

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

IN RE:

DECLARATORY STATEMENT ON BEHALF
OF WINN DIXIE STORES, INC.,

DABT CASE NO.: 2020-002702
DS: 2020-005

Petitioner.

DS 2020-005

Final Order on Petition for Declaratory Statement

The Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (“Division”), pursuant to section 120.565, Florida Statutes, and rule 28-105.003, Florida Administrative Code, hereby issues this Final Order on the Petition for Declaratory Statement (“Petition”) requested on behalf of Winn Dixie Stores, Inc. (“Petitioner”).

Issue Presented

1. Petitioner requests a declaratory statement regarding whether: (1) Petitioner is substantially affected by the statute and rules cited in its Petition; (2) in the event of a product recall by a distributor, Petitioner may seek reimbursement from the distributor of any actual costs Petitioner incurs to remove, ship or dispose of the distributor’s recalled products; (3) a distributor’s reimbursement of the actual costs incurred by Petitioner in connection with the distributor’s product recall violates the provisions of chapter 561, Florida Statutes, or rule chapter 61A-1, Florida Administrative Code; and (4) Petitioner’s receipt of funds from a distributor as reimbursement of the actual costs incurred by Petitioner in connection with the distributor’s product recall violates the provisions of chapter 561, Florida Statutes, or rule chapter 61A-1, Florida Administrative Code.

2. In particular, Petitioner seeks a declaration from the Division as to the applicability of section 561.42(1), Florida Statutes, and rules 61A-1.010 and 61A-1.0107, Florida Administrative Code, to Petitioner's contractual provisions mandating the reimbursement of actual costs incurred by Petitioner in connection with a product recall.

Findings of Fact¹

3. On January 13, 2020, Petitioner submitted to the Division a Petition requesting that the Division provide a declaratory statement on the issues presented within the Petition. A copy of the Petition is attached hereto as "Exhibit A" and is incorporated by reference.

4. On January 21, 2020, the Division published notice of its receipt of the Petition in Volume 46, Number 13 of the Florida Administrative Register.

Petitioner's Proposed Business Model

5. Petitioner owns and operates multiple grocery stores in Florida that are licensed by the Division as retail vendors to sell alcoholic beverages to consumers.

6. Before purchasing alcoholic beverages from a distributor, Petitioner requires the distributor to agree, in writing, to reimburse Petitioner for the actual costs Petitioner incurs in connection with any recall by the distributor.

7. According to the Petition, the actual costs incurred by Petitioner in connection with product recalls typically include labor to remove the recalled products from Petitioner's shelves, shipping fees to return those products to the distributor or manufacturer, and any disposal costs.

8. In the event a distributor that supplies alcoholic beverages to Petitioner conducts a recall in the future, Petitioner wishes to enforce the terms of its recall agreement with the

¹ All of the facts presented in the Petition were duly considered, included in the record, and form the basis of this Order. The Division takes no position as to the accuracy of the facts and accepts them as submitted by Petitioner for the purpose of issuing this Final Order Granting the Petition.

distributor and seek reimbursement from the distributor of the actual costs Petitioner incurs as a consequence of the recall.

Intervenors

9. On February 5, 2020, the Wine and Spirits Distributors of Florida, Inc., the Florida Beer Wholesalers Association, Inc., and the Beer Industry of Florida, Inc., filed a motion to intervene. A copy of the motion is attached hereto as “Exhibit B” and is incorporated by reference.

10. On February 11, 2020, the Florida Independent Spirits Association filed a motion to intervene. A copy of the motion is attached hereto as “Exhibit C” and is incorporated by reference.

Conclusions of Law

11. The Division has jurisdiction over this matter. *See* §§ 120.565, 561.02, 561.08, and 561.11, Fla. Stat. The Division is responsible for the administration, regulation, and enforcement of chapters 561 through 568, Florida Statutes, referred to as the “Beverage Law.” *See* §§ 561.01(6), 561.02, Fla. Stat.

12. Petitioner has standing as a licensee and Intervenors have standing in this matter as associations of alcoholic beverage distributors and retailers. *See* § 120.565, Fla. Stat.

13. The purpose of section 561.42, Florida Statutes, is to prevent the evils of the “tied house” by prohibiting manufacturers, wholesalers, and distributors of alcoholic beverages from controlling retail outlets. *Pickerill v. Schott*, 55 So. 2d 716, 718-19 (Fla. 1951), *cert. denied*, 344 U.S. 815 (1952); *Musleh v. Fulton Distrib. Co. of Fla.*, 254 So. 2d 815, 817 (Fla. 1st DCA 1971).

14. The Division has the authority to adopt rules and enforce tied-house limitations on forms of assistance manufacturers, distributors, and vendors of alcoholic beverages can provide to each other. *See* § 561.42(8), Fla. Stat.

15. The Division promulgated rule 61A-1.010, Florida Administrative Code, which provides:

Industry members are prohibited from furnishing, supplying, giving, renting, or lending, to a vendor, any equipment, fixtures, furniture, furnishings, signs, supplies, credit, money, compensation, rebates, accumulated rebates, fees of any kind including slotting fees, services, property, or other thing of value of any description not included in the exceptions specified in chapter 61A-1, F.A.C., or specifically authorized by Florida Statutes, to vendors or their employees or agents acting within their scope of employment. In addition, vendors and their employees or agents acting within the scope of employment are prohibited from accepting such forms of assistance. This prohibition against assisting any vendor includes engaging in cooperative advertising – participating in or paying for any advertising in cooperation with a vendor.

16. The terms described in Petitioner's sample recall agreement do not appear anywhere in chapter 61A-1, Florida Administrative Code, as an exception. Petitioner admits as much. Likewise, the terms are not specifically authorized by Florida Statutes. Stated another way, the terms described in Petitioner's sample recall agreement neither qualify as an exception by rule nor are they expressly authorized by Florida's Beverage Law.

17. Accordingly, Petitioner's second, third, and fourth inquiries are answered in the negative.

Conclusion

Having considered the facts and circumstances set forth in the Petition, it is ORDERED that the Division hereby GRANTS the Petition for Declaratory Statement and answers Petitioner's inquiries as set forth above. It is further ORDERED that the motions to intervene are GRANTED. These conclusions have no application in the event that the factual

circumstances and/or relationships among the entities described herein are incorrect or change, or in the event the law or rules pertinent to Petitioner's petition are modified in the future.

DONE and **ORDERED** in Tallahassee, Florida this 3rd day of February, 2021.



A handwritten signature in cursive script, appearing to read "R. Sterling Whisenhunt", written over a horizontal line.

R. Sterling Whisenhunt, Director
Division of Alcoholic Beverages and Tobacco


Notice of Right to Appeal Unless Waived

Unless expressly waived, any party substantially affected by this final order may seek judicial review by filing an original Notice of Appeal with the Clerk of the Department of Business and Professional Regulation, and a copy of the notice, accompanied by the filing fees prescribed by law, with the clerk of the appropriate District Court of Appeal within thirty (30) days of rendition of this order, in accordance with rule 9.110, Florida Rules of Appellate Procedure, and section 120.68, Florida Statutes.

Certificate of Service

I hereby certify that the preceding Final Order on Petition for Declaratory Statement has been provided via U.S. mail and electronic mail to the following party on this 3rd day of February, 2021:

Daniel Hernandez, Esq.
Shutts & Bowen, LLP
4301 W. Boy Scout Blvd., Suite 300
Tampa, FL 33607
DHernandez@shutts.com



Ronda Bryan, Agency Clerk
Department of Business & Professional Regulation

Copies furnished to:
R. Sterling Whisenhunt, Director
Ross Marshman, Deputy General Counsel
Megan Kachur, Chief Attorney

FILED	
Department of Business and Professional Regulation	
Senior Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	1/13/2020
File #	

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

In Re: Petition for Declaratory Statement
on behalf of Winn Dixie Stores, Inc.

DS 2020-005

Petition for Declaratory Statement

Winn Dixie Stores, Inc., pursuant to section 120.565, Florida Statutes, and Rule 28-105.002, Florida Administrative Code, hereby petitions the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (the "Division"), to issue a declaratory statement regarding the applicability of section 561.42(1), Florida Statutes, and rules 61A-1.010 and 61A-1.0107, Florida Administrative Code, to the facts set forth below.

Issue Presented

Whether section 561.42(1), Florida Statutes, and rules 61A-1.010 and 61A-1.0107, Florida Administrative Code, prohibit a distributor of alcoholic beverage products from reimbursing the actual costs Winn Dixie incurs to remove, ship or dispose of the distributor's recalled products and whether Winn Dixie is prohibited from receiving such reimbursement.

Applicable Facts

1. Winn Dixie Stores, Inc. ("Winn Dixie") is a Florida corporation headquartered in Jacksonville, Florida. Winn Dixie's principal address is 8928 Prominence Parkway, #200, Jacksonville, Florida 32256. For purposes of this Petition, communications with Winn Dixie should be directed to the undersigned attorney at the address, e-mail or telephone number indicated below.

2. Winn Dixie owns and operates multiple grocery stores in Florida that are licensed by the Division to sell alcoholic beverages to customers on a retail basis.

Exhibit

A

3. Winn Dixie purchases the alcoholic beverages it sells to its customers from distributors licensed by the Division.

4. Before purchasing alcoholic beverages from a distributor, Winn Dixie requires the distributor to agree, in writing, to reimburse Winn Dixie for the actual costs Winn Dixie incurs in connection with any recall by the distributor. A sample recall agreement utilized by Winn Dixie in the past is attached hereto as Exhibit A.

5. Actual costs incurred by Winn Dixie in connection with product recalls typically include labor to remove the recalled products from Winn Dixie shelves and shipping fees to return¹ those products to the distributor.

6. In the event a distributor that supplies alcoholic beverages to Winn Dixie conducts a recall in the future, Winn Dixie wishes to enforce the terms of its recall agreement with the distributor and seek reimbursement from the distributor of the actual costs Winn Dixie incurs as a consequence of the recall.

7. Winn Dixie has a substantial interest in obtaining reimbursement of its labor, shipping and disposal costs related to product recalls and is in doubt as to whether Florida's Tied House laws prohibit it from seeking reimbursement of these costs. Winn Dixie is substantially affected by the laws and rules addressed in this Petition.

Applicable Laws and Rules

8. Section 561.42(1), Florida Statutes, prohibits vendors like Winn Dixie from accepting gifts, loans or rebates of money from distributors of alcoholic beverages:

(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

¹ If the distributor requests that Winn Dixie dispose of the recalled products rather than returning them, Winn Dixie may seek reimbursement from the distributor of the actual disposal costs it incurs.

state or out-of-state, nor any broker, sales agent, or sales person thereof, shall . . . 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 manufacturer, distributor, importer, primary American source of supply, brand owner or brand registrant, or any broker, sales agent, or sales person thereof.

9. Rule 61A-1.010, Florida Administrative Code, implements Section 561.42(1) and clarifies that a vendor may not accept compensation or fees of any kind from a distributor unless the compensation or fee meets one of the limited exceptions set forth in rule chapter 61A-1:

(1) Industry members are prohibited from furnishing, supplying, giving, renting, or lending, to a vendor, any equipment, fixtures, furniture, furnishings, signs, supplies, credit, money, compensation, rebates, accumulated rebates, fees of any kind including slotting fees, services, property, or other thing of value of any description not included in the exceptions specified in Chapter 61A-1, F.A.C., or specifically authorized by Florida Statutes, to vendors or their employees or agents acting within their scope of employment. In addition, vendors and their employees or agents acting within the scope of employment are prohibited from accepting such forms of assistance. This prohibition against assisting any vendor includes engaging in cooperative advertising – participating in or paying for any advertising in cooperation with a vendor.

(2) As used in Rules 61A-1.010 through 61A-1.0108, F.A.C., “industry member” means manufacturer; distributor; importer; primary American source of supply; brand owner or registrant; and any broker, sales agent, or sales person of any of the aforementioned licensees.

10. None of the exceptions set forth in rule chapter 61A-1 appear to apply to the facts set forth in this Petition.

11. For example, rule 61A-1.0107, Florida Administrative Code, provides that a vendor may return a recalled product to the distributor for cash, but does not address a vendor’s

ability to seek reimbursement from the distributor of the costs the vendor incurs to return the recalled product:

(1) Vendors who make a request for return of damaged products within fifteen days after delivery may receive exchange of product, cash, or a credit against outstanding indebtedness.

.....

(3) No return of the product shall be permitted if the vendor's request is made more than fifteen days after the delivery date, except in the following circumstances:

(a) Recall. When a manufacturer has issued a product recall that affects multiple unaffiliated vendors, as defined in Rule 61A-1.01015, F.A.C., the recalled product may be returned for exchange, cash, or credit as provided in subsection (1) of this rule.

12. As explained in *Musleh v. Fulton Distributing Co. of Florida*, 254 So.2d 815, 817

(Fla. 1st DCA 1971):

The purpose of the Tied House Evil Law is to prohibit manufacturers, wholesalers, and distributors of alcoholic beverages from controlling retail outlets operated by licensed vendors through the granting, withholding or extension of credit, the lending of money, investment in the business of the retailer, the making of rebates or the giving of any other financial assistance.

13. At least one Florida court has determined that a comparable indemnity agreement between Winn Dixie and one of its beer distributors did not violate Florida's Tied House laws. *Winn Dixie Stores, Inc. v. Schenck Co.*, 662 So.2d (Fla. 5th DCA 1995), involved a lawsuit by a customer who suffered personal injuries in a Winn Dixie store when cases of beer stacked by the distributor (Schenck) in the store fell on the customer. The customer sued Winn Dixie and Schenck. As part of the lawsuit, Winn Dixie brought a cross-claim against Schenck based upon a public liability indemnity agreement entered into by the parties. Ultimately, the parties settled the lawsuit, with Schenck and Winn Dixie each paying a portion of the settlement amount. When Winn Dixie sought indemnification from Schenck pursuant to the terms of their

agreement, the trial court found that Florida's Tied House laws barred Winn Dixie from enforcing the indemnity agreement. On appeal, the Fifth District held that the indemnity agreement did not violate the Tied House laws:

We do agree, however, with Winn Dixie's contention that the agreement in question is a simple contract for indemnity which does not violate the terms or the purpose of the Tied House Evil Statute. As pointed out by the Florida Supreme Court:

The purpose of this Act was to prevent monopoly or control by manufacturers or distributors of the retail outlets for the sale of intoxicating liquors.

The agreement between Winn Dixie and Schenck had nothing to do with the granting, withholding or extending of credit; the lending of money; investment in Winn Dixie's business or the making of rebates; or assistance of a vendor by a manufacturer via gifts or loans of money or property of any description. The instant agreement was a contract with mutual benefits. The statute simply does not cover this agreement.

Id. at 1023, quoting *Pickerill v. Schott*, 55 So.2d 716 (Fla.1951), cert. denied, 344 U.S. 815, 73 S.Ct. 9, 97 L.Ed. 634 (1952)

14. Like the indemnity agreement in *Winn Dixie Stores, Inc. v. Schenck Co.*, the recall agreement between Winn Dixie and its distributors is a contract with mutual benefits that does not constitute the giving of a credit, a loan, a rebate or a gift by the distributor to Winn Dixie.

Declaratory Statement Requested by Winn Dixie

15. Winn Dixie is in need of a declaration by the Division as to the applicability of section 561.42(1), Florida Statutes, and rules 61A-1.010 and 61A-1.0107, Florida Administrative Code, to the facts set forth above so that Winn Dixie may select a proper course of action in advance of a recall of products purchased by Winn Dixie.

16. Winn Dixie respectfully requests that the Division declare the following:

a. Winn Dixie is substantially affected by the statute and rules cited in this Petition;

- b. In the event of a product recall by a distributor, Winn Dixie may seek reimbursement from the distributor of any actual costs Winn Dixie incurs to remove, ship or dispose of the distributor's recalled products;
- c. A distributor's reimbursement of the actual costs incurred by Winn Dixie in connection with the distributor's product recall does not violate the provisions of Chapter 561, Florida Statutes, or Chapter 61A-1, Florida Administrative Code; and
- d. Winn Dixie's receipt of funds from a distributor as reimbursement of the actual costs incurred by Winn Dixie in connection with the distributor's product recall does not violate the provisions of Chapter 561, Florida Statutes, or Chapter 61A-1, Florida Administrative Code.

WHEREFORE, Winn Dixie respectfully requests that the Division issue a final order containing the declaratory statements requested in this Petition.

Respectfully submitted this 13th day of January 2020.

/s/ Daniel Hernandez
Daniel Hernandez, Esquire
Florida Bar No. 176834
Shutts & Bowen LLP
4301 W. Boy Scout Blvd., Suite 300
Tampa, FL 33607-5716
(813) 227-8114
(813) 227-8234 (Fax)
dhernandez@shutts.com

Attorneys for Winn Dixie Stores, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed using electronic mail this 13th day of January 2020 to: **Ronda L. Bryan, Agency Clerk** AGC.Filing@myfloridalicense.com, Department of Business and Professional Regulation, Agency Clerk's Office – 2601 Blair Stone Road, Tallahassee, Florida 32399-2202, and to the Division of Alcoholic Beverages and Tobacco, 2601 Blair Stone Road Tallahassee, Florida 32399-1027


/s/ Daniel Hernandez
Daniel Hernandez, Esquire

EXHIBIT A



Southeastern Grocers

Home of
BI-LO,  Winn-Dixie


To: Our Valued Suppliers
Subject: Product Recall/Removal Processing Fees

With the increased supply chain costs and the increasing recalls and withdrawals occurrences, we find it necessary to recover the labor and disposal costs of removing these items from our stores and distribution centers.

The following product removal processing fees apply to the withdrawal, removal, or recall of any product from BI-LO, Harvey's or Winn-Dixie stores and distribution centers as the result of quality concerns, labeling errors, possible contamination or threat of illness, packaging errors, regulatory requirements, adulteration, purported infringement or other legal claim or concern, or any other reason that is the result of a supplier-controlled product issue. These fees will not apply if the product removal is the result of Southeastern Grocer's improper handling of the item.

- ❖ \$20 minimum per store per item number/UPC withdrawn - every item (each item number or UPC) removed from sale will be subject to this assessment to offset store labor and associated administrative expenses incurred as a result of the removal. An additional assessment may apply for increased costs in unusual situations.

Item disposal fees - Southeastern Grocers prefers that all non-hazardous/non-chemical items be returned to Supplier for proper management or disposal. Any item disposed of at store level would be subject to the following additional minimum charges:

- ❖ \$20 Minimum per store for non-hazardous/non-chemical items disposed of at store level in dumpsters or company owned reclamation centers;
- ❖ \$100 Minimum charge per store for any item that must be disposed of through our hazardous/chemical waste management process. Depending upon the volume and weight of the item(s), this charge may vary and alternative methods of managing proper disposal may be required.

Additional charges for any unusual processing or burdens may be assessed.

- ❖ Suppliers are responsible for all shipping costs.
- ❖ Shipments to and consolidations by the reclamation center will include a handling fee as provided for in the Southeastern Grocer's Corporate Reclamation Agreement.

Winn-Dixie

Getting better all the time.

Additional costs related to any special handling requirement or burdens will be addressed as circumstances warrant. To be clear, the fees as provided are the minimum fees, and do not limit Winn-Dixie's right to recover any costs (whether at store, DC or return center) of a product removal greater than the guideline amounts.

The following are examples of how Winn-Dixie will assess product removal processing fees.

Example 1- A supplier has two items in 523 stores that are removed from sale and returned to the supplier for management and disposal.

Example 2- Same scenario as first example, except Supplier opts to have the non-hazardous items disposed of at the stores.

1. Processing Fee only

- ❖ Fee per item (URC) \$20
- ❖ Number of Stores 523
- ❖ Number of items withdrawn 2
- ❖ Total processing fee \$20,920

2. Processing fee plus non-hazardous item disposal

- ❖ Processing fee (see example 1) \$20,920
- ❖ Non-hazardous disposal fee / per store \$20
- ❖ Number of stores 523
- ❖ Disposal fee sub-total \$20,920
- ❖ Total withdrawal fee charged to supplier \$41,840

Note that, in any case, Supplier will be obligated to bear any shipping costs and any return center handling fees.

This has become standard practice for retailers throughout the industry to recover additional supply chain costs for FDA/USDA recalls or product withdrawals. Should you have any questions regarding this or any other reverse logistics program, please contact Gary Regina, Supply Chain Manager [winndixie.com](mailto:gary.regina@winndixie.com) or [REDACTED].

This fee schedule will be effective [REDACTED].

We look forward to your cooperation as we continue to service our mutual customers and grow our business together.

BY CLICKING THE "AGREE" BUTTON BELOW, THE PERSON IDENTIFIED ON THE "VIEW ATTACHED AGREEMENT" PORTION OF THE SUPPLIER ON-BOARDING PACKET CONTAINED IN WINN-DIXIE'S ELECTRONIC VENDOR PORTAL HEREBY CERTIFIES THAT HE OR SHE HAS READ, UNDERSTOOD, AND AGREES TO ALL OF THE ABOVE TERMS AND CONDITIONS OF THIS PRODUCT RECALL/ REMOVAL PROCESSING FEES, WHICH IS EXHIBIT 8 TO THE SUPPLIER ON-BOARDING PACKET, ON BEHALF OF THE ENTITY IDENTIFIED AS "SUPPLIER" IN THE "SUPPLIER LEGAL NAME" FIELD OF THE CONTACT INFORMATION PAGE OF WINN-DIXIE'S ELECTRONIC VENDOR PORTAL (AND CERTIFIES THAT HE OR SHE IS AUTHORIZED TO SIGN AGREEMENTS ON SUCH SUPPLIER'S BEHALF).

FILED
Department of Business and Professional Regulation
Senior Deputy Agency Clerk
CLERK Brandon Nichols
Date 2/5/2020
File #

**FLORIDA DEPARTMENT OF BUSINESS
AND PROFESSIONAL REGULATION,
DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO**

In Re: Petition for Declaratory Statement
on behalf of Winn Dixie Stores, Inc.

Case No. DS 2020-005

**MOTION TO INTERVENE BY THE
WINE AND SPIRITS DISTRIBUTORS OF FLORIDA,
THE FLORIDA BEER WHOLESALERS ASSOCIATION,
AND THE BEER INDUSTRY OF FLORIDA**

Pursuant to section 120.565, Florida Statutes, and rule 28-105.0027, Florida Administrative Code, the Wine and Spirits Distributors of Florida, Inc. ("WSDF"), the Florida Beer Wholesalers Association, Inc. ("FBWA"), and the Beer Industry of Florida, Inc. ("BIF"), (collectively the "Prospective Intervenors") move to intervene in this declaratory statement proceeding initiated by Winn Dixie Stores, Inc. ("Winn Dixie").

I. Introduction

1. The Petition for Declaratory Statement filed by Winn Dixie seeks an interpretation of section 561.42(1), Florida Statutes, and rules 61A-1.010 and 61A-1.0107, Florida Administrative Code, two rules that were adopted to implement section 561.42(1). As framed by Winn Dixie in its petition, the question presented is whether the statute and rules "prohibit a distributor of alcoholic beverage products from reimbursing the actual costs Winn Dixie incurs to remove, ship or

RECEIVED

FEB 05 2020

DBPR Agency Clerk

Exhibit

B

dispose of the distributor's recalled products and whether Winn Dixie is prohibited from receiving such reimbursement." See Petition, p. 1. The Prospective Intervenors assert that the answer to the question is unequivocally yes.

II. Agency Affected

2. The agency affected is the Florida Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco ("DABT"), 2601 Blair Stone Road, Tallahassee, Florida 32399.

3. DABT is an agency of the State of Florida created pursuant to section 20.165(2)(b) and chapter 561, Florida Statutes, and is vested with regulatory and supervisory authority over the conduct, management, and operation of the manufacturing, packaging, distribution, and sale of all alcoholic beverages in Florida. § 561.02, Fla. Stat. The agency's identification number for this proceeding is DS 2020-005.

III. Identity of the Prospective Intervenors and their Attorneys

4. The Prospective Intervenors are:
- a. Wine and Spirits Distributors of Florida, Inc.;
 - b. Florida Beer Wholesalers Association, Inc.; and
 - c. Beer Industry of Florida, Inc.

The Prospective Intervenors are represented by Donna E. Blanton of the Radey Law Firm, 301 S. Bronough Street, Suite 200, Tallahassee, Florida 32301, (850)

425-6654, Fax (850) 425-6694, Email: dblanton@radeylaw.com, and lmcclroy@radeylaw.com. For purposes of this proceeding, contact information for the Prospective Intervenors is that of undersigned counsel.

IV. Substantial Interests of the Prospective Intervenors

5. The Prospective Intervenors are all associations of alcoholic beverage distributors. Members of the associations are licensed by DABT as distributors pursuant to chapter 561, Florida Statutes, and are heavily regulated by DABT. One of the primary purposes of each association is to act on behalf of its members by representing their common interests before various governmental entities of the State of Florida, including DABT.

6. WSDF was founded in 1958 and has three members serving Florida, all of whom are licensed to distribute beer, wine, and spirits. WSDF is headquartered in Tallahassee.

7. FBWA is a not-for-profit trade association of twenty-two independent licensed beer and wine distributors. For thirty years, FBWA has been dedicated to educating policy makers, licensees, and the general public about the societal value in regulating the manufacturing, the independent distribution of, and the independent retail sale of, alcoholic beverages. FBWA is headquartered in Tallahassee.

8. BIF is a trade association for Florida's beer distributors headquartered in Tallahassee. Since 1945, BIF has provided advocacy before Florida government. Strengthening the 21st Amendment by promoting, protecting, and defending the three-tier system of alcohol distribution remains a primary and constant goal.

9. As licensed distributors, the Prospective Intervenor's members are governed by section 561.42, Florida Statutes, rules 61A-1.010 and 61A-1.0107, the statute and rules at issue in this proceeding. The Prospective Intervenor's members are substantially affected by any decision of DABT that interprets the statutes and rules governing alcoholic beverages in a manner that affects the regulation of licensed activity. In this case, the Petition for Declaratory Statement would directly affect the activities of licensed distributors, which are prohibited by section 561.42(1) and rule 61A-1.010 from providing any form of assistance to a vendor unless a specific exception is provided in Chapter 61A-1, Florida Administrative Code. As discussed below, no such exception covers the activity that Winn Dixie asks about. The question raised in the Petition for Declaratory Statement directly affects the substantial interests of WSDF, FBWA, and BIF.

10. Florida courts have made clear that agency declaratory statements affect more than just the entities requesting the statement. *See, e.g., Florida Department of Business and Professional Regulation, Division of Pari-Mutuel*

Wagering v. Investment Corp. of Palm Beach, 747 So. 2d 374, 377 (Fla. 1999) (“By providing for publication of notice when the Petition is filed, the Legislature clearly understood that the answer to a Petition for Declaratory Statement may very well have impact on others who are regulated by the agency.”).

11. The Uniform Rules of Procedure specifically permit intervention by those who are entitled to participate as a matter of right, pursuant to agency rule, or whose substantial interests will be determined or affected by the declaratory statement. Rule 28-105.0027, Fla. Admin. Code.

12. Associations have standing to participate in declaratory statement proceedings when the association fairly represents members that are substantially affected. *Federation of Mobile Home Owners of Fla., Inc. v. Dep’t of Bus. Reg., Div. of Land Sales, Condominiums and Mobile Homes*, 479 So. 2d 252, 254 (Fla. 2d DCA 1985).

13. The Prospective Intervenors’ members will be substantially affected by DABT’s answer to Winn Dixie’s Petition for Declaratory Statement. Therefore, WSDF, FBWA, and BIF should be permitted to intervene in this proceeding.

V. Notice

14. The Prospective Intervenors learned that the Petition had been filed with DABT on January 21, 2020, when notice of the same was published in the Florida Administrative Register.

VI. Argument

15. Section 561.42, Florida Statutes, commonly called the Tied House Evil Law, prohibits manufacturers, distributors, importers, primary American sources of supply, brand owners, or registrants, as well as their brokers, sales agents, or sales persons, from having any financial or ownership interest in a vendor and prohibits these entities from assisting any vendor. It provides in relevant part:

(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; nor shall such manufacturer, distributor, importer, primary American source of supply, brand owner or brand registrant, or any broker, sales agent, or sales person thereof, 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 manufacturer, distributor, importer, primary American source of supply, brand owner or brand registrant, or any broker, sales agent, or sales person thereof . . .

16. The Tied House Evil Law dates to the repeal of Prohibition. Courts have described the purpose of the statute as prohibiting manufacturers and distributors of alcoholic beverages from controlling retail outlets operated by licensed vendors through granting, withholding or extension of credit, lending of money, investment in business of the retailer, making of rebates, or giving any

other financial assistance. *E.g.*, *Pickerill v. Schott*, 55 So. 2d 716 (Fla. 1951); *Central Florida Distributing Co. v. Jackson*, 324 So. 2d 143 (Fla. 1st DCA 1975); *Anheuser-Busch, Inc. v. Department of Business Regulation*, 393 So. 2d 1177 (Fla. 1st DCA 1981), *Winn-Dixie Stores, Inc. v. Schenck Co.*, 662 So. 2d 1021 (Fla. 5th DCA 1995).

17. Section 561.42(8), Florida Statutes, provides rulemaking authority to the Division to enforce the limitations on forms of assistance. It states: "The division may adopt rules and require reports to enforce, and may impose administrative sanctions for any violation of, the limitations established in this section on credits, coupons, and other forms of assistance."

18. In 2010, the Division adopted Chapter 61A-1, Florida Administrative Code. Although various rules (including a chart) existed before 2010 in an effort to provide guidance concerning interpretation of section 542.42(1), Florida Statutes, earlier rules were not as comprehensive or as explicit concerning the prohibited and permitted activities. The first rule in chapter 61A-1, rule 61A-1.010, provides in relevant part:

(1) Industry members are prohibited from furnishing, supplying, giving, renting, or lending, to a vendor, any equipment, fixtures, furniture, furnishings, signs, supplies, credit, money, compensation, rebates, accumulated rebates, fees of any kind including slotting fees, services, property, or other thing of value of any description not included in the exceptions specified in Chapter 61A-1, F.A.C. or specifically authorized by Florida Statutes, to vendors or their employees or agents acting within their scope of employment. In

addition, vendors and their employees or agents acting within the scope of employment are prohibited from accepting such forms of assistance. This prohibition against assisting any vendor includes engaging in cooperative advertising – participating in or paying for any advertising in cooperation with a vendor.

(Emphasis supplied).

19. As Winn Dixie acknowledges in its petition, none of the exceptions in rule chapter 61A-1 address the conduct Winn Dixie inquires about. *See* Petition, p. 3. The only exception remotely related is rule 61A-1.0107, which was first adopted in 2010 and relates to Returns of Damaged Products. The rule provides that a vendor may return a recalled product to the distributor for exchange, cash, or credit, but as Winn Dixie acknowledges, it “does not address a vendor’s ability to seek reimbursement from the distributor of the costs the vendor incurs to return the recalled product.” Petition, pp. 3-4.¹ The rule provides in relevant part:

(1) Vendors who make a request for return of damaged products within fifteen days after delivery may receive exchange of product, cash, or a credit against outstanding indebtedness. . . .

(3) No return of the product shall be permitted if the vendor’s request is made more than fifteen days after the delivery date, except in the following circumstances:

¹ Practically speaking, manufacturers contact their distributors ahead of all others concerning alcoholic beverage product that is the subject of a recall. Because of their direct store delivery and product integrity responsibilities, distributors are quick to remove and replace, or credit vendors, for product that is the subject of a recall.

(a) Recall. When a manufacturer has issued a product recall that affects multiple unaffiliated vendors, as defined in Rule 61A-1.01015, F.A.C., the recalled product may be returned for exchange, cash, or credit as provided in subsection (1) of this rule.

20. The exceptions to the general prohibition against assistance to a vendor in rule chapter 61A-1 should be narrowly construed and, according to established rules of statutory construction, limited to their plain language. *See, e.g., Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952):

We have oft-times held that the rule 'Expressio unius est exclusio alterius' is applicable in the connection with statutory construction. This maxim, which translated from the Latin means: express mention of one thing is the exclusion of another, is definitely controlling in this case. The legislature made one exception to the precise language of the statute of limitations. We apprehend that had the legislature intended to establish other exceptions it would have done so clearly and unequivocally.

By addressing recalls in rule 61A-1 and stating that a recalled product may be returned for exchange, cash, or credit, DABT intended that other payments to vendors in connection with recalls remain subject to the general prohibition. *E.g., Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976) ("It is of course, a general principle of statutory construction that the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius. Hence, when a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned.").

21. Winn Dixie relies on a case that predates the current rules in chapter 61A-1 to argue that an agreement between Winn Dixie and distributors requiring distributors to pay Winn Dixie's costs associated with any recall does not violate the Tied House Evil statute and associated rules. See Petition, pp. 4-5. In *Winn Dixie Stores, Inc. v. Schenck Co.*, 662 So. 2d at 1023, the Fifth District Court of Appeal held that an indemnity agreement between a distributor and Winn Dixie, a vendor, did not violate the Tied House Evil statute. The case was based purely on section 561.42, not any implementing rules, which now make clear that the only exceptions to the prohibition in the Tied House Evil statute and in rule 61A-1.010 are those found in chapter 61A-1.

22. DABT has no authority to deviate from the plain language of its rules and must enforce the general prohibition in rule 61A-1.010. See, e.g., *Cleveland Clinic Fla. Hosp. v. Agency for Health Care Admin.*, 679 So. 2d 1237 (Fla. 1st DCA 1996) (“[W]hile an administrative agency ‘is not necessarily bound by its initial construction of a statute evidenced by the adoption of a rule,’ the agency may implement its changed interpretation only by ‘validly adopting subsequent rule changes.’”) (quoting *Dep’t of Admin., Div. of Retir. v. Albanese*, 445 So. 2d 639, 642 (Fla. 1st DCA 1984)).

23. Thus, DABT must answer Winn Dixie's Petition for Declaratory Statement in the negative.

VII. Relief Requested

For the reasons expressed, the Prospective Intervenors respectfully request that DABT permit the intervention of WSDF, DABT, and BIE in this proceeding. The Prospective Intervenors further request that DABT respond to the petition with a Declaratory Statement that section 561.42(10), Florida Statutes, and rules 61A-1.010 and 61A-0107, Florida Administrative Code, prohibit a distributor from reimbursing the actual costs that Winn Dixie may incur to remove, ship, or dispose of the distributor's recalled products and that Winn Dixie is prohibited from receiving such reimbursement.

Respectfully submitted this 5th day of February, 2020.

/s/ Donna E. Blanton

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Attorney for Prospective Intervenors

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed by hand delivery with the agency clerk, Florida Department of Business and Professional Regulation, 2601 Blair Stone Road, Tallahassee, Florida 32399 and served by email on counsel for Petitioner Daniel Hernandez, Shutts & Bowen LLP, 4301 West Boy Scout Blvd, Suite 300, Tampa, Florida 33607-5716 (dhernandez@shutts.com), this 5th day of February, 2020.

/s/ Donna E. Blanton

Donna E. Blanton

FILED	
Department of Business and Professional Regulation	
Senior Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	2/11/2020
File #	

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

In Re: Petition for Declaratory Statement
on behalf of Winn Dixie Stores, Inc.

CASE NO. DS 2020-005

**MOTION TO INTERVENE BY THE FLORIDA INDEPENDENT
SPIRITS ASSOCIATION**

Pursuant to section 120.565, Florida Statutes, and Rule 28-105.0027, Florida Administrative Code, the Florida Independent Spirits Association (“FISA”), moves to intervene in relation to the Petition for Declaratory Statement (“Petition”) filed by Winn Dixie Stores, Inc. (“Winn Dixie”) and published in the Florida Administrative Register on January 21, 2020. FISA respectfully requests that the Division of Alcoholic Beverages and Tobacco (“Division”) answer the questions posed in the Petition (i.e., whether retailers may require or request that alcoholic beverage distributors reimburse them for the labor and other costs of returning recalled products) in the negative. In support of its intervention and that position, FISA would offer the following:

Affected Parties

1. The Division (which is part of the Department of Business and Professional Regulation) is the affected agency in this proceeding.
2. FISA is an independent association of alcoholic beverage retailers.

FISA represents ABC Fine Wine and Spirits and all of its 85 Florida, Division-licensed stores. FISA also represents more than 100 other Division-licensed alcoholic beverage retailers, which are mostly small, family-owned businesses. FISA exists to represent the interests of its members before the Division, in the Legislature, and otherwise.

3. FISA is represented in this matter by William Hall and Daniel Russell of Dean Mead & Dunbar. The contact information for FISA's counsel is below.

Substantial Interests

4. All FISA members hold Division-issued licenses which allow them to sell alcoholic beverages. Further, all FISA members are subject to regulation by the provisions at issue in the Petition (specifically, section 561.42, Florida Statutes and Chapter 61A-1, Florida Administrative Code). As Florida Courts have recognized in other administrative contexts, FISA members are substantially affected *per se* by any Division determination that will determine how they are regulated. *See Reiff v. Northeast Fla. State Hosp.*, 710 So. 2d 1030, 1032 (Fla. 1st DCA 1998), *citing Coalition for Mental Health Professions v. Dept. of Prof'l Reg.*, 546 So. 2d 27, 28 (Fla. 1st DCA 1989) (emphasis added); *Televsual Communications, Inc. v. State, Dept. of Labor and Employment Security/Div. of Worker's Compensation*, 667 So. 2d 372, 374 (Fla. 1st DCA 1995), *Ward v. Bd. of Trustees*, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995). Associations have standing to participate in administrative

actions in the place of such substantially affected members. *Federation of Mobile Home Owners of Fla., Inc. v. Dep't of Bus. Reg., Div. of Land Sales, Condominiums and Mobile Homes*, 479 So. 2d 252, 254 (Fla. 2d DCA 1985).

5. Although it would appear at first blush that retailers would benefit from the position Winn Dixie spells out in the Petition, FISA believes that answering the questions presented in the affirmative would have adverse implications throughout the Beverage Law. Specifically, FISA is concerned that allowing changes to Division policy through declaratory statements would undermine the rulemaking process.

Argument

6. Rule 61A-1.1010, F.A.C. states as follows:

(1) Industry members are prohibited from furnishing, supplying, giving, renting, or lending, to a vendor, any equipment, fixtures, furniture, furnishings, signs, supplies, credit, money, compensation, rebates, accumulated rebates, fees of any kind including slotting fees, services, property, **or other thing of value of any description not included in the exceptions specified in Chapter 61A-1, F.A.C. or specifically authorized by Florida Statutes**, to vendors or their employees or agents acting within their scope of employment. In addition, vendors and their employees or agents acting within the scope of employment are prohibited from accepting such forms of assistance. This prohibition against assisting any vendor includes engaging in cooperative advertising – participating in or paying for any advertising in cooperation with a vendor.

(Emphasis supplied).

7. In its Petition, Winn Dixie seeks the authority to obtain a thing of value (reimbursement for its labor and other costs associated with recalls) that is not

specified in Chapter 61A-1, F.A.C., and is not specifically authorized in Florida Statutes. Regardless of whether such a reimbursement would be beneficial to some retailers, it is legally prohibited by the above-mentioned rule. Substantial changes to Division policy must be accomplished through either a legislative change or through agency rulemaking. If the Division answers Winn Dixie's questions in the affirmative, it would be essentially amending Rule 61A-1.010, F.A.C., to allow for the reimbursements sought through the Petition. Such de facto rulemaking may not be carried out through a declaratory statement. *Chiles v. Dept. of State, Div. of Elections*, 711 So. 2d 151, 154 (Fla. 1st DCA 1998); *Fla. Dept. of Bus. and Prof'l Reg., Div. of Pari-Mutuel Wagering v. Investment Corp. of Palm Beach*, 747 So. 2d 374 (Fla. 1999).

8. By failing to follow this proper protocol, the Division would be precluding licensees such as FISA's members from helping to shape the policies that regulate them. The Administrative Procedure Act promises regulated parties exactly that opportunity. *State, Dept. of Health and Rehabilitative Services v. Professional Firefighters of Florida, Inc.* 366 So. 2d 1276, 1277 (Fla. 1st DCA 1979); *Balino v. Department of Health and Rehabilitative Services*, 362 So. 2d 21, 24 (Fla. 1st DCA 1978).

9. For the reasons spelled out above, FISA respectfully requests that the Division answer the questions Winn Dixies poses in the Petition in the negative.

Respectfully submitted this 11th day of February 2020.

s/ William Hall

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was filed by hand delivery with the Agency Clerk, Florida Department of Business and Professional Regulation, 2601 Blair Stone Road, Tallahassee, Florida 32399, and served by e-mail on counsel for Petitioner Daniel Hernandez, Shutts & Bowen LLP, 4301 West Boy Scout Blvd, Suite 300, Tampa, Florida 33607-5716 (dhernandez@shutts.com), this 11th day of February 2020.

s/ William Hall