcoholic beverage tax laws as unconstitutional under the United States and Florida constitutions. McKesson also sought a refund of the discriminatory portion of its tax liability. McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, No. 86-2997 (Fla. 2d Cir. Ct. March 20, 1987).

3. On March 20, 1987, the Circuit Court granted McKesson's motion for summary judgment, and declared the tax laws' discriminatory tax preferences unconstitutional. The Circuit Court declared that its order would be given prospective effect, and denied McKesson's refund claim. McKesson Corporation v. Division of

Alcoholic Beverages and Tobacco, No. 86-2997 (Fla. 2d Cir. Ct. March 20, 1987).

4. Both McKesson and DABT appealed the Circuit Court's order to the First District Court of Appeal. DABT's appeal stayed the Circuit Court's preliminary injunction against further collection of the discriminatory taxes pursuant to Fla. R. App. P. 9.310(b)(2).

5. DABT continued to collect taxes under the discriminatory scheme while the appeal was pending and told Intervenor and others that if DABT lost the appeal, DABT would not attempt to retroactively collect additional taxes for the period during which the appeal was pending.

6. On April 13, 1987, the First District Court of Appeal certified to this Court that the pending appeal was of great public importance. Division of Alcoholic Beverages and Tobacco v. McKesson Corporation, No. BS-402 (Fla. 1st DCA, Order April 13, 1987).

7. On April 22, 1987, this Court accepted jurisdiction over the appeal. Division of Alcoholic Beverages and Tobacco v. McKesson Corporation, 524 So. 2d 1000 (Fla. 1987) Order dated April 22, 1987.

8. On May 2, 1988, after rehearing, this Court affirmed the judgment of the trial court. Division of Alcoholic Beverages and Tobacco v. McKesson Corporation, 524 So. 2d 1000 (Fla. 1988).

9. On May 3, 1988, DABT instructed Intervenor to cease further collection of taxes in accordance with the discriminatory tax scheme.

10. On November 14, 1988, the United States Supreme Court granted McKesson's petition for a writ of certiorari to review this Court's denial of McKesson's refund claim. McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, 488 U.S. 954, 109 S.Ct. 389, 102 L.Ed.2d 378 (1988).

11. On June 4, 1990, the United States Supreme Court reversed the judgment of this Court and ordered DABT to provide McKesson with some form of meaningful backward-looking relief. The United States Supreme Court remanded the case to this Court for further proceedings. McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, ____U.S. ____, 110 S.Ct. 2238, 110 L.Ed.2d 18 (1990).

12. On August 31, 1990, DABT filed with this Court its Initial Brief on Remand. The Initial Brief contained DABT's proposal to assess and collect back taxes from those of McKesson's competitors who benefitted from tax rate reductions during the contested tax period. A set of proposed emergency rules was attached to the Initial Brief. Division of Alcoholic Beverages and Tobacco v. McKesson Corporation, 574 So. 2d 114 (Fla. 1991), Petitioner's Initial Brief at p.2 and Appendix 1.

13. On January 15, 1991, this Court issued its opinion on remand. Division of Alcoholic Beverages and Tobacco v. McKesson Corporation, 574 So. 2d 114 (Fla. 1991). The opinion noted that DABT sought to retroactively assess and collect the taxes from McKesson's competitors

> by promulgating an emergency rule setting forth the procedure for the retroactive assessment and collection of the tax.

Id. at 115. The Court remanded the case to the trial court for determination whether DABT's

> proposal meets "the minimum federal requirements" outlined in the Supreme Court's opinion... [and] whether the proposal comports with federal and state protections afforded those against whom the proposed tax will be assessed.

Id. at 116.

14. Instead of submitting its proposal to the trial court for those determinations, DABT, on April 2, 1991, adopted Fla. Admin. Code Rules 7AER91-8, 7AER91-9, and 7AER91-10, (the "Rules"). The Rules are emergency rules, adopted pursuant to §120.54(9), Fla. Stat. (1991). The Rules establish the procedures for assessment and collection of special taxes from affected taxpayers, one of whom is Intervenor. The Rules state, in part, that a previously favored distributor may intervene in the remanded McKesson case or may contest the calculation of its assessment in an administrative proceeding under Chapter 120. DABT has interpreted this to mean that no other aspect of the Rules may be challenged in an administrative proceeding.

15. On the same day that it adopted the Rules, DABT issued to Intervenor a notice of assessment of $828,100.17 in special taxes assessed pursuant to the Rules.

16. Also on that day, DABT filed with the Second Circuit Court a notice stating that by its adoption of the Rules and

assessment of taxes based thereon, it was in compliance with the mandate of the United States Supreme Court, and that McKesson had been given its meaningful backward-looking relief by virtue of the Rules and the assessments. Division of Alcoholic Beverages and Tobacco v. McKesson Corporation, No. 86-2997 (Fla. 2d Cir. Ct. March 20, 1987, Notice filed April 2, 1991).

17. Subsequent to April 2, 1991, several beverage distributors intervened in the remanded case in order to contest the constitutionality of the Rules.

18. The Rules were first published in Florida Administrative Weekly on April 12, 1991.

19. Intervenor received its notice of assessment and a copy of the Rules on April 12, 1991.

STATEMENT OF THE CASE

20. On May 2, 1991, Intervenor filed with the Division of Administrative Hearings ("DOAH") a Petition for Administrative Determination of Invalidity of Emergency Rules. Florida West Coast Beverage Distributors v. Division of Alcoholic Beverages and Tobacco, No. 91-2701R (Fla. Div. Admin. Hearings, petition filed May 2, 1991) (hereafter, the "DOAH Proceeding"). In its Petition, Intervenor alleged that, for several reasons, the Rules constitute an invalid exercise of delegated legislative authority. In its Petition, Intervenor did not challenge any aspect of the Rules on constitutional grounds.

21. On May 8, 1991, DOAH assigned Hearing Officer P. Michael Ruff ("Ruff") to the case.

22. On May 14, 1991, DABT filed with Ruff a Motion to Dismiss the Petition.

23. On May 28, 1991, prior to receiving Intervenor's Response to the Motion to Dismiss, Ruff dismissed the Petition because the Motion was unopposed.

24. Later that day, Ruff received Intervenor's Response to the Motion. He realized that in counting the days for which the Response was deemed timely filed, he forgot that May 27, 1991, which would have been the last day for Intervenor's timely Response, was a legal holiday (Memorial Day), and that Intervenor's Response was, therefore, timely filed.

25. On June 4, 1991, Ruff sua sponte, and after consultation with counsel for the parties, issued a corrected order, reopening the case and scheduling argument on DABT's motion to dismiss.

26. On June 5, 1991, after hearing oral argument and after consideration of the Motion and the Response, Ruff denied DABT's Motion to Dismiss.

27. on June 20, 1991, DABT filed with Ruff a Motion for Reconsideration or to Hold in Abeyance.

28. On July 16, 1991, Ruff denied DABT's Motion for Reconsideration and Motion to Hold in Abeyance.

29. On July 17, 1991, DABT filed with this Court the Petition in this cause.

30. On July 18, 1991, this Court denied DABT's request for a stay of the DOAH Proceeding.

31. On July 19, 1991, Ruff presided over the Final Hearing in the DOAH Proceeding. Intervenor presented one witness and several Exhibits. DABT presented no evidence, but joined Intervenor's requests for official recognition of several Exhibits.

32. On July 30, 1991, Intervenor filed with Ruff several documents and Exhibits of which Ruff agreed to take official notice.

33. On August 6, 1991, Intervenor filed with Ruff Intervenor's Proposed Final Order.

34. On August 6, 1991, DABT filed with Ruff DABT's Proposed Final Order.

35. On August 21, 1991, this Court issued its Order Nisi directing Ruff to show cause why DABT's Petition for Writ of Prohibition should not be granted.

36. Subsequently, this Court granted Intervenor's Motion for Intervention, permitting the intervention of Intervenor, as the real party in interest, as a party Respondent.

RELIEF SOUGHT

Intervenor respectfully requests this Honorable Court, upon consideration of the pleadings of the parties, to grant a judgment denying the relief sought by DABT in its Petition, and dissolve the stay issued in the Order Nisi. In the alternative, Intervenor requests the opportunity to present evidence and oral argument in support of its positions outlined herein.

SUMMARY OF ARGUMENT

This Court has no jurisdiction to consider the Petition for the Writ of Prohibition filed in this case because no party may directly appeal the decision rendered in the DOAH Proceeding to this Court. Even if this Court had jurisdiction to receive a direct appeal of the DOAH Proceeding, however, DABT did not plead sufficient facts and did not comply with the statutory requirements for invoking the jurisdiction of this Court.

Further, even if DABT had complied with those requirements and plead sufficient facts showing that it might be entitled to relief, it would not be entitled to the requested relief. Although DABT alleged that nebulous constitutional issues were presented in the DOAH Proceeding, a review of the petition, the record, and the proposed final orders from that proceeding clearly shows that no constitutional issues were therein presented. The only issues presented in the DOAH Proceeding are within DOAH's and Ruff's jurisdiction.

Finally, even if constitutional issues were presented in the DOAH Proceeding, a multitude of prior decisions of this Court and other Florida appellate courts clearly state that under no circumstances would DABT be entitled to the requested relief. Those decisions hold that an administrative proceeding may only be stayed in favor of a circuit court proceeding when there is an identity of parties in the two proceedings, and then only if the petitioner in the administrative proceeding has challenged the facial

constitutionality of a statute in circuit court. If the record in the DOAH Proceeding lent even a shred of support to DABT's allegations contained in the Petition in this case, the requested writ could not be granted, because DABT admitted in its Petition that only the Rules were challenged by Intervenor in the DOAH Proceeding.

ARGUMENT

I. THIS COURT HAS NO JURISDICTION TO CONSIDER THE PETITION IN THIS CASE.

DABT alleges that this Court has jurisdiction to issue a Writ of Prohibition in this case. DABT contends that this writ is necessary to the complete exercise of this Court's jurisdiction under Fla. R. App. P. 9.030(a)(3), which provides that

> [t]he Supreme Court may issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction.

DABT has incorrectly interpreted the meaning of this rule.

The Supreme Court's jurisdiction is governed by Article V of the Florida Constitution. This Court must determine its jurisdiction before it may issue any writ necessary and proper to the complete exercise of that jurisdiction. Seaboard Air Line R. Co. v. Gay, 60 So. 2d 591 (Fla. 1953). The "all writs" power is not an independent basis for jurisdiction. An application for constitutional or other writs necessary to the complete exercise of the jurisdiction of the Court may only be entertained in cases in which the Court may properly acquire jurisdiction. Besoner v. Crawford, 357 So. 2d 414 (Fla. 1978). If the Court has no jurisdiction, then it has no authority or power to issue a writ to the complete exercise of its nonexistent jurisdiction. Seaboard Air Line R. Co., supra, at 594. The power to issue all writs refers only to ancillary writs to aid in the complete exercise of the original or appellate jurisdiction of this Court, and does not confer added original or appellate jurisdiction in any case. Id.

When an application is not sought to protect the existing jurisdiction of the court, but rather seeks to use the constitutional all writs power of the court as an independent basis for jurisdiction, the writ must be dismissed. Besoner v. Crawford, supra; see also St. Paul Title Insurance Corporation v. Davis, 392 So. 2d 1304 (Fla. 1981).

The Florida Constitution limits this Court's jurisdiction under the all writs power to cases in which a direct appeal to the Court would be allowed as a matter of right. State ex rel. Sentinel Star Company, Inc. v. Lambeth, 192 So. 2d 518 (Fla. 4th DCA 1966); Cf. State ex rel. Florida Real Estate Commission v. Anderson, 164 So. 2d 265 (Fla. 2d DCA 1964). According to §120.68, Fla. Stat. (1991), final agency action is appealable directly to an appropriate district court of appeal. See, e.g., State ex rel. Florida Department of Natural Resources v. District Court of Appeal of Florida, Second District, 355 So. 2d 772 (Fla. 1978). Direct appeal of the DOAH Proceeding to the this Court is not allowed. Therefore, this petition should have been filed in an appropriate district court of appeal.

DABT implies that this Court has jurisdiction to issue a writ of prohibition in this case because a "constitutional issue" is involved in the DOAH Proceeding. DABT, however, incorrectly categorizes the issues in the DOAH Proceeding. Other than a general reference to the "manner and means of payment," DABT's argument fails to specify the "constitutional issue" alleged to be at bar. There is a reason for this lack of specificity. No constitutional

issue was raised in the DOAH Proceeding. Further, there is no provision within the Florida Constitution which provides this Court with blanket jurisdiction over any case simply because a party chooses to allege the presence of an unspecified "constitutional issue." For the foregoing reasons, this Court has no jurisdiction to consider the petition filed in this case.

If, however, the Court determines that, based on the Florida Constitution, it has jurisdiction to consider the petition in this case, DABT's petition is generally insufficient to invoke that jurisdiction. The Court cannot issue the requested writ unless it specifically finds that Ruff has no jurisdiction over the DOAH Proceeding and that irreparable damage is likely to follow Ruff's improper exercise of jurisdiction. English v. McCrary, 348 So. 2d 293 (Fla. 1977). Prohibition is an extraordinary writ and is extremely narrow in its scope. Lawrence v. Orange County, 404 So. 2d 421 (Fla. 5th DCA 1981). Writs of prohibition may be invoked

> only in emergency cases to forestall an impending present injury when a person seeking writ has no other appropriate and adequate legal remedy... [O]nly when damage is likely to follow the inferior court's acting without authority of law or in excess of jurisdiction will the writ issue.

English, supra, at 297; Curtis v. Albritton, 132 So. 677, 679 (Fla. 1931); Lawrence, supra, at 422; Gordon v. Savage, 383 So. 2d 646 (Fla. 5th DCA 1980). Because DABT failed to plead that such irreparable harm will result from Ruff's improper exercise of jurisdiction, this Court must assume that DABT's right to appeal

any adverse determination in the DOAH Proceeding is sufficient to cure any improper exercise of jurisdiction by Ruff.

Further, even if the petition is deemed to allege some type of irreparable injury that will be suffered by DABT if Ruff exceeds his jurisdiction, §81.011, Fla. Stat. (1991) requires the initial petition in any case in which prohibition is sought to be verified by affidavit. DABT did not file a verified petition in this case, and, therefore, did not comply with the statutory mandate for invoking the jurisdiction of this Court.

II. ISSUANCE OF A WRIT OF PROHIBITION IN THIS CASE WOULD VIOLATE THE PROCEDURAL PROTECTIONS GUARANTEED TO INTERVENOR BY CHAPTER 120, FLA. STAT. (1991) AND WOULD IMPERMISSIBLY INTRUDE ON THE ADMINISTRATIVE PROCESS.

A. <u>The Protection Guaranteed By Chapter 120</u>.

Throughout the DOAH Proceeding and in its petition in this cause, DABT argued that Ruff has no jurisdiction over the DOAH Proceeding and that Intervenor did not timely invoke Ruff's or DOAH's jurisdiction. DABT's argument is based on provisions of the Rules that purport to limit DOAH's scope of review of the Rules (subject matter jurisdiction) and Intervenor's timely invocation of that jurisdiction (standing). The argument, however, must fail.

Any exercise by DABT of rule-making power is subject to Chapter 120, Fla. Stat. (1991). That chapter authorizes executive agencies of the State of Florida to adopt rules for the orderly administration of government. Section 120.54, Fla. Stat. (1991)

sets forth a number of requirements that any agency must follow in the rule-making process. No executive agencies are exempt from these requirements, unless specifically exempted by statute. §120.52(1), Fla. Stat. (1991); Commercial Consultants Corp. v. Department of Business Regulation, 363 So. 2d 1162 (Fla. 1st DCA 1978); Graham Contracting, Inc, v. Department of General Services, 363 So. 2d 810 (Fla. 1st DCA 1978). The Department of Business Regulation is an executive agency within the meaning of Chapter 120. See, §§20.02(1) and 20.16, Fla. Stat. (1991). Its division, DABT, is also an executive agency within the meaning of Chapter 120. See §20.16(2)(a), Fla. Stat. (1991). No statute grants either the Department of Business Regulation or DABT an exemption from the requirements of Chapter 120. DABT must, therefore, follow the requirements of §120.54 when engaging in rule-making. See, e.g., 4245 Corporation v. Division of Beverage, 348 So. 2d 934 (Fla. 1st DCA 1977) (DABT's rule-making is final agency action subject to administrative challenge).

Section 120.54, Fla. Stat. (1991), contemplates two types of procedures that may be used by any agency that intends to engage in rule-making. The standard procedure requires an agency to give public notice of its intended action, to make its proposed action available for inspection and copying, and to hold public hearings on the proposed action if requested by any affected party.

The other procedure, known as emergency rule-making, is authorized by §120.54(9), Fla. Stat. (1991). This was the procedure DABT used in adopting the Rules. An agency may adopt

rules without first complying with some of the requirements for standard rule-making if it finds an immediate danger to the public health, safety, or welfare. The procedure for adoption of emergency rules must, nevertheless, meet certain requirements. Among these is a requirement that the emergency rule-making procedure must provide at least the procedural protection given by other statutes and the Constitutions of Florida and the United States. §120.54(9)(a)1, Fla. Stat. (1991). In its adoption of the Rules, therefore, DABT was required to provide those procedural protections.

One such procedural protection is found within §120.56, Fla. Stat. (1991), which provides that

> any person substantially affected by a rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.

No exception is found in that section for emergency rules adopted pursuant to §120.54(9), Fla. Stat. (1991). No other provision of law permits DABT to exempt itself or its rules from the protections provided by §120.56, Fla. Stat. (1991), and DABT certainly can not, by rule, limit a party's access to the statutorily guaranteed administrative process. Cf. Graham Contracting, Inc. v. Department of General Services, 363 So. 2d 810, 813 (Fla. 1st DCA 1978); Cappeletti Brothers, Inc. v. State of Florida Department of Transportation, 362 So. 2d 346 (Fla. 1st DCA 1978), cert. denied, 368 So. 2d 1374 (Fla. 1979).

DABT argues that by adopting the Rules, it was only complying with this Court's mandate in McKesson v. Division of Alcoholic Beverages and Tobacco, 574 So. 2d 114 (Fla. 1991). The implication of DABT's argument is that if it engages in rule-making that it believes furthers a mandate of this Court, it need not comply with Chapter 120. DABT has cited as authority for this proposition the cases O.P. Corporation v. The Village of North Palm Beach, 302 So. 2d 130 (Fla. 1974) and Brunner Enterprises, Inc. v. Department of Revenue, 452 So. 2d 550 (Fla. 1984). In those cases, however, this Court was merely supervising the execution of mandates previously issued to lower courts in cases involving parties who had appeared before this Court. This Court can not suspend the operation of Chapter 120 in order to enable DABT to perform an act that DABT believes furthers the Court's enunciated policies. No provision of law permits this Court to authorize DABT to engage in rule-making other than in compliance with Chapter 120. Graham Contracting, supra.

DABT's argument also implies that this Court ordered DABT to adopt the Rules. Nothing could be further from the truth. This Court's mandate was for DABT to submit its proposal to the Circuit Court for constitutional review. By adopting the Rules prior to such review, DABT immediately subjected itself to the provisions of Chapter 120, including §120.56, Fla. Stat. (1991). Even if this Court had ordered DABT to adopt the Rules as originally presented in DABT's Initial Brief on Remand, DABT would have been required to comply with the rule-making procedures contained in Chapter 120.

DABT's argument that Ruff is interfering with this Court's mandate ignores the fact that DABT is an executive agency and as such, its exercise of rule-making power is always subject to Chapter 120. This Court cannot permit any agency to exempt itself from the rule-making requirements of Chapter 120 simply because the agency believes that its rule-making furthers the decisions of this Court. Such a policy would emasculate Chapter 120 and would effectively deny to the citizens of this State the due process and procedural guarantees contained therein.

DABT also claims that Intervenor's petition in the DOAH Proceeding was untimely. DABT bases this claim on provisions in Rule 7AER91-10 that require a distributor to intervene in the remanded McKesson case in the 2d Circuit Court or otherwise seek administrative review of the amount of the assessment within 21 days from receipt of the notice of assessment. This argument ignores §120.54(4)(b), Fla. Stat. (1991), relating to requests for administrative review of rule-making, which provides

> The request seeking a determination under this subsection and must be filed with [DOAH] within 21 days after publication of the notice.

The record in the DOAH Proceeding establishes that Intervenor received its notice of tax assessment on April 12, 1991. Even if receipt was established on an earlier date, however, DABT would be unable to prevail with this argument because DABT can not, by rule, alter the statutorily mandated time schedule for invoking administrative review of DABT's rule-making. Cf. City of St. Cloud

v. Department of Environmental Regulation, 490 So. 2d 1356 (Fla. 5th DCA 1986). Permitting DABT to establish arbitrary rules relating to administrative procedure that are in direct contravention of statutory requirements would constitute a fundamental denial of Intervenor's right to due process of law guaranteed by the United States and Florida Constitutions. Varney v. Florida Real Estate Commission, 515 So. 2d 383 (Fla. 5th DCA 1987).

Ruff, therefore, has general jurisdiction to review DABT rule-making pursuant to §120.56, Fla. Stat. (1991), and because Intervenor filed its petition within 21 days after publication of the Rules in Florida Administrative Weekly, Intervenor timely invoked that jurisdiction.

B. Judicial Restraint and the Administrative Process.

The scope of Ruff's jurisdiction to review issues surrounding DABT's adoption of the Rules must next be examined. As noted above, §120.56(1) Fla. Stat. (1991), permits any "substantially affected" person to administratively challenge the validity of an agency rule. The challenge must be based on the ground that the rule is an "invalid exercise of delegated legislative authority." An "invalid exercise of delegated legislative authority" is an agency action that goes beyond the powers, functions, and duties delegated to the agency by the Legislature. §120.52(8), Fla. Stat. (1991). Ruff's jurisdiction is, therefore, limited to consideration of the issues associated with an invalid exercise of delegated

legislative authority. He cannot decide constitutional issues or otherwise exceed his jurisdiction. Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc., 361 So. 2d 695 (Fla. 1978). Prohibition is the proper remedy for preventing a subordinate tribunal from exceeding its jurisdiction. State ex rel. Floral City Phosphate Co. v. Hocker, 33 Fla. 283, 14 So. 586 (1894). When petitioned for a writ of prohibition, this Court cannot and will not assume that an inferior judicial body will act erroneously in the exercise of its jurisdiction unless presented with clear and convincing evidence to the contrary. Smith v. Peacock, 146 Fla. 181, 200 So. 522 (1941); Adams v. Lewis, 146 Fla. 177, 200 So. 852 (1941).

DABT asserted in its Petition in this cause that the "manner and means of payment" of the tax assessments issued pursuant to the Rules is a constitutional issue. Intervenor does not doubt that a constitutional challenge may be brought against the "manner and means of payment" of the tax established by the Rules. Intervenor, however, made no such constitutional challenge to the "manner and means of payment," nor to any other aspect of the Rules.

Even a cursory examination of the Petition filed by Intervenor in the DOAH Proceeding reveals that Intervenor only challenged the Rules on the ground that the Rules constitute an invalid exercise of delegated legislative authority. Examination of the transcript of the final hearing and the proposed final order filed after the hearing by Intervenor confirms that Intervenor raised no constitutional issues. Intervenor sought no determination that the

Rules are unconstitutional, and there is found in the record of the DOAH Proceeding no indication that Ruff will even consider constitutional issues. The record in the DOAH Proceeding is devoid of any evidence that Intervenor has requested Ruff to exceed his jurisdiction or that Ruff will do so.

The McKesson case, throughout its long history, is fraught with constitutional issues. From the day the initial pleading in that case was filed in the Second Circuit Court, constitutional issues were of paramount concern. Even today, while the case remains pending in the trial court on remand, constitutional considerations are of prime importance. McKesson and the intervenors in that forum have raised numerous constitutional issues relating to the beverage tax and the special tax imposed by the Rules. Intervenor could have chosen to participate in that proceeding and to challenge the Rules on constitutional grounds. Intervenor, however, chose not to participate in that case and instead challenged the Rules as an invalid exercise of delegated legislative authority. Intervenor submits that this is the only available course of action that permits Intervenor to maintain a challenge to the propriety of DABT's action in adopting the Rules, under this Court's rulings in Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Fund, 427 So. 2d 153 (Fla. 1982) and Albrecht v. State of Florida, 444 So. 2d 8 (Fla. 1984).

The question of when the courts of this State should intervene in the administrative process has historically been a confusing

one. §120.73, Fla. Stat. (1991), states that nothing in Chapter 120 is intended to deprive circuit courts of jurisdiction in declaratory actions under Chapter 86. This has historically been interpreted to mean that circuit courts may consider at least certain kinds of constitutional challenges in the rule-making context before exhaustion of a party's administrative remedies, and that circuit courts may also consider injunctive or declaratory action if a promised administrative remedy will provide relief that is "too little or too late." Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Improvement Fund, 427 So. 2d 153 (Fla. 1982); Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc., 361 So. 2d 695 (Fla. 1978); School Board of Leon County v. Mitchell, 346 So. 2d 562 (Fla. 1st DCA 1977), cert. den. 358 So. 2d 132 (Fla. 1978); State of Florida ex rel. Department of General Services v. Willis, 344 So. 2d 580 (Fla. 1st DCA 1977).

Neither party to this proceeding has raised a concern that the relief to be granted by the DOAH Proceeding is "too little, too late." DABT, however, has claimed that certain constitutional issues are the exclusive province of the Second Circuit Court and that the DOAH Proceeding must, therefore, be stayed. Gulf Pines, supra, is the starting point for any inquiry into the correctness of DABT's argument.

In that case, Oaklawn Memorial Park, Inc. halted its Chapter 120 proceeding and sought in circuit court a declaration of the facial unconstitutionality of the statute on which the administrative proceeding was based. Gulf Pines Memorial Park,

Inc., an intervenor in the circuit court proceeding, argued that, because Oaklawn failed to exhaust its administrative remedies, the circuit court lacked jurisdiction to hear the case. This Court held that although the mere assertion of constitutional questions does not automatically entitle a party to bypass administrative channels, because the hearing officer could not consider the constitutional issue, circuit court jurisdiction was properly invoked. DABT cites the Gulf Pines case as authority for the proposition that only the circuit court can hear a challenge to agency action if constitutional issues are present. Clearly, however, this statement is overly broad, and Gulf Pines must be examined in light of subsequent developments.

After Gulf Pines, this Court decided Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Fund, 427 So. 2d 153 (Fla. 1982). In that case, this Court delineated three types of constitutional challenges that may be raised in the Chapter 120 context: facial unconstitutionality of a statute, facial unconstitutionality of an agency rule, and unconstitutional application by an agency of either a statute or a rule. The Court stated that only if the challenge is to the facial constitutionality of a statute should the challenger proceed directly to circuit court, citing Gulf Pines. Key Haven, 427 So. 2d 153, 157. The Court then stated that for either of the other types of constitutional challenges, adequate remedies exist in the administrative process, which must first be exhausted before a circuit court proceeding can be commenced. The Court held that

because agency action was not yet final, Key Haven failed to exhaust its administrative remedies with respect to a permit denial (agency application of a rule or statute), and, therefore, it could not seek in circuit court a declaration that the permit denial was an unconstitutional taking of property. The court emphasized that if a party elects circuit court as a forum at any time after "final agency action," that party thereby waives any right to challenge the agency action on any grounds except constitutionality.

In State of Florida Commission on Ethics v. Sullivan, 430 So. 2d 928 (Fla. 1st DCA 1983), the First District Court of Appeal applied Key Haven to affirm the dismissal of a circuit court challenge to the constitutionality of agency action, because the plaintiff did not challenge the facial constitutionality of a statute and did not show that administrative remedies were inappropriate.

In Albrecht v. State, 444 So. 2d 8 (Fla. 1984), this Court explained in greater detail the rationale of Key Haven. The facts were similar to those present in Key Haven, except that the plaintiff exhausted his administrative remedies, and appealed his permit denial to the First District Court of Appeal, which affirmed the permit denial. The plaintiff thereafter sought in circuit court a declaration that the permit denial amounted to an unconstitutional taking of property. The trial court granted the State's motion to dismiss on the grounds of res judicata and the First District Court of Appeal affirmed. This Court reversed, holding that res judicata was inapplicable, because the parties did

not and were not required to litigate the constitutional claim in the administrative process, including the appeal in the First District.

The Court explained that Key Haven requires a party to first exhaust its administrative remedies prior to challenging the constitutionality of an agency rule or the application by an agency of either a statute or an agency rule. The party challenging the rule or agency action has some discretion as to the scope of his challenge; i.e., he may, at any time after the agency action has become "final," accept the agency action as proper and elect not to proceed with an administrative hearing or an appeal to the district court. At such time, he may then proceed to challenge the constitutionality of the agency rule or action in circuit court. The court reiterated, however, that by so doing, the challenger accepts as proper the agency rule or action and is thereafter barred from challenging it on other than constitutional grounds. Because the constitutional claim is a separate and distinct claim from the claim challenging the propriety of the agency's action, the constitutional claim is preserved and remains ripe for circuit court consideration even after the administrative hearing and all appeals are exhausted. The Court pointed out that Key Haven permits a party to argue its constitutional claims before the district court of appeal on direct review of the administrative process, but emphasized that the party bringing the action has his choice of forum for litigation of the constitutional issue. Because the constitutional challenge was related to agency action and

because the plaintiff did not raise the constitutional issue in the district court, this Court remanded the case and ordered the trial court to conduct a de novo proceeding on the plaintiff's constitutional claim.

Key Haven and Albrecht were followed by this Court in Dade County v. National Bulk Carriers Inc., 450 So. 2d 213 (Fla. 1984), in which the court emphasized once again that a party affected by agency action must first challenge the propriety of the action and, failing in that challenge, may then proceed in circuit court to challenge the action on constitutional grounds. Key Haven, Albrecht, and National Bulk Carriers have consistently been followed by this Court, by every district court of appeal that has considered the issue, and by DOAH. See Atlantic International Investment Corporation v. State of Florida, 478 So. 2d 805 (Fla. 1985); Glendale Federal Savings and Loan Association v. Florida Department of Insurance, 485 So. 2d 1321 (Fla. 1st DCA 1986); Janson v. City of St. Augustine, 468 So. 2d 329 (Fla. 5th DCA 1985); Bowen v. Florida Department of Environmental Regulation, 448 So. 2d 566 (Fla. 2d DCA 1984); Board of Trustees of the Internal Improvement Fund v. Ray, 444 So. 2d 1110 (Fla. 4th DCA 1984); Department of Health and Rehabilitative Services v. Arthritis Medical Center, Inc., 32 Fla. Supp. 2d 197 (Fla. Dept. Admin. Hearings 1988); and Sloan v. St. Lucie County Expressing Authority, 28 Fla. Supp. 2d 252 (Fla. Dept. Admin. Hearings 1987).

The well-settled law of Key Haven and its progeny is that if a party challenges the rules or final action of an executive agency

on any ground other than the facial unconstitutionality of a statute, that party must first proceed to exhaust its administrative remedies before proceeding in circuit court with a constitutional challenge to the rules or final action. The party may raise its constitutional challenge during the administrative process so that the constitutional challenge may be brought before the district court of appeal during review of the administrative process, but it is never required to do so. If a party first proceeds in circuit court with a constitutional challenge to an agency rule or agency action, the party is forever barred from challenging the propriety of the action on any other grounds.

All of the cases cited by DABT are consistent with this analysis. In Gulf Pines, supra; E. T. Legg and Company v. Franza, 383 So. 2d 962 (Fla. 4th DCA 1980); and Department of Revenue v. Young American Builders, 330 So. 2d 864 (Fla. 1st DCA 1976), the plaintiffs all challenged in circuit court the facial constitutionality of a statute. Although the cases were decided prior to Key Haven, the circuit courts involved were permitted to proceed with the cases. As pointed out by the Key Haven court, Young America and Gulf Pines are consistent with the analysis contained in the Key Haven case. Key Haven, 427 So. 2d 153, 157. Clearly, the holding in E. T. Legg would not have changed if the reviewing court had the benefit of the Key Haven analysis. Finally, Dyna Span Corporation v. Pollock, 510 So. 2d 307 (Fla. 4th DCA 1986), the only post-Key Haven case cited in DABT's constitutional analysis, cites E. T. Legg. In Dyna Span, as in

all other cases cited by DABT, the issue before the circuit court was the facial constitutionality of a statute. As in the other cases, and consistent with Key Haven, the circuit court was directed to consider that issue prior to the correlative administrative proceeding.

In no case has this Court or any other appellate court in this State stayed an administrative proceeding to enable a circuit court to decide a constitutional challenge to an agency rule or to agency application of a rule or a statute. Key Haven and its progeny, citation to which is noticeably absent from DABT's petition, control this issue. The cases clearly hold that even if Intervenor's challenge to the "manner and means of payment" is a challenge to the Rules' facial constitutionality, Ruff's jurisdiction over the other issues in the DOAH Proceeding is unaffected. Intervenor must be permitted to go forward with the DOAH Proceeding. If it is unsuccessful in that case, it may then appeal to the appropriate district court. Intervenor then has the option of raising its constitutional challenge to the rules in the district court, or it may commence a de novo constitutional challenge in the appropriate circuit court. Key Haven, supra.; Albrecht, supra.

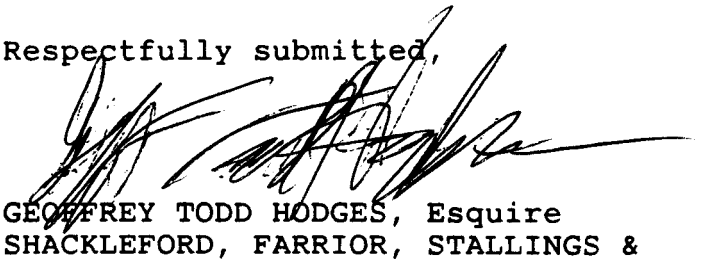
CONCLUSION

DABT improperly invoked the jurisdiction of this Court. Although the Florida Rules of Appellate Procedure would ordinarily permit a transfer of the case to an appropriate district court of appeal, no transfer can be made in this case because of DABT's failure to comply with the statutory requirement for invoking any court's jurisdiction to consider a petition for a writ of prohibition. Dismissal with prejudice is the only possible remedy.

Such a result is not unfair to DABT. Substantively, a review of the record in the DOAH Proceeding shows that DABT had no factual basis for pleading that constitutional issues were present in that case. Further, a review of the controlling precedents shows that even if there was a basis for DABT's claim, under no legal theory could DABT ever be entitled to the relief it sought.

For the foregoing reasons, Intervenor prays that this Honorable Court deny the relief requested in the Petition, dissolve the stay created by the Order Nisi, and dismiss the cause with prejudice.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been furnished by U.S. Mail to P. Michael Ruff, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-1550; to Donald D. Conn, Esquire and John B. Fretwell, Esquire, Department of Business Regulation, 725 South Bronough Street, Tallahassee, Florida 32399-1007; and to Robert A. Butterworth, Esquire, Joseph C. Mellichamp, III, Esquire, and Eric J. Taylor, Esquire, Office of the Attorney General, State of Florida, The Capitol, Tax Section, Tallahassee, Florida 32399-1050 this 4th day of September, 1991.

GEOFFREY TODD HODGES

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