STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida

FILED
12 JUL 12 PM 4:16
DIVISION OF ADMINISTRATIVE HEARINGS

CARTER PRITCHETT ADVERTISING, INC.

Petitioner,

DOAH CASE NO. 11-1681
DOT CASE NO. 10-004

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent,

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CBS OUTDOOR, INC.

Petitioner,

DOAH CASE NO. 11-1682
DOT CASE NO. 09-114

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent,

______________________________/

## FINAL ORDER

On October 30, 2009, the State of Florida, Department of Transportation ("Department"), issued a Notice of Denied Outdoor Advertising Permit Application (Application Nos. 57663 and 57664) advising CBS Outdoor, Inc. ("CBS") that CBS' application for a proposed sign site located in the City of Miami at 3800 Northwest 2nd Avenue was not approved because:

> Sign does not meet spacing requirements (1500' for interstates, 1000' for FAP). In conflict with permitted sign(s), tag#(s): BV314/315. Held by: Carter-Pritchett.

[s.479.07(9)(a), 1.,& 2, FS]

On December 18, 2009, the Department issued a Notice of Intent to Revoke Sign Permit for Violation, advising Carter Outdoor Advertising ("Carter") that the Department intended to revoke its permits for a double-faced sign bearing permit tag numbers BV314 and BV315 located in the City of Miami at 3825 NW 2nd Avenue for the following violation:

> This nonconforming sign no longer exists at the permitted location and is deemed abandoned by the Department, pursuant to s. 14-10.007(6)(b), Florida Administrative Code.

On November 19, 2009, CBS filed a Petition for Formal Proceedings requesting a formal administrative hearing on the Department's denial of its application. By letter dated January 15, 2010, and received by the Department on or about January 20, 2010, Carter requested an informal administrative hearing to challenge the Notice of Intent to Revoke.

An informal hearing was held on March 18, 2011, on CBS' Petition to Intervene and Motion to Transfer to the Division of Administrative Hearings. The Department relinquished jurisdiction to the Division of Administrative Hearings ("DOAH").

On April 5, 2011, the Department referred the matters to DOAH. Petitioner Carter is the subject of DOAH Case No. 11-

1681, and Petitioner CBS is the subject of DOAH Case No. 11-1682. The parties' Joint Motion to Consolidate DOAH Case Nos. 11-1681 and 11-1682 was granted by Order of Consolidation issued on April 22, 2011.

After a number of continuances, the final consolidated hearing was held on October 18 and 19, 2011, in Miami, Florida, and January 25, 2012, in Tallahassee, Florida, before June C. McKinney, a duly appointed administrative law judge ("ALJ"). Appearances on behalf of the parties were as follows:

For Petitioner Carter: Carol Ann Licko, Esquire
Hogan Lovells US LLP
1111 Brickell Avenue, Suite 1900
Miami, Florida 33131

For Petitioner CBS: Thomas R. Bolf, Esquire
Greenspoon Marder, P.A.
15th Floor
200 East Broward Boulevard
Fort Lauderdale, Florida 33301

For Respondent: Kimberly Clark Menchion, Esquire
Department of Transportation
The Haydon Burns Building
605 Suwannee Street, MS 58
Tallahassee, Florida 32399

At the hearing, Carter presented the testimony of seven witnesses: Rex Hodges, a principal of Carter, who testified as the corporate representative for Carter; Scott Carter, a principal of Carter and a representative of Scott Carter Signs, Inc.; Jean Jose, a representative of the Tabernacle of God In Christ, Inc.; Joe Little, CBS' Vice President of Real Estate for

the Southeast Region; Ed Scherer, a former real estate representative for CBS; Vanessa Acosta, the current Assistant Director of Building and Zoning for the City of Miami; and Orlando Toledo, a former representative of the City of Miami who had worked for the City as the Zoning Administrator, Director of Building, Zoning, and Planning, and Director of Building and Zoning. Carter's Exhibits 2, 4, 5, 9, 11, 12, 15 through 18, 21, 24 through 32, 40, 42, 43, 47 through 51, 55, 56, 59, 61 through 71, 73 through 85, 87, 88, 92, 115, 117, and 118 were received into evidence.

CBS presented the testimony of two witnesses: Daniel Blanton, a surveyor who testified as an expert; and Joe Little, CBS' Vice President of Real Estate for the Southeast Region, who testified as corporate representative for CBS. CBS' Exhibits 4, 13, 14, 18, 19, 23, 26, 30, 30A, 39, 40, 42 through 44, 51, 52, 55, and 57 through 62 were received into evidence.

The Department presented the testimony of two witnesses: Robert Jessee, the Department's Manager of Outdoor Advertising and Logo, who testified as corporate representative for the Department; and Mack Barnes, a representative of Cardno TBE and consultant for the Department, who served as an outdoor advertising inspector. The Department's Exhibits 1 through 19 were received into evidence.

The transcript of the October 18 and 19 proceedings was filed with DOAH on December 19, 2011, and the transcript of the January 25 proceedings was filed with DOAH on February 13, 2012. By stipulation of the parties, the October 5, 2010 deposition of Lynn Holschuh was also submitted for the ALJ's consideration. All parties timely filed proposed recommended orders and the ALJ entered her Recommended Order on April 17, 2012, wherein she recommended that the Department issue a final order upholding Carter's Notice of Intent to Revoke Sign Permit for Violation and granting CBS' permit applications. The parties timely filed exceptions to the Recommended Order on May 2, 2012. Additionally, Carter filed responses to CBS' and the Department's exceptions, CBS filed a response to Carter's exceptions, and the Department filed a response to Carter's exceptions.

**STATEMENT OF THE ISSUES**

As stated by the ALJ in her Recommended Order:

> The issues in this case are: whether the Department of Transportation ("Department") properly issued a Notice of Intent to Revoke Sign Permit for Violation to Carter Outdoor Advertising a/k/a Carter Pritchett Advertising ("Carter") for the outdoor advertising sign permitted with tag numbers BV314/315 and whether the Department properly denied CBS Outdoor, Inc.'s ("CBS") application for outdoor advertising sign permit based on a spacing conflict with the

outdoor advertising sign permitted with tag numbers BV314/315.

**EXCEPTIONS**

Pursuant to Section 120.57(1)(l), Florida Statutes (2011), an agency has the authority to reject or modify the findings of fact set out in the recommended order. However, the agency cannot do so unless it first determines from a review of the entire record, and states with particularity in its final order, that the findings of fact were not based on competent, substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. Rogers v. Department of Health, 920 So. 2d 27, 30 (Fla. 1st DCA 2005).[1]

"Competent, substantial evidence," in the context of an administrative proceeding, has been defined as "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred" or such evidence as is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." Heifetz v. Dep't of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). In determining whether an administrative

[1] The parties do not contend that the proceedings on which the challenged findings were based did not comply with the essential requirements of law.

law judge's findings of fact have the requisite record support, neither an agency nor a reviewing court may re-weigh the evidence presented, judge the credibility of witnesses, or otherwise interpret the evidence to fit its desired conclusion. Bill Salter Advertising, Inc. v. Department of Transportation, 974 So. 2d 548, 551 (Fla. 1st DCA 2008); Rogers, 920 So. 2d at 30; Heifetz, 475 So. 2d at 1281; Section 120.68(7)(b), Florida Statutes (2011). If there is competent substantial evidence in the record to support the administrative law judge's findings of fact, the agency may not reject them, modify them, or make new findings. Rogers, 920 So. 2d at 30.

Regarding an agency's treatment of conclusions of law, Section 120.57(1)(l), Florida Statutes (2011), provides:

> The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.

## CARTER

Carter first takes exception to Conclusions of Law 59 and 63 of the Recommended Order where the ALJ concluded that the Department met its burden of showing that Carter had abandoned the double-faced sign located at the Tabernacle of God in Christ Church at 3825 N.W. 2nd Avenue, Miami, Florida ("Tabernacle Sign"). Carter contends that the Department failed to show by clear and convincing evidence that Carter intentionally and voluntarily relinquished further use of the Tabernacle Sign. Carter's exception is not well-taken for at least two reasons.

First, Florida Administrative Code Rule 14-10.007(6)(b) does not require a showing that the sign owner "intentionally and voluntarily" relinquished further use of its sign. The rule is silent with respect to intent and requires a showing either that the sign structure no longer exists at the permitted location, or that the sign owner failed to operate and maintain the sign for a period of 12 months or longer.[2]

Second, in support of its position Carter looks to testimony adduced and evidence admitted at the hearing and asserts that there is substantial competent evidence showing that Carter did not abandon the Tabernacle Sign location.

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[2] As will be discussed more fully below, the Department was required to show abandonment by a preponderance of the evidence as opposed to clear and convincing evidence.

Essentially, Carter is requesting the Department to accept its view of the record evidence over that of the ALJ and, to the extent there is conflicting testimony, to revisit the ALJ's resolution of any such conflicts. The Department cannot do so. Bill Salter Advertising, Inc., 974 So. 2d at 551; Rogers, 920 So. 2d at 30. In any event, Carter's assertion cannot stand in light of its pre-hearing stipulation that: "At some time in 2008 or 2009, the sign structure comprising the Tabernacle Sign structure ceased being at 3825 NW 2nd Avenue, Miami, Florida." (Joint Pre-Hearing Stipulation, E. 17.) The ALJ properly concluded that Carter "abandoned" the Tabernacle Sign as that term is defined in Florida Administrative Code Rule 14-10.007(6)(b). Carter's first exception is rejected.

Carter's second exception is addressed to Conclusion of Law 60 of the Recommended Order where the ALJ concluded that this case was distinguishable from the 5th DCA's decision in Hobbs v. Dep't of Transp., 831 So. 2d 745 (Fla. 5th DCA 2002). In Hobbs, the holder of a sign permit for a nonconforming sign asked the Department to cancel its sign permit and the Department agreed. Hobbs, 831 So. 2d at 747. No one notified sign owner Hobbs of this action. Id. When Hobbs discovered that the sign permit had been cancelled, he began efforts to keep his existing nonconforming sign in the same physical location, by seeking to obtain a new sign permit for the permitted location where his

sign continued to exist. Here, on the other hand, Carter voluntarily removed its sign from the permitted location and erected a new sign at a nearby location without a permit. Hobbs is materially distinguishable from, and thus inapposite to, this case. Carter's second exception is rejected.

In its third exception, Carter takes issue with Conclusions of Law 61 and 63 of the Recommended Order claiming that the ALJ erroneously concluded that Florida Administrative Code Rule 14-10.007(6)(b) provides an objective test for determining a party's **intent** pertaining to abandonment. Carter's complaint that the ALJ mistakenly read an intent element into the rule is well-taken. The full text of Rule 14-10.007(6)(b) is silent with respect to ascertaining a party's intent to abandon a nonconforming sign. Consequently, the first sentence of Conclusion of Law 61 is modified to read: "Additionally, rule 14-10.007(6)(b) provides an objective test for determining whether a sign has been abandoned or discontinued, namely...." The Department finds that this modification of Conclusion of Law 61 is as or more reasonable than the original conclusion.

To the extent Carter is suggesting that Rule 14-10.007(6)(b) is invalid because it lacks an intent requirement, Carter's exception is rejected because the instant action is not a rule challenge proceeding pursuant to Chapter 120.56, Florida Statutes. Moreover, insofar as Carter's third exception is

addressed to Conclusion of Law 63 it is rejected because the ALJ did not make a determination regarding "intent" to abandon the Tabernacle Sign but simply noted that Carter had voluntarily moved the sign from the original site.

As the final point in its third exception, Carter complains that the ALJ failed to acknowledge that Florida Administrative Code Rule 14-10.007(5) provides that nonconforming signs may be relocated to conforming locations. Although the ALJ did not cite Rule 14-10.007(5) in Conclusions of Law 61 and 63, the ALJ's determination in Conclusion of Law 62 that Carter did not relocate the Tabernacle Sign to a conforming location under the law demonstrates that the ALJ considered the operation of Rule 14-10.007(5), and determined that Carter had not relocated the Tabernacle Sign in conformity with the rule. Carter's third exception in this regard is rejected as well.

Carter next takes exception to Conclusion of Law 62 of the Recommended Order contending that the ALJ erred in concluding that the only possible relocation of nonconforming signs is a relocation made necessary by a public works project and only if the sign is moved within 100 feet of the original location with the Department's approval pursuant to Sections 479.15(3)-(6), Florida Statutes, and Florida Administrative Code Rule 14-10.004(11). Again, the ALJ's conclusion that Carter did not relocate the Tabernacle Sign to a conforming location under the

law demonstrates that the ALJ considered the operation of Florida Administrative Code Rule 14-10.007(5), and determined that Carter had not relocated the Tabernacle Sign in conformity with the rule which provides: "A nonconforming sign may not be relocated, except to a conforming location." Carter's fourth exception is rejected.

Carter's fifth exception addresses Conclusion of Law 66 of the Recommended Order. Carter asserts that the ALJ erred in concluding that she need not consider any of Carter's contentions claimed under intervenor status pertaining to the denial of CBS' outdoor advertising permit application. Regarding Carter's attempt to inject new issues into the CBS permit application proceeding, the ALJ concluded:

> Even though Carter refers to itself as an intervenor in its Proposed Recommended Order and contends it can advance additional grounds for the denial of CBS's application based on its intervenor status, Carter did not petition for leave to intervene in this matter pursuant to rule 28-106.205. Accordingly, Carter is not an intervenor and the undersigned need not consider any of Carter's contentions claimed under intervenor status.

The record confirms that Carter was not an intervenor in the CBS action. Moreover, Carter did not appear as a party in the CBS action as contemplated by Section 120.52(13)(b), Florida Statutes (2011), and the consolidation of the Carter and CBS cases did not operate to make Carter a party to the CBS action.

OneBeacon Insurance Co. v. Delta Fire Sprinklers, Inc., 898 So. 2d 113, 116 (Fla. 5th DCA 2005). Carter's fifth exception is rejected.

In its sixth exception, Carter challenges Conclusion of Law 67 of the Recommended Order claiming that the ALJ erred in concluding that any issues related to the City of Miami are not before this tribunal. The City of Miami issues were additional issues Carter raised with respect to the CBS permit application action. As concluded in the disposition of Carter's fifth exception, Carter was neither an intervenor in, nor a party to, the CBS action and could not, therefore, advance additional grounds for the denial of CBS' applications. The ALJ properly concluded that any issues related to the City of Miami were not properly before her. Carter's sixth exception is rejected.

Carter's seventh exception is directed to Conclusion of Law 68 of the Recommended Order. Carter contends that the ALJ erred in concluding that Carter's assertion of application priority is a red herring and that under any analysis CBS submitted its outdoor advertising application on October 1, 2009, and is first in line before either of Carter's 2009 application submissions. Conclusion of Law 68 is clearly supported by unchallenged Findings of Fact 26 and 37 through 44, which deal with the timing of the Carter and CBS applications,

and all of which are supported by competent substantial evidence. Carter's seventh exception is rejected.

Finally, Carter takes exception to Conclusions of Law 69 and 70 of the Recommended Order where the ALJ concluded that CBS met its burden to show that its application was properly filed and administered by the Department and the Department has no grounds to withhold the permit from CBS as the sole reason for application denial ceases to exist. Carter's exception is based upon the reasoning it advanced in its fifth, sixth, and seventh exceptions. In light of the disposition of those exceptions, Carter's eighth exception is rejected.

**CBS**

In its first exception CBS requests that the Preliminary Statement in the Recommended Order be clarified to reflect that by stipulation of the parties, Lynn Holschuh's deposition testimony was submitted for the ALJ's consideration. This Final Order notes the submission of Ms. Holschuh's deposition. CBS' first exception is accepted.

CBS' second exception is directed to Finding of Fact 8 of the Recommended Order. CBS contends that the ALJ's finding that around August 2008, Carter began looking for a new location for the Tabernacle sign is not supported by competent substantial evidence insofar as the record testimony shows that Carter had

acquired a building permit from the City of Miami for the DeVecht site on April 9, 2008. CBS' second exception is well-taken. Consequently, Finding of Fact 8 is amended to read: "Prior to April 9, 2008, Carter began looking for a new location for the Tabernacle Sign."

CBS next takes exception to Finding of Fact 10 of the Recommended Order claiming that it should be clarified to reflect that the permits Carter obtained for its new location were City of Miami and not Department permits. Read in context with Finding of Fact 9, it is clear that the ALJ was referring to City of Miami permits. CBS' third exception is rejected.

CBS' fourth exception, for purposes of clarification, takes issue with Conclusion of Law 59 of the Recommended Order insofar as it does not reference Carter's stipulation that at some time in 2008 or 2009, the sign structure comprising the Tabernacle Sign structure ceased being at 3825 NW 2nd Avenue, Miami, Florida. Carter's stipulation forms part of the evidentiary basis for the ALJ's finding that the nonconforming sign no longer exists at the permitted location. An additional factual finding to reflect the existence and contents of the stipulation is unnecessary and, in any event, inappropriate. Rogers, 920 So. 2d at 30. CBS' fourth exception is rejected.

CBS's fifth exception seeks clarification of Conclusion of Law 60 of the Recommended Order to reference the fact that Scott

Carter testified that Carter did not intend to rebuild the Tabernacle Sign at its permitted location. Although the exception is directed to a conclusion of law, CBS is essentially requesting the Department to make an additional finding of fact. The Department cannot do so. Rogers, 920 So. 2d at 30. CBS' fifth exception is rejected.

In its sixth exception, CBS seeks the addition of language to Conclusion of Law 60 of the Recommended Order addressing the relevance of findings of fact referencing the posting of tags at Carter's new location and the Tabernacle Church site. Conclusion of Law 60 refers to legal arguments advanced by Carter in its proposed recommended order and specifically addresses Carter's reliance upon the Hobbs decision. The relevance of whether, or where, the permit tags had been posted has no bearing upon the matter addressed in Conclusion of Law 60. CBS' sixth exception is rejected.

CBS' seventh exception takes issue with Conclusion of Law 61 of the Recommended Order insofar as the ALJ concluded that Florida Administrative Code Rule 14-10.007(6)(b) provides an objective test for determining a party's intent to abandon a nonconforming sign. CBS notes that the rule does not specifically reference intent and contends that the conclusion should be modified by replacing "a party's intent" with the phrase "whether a sign has been abandoned or discontinued."

Based upon the reasoning and modification of Conclusion of Law 61 set out in the disposition of Carter's third exception, CBS' seventh exception is accepted.

In its eighth exception, CBS seeks clarification of Conclusion of Law 62 of the Recommended Order to reflect that Carter's argument that it relocated the nonconforming Tabernacle sign was grounded on Florida Administrative Code Rule 14-10.007(5). The ALJ's conclusion that Carter did not relocate the Tabernacle Sign to a conforming location under the law necessarily is a rejection of any contention that Carter relocated the Tabernacle Sign in conformity with the rule which provides: "A nonconforming sign may not be relocated, except to a conforming location." CBS' eighth exception is rejected.

CBS' last exception is directed to Conclusion of Law 66 of the Recommended Order and seeks supplementation of the conclusion to reflect that additional issues Carter sought to raise were never pled by Carter or any other party and were not attempted to be raised in these proceedings until shortly before the hearing in this case, over the objections of CBS and the Department. In light of the disposition of Carter's fifth and sixth exceptions, CBS' requested supplementation of Conclusion of Law 66 is unnecessary. CBS' ninth exception is rejected.

**THE DEPARTMENT**

The Department first takes issue with Conclusion of Law 55 of the Recommended Order wherein the ALJ concluded that the Department's burden of proof in the Carter permit revocation case was by clear and convincing evidence. The Department asserts that its burden of proof was instead by a preponderance of the evidence.

In Woody Drake Advertising, Inc. v. Department of Transportation, Case No. 09-5187 (DOAH Jan. 7, 2010), the administrative law judge addressed the burden and standard of proof applicable to a proceeding to revoke an outdoor advertising sign permit concluding:

> 24. As the party seeking to revoke the sign permit, Respondent bears the burden to prove its allegation by a preponderance of the evidence. Fla. Dep't of Transp. v. J.W.C., 396 So. 2d 778, 788 (Fla. 1st DCA 1981). "Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, . . . ."

The instant matter is not a penal or licensure disciplinary proceeding, and there are no other statutes establishing the standard of proof for the revocation of an outdoor advertising sign permit. The Department's exception is well-taken and Conclusion of Law 55 is modified to read: "Accordingly, the Department bears the burden of proof by a preponderance of the

evidence as the party seeking to revoke Carter's sign permits tag numbers BV314/315 in DOAH Case Number 11-1681." The Department finds that this modification of Conclusion of Law 55 is as or more reasonable than the original conclusion.

The Department's second and final exception is directed to Conclusion of Law 61 of the Recommended Order where the ALJ concluded that Florida Administrative Code Rule 14-10.007(6)(b) provides an objective test for determining a party's intent to abandon a nonconforming sign. The Department contends that intent is not an element of proof needed to establish abandonment and requests that the conclusion be modified to read: "Additionally, Rule 14-10.007(6)(b) provides an objective test for determining abandonment, namely..." Based upon the reasoning and modification of Conclusion of Law 61 set out in the disposition of Carter's third exception, the Department's second exception is accepted.

**FINDINGS OF FACT**

After review of the record in its entirety, it is determined that the Administrative Law Judge's Findings of Fact in paragraphs 1 through 7, 8 as modified, and 9 through 50 of the Recommended Order are supported by competent, substantial evidence and are adopted and incorporated as if fully set forth herein.

## CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter of and the parties to this proceeding pursuant to Chapters 120 and 479, Florida Statutes.

2. The Conclusions of Law in paragraphs 50 through 54, 55 as modified, 56 through 60, 61 as modified, and 62 through 70 of the Recommended Order are fully supported in law, and are adopted and incorporated as if fully set forth herein.

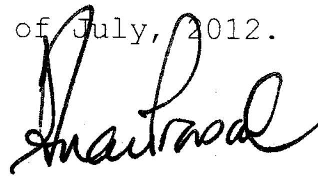
## ORDER

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

**ORDERED** that Carter Outdoor Advertising's permits for a double-faced sign bearing permit tag numbers BV314 and BV315 located in the City of Miami at 3825 NW 2nd Avenue, are revoked. It is further

**ORDERED** that CBS Outdoor, Inc.'s Outdoor Advertising Permit Application Nos. 57663 and 57664, for a proposed sign site located in the City of Miami at 3800 Northwest 2nd Avenue, are granted.

**DONE AND ORDERED** this 10th day of July, 2012.



Ananth Prasad, P.E.
Secretary
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Tallahassee, Florida 32399

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**NOTICE OF RIGHT TO APPEAL**

**THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULES 9.110 AND 9.190, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH THE DEPARTMENT'S CLERK OF AGENCY PROCEEDINGS, HAYDON BURNS BUILDING, 605 SUWANNEE STREET, M.S. 58, TALLAHASSEE, FLORIDA 32399-0458, WITHIN 30 DAYS OF RENDITION OF THIS ORDER.**

Copies furnished to:

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