

STATE OF FLORIDA  
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

In re:

PETITION FOR DECLARATORY  
STATEMENT BEFORE THE  
DEPARTMENT OF BUSINESS AND  
PROFESSIONAL REGULATION,  
DIVISION OF ALCOHOLIC BEVERAGES  
AND TOBACCO,

Final Order No. BPR-2005-06283 Date: 11-8-2005  
FILED

Department of Business and Professional Regulation  
AGENCY CLERK

Sarah Wachman, Agency Clerk

By: *Sarah Wachman*

Circle K Stores  
c/o Patrick Riha,

CASE NO.: DS 2005-004

Petitioner  
\_\_\_\_\_

**NOTICE OF SCRIVENER'S ERROR**

On May 26, 2005, the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco issued a DECLARATORY STATEMENT in the above-listed case which contained the following scrivener's error with the correction indicated below in bold and underline:

Conclusion of Law 5.:

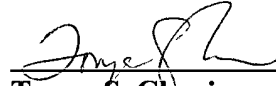
A court will generally uphold an agency's determination of the intent of a statutory provision within its power to enforce and interpret, as well as agency action based upon this construction. Thus, where an agency is acting within its authority as defined by law, a court will substitute its judgment for that of an agency where there is room for a difference of intelligent opinion on the subject. Storrs v. Pensacola & A.R. Co., 11 So. 226 (1892); Wilson v. Pest Control Com., 199 So. 2d 777 (4th DCA 1967); Baptist Hosp., Inc. v. State, Dep't of Health and Rehabilitative Services, 500 So. 2d 620 (1st DCA 1986); SOS Alford v. Sch. Bd., 511 So. 2d 438 (1st DCA 1987).

The correct brief of the case is:

A court will generally uphold an agency's determination of the intent of a statutory provision within its power to enforce and interpret, as well as agency action based upon this construction. Thus, where an agency is acting within its authority as defined by law, a court will **not** substitute its judgment for that of an agency where

there is room for a difference of intelligent opinion on the subject. Storrs v. Pensacola & A.R. Co., 11 So. 226 (1892); Wilson v. Pest Control Com., 199 So. 2d 777 (4th DCA 1967); Baptist Hosp., Inc. v. State, Dep't of Health and Rehabilitative Services, 500 So. 2d 620 (1st DCA 1986); SOS Alford v. Sch. Bd., 511 So. 2d 438 (1st DCA 1987). (emphasis added)

Respectfully submitted,



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**Tonya S. Chavis**  
**Fla. Bar No. 0994464**  
**DBPR - Northwood Centre**  
**1940 North Monroe Street**  
**Tallahassee, Florida 32399**  
**(850) 488-0062**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the **Notice of Scrivener's error** was sent to Christopher G. Schultz, Esq., at 33900 Schoolcraft, Livonia, Michigan 48150 by U.S. Mail on November 9<sup>th</sup>, 2005.

  
\_\_\_\_\_  
Tonya S. Chavis

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

In re:

PETITION FOR DECLARATORY  
STATEMENT BEFORE THE  
DEPARTMENT OF BUSINESS AND  
PROFESSIONAL REGULATION,  
DIVISION OF ALCOHOLIC BEVERAGES  
AND TOBACCO,

**DS 2005-004**

Circle K Stores Inc,  
c/o Patrick Riha

Petitioner

Final Order No. BPR-2005-02775 Date: **5-26-05**  
**FILED**

Department of Business and Professional Regulation  
AGENCY CLERK

Sarah Wachman, Agency Clerk

By: *Sarah Wachman*

**DECLARATORY STATEMENT**

This Declaratory Statement is rendered by the Director of the Division of Alcoholic Beverages and Tobacco ("Division"), pursuant to Sections 120.565 and 561.42, Fla. Stat. (2004). The Petitioner, Circle K Stores, Inc., has filed a Petition for Declaratory Statement, containing a statement of facts, and a discussion of relevant Florida law and administrative rules. A copy of the Petition for Declaratory Statement is attached hereto and incorporated by reference.

**ISSUES PRESENTED**

The Petitioner presents the following issues to the Division:

1. Whether it is statutorily permissible, under Section 561.42, Fla. Stat. (2004), for Petitioner, a retail vendor, to sell advertising space on multiple digital signage screens ("LCD and LED"), located within the vendor's stores, but viewable both in and outside of the vendor's stores, to vendors of products, including beer manufacturers?

2. Whether Petitioner may exercise its preference to have the advertising program administered by a department within its corporate structure; or create or use a separate corporate subsidiary or an affiliated entity for the purposes of running and administering the advertising programs; or retain an outside advertising agency for the purposes of obtaining subscriptions for advertising the program?

### **FACTS**

On March 1, 2005, the Division received a Petition for Declaratory Statement filed by Circle K Stores, Inc. (c/o Patrick Riha) Petitioner.

The conclusion of the Declaratory Statement is based on the facts described in Petitioner's Petition for Declaratory Statement (hereinafter "the Petition"), research by the Division, and the particular factual assertions described therein. All of the facts presented in the Petition were duly considered and form the basis for this Declaratory Statement. The facts as stated in the Petition for Declaratory Statement are as follows:

Petitioner has proposed to put a variety of LCD and/or LED screens in their stores for the purposes of advertising products for sale within the store. According to the Petitioner, there are, at this time, four anticipated locations for placing digital signage in the store. The first location would be next to the cash registers where it is anticipated that they will place two (2) fifteen (15) inch flat panel screens that would run advertisements within the store. The second location would be mounted above the cooler doors near the back of each store where it is anticipated that a thirty (30) inch LCD screen would run advertisements within the store. The third location would

be inside the store near the front windows, facing the street/parking area, utilizing an LED window sign, running static or animated advertising. The fourth location would be outside the store, mounted on the building above the front door, utilizing a digital LED spanner sign advertising products available within the store. According to the Petitioner, the LED signs would be in place of paper signs currently being used.

The Petitioner states that the advertising on these digital signs could be one of several types. On the LCD type screens (a television type of monitor), the Petitioner would develop regular commercial types of advertising, similar to those seen in television commercials. This type of screen could also be used for a scroll or ticker tape type of advertising, or a frozen frame type of display. The LCD type screens would advertise products for sale within the store and include current pricing, product promotion, specials, etc., as may be adopted by the store from time to time. The LED digital signs would animate the products and prices.

The Petitioner has proposed three options for the advertising program. The first option, the Petitioner's preference, would have the advertising program administered by a department within the Circle K corporate structure. This department would be responsible for running the advertising program and making the capital investment to purchase the digital signs, installing the signs, and operating the signs within the store. Petitioner's second proposed option is that it could create or use a separate corporate subsidiary or affiliated entity for the purposes of running and administering the advertising program. Under this option the agency would solicit advertising from distributors and/or manufacturers, and the advertising agency would then pay a fee to Circle K for the use of Circle K's equipment to display the advertisements in its

stores. The capital investment in the screens, monitors and signs would still be made by Circle K and they would retain ownership and be responsible for the installation and operation of the monitors. Petitioner's third proposed option is to administer the program through an outside advertising agency.

Under any of the above-listed options, the Petitioner anticipates that the advertising programs would be available to all suppliers and vendors of products in an "arm's length" sale for advertising space. Prices charged for advertising to a beer manufacturer would be the same as the price charged to any other product or distributor. Specifically, the Petitioner states that "[t]he distributor or manufacturer would not be providing a point-of-purchase signs as defined by the statute." Letter from Christopher Schultz, Petitioner's Attorney, Cummings, McClorey, Davis & Acho, P.L.C., to Pat Parmer, Director, Div. of Alcoholic Beverages and Tobacco (Oct. 8, 2004) (on file with the Div. of Alcoholic Beverages and Tobacco).

The Petitioner submitted a requested for a Declaratory Statement pursuant to Section 120.565(1), Fla. Stat. (2004), to clarify whether the digital screens and locations, along with the various options for the advertising programs are permitted under Sections 561.42(10) and (11), Fla. Stat. (2004).

## **ANALYSIS**

### **Outside Signs**

Petitioner proposes to rent advertising space on LCD and LED screens located inside, but viewable to the outside and outside LCD or LED screens to advertisers, including beer manufacturers. Petitioner proposes that the administration of the advertising program be located within a department within the corporate structure, or

within an affiliate or subsidiary of the corporate structure or by contract with an outside advertising agency.

Subsection 561.42(10), Fla. Stat. (2004), prohibits manufacturer or distributors of beverages referred to by this section from directly or indirectly giving, lending, renting, selling, or in any other manner furnishing to a vender *any outside sign, printed, painted, electric or otherwise*. In addition, the subsection prohibits vendors from displaying any sign advertising any brand of alcoholic beverages on the outside of his or her licensed premises, on any lot ground of which the licensed premises are situate, or on any building of which the licensed premises are a part. § 561.42(10), Fla. Stat. (2004). Therefore, Subsection 561.42(10), Fla. Stat. (2004), clearly prohibits the Petitioner from establishing an in-house or affiliated entity or subsidiary from establishing an advertising program that would include renting to manufacturers and/or distributors of the licensed beverages any type of signage either viewable from the outside or located from the outside. § 561.42(10), Fla. Stat. (2004).

Petitioner proposes, in the alternative to in-house or affiliated/subsidiary form of advertising program leasing the screens (purchased, maintained, and operated by the Petitioner) to an outside advertising agency and cites in support thereof, J. R. Hunter v. W. L. McKnight, 86 So.2d 434 (Fla.1956). In Hunter, the Supreme Court held that a roof-top sign located upon a retail vendor of alcoholic beverages for consumption, leased by an advertising company, displaying a beer advertisement, which did not refer to the licensed retailer nor mention that the product was sold on the premises, was not a ruse to evade statutory prohibition. Id. at 434. In its analysis, the Court reviewed the history of Section 561.42(10), Fla. Stat. (2004), and stated that “it was



clear that Subsection (10) of Section 561.42 does not prohibit, per se, the location of a sign advertising an alcoholic beverage on the outside of the vendor's premises." Hunter, 86 So.2d at 436 (Fla.1956). However, the Court continued in its analysis of the subsection saying that the purpose of the subsection was to prohibit "the furnishing of a sign by the wholesaler to the vendor in such a manner as to create a financial or business obligation from the vendor to the wholesaler." Id. at 436. Clearly, in the scheme proposed by the Petitioner, regardless of any agreement with an advertising agency, the Petitioner would make the initial capital investment of the LED screens, the LED screens would be located within the premises or mounted to the outside of the building over the door running advertisements of products, including, as the Petitioner described in the Petition, "[a]ll of these would advertise products for sale within the store. This would include current pricing, product promotion, specials, etc., as may be adopted by the store from time to time. Letter from Christopher Schultz, Petitioner's Attorney, Cummings, McClorey, Davis & Acho, P.L.C., to Pat Parmer, Director, Div. of Alcoholic Beverages and Tobacco (Oct. 25, 2004) (on file with the Div. of Alcoholic Beverages and Tobacco). Clearly, this is significantly different from the advertising scheme as found in Hunter, and would be in clear violation of Subsection 561.42(1), Fla. Stat. (2004). Hunter, 86 So.2d at 436.

### **Interior Signs**

Petitioner proposes, in addition to two LED screens, to install two (2) fifteen (15) inch LCD flat screen panels next to the cash registers and a thirty (30) inch LCD screen above the cooler doors near the back of each store, to run advertisements,

provided by the beer manufacturers or distributors, as well as nonalcoholic beverage advertisers within the store. The Court's analysis in Hunter, would also apply to this portion of Petitioner's scheme. Hunter, 86 So.2d at 436. As stated by the court, and previously cited in this Declaratory Statement, the purpose of the Act, Section 561.42, Fla. Stat. (2004), is to prevent the creation of a financial or business obligation from the vendor to the [licensed] wholesaler. Id. at 436. Petitioner's proposal, whether administered within the corporate structure or by an outside advertising agency, clearly results in the creation of a financial or business obligation between the vendor and the licensed wholesaler or distributor for advertising of licensed beverages.

Subsection 561.42(11), Fla. Stat. (2004), provides that a vendor may display in the interior of his or her licensed premises, including the window or windows, neon, electric, or other signs, including window painting and decalcomanias applied to the surface of the interior or exterior of such windows, posters, placards, and other advertising material advertising the brand or brands of alcoholic beverages sold by him or her, whether visible or not from the outside of the licensed premises. § 561.42(11), Fla. Stat. (2004). A vendor is prohibited from displaying in the window or windows more than neon, electric, or similar sign, advertising the product of any one manufacturer. § 561.42(11), Fla. Stat. (2004).

In the advertising scheme proposed by the Petitioner, two (2) LED screens would be viewable from outside the premises, one located within the store but viewable through a window, and one located outside the store, attached to the building and over the doors to the public. Subsection 561.42(11), Fla. Stat. (2004), limits the display in vendor's windows to one electric sign per manufacturer. § 561.42(11), Fla. Stat.

(2004). Therefore, the two (2) LED screens could only display advertising materials for different manufacturers, subject to the limitations contained within the other subsections of the act.

Subsection 561.42(12)(g), Fla. Stat. (2004), specifies that “manufacturers or distributors of beer are prohibited from engaging in cooperative advertising with vendors.” § 561.42, Fla. Stat. (2004). Petitioner’s proposed advertising scheme clearly creates a “cooperative advertising” scheme between manufacturers and/or distributors of beer in that the screens are owned by the vendor, the screens are controlled by the vendor, the purpose of the advertisements displayed on the screens are to advertise products sold in vendor’s stores and advertise vendor’s price incentives for purchasing the licensed products. Clearly, this scheme, even if managed by an outside advertising agency, creates a cooperative advertising scheme between the vendor and manufacturers and/or distributors of beer.

### **CONCLUSIONS OF LAW**

1. The Division has jurisdiction over this matter pursuant to Sections 120.565, 561.02, 561.08, and 561.11, Fla. Stat. (2004), and is responsible for the application and enforcement of Chapters 561 and 562, Fla. Stat. (2004), specifically Section 561.42, Fla. Stat. (2004).
2. The Petitioner is substantially affected by the statutory provision cited above and has standing to seek the Declaratory Statement.
3. Section 561.08, Fla. Stat. (2004), is the enabling statute that empowers the Division to enforce the provisions of the beverage law and implement the rules necessary to carry out the purpose and intent of

the beverage law statutes. The principles of statutory construction require that statutes be given a reasonable interpretation. Drost v. State Dept. of Environmental Regulation, 559 So.2d 1154 (Fla. 3d DCA 1989). Therefore, it is the responsibility and duty of the Division to construe and interpret the provision of Section 561.42(1), Fla. Stat. (2004), and apply said provision to a stated set of facts in a reasonable manner consistent with the purpose, intent, and spirit of the statutory provisions in order to avoid an absurd, arbitrary, or unreasonable result. See Towerhouse Condominium, Inc. v. Millman, 475 So. 2d 674 (Fla. 1985); See also Fletcher v. Fletcher, 573 So. 2d 941 (Fla. 1st DCA 1991).

4. The legislative intent is the polestar by which the agency or a court must be guided in interpreting a statutory provision even where reasonable difference may arise to its meaning. In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender, 561 So. 2d 1130 (Fla. 1990). Lowry v. Parole and Prob. Comm'n, 473 So. 2d 1248 (Fla. 1985). To determine the legislative intent a court will consider the act as a whole, i.e. the evil to be corrected, the language of the act, including its title, history of its enactment, and state of the law already in evidence. State Dep't of Env'tl. Regulation v. SCM Glidco Organics Corp., 606 So. 2d 722 (Fla. 1<sup>st</sup> DCA 1992). If the statute's language is clear and unambiguous, the words given by the legislature are sufficient, and it is unnecessary to

rely on the rules of statutory construction or speculate as to what the legislature intended. Zuckerman v. Alter, 615 So. 2d 661 (Fla. 1993).

5. A court will generally uphold an agency's determination of the intent of a statutory provision within its power to enforce and interpret, as well as agency action based upon this construction. Thus, where an agency is acting within its authority as defined by law, a court will substitute its judgment for that of an agency where there is room for a difference of intelligent opinion on the subject. Storrs v. Pensacola & A.R. Co., 11 So. 226 (1892); Wilson v. Pest Control Com., 199 So. 2d 777 (4<sup>th</sup> DCA 1967); Baptist Hosp., Inc. v. State, Dep't of Health and Rehabilitative Services, 500 So. 2d 620 (1st DCA 1986); SOS Alford v. Sch. Bd., 511 So. 2d 438 (1st DCA 1987).
6. There has been no Florida court decision determining the applicability of Section 561.42, Fla. Stat. (2004), to a factual situation such as the one presented by Circle K Stores, Inc. However, state courts construing Tied House Evil provisions have provided guidance as to the purpose and intent of said statutory provisions and how the Division should construe and apply these provisions.

### CONCLUSION

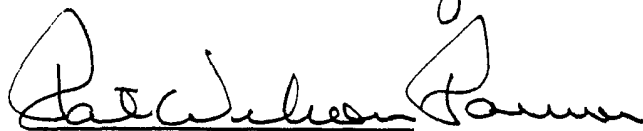
Based upon the facts presented by the Petitioner, research by the Division, and the analysis and legal conclusions set forth in full herein, the Division makes the following declarations:

- A. That the Division has no statutory authority to regulate any nonlicensed paid advertising scheme proposed by the Petitioner.
- B. That it is the responsibility of the Division to construe and interpret the provisions of Section 561.42, Fla. Stat. (2004)
- C. That the legislative intent of Section 561.42, Fla. Stat. (2004) is paramount.
- D. That the longstanding and well-established intent of Section 561.42, Fla. Stat. (2004) is to prohibit any relationship between a manufacturer or distributor of alcoholic beverages and a vendor licensed to sell alcoholic beverages.
- E. The Division, pursuant to Section 561.42, Fla. Stat. (2004), has the statutory authority to regulate advertising schemes related to the advertisement of alcoholic beverages by licensed vendors.
- F. That the proposal by the Petitioner to establish an in-house, affiliate or subsidiary of the corporate structure to establish and administer advertising of licensed beverages on LED and LCD screens located within and without the vendor's stores is prohibited by Section 561.42, Fla. Stat. (2004).
- G. That the alternative proposal by the Petitioner to contract with an outside advertising agency to administer the advertising of licensed beverage on LED and LCD screens, purchased and controlled by the vendor, and located within and without the vendor's stores is prohibited by Section 561.42, Fla. Stat. (2004).
- H. That the advertising scheme proposed by the Petitioner for LED screens located either within the building but viewable to the outside or outside the building and attached to the building to advertise licensed products sold by the

vendor and vendor's "specials" relating to the licensed products is prohibited by Section 561.42(10), Fla. Stat. (2004).

- I. That the display of nonpaid advertising of licensed beverages is subject to the limitation of Section 561.42(11), Fla. Stat. (2004), which limits such advertising to one product per manufacturer.
- J. That the advertising scheme for licensed beverages proposed by the Petitioner for all screens, LED and LCD, located inside the vendor's premises creates "cooperative advertising" between the vendor and the manufacturer or distributor of alcoholic beverages, pursuant to Paragraph (g) of Subsection 561.52(12), Fla. Stat. (2004), and is, therefore prohibited.
- K. That based on the foregoing facts and legal research, the Division cannot approve these types of business arrangements.
- L. That this conclusion is based on the facts described in the Petitioner's Petition for Declaratory Statement and legal research by the Division. Accordingly, this conclusion has no application in the event that the factual circumstances and/or relationships among the entities described herein are incorrect or change.

**DONE AND ORDERED** this 25<sup>th</sup> day of May, 2005



Pat Wilson Parmer, Director  
Division of Alcoholic Beverages & Tobacco  
1940 North Monroe Street  
Tallahassee, Florida 32399-1020  
(850) 488-3227

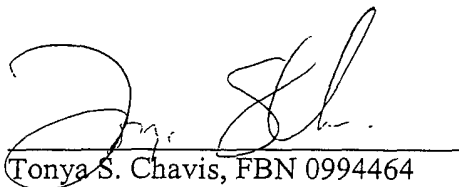


RIGHT TO APPEAL

THIS DECLARATORY STATEMENT CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH THE AGENCY CLERK FOR THE DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, WITHIN 30 DAYS OF THE RENDITION OF THIS DECLARATORY STATEMENT.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Christopher G. Shultz, Esquire, 33900 Schoolcraft, Livonia, Michigan 48150, this 27 day of May, 2005.

A handwritten signature in black ink, appearing to read "Tonya S. Chavis", is written over a horizontal line.

Tonya S. Chavis, FBN 0994464

Assistant General Counsel

Department of Business and Professional Regulations

Division of Alcoholic Beverages and Tobacco



## NOTICE OF PETITION FOR DECLARATORY STATEMENT

NOTICE IS HEREBY GIVEN THAT on March 1, 2005, the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, received a Petition for Declaratory Statement filed by Christopher G. Schultz, Esquire, on behalf of Circle K Stores, Inc.

Petitioner requests a declaratory statement on whether it is statutorily permissible, under Section 561.42, F.S., for Petitioner, a retail vendor, to sell beer manufacturers the right to advertise on digital signage advertising products for sale within and outside of Circle K stores; whether Circle K may exercise its preference to have the advertising program administered by a department within Circle K's corporate structure, which department would also be responsible for making the capital investment to purchase, install and operate the digital signs; or, in the alternative, through an affiliated entity or outside advertising agency.

A copy of the Petition for Declaratory Statement, Docket No. DS 2005-004, may be obtained by writing Sarah Wachman, Agency Clerk, Department of Business and Professional Regulation, 1940 North Monroe Street, Tallahassee, Florida 32399-1020 (telephone 850-921-0342).

**PETITION FOR DECLARATORY STATEMENT BEFORE**  
**DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION**  
**DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO**

Petitioner: Circle K Stores Inc.  
12911 N. Telecom Parkway  
Tampa, Florida 33673  
c/o Patrick Riha  
Fax: (813) 910-6914

Christopher G. Schultz (P37008)  
Attorney for Circle K Stores Inc.  
Cummings, McClorey, Davis & Acho, P.L.C.  
33900 Schoolcraft  
Livonia, Michigan 48150  
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**FILED**  
Department of Business and Professional Regulation  
DEPUTY CLERK

CLERK *Brandon M. Nichols*  
DATE 3-1-2005

**DS 2005-004**

**THE STATUTORY PROVISIONS ON WHICH A**  
**DECLARATORY STATEMENT IS SOUGHT**

Florida Statute Chapter 561.42 prohibits a manufacturer or distributor of beer from having any financial interest, directly or indirectly, in an establishment or business of any vendor licensed under the beverage law. The statute provides, at 561.42(10), that no manufacturer or distributor of beverages referred herein shall directly or indirectly give, lend, rent, sell, or in any manner furnish to any vendor any outdoor sign.

Chapter 561.42(11) provides that a vendor may display in the interior of the licensed premises, neon, electric or other signs, posters, placards, and other advertising material advertising the brand or brands of alcoholic beverages sold by him or her, but no vendor shall display in the window or windows of his or her licensed premises more than one neon, electric or similar sign, advertising the product of any one manufacturer.

RECEIVED  
MAR 1 2005  
DBPR Agency Clerk

Chapter 561.42(12) provides that a manufacturer or distributor may give, lend, furnish or sell to a vendor who sells the products of such manufacturer or distributor, neon or electric signs, window paintings and decalcomanias, posters, placards or other advertising material herein authorized to be used or displayed by the vendor in the interior of his or licensed premises. The Division shall make reasonable rules governing promotional displays and advertising which rules shall not conflict with or be more stringent than the federal regulations pertaining to such promotional displays and advertising furnished to vendors by distributors and manufacturers; provided however that:

- g. Manufacturers and distributors of beer shall not engage in cooperative advertising with vendors.

Circle K Stores Inc. ("Circle K") desires to put a variety of LCD and/or LED screens in their stores for purposes of advertising products for sale within the store. At this time, there are four locations anticipated for placing digital signage in or on the store. The first location is next to the cash registers where it is anticipated they will place two (2) fifteen (15") inch flat panel screens that would run advertisements within the store. The second location would be mounted above the cooler doors near the back of each store where it is anticipated that a thirty (30") inch LCD screen would run advertisements within the store. The third location is inside the store near the front windows, facing the street/parking area. This would be an LED window sign, running static or animated advertising. The fourth location would be outside of the store, mounted on the building above the front door. This would be a digital LED spanner sign advertising products available within the store. The LED signs would be in place of paper signs currently being used.

The advertising on these digital signs could be one of several different types. On the LCD type screens, which are TV type of monitors, Circle K would develop regular commercial types of

advertising, similar to those seen in television commercials. It could also develop a scroll or ticker tape type of advertising, or a frozen frame type of display. All of these would advertise products for sale within the store. This would include current pricing, product promotion, specials, etc. as may be adopted by the store from time to time. The LED digital signs would animate the products and prices.

Circle K would sell manufacturers the right to advertise on the digital signs. The right to advertise would be available to beer manufacturers. The fee would be based on a number of different factors, but the factors would be applied to all brands advertising. The fee for a beer manufacturer would be determined in the same way for any other advertiser, and the same factors would be used to determine the pricing of the advertising on the monitors. The rate for the advertising is principally based on the cost per thousand impressions (CPM), which is the same methodology used in television, radio, newspapers, billboards, and other types of ads.

With the 15" panels next to the cash register and the 30" LCD's by the coolers, it would be possible to have manufacturers supply Circle K CD's or computer programs containing their advertisement. For example, a beer company could provide a computer program similar to their national television advertisements and commercials, and the store could run the advertisement on the digital sign along with other product advertisements. This would look very much like a TV commercial and would be available to all manufacturers and distributors of products within the store.

These advertising programs would be available to all suppliers and vendors of products. This is not intended to be anything other than an arm's length sale for advertising space. In reviewing the Tied House Evil Statute, this does not appear to be a gift, loan, or the giving of a rebate. Prices charged for advertising to a beer manufacturer would be the same as the price charged to any other

product manufacturer or distributor. There is a legitimate business reason for advertising within the stores. The manufacturer would not be providing any point-of-purchase signs as defined by the statute.

This appears to be similar to the administrative decision of the *Department of Business Regulation, Division of Alcoholic Beverages and Tobacco v Better Brands, Inc.*, State of Florida Division of Administrative Hearing, February 12, 1978. There the administrative panel held that the placement of an advertisement in a program printed by a licensed beer vendor was not the giving of a gift, loan, money or property, or giving of a rebate contrary to the Tied House Evil Statute. The facts of that case involved an operator of a Bowl-A-Rama, a licensed beer vendor, that hosted a regional professional bowlers association tournament. As part of the tournament, they printed a program and approached a beer distributor for the purchase of advertisement within the program. The distributor purchased a full page ad at a price which was no greater than the price charged to any other local advertiser. The administrative panel held that the purchase of the advertisement in the program was assistance to the owner and licensed vendor. Nothing in the evidence indicated, however, that the transaction was a gift, loan, the giving of a rebate, or anything other than the arm's length sale as it purported to be. The evidence did not show that the price for the advertisement was inflated. The fact that the advertisement was taken in the national portion of the program as well as in the local portion of the program indicates the existence of a legitimate business reason for the advertisement taken by the beer distributor. In the Circle K program, the purchase of advertising space is similar to the purchase of the printed advertisement within the Bowl-A-Rama program. It is the purchase of advertising space, charged on a uniform basis as part of an arms length transaction

The next issue is the administration of the advertising program. It would be Circle K's

preference to have the advertising program administered by a department within its corporate structure. This department would be responsible for running the advertising program and making the capital investment to purchase the digital signs, installing them and operating them within the stores at its own expense. If the Division determines that this is too close of a relationship between the advertising program and a licensee, then Circle K could create or use a separate corporate subsidiary or affiliated entity for purposes of running and administering the advertising programs. A third option would be to retain an outside advertising agency for the purpose of obtaining subscriptions for the advertising program. The agency would solicit advertising from distributors and/or manufacturers, and the advertising agency would then pay a fee to Circle K for use of Circle K's equipment to display the advertisements in its stores. The capital investment in the screens, monitors and signs would still be made by Circle K and they would retain ownership and be responsible for the installation and operation of the monitors. The third option to administer the program through an outside agency appears to be favored based on the case of *J.R. Hunter v W.L. McKnight d/b/a Webster Outdoor Advertising Company*, 86 S2d 434 (1956). This case addressed an outdoor advertisement placed on the roof of a retail vendor's premises. The outdoor advertisement was leased by an outdoor advertising company through an advertising agency, which placed a well known beer sign on the vendor's building. The sign used by the beer company for advertising its product was used throughout the country and did not refer to the retail vendor or mention that the product was sold on the premises. The court, relying on the history of the Tied House Evil Statute, recognized that the vendor was authorized to display, in the interior of the premises, signs and other material advertising a brand of alcoholic beverages sold therein, and that the manufacturer or distributor is authorized to supply such advertising material to a vendor. The

statute did not address the supplying and displaying of outdoor signs at that time. The court held that it was okay to have the outdoor sign placed on the roof of the licensed premises since the sign was leased through an outdoor advertising agency and not directly by the vendor.

It is our request for a declaratory statement addressing whether the advertising program as described above could be implemented by Circle K for use in its stores within the State of Florida.

We are asking if this proposed program would be consistent with the intent and purpose of Florida statute, specifically Chapter 561.42. We also ask for a declaratory statement as to whether Circle K could administer this advertising program through a division within its corporate structure or an affiliated entity, or whether it would have to use an outside advertising agency for procurement of such advertising contracts. We question whether the use of an outside agency for the procurement of contracts is necessary under the terms and intent of the Tied House Evil Statute.

Respectfully submitted,

CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C.

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By: 

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