

Department of Business and Professional Regulation

AGENCY CLERK

Sarah Wachman, Agency Clerk

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND
DIVISION OF ALCOHOLIC BEVERAGES

By: Sarah Wachman

IN RE:

DS 2001-002

PETITION FOR DECLARATORY STATEMENT,
On behalf of ANGOSTURA HOLDINGS LIMITED,

Petitioner.
_____ /

DECLARATORY STATEMENT

This Declaratory Statement is rendered by the Director of the Division of Alcoholic Beverages and Tobacco ("DIVISION") pursuant to section 120.565, Florida Statutes. The Petitioner, ANGOSTURA HOLDINGS LIMITED, has filed a Petition for Declaratory Statement, containing a statement of facts, a discussion of relevant Florida law and administrative rules. A copy of the Petition for Declaratory Statement with appendix is attached hereto and incorporated by references.

ISSUE PRESENTED

The Petitioner presents the following issue to the Division:

Whether §561.22 and §561.42(1), Florida Statutes 2000, prohibit the proposed business arrangement described in the Petitioner's Petition for Declaratory Statement?

1. On or about, February 12, 2001, Angostura Holdings Limited filed a Petition for Declaratory Statement with the Division. After careful review of the Petition, the Division found that the Petition did not contain facts specific enough for the Division to issue an effective and well-informed Declaratory Statement. Pursuant to a conversation

with Counsel for Angostura Holdings Limited on April 18, 2001, the Division wrote a letter to the Petitioner requesting specificity of statements made in the Petition. The April 20, 2001 letter, contained questions that requested specific facts concerning the proposed business plan. It was agreed that Petitioner's response to the questions would serve as a renewed request for Petition for Declaratory Statement, thereby giving the Division 90 days to respond from the date of the receipt of the Petitioner's answers to the Division's questions. Petitioner did respond to the Division's request on April 27, 2001. However, Petitioner elected not to answer all of the questions presented by the Division. Petitioner asserted that information requested was considered confidential, and that they were not desirous of prematurely disclosing this information in a public record. Petitioner's failure to provide the Division with the specific facts requested is basis alone, to deny the Petition for Declaratory Statement. However, the Division renders its findings of Fact on the basis of the information contained in the Petition for Declaratory Statement and the additional requested response filed herein.

2. The conclusion in this Declaratory Statement is based on the facts described in Petitioners' Petition for Declaratory Statement and its Appendix (herein after "the Petition"), research by the Division, and the particular factual assertions described therein. Accordingly, this conclusion has no application in the event that the factual circumstances and/or relationships among the entities described in the Petition change. 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:

Angostura is a manufacturer of alcoholic beverages located in the Republic of Trinidad and Tobago, with its offices and manufacturing plant

at the House of Angostura, Angostura Complex, Eastern Main Road, Laventille, Trinidad. Angostura is a Trinidad and Tobago company formed and existing under the Laws of the Republic of Trinidad and Tobago.

Angostura is engaged in the manufacture and export of alcoholic beverages solely in the Republic of Trinidad and Tobago. Angostura does not hold a license or registration for the manufacture, distribution, or exporting of alcoholic beverages from any jurisdiction other than the Republic of Trinidad and Tobago. It specifically does not hold and such license or registration from Florida or any other state of the United States.

Angostura desires a vendor's license. A wholly owned subsidiary, in which Angostura has a controlling interest, would obtain the license. The subsidiary would hold a retail alcoholic beverage license issued by the Division, be a vendor of alcoholic beverages, and would not hold a license or registration for the manufacture, distribution or exporting of alcoholic beverages from any state of the United States.

CONCLUSIONS OF LAW

3. The Division has jurisdiction over this matter pursuant to Sections 120.565, 561.02, 561.08, and 561.11, Florida Statutes, and is responsible for the application and enforcement of Chapters 561 and 562, Florida Statutes, specifically sections 561.22 and 561.42, Florida Statutes.

4. The Petitioner is substantially affected by the statutory provisions cited above and has standing to seek this Declaratory Statement.

5. Section 561.08, Florida Statutes, empowers and directs the Division to enforce the provisions of the Beverage Law and perform such acts as may be necessary to carry out the provisions thereof. Accordingly, it is the Division that construes and interprets the alcoholic beverage laws of the State of Florida and makes the determination as to whether they are applicable to a specific set of facts.

6. Of utmost importance and concern is the relationship between a manufacturer

and a vendor. Section 561.42(1), Florida Statutes, states the following:

“ No licensed manufacturer or distributor of any of the beverages herein referred to shall have any financial interest, directly or indirectly, in the establishment or business of any vendor licensed under the Beverage Law; nor shall such licensed manufacturer or distributor assist any vendor by any gifts or loans of money or property of any description or by the giving of any rebates of any kind whatsoever. No licensed vendor shall accept, directly or indirectly, any gift or loan of money or property of any description or any rebates from any such licensed manufacturer or distributor; provided, however, that this does not apply to any bottles, barrels, or other containers necessary for the legitimate transportation of such beverages or to advertising materials and does not apply to the extension of credit for liquors sold, made strictly in compliance with the provisions of this section.”

7. The Florida Supreme Court, in the case of Pickerill vs. Schott, 55 So. 2d 716 (1951), upheld the constitutionality of Section 561.42(1), F. S., and discussed in detail the purpose and intent behind the enactment of Section 561.42, F. S. The Court recognized that statutes of this type are aimed at the evil known as the “tied house”. Id at 717. Moreover, the Court recognized that their purpose is to prevent the integration of retailer and wholesale outlets and to remove the retail from financial or business obligations to the wholesaler or manufacturer, with the exception of ordinary commercial credit. Id at 717. The Court further stated that the Tied House Evil Law prohibits manufacturers, wholesalers, and distributors from having any financial interest in retailers, directly or

indirectly. Id. at 717. The Court in Mayhues' Super Liquor Store, Inc. vs. Mielkeljohn, 426 F.2d. 142 (1970) followed Pickerill, and stated, "the basic purpose of "tied house evil" statute is to divorce manufacturing /distributing activities of alcoholic beverage businesses from that of retailers."

8. Section 561.42 is specifically intended to prohibit a relationship between a manufacturer and a vendor so as to prevent even the possibility of any such integration between a vendor and manufacturer or the appearance thereof. The fact that Angostura is a foreign manufacturer of alcoholic beverages and is not licensed within the boundaries of Florida or any other state of the United States does not supersede the longstanding intent and implementation of Section 561.42. If the Division authorizes Angostura's request to have a wholly owned subsidiary in Florida with a vendor's license, it would obliterate the obvious purpose and intent of Section 561.42.

9. Section 561.42, Florida Statutes has been in existence since 1935 and the Courts have consistently interpreted the section to prohibit a manufacturer from rendering financial assistance or aid to a vendor or to have any financial interest in, either directly or indirectly, a retail establishment. Pickerill at 716, Mayhues at 142. Courts have construed this provision to require that manufacturers and distributors be totally separate and apart from a vendor and be in no way involved in each other's business, either financially or otherwise. Id. at 142. No manufacturer located in Florida or elsewhere in the United States could have the relationship that Angostura proposes to have with a vendor in Florida. However, it has been suggested that if Section 561.42 is construed in conjunction with Section 561.22, Florida Statutes, the conclusion must be reached that a manufacturer who manufactures an alcoholic beverage outside of the United States is not

subject to the provisions of Section 561.42. In turn, Angostura submits that, because they are manufacturers of alcoholic beverages outside of the borders of the United States, they are totally unaffected by the proscriptions and limitations of Section 561.42.

10. However, it is well settled that, in interpreting any statute, the primary purpose is to ascertain the legislative intent. Ruff vs. Brayon, 32 So. 2d. 840 (Fla. 1947). Where there is any doubt as to the meaning of the statute, the purpose for which it was enacted is of primary importance in the final interpretation. Id. at 840. Any interpretation of a statute should be avoided that would impair, pervert, nullify or change the object of the statute and its intended purpose. Van Pelt vs. Hilliard, 78 So. 693 (Fla. 1918). Every statute should be construed to give effect to the evident legislative intent and the statute should be given a reasonable interpretation in harmony with the intent of the legislature. Garner vs. Ward, 251 So. 2d. 252 (Fla. S. Ct. 1971). A statute should be construed in light of the evil to be remedied and the remedy conceived by the Legislature to cure such evil. Brown vs. Griffin, 229 So. 2d. 225 (Fla. S. Ct. 1969); Orlando Sports Stadium, Inc. vs. State ex rel Powell, 262 So. 2d 881 (Fla. S. Ct. 1972). The Court will consider not only the language or words used in the statute, but also its history, its legislative setting, the subject matter on which the statute operates, the evil to be corrected and objects to be obtained, all of which are as much a part of the law as the words themselves. Dade federal Savings and Loan Assn. vs. Miami Title and Abstract Division of American Title Insurance Co., 217 So. 2d 873 (Fla. 3d DCA 1969).

11. Section 561.22 is also a part of the overall regulatory scheme in Florida to keep manufacturers, distributors, and vendors totally apart and separate. Section 561.22(1) is very clear in its purpose and specifically provides that:

“Except as hereinafter provided, any applicant may receive a license as a manufacturer, distributor, or exporter, but no license shall be issued to a manufacturer, distributor, or exporter as a vendor, nor shall any license be issued to a vendor as a manufacturer, distributor, or exporter.”

The sole purpose of this section was to prohibit a manufacturer or distributor from also being licensed as a vendor or to prohibit a vendor from also being licensed as a manufacturer or distributor. Angostura being a manufacturer of alcoholic beverages would be directly prohibited from coming into Florida and being licensed as a vendor.

12. The Legislature recognized that in certain instances a vendor in Florida may be affiliated with a manufacturer so that even though the manufacturer has not, in fact, applied for licensing as a vendor, the effect is the same. The Legislature amended Section 561.22 by adding subsections (2-5) to prevent a vendor licensed in Florida or any state of the United States from either obtaining a license or renewing a license if that vendor was interested in or connected, directly or indirectly, or through any subsidiary or affiliate, including stock ownership, in manufacturing, distributing or exporting alcoholic beverages. However, Section 561.22 stands alone as does Section 561.42, Florida Statutes. The primary purpose of Section 561.42 is to prevent and prohibit any kind of financial relationship between a manufacturer and a vendor while the purpose of 561.22, Florida Statutes, is to prohibit the licensing of a manufacturer as a vendor.

13. Angostura suggested that the use of the words, “in this state or any state of the United States”, contained in subsections 2 and 3 of Section 561.22, would not prohibit a vendor from being licensed or from renewing an existing license even though that vendor may be interested in or connected, directly or indirectly, with a manufacturer

located outside of the country. Assuming arguendo that Angostura facial reading is correct, such construction should not be used to repeal the direct proscriptions contained within Section 561.42, Florida Statutes. In addition, it is clear from case law that the legislative intent of Section 561.42 is to prohibit a relationship between a manufacturer and vendor. If the Petitioner is allowed to implement their proposed business plan, they would be involved the exact type of "direct-tie" that Section 561.42 and 561.22 seeks to prohibit.

CONCLUSION

Based upon the facts presented by the Petitioner, research by the Division, and the legal conclusions set forth in full herein, the DIVISION declares that the Florida Beverages Laws prohibits Petitioner's proposed business plan.

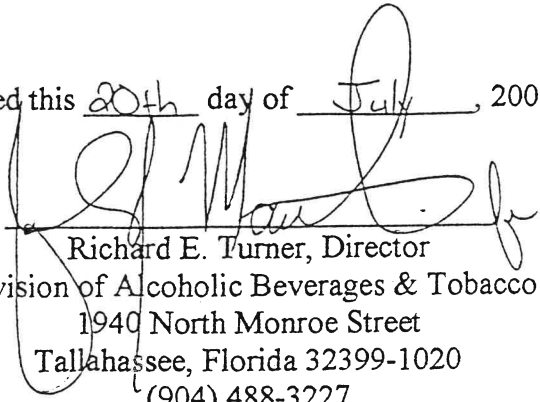
THE DIVISION HEREBY CONCLUDES:

- A. That is the responsibility and duty of the DIVISION to construe and interpret the provisions of Sections 561.22 and 561.42.
- B. That the legislative intent of Sections 561.22 and 561.42, Florida Statutes is paramount.
- C. That the longstanding and well-established intent of the Sections 561.22 and 561.42 is to prohibit any relationship between a manufacturer of alcoholic beverages and a vendor licensed to sell alcoholic beverages.

- D. That based on the legislative intent of Sections 561.22 and 561.42, both sections apply to Angostura Limited Holding, Inc.
- E. That Petitioner's proposed business plan is directly contrary to the intent of Sections 561.22 and 561.42 .
- F. That the Petitioner's proposed business plan attempts to create a relationship between manufacturer and vendor, that Sections 561.22 and 561.42 are specifically designed to prohibit.
- G. That based on the foregoing facts and legal research, the DIVISION cannot approve Petitioner's proposed business plan.
- H. That this conclusion is based on the facts described in the Petitioner's Petition for Declaratory Statement, including the Appendix, 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.

Dated this 20th day of July, 2001



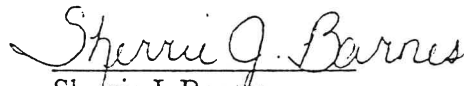
Richard E. Turner, Director
Division of Alcoholic Beverages & Tobacco
1940 North Monroe Street
Tallahassee, Florida 32399-1020
(904) 488-3227

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 SARAH L. WACHMAN, 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: Louis J. Terminello, Esquire, 2700 S.W. 37 Avenue, Miami, FL 33133-2728, this 20th day of July, 2001.


Sherrie J. Barnes
Assistant General Counsel

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

FILED

Department of Business and Professional Regulation
DEPUTY CLERK

In the matter of:
ANGOSTURA HOLDINGS LIMITED,
Petitioner

DBPR No.:

CLERK

DATE

Branden M. Nichol
2-13-2001

PETITION FOR DECLARATORY STATEMENT

ANGOSTURA HOLDINGS LIMITED ("Angostura"), by and through its undersigned counsel, pursuant to F.S. 120.565 and Rule Chapter 28-105, F.A.C. hereby petitions the DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO ("Division"), DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, for a declaratory statement on the following matter:

ISSUE

It is respectfully requested that the Division declare that the Beverage Law, including F.S. 561.22 and 561.42, do not prohibit Angostura, a manufacturer of alcoholic beverages in a foreign jurisdiction, neither licensed nor registered by any state in the United States, from holding an interest, including a controlling interest, in a separate business entity licensed by the Division as a vendor of alcoholic beverages.

FACTS

1. Angostura is a manufacturer of alcoholic beverages located in the Republic of Trinidad and Tobago, with its offices and manufacturing plant located at The House of Angostura, Angostura Complex, Eastern Main Road, Laventille, Trinidad. Angostura is a Trinidad and Tobago company formed and existing under the Laws of the Republic of Trinidad and Tobago.

2. Angostura is engaged in the manufacture and export of alcoholic beverages solely in the Republic of Trinidad and Tobago. Angostura does not hold a license or registration for the manufacture, distribution or exporting of alcoholic beverages from any jurisdiction other than the Republic of Trinidad and Tobago. It specifically does not hold any such license or registration from Florida or any other state of the United States.

3. Angostura is desirous, either in its own name or through a wholly owned subsidiary, which also will not hold a license or registration for the manufacture, distribution, or exporting of alcoholic beverages from any state of the United States, of acquiring an interest in a separate business entity which will be a vendor of alcoholic beverages, holding a retail alcoholic beverage license issued by the Division. The interest acquired may be a controlling interest.

4. Angostura does not believe any provision of the Beverage Law, Chapter 561-568, F.S., prohibits such acquisition. Angostura seeks a declaratory statement from the Division confirming that the Beverage Law does not prohibit such acquisition.

RECEIVED

FEB 13 2001

OFFICE OF GENERAL COUNSEL

LAW

5. Two specific provisions of the Beverage Laws may relate to this matter. The first is F.S. 561.42(1), which provides:

“No licensed manufacturer or distributor of any of the beverages herein referred to shall have any financial interest, directly or indirectly, in the establishment or business of any vendor licensed under the Beverage Law; nor shall such licensed manufacturer or distributor assist any vendor by any gifts or loans of money or property of any description or by the giving of any rebates of any kind whatsoever. No licensed vendor shall accept, directly or indirectly, any gift or loan of money or property of any description or any rebates from any such licensed manufacturer or distributor; provided, however, that this does not apply to any bottles, barrels, or other containers necessary for the legitimate transportation of such beverages or to advertising materials and does not apply to the extension of credit, for liquors sold, made strictly in compliance with the provisions of this section.”

6. This provision was created by section 4 of Chapter 16774, Laws of Florida, 1935, and is known as the Tied House Law. The language of this initial enactment, despite the intervening sixty-six (66) years, remains unchanged in any substantive manner. See F.S. 561.42(1) (2000).

7. It is apparent that the Legislature limited the application of this statute to a Florida “licensed manufacturer”. Indeed, section 2 of Chapter 16774, Laws of Florida, 1935, provided that licenses referred to in the Beverage Law are classified as manufacturers, distributors and vendors licensed in this state. This latter provision continues to be embodied in F.S. 561.14(2000).

8. Further, Chapter 16774, with certain limited exceptions, provided that both Florida licensed manufacturers and Florida licensed distributors could sell directly to Florida licensed vendors. Section 4 of Chapter 16774 thus precluded only those persons who could directly sell to a Florida licensed vendor, i.e. Florida licensed manufacturers or distributors, from having any financial interest in licensed vendors.

9. Though the Legislature subsequently precluded manufacturers licensed in Florida from directly selling to licensed vendors, these same statutory provisions, F.S. 561.42(1) and F.S. 561.14, continue in substantially the same form and prohibit only a “licensed manufacturer” from having a financial interest in a vendor.

10. Consequently, any construction of F.S. 561.42(1) that deems this statute to be applicable to a manufacturer located solely in a foreign jurisdiction both ignores the clear legislative intent in the enactment of the statute and renders meaningless the legislative use of the limiting term “licensed”, despite the clear meaning accorded such term by F.S. 561.14(1). It is therefore respectfully submitted that F.S. 561.42(1) is of no application to Petitioner’s factual situation.

11. The second statute to be considered in this matter is F.S. 561.22. This statute was initially enacted by section 2 of Chapter 16774, Laws of Florida, 1935. The current F.S. 561.22 (1) continues this original provision, which precludes a party from holding both a Florida manufacturer or distributor’s license and a Florida vendor’s license.

12. The initial enactment was amended by Chapter 25359, Laws of Florida, 1949, which added several subsections to F.S. 561.22, including subsection (3). This subsection, which remains substantially unchanged to date, provides:

"If any applicant for a vendor's license or the renewal thereof is a corporation, such corporation is within the provisions of subsection (1) if such corporation is affiliated with, directly or indirectly, any other corporation which is engaged in manufacturing, distributing, or exporting alcoholic beverages under a license or registration of this state or any other state of the United States, or if such applicant corporation is controlled by or the majority stock therein owned by another corporation, which latter corporation owns or controls in any way the majority stock or controlling interest in any other corporation that is engaged, directly or indirectly, in manufacturing, distributing, or exporting alcoholic beverages under a license or registration in this state or any other state in the United States."

13. The 1949 amendment to F.S. 561.22, expanded the prohibition against Florida licensed manufacturers holding a Florida vendor's license by including within the prohibition manufacturers licensed in "any other state in the United States." Clearly, if the original 1935 prohibition were deemed to apply to all manufacturers licensed outside of Florida, there would have been no need whatsoever for the 1949 amendment. The 1949 amendment is the latest expression of the legislative intent and clearly precludes only those manufactures licensed in "this state or any other state of the United States" from holding an interest in a Florida licensed vendor.

14. It is further readily apparent that if the Tied House law, F.S. 561.42(1), barred any manufacturer, whether domestic or foreign, from having any financial interest in a licensed vendor in this state, there would likewise have been absolutely no reason for the enactment of the 1949 amendments to F.S. 561.22. Indeed, the 1949 amendments are meaningful because F.S. 561.22(1) and F.S. 561.42(1), prior to the amendments, applied only to Florida licensed manufacturers, distributors and vendors.

15. See also F.S. 561.221(1)(a) which provides:

"Nothing contained in s. 561.22, s. 561.42, or any other provision of the Beverage Law prohibits the ownership, management, operation, or control of not more than three vendor's licenses for the sale of alcoholic beverages by a manufacturer of wine who is licensed and engaged in the manufacture of wine in this state, even if such manufacturer is also licensed as a distributor;...

Since F.S. 561.221(1)(a) applies only to a Florida licensed manufacturer who also seeks to hold a Florida vendor's license, it was necessary to except such Florida licensed manufacturer from the prohibitions of both F.S. 561.22(1) and 561.42 (1).

16. Consequently, any construction of F.S. 561.22 that deems this statute to be applicable to a manufacturer located solely in a foreign jurisdiction ignores the Legislature's use of the limiting language "under a license or registration in this state or any other state in the United States". It is therefore respectfully submitted that F.S. 561.22 is of no application to Petitioner's factual situation.

17. In light of the foregoing, it is clear that F.S. 561.22 and F.S. 561.42(1), are inapplicable to Angostura's particularized factual situation. No other provisions of the Beverage Law specifically address Angostura's factual situation and Angostura is authorized by the Beverage Law to acquire an interest, including a controlling interest, in a Florida licensed vendor.

For the foregoing reasons it is respectfully submitted that such question should be answered in the affirmative.

RESPECTFULLY SUBMITTED this 12th of February, 2001.

By: 

LOUIS J. TERMINELLO.
Florida Bar Number 872547
Terminello & Terminello, P. A.
2700 S.W. 37th Avenue
Miami, FL 33133-2728
(305) 444-5002 Telephone
(305) 448-5566 Fax

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been sent by U.S. Mail to Sarah Wachman, Clerk, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, 1940 North Monroe Street, Tallahassee, Florida 32399-1021 this 12th day of February, 2001.


LOUIS J. TERMINELLO

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF ALCOHOLIC BEVERAGES)
AND TOBACCO,)

Petitioner,)

vs.)

MANOS, INC., d/b/a SEA PORT,)
a/k/a LIGHTHOUSE,)

Respondent.)
_____)

RECEIVED

SEP 27 2001

OFFICE OF GENERAL COUNSEL

Case No. 01-3132

NOTICE OF HEARING

A hearing will be held in this case at the Department of Children and Family Services, Building F, Room F121, 705 Blake Avenue, Cocoa, Florida, on October 23 and 24, 2001, at 9:00 a.m., or as soon thereafter as can be heard. Continuances will be granted only by order of the Administrative Law Judge for good cause shown.

ISSUE: As set forth in the Notice of Hearing, dated August 15, 2001.

AUTHORITY: Chapter 120, Florida Statutes; and Chapter 28-106, Parts I and II, Florida Administrative Code.

The parties shall arrange to have all witnesses and evidence present at the time and place of hearing. Subpoenas will be issued by the Administrative Law Judge upon request of the parties. All parties have the right to present oral argument and to cross-examine opposing witnesses. All parties have the right to be represented by counsel or other qualified representative, in accordance with Rule 28-106.106, Florida Administrative Code. Failure to appear at this hearing may be grounds for entry of a recommended order of dismissal.

The agency shall be responsible for making the necessary arrangements for a court reporter.

September 25, 2001



DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

COPIES FURNISHED:

Raymond Cascella, President
Manos, Inc., d/b/a Sea Port
a/k/a Lighthouse
680 George King Boulevard
Cape Canaveral, Florida 32920

Michael J. Wheeler, Esquire
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street, Suite 60
Tallahassee, Florida 32399-2202

ROOM CONFIRMATION COPY:

Connie Balog
Department of Children and Family Services
705 Blake Avenue
Cocoa, Florida 32922
(321) 690-3870
SUNCOM 362-3870

In accordance with the Americans with Disabilities Act, persons needing a special accommodation to participate in this proceeding should contact the Judge's secretary no later than seven days prior to the hearing. The Judge's secretary may be contacted at the address or telephone numbers above, via 1-800-955-8771 (TDD), or 1-800-955-8770 (Voice) Florida Relay Service.

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

In re:

Final Order No. BPR-2001-01151 Date: **3-16-01**
FILED

Department of Business and Professional Regulation
AGENCY CLERK

Sarah Wachman, Agency Clerk

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

By:

Brandon M. Nichols

FITZPATRICK ENTERPRISES, INC.,
Petitioner.

DS 2000-026

DECLARATORY STATEMENT

This Declaratory Statement is rendered by the Director of the Division of
Alcoholic Beverages and Tobacco, (Division) pursuant to ss. 120.565 and 561.15, Florida
Statutes.

ISSUES

1. Whether the product "Cosmic Jelly" and similar products manufactured and sold by Fitzpatrick Enterprises, Inc., and all ethyl alcohol intended for use or used by the said Petitioner in the manufacture of such "Cosmic Jelly" products, are exempt from regulation by the State of Florida, under the laws relating to Alcoholic Beverages and Tobacco, Florida Statutes Title XXXIV, Chapters 561, 562, 563, 564, 565, 567, and 568.
2. Whether manufacturers of ethyl alcohol are entitled to sell, ship, deliver, or otherwise transfer possession of ethyl alcohol in bulk or otherwise to Fitzpatrick Enterprises, Inc., for use in manufacturing the product "Cosmic Jelly" and all similar products manufactured by Fitzpatrick Enterprises, Inc.

3. Whether freight and goods carriers of all descriptions are entitled to convey ethyl alcohol in bulk or otherwise, from manufacturers thereof, wheresoever situated, and deliver same to Fitzpatrick Enterprises, Inc., at the premises where the product "Cosmic Jelly" and all similar products of Fitzpatrick Enterprises, Inc., are manufactured.

FACTS

On December 20, 2000, the Division received a Petition for Declaratory Statement filed by Jeffrey F. Pattinson as President/Director of Fitzpatrick Enterprises, Inc. (Petitioner).

According to correspondence previously received from Petitioner, Petitioner is a manufacturer's representative, importer and exporter in Miami, who has developed plans to manufacture "Cosmic Jelly", a product using ethyl alcohol. "Cosmic Jelly" is made from various beverages (e.g. rum, grain alcohol, brandy, tequila) and other ingredients, and is processed into a gelatin that, according to Petitioner, remains indefinitely in a gelatin state unless exposed to high heat.

The Division has previously informed Petitioner that it does not consider "Cosmic Jelly" to be a product that the Division regulates. Therefore the Division could not issue an alcoholic beverage license to the Petitioner, either as a manufacturer, distributor, or retailer. Consequently, the statutory constraints of the "three tier" system of alcoholic beverage regulation in Florida would prohibit the Petitioner from purchasing alcohol in bulk directly from alcoholic beverage manufacturers for ingredients in Petitioner's product. The Petitioner states that purchasing the necessary alcoholic beverages at the retail level in units no larger than the permitted 1.75 liters would not be feasible.

The Petitioner has submitted a request for a declaratory statement pursuant to Florida Statutes section 120.656(2)(2000) to clarify whether: (1) this product is exempt from regulation of the Florida alcoholic beverage laws; (2) they may receive bulk shipments of alcohol directly from alcohol manufacturers for use in manufacturing "Cosmic Jelly"; (3) freight carriers may ship alcoholic beverages to Petitioner at the manufacturing site.

ANALYSIS

Prior to the filing of the instant Petition, The Division has stated to the Petitioner that the product in question, "Cosmic Jelly", appeared to be essentially a food product, and therefore the Petitioner could not be licensed as a manufacturer of alcoholic beverages. Conversely, correspondence from the Petitioner to the Division related that the federal Bureau of Alcohol, Tobacco and Firearms (BATF) has evaluated "Cosmic Jelly" for federal regulatory purposes and has classified it as a "distilled spirit specialty, fit for beverage purposes".

Section 561.01 (4)(a), Florida Statutes defines "alcoholic beverages" as "...distilled spirits and all beverages containing one half of 1 percent or more alcohol by volume."

Section 561.01 (5), Florida Statutes defines "intoxicating beverage" and "intoxicating liquor" as "...only those alcoholic beverages containing more than 4.007 percent of alcohol by volume."

If the product "Cosmic Jelly" were evaluated solely as to the amount of alcohol included--11% or more, according to the Petitioner--it would meet the threshold for both of the above statutory definitions.

The question then remains as to whether the product's intended gelatin-like state when sold removes it from consideration (and regulation) as an alcoholic/intoxicating beverage. Section 561.02, Florida Statutes excludes several ethyl alcohol products or applications from the Division's regulatory purview:

[N]one of the provisions of the Beverage Law shall apply to ethyl alcohol intended for use or used for the following purposes:

- (1) Scientific, chemical, mechanical, industrial, or medicinal purposes;
- (2) Patented, patent, proprietary, medicinal, pharmaceutical, antiseptic, toilet, scientific, chemical, mechanical or industrial preparations, or products unfit for beverage purposes;
- (3) Flavoring extracts and syrups, unfit for beverage purposes.

Petitioner's product does not appear to substantially correlate to any of the ethyl alcohol products or applications listed above that are exempt from enforcement of the Beverage Laws. It is clear from Petitioner's correspondence with the Division that "Cosmic Jelly" is intended to be consumed as a stand alone item similar in fashion to alcohol based beverages commonly called "mixed drinks", "cocktails", "liqueurs", "cordials", etc., which use similar ingredients in the customary liquid form.

It is also noteworthy that "Cosmic Jelly" begins as a *liquid* mixture whose consistency is then altered through manufacturing processes into a gel-like substance that remains stable at ordinary temperatures; and that this gel can be *re-liquefied* through the application of high heat.

After further review, and additional consultation with BATF, the Division has concluded that the product referred to as "Cosmic Jelly", while not strictly an "alcoholic beverage" or "intoxicating beverage" in the classic sense, possesses characteristics more

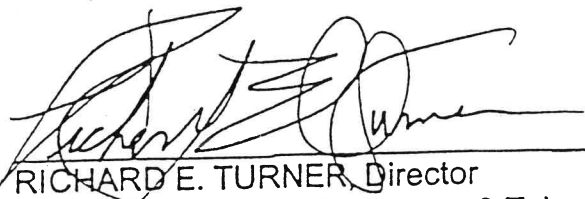
akin to an alcoholic/intoxicating beverage than a food product, both in its composition and its anticipated use. Also, based on correspondence between the Division and the Petitioner, the Petitioner does not envision marketing "Cosmic Jelly" as a food product, but more or less as a novelty containing alcohol as a prominent ingredient.

CONCLUSION

Petitioner's first question as set forth above is answered in the affirmative; Petitioner's second and third questions as set forth above are thereby rendered moot. The Division therefore makes the following declarations:

1. The Division will classify the product "Cosmic Jelly" as an "alcoholic beverage" and /or "intoxicating beverage".
2. The Division will regulate the product "Cosmic Jelly" as an "alcoholic beverage" and/or "intoxicating beverage", as defined in Section 561.01 (4)(a), Florida Statutes and Section 561.01 (5), Florida Statutes, respectively.
3. The Petitioner is subject to licensure by the Division as a manufacturer of alcoholic beverages, and, if qualified, is entitled to obtain a license for that purpose.

DONE AND ORDERED this 16th day of March, 2001.


RICHARD E. TURNER, 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 s. 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 and with this agency at the Office of the Agency Clerk, 1940 North Monroe Street, Tallahassee, FL 32399, within 30 days of rendition of this Order, accompanied by the appropriate filing fees.