

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

<b>FILED</b>	
Department of Business and Professional Regulation	
Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	<b>6/12/2014</b>
File #	<b>2014-04392</b>

IN RE:

PETITION FOR DECLARATORY STATEMENT  
TO THE DEPARTMENT OF ALCOHOLIC  
BEVERAGES AND TOBACCO,

On behalf of Jeffrey M. Borysiewicz,

**DS 2014-004**

**DECLARATORY STATEMENT**

This Declaratory Statement is rendered by the Director of the Division of Alcoholic Beverages and Tobacco (hereinafter "Division") pursuant to Section 120.565, Florida Statutes. The Petitioner, Jeffrey M. Borysiewicz, (hereinafter "Petitioner"), has filed a Petition for Declaratory Statement containing a statement of facts and a discussion of relevant Florida law, administrative rules, and prior Declaratory Statements issued by the Division. A copy of the Petition for Declaratory Statement is attached hereto and incorporated by reference.

**ISSUES PRESENTED**

The Petitioner presents the following issue to the division:

Whether Petitioner's involvement in Corporate Entity creates a "tier connection" between an alcoholic beverage vending license and an alcoholic beverage manufacturing license that is prohibited by Florida's "Tied house Evil" laws under Sections 561.42, 561.22, and 565.03.

**FINDINGS OF FACT**

1. On January 1, 2014, the Division received a Petition for Declaratory Statement from Petitioner Jeffrey M. Borysiewicz, thereby giving the Division ninety days to respond. The Division renders its Findings of Fact on the basis of the information contained in the Petition.
2. Notice of the Petition was published on January 28, 2014, in Volume 40, Issue 18 of Florida Administrative Weekly.

3. The conclusions of this Declaratory Statement are based on the facts described in the Petition 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. A summary of the facts connected with the Petition is as follows:

Petitioner, Jeffrey M. Borysiewicz, seeks to become a minority owner in a business entity (herein referred to as "Corporate Entity") structured as either a limited liability corporation or another corporate form that has ownership interests divided among different investors. This Corporate Entity plans to operate as a tourist-attracting Craft Distillery with an alcoholic beverage manufacturing license from the State of Florida. Corporate Entity's purpose involving Petitioner in its business is solely to utilize his capital in commencing the business venture. Petitioner will not be a director or officer of the Corporate Entity nor involved in the daily operations of the business. Petitioner's association with Corporate Entity will be limited to a minority ownership interest equal to or less than 33.3 percent. All management decisions of the Craft Distillery will be controlled by the officers and directors of Corporate Entity.

Petitioner also presently owns and operates the Corona Cigars Company, a chain of retail stores for tobacco and tobacco-related products with a small lounge area for the sale and consumption of beer, wine, and distilled liquors. Corona Cigars is a privately-owned company wholly and individually owned by Petitioner. The company consists of 3 retail stores, all located within the Central Florida area. Within the stores, Corona Cigars operates lounges that serve an assortment of alcoholic beverages. In order to sell alcoholic beverages at each location, Corona Cigars operates and maintain three 4COP vending licenses issued by the Division. Petitioner does not individually own title to any alcoholic beverage vendor licenses, but due to Petitioner's ownership of Corona Cigars, there is a link between himself and Corona Cigars' alcoholic beverage vendor licenses.

Petitioner notes that because of the lengthy nature of the distillation period, Corona Cigars is unlikely to begin selling spirits from Corporate Entity's Craft Distillery for anywhere from several months to several years. Petitioner also pledges that no more than 20 percent of the combined annual total of all alcoholic beverages purchased by Corona Cigars shall be produced by Corporate Entity's Craft Distillery. Further, Petitioner states that if the Division is to approve this Declaratory Statement, Corporate Entity is willing to file annual affidavits to verify that neither Corporate Entity nor Petitioner will manipulate or gain an unfair advantage in the distilled spirits market for a period of three years after the effective date of the Declaratory Statement.

Petitioner seeks an answer as to whether his ownership position at Corona cigars could prevent him from maintaining an ownership interest in Corporate Entity under Sections 561.22 and 561.42. Corporate Entity's future business plans are pending resolution of this issue.

## CONCLUSIONS OF LAW

4. 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, Florida Statutes.

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. Pursuant to this authority, the Division is empowered 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. 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. Section 120.565, Florida Statutes, provides:

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

7. Rule 28-105.001, Florida Administrative Code, provides:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

8. Petitioner plans to continue operating his Corona Cigar store, which engages in the business of alcohol sales for a percentage of its monthly revenue. Petitioner also plans to hold an ownership interest on an alcohol manufacturing business ("Corporate Entity") while

maintaining ownership and management of Corona Cigars. Petitioner would thus be substantially affected by the application of the Beverage Law. Under the above stated laws, the Division finds that Petitioner, Jeffrey M. Borysiewicz, has standing to seek this declaratory statement.

9. § 561.22, Florida Statutes, provides:

- (1) Except as provided in this section, any applicant may receive a license as a manufacturer or distributor or may be registered as an exporter, but a license or registration may not be issued to a manufacturer, distributor, or exporter as a vendor, and a license or registration may not be issued to a vendor as a manufacturer, distributor, or exporter.
- (2) (a) If any applicant for a vendor's license or renewal thereof is an individual, such individual is within the provisions of subsection (1) if he or she is interested or connected, directly or indirectly, with any corporation which is engaged, directly or indirectly, or through any subsidiary or affiliate corporation, including any stock ownership exceeding 0.5 percent owned individually, including a 0.5 percent interest in a blind or revocable trust, as set forth in subsection (3), in manufacturing, distributing, or exporting alcoholic beverages under a license or registration of this state or any state of the United States.  
  
(b) If any applicant for a vendor's license or renewal thereof is a copartnership, such copartnership is within the provisions of subsection (1) if any member of the copartnership is interested or connected, directly or indirectly, with any corporation which is engaged, directly or indirectly, or through any subsidiary or affiliate corporation, including any stock ownership as set forth in subsection (3), in manufacturing, distributing, or exporting alcoholic beverages under a license or registration of this state or any state of the United States.
- (3) 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.

10. § 561.42, Florida Statutes, provides:

- (1) No manufacturer, distributor, importer, primary American source of supply, or brand owner or registrant of any of the beverages herein referred to, whether licensed or operating in this state or out-of-state, nor any broker, sales agent, or sales person thereof, shall have any financial interest, directly or indirectly, in the establishment or business of any vendor licensed under the Beverage Law...

11. The purpose of § 561.42 is to prevent the integration of retailer and wholesale outlets and to remove retailer from financial or business obligations to the wholesaler or manufacturer, with the exception of ordinary commercial credit. Pickerill v. Schott, 55 So. 2d 716, 717 (Fla. 1951). Therefore, the licensing of an alien manufacturer as a vendor, and vice versa, would violate §§ 561.42 and 561.22, F.S.. In re: Petition for Declaratory Statement, On behalf of Angostura Holdings Limited, BPR 2001-03114, July 20, 2001.

12. § 561.22(1), F.S., prohibits the licensing of a manufacturer or distributor as a vendor, or the licensing of a vendor as a manufacturer or distributor. Further, § 561.22(3), F.S., sets forth two circumstances in which a corporate applicant will be prohibited from obtaining a vendor's license: when the corporate applicant is directly or indirectly affiliated with any other corporation which is engaged in manufacturing, distributing, or exporting alcoholic beverages, and when the corporate applicant is controlled or majority 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 directly or indirectly engaged in manufacturing, distributing, or exporting alcoholic beverages.

13. [T]wo corporations are "affiliated with" each other only when the same individual, or a group of cooperating individuals having common interests, have the power to control formation and execution of the business policies of both corporations. Such control may be from stock ownership, voting trusts, common officers, contracts, or a combination of two or more of these elements, but there must be an actual practical control or a legal power to control. In re: Petition

for declaratory statement, On behalf of BK WHOPPER BAR, LLC, a Florida Limited Liability Company and BURGER KING CORPORATION, a Florida corporation, DS 2012-062, April, 2013 (quoting Walter J. John and Southern Wine and Spirits, Inc. v. Meiklejohn, Case No 68-196 (Fla. 2d Jud. Cir. 1968) (Judgment)).

14. Also persuasive is the Florida Business Corporation Act, § 607.0901(1)(a), Florida Statutes, which states:

“Affiliate” means a person who directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, a specified person.

15. Petitioner plans to obtain an ownership interest in an alcoholic beverage manufacturing business while simultaneously maintaining an ownership interest in Corona Cigars, a tobacco and alcoholic beverage vendor. Section 561.22(3) prohibits a person who maintains a direct or indirect affiliation with a manufacturer from obtaining a vendor’s license. It derives from this interpretation that someone who already has ownership of an alcoholic beverage vending business cannot become affiliated with an alcoholic beverage manufacturer. The fact that petitioner does not individually own title to the alcoholic beverage vendor licenses issued to Corona Cigars is irrelevant, as he is the sole owner of Corona Cigars and financially profits from the sale of alcoholic beverages performed under these licenses (17 percent of Corona Cigars’ total gross revenue). Further, Petitioner would be affiliated with both Corona Cigars and Corporate Entity through his ownership interests and potential opportunity to exert financial control. The potential harm of this affiliation cannot be ameliorated by the three years of annual compliance affidavits that petitioner proposes. Essentially, this proposed plan would leave open the possibility of a violation after the three year period.

### CONCLUSION

16. In his proposed business operations, Petitioner would be directly engaged in the sale of alcoholic beverages in the State of Florida while also maintaining an ownership interest in an alcoholic beverage manufacturing business. These proposed business operations would violate Sections 561.42 and 561.22, Florida Statutes, because they would require the Petitioner to hold a direct financial interest on both an alcoholic beverage vending license and an alcoholic beverage manufacturing license, conduct which the aforementioned statutes expressly prohibit.

Dated this 11<sup>th</sup> day of June, 2014.

A handwritten signature in black ink, appearing to read "William N. Spicola", is written over a horizontal line.

William N. Spicola, Director  
Division of Alcoholic Beverages and Tobacco  
1940 North Monroe Street  
Tallahassee, Florida 32399-1020

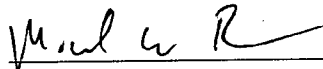
**RIGHT TO APPEAL**

THIS DECLARATORY STATEMENT CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED PURSUANT TO 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 RONDA BRYAN, 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 David M. Campione, Esq. at 2750 Dora Avenue, Tavares, FL 32778 on this

12 day of ~~May~~  
*June*, 2014.



Michael W. Ross  
Chief Attorney.



**DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO**

<b>FILED</b>	
Department of Business and Professional Regulation Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	1/17/2014
File #	

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

The Petitioner, Jeffrey M. Borysiewicz ("Petitioner"), hereby petitions the Florida Department of Business and Professional Regulation's Division of Alcoholic Beverages and Tobacco ("Division"), pursuant to Florida Statute Section 120.565 for a Declaratory Statement as to the applicability of Florida Statute Sections 561.22, 561.42 and 565.03 to Petitioner's particular set of circumstances enumerated herein:

**Parties**

1. The name, address, email address, telephone number and fax number of the Petitioner is as follows:

**RECEIVED**

**JAN 27 2014**

**DBPR  
OGC-AB&T**

Jeffrey M. Borysiewicz  
7792 West Sand Lake Road  
Orlando, Florida 32819  
Email: coronacigar@yahoo.com  
Telephone: 407-404-5344  
Facsimile: 407-404-5345

**DS 2014-004**

**Facts**

2. Petitioner will be a minority owner in a business entity structured as either a limited liability corporation (LLC) or another corporate form that has ownership interests divided among different investors ("Corporate Entity").
3. Corporate Entity is planning on owning and operating a Craft Distillery in the State of Florida.
4. In order to operate the Craft Distillery, Corporate Entity will apply for an applicable Florida alcoholic beverage manufacturing license.
5. Corporate Entity will faithfully operate the Craft Distillery under the recently amended provisions of Florida Statute Section 565.03.
6. Corporate Entity intends on profitably operating the Craft Distillery as a tourist attraction to capitalize on the millions of visitors that vacation in the Sunshine State each year.
7. Petitioner, a proposed minority owner of Corporate Entity, also owns and operates the Corona Cigar Company ("Corona Cigars"), a chain of retail stores for tobacco and tobacco related products with a small lounge area for the sale and consumption of beer, wine and distilled spirits.

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**JAN 17 2014**

**DBPR Agency Clerk**

8. Corona Cigars is a privately-owned company wholly and individually owned by Petitioner.
9. Corona Cigars is known for its world-class variety of cigars and other tobacco products. Corona Cigars sells thousands of brands of cigars from over a dozen different countries. It furnishes its stores with authentic South American furniture, décor, and music to create an ambience associated with cigar smoking. *See attached.*
10. Corona Cigars has three retail stores, all located within the Central Florida area. Corona Cigar's customer base consists mainly of experienced tobacco smokers and cigar aficionados. In order to draw a wider-range of clientele to these retail stores, Corona Cigars operates "lounges" within its stores that serve an assortment of alcoholic beverages. *See attached.*
11. In order to sell alcoholic beverages at its different retail stores, Corona Cigars operates and maintains three 4COP vending licenses, all issued by the Division as required by Florida law. *See attached.*
12. Petitioner does not individually own title to any alcoholic beverage vendor licenses. However, due to Petitioner's ownership of Corona Cigars, there is a link between himself and Corona Cigar's alcoholic beverage vendor licenses.
13. The vast majority of Corona Cigar's business is from the sale of tobacco and tobacco related products. Corona Cigars' annual sales of alcoholic beverages currently only represent approximately 17% of total gross revenue. Corona Cigar stocks and sells over 300 varieties of distilled spirits, with no one particular brand of spirit accounting for more than 1.7% of liquor sales.
14. Corona Cigar's sale of liquor within its lounges does not directly compete with other alcoholic beverage vendor establishments in the Central Florida area. Corona Cigar's lounges are located within what are primarily retail stores for tobacco clients. It is not a business established primarily for the dispensing of alcoholic beverages.
15. Corporate Entity is substantially affected by Florida Statute Sections 561.22 and 561.42. Corporate Entity is in doubt as to whether Petitioner's position at Corona Cigars prevents him from maintaining an ownership interest in Corporate Entity. Corporate Entity's future business plans are pending resolution of this issue.
16. Corporate Entity understands and supports the principles behind Florida's "Tied House Evil" statutes. Corporate Entity neither wants to nor intends, directly or indirectly, to violate its rules under Sections 561.22 and 561.42.

17. Corporate Entity's purpose in involving Petitioner is to utilize Petitioner's capital in commencing the Craft Distillery venture. Corporate Entity has no desire to use its connection with Petitioner for the purpose of obtaining an interest in, connection with, or affiliation with Corona Cigars or any other Florida alcoholic beverage vendor.

18. Petitioner's association with Corporate Entity will be limited to a minority ownership interest equal to or less than 33.3%.

19. Petitioner will not be a director or officer of Corporate Entity, or involved in the daily operations of the Craft Distillery. Further, no other board member, director, officer, or investor in Corporate Entity will have any connection, financial or operational, with Corona Cigars.

20. The management decisions of the Craft Distillery, including the decisions as to the variety and quantity of its distilled spirits, will be controlled by the officers and directors of Corporate Entity.

21. Petitioner's position with Corporate Entity does not allow Corona Cigars any opportunity to manipulate or control the day-to-day operations of Corporate Entity's Craft Distillery, or vice-versa.

22. There will never be any obligation on the part of Corona Cigars to purchase or promote Corporate Entity's Craft Distillery or its distilled spirits. Corona Cigars will continue to operate independently of Corporate Entity, thus exercising the freedom and autonomy to select and purchase various types, brands, and quantities of alcoholic beverages based on the demand of its patrons, availability, pricing and other relevant factors.

23. Petitioner pledges that no more than twenty percent (20%) of the combined annual total of all alcoholic beverages (measured by gallons) purchased by Corona Cigars shall be produced by Corporate Entity's Craft Distillery.

24. In Petitioner's particular set of circumstances, the lengthy nature of the distillation process itself would not allow Corona Cigars to begin selling spirits from Corporate Entity's Craft Distillery for anywhere from several months to several years.

25. Craft Distillery is by definition a manufacturer that is *already* its own retailer. Corporate Entity has no incentive to violate the "Tied House Evil" rules through Petitioner's tangential involvement because the Craft Distillery is already an exception to those rules.

26. To further verify that neither Corporate Entity nor Petitioner will manipulate or gain an unfair advantage in the distilled spirits market, for a period of three years after the effective date of the Division's Final Order approving this Declaratory Statement: Corporate Entity will annually file, on or before January 31<sup>st</sup>, affidavits that establish that the above

described factual circumstances still exist and shall annually provide to the Division the percentage which alcoholic beverage products produced by Corporate Entity's Craft Distillery make up the total of all alcoholic beverage products which are purchased by Corona Cigars during the previous calendar year.

#### **Memorandum Of Law**

The Division has jurisdiction and authority to review and respond to this Declaratory Statement pursuant to Florida Statute Sections 120.565, 561.02, 561.08, 561.22, and 561.42.

Section 561.08 empowers and directs the Division to enforce the provisions of the Beverage Law (Chapters 561 and 562). It is the province of the Division to construe and interpret provisions within the Beverage Law and determine whether those provisions are applicable to Petitioner's particular set of circumstances.

A decision by a Florida administrative agency that interprets the intent of a statutory provision will generally be upheld by a court. See e.g., *SOS Afford v. School Board*, 511 So.2d 438 (Fla. 1<sup>st</sup> DCA 1987). A statute should be interpreted to give effect to the clear and unambiguous legislative intent derived from the words and plain language used, and not through speculation of what was subjectively intended. *Zuckerman v. Alter*, 615 So.2d 661 (Fla. 1993). Consequently, legislative intent is the polestar by which an agency or court must interpret statutory provisions. *In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender*, 561 So.2d 1130 (Fla. 1990).

Additionally, it is an important principle of interpretation that a statute should be construed in a way that avoids arbitrary, absurd, and unreasonable results. *Carawan v. State*, 515 So.2d 161 (Fla. 1987). Unreasonable or ridiculous interpretations distort fundamental principles of statutory construction and necessitate the use of reasonable interpretations. *Drost v. State Department of Environmental Regulation*, 559 So.2d 1154 (Fla. 3<sup>rd</sup> DCA 1989).

The overall purpose and intent of Florida Statutes Sections 561.22 and 561.42 is to prevent integration among the different tiers of Florida's alcoholic beverage industry (vendors, distributors, and manufacturers). See *Mayhue's Super Liquor Store, Inc. v. Meiklejohn*, 426 F.2d 142, 147 (Fla. 5<sup>th</sup> Cir. 1970); *Musleh v. Fulton Distributing Co. of Florida*, 254 So.2d 815 (Fla. 1<sup>st</sup> DCA 1971); *Central Florida Distributing Company*, 324 So.2d 143, 145 (Fla. 1<sup>st</sup> DCA 1976).

Section 561.42 states the applicable portion of the "Tied House Evil" law, also known as the "Three Tier Rule"

**No manufacturer ... shall have any financial interest, directly or indirectly, in the establishment or business of any vendor licensed under the Beverage Law....**

Sections 561.22(1) and 561.22(5) further expound into the specifically prohibited connections between a manufacturer and a vendor.

Section 561.22(1) states:

**Except as provided in this section, any applicant may receive a license as a manufacturer or distributor or may be registered as an exporter, but a license or registration may not be issued to a manufacturer, distributor, or exporter as a vendor, and a license or registration may not be issued to a vendor as a manufacturer, distributor, or exporter.**

Section 561.22(5) provides as follows:

**If any applicant for a manufacturer's or distributor's license or an exporter's registration, 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 selling alcoholic beverages as vendor under a license of this state or when 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 selling alcoholic beverages as vendor under a license of this state.**

Florida courts have held that the general principle of the "Tied House Evil" laws concern the prevention of large manufacturing entities from controlling small independent retailers. See *Pickerill v. Schott*, 55 So.2d 716, 718 (Fla. 1951); *Hunter v. McKnight*, 86 So.2d 434, 435 (Fla. 1956). The laws are meant to protect retailers from coercive control and to protect the public's interest in the fair pricing of alcoholic beverages. See *Musleh v. Fulton Distributing Co. of Florida*, 254 So.2d 815 (Fla. 1<sup>st</sup> DCA 1971).

Attempting to reconcile the broad interpretable language of the Florida Statutes with the specific principles of Florida case law has led to confusion in establishing what types of relationships violate the "Tied House Evil" laws. This confusion has led many individuals and corporate entities to petition the Division of Alcoholic Beverages and Tobacco for clarification on what kinds of "tier connections" the "Tied House Evil" laws prohibit.

The Division has used two different tests to determine whether a prohibited connection exists between two separate alcoholic beverage tiers. If the results of these tests determine that the connection between the tiers is "remote", then there is no control of one tier over the other and no "direct or indirect, financial interest" linking them, and therefore no violation of the "Tied House Evil" provisions. See BPR-97-03610, *Sega Gameworks, L.L.C.*, Order on Declaratory Statement, April 17, 1997, pgh. 14. If the results of these tests determine that there was "affiliation"<sup>1</sup>, "ownership" or control then there is a "direct or indirect, financial interest" between two tiers, and therefore a violation of the "Tied House Evil" provisions. See DS-2011-017, *BK Whopper Bar*, Order Denying Declaratory Statement, March 8, 2012.<sup>2</sup>

The Division has previously analyzed Section 561.22(3) in a prior Declaratory Statement. See DS-2011-017, Order Denying Declaratory Statement, March 8, 2012, pgh. 20-24. Section 561.22(3) includes language identical to Section 561.22(5), the only difference being that Section 561.22(3) addresses a corporate applicant for a vendor's license while Section 561.22(5) addresses a corporate applicant for a manufacturing or distributing license. Therefore, although the Division has not had an opportunity to specifically analyze Section 561.22(5) in detail, Corporate Entity will argue under the assumption that the Division would apply similar reasoning and construction for the same words appearing in both sections. See *Goldstein v. Acme Concrete Corp.*, 103 So.2d 202 (Fla. 1958).

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<sup>1</sup> Petitioner asserts the use of the term "affiliation" only in connection to a corporate applicant, as listed in Sections 561.22(3) and 561.22(5). Petitioner has no opinion on that term's connection with Individual or Partnership license applicants under Section 561.22(2).

<sup>2</sup> For purposes of this Declaratory Statement, Petitioner accepts the Division's previous Interpretation of a limited liability company being included under the term "corporation" in Section 561.22(3). Petitioner applies that same Interpretation to the meaning of the term "corporation" included in Section 561.22(5). See *In Re: Petition for Declaratory Statement on behalf of BK Whopper Bar*, ds-2011-017, quoting *Olmstead v. Federal Trade Commission*, 44 So. 3d 76, 80 (Fla. 2010).

### Application

The question at issue in this Petition is whether Petitioner's tangential involvement in Corporate Entity creates a "tier connection" between an alcoholic beverage vending license and an alcoholic beverage manufacturing license that is prohibited by Florida's "Tied House Evil" laws under Sections 561.42, 561.22 and 565.03.

In response, Petitioner would first assert that the "tier connection" created through Petitioner's involvement with Corporate Entity does not violate the general principles and spirit of the "Tied House Evil" rules.

Under Florida jurisprudence, the principle function of the "Tied House Evil" laws has always been to protect small independent retailers from the indomitable influence of vast manufacturing and distributing entities. See *Musleh v. Fulton Distributing Co. of Florida*, 254 So.2d 815 (Fla. 1<sup>st</sup> DCA 1971); *Hunter v. McKnight*, 86 So.2d 434, 435 (Fla. 1956); *Pickerill v. Schott*, 55 So.2d 716, 718 (Fla. 1951). That possibility of a manufacturer exercising undue influence or control over retailers does not exist in Petitioner's particular set of circumstances. See *Mayhue's Super Liquor Store, Inc. v. Meiklejohn*, 426 F.2d 142, 147 (Fla. 5<sup>th</sup> Cir. 1970); *Central Florida Distributing Company*, 324 So 2d 143, 145 (Fla. 1<sup>st</sup> DCA 1976).

Corporate Entity is a business organization applying for a manufacturing license while having a tangential connection to a vendor's license. The vulnerable smaller entity in this "tier connection" is the proposed Craft Distillery. However, the opportunities for a vendor to control a manufacturer to the vendor's advantage are not nearly as prevalent or dangerous as the situation the "Tied House Evil" laws sought to prevent. A large manufacturer would have the financial ability and corporate network capable of forcing a small vendor to possibly manipulate pricing and inventory to its advantage. A large retailer whose primary source of business is cigars has no business leverage over a small liquor manufacturer. In fact, as mentioned above, the ability of that small liquor manufacturer to sell its own product further diminishes a fear of undue control by the tobacco retailer. See Florida Statute Section 565.03.

Furthermore, Petitioner's particular set of circumstances successfully passes all of the Division's tests of control, ownership, and affiliation. As mentioned above, the Division has previously addressed declaratory statements seeking clarification of rights under Sections 561.42 and 561.22. In the Universal City Florida Partners ("UCFP") and Seagrams ("SEAGRAM")

Declaratory Statement, the Division found that a corporate entity with ownership of a manufacturing license (SEAGRAM) who purchased another corporate entity with incidental ties to a vendor's license (UCFP) did not amount to a violation of the "Tied House Evil" laws. See BPR-96-01977, Order Approving Declaratory Statement, April 8, 1996, pgh. 42. As a part of this decision, the Division found the following factors critical:

- (1) The primary business of UCFP was not the sale of alcoholic beverages
- (2) The operation of UCFP could not be controlled by SEAGRAM
- (3) UCFP was not obligated to purchase or promote SEAGRAM products
- (4) SEAGRAM would not be involved in the day-to-day operation of UCFP
- (5) The officers and directors of SEAGRAM would not serve as officers or directors of UCFP
- (6) No more than 20 percent of the combined annual total of all alcoholic beverages (measured by gallons) purchased by UCFP would be produced by SEAGRAM.

See BPR-97-03610, Order Approving Declaratory Statement, April 17, 1997, pgh. 14.

In the instant case, Petitioner will not have the ability to independently exercise control over the Craft Distillery through his minority ownership interest in Corporate Entity.

- (1) The primary business of Petitioner/Corona Cigars is not the sale of alcoholic beverages.
- (2) The operation of Corona Cigars could not be controlled by the Craft Distillery, or vice-versa.
- (3) There will never be an obligation by Corona Cigars or the Craft Distillery to promote or purchase the other's products.
- (4) Petitioner will not be involved in the day-to-day operations of the Craft Distillery, or vice-versa.
- (5) The officers and directors of Corporate Entity will not serve as officers or directors of Corona Cigars, or vice-versa.
- (6) No more than 20 percent of the combined annual total of all alcoholic beverages (measured by gallons) purchased by Corona Cigars will be produced by the Craft Distillery.



Corporate Entity's situation is a "reverse" of UCFP and SEAGRAM. SEAGRAM was an alcoholic beverage manufacturer who bought a corporation that was incidentally involved in alcoholic beverage sales. Petitioner is a tobacco retailer modestly involved in alcoholic beverage sales that would like to have a minority ownership in alcoholic beverage manufacturing. In fact, Corporate Entity's position is further removed from "Tied House Evil" violations than even SEAGRAM, as Petitioner has no majority ownership in any business primarily dedicated to the sale, distribution, or manufacturing of alcoholic beverages.

The Division has an additional "Tied House Evil" test that analyzes a corporate applicant's "affiliation" with or "ownership" of a separate corporate entity that owns a different alcoholic beverage license. Under this test there are two circumstances when a corporate applicant will be prohibited from obtaining a manufacturer's license. See DS-2011-017, Order Denying Declaratory Statement, March 8, 2012, pgh. 21.

The first circumstance is when the corporate applicant for a manufacturing license is majority-owned by another corporation, which latter corporation owns or controls, directly or indirectly, a vendor establishment. This first circumstance enforces the general prohibition of "control" and "financial interest" as seen in Florida jurisprudence Florida Statute Section 561.42.

The second circumstance, of being in "affiliation" with another corporation, did not have a clear definition or application until it was just recently analyzed by the Division. See DS-2011-017, Order Denying Declaratory Statement, March 8, 2012, pgh. 21. The Division found that "affiliation" was meant to encompass all other relationships where "control of an applicant corporation is derived from *some other method than ownership*." [emphasis added] *Id.* These "other methods" included stock ownership, voting trusts, or any other means where actual practical control linked the two tiers. *Id.*, quoting *Walter J. John and Southern Wine and Spirits, Inc. v. Meiklejohn*, Case No. 68-196 (Fla. 2d Jud. Cir. 1968).

In the BK Whopper Bar Declaratory Statement of March, 8, 2012, the Division held that BK Whopper Bar's proposed business arrangement violated the "Tied House Evil" laws by failing the "affiliation" test. See *id.* at 24-25. Burger King proposed an arrangement where four directors of different Burger King corporate entities would have positions of control in both the manufacturing entity, Anheuser-Busch, and with the vending entity, Burger King. The Division held that although none of the four directors had a "controlling" or "majority ownership" interest

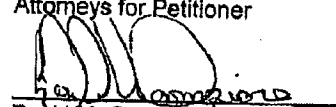
in any one entity that controlled an alcoholic beverage license, the fact that they were four "cooperating individuals [with] common interests in both Burger King...and [Anheuser-Busch]...[c]oupled with their director positions, ownership interests, and ability to control decision-making" created a prohibited connection of "affiliation."

Corporate Entity does not have the same ownership relationships as described in the BK Whopper Bar Declaratory Statement. Corporate Entity does not have a corporate hierarchy structured with numerous subsidiaries and entities. Corporate Entity will be a single entity running the day-to-day operations of the Craft Distillery. Corporate Entity does not have multiple officers acting as directors in different areas of the same corporation. Corporate Entity may have officers and directors managing the Craft Distillery, but none of them will be involved in Corona Cigars or any other alcoholic beverage vendor. Corporate Entity does not operate a network of different manufacturing operations across the country. At the moment, Corporate Entity is seeking to own and operate a single Craft Distillery in the State of Florida. Similarly, Petitioner does not have hundreds of retail establishments. Petitioner owns three stores, each retaining a 4COP license. Corporate Entity also does not have a "tier connection" with all three tiers of alcoholic beverages. See DS-2011-017, Order Denying Declaratory Statement, March 8, 2012, pgh. 14.

Wherefore, Petitioner requests a Declaratory Statement from the Division finding that Petitioner's proposed ownership interest in the aforesaid business structure of Corporate Entity is permissible under Florida Statutes Chapter 561, and Petitioner's ownership interest in Corporate Entity would not disqualify Corporate Entity from obtaining a Florida Alcoholic Beverage License as a manufacturer and "Craft Distillery" under Florida Statutes Chapters 561 and 565.

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