STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,	)	
Petitioner,	)	
vs.	)	Case No. 04-2786
ROBERT JOSEPH MOLITOR, d/b/a OAR HOUSE BAR AND LIQUORS,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on June 27 and 28, 2005, in Tampa, Florida, before Fred L. Buckine, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Renee Alsobrook, Esquire
Sorin Ardelean, Esquire
Department of Business and Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: David J. Sockol, Esquire
Derek A. DiPasquale, Esquire
111 Second Avenue Northeast, Suite 1401
St. Petersburg, Florida 33701

STATEMENT OF THE ISSUE

There are two issues presented in this proceeding. One, whether Respondent and/or its employees or agents possessed, sold or served on its licensed premises alcoholic beverages labeled as and represented to be a specific alcoholic beverage(s), but the containers did not contain the alcoholic beverage(s) as stated on the labels of the bottles (misrepresentation), in violation of Section 562.061, Florida Statutes (2004).[1] Two, whether Respondent reused or refilled with distilled spirituous liquors for the purpose of sale bottle(s) or other containers which once contained spirituous liquors, misrepresented or permitted to be misrepresented the brand of distilled spirits being sold or offered for sale in or from any bottle or containers for the purpose of sale in violation of Section 565.11, Florida Statutes.

PRELIMINARY STATEMENT

This cause has a procedural history extending from August 9, 2004, until the final hearing on June 27 and 28, 2005.

On August 9, 2004, Petitioner, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, referred this cause (one count Administrative Action and Request for Hearing) to the Division of Administrative Hearings for assignment of an Administrative Law Judge.

By Notice of August 20, 2004, the final hearing was scheduled for October 11, 2004.

On October 4, 2004, a motion to continue and place case in abeyance was filed by Respondent. On October 5, 2004, Respondent filed an Amended Motion for Continuance and for Extension to Respond to Petitioner's First Set of Interrogatories.

On October 5, 2004, an Order was entered placing the case in abeyance, with a written status report due not later than January 5, 2005.

On January 4, 2005, Respondent filed a Motion to Resume Proceeding. On January 14, 2005, Respondent's motion was granted, and a Notice of Hearing by Video Teleconference, scheduling the final hearing for February 28, 2005, was entered.

On February 4, 2005, and February 8, 2005, Petitioner and Respondent, respectively, filed Motions to Introduce Expert Testimony by Telephone Conference. On February 8, 2005, Respondent filed a Motion for Continuance of Proceedings for 60 Days to Complete Discovery.

On February 28, 2005, Orders were entered granting expert testimony via telephone conference and granting a continuance and rescheduling the final hearing for April 28, 2005, in Tampa, Florida.

On April 6, 2005, Petitioner filed a Motion to Amend Administrative Action and the First Amended Administrative Complaint, alleging violations of Sections 565.11 and 561.29, Florida Statutes. The motion was granted by Order of April 8, 2005.

On April 13, 2005, the parties filed a Joint Motion to Continue, and the Order Granting Continuance and Re-scheduling Hearing for May 18, 2005, was entered on April 14, 2005.

On May 6, 2005, Respondent filed a Motion to Compel and Motion for Continuance, and Petitioner filed a Response to Motion to Compel on May 10, 2005.

On May 13, 2005, an Order was entered granting a continuance and rescheduling the final hearing for June 27 and 28, 2005.

On May 24, 25, and 27, 2005, Petitioner filed Notices of Taking Depositions, a Motion to Perpetuate Testimony, and a Notice of Service of Respondent's Amended Expert Disclosure.

On June 3, 2005, Respondent filed a Motion to Dismiss and Relinquish Jurisdiction, and Petitioner filed Petitioner's response to Respondent's Motion to Dismiss and Relinquish Jurisdiction on June 6, 2005.

On June 8, 2005, Petitioner filed Petitioner's Motion in Limine and Motion to Compel discovery.

On June 15, 2005, Petitioner filed 16 depositions taken of Respondent's witnesses.

On June 20, 2005, Respondent's Motion in Limine to Exclude Evidence, Testimony and Argument from and regarding the Williams Reagent [Field] Test, the Photographs of the Liquor Bottles and the National Laboratory Testing Results [Alcoholic] Analysis was filed, and Petitioner filed its objections on June 24, 2005.

At the hearing, Petitioner presented the testimony of three witnesses: James Jagnathan, Ph.D., senior alcohol chemist at the Alcohol and Tobacco Tax and Trade Bureau laboratory in Ammendale, Maryland, and Lieutenant George Miller and Special Agent Jim Dykes, both employees of Petitioner. Petitioner offered 11 exhibits. All exhibits were received in evidence.

Respondent presented the testimony of: Robert Joseph Molitor, licensee and owner of Oar House Bar and Liquors; John Molitor, manager of Oar House Bar and Liquors and son of Robert Joseph Molitor; Richard Wilson, part-time bartender for Oar House Bar and Liquors; Shana Clayton, an Oar House Bar and Liquors customer; Jason Havens, an Oar House Bar and Liquors customer; Brittian Thornton, part-time bartender at Oar House Bar and Liquors; Toni Schemenauer, a part-time bartender and assistant store manager of the adjoining Oar House Bar and Liquors liquor store; and Irwin L. Adler, Ph.D., engineer.

Respondent's motion to qualify Dr. Adler as an expert in chemical analysis of alcoholic beverages was denied. Respondent offered Exhibits A and B, which were both received in evidence. At the end of the hearing, neither party ordered a transcript. Respondent opted to delay incurring the expense of ordering a transcript until after the filing of a post-hearing motion for involuntary dismissal at the conclusion of Petitioner's case (considered as motion for summary recommended order) and a ruling by the undersigned. On July 12, 2005, Respondent filed a renewed Motion for Involuntary Dismissal at the conclusion of all testimony.

On July 15, 2005, Petitioner filed a Notice of Substitution and Appearance of Counsel and a response to Respondent's Motion to Allow Oral Renewal of Motion for Involuntary Dismissal made at the end of the Petitioner's Case.

On August 12, 2005, a telephonic conference call on Respondent's renewal for involuntary dismissal at the end of Petitioner's case and Petitioner's response thereto was held, and Respondent's motion was denied. Respondent's ore tenus motion for extension of time to file proposed recommended order after delivery of transcript, due to scheduled court appointments, was granted thereby waiving the time requirement for submittal of this Recommend Order. See Fla. Admin. Code R. 28-106.216. The parties' post-hearing submittals were due no

later than October 10, 2005. The two-volume Transcript of the June 27, 2005, hearing was filed on August 24, 2005. The one-volume Transcript of the June 28, 2005, hearing was filed on August 30, 2005.

Petitioner filed a Proposed Recommended Order on October 4, 2005, and Respondent filed a Proposed Recommended Order on October 12, 2005; both parties' proposals were given consideration by the undersigned in preparation of this Recommended Order.

FINDINGS OF FACT

Based upon observation of the witnesses and their demeanor while testifying, depositions filed, documentary materials received into evidence, stipulations by the parties, and evidentiary rulings made pursuant to Section 120.57, Florida Statutes, the following relevant, substantial, and material facts are determined:

1. Petitioner, Department of Business and Professional Regulations, by and through the Division of Alcoholic Beverages and Tobacco (DABT), is the state agency responsible for supervision of the conduct, management, and operation of the manufacturing, packaging, distribution, and sale within the state of all alcoholic beverages and the enforcement of the provisions of the Beverage Law, the Tobacco Law, and rules and regulations of DABT in connection therewith. It is the express

legislative intent that the state retains primary regulatory authority over the activities of licensees under the Beverage Law within the power of the state and DABT.

2. At all times material hereto, Respondent, Robert Joseph Molitor, d/b/a Oar House Bar and Liquors (Oar House), was the licensee holder of license number 62-00683, Series 4-COP, issued by DABT, and owner of the licensed premises located at 4807 22nd Avenue, South, St. Petersburg, Florida 33711-2927. This facility consists of a bar with an open doorway into the adjoining liquor store. The Series 4-COP license allows Respondent to make sales of beer, wine, and liquors at the liquor store adjoining the bar for off-premises consumption and allows sales of beer, wine, and liquor for on-premises consumption at the bar. John Molitor, son of Respondent, Robert Joseph Molitor, at all time pertinent was the operational manager of the Series 4-COP licensed business premises.

3. Oar House and the owner of the licensed premises are subject to the regulatory jurisdiction of DABT because of having been issued license number 62-00683, Series 4-COP, by DABT.

4. DABT received an unsolicited telephonic compliant from Robert Boyle, a former Oar House bartender and customer. Mr. Boyle complained that Oar House was "refilling" brand-named bottles of liquor with cheaper brands of liquor. Mr. Boyle also mentioned that a green funnel, believed to have been used to

refill the liquor bottles, could be found in the storeroom behind the bar at the licensed premises. Unsolicited telephonic complaints from customers are but one source alerting DABT to those bars where there are suspicions and questions regarding liquors sold and served to its customers.

5. Having received a complaint that Oar House was refilling liquor bottles, DABT initiated an investigation and on July 24, 2003, DABT special agents, Jim Dykes and DiPietro (no first name in the record), entered the premises of Oar House. During the July 24th visit, the agents identified themselves to John Molitor and requested he "stick around" for any questions they might have upon completion of their investigation. John Molitor ignored the agents' request and departed the premises before the agents concluded their investigation. The agents found a green funnel on the storeroom shelf behind the bar as reported by Mr. Boyle. The agents photographed the green funnel.

6. Agents Dykes and DiPietro observed and identified a bottle of expensive liquor with a worn, stained label in a speed rack behind the bar. The expensive liquor identified with the worn label was (by brand name) Johnnie Walker Black Label Scotch Whiskey (Johnnie Walker Whiskey). The speed rack was located in the middle of the bar for easy and equal access from either end

of the bar. The brand labels on liquor bottles stored in speed racks are visible from the customer side of the bar.

7. DABT Agents Dykes and DiPietro performed the Williams Reagent Field Test on the seized bottle of Johnnie Walker Whiskey. The Williams Reagent Field Test consists of comparing the "color" of a suspect brand bottle of liquor to an original unopened bottle of the same brand product taken from the adjoining package store. The "subject" bottle showed a visual difference of color from the original same brand product. Because the Williams Reagent Field Test is not as reliable as the chemical analysis testing processes, all suspect bottles of alcohol tested using the Williams Reagent Field Test are submitted for additional chemical analysis testing. The agents seized the suspect bottle of Johnnie Walker Whiskey and issued to Respondent Evidence Receipt No. 53528.

8. For this suspected violation (refilling), DABT issued a Notice of Warning to Respondent dated July 24, 2003.

9. Six days later, July 30, 2003, DABT agents again visited the Oar House bar and again found Respondent in possession of three liquor bottles suspected of containing liquor different from the specific brand labeled. The three suspect bottles of liquor were Chivas Regal Scotch Whiskey (Chivas Regal Whiskey), J & B Blended Whiskey (J & B Whiskey), and Canadian Club Blended Whiskey (Canadian Whiskey). The

Williams Reagent Field Test performed on the three seized bottles on July 30, 2003, showed a difference of color of the suspect bottles compared to the original unopened products of the same brand. The agents seized, corked, and photographed the suspect bottles of liquors and issued Respondent Evidence Receipts for the seized liquor.

10. The four bottles of liquor found on Respondent's licensed premises that were field-tested, seized, and photographed were: (1) Johnnie Walker Whiskey, (2) Chivas Regal Whiskey, (3) J & B Whiskey, and (4) Canadian Club Whiskey. Each of the above four bottles was taped, sealed, and marked for identification, by initials of the agent, in preparation for shipping, testing, and chemical analysis by the Department of Treasury, Bureau of Alcohol, Tobacco and Firearms (BATF), National Laboratory, in Ammendale, Maryland.

11. On or about November 3, 2003, BATF senior alcohol analysis chemist, James Jagonathan, Ph.D., caused to be performed, four alcohol chemical analysis tests on each of the four suspect bottles of liquor (Findings of Fact 10) sent under seal by DABT.

12. The four chemical alcohol analysis tests performed by Dr. Jagonathan are standard tests approved by the Association of Official Analytical Chemists (AOAC). These tests establish the objective criteria for determination of whether an open bottle

of alcohol contains the requisite "qualitative" and "quantative" brand alcohol and the amount of alcohol therein as stated on the label, minus allowable lost. The four tests performed were: (1) the solids test, which measures the quantity of nonalcoholic materials in the suspect bottle compared to the permissible quantity of nonalcoholic materials in the original manufactured brand bottle; (2) the lovibond test, which measures the difference in the color of the alcohol in the suspect bottle compared to the color of the alcohol in the original manufactured brand bottle and is performed by use of a color UV Spectrometer; (3) The alcohol-density meter test, which measures the "volume" of alcohol in the suspect bottle compared to the "permissible volume" of alcohol in the original manufactured brand bottle; and (4) the fusel oils test, which measures the quantity of "fusel oils" in the suspect bottle compared to the "permissible quantity of fusel oils" in the original manufactured brand bottle. The fusel oils test is a "comparative measurement" test, and the comparison is made by use of the Gas Chromatography meter. In each of the above test, objective predetermined deviation "allowances" for losses due to manufacturing and processing are permissible (i.e. Findings of Fact 14, 17, 18, and 19).

13. There is no legal requirement that DABT identify the specific type/brand of alcohol ("refilled" or added to the

original); identify the specific type or name of the solids ("added" to the original); or provide explanation for alcoholic "evaporation" resulting from exposure or open pourers found in a suspect bottle(s).

14. Dr. Jagonathan informed DABT that two of the suspect bottles (Sample No. 120030859, J & B Whiskey, 50 ml, 40 percent by volume and Sample No. 120030862, Johnnie Walker Whiskey, 750 ml, 40 percent by volume) were "refilled" with an alcoholic product other than as listed on the respective labels. The alcohol content of the "suspect" bottle of J & B Whiskey was 39.10 percent. The alcohol content of the original manufactured J & B Whiskey product was 39.95 percent. This 0.85 percent variation of alcohol content from the original manufactured product conclusively demonstrated "refilling" with an alcoholic product other than as listed on the respective label. The alcohol content of the "suspect" bottle of Johnnie Walker Whiskey was 39.15 percent. The alcohol content of the original manufactured bottle of Johnnie Walker Whiskey product was 39.90 percent. This 0.75 percent variation of alcohol content from the original manufactured product conclusively demonstrated "refilling" with an alcoholic product other than as listed on the respective label.

15. Dr. Jagonathan informed DABT that the suspect bottle (Sample No. 3120030861, Chivas Regal Whiskey, 50 ml, 40 percent

by volume) contained liquid other than the original product (i.e. "probably refilled").

16. Dr. Jagonathan advised DABT that the suspect bottle (Sample No. 120030860, Canadian Club Whiskey, 50 ml, 40 percent by volume) was consistent with an original manufactured authentic product.

17. Dr. Jagonathan gave uncontroverted testimony that producers/distillers are required to have in sealed, unopened bottles the alcohol content (i.e. 40 percent) stated on the label, per volume. DABT acknowledges that the escape of a minuscule amount of alcohol evaporation during the distilling and bottling processes permits producers/distillers a 0.15 percent deviation from the 40 percent required alcohol standard (i.e. 40.15 percent high and 39.85 percent low are permissible). Possession of bottles of an alcoholic beverage with alcohol content above and/or below the permissible 0.15 percent deviations from the required 40 percent alcohol content per volume is illegal.

18. Regarding the lovibond (color) test, Dr. Jagonathan gave uncontroverted testimony that a 0.10 percent (+ or -) deviation from the normal color, as measured by color UV Spectrometer, is allowed for loss during manufacturing, distilling and bottling processes. As an example, with the

J & B Whiskey, the "suspect" bottle had a 7.7 percent lovibond color test result, and the "original" product a 3.0 percent lovibond color test result (7.7 percent - 3.0 percent = 4.7 percent). The Johnnie Walker Whiskey "suspect" bottle had a 2.8 percent lovibond color test result and the original a 10.9 percent lovibond color result(10.9 percent - 2.8 percent = 7.2 percent).

19. By testimony of an expert alcohol chemist of the National Alcohol and Tobacco Tax and Trade Bureau (ATTB) Laboratory in Ammendale, Maryland, based upon the accepted methods of standard tests approved by the AOAC, the established objective criteria for determining whether an open bottle of alcohol contains the requisite qualitative and quantative brand alcohol and amount of alcohol therein, minus allowable loss as stated on the label, are determined by the four tests stated above.

20. DABT proved by clear and convincing evidence that the J & B Whiskey (Sample No. 120030859) and Johnnie Walker Whiskey (Sample No. 120030862) were "refilled" with liquids other than the original liquid from the manufactures. The testing results conclusively established that the alcoholic chemical contents of the above samples tested were not the same as the content of what an original product label would have been for each respective sample.

21. DABT, by uncontroverted clear and convincing evidence, proved that Chivas Regal Whiskey (Sample No. 120030861) "probably" contained a refilled liquid other than the original liquid sent from the manufactures. The test results conclusively established that the chemical content of the sample tested was not the same as the content of what an original product would have been for this sample.

22. DABT, by uncontroverted clear and convincing evidence proved that the Canadian Club Whiskey's (Sample No. 120030860) liquid contents were consistent with and within allowable deviation with the authentic product sent from the manufacturer. The test result conclusively established that the chemical content of the sample tested was the same as the content of an original product.

23. DABT proved clearly and convincingly that Respondent possessed the three bottles herein above labeled as "authentic" whiskey. Those three suspect (i.e. "refilled") bottles seized from Respondent's bar did not have the same chemical content as Respondent's original whiskey of the same brand brought from Respondent's adjoining liquor store.

24. Respondent argues that the standard tests approved by AOAC do not: (1) take into consideration or make allowance that "explain" alcohol evaporation loss due to room (heat) temperature and (2) make an allowance for alcoholic loss due to

length of time bottles were left with open pourers in the speed rack. Also, the established objective criteria (plus or minus 0.15 percent) for determination of whether an open bottle of alcohol contained the requisite qualitative and quantative brand alcohol and amount of alcohol therein, minus allowable loss as stated on the label are "arbitrary," are each contrary to existing case law establishing legal precedent and, thus, should be disregarded for want of legal foundation. These arguments, contrary to law, are rejected.

25. The opinion testimony of Respondent's witness, Irwin L. Adler, Ph.D., engineer and professional wine taster, who was not qualified as an expert in chemical alcohol analysis, was neither relevant nor material to the "refilling" issues in this proceeding.

26. DABT agents seized four bottles from the licensed premises that were sent to the ATTB's laboratory for testing. The results show that three of the four bottles were materially altered in some fashion that is inconsistent with the Florida Beverage Law. Respondent was clearly negligent and did not exercise a "reasonable standard of diligence" by allowing materially altered refilled bottles of scotch to be present (sold) on his licensed premises.[2]

27. DABT proved by clear and convincing evidence that Respondent, Robert Joseph Molitor, d/b/a Oar House Bar and

Liquors, holder of license number 62-00683, Series 4-COP, and owner of the licensed premises located at 4807 22nd Avenue, South, St. Petersburg, Florida 33711-2927, violated Section 565.11, Florida Statutes, by and through Section 561.29, Florida Statutes, as alleged in the Amended Administrative Complaint, and is, therefore, subject to appropriate penalty.

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2005).

29. DABT has the burden of proof to demonstrate by clear and convincing evidence that Respondent, Robert Joseph Molitor, d/b/a Oar House Bar and Liquors, licensee holder of license number 62-00683, Series 4COP, and owner of the licensed premises located at 4807 22nd Avenue, South, St. Petersburg, Florida 33711-2927, violated Sections 561.29, 562.061, and 565.11, Florida Statutes, as alleged in the Amended Administrative Complaint. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 832 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987); and Pic N' Save Central Florida, Inc. v. Department of Business and Professional Regulations, Division of Alcoholic Beverages and Tobacco, 601 So. 2d 245, 249 (Fla. 1st

DCA 1992). In, Slomowitz v. Walker, 429 So. 2d 800 (Fla. 4th DCA 1983), the court provided guidance to the clear and convincing evidence standard:

> [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must e distinctly remembered, the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that is produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

30. DABT is given broad power to supervise the manufacturing, distributing, and sale of alcoholic beverages and to enforce the provisions of the Beverage Law, Section 561.02, Florida Statutes.

31. Subsection 561.29(1)(a), Florida Statutes, provides in relevant part:

> (1) The division is given full power and authority to revoke or suspend the license of any person holding a license under the Beverage Law, when it is determined or found by the division upon sufficient cause appearing of:
>
> (a) Violation by the licensee or his or her or its agents, officers, servants, or employees, on the licensed premises, or elsewhere while in the scope of employment, of any of the laws of this state. . . .

32. Section 562.061, Florida Statutes, provides:

> Misrepresentation of beverages sold on licensed premises. It is unlawful for any licensee, his or her agent or employee knowingly to sell or serve any beverage represented or purporting to be an alcoholic beverage which in fact is not such beverage. It is further unlawful for any licensee knowingly to keep or store on the licensed premises any bottles which are filled or contain liquid other than that stated on the label of such bottle.

33. The above prohibits an alcoholic beverage licensee from offering for sale and/or the mere possession of mislabeled alcoholic beverage containers. In the case sub judice, Respondent was in possession of three bottles which were refilled or contained alcoholic liquid other than that stated on the labels of such bottles.

34. The laboratory tests conducted by BATF on the spirits seized from Respondent conclusively show that the products contained in the bottles of J & B Blended Scotch Whiskey, Chivas Regal Whiskey, and Johnnie Walker Whiskey, respectively, were not what their labels identified them as being. As required, DABT proved the contents of the "beverage represented or purporting to be an alcoholic beverage . . . is not such beverage." § 562.061, Fla. Stat.

35. In Department of Business Regulation, Division of Alcoholic Beverages and Tobacco v. McGuire, DOAH Case No. 82-1150, 1982 WL 214863, 1 (Fla. Div. Admin. Hrgs. 1982), agents

found a number of bottles with worn stamps and labels on the licensed premises. After positive field tests and seizure of the suspect bottles, laboratory tests resulted in a conclusive analysis of the chemical content to established that the chemical contents of the suspect bottles were not the same as the chemical content of the original labeled product for each respective brand. The McGuire conclusion of law stated the licensee is prohibited "from offering for sale or even possessing mislabeled alcoholic beverage containers . . ." Id. at 2. The issue in the present case is identical, and the circumstances are strikingly similar to McGuire. The suspect bottles in both had worn labels. The field tests in both were positive. The independent professional laboratory test results revealed specific discrepancy(s)(above or below the permissible 0.15 percent deviation from 40 percent alcohol per volume) in the chemical content of the liquid content of the suspect bottles when compared to the original product.

36. In the case sub judice, like in McGuire, a liquid with a different chemical content than an original product was on the premises and served as the original contents. Whether the suspect bottle was "watered down" or just "blended with another brand of liquor," a liquid whose chemical contents is not within the allowable range of 0.15 percent of the original product convincingly demonstrates it was not the same product as

labeled. Consequently, the undisputed evidence in this case clearly and convincingly supports the allegation made by Petitioner that Respondent violated Section 562.061, Florida Statutes, because the licensee had in his possession in his licensed premises J & B Whiskey, Chivas Regal Whiskey, and Johnnie Walker Whiskey purported to be whiskey of a certain brand, when in fact the bottles contained a liquid that was chemically different from the original J & B Whiskey, Chivas Regal Whiskey, and Johnnie Walker Whiskey as described on the label of each such bottle, respectively.

37. Section 565.11, Florida Statutes, provides as follows in relevant part:

> Any person who shall reuse or refill with distilled spirituous liquors for the purpose of sale a bottle or other container which has once been used to contain spirituous liquors, or any person who shall willfully misrepresent or permit to be misrepresented the brand of distilled spirits being sold or offered for sale in or from any bottles or containers, shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083 and, when such person is licensed under this law, be subject to have his or her license revoked by the division. The possession of such a refilled or a mislabeled bottle or other container of spirituous liquors shall be prima facie evidence of the violation of this section.

In re: Bavosa License, No. 177, October sessions, 1961 (April 9, 1962), Court of Quarter Session of Pennsylvania, Lackawanna County, 30 Pa. D. & C.2d 348, 1962 WL 7080 (Pa.Quar.Sess.). In Bavosa, an appeal was taken for the Liquor Control Board's suspension of appellant's hotel liquor license for violation of section 491 of the Liquor Code, prohibiting the adulteration or contamination of liquor or the refilling of bottles. Appellants argued there, as does Respondent in the case sub judice, that bottles with lower proof were slow sellers, were on the back bar, and were capped with open-ended pouring sprouts for an extended period of time and that the discrepancy in proof was due to evaporation created by atmospheric conditions. In rejecting arguments of the appellants, the court recited performance of the Williams Reagent Field Test followed by the laboratory tests of (a) solid contents and (b) proportionate percentage of total acids, volatile acids, fixed acids, and esters (solids) supported its upholding the suspension. At p. 250, the court held:

> Each distiller uses his own formula in determining the solid content and proportionate percentage of acids and esters, and then blends the whiskey to maintain the uniformity of the formula so that there is a minimum of variance in the solid content and proportionate percentage of acids and esters in his product, although there is wide variance between his product and the same proof whiskey blended by other distilleries.

The laboratory tests disclosed that three bottles contained such wide variations in solid contents, total acids, volatile acids, fixed acids and esters, as to establish that those bottles, although containing the required proof, did not contain the brand whiskey called for on the brand label. The condition of three bottles was completely unaffected by evaporation and shows the necessary presence of a human agency in bringing about this change. In the case sub judice, the condition of three bottles was unaffected by evaporation and proved the necessary presence of a human agency in bringing about the change in content. Second, the three bottles of adulterated whiskey in this case were in the possession of Respondent. The latter fact is, in itself, sufficient to sustain a violation of the statute as alleged in the Amended Administrative Complaint.

38. The above Florida Beverage Law statute concerning "refilling" runs parallel with the Federal version that prohibits similar activity. Compare 26 U.S.C.A., Section 5301(c), and Sections 562.01 and 565.11, Florida Statutes.

39. The Internal Revenue Code, 26 U.S.C.A. Section 5301(c), contains a similar provision dealing with the refilling of liquor bottles. It provides in relevant part:

> (c) Refilling of liquor bottles--No person who sells, or offers for sale, distilled spirits, or agents of employee of such person, shall-

> (1) Place in any liquor bottle any distilled spirits whatsoever other than those contained in such bottle at the time of tax determination under the provisions of this chapter; or
> (2) possess any liquor bottle in which any distilled spirits have been placed in violation of the provisions of paragraph (1); or
> (3) by the addition of any substance whatsoever to any liquor bottle, in any manner alter or increase any portion of the original contents contained in such bottle at the time of tax determination under the provisions of this chapter; or
> (4) possess any liquor bottle, any portion of the contents of which has been altered or increased in violation of the provisions of the paragraph (3); except that the Secretary may by regulations authorize the reuse of liquor bottles, under such conditions as he may by regulations prescribe. When used in this subsection the term "liquor bottle" shall mean a liquor bottle or other container which has been used for the bottling of packaging of distilled spirits under regulations issued pursuant to subsection (a).

40. The purpose behind the Federal regulation was to protect and facilitate the collection of Federal revenues. In Stilinovic v. United States, 336 F.2d 863, 863 (8th Cir. 1964) (constitutional challenge to 26 U.S.C.A. Section 5301(c)), the court held that Congress acted within its constitutional power by facilitating the collection of revenue. The majority held that prevention of refilling or reusing bottles was necessary in order to ensure the protection of revenue because of the difficulty in determining whether tax was collected on the

contents of the bottle. Id. at 863. The excise tax laid on spirits is a very important source of revenue to the national government, and, because of the importance of the revenue, Congress enacted various laws in attempting to ensure collection. United States v. Duffy, 282 F. Supp 777 (S.D.N.Y. 1968). In Duffy, the court, at 779, stated:

> . . . By regulation, the Secretary requires that the stamp be affixed when the bottle is first filled or first imported. 26 C.F.R. Sections 201.541, 251.56, 251.110. A further important protection of the revenue from spirits is the provision (26 U.S.C., Section 5301(c)) making it a criminal offense for any seller of spirits to "refill" a liquor bottle either with "any distilled spirits whatsoever other than those contained in such bottle at the time of stamping" or "with any substance whatsoever" or "in any manner" to "alter or increase any portion of the original contents contained in such bottle at the time of stamping." The importance of this particular law to the revenue was emphasized in Report No. 2090 of the Committee on Finance of the Senate as follows (3 U. S. Code Cong. And Adm. News 1958, pp. 4562, 4563):
>
> The prevention of the reuse of liquor bottles or other authorized containers for the packaging of any distilled spirits, or of the alteration of the original contents of liquor bottles or other authorized containers which have been used for the packaging of distilled spirits, is essential for the protection of the revenue since it is in most cases impossible, once the container has been refilled or the original contents thereof altered by the addition of any substance (whether taxable of nontaxable), to establish whether the tax on

> the contents of such containers has been lawfully determined.
>
> * * *
>
> The language of this subsection as contained in the House bill and as restated by your committee is intended to obviate any question that its provisions are applicable, whether or not the tax has been paid or determined on the distilled spirits used in refilling and whether or not the substance used to alter the original contents is taxable under the internal revenue laws.

41. Notwithstanding its earlier decision in United States v. Goldberg, 225 F.2d 180, at 188 (8th Cir. 1955), in its subsequent Stilinovic decision the Eighth Circuit made clear the burden of proof holding that:

> Each manufacturer of distilled spirits has a formula. Through the various insignia required to be shown on the bottle, placed on the label, and on the revenue stamp, authorized investigators are able to ascertain with relative ease and reasonable certainty whether the distilled spirits in the container are those described by the various insignia. In the event the whiskey in the container does not correspond with that described and that on which the tax as evidenced by the stamp was paid, the burden should not be upon the Government to assume the almost insurmountable task of determining the source of the whiskey added to the container contrary to the regulations.

42. The Federal case law construing Internal Revenue Code, 26 U.S.C.A. Section 5301(c), is persuasive and herein is used as guidance when construing Chapters 561 through 569, Florida

Statutes, because Florida case law involving the provisions, purposes, and evidentiary proof issues is rather scarce.[3] In United States v. Milstead, 401 F.2d 51, 53 (7th Cir. 1968) (appeal of a criminal conviction for possession of liquor bottles containing distilled spirits other than those originally contained in bottle at time of stamping in violation of 26 U.S.C.A. Section 5301(c)), the court reviewed the operative and pertinent provisions of Section 5301(c) and held:

> . . . the only elements government was required to prove was that defendant was a retail "liquor dealer" who "possessed" liquor bottles refilled with distilled spirits that were not in the bottles when originally filled and stamped. Stated another way, it does not matter who refilled the bottles. The prosecution need only show that they were "refilled and then found in defendant's possession."

43. Citing United States v. Wasik, F. Supp 280 (W. D. Pa., 1964), at 281, ruling on element of possession: "It is within the contemplation of the statute that the acts which make defendant's possession illegal could have been performed by someone else. The offense with which they are charged is possessing the bottles after they were refilled or the contents altered . . .". The Milstead court adopted and extended Wasik to address identity of the perpetrators:

> We agree with the government counsel that the elements of defendant's offense, as enumerated by Section 5301(c)(2), are that defendant was a retail "liquor dealer" and

> that he "possessed" liquor bottles refilled with distilled spirits that were not in those bottles when originally filled and stamped, with "no proof required from the government as to who might have refilled the bottles." We hold that the government met its burden of proof on that issue at the trial. [Emphasis added]

44. In the case sub judice, the Department met its burden of proof on the issue of "Respondent's possession of liquor bottles refilled with distilled spirits that were not in those bottles when originally filled and stamped," in violation of the Florida Statutes, as alleged in the Amended Administrative Complaint.

Penalty

45. Subsection 561.29(1), Florida Statutes, provides:

> (1) The division is given full power and authority to revoke or suspend the license of any person holding a license under the Beverage Law, when it is determined or found by the division upon sufficient cause appearing of:
>
> (a) Violation by the licensee or his or her or its agents, officers, servants, or employees, on the licensed premises, or elsewhere while in the scope of employment, of any of the laws of this state or of the United States. . . .
> (b) Violation by the licensee or, if a corporation, by any officers thereof, of any laws of this state or any state or territory of the United States.
>
> * * *
>
> (e) Violation by the licensee, or, if a corporation, by any officer or stockholder

> thereof, of any rule or rules promulgated by the division in accordance with the provisions of this chapter or of any law referred to in paragraph (a), or a violation of any such rule or law by any agent, servant, or employee of the licensee on the licensed premises or in the scope of such employment.

46. Subsection 561.29(3), Florida Statutes, provides:

> The division may impose a civil penalty against a licensee for any violation mentioned in the Beverage Law, or any rule issued pursuant thereto, not to exceed $1,000 for violations arising out of a single transaction. If the licensee fails to pay the civil penalty, his or her license shall be suspended for such period of time as the division may specify. The funds so collected as civil penalties shall be deposited in the state General Revenue Fund.

Florida Administrative Code--Penalty Guidelines

47. Florida Administrative Code Rule 61A-2.002(11) prescribes the penalty guidelines to be imposed upon an alcoholic beverage licensee when violations are found to have been committed. For a first-time violation of Section 565.11, Florida Statutes, the Rule calls for $1,000.00 fine and a 20-day suspension.

Policy Considerations

48. The Beverage Law currently imposes a surcharge fee for each ounce of liquor that is sold for consumption on the licensed premises of vendors.

49. Subsection 561.501(1), Florida Statutes, provides that:

> Notwithstanding s. 561.50 or any other provision of the Beverage Law, a surcharge of 3.34 cents is imposed upon each ounce of liquor and each 4 ounces of wine, a surcharge of 2 cents is imposed on each 12 ounces of cider, and a surcharge of 1.34 cents is imposed on each 12 ounces of beer sold at retail for consumption on premises licensed by the division as an alcoholic beverage vendor. However, the surcharges imposed under this subsection need not be paid upon such beverages when they are sold by an organization that is licensed by the division under s. 561.422 or s. 565.02(4) as an alcoholic beverage vendor and that is determined by the Internal Revenue Service to be currently exempt from federal income tax under s. 501(c)(3), (4), (5), (6), (7), (8), or (19) of the Internal Revenue Code of 1986, as amended.

50. The cumulative effect of refilling has the potential to equal an enormous amount of uncollected excise tax. Refilling is not only unlawful, but is of significant consequence if one considered the refilling occurring unabated and unpunished in the thousands of licensed bars throughout the state. In each instance that the alcohol is "refilled" or "watered down," a few ounces of alcohol are sold without the payment of surcharge tax.

51. Section 565.11, Florida Statutes, provides that the mere possession of a refilled or mislabeled bottle of spirituous liquor is considered prima facie evidence of violation of the

refilling provision. This statute, by its prohibition of refilling bottles by licensees, thus, serves to preclude avoidance of tax liability, enhance revenue collection, and protect the health of consumers.

RECOMMENDATION

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

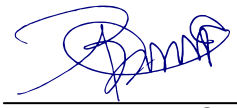
RECOMMENDED that Petitioner, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, enter a final order:

1. Finding that Respondent, Robert Joseph Molitor, licensee holder of license number 62-00683, Series 4-COP, d/b/a Oar House Bar and Liquors, located at 4807 22nd Avenue, South, St. Petersburg, Florida 33711-2927, as a first-time offender, violated Sections 562.061 and 565.11, Florida Statutes, as charged in the Amended Administrative Complaint;

2. Imposing an administrative penalty against Robert Joseph Molitor, licensee holder of license numbered 62-00683, Series 4-COP, and suspending his license numbered 62-00683, Series 4-COP, for a period of 20 consecutive days; and

3. Imposing a civil penalty against Robert Joseph Molitor, licensee holder of license numbered 62-00683, Series 4-COP, of an administrative fine in the amount of $1,000.00, payable to the Department.

DONE AND ENTERED this 23rd day of November, 2005, in Tallahassee, Leon County, Florida.



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

Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of November, 2005.

ENDNOTES

1/ All references are to Florida Statutes 2005 unless otherwise indicated herein.

2/ See Lash, Inc. v. Dept' of Bus. & Prof'l Regulation, 411 So. 2d 276 (Fla. 3rd DCA 1982); Trader Jon, Inc. v. State Beverage Dep't, 119 So. 2d 735, 739-40 (Fla. 1st DCA 1960).

3/ See Florida Tax Code 561.501--Under this code, each licensee is required to pay to the Division a surcharge tax on sale of alcoholic beverages for consumption on the licensed premises.

COPIES FURNISHED:

Captain John Blair, District Supervisor
Department of Business and
Professional Regulation
1313 Tampa Street, Suite 909
Park Trammel Building, No. 702
Tampa, Florida 33602

David J. Sockol, Esquire
Derek A. DiPasquale, Esquire
111 Second Avenue, Northeast, Suite 1401
St. Petersburg, Florida 33701

Renee Alsobrook, Esquire
Sorin Ardelean, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

Jack Tuter, Director
Division of Alcoholic Beverages and Tobacco
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Josefina Tamayo, General Counsel
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-2202

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.