

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DISCOVERY TOURS WHOLESALERS, )  
INC., )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 03-2754F  
 )  
DEPARTMENT OF HEALTH, )  
 )  
Respondent. )  
\_\_\_\_\_ )

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case in Tampa, Florida on August 19, 2004, before Carolyn S. Holifield, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Brandon L. Kolb, Esquire  
Discovery Tours  
Legal Department  
35202 State Road 54  
Zephyrhills, Florida 33541

For Respondent: Robert Daniti, Esquire  
Department of Health  
4052 Bald Cypress Way, BIN A02  
Tallahassee, Florida 32399-1703

STATEMENT OF THE ISSUE

The issue is whether Petitioner is entitled to an award of attorney's fees and costs pursuant to Section 57.111, Florida

Statute (2003), and, if so, what amount of attorney's fees and costs is recoverable by Petitioner.

PRELIMINARY STATEMENT

On July 28, 2003, Petitioner, Discovery Tours Wholesalers, Inc. ("Petitioner" or "Tours"), filed a Petition for Award of Attorney Fees and Costs ("Petition" or "Petition for Attorney Fees") and the Affidavits of Josephine Kimball and Rolando J. Santiago in support of Tours' Petition for Attorney Fees pursuant to Section 57.111, Florida Statutes (2003). The Petition seeks attorney's fees and costs incurred by Petitioner in litigating Department of Health v. Discovery Experimental, et. al., Case No. 93-6184 (DOAH April 18, 2003), which consolidated four cases, DOAH Case Nos. 93-6184, 95-2255, 97-3836, and 98-4364. The Administrative Complaint filed by the Department of Health ("Department") and which was the subject of DOAH Case No. 97-3836, named several Respondents, in addition to Tours. With regard to Tours, the allegations in the Administrative Complaint were as follows:

Respondent, Discovery Tour Wholesalers, Inc. (Tours) is a Florida Corporation whose principal place of business is 29949 S.R. 54 West, Wesley Chapel, Florida, Pasco County, Florida. Tours is really the alter ego of James T. Kimball in that Mr. Kimball utilizes Tours on a continuing basis to launder money he receives for the manufacture, promotion, advertisement, sale and other distribution of his drug products, which are not approved by FDA and which are

misbranded and adulterated. Tours, on paper is controlled by Respondent, Josephine Kimball, spouse of Respondent, James T. Kimball. Mrs. Kimball owns more than a majority of stock in Tours, a closely held corporation. Tours maintains all or a vast majority of the accounting, books, check registers and other financial records of each of the corporate respondents, and is paid consultant fees for this and other activities which support the unlawful drug enterprise. Tours owns the real estate where the unlawful drug enterprise which is the subject of this complaint is headquartered at 29949 S.R. 54 West, Wesley Chapel, Florida, and DEDI [Discovery Experimental and Development, Inc.], DDI [Discovery Distributing, Inc.], ASTAK, and B&B [B&B Freight Forwarding, Inc.], currently pay rent, or have at times in the past material to this complaint paid rent, as tenants of Tours.

The Administrative Complaint also alleged that the complaint was an action to enforce applicable laws and rules promulgated thereunder against "an enterprise or enterprises under the direction and control of Respondent James T. Kimball to manufacture, promote, advertise, or sell or otherwise distribute misbranded, adulterated drugs" in violation of Section 499.023, Florida Statutes (1997).

After the conclusion of the final hearing, the undersigned issued a Recommended Order in the underlying proceeding on April 18, 2003. The Recommended Order in the underlying proceeding recommended that the Department dismiss the Administrative Complaint against Tours. The Department's Final

Order, executed May 23, 2003, approved, adopted, and incorporated by reference the Recommended Order in the underlying proceeding.

In this case, the Department challenged Tours' assertion that it is a small business party within the meaning of Section 57.111, Florida Statutes (2003), and is entitled to attorney's fees and costs. Moreover, the Department asserted that it was substantially justified in filing the administrative action in the underlying proceeding.

By Amended Notice of Hearing issued September 3, 2003, the hearing in this case was set for October 24, 2003. Prior to that date, the parties requested and were granted several continuances for good cause shown. Thereafter, the final hearing was held on August 19, 2004.

On March 10, 2004, this case was consolidated with Global Health Information/Medical Research Institute, Inc. v. Department of Health, DOAH Case No. 03-2806; and Josephine Kimball v. Department of Health, DOAH Case No. 03-2807, solely for the purpose of the final hearing because the three cases involved identical witnesses and documentary evidence. However, the parties and the undersigned agreed that a separate final order would be issued in each case.

Prior to the evidentiary part of the hearing, the undersigned denied two pending motions, the Department's Motion

in Limine and/or the Department's Motion for Partial Judgment as to the maximum amount of attorney's fees that can be awarded to Tours and Petitioner, Global Health Information/Medical Research, Inc.

At hearing, Petitioner presented the testimony of five witnesses: Josephine Kimball; Toni Kimball; Joy Young; Rolando J. Santiago, Esquire; and Jon Pellet, Esquire. The Department stipulated that Mr. Pellett was as an expert witness for purposes of this hearing. Petitioner offered and had ten exhibits received into evidence. The Department presented the testimony of two witnesses: Jerry Hill, R. Ph., Bureau Chief of the Department's Bureau of Statewide Pharmaceutical Services; and Deborah Orr, a former drug agent and investigator with the Department. The Department offered and had 12 exhibits received into evidence. The parties had five joint exhibits received into evidence.<sup>1/</sup>

A Transcript of the proceeding was filed on September 3, 2004. At the conclusion of the hearing, the time for filing proposed final orders was set for ten days from the filing of the Transcript. Prior to that date, upon motion filed by the Department, the time for filing proposed orders was extended until September 23, 2004. On September 22, 2004, the parties filed an agreed motion to extend the time for filing proposed

orders. The agreed motion was granted and the time for filing proposed final orders was extended until October 8, 2004.

The Department and Petitioner filed their Proposed Final Orders on October 8, 2004, and October 12, 2004, respectively. Both Proposed Final Orders have been considered in preparation of this Final Order.

#### FINDINGS OF FACT

Based on the oral and documentary evidence presented at hearing and on the entire record of this proceeding, the following Findings of Fact are made.

1. The Department, through its Bureau of Statewide Pharmaceutical Services (formerly Bureau of Pharmacy Services), is, and was at all times relevant to this proceeding, the state agency responsible for administering and enforcing the Florida Drug and Cosmetic Act, Chapter 499, Florida Statutes (1997), which included the regulation of the manufacture, promotion, and distribution of prescription drugs.

2. In late 1990, the Department began investigating the unlawful advertising, manufacture, and sale of prescription drugs that were not approved in commerce by the United States Department of Health and Human Services, Food and Drug Administration (FDA), by an establishment located at 29949 State Road 54 West, Wesley Chapel, Florida ("29949 State Road 54 West" or "business establishment"). The business establishment was

the primary business address of several closely held corporations owned and operated by James T. Kimball, and his wife, Josephine Kimball.

3. In or about 1991, the Department initiated and settled an enforcement action against Discovery Distributing, Inc. (Discovery Distributing), located at 29949 State Road 54 West and its president, Mr. Kimball. The enforcement action related to Discovery Distributing's promotion of an unlawful product called Kimballac. Pursuant to the settlement in the aforementioned enforcement action, Mr. Kimball agreed not to manufacture or distribute drugs that had not been approved by FDA. The drug referenced in the Stipulation for Settlement (Settlement) in that case (DOAH Case No. 91-2420) was Seligiline HCL.

4. Notwithstanding the terms of the Settlement, the Department learned that soon after the Settlement was signed, the unlawful activities resumed with the same type of products being sold to the citizens of Florida. Accordingly, the Department continued its investigation of the unlawful activities related to the manufacture and distribution of drugs not approved by the FDA at 29949 State Road 54 West.

5. The Department initiated an Administrative Complaint in August 1993 (1993 Administrative Complaint), while in the middle of its investigation and after participating in a federal and

state force of agencies that executed a search and seizure of the Kimballs' business establishment at 29949 State Road 54 West and their home located in Wesley Chapel, as well as other locations. The search and seizure took place on May 12, 1993, pursuant to federal warrants.

6. The 1993 Administrative Complaint was issued to Discovery Experimental and Development, Inc. ("DEDI"), located at 29949 State Road 54 West and related to that company's alleged sale of drugs that were not approved by the FDA. After the 1993 Administrative Complaint was filed, the Department continued to investigate the activities of DEDI.

7. Ms. Deborah Orr (Agent Orr) began working for the Department as a drug agent in or about 1993 and was assigned to investigate the underlying case until the case culminated.

8. During the investigation, Agent Orr and other Department agents, investigators, and officials reviewed documents and other evidence seized during the search of the business establishment and the home of the Kimballs that tied both Mr. and Mrs. Kimball to several corporations that appeared to be connected to the manufacture and sale of certain unapproved drugs.

9. Among the documents found and seized from the Kimballs' home, pursuant to the 1993 warrant and reviewed by Agent Orr, was the financial statement of James and Josephine Kimball dated



April 14, 1992. According to that document, James and Josephine Kimball were 90-percent owners of DEDI, which "develops pharmaceuticals and chemicals for manufacturing" and had an assessed value of \$1,000,000; James and Josephine Kimball were 90-percent owners of ASTAK, Inc. ("ASTAK"), a company that "manufactures custom order vitamins"; James Kimball was a 100-percent owner of Discover Experimental and Development, Mexico N.A. (DEDI of Mexico), a company that "manufacture[s] pharmaceuticals" and ships to 12 countries; and James and Josephine Kimball were 83-percent owners of Tours, which owned the real property located at 29949 State Road 54 West.

10. The Department's investigation indicated that several companies controlled by the Kimballs had separate and distinct functions related to the unlawful drug enterprise. For example, it appeared that one company manufactured the unlawful drugs, another took and filled orders from customers for the unlawful drugs, and another put out promotional information and literature about the unlawful drugs. In the case of Tours, the Department believed that funds from the unlawful drug enterprise were being transferred to or deposited in Tours' accounts.

11. During the investigation, the Department determined that most of the corporations involved in the unlawful drug enterprise had common ownership and operated from 29949 State Road 54 West, which was owned by Tours. Although Tours, a

travel agency, appeared to be operated by Mrs. Kimball, documentation seized from the Kimball residence indicated that Mr. Kimball was also an owner of Tours.

12. The Department's investigation revealed that Tours rented space to the corporate Respondents in the underlying proceeding that were alleged and found to have been involved in unlawful drug activity. Tours, through Mrs. Kimball, also was determined to have provided administrative and secretarial services, as well as "consultant services" for these companies. However, upon review of documentation seized from the business establishment, the Department investigators determined that Tours' relationship with the companies involved in the unlawful drug activity was not limited to that of a landlord or a secretary.

13. The Department investigator, Agent Orr, received and reviewed several checks written to Tours by companies operating out of the 29949 State Road 54 West location, specifically DEDI and ASTAK, both of which were involved in the manufacture and distribution of drugs that were not approved by the FDA. From a review of these checks, it appeared that Tours, through Mrs. Kimball, had signature authority on those corporate bank accounts because some of the checks written to Tours by DEDI and by ASTAK, on their respective bank accounts, were actually signed by Mrs. Kimball. Therefore, in those instances, Mrs.

Kimball, as the person operating Tours, was the payee on those checks and also signed the checks as the payor.

14. Although the Department's investigation revealed that Tours, through Mrs. Kimball, provided consultant services, as well as secretarial services, it was unclear what services were deemed to be and provided as consultant services. Nonetheless, during the Department's investigation, checks seized from the business establishment indicated that one or more of the corporations involved in the illegal drug activity had paid "consultant fees" to Tours. Based on the Department's review of the seized records, the amount of money paid by these companies to Tours as unspecified "consultant fees" appeared to be unreasonably high.

15. Prior to issuance of the 1997 Administrative Complaint in the underlying proceeding, Agent Orr wrote a report of her findings based on her multi-year investigation and sent them to her supervisor, who forwarded the report to Jerry Hill, R.Ph., Bureau Chief of the Department's Bureau of Statewide Pharmaceutical Services. Mr. Hill reviewed Agent Orr's report and other information and evidence obtained during the investigation. He also talked to some of the Department agents and/or investigators who participated in the investigation at various times during the years the investigation was on-going.

16. Based on his review of Agent Orr's report and related information and evidence, Mr. Hill believed there were several companies involved in promoting and/or advertising, manufacturing, and distributing prescription drugs that were not approved by the FDA. The specific unapproved drugs were selegiline citrate (deprenyl) and some silvicidal products, some of which had been found during inspections of the premises at 29949 State Road 54 West prior to issuance of the 1997 Administrative Complaint in the underlying proceeding. After reviewing all of the information provided to him, Mr. Hill believed that some of the companies were more involved in the illegal drug operation than others. However, he also believed that all of the principals had some involvement in the illegal activity.

17. Based on the information Mr. Hill obtained prior to issuing the 1997 Administrative Complaint, he believed that ASTAK, a company owned by the Kimballs, manufactured the unapproved drugs and operated in the building owned by Tours.

18. A review of the documentation provided to Mr. Hill indicated Mrs. Kimball, the person who operated Tours, had full signature authority on the checking accounts of several of the corporations that the Department determined were involved in the illegal drug activity. Based on checks seized pursuant to the federal search warrants, Mr. Hill determined that checks from

DEDI, written to Tours for consulting fees, were signed by Mrs. Kimball. There was also documentation that Mrs. Kimball signed checks from ASTAK that were written to Tours.

19. Based on the information and evidence Mr. Hill had received, he believed that the corporations that were engaging in the illegal drug activities involved two principal natural persons, James and Josephine Kimball.

20. Mr. Hill believed that he had sufficient evidence to tie several of the companies together, including DEDI, DEDI of Mexico, ASTAK, and Tours. Given the companies' common ownership, Mr. Hill was concerned that if the Department did not tie the companies together and prosecute all the entities that were involved in the operation, the illegal activity would continue through some other company and the unapproved drugs would get into commerce.

21. Based on the information that he was provided, Mr. Hill believed that Tours was really just another company that was supported by and involved in the unlawful and criminal activity and that the whole purpose of the corporations was to promote, manufacture, and sell unapproved drugs. Moreover, it was Mr. Hill's belief that there was a scheme to hide the illegal activity by putting money from the sales of the unapproved drugs into accounts of the various corporations owned by Mr. and Mrs. Kimball, including Tours.

22. After careful consideration of all the information and evidence provided to him by Department investigators, agents, and other Department officials familiar with and involved in the investigation, Mr. Hill concluded that Tours participated in the illegal drug enterprise and was, therefore, in violation of Chapter 499, Florida Statutes (1997). Having made that determination, on or about June 24, 1997, Mr. Hill issued the 1997 Administrative Complaint in the underlying proceeding, which was later assigned DOAH Case No. 97-3836.

23. Pursuant to a Delegation of Authority dated February 19, 1997, Mr. Hill was authorized to initiate and pursue to conclusion any legal or administrative action authorized by Chapter 499, Florida Statutes (1997).

24. In the underlying administrative proceeding, after taking and considering testimony and documentary evidence, the Administrative Law Judge issued a Recommended Order finding that the Department failed to establish by clear and convincing evidence that Tours violated the provisions of Chapter 499, Florida Statutes (1997), as alleged by the Department. That Recommended Order was adopted in the Department's Final Order.

25. At all times relevant to this proceeding, Tours was a Florida corporation with its primary office in Florida and had less than 25 employees and a net worth of less than \$2,000,000.

26. Tours was represented by Elliot Dunn, Esquire, in the underlying proceeding, including and through the final hearing. Mr. Dunn withdrew from the case prior to the parties' filing their Proposed Recommended Orders.

27. Mr. Dunn did not testify at this proceeding and no time records related to his representation of Tours or any of the other Petitioners in the underlying proceeding were available for review, inspection, or consideration.

28. Tours did not pay Mr. Dunn for the legal services that he provided. Instead, he was paid by ASTAK, one of the non-prevailing parties in the underlying proceeding, and later, by Strictly Supplements. There was never a contract between Tours and Mr. Dunn that defined the terms and conditions of Mr. Dunn's legal representation on behalf of Tours. However, during the time Mr. Dunn represented Tours, he was in-house counsel for ASTAK and/or DEDI, a job for which his annual salary was about \$52,000.

29. Petitioner's expert witness opined that a reasonable hourly rate for attorneys representing each of the Petitioners, including Tours, was \$175 to \$350.

30. Petitioner's expert did not form an opinion as to the total number of hours reasonably spent by Mr. Dunn representing Tours in the underlying proceeding. Rather, the expert testified that he utilized Rule Regulating Florida Bar 4-1.5,

which deals with the reasonableness of fees. Based on the factors in that Rule, Petitioner's expert opined that reasonable attorney's fees incurred by Tours in the defense of the underlying case are \$50,000, assuming the hourly rate of \$175.

31. Rolando J. Santiago, Esquire, provided legal services to Tours in the post-hearing phase of the underlying proceeding. Specifically, Mr. Santiago reviewed the case file and the record in the underlying case and prepared the Proposed Recommended Order and related pleadings for Tours.

32. Mr. Santiago's hourly rate is \$175 and he spent 157 hours providing legal services to Tours in the underlying proceeding. Therefore, Mr. Santiago's fee for the legal work he performed for Tours is \$27,475.

33. In light of the findings and conclusions reached in this Final Order, no findings are made or necessary regarding issues related to the reasonableness of the attorney's fees, the quality of the evidence presented on that issue or any other issues related to attorney's fees.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the subject matter and parties to this proceeding. §§ 57.111 and 120.57, Fla. Stat. (2004).

35. In proceedings to establish entitlement to an award of attorney's fees and costs pursuant to Section 57.111, Florida



Statutes (2003), the initial burden of proof is on the party requesting the award to establish by a preponderance of the evidence that it prevailed in the underlying action and that it was a small business party at the time the action was initiated.

36. Petitioner proved that it is a small business party within the meaning of Subsection 57.111(3)(d)1.b., Florida Statutes (2003). Furthermore, Petitioner established that the underlying action was initiated by the Agency. Therefore, Petitioner has met its burden of establishing that it is a prevailing small business party.

37. Because Petitioner met its burden, the burden shifts to the Department to demonstrate that its actions were substantially justified or that special circumstances exist, which would make an award of attorney's fees and costs unjust. Subsection 57.111(4)(a), Florida Statutes (2003), provides that unless the actions of the Respondent were substantially justified or there are special circumstances that would make an award unjust, an award of fees and costs shall be made to Petitioner.

38. In this case, the Department was substantially justified in initiating the underlying administrative action against Tours. The evidence established that at the time the Department initiated the underlying administrative action against Tours, the Department had a reasonable basis in law and

fact to believe that Tours violated provisions of Chapter 499, Florida Statutes (1997).

39. The purpose of Section 57.111, Florida Statutes (2003), is to diminish the deterrent effect of defending against unreasonable government action because of the expense of civil actions and administrative proceedings. The Department satisfied its burden of showing that the governmental action against Tours was not unreasonable at the time the Department initiated the action.

40. The fact that Respondent failed to prove the allegations in the Administrative Complaint by clear and convincing evidence does not raise a presumption that the Department was not substantially justified in initiating the administrative action against Tours.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that Petitioner Discovery Tours Wholesalers, Inc.'s Petition for Attorney Fees and Costs be DISMISSED.

DONE AND ORDERED this 5th day of January, 2005, in  
Tallahassee, Leon County, Florida.

*Carolyn S. Holifield*

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CAROLYN S. HOLIFIELD  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 5th day of January, 2005.

ENDNOTE

<sup>1/</sup> The record in this case will be retained with the Final Order  
in DOAH Case No. 03-2807F.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.