STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF REVENUE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	Case No. 09-1274
SERVERS, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on June 1, 2009, at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Rachel W. Clark, Esquire
KaCee L. Widener, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

For Respondent: Servers, Inc., pro se
(By Bruce Drumm, its president)
35 East Acre Drive
Plantation, Florida 33317

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent failed to remit taxes, interest, penalties, and fees pursuant to a Compliance Agreement between Respondent and Petitioner; and, if

so, whether Petitioner should revoke Respondent's sales tax registration certificate in consequence thereof.

PRELIMINARY STATEMENT

On February 12, 2009, Petitioner Department of Revenue issued an Administrative Complaint against Respondent Servers, Inc., thereby notifying Respondent that its registration certificate, which authorizes Respondent to engage in the business of selling tangible personal property at retail as a "dealer" responsible for collecting and remitting sales taxes to the state, would soon be revoked unless Respondent requested a hearing. As grounds for revocation, the Department alleged that Respondent had failed to perform satisfactorily under a Compliance Agreement, pursuant to which the Department earlier had agreed not to revoke Respondent's certificate for nonpayment of taxes if Respondent paid the overdue taxes, which it admittedly owed, and satisfied other specified conditions.

Respondent timely exercised its right to be heard in a formal administrative proceeding. On March 11, 2009, the Department referred the matter to the Division of Administrative Hearings, where the case was assigned to an Administrative Law Judge.

The final hearing took place as scheduled on June 1, 2009, with both parties present. The Department presented the testimony of Tara Teague Schaffner, whom the Department

employed, at the time of the hearing, as a Senior Revenue Consultant. In addition, Petitioner's Exhibits 1 through 6 were received in evidence. Respondent's president, Bruce Drumm, testified for Respondent, which also introduced Respondent's Exhibit A into the record.

The final hearing transcript was filed on June 30, 2009. Thereafter, the Department timely submitted a Proposed Recommended Order, in accordance with the schedule established at the conclusion of the hearing, which set July 10, 2009, as the deadline. On July 22, 2009, Respondent filed a Belated Motion for Enlargement of Time Within Which to File Recommended Order ("Motion"), together with a Proposed Recommended Order. The Department did not object to the relief sought in the Motion.

The undersigned reviewed Respondent's untimely-filed Proposed Recommended Order, effectively granting the Motion. The Department's Proposed Recommended Order, too, has been reviewed and considered.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2008 Florida Statutes.

FINDINGS OF FACT

1. Petitioner Department of Revenue ("Department") is the agency of state government authorized to administer the tax laws of the State of Florida.

2. Respondent Servers, Inc. ("Servers") is a Florida corporation whose principal place of business is located in Plantation, Florida. Servers sells tangible personal property at retail and consequently is required to collect from its customers, and remit to the Department, sales tax on every transaction which is taxable under Chapter 212, Florida Statutes. In connection with this responsibility, Servers is an authorized "dealer," holding a sales tax certificate of registration numbered 16-8012479332-4 (the "Certificate"), which the Department issued on May 11, 2002.

3. On May 2, 2008, the Department issued a notice to Servers, which initiated a proceeding to revoke Servers' Certificate for failure to remit taxes. Servers was invited to appear at an informal conference with the Department on June 18, 2008. At the informal conference, Servers would have the opportunity to avoid revocation either by presenting evidence refuting the charges regarding unpaid taxes, or by entering into a compliance agreement pursuant to which the outstanding liability would be satisfied.

4. The informal conference took place as scheduled. Bruce Drumm, Servers' president, appeared on behalf of the corporation. At the conference, the Department and Servers entered into a written compliance agreement (the "Agreement"). Under the Agreement, Servers admitted that it owed the State of

Florida a grand total of $10,868.60, a sum which comprised $8,453.45 in unpaid taxes, $1,557.86 in interest, fees in the amount of $40.00, and a penalty of $817.29.

5. Servers agreed to pay its debt in installments, in exchange for the Department's promise to forbear from revoking Servers' Certificate. The Agreement called for Servers to make a down payment of $1,500 on June 25, 2008, followed by six monthly payments in the respective amounts of $750 (July through October) and $1,200 (November and December), due on specific dates beginning July 16, 2008, and ending December 16, 2008. The balance remaining after Servers' payment of $6,900 pursuant to foregoing schedule was "to be renegotiated on December 16, 2008."

6. The Agreement did not provide that time was of the essence with regard to Servers' duty to make the installment payments, nor was there a grace period applicable to the payment deadlines. The Agreement did, however, state as follows:

> E. If the certificate holder fails to comply with any obligation under this agreement, the Department has the right to initiate revocation procedures by filing an Administrative Complaint, with a copy to the certificate holder, but without further notice to the certificate holder of the default. In the event of an action to revoke the certificate the Department shall introduce this Agreement into evidence as proof of the facts recited herein.

* * *

G. If the certificate holder fails to perform any of the obligations under this agreement, including the timely filing of returns and payment of all taxes, penalties and interest as they become due, all amounts of the tax, interest and penalty settled under this agreement and any unpaid balance shall be immediately due and payable and collectible by all legal means.

7. In addition to promising to pay the outstanding indebtedness, Servers agreed:

A. To accurately complete all past due sales tax returns and file them no later than Due date.

B. To remit all past due payments to the Department as stated in the attached payment agreement.

C. To accurately complete and timely file all required sales tax returns for the next 12 months, beginning with the period 07/2008 through 06/2009.

D. To timely remit all sales tax collections due for the next 12 months, associated with the periods stated above.

E. To comply with all other provisions of Chapter 212, Florida Statutes.

8. Servers delivered each of the seven scheduled payments to the Department, fulfilling this particular financial obligation. Two of the payments (for October and December, respectively), however, were tendered on the next day after the

due date, and one payment (September) was tendered on the second day after the due date. The Department accepted these late payments.

9. The Department claims that each of these brief delays in performance on Servers' part amounted to a substantial violation of the Agreement. It alleges also that Servers further breached the Agreement by filing late returns for July and September 2008, and by being overdue in payment of taxes for the months of October and November 2008. Of these additional alleged breaches, only one was clearly proved. Based on the evidence presented, the undersigned finds that Servers' payment of the taxes due in November 2008 was delinquent.

10. The proof of Servers' delinquency came in the form of an admission, which was offered against Servers during the cross- examination of the Department's sole witness, Tara Teague Schaffner. The damaging testimony, in other words, was elicited not by the Department, but by Servers' representative, Mr. Drumm. The admission, moreover, was memorialized in the Department's business records, from which Ms. Schaffner (in response to Mr. Drumm's questions) read lengthy excerpts out loud, thereby "publishing" the contents of the Department's internal documents into the evidentiary record of this proceeding. The business records from which Ms. Schaffner quoted were not offered into evidence.

11. That the Department's records constituted "business records" for purposes of the business-records exception to the hearsay rule was established through Mr. Drumm's interrogation of Ms. Schaffner. Prompted by Mr. Drumm's questioning, Ms. Schaffner testified credibly, and the undersigned finds, that the Department's file on Servers contains, among other things, notes concerning conversations with the taxpayer, which were made contemporaneously, in the performance of a regular business activity, by a person with knowledge of the conversations, and which were kept in the regular course of the Department's business.

12. For reasons that will be discussed below, the undersigned has concluded that the contents of the Department's business records, though presented in an unusual manner, nevertheless constitute admissible evidence which clearly and convincingly proves that Servers committed at least one material breach of the Agreement, namely being delinquent with regard to payment of taxes due in November 2008.

13. To facilitate the forthcoming analysis of the admissibility of the dispositive evidence, and to show the basis for the finding that Servers breached the Agreement, the critical testimony is quoted here:

> **Q** [by Mr. Drumm] And do you [i.e. the Department] have any comments [in your records] regarding the 12/16 payment [for

> which the schedule in the Agreement provided]?
>
> **A** [by Ms. Schaffner] We have a note on the 17th of December [2008]. It says received stip payment due December 16th, twelve hundred dollars, hand delivered on December 17th.
>
> **Q** Are there any comments in the notes regarding my request to negotiate the balance due at that time?
>
> **A** On the 21st it says that Ms. Aboite [an employee of the Department] called you. She spoke to Bruce Drumm, the owner, reference delinquency for October and November 2008. He said that the return of payment was mailed yesterday for November and December 2008, informed him about the payment for October, stated he claimed to check the records and call me back. Advised he was informed all current returns should be mailed to the Hollywood Service Center for the 12th month, informed Mr. Drumm stip payment late, was due on December 17th.

T. 44-45 (emphasis added).

14. There are, to be sure, some discrepancies in Ms. Schaffner's testimony, which might be attributable to her misreading of information contained in the Department's records, or to inaccuracies in the entries themselves. For example, the "21st" of December 2008, which is when Ms. Aboite reportedly called Mr. Drumm——assuming the referenced month was December——fell on a Sunday. While it is possible that Ms. Aboite transacted official business on Sunday, December 21, 2008, the undersigned doubts that such occurred, and declines to so find.

The undersigned does find, however, that the conversation recorded in the notes took place around (and most likely after) December 17, 2008. This much is clear from the context of the comments. Ms. Schaffner's testimony, after all, came in response to a question of Mr. Drumm's inquiring about his request to negotiate with the Department "at that time," meaning the period of December 16-17, 2008.

15. Similarly, the comment that the payment "was due" on December 17, 2008, is not correct. The payment was *due* on December 16 and was *received* by the Department on December 17, 2008. These facts are not disputed. Either the witness, or the maker of the notes from which the witness read, was mistaken.

16. These are minor points, however, that ultimately do not seriously discredit Ms. Schaffner's testimony that, according to the Department's records, Servers' owner, Mr. Drumm, admitted on or about December 17, 2008, having just recently (the day before) mailed the tax payment due in November 2008. That payment (as will be discussed below) was delinquent as a matter of law if it were mailed after November 20, 2008—— which Mr. Drumm plainly admitted was the case.

17. In sum, whatever other defaults under the Agreement Servers might have committed, the established fact is——as the evidence clearly and convincingly proves——that Servers failed to *timely* remit all sales tax collections due in November 2008.

This failure was a material and substantial breach of the Agreement.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

19. Section 212.05, Florida Statutes, provides, in pertinent part, as follows:

> It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, including the business of making mail order sales, or who rents or furnishes any of the things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined herein and who leases or rents such property within the state.

20. Section 212.06, Florida Statutes, states:

> (1)(a) The aforesaid [sales and use] tax at the rate of 6 percent of the retail sales price as of the moment of sale, 6 percent of the cost price as of the moment of purchase, or 6 percent of the cost price as of the moment of commingling with the general mass of property in this state, as the case may be, shall be collectible from all dealers as herein defined on the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state of tangible personal property or services taxable under this chapter. The full amount of the tax on a credit sale, installment sale, or sale made on any kind of deferred payment plan shall be due at the

> moment of the transaction in the same manner as on a cash sale.
>
> * * *
>
> (2)(a) The term "dealer," as used in this chapter, includes every person who manufactures or produces tangible personal property for sale at retail; for use, consumption, or distribution; or for storage to be used or consumed in this state.
> (b) The term "dealer" is further defined to mean every person, as used in this chapter, who imports, or causes to be imported, tangible personal property from any state or foreign country for sale at retail; for use, consumption, or distribution; or for storage to be used or consumed in this state.
> (c) The term "dealer" is further defined to mean every person, as used in this chapter, who sells at retail or who offers for sale at retail, or who has in his or her possession for sale at retail; or for use, consumption, or distribution; or for storage to be used or consumed in this state, tangible personal property as defined herein, including a retailer who transacts a mail order sale.
>
> * * *
>
> (3)(a) Except as provided in paragraph (b), every dealer making sales, whether within or outside the state, of tangible personal property for distribution, storage, or use or other consumption, in this state, shall, at the time of making sales, collect the tax imposed by this chapter from the purchaser.

21. Section 212.11(1)(e), Florida Statutes, provides that where, as here, the dealer remits taxes through the mail, the dealer's returns are timely as a matter of law "if postmarked on or before the 20th day of the month" in which the taxes are due.

(If "the 20th day falls on a Saturday, Sunday, or . . . legal holiday, returns shall be accepted as timely if postmarked on the next succeeding workday." Id.)

22. Section 212.15(1), Florida Statutes, provides as follows:

> The taxes imposed by this chapter shall, except as provided in s. 212.06(5)(a)2.e., become state funds at the moment of collection and shall for each month be due to the department on the first day of the succeeding month and be delinquent on the 21st day of such month. All returns postmarked after the 20th day of such month are delinquent.

(Emphasis added.)

23. In accordance with Section 212.18(3)(a), Florida Statutes, every "person desiring to engage in or conduct business in this state as a dealer . . . must file with the department an application for a certificate of registration for each place of business, showing the names of the persons who have interests in such business and their residences, the address of the business, and such other data as the department may reasonably require." Upon receiving such an application, the Department "will grant to the applicant a separate certificate of registration for each place of business, which certificate may be canceled by the department or its designated assistants for any failure by the certificateholder to comply with any of the provisions of . . . chapter [212]."

§ 212.18(3)(b), Fla. Stat. No "person shall engage in business as a dealer . . . without first having obtained such a certificate or after such certificate has been canceled." Id.

24. Section 212.18(3)(d), Florida Statutes, provides as follows:

> The department may revoke any dealer's certificate of registration when the dealer fails to comply with this chapter. Prior to revocation of a dealer's certificate of registration, the department must schedule an informal conference at which the dealer may present evidence regarding the department's intended revocation or enter into a compliance agreement with the department. The department must notify the dealer of its intended action and the time, place, and date of the scheduled informal conference by written notification sent by United States mail to the dealer's last known address of record furnished by the dealer on a form prescribed by the department. The dealer is required to attend the informal conference and present evidence refuting the department's intended revocation or enter into a compliance agreement with the department which resolves the dealer's failure to comply with this chapter. The department shall issue an administrative complaint under s. 120.60 if the dealer fails to attend the department's informal conference, fails to enter into a compliance agreement with the department resolving the dealer's noncompliance with this chapter, or fails to comply with the executed compliance agreement.

(Emphasis added.)

25. A proceeding to revoke a license is penal in nature. State ex rel. Vining v. Florida Real Estate Commission, 281 So.

2d 487, 491 (Fla. 1973). Accordingly, the Department must prove the charges against Servers by clear and convincing evidence. Department of Banking & Fin., Div. of Sec. & Investor Protection v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996)(citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)); Nair v. Department of Business & Professional Regulation, Bd. of Medicine, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

26. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the court developed a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that:

> clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking confusion as to the facts in issue. The evidence must be of such weight that it 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.

Id. The Florida Supreme Court later adopted the Slomowitz court's description of clear and convincing evidence. See In re Davey, 645 So. 2d 398, 404 (Fla. 1994). The First District

Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992)(citation omitted).

27. As explained above, the evidence shows clearly and convincingly that Servers failed materially to comply with the Agreement when it caused or permitted the taxes due in the month of November 2008 to become delinquent. This fact was established by an admission, made by Mr. Drumm, as memorialized in the business records of the Department. In the incriminating statement, Mr. Drumm admitted that Servers had paid the sales taxes "for November" 2008——which payment was delinquent if not postmarked by November 20, 2008——in December 2008. Given the importance of this admission, some discussion of its admissibility is in order.

28. To begin, the Department's record containing the crucial admission was not offered as evidence. Consequently, a valid best-evidence objection might have been raised to Ms. Schaffner's testimony, which effectively proved the contents of the writing. See § 90.952 (best evidence rule); see also § 120.569(2)(h), Fla. Stat. (copies admissible in lieu of original documents). No such objection was made at hearing, however;

indeed, Mr. Drumm himself elicited the testimony, on cross-examination, when he inquired about Servers' request to negotiate the balance due——a subject that had not been explored on direct-examination. Thus, the best-evidence objection was waived. See § 90.104(1)(a), Fla. Stat.; Lewis v. State, 403 So. 2d 568, 569 (Fla. 1st DCA 1981).

29. The contents of the Department's records, which Ms. Schaffner published into the evidentiary record, are hearsay if offered to prove the truth of the matters asserted. In an administrative hearing, hearsay is admissible but cannot be the exclusive basis for a finding of fact unless it falls within a recognized exception to the hearsay rule. See § 120.57(1)(c), Fla. Stat.

30. Section 90.803(6), Florida Statutes, provides that the following are excepted from the hearsay rule:

> (6) RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY.–
>
> (a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of

> information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Thus, to admit a business record, the proponent must show that the document was:

> 1. made at or near the time of the event recorded,
>
> 2. by or from information transmitted by a person with knowledge, and
>
> 3. kept in the course of a regularly conducted business activity and
>
> 4. that it was the regular practice of that business to make such a record.

Quinn v. State, 662 So. 2d 947, 953 (Fla. 5th DCA 1995)(footnote omitted).

31. To lay the proper predicate for invoking this exception,

> it is necessary to call a witness who can show that each of the foundational requirements set out in the statute is present. . . . It is not necessary to call the person who actually prepared the document. The records custodian or any qualified witness who has the necessary knowledge to testify as to how the record was made can lay the necessary foundation. . . . If the offering party does not lay the necessary foundation, the evidence is not admissible under [the business-records exception].

Forester v. Jewell, 610 So. 2d 1369, 1373 (Fla. 1st DCA 1992)(citations omitted).

32. Ms. Schaffner was a qualified witness for purposes of laying the foundation needed to admit the Department's records under the business-records exception. Her testimony established that it is the regular practice of the Department to make, and keep in its files, written records of contacts with taxpayers, such the conversations between Mr. Drumm and Ms. Aboite, which Ms. Aboite duly documented.

33. Ms. Schaffner's testimony concerning the Department's business records was not itself sufficient, however, to make Mr. Drumm's declaration——that the return of payment for November 2008 had just been mailed "yesterday," in December 2008——admissible over a hearsay objection. This is because, to the extent offered to prove the truth of the matters asserted (which of course it was), Mr. Drumm's damaging out-of-court statement (which is hearsay) actually constitutes hearsay *within* hearsay, the "outer" hearsay being the declarations contained in the Department's records——declarations which include the "inner" hearsay of Mr. Drumm's statement. Mr. Drumm's incriminating statement to Ms. Aboite, unlike other entries in the Department's records, does not fall within the business-records exception because, as the Quinn court wrote:

> It is well established that although the person who made the report need not have personal knowledge of the matter recorded, the information contained in the report "must be supplied by persons with knowledge who are acting within the course of the regularly conducted business activity. If the initial supplier of information is not acting within the course of the business, the information in the record cannot qualify for admission. Statements from persons who are not acting within the regular course of the business may be admissible if they fall within another exception." Charles Ehrhardt, *Florida Evidence* Vol I (1994) at 625-6.

662 So. 2d at 953-54 (emphasis added); Harris v. Game and Fresh Water Fish Com'n, 495 So. 2d 806, 808-09 (Fla. 1st DCA 1986); see also Franzen v. State, 746 So. 2d 473, 474 (Fla. 2d DCA 1998)(Casanueva, J., explaining, in a concurring opinion, that the predicate for admitting a business record includes the requirement "that the source of the information be an employee or agent of the business possessing the requisite knowledge of the data or information.").

34. In other words, declarations are admissible under the business-records exception only if they were written by a person who, while *conducting the regular affairs of the business*, inscribed facts of which he had personal knowledge; or, alternatively, recorded facts as told to him by someone else who not only had personal knowledge of such facts, but also *in the ordinary course of the business* "transmitted" the data or

information to the drafter of the record. The business-records exception thus does not apply to Mr. Drumm's out-of-court statements because he was neither an employee nor an agent of the Department and was not acting within the regular course of Department's business when he spoke with Ms. Aboite; in short, Mr. Drumm, who was the source with personal knowledge of the material fact (the untimeliness of Servers' payment of sales taxes due in November 2008) was not under a "business duty" to report the information accurately to the Department.

35. This is not the end of the matter, however, for according to Section 90.805, Florida Statutes, "[h]earsay within hearsay is not excluded under s. 90.802, provided each part of the combined statements conforms with an exception to the hearsay rule as provided in s. 90.803 or s. 90.804." See, e.g., Harris, 495 So. at 809 ("The general rule is that a hearsay statement which includes another hearsay statement is admissible only when both statements conform to the requirements of a hearsay exception."). In this instance, Mr. Drumm's out-of-court statements are potentially admissible pursuant to Section 90.803(18)(d), which provides that certain statements by a party or his agent fall under an exception to the hearsay rule. Such statements include:

> 18) ADMISSIONS.--A statement that is offered against a party and is:

* * *

> (d) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment thereof, made during the existence of the relationship[.]

36. As Servers' owner and president, Mr. Drumm clearly was an agent of Servers acting within the scope of the agency when he spoke with Ms. Aboite concerning Servers' delinquent payment of taxes.[1] Mr. Drumm's statement, which Ms. Schaffner offered against Servers during the course of her cross-examination, is therefore admissible as proof of the matters asserted under the hearsay exception for admissions.

37. To summarize: Ms. Schaffner proved the contents of the Department's records by reading from them aloud during her testimony. No objection to this irregular method of proving the records' contents was made. The contents of the Department's records are admissible under the business-records exception to the hearsay rule. Mr. Drumm's statement regarding Servers' delinquent payment of taxes, which is hearsay included within the admissible contents of the Department's business records, is not admissible *under the business-records exception* as proof of the truth of the matters asserted therein; it *is* admissible as such proof, however, *under the separate exception for admissions by a party opponent*.

38. Mr. Drumm's statement to Ms. Aboite establishes clearly and convincingly that Servers did not pay the taxes due in November 2008 until some time in December 2008. The actual date of payment in December 2008 is irrelevant because such taxes were due to be paid on November 1, 2008, and the payment thereof was delinquent *as a matter of law* if not mailed to the Department on or before November 20, 2008. The undersigned concludes without hesitation that Servers' delinquent payment in *December* 2008 of taxes due on November 1, 2008, constituted a substantial and material breach of its obligation under the Agreement to "timely remit all sales tax collections due for the next 12 months . . . ."

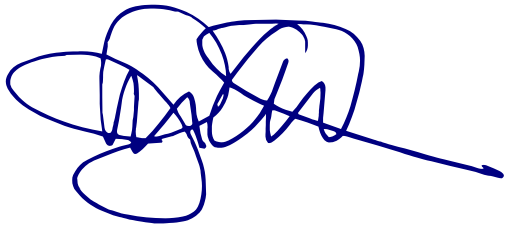
39. Upon determining (as it did) that Servers had committed a material breach of the Agreement, the Department had the right under the Agreement, and the duty under Section 212.18(3)(d), Florida Statutes, to initiate a proceeding to revoke Servers' Certificate (which it did). At hearing on the Administrative Complaint, sufficient evidence, as described above, was presented regarding Servers' material noncompliance with the Agreement, to justify revocation of the Certificate.[2]

40. In view of the foregoing findings and conclusions, it is not necessary to decide whether Servers' few late installment payments under the Agreement, without more, would have warranted revocation.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department enter a final order revoking sales tax certificate of registration numbered 16-8012479332-4, which the Department issued to Servers, Inc., on May 11, 2002.

DONE AND ENTERED this 31st day of July, 2009, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of July, 2009.

ENDNOTES

[1]/ The Department's business record refers to Mr. Drumm as "the owner" of Servers and hence establishes the foundation for admitting Mr. Drumm's statement as an "admission" within the exception to the hearsay rule. See Harris, 495 So. at 809 (For a "double hearsay" statement within a business record to be admissible, the business record must establish the foundation

for the hearsay exception under which the "inner" hearsay statement is urged to fall).

[2]/ The undersigned has not overlooked Servers' claim that its failures, if any, to perform statutory or contractual obligations resulted from Mr. Drumm's having been under medical care for a chronic disease. The undersigned does not doubt that Mr. Drumm was ill or that his medical condition adversely impacted his business. These facts, however, do not constitute a legal defense to the charges against Servers.

COPIES FURNISHED:

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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.