STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ASIAN AMERICAN HOTEL OWNERS ASSOCIATION, INC,[1/]

Petitioner,

vs.

Case No. 19-1034RU

DEPARTMENT OF REVENUE,

Respondent.
_______________________________/

FINAL ORDER

On March 27, 2019, Administrative Law Judge Robert J. Telfer III, of the Florida Division of Administrative Hearings (Division), conducted a duly-noticed hearing in Tallahassee, Florida.

APPEARANCES

For Petitioner: H. French Brown, Esquire
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STATEMENT OF THE ISSUE

Whether certain statements contained within a Voluntary Compliance Agreement (Airbnb Agreement), entered into between Respondent, Department of Revenue (Department), and Airbnb, Inc., constitute an unadopted rule, in violation of sections 120.52(2), 120.54, and 120.56(4), Florida Statutes (2018).

PRELIMINARY STATEMENT

On February 26, 2019, Petitioners, Asian American Hotel Owners Association, Inc. (AAHOA), and SH Sarasota, LLC, filed a Petition to Determine the Invalidity of an Agency Statement Defined as an Unadopted Rule. The Petition sought a determination that the Airbnb Agreement, as well as another alleged agreement between the Department and HOMEAWAY.COM, constituted unadopted rules, and also alleged that the Airbnb Agreement and the agreement between the Department and HOMEAWAY.COM were invalid exercises of delegated legislative authority, in violation of section 120.52(8). On February 27, 2019, Chief Judge Robert Cohen issued an Order of Assignment, which assigned this matter to the undersigned administrative law judge (ALJ).

On March 8, 2019, the Department filed a Motion to Dismiss, contending that: (1) the Division lacked subject matter jurisdiction; (2) Petitioners lacked standing to challenge the Airbnb Agreement and the alleged agreement between the Department

and HOMEAWAY.COM as unadopted rules or invalid exercises of delegated legislative authority; (3) the Airbnb Agreement and the alleged agreement between the Department and HOMEAWAY.COM were not statements of general applicability, and thus not subject to rule challenge proceedings; (4) Petitioners failed to identify particular provisions of the alleged agreement between the Department and HOMEAWAY.COM that they wished to invalidate; (5) the Petition ignored the due process concerns of third parties; and (6) the Petition's allegations (contained in Count II) concerning invalid exercise of delegated legislative authority was inappropriate in an unadopted rule challenge proceeding.

On March 11, 2019, Petitioners filed two motions: (1) a Motion for Protective Order; and (2) a Motion to Determine the Confidentiality of Certain Documents and to Compel Discovery. On March 12, 2019, Petitioner SH Sarasota, filed a Notice of Voluntary Dismissal of Its Participation in This Action.

On March 14, 2019, AAHOA filed a Response to the Department's Motion to Dismiss, and the Department filed a Response in Opposition to Petitioners' Motion for Protective Order, as well as a Response in Opposition to Petitioners' Motion to Determine the Confidentiality of Certain Documents and to Compel Discovery.

The undersigned conducted a live hearing on all pending motions on March 15, 2019. Consistent with the undersigned's

oral rulings at the March 15, 2019, hearing, the undersigned issued an Order Granting, in Part, and Denying, in Part, the Department's Motion to Dismiss on March 18, 2019, which: (1) granted the Department's Motion to Dismiss as to Count II of the Petition, which contended that the alleged unadopted rule was also an invalid exercise of delegated legislative authority, as this was improper in a proceeding brought under section 120.56(4); and (2) denied the Department's Motion to Dismiss in all other respects, with the opportunity for the parties to present evidence and legal argument at the final hearing as to whether Petitioner had standing, and whether the Airbnb Agreement and the alleged agreement between the Department and HOMEAWAY.COM were agency statements that constitute an unadopted rule.[2/]

Next, consistent with the undersigned's oral ruling at the March 15, 2019, motion hearing, the undersigned issued an Order Concerning Petitioner's Motion to Determine the Confidentiality of Certain Documents and to Compel Discovery (Confidentiality Order), which allowed AAHOA to serve an amended Interrogatory 4., to seek certain information that would not request confidential and exempt information under sections 213.053(2)(a) and 213.21(3)(a), Florida Statutes, and provided time frames for the service and response to such an amended interrogatory. AAHOA

served, and the Department responded to, an amended interrogatory within the time frame set forth in the Confidentiality Order.

Additionally, at the March 15, 2019, motion hearing, the parties agreed to confer further, at the undersigned's urging, in an attempt to agree to the terms of an acceptable confidentiality agreement. Thereafter, on March 19, 2019, the parties filed a Joint Motion for Entry of Stipulated Protective Order, and on March 20, 2019, the undersigned entered a Stipulated Protective Order.

The undersigned conducted the final hearing on March 27, 2019.[3/] The undersigned admitted into evidence Joint Exhibits 1 and 2.[4/] AAHOA presented the testimony of Rachel Humphrey, the interim president and chief executive officer of AAHOA. The undersigned accepted Petitioner's Exhibits P1 through P8 into evidence; the Department objected to Exhibits P5 and P6 on hearsay grounds.[5/] The Department presented the testimony of George Hamm, Esquire, the deputy general counsel of the Department. The undersigned accepted Respondent's Exhibits R1 through R4, without objection.

The Transcript of the final hearing was filed with the Division on April 4, 2019. At the final hearing, the undersigned provided the parties with a deadline of April 8, 2019, to submit proposed final orders. Both parties timely filed proposed final

orders, which the undersigned has considered in the preparation of this Final Order.[6/]

All statutory references are to the 2018 codification of the Florida Statutes unless otherwise indicated.

FINDINGS OF FACT

THE PARTIES

1. AAHOA is a nationwide trade association that represents the hotel industry. According to Ms. Humphrey, AAHOA members own approximately 60 percent of all hotels in the United States. Ms. Humphrey characterized AAHOA as "the voice of American hotel owners[.]"

2. Ms. Humphrey testified that AAHOA's Florida members constitute its third largest membership, by volume, of all its members per state. Ms. Humphrey further testified that most of AAHOA's members are active hoteliers, actively engaged in the ownership and operations of their properties.

3. The undersigned has reviewed AAHOA's membership list as it pertains to Florida members, which the undersigned accepted as an exhibit in this proceeding, subject to the Stipulated Protective Order. Broadly speaking, this membership list indicates a large membership, with individual members (and spouses) listing various "organizations," many of which appear to be recognized hotel names, as part of their memberships.

4. Ms. Humphrey testified that its members own hotels in a variety of forms: sole proprietorships; joint ventures; partnerships; and various corporate forms, including limited liability companies. When pressed at the final hearing during cross-examination, Ms. Humphrey was unable to identify whether any of the individuals or entities listed in the Florida membership list owned a hotel in Florida.

5. The Department is the state agency responsible for administering Florida's revenue laws.

TRANSIENT RENTAL TAX

6. Among its many duties, the Department is responsible for imposing and collecting Florida's transient rentals tax (TRT), a type of tax imposed on short-term accommodations rentals. See §§ 20.21, 212.03, and 213.05, Fla. Stat.

7. Section 212.03(1)(a) provides the general basis for TRT:

> It is hereby declared to be the legislative intent that every person is exercising a taxable privilege in the business of renting, leasing, letting, or granting a license to use any living quarters or sleeping or housekeeping accommodations in, from, or a part of, or in connection with any hotel, apartment house, roominghouse, tourist or trailer camp, mobile home park, recreational vehicle park, condominium, or timeshare resort. . . . For the exercise of such taxable privilege, a tax is hereby levied in an amount equal to 6 percent of and on the total rental charged for such living quarters or sleeping or housekeeping accommodations by the person charging or collecting the rental. Such tax shall apply to hotels, apartment houses, roominghouses, tourist or trailer

> camps, mobile home parks, recreational vehicle parks, condominiums, or timeshare resorts, whether or not these facilities have dining rooms, cafes, or other places where meals or lunches are sold or served to guests.

8. Section 212.03(2) provides the procedure for the collection of TRT:

> [TRT] shall be in addition to the total amount of the rental, shall be charged by the lessor or person receiving the rent in and by said rental agreement to the lessee or person paying the rental, and shall be due and payable at the time of the receipt of such rental payment by the lessor or person, as defined in this chapter, who receives said rental or payment. The owner, lessor, or person receiving the rent shall remit the tax to the department at the times and in the manner hereinafter provided for dealers to remit taxes under this chapter. The same duties imposed by this chapter upon dealers in tangible personal property respecting the collection and remission of [TRT]; the making of returns; the keeping of books, records, and accounts; and the compliance with the rules and regulations of the department in the administration of this chapter shall apply to and be binding upon all persons who manage or operate hotels, apartment houses, roominghouses, tourist and trailer camps, and the rental of condominium units, and to all persons who collect or receive such rents on behalf of such owner or lessor taxable under this chapter.

9. Also included in the Department's responsibilities is its obligation to identify the person who has a duty to register as a "dealer" for the purpose of collecting and remitting TRT. See § 212.18(3)(c)2.b., Fla. Stat. The term "dealer," in the

context of the issues raised in this unadopted rule challenge, means:

> [A]ny person who leases, or grants a license to use, occupy, or enter upon, living quarters, sleeping or housekeeping accommodations in hotels, apartment houses, roominghouses, tourist or trailer camps, real property, space or spaces in parking lots or garages for motor vehicles, docking or storage space or spaces for boats in boat docks or marinas, or tie-down or storage space or spaces for aircraft at airports. The term "dealer" also means any person who has leased, occupied, or used or was entitled to use any living quarters, sleeping or housekeeping accommodations in hotels, apartment houses, roominghouses, tourist or trailer camps, real property, space or spaces in parking lots or garages for motor vehicles or docking or storage space or spaces for boats in docks or marinas, or who has purchased communications services or electric power or energy, and who cannot prove that the tax levied by this chapter has been paid to the vendor or lessor on any such transactions.

§ 212.06(2)(j), Fla. Stat.

10. Florida law provides that all dealers must register with the Department. § 212.18(3)(a), Fla. Stat. Florida Administrative Code Rule 12A-1.060(1)(a)9. further defines who must register as a "dealer":

> (1) Persons required to register as dealers.
>
> (a) Every person desiring to engage in or conduct any one of the following businesses in this state as a "dealer" must register with the Department of Revenue and obtain a

> separate certificate of registration for each place of business:
>
> * * *
>
> 9. Lease, let, rental, or granting licenses to use any living quarters or sleeping or housekeeping accommodations subject to the transient rental tax imposed under Section 212.03, F.S.

11. All dealers must remit all TRT collected to the Department. "Any person who . . . fails to remit taxes collected under this chapter is guilty of theft of state funds." § 212.15(2), Fla. Stat.

12. The undersigned finds that, under the above-described statutory and regulatory structure, hotels are considered "dealers" that must register with the Department and collect and remit TRT to the Department.

<u>THE AIRBNB AGREEMENT</u>

13. Airbnb is an internet-based platform, through which a third party desiring to offer accommodations (hosts), and a third party desiring to book an accommodation (guests), have the opportunity to communicate, negotiate, and consummate a booking transaction for accommodations pursuant to a direct agreement, in which Airbnb is not a direct party.

14. Airbnb utilizes third-party payment processors to provide a secure payment processing service, which allows hosts to receive payments from guests electronically. When the host accepts and confirms a guest's reservation request, Airbnb,

acting through third-party payment processors, electronically processes the guest's payment, which is typically held for approximately 24 hours after the guest checks into the host's property, and then is released directly to the host, less an applicable service fee.

15. The Department and Airbnb entered into the Airbnb Agreement on December 1, 2015. The Airbnb Agreement states that the parties entered into the Airbnb Agreement:

> [T]o facilitate the reporting, collection and remittance of the Transient Rental Tax imposed by Florida Statute § 212.03; the Discretionary Sales Surtax imposed pursuant to Florida Statute 212.054; and the Tourist Development Tax imposed by Florida Statute § 125.0104 by those counties that have not adopted an ordinance providing for the self-collection and administration of their respective Tourist Development Tax pursuant to Florida Statute § 125.0140(10) (hereinafter collectively, "TRT"), resulting from Rental Transactions completed by Hosts and Guests on the Platform for the occupancy of accommodations located in the State of Florida (the "State")[.]"

16. The Department also considered the following factors when entering into the Airbnb Agreement, consistent with section 213.21(7)(b), which provide the Department with the authority to settle and compromise tax due under voluntary self-disclosure, and when the Department is able to determine that a settlement and compromise is in the best interests of the state:

(a) Its legal authority to designate "dealers" for purposes of registration, collection, and remittance of state taxes and the provisions of rule 12A-1.061(9);

(b) The difficulty of identifying persons who may be attempting to engage in a transient rental, particularly those exclusively utilizing a third-party platform;

(c) The "significant" administrative burden of identifying, registering, tracking, accounting for, and processing returns and payments from a significant number of individual "hosts" utilizing the Airbnb platform, while designating Airbnb as a "dealer" would be more efficient;

(d) The difficulty it would encounter in enforcing and collecting from the individual "hosts." The Department stated that it would expend extraordinary resources and time, without guarantee of success, in identifying, auditing, assessing, and collecting from these individual "hosts." Through designating Airbnb as a "dealer," collections and the auditing process would be more stable and simplified because Airbnb, as the "dealer," agreed to be liable for audit by the Department and agreed to provide records sufficient to determine its liability with a much higher degree of confidence than if the Department attempted to identify and audit the individual "hosts";

(e) The Department retained the ability to hold "hosts" liable for any applicable taxes, penalties, and interest, if a

“host” were to make material misrepresentations to Airbnb or the Department;

(f) The benefits of the Airbnb Agreement’s providing predictability in terms of legal issues that could arise between Airbnb and the Department; and

(g) The future voluntary compliance of taxpayers and the best interests of the state.

17. Mr. Hamm confirmed that the Department considered these factors, as enunciated in section 213.21(7)(b), and further testified that the Airbnb Agreement was the result of an “unique” set of circumstances that operates in the best interest of the state.

18. Under the Airbnb Agreement, Airbnb:

> [A]grees to assume the duties of a TRT “dealer” during the period in which this [Airbnb] Agreement as described in Section 212.03(2) and Section 212.18 of the Florida Statutes with respect to Rental Transactions between Hosts and Guests completed on the Platform for which TRT . . . is applicable.

19. The Airbnb Agreement also provides that Airbnb shall collect and remit TRT for all Florida-based rental transactions that users complete on the Airbnb platform.

20. The Airbnb Agreement provides that the Department agrees to not directly audit guests or hosts, stating:

> [T]he Department agrees that any audit of [Airbnb]’s Rental Transactions covered by this [Airbnb] Agreement will be based on TRT returns filed with the Department by [Airbnb]

> and [Airbnb]'s supporting documentation for such returns, and the Department agrees that it will not directly or indirectly audit Guests or Hosts for such Rental Transactions that are transacted through the Platform.

21. The Airbnb Agreement also states that, with respect to a host's activities on the Airbnb platform, the Department will not require the host to individually register with the Department to collect, remit, and report TRT to the Department under section 212.18.[7/]

AAHOA'S UNADOPTED RULE CHALLENGE

22. AAHOA's Petition alleges that the Airbnb Agreement constitutes an unadopted rule because it was not adopted pursuant to the requisite procedures identified in section 120.54.

23. AAHOA contends that the Airbnb Agreement provides broad rights and statutory waivers to hosts that are not available to hoteliers in Florida, which comprise its membership ranks.

24. AAHOA alleges that the Airbnb Agreement substantially affects its members because Florida law requires its members to register, collect, and remit TRT, to register as dealers with the Department for each place of business, and to subject themselves to Department audit; conversely, they contend that the Airbnb Agreement waives these same legal requirements for hosts that use the Airbnb platform.

25. According to AAHOA, with the Airbnb Agreement in effect, its Florida members must incur regulatory costs and

burdens that hosts under the Airbnb platform—who are direct competitors to AAHOA's Florida members—do not.

26. Ms. Humphrey testified that AAHOA "is the voice of American hotel owners . . . and our members as hoteliers always have an interest in making sure that there's a level playing field among businesses that operate in the same space."

27. Ms. Humphrey further commented on how the Airbnb Agreement affects AAHOA's Florida members:

> Any time a hotelier is required to register or collect, remit, and be subject to audit, there are inherent labor costs involved with that. There are daily, weekly, monthly and annual reconciliations that need to take place. Any time employees are tasked with activities in furtherance of compliance efforts, that's time they're not spending in other areas to drive revenues, to drive [return on investment]. Additionally, many hoteliers will outsource or have accounting or other third parties who assist with that process. And there's an actual expense, of course, in hiring any of those. Any time you have labor and expenses in one area, that's pulling away from the [return on investment].

28. AAHOA maintains that the expenses it outlined in paragraphs 24 through 27 above, which affect its Florida-based hotel-owning members' return on investment, cause it injury, when compared to an Airbnb host which, under the Airbnb Agreement, will not incur such expenses.

29. However, the undersigned finds that AAHOA was unable to identify with any level of specificity, or to quantify any damages suffered or would suffer, or identify negative effects on

the return on investment of any of its Florida-based hotel-owning members, as a result of the Airbnb Agreement.

30. The undersigned finds that, regardless of the existence of the Airbnb Agreement, any “dealer” in Florida, including any of AAHOA’s Florida-based hotel-owning members, is required to comply with the applicable laws concerning registering as a dealer, and collecting and remitting TRT. Further, any “dealer” remains subject to a possible audit. AAHOA’s Florida-based hotel-owning members are incurring the regulatory costs it contends negatively affect its return on investment, regardless of the existence of the Airbnb Agreement.

31. The Airbnb Agreement provides that Airbnb collects service fees from guests and hosts, which it calculates as a percentage of the rental transaction amount that hosts set. The Airbnb Agreement also provides that Airbnb will impose TRT on the rental transaction amount, but not these service fees. Thus, the undersigned finds that hosts incur a cost, outside of TRT, that it must pay to Airbnb under the Airbnb Agreement.

32. AAHOA did not establish that any of the individuals or entities listed in its Florida membership list owned a hotel in Florida. Further, the undersigned finds that AAHOA did not establish that a substantial number of its members have a substantial interest that is affected by the Airbnb Agreement.

33. The undersigned finds that AAHOA failed to introduce any evidence to corroborate its claimed injury that the Airbnb Agreement's requirement that Airbnb collect and remit TRT, as opposed to hosts doing so, or eliminating the need for hosts to register or be subject to audits, caused any harm to any of its members, let alone a substantial number of them.

34. To that end, the undersigned notes that AAHOA failed to identify any Florida-based hotel-owning member who specifically identified the Airbnb Agreement as affecting that member's return on investment for any hotel property.

35. Additionally, AAHOA failed to introduce any evidence that would demonstrate that the Airbnb Agreement has affected the economic performance of its Florida-based hotels in any way. Although AAHOA has consistently stated that "basic logic" establishes that the Airbnb Agreement affects a substantial number of its members, the undersigned finds that AAHOA simply fell short of establishing this important fact.

36. The undersigned finds that AAHOA has not presented any competent substantial evidence to demonstrate that a substantial number of its members are affected by the Airbnb Agreement's requirement that Airbnb, and not hosts, register, collect, and remit TRT, and be subject to audit for those transactions effected on its platform. Accordingly, the undersigned finds that AAHOA's claimed injury—that is, that its Florida-based

hotel-owning members are injured because the Airbnb Agreement exempts hosts from certain requirements, thus causing an "unlevel playing field"—is based on speculation.

CONCLUSIONS OF LAW

37. The Division has jurisdiction over the subject matter and the parties to this proceeding in accordance with sections 120.54 and 120.56.

38. Section 120.56(1)(e) describes the nature of an unadopted rule challenge proceeding:

> Hearings under this section shall be de novo in nature. The standard of proof shall be the preponderance of the evidence. Hearings shall be conducted in the same manner as provided in ss. 120.569 and 120.57, except that the administrative law judge's order shall be final agency action.

STANDING

39. The standard for standing in a rule challenge proceeding is less demanding that in an action brought under section 120.57. The ability to challenge a rule "was intended to create an opportunity for a citizen-initiated check on rule making that exceeded delegated statutory authority." Dep't of Prof'l Reg., Bd. of Dentistry v. Fla. Dental Hygenist Ass'n, Inc., 612 So. 2d 646, 652 (Fla. 1st DCA 1993)(quoting Patricia A. Dore, Access to Florida Administrative Proceedings, 13 Fla. St. U. L. Rev. 965, 1014 (1986)).

40. Section 120.52(13)(b) provides that a party to an administrative proceeding is "any person . . . whose substantial interests will be affected by the proposed agency action . . . ."

41. A party is substantially affected if the rule will (a) result in a real or immediate injury in fact, and (b) the alleged interest is within the zone of interest to be protected or regulated. See Jacoby v. Fla. Bd. of Med., 917 So. 2d 358, 360 (Fla. 1st DCA 2005).

42. To satisfy the sufficiently real and immediate injury in fact element, an injury must not be based on pure speculation or conjecture. See Off. of Ins. Reg. v. Secure Enters., LLC, 124 So. 3d 332, 336 (Fla. 1st DCA 2013).

43. For an association to establish standing as a party (i.e., associational standing), it must prove that a substantial number of its members, but not necessarily a majority, have a substantial interest that reasonably could be affected, that the subject matter of the proposed activity is within the general scope of the interests and activities for which the organization was created, and that the relief requested is of the type appropriate for the organization to receive on behalf of its members. See Fla. Home Builders Ass'n v. Dep't of Labor & Emp. Sec., 412 So. 2d 351, 353-54 (Fla. 1982). See also NAACP, Inc. v. Fla. Bd. of Regents, 863 So. 2d 294 (Fla. 2003)(applying Fla. Home Builders, 412 So. 2d at 297-300).

44. AAHOA posits that NAACP, Board of Dentistry, and Rosenzweig v. Department of Transportation, 979 So. 2d 1050 (Fla. 1st DCA 2008), provide a basis for associational standing in this proceeding.

45. In NAACP, the Florida Supreme Court applied the test for associational standing enunciated in Florida Home Builders Association, to conclude that amendments to rules that would eliminate certain affirmative action policies by Florida's state universities had an "obvious" impact on African-American students, as compared to nonminority students. NAACP, 863 So. 2d at 299. The NAACP court found that a "substantial number of the association's members were both prospective applicants to the State University System and were minorities that would obviously be affected by any change in policy concerning minority admissions." Id. Based on these findings, the NAACP court held that "the association has demonstrated a sufficient impact on its student members as genuine prospective candidates for admission to the state university system to meet the requirement of substantial impact." Id. at 300.

46. In Board of Dentistry, an association of Florida dental hygienists challenged a proposed rule that designated the Alabama Dental Hygiene Program as an approved dental hygiene college within the meaning of the licensing statute. Bd. of Dentistry, 612 So. 2d at 647-48. The court, in determining that the

appellee had standing, noted that it required "no flight of imagination to reason that if the rule would produce a flood of lesser-trained hygienists, presumably available for employment for less compensation, this would have an economic impact on the existing pool of more highly-trained individuals." Id. at 649. The court further found that "those hygienists who are already qualified, licensed and practicing in Florida have a sufficient interest in maintaining the levels of education and competence required for licensing to afford them standing to challenge an unauthorized encroachment upon their practice." Id. at 651. The court determined that the "professional and economic interests" of current dental hygienists were directly affected, and concluded that the association had standing to challenge the rule.

47. In Rosenzweig, an individual and two organizations devoted to bicyclists challenged the Department of Transportation's (DOT) implementation of a statute pertaining to the design and placement of bicycle lanes in conjunction with the resurfacing, restoration, and rehabilitation of State Road A1A in Palm Beach County. Rosenzweig, 979 So. 2d at 1052. DOT challenged the appellants' standing, relying on decisions concerning whether taxpayers could challenge the decision of a legislative body to make an expenditure. Id. at 1053. The court, noting that one of the legislative purposes of the

Administrative Procedures Act was to expand public access to the activities of governmental agencies, held:

> The statute . . . sets forth a policy for incorporating bicycle lanes in construction and reconstruction projects, and it further delineates situations where the Department need not establish the bicycle lanes. § 335.065, Fla. Stat. The statute's straightforward purpose is to regulate the placement of bicycle and pedestrian ways. Reason dictates that a bicycle organization, like appellants, can demonstrate that a substantial number of its members will be affected by the Department's decisions relating to the construction of bicycle paths.

Id. at 1054.

48. The undersigned concludes that NAACP, Board of Dentistry, and Rosenzweig are distinguishable from the facts adduced in the instant matter, and thus provide no basis for AAHOA's arguments that it has established association standing to sustain this unadopted rule challenge:

(a) In NAACP, the court found that a "substantial number of the association's members were both prospective applicants to the State University System and were minorities that would obviously be affected by any change in policy concerning minority admissions[.]" NAACP, 863 So. 2d at 299. In contrast, AAHOA failed to establish, through competent substantial evidence, that any of the entities listed in its membership list owned a hotel in Florida and failed to identify any Florida-based hotel-owning

member who specifically identified the Airbnb Agreement as affecting that member’s return on investment;

(b) In Board of Dentistry, the court found that the “professional and economic interests” of current dental hygienists were directly affected by the proposed rule. Bd. Of Dentistry, 612 So. 2d at 651. As previously noted, AAHOA failed to identify any Florida-based hotel-owning member who specifically identified the Airbnb Agreement as affecting that member’s return on investment. Additionally, any “dealer” in Florida, regardless of the Airbnb Agreement, is required to comply with applicable laws concerning registering as a dealer, and collecting and remitting TRT; and

(c) In Rosenzweig, the court found that the bicyclist organizations demonstrated that the DOT’s decisions relating to placement of bicycle paths affected a substantial number of its members. Rosenzweig, 979 So. 2d at 1054. The undersigned finds that AAHOA failed to do the same.

49. The undersigned concludes that AAHOA was unable to establish associational standing in this matter because it failed to prove that a substantial number of its members, but not necessarily a majority, have a substantial interest that reasonably could be affected by the Airbnb Agreement.

50. Based on the evidence presented, it was not “obvious,” as the NAACP court stated, it does not “stand[] to reason,” as

the Rosenzweig court stated, and it would require a "flight of fancy," as the Board of Dentistry court stated, for the undersigned to conclude that a substantial number of AAHOA's Florida-based hotel-owning members were affected by the Airbnb Agreement.

51. The undersigned notes that AAHOA's Florida-based hotel-owning members remain subject to requirements under Florida law to register, collect, and remit TRT, and to be subject to possible audit regardless of the existence of the Airbnb Agreement. Further, although not fully developed at the final hearing, the service fees that Airbnb imposes on hosts and guests, which are in addition to TRT, cuts against AAHOA's argument that the Airbnb Agreement creates an unlevel playing field.

52. The undersigned also concludes that AAHOA failed to establish the "real or immediate injury in fact" requirement for standing in a rule challenge proceeding. In Secure Enterprises, 124 So. 3d at 337-38, the court found that the appellees lacked standing in a rule challenge proceeding, under the "real or immediate injury in fact" element, because the alleged injury was speculative and based on conjecture. See also K.M. v. Fla. Dep't of Health, 237 So. 3d 1084, 1088-89 (Fla. 3d DCA 2017)(holding that "[w]hile not requiring a strict 'but for' relationship between the proposed administrative action and the alleged

injury, the nexus between the two . . . [must] not depend upon conjecture or speculation.”).

53. The Secure Enterprises court, in reversing an ALJ’s conclusion that a petitioner had standing in a rule challenge, noted that the ALJ found that injury in fact “may be *inferred* from the *likelihood* . . . [that the rule’s effect] would ‘*likely cause*’ Appellee economic injury,” Secure Enterprises, 124 So. 3d at 339. The court held that such findings confirmed that petitioners failed to show that the rules and forms at issue resulted in a “real or immediate” injury in fact sufficient to satisfy the substantially affected test. Id.

54. Similarly, the undersigned concludes that AAHOA presented no competent substantial evidence that the Airbnb Agreement’s requirement that Airbnb, and not hosts, register, collect, and remit TRT and be subject to audit for those transactions effected on its platform, affected any of its Florida-based hotel-owning members. As held in Secure Enterprises, if the alleged injury is speculative or based on conjecture, it cannot satisfy this requirement. For this additional reason, the undersigned concludes that AAHOA does not have the requisite standing for this proceeding.[8/]

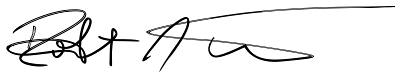
55. In its Proposed Final Order, the Department requests that the undersigned award it reasonable attorney’s fees and

costs pursuant to section 120.595(4)(d). The undersigned, having reviewed the file, and based on the foregoing Findings of Fact and Conclusions of Law, concludes that the Department shall not be awarded attorney's fees and costs pursuant to section 120.595(4)(d).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that AAHOA's Petition to Determine the Invalidity of an Agency Statement Defined as an Unadopted Rule is hereby DISMISSED.

DONE AND ORDERED this 25th day of April, 2019, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of April, 2019.

ENDNOTES

[1/] The undersigned dismissed SH Sarasota at the final hearing and has modified the case style to reflect this dismissal.

[2/] At the March 15, 2019 hearing, and subsequently in the Joint Pre-hearing Stipulation, AAHOA abandoned its unadopted rule challenge with respect to any agreement between the Department and HOMEAWAY.COM.

[3/] On March 26, 2019, AAHOA filed a Motion for Official Recognition, requesting the undersigned to take official recognition of Florida Administrative Code Rules 12A-1.060 and 12A-1.061, as well as the Department's Form DR-1C, entitled "Application for Collective Registration of Living or Sleeping Accommodations." On March 27, 2019, the undersigned entered an Order Granting Motion for Official Recognition.

[4/] Joint Exhibit 2, AAHOA's member list, falls within the protection of the Stipulated Protective Order as a trade secret of AAHOA.

[5/] Exhibits P7 and P8 are copies of the deposition transcripts of Rachel Humphrey and George Hamm. The undersigned notes that Exhibits P7 and P8 are not the original deposition transcripts of Ms. Humphrey or Mr. Hamm, and do not contain any of the numerous exhibits discussed at length during these depositions. The undersigned has reviewed these copies of the transcripts, sans exhibits, and has accorded them their appropriate weight.

[6/] The undersigned notes that the Department timely submitted redacted and unredacted proposed final orders. The Department's unredacted proposed final order contains matters that fall within the Stipulated Protective Order.

[7/] In doing away with the registration, collecting, and remitting requirement for hosts under section 212.18, it appears that the Airbnb Agreement also does away with the criminal penalties, under section 212.18(3)(c), for a host's failure to register with the Department.

[8/] Because the undersigned concludes that AAHOA lacks standing to pursue this unadopted rule challenge, the undersigned declines to address the merits of AAHOA's Petition.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.