

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GIL GONZALEZ,

Petitioner,

vs.

Case No. 20-3509

TRAVBUZZ INC., D/B/A PALACE TOURS, AND
HUDSON INSURANCE COMPANY, AS
SURETY,

Respondents.

RECOMMENDED ORDER

On October 16, 2020, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing by Zoom.

APPEARANCES

For Petitioner: Gil Gonzalez, pro se
8444 Mono Lake Drive
San Diego, California 92119

For Respondent Travbuzz, Inc.:

H. Richard Bisbee, Esquire
H. Richard Bisbee, P.A.
1882 Capitol Circle Northeast, Suite 206
Tallahassee, Florida 32308

For Respondent Hudson Insurance Company:

Benjamin C. Patton, Esquire
McRae & Metcalf, P.A.
2612 Centennial Place
Tallahassee, Florida 32308

STATEMENT OF THE ISSUES

The issues are whether, pursuant to section 559.929(3), Florida Statutes (2019), Petitioner has been injured by the fraud, misrepresentation, breach of contract, financial failure, or any other violation of chapter 559, part XI, by Respondent Travbuzz, Inc. (Respondent), for prearranged travel services and, if so, the extent to which Respondent is indebted to Petitioner on account of the injury.

PRELIMINARY STATEMENT

By Consumer Complaint Form filed on April 23, 2020, with the Department of Agriculture and Consumer Services (Department), Petitioner stated that, on January 6, 2020, he completed payment for the purchase from Respondent of two tickets for a train tour of India at a total cost of \$8600.40, with a departure date of April 1, 2020. The Consumer Complaint Form states that, in early March 2020, the emergence of the Covid-19 pandemic made it clear to Petitioner that the trip was not going to be possible and Petitioner requested a refund from Respondent, which responded that it had already forwarded the money to the tour operator, the Rajahstan Tourism Development Corporation (RTDC); the time to obtain a refund had passed; and Respondent would negotiate with RTDC to try to obtain a partial refund. The Consumer Complaint Form asserts that, on March 11, 2020, RTDC cancelled the remaining train tours for the September through April season, which included Petitioner's trip, but Respondent has refused to refund any or all of Petitioner's payment; however, Petitioner filed with his credit card issuer a dispute as to \$1911.20, which was the portion of the purchase price that Petitioner had paid by credit card.

On May 11, 2020, Petitioner executed a Sellers of Travel Claim Affidavit that incorporates the Consumer Complaint Form and attests that, on

March 23, 2020, Petitioner learned that the travel services would not be provided or Respondent would not provide the refund.

On May 20, 2020, the Department documented a Consumer Claim Request by Petitioner for \$8600.40 against Respondent, whose Seller of Travel registration number is ST-41461 and was active through at least July 18, 2020.

By letter dated June 12, 2020, to Respondent, the Department identified Petitioner's claim and the Department's intent to adjudicate the claim administratively in accordance with section 559.929 and chapter 120. The Department stated that the claim alleges "injury based on at least one of the following: fraud, misrepresentation, breach of contract, financial failure, or a violation of the Florida Sellers of Travel Act" (Act), which refers to chapter 559, part XI. The letter provides Respondent with a right to request a formal hearing to dispute its liability for this claim. The letter warns that a failure to satisfy the claim or timely request a hearing will result in the Department's issuance of a final order requiring the satisfaction of the claim within 30 days--failing which, the Department will demand payment from Respondent Hudson Insurance Company (Surety), which had issued a surety bond to Respondent, as described below.

By Petition for Formal Hearing dated July 7, 2020, Respondent timely requested a formal hearing. The petition denies that Respondent engaged in any fraud, misrepresentation, breach of contract, financial failure, or violation of the Act. The petition acknowledges that Petitioner purchased the travel services described above, but claims that Respondent was not properly served with the June 12 letter, Petitioner's sole remedy is a breach of contract action in court, and, pursuant to the dispute resolution clause of the contract into which the parties entered on November 12, 2019 (Contract),

Petitioner may file his breach of contract action only in Miami-Dade County, Florida.

Factually, the petition states that Petitioner has been registered as a Seller of Travel since 2018 and has had no prior complaints for injuries that would produce liability under its bond. The petition notes that Respondent, as an independent travel agent of RTDC, sells RTDC's train tours to Respondent's customers, such as Petitioner. The petition does not dispute Petitioner's allegations of the purchase of two tickets for the train tour departing April 1, 2020, or the payments described above.

The petition describes the contacts between Petitioner and Respondent's principal in somewhat different terms than those described by Petitioner. The petition states that, during the first two weeks of March, Petitioner called Respondent's principal and then emailed him a news article reporting RTDC's decision to cancel the March departures, but not the April 1 departure, due to the pandemic, and Petitioner did not request a refund or ask to cancel his train tour. The petition states that, on March 13, Petitioner emailed Respondent's principal a news article reporting that RTDC had cancelled all departures through the end of the current season--i.e., through the end of April--and asked Respondent's principal to advise Petitioner of his options. The petition adds that, on March 15, Petitioner emailed Respondent's principal a news article reporting that some tourist operators were granting refunds, but RTDC had not done so, even though the Indian government had cancelled all tourist visas through April 15, and Petitioner hoped that Respondent would immediately issue refunds. The petition notes that, also on March 13, Petitioner emailed Respondent's principal that the Indian government had cancelled all nongovernmental visas and asked Respondent to keep him informed as to what RTDC decided to do. The petition claims that RTDC refused to refund any payments for train tours,

but, by email dated March 19, Respondent informed Petitioner that it had been able to negotiate "as a special case" an option to postpone the train tour, but Petitioner failed to accept the offer by the stated deadline of March 25.

The petition raises several factual defenses under the Contract:

1) Petitioner waived his right to seek a refund because he declined to obtain travel insurance to cover his losses in the event of the cancellation of the train tour; 2) the cancellation of the train tour occurred after the final deadline for a cancellation with any refund; 3) Respondent is not liable for any loss suffered by Petitioner for the wrongful, negligent or arbitrary acts or omissions of an independent supplier not under the control of Respondent, for any damages arising from Petitioner's interaction with any retailer or vendor, or for acts of God, medical epidemics, quarantines or other causes not under Respondent's control. The petition also claims a setoff of the \$1911.20 that Petitioner disputed with his credit card issuer on or about April 20, 2020.

By letter filed August 7, 2020, the Department transmitted the file to DOAH with instructions to conduct a hearing on Petitioner's claim of \$8600.40 against the Surety's bond.

On October 9, 2020, the parties filed a Prehearing Statement, which states that the purchase price of the travel services was \$8675.40--the additional \$75 is described below. Petitioner restated his above-described claims and, for the first time, relied on the following provision of the Contract: "In the event that a tour is canceled through no action of the Client, the Client will receive a full refund of US\$." Respondent restated most of its above-described defenses and elaborated upon its claim of a lack of subject matter jurisdiction by contending that the Department has proposed no agency action. The Surety adopted Respondent's defenses.

At the hearing, Petitioner called two witnesses and offered into evidence 11 exhibits: Petitioner Exhibits A through K. Respondent called one witness and offered into evidence eight exhibits: Respondent Exhibits 1 through 8. All exhibits were admitted except for Petitioner Exhibits F and J, which were proffered.

The parties did not order a transcript. Respondent filed a proposed recommended order on October 30, 2020.

FINDINGS OF FACT

1. Respondent provides prearranged travel services for individuals or groups. Having relocated from New Jersey to Miami, Florida, evidently in 2018, Respondent has been registered at all material times with the Department as a "seller of travel" within the meaning of the Act and holds registration number ST-41461.

2. With Respondent as the principal, the Surety issued a Sellers of Travel Surety Bond bearing bond number 10076529 in the amount of \$25,000, effective from June 22, 2018, until duly cancelled (Bond).

3. On November 12, 2019, Petitioner, a resident of San Diego, California, purchased from Respondent one ticket for himself and one ticket for his daughter on the Palace on Wheels: A Week in Wonderland Tour (POWAWIWT) with a departure date of April 1, 2020. Earnestly described by Respondent's principal as a "cruise ship on wheels," the POWAWIWT provides one week's transportation, accommodations, and meals for travelers seeking to visit several of India's cultural and historical landmarks without the inconvenience of changing hotels, finding restaurants, arranging intercity transportation, or, it seems, obtaining refunds for trips that never take place.

4. The purchase price for two POWAWIWT tickets was \$8600.40. Additionally, Petitioner purchased from Respondent a guided side trip at one location for \$75. At the time of the purchase of the two POWAWIWT tickets,

Respondent charged Petitioner's credit card for the required downpayment of \$1911.20 for both tickets. By personal check dated January 6, 2020, Petitioner timely paid the balance due for both tickets of \$6689.20. By personal check dated February 19, 2020, Petitioner paid the \$75 charge for the side trip.

5. The credit card issuer duly debited Petitioner's account and credited Respondent's account for the charged amount, and Respondent obtained the funds represented by both checks. Petitioner later disputed the credit card charges, and the credit card company debited the \$1911.20 amount in dispute from Respondent's account. Although Petitioner claimed that his account had not been credited for this amount, as of the evening prior to the hearing, Respondent's credit for these charges had not been restored, so the \$1911.20 still seems to be in the possession of the credit card issuer. Despite availing himself of the remedy available under the Act, Petitioner has not authorized the credit card issuer to restore to Respondent's account the credit for the \$1911.20.

6. This case is a byproduct of the emerging Covid-19 pandemic, which, as discussed below, caused RTDC to cancel Petitioner's April 1 POWAWIWT. According to Respondent, RTDC has refused to refund Petitioner's payment of \$8600.40 gross or about \$8000 after deducting Respondent's 7% commission.¹ Although Respondent's principal deflects the blame to RTDC for its no-refund policy and to Petitioner for supposedly waffling on the relief that he sought for the cancelled trip, Respondent quietly has declined to refund its commission of approximately \$600, as well as the additional \$75 payment, although the failure to refund the \$75 may be explained by Petitioner's failure to address this negligible amount until he prepared the Prehearing Statement in this case.

¹ Respondent's principal testified that Respondent discounted the price of the April 1 POWAWIWT by reducing its standard 17% commission, which would approximate \$1460, to 7%, for a 10% discount, or about \$860, leaving a net commission of about \$600.

7. Respondent's factual defenses to Petitioner's refund claim include the several defenses set forth above and a new defense asserted for the first time at the hearing: Petitioner cancelled his POWAWIWT before RTDC cancelled his POWAWIWT, so Petitioner was never entitled to a refund under the terms of the Contract. This defense oddly finds more support in Petitioner's allegation that he demanded a refund before RTDC cancelled the April 1 POWAWIWT than in Respondent's allegation that Petitioner did not demand a refund until the March 13 email, in which he reported that RTDC had cancelled the April 1 POWAWIWT.² Regardless, this new defense is no more supported by the facts than Respondent's previously stated defenses.

8. Respondent's who-cancelled-first defense is based on emails and telephone calls. Petitioner's emails portray his consistent efforts to obtain a refund for the trip, but only after RTDC had cancelled the April 1 POWAWIWT. The lone email of Respondent's principal serves to reveal Respondent's inability to respond meaningfully to Petitioner's efforts to protect his travel purchase and raises the possibility of bad faith on the part of Respondent's principal.

9. On March 9, Petitioner emailed Respondent's principal a *Times of India* news article that reported that RTDC had cancelled the March POWAWIWTs, but not the April 1 POWAWIWT. This email does not seek to cancel the April 1 POWAWIWT, but expresses concern that RTDC will cancel the trip. On March 13, Petitioner emailed Respondent's principal a *Times of India* news article that reported that RTDC had cancelled the remaining POWAWIWTs through April. This email complains that RTDC had not

² This oddity is unsurprising given the patter of each witness's testimony. Respondent's principal peppered his testimony with false apologies while, in a reassuring tone, he gently deferred and deflected blame and patiently, but mistakenly, insisted that the Contract did not require him to refund monies paid for a train trip that never took place. Petitioner frenetically rebutted each factual defense while somehow missing the salient points that he had paid for a POWAWIWT that never took place, Respondent refused to refund Petitioner's payment, and the Contract calls for a refund. Although a retired appellate attorney for the state of California, Petitioner seems to have grounded his early demands for a refund on natural law, because he appears not to have discovered one of the crucial contractual provisions, as discussed below, until he prepared the Prehearing Statement

responded to Petitioner's requests for information, requests advice as to his available options, and asks for some assurance that Petitioner would not lose his payments of \$8600 for the train tour plus an unspecified amount "for post trip activities" that are also unspecified. On March 15, Petitioner emailed Respondent's principal a news article in *The Hindu* that reported that another operator of train tours in India was paying refunds for cancelled trips and all tourist visas into India had been cancelled through April 15. This email implores Respondent to do the right thing and immediately refund the money paid for the cancelled trip. A few hours later, Petitioner emailed Respondent's principal an *India West* news article that reported that India was now in a complete lockdown and the Indian government had cancelled all nondiplomatic visas. This email asks Respondent's principal to keep Petitioner informed on what RTDC was going to do and expresses hope that RTDC issues refunds.

10. On March 19, Respondent's principal emailed Petitioner that "we are reaching some agreement with our ground operator for the train and this is what is being finalized." The statement clearly discloses no agreement, but, at best, an expectation of an agreement. The email describes the expected agreement to allow Petitioner to take a POWAWIWT during the following season from September 2020 through April 2021, but requires Petitioner to select travel dates within six days and pay whatever fare is in effect at the time of the trip. Respondent's principal never explained why Petitioner had only six days to accept an "offer" that RTDC had not yet authorized its agent to make, might not authorize within the six-day deadline, and might not ever authorize. Respondent's demand for a near-immediate acceptance of a nonexistent offer of a trip at market price was unreasonable and suggests that Respondent's principal was merely trying to induce Petitioner to make an offer in the form of an acceptance, so the principal might have greater bargaining leverage with RTDC.

11. On March 23, Petitioner emailed Respondent's principal, noting a series of unanswered emails and phone calls from Petitioner to the principal since the receipt of the March 19 "offer." Asking for clarification of the terms of the "offer," Petitioner's email concedes that it appears that Petitioner's money is lost and asks merely that Respondent show him the courtesy of calling him, confirming his fear, and providing a full explanation of what happened. Later that day, an employee of Respondent emailed Petitioner and informed him that the principal was suffering from a respiratory disorder and was unable to talk, so that future communications needed to be by email. Petitioner received no more emails from Respondent's principal, who, having returned to the United States after taking a POWAWIWT in early March, was later diagnosed with Covid.

12. The telephone calls are undocumented. The credibility of Respondent's principal started to leave the tracks with the March 19 email of an illusory "offer" with an immediate deadline for acceptance. A month later, in responding to the disputed credit card charge, the credibility of Respondent's principal derailed completely, as he attempted to resecure the \$1911.20 credit with material misrepresentations of what had taken place in an email dated April 21 to the credit card issuer. The email claims that Petitioner never cancelled the trip, so he was a "no-show"--a Kafkaesque claim that implies a duty to report for a trip that, undisclosed in the email, the sponsor had cancelled over two weeks prior to departure. The email states that, at the beginning of March, Petitioner called and said he did not feel comfortable taking the trip, but the trains were still running and "Cancel for Fear" was not an allowable reason for waiving a cancellation fee--perhaps true, but irrelevant. The email encloses a copy of the principal's March 19 email, states that Petitioner did not accept this "offer," and concludes that "[s]ince [Petitioner] did not cancel or inform us of the decision for travel before the travel date, the charge is valid as per the terms and conditions." The email cites a provision of the Contract addressing no-shows and, despite the

absence of any mention of RTDC's cancellation of the trip due to the pandemic, adds a seemingly obscure reference to another provision of the Contract addressing acts of God, medical epidemics, quarantines, or other causes beyond Respondent's control for the cancellation of a trip. Notably, the email omits mention of the provisions of the Contract, described below, clearly calling for a refund.

13. On balance, it is impossible to credit the testimony of Respondent's principal that, in telephone calls, Petitioner cancelled the trip before RTDC cancelled the trip or, more generally, that Petitioner could not settle on an acceptable remedy, and his indecisiveness prevented Respondent's principal from negotiating a settlement with RTDC--an assertion that, even if proved, would be irrelevant.

14. Notwithstanding resolute attempts by Respondent's principal to misdirect attention from these unavoidable facts, Petitioner has paid for a train tour that never took place, RTDC cancelled the tour, and Petitioner never cancelled his tickets. The question is therefore whether, in its Contract, Respondent successfully transferred the risk of loss to Petitioner for a trip cancelled by the tour sponsor due to the pandemic. Analysis of this issue necessitates consideration of several provisions of the Contract that, despite its prolixity, is initially remarkable for two omissions: Respondent's Seller of Travel registration number³ and the name of RTDC as the sponsor of the POWAWIWT.

15. Respondent claims that Petitioner caused his injury by declining to purchase travel insurance. The cover page of the Contract contains a section

³ Section 559.928(5) requires a seller of travel to include in each consumer contract the following: "[Name of seller of travel] is registered with the State of Florida as a Seller of Travel. Registration No. [X]." Even absent any mention of a statute, this disclosure provides a consumer with some means to learn of the somewhat obscure Act, the seller's statutory responsibilities, and the relief that may be available to a consumer for a seller's failure to discharge these responsibilities. Petitioner testified only that he somehow learned of the Act, but never said how. The record does not permit a finding that the omission of the statutory disclosure was purposeful, so as to conceal from the consumer the existence of the Act, or was a product of guileless ineptitude.

called "Travel Insurance." This section provides an opportunity to purchase travel insurance from an entity "recommended by [Respondent]." The options are to check a box to purchase from Respondent's recommended entity or to check a box that states the traveler undertakes to obtain travel insurance independently, but this provision adds that, if travel insurance is not obtained, the consumer "absolve[s Respondent, t]he tour operator and the travel agent of all possible liabilities which may arise due to my failure to obtain adequate insurance coverage." Respondent offered no proof that its recommended travel insurance or other available travel insurance would pay for the cancellation of the April 1 POWAWIWT due to the pandemic, so Petitioner's choice not to purchase travel insurance is irrelevant.

Additionally, the clear provisions of the Contract, discussed below, requiring a refund for a trip cancelled by the sponsor rebut Respondent's labored effort to apply the travel insurance provision to shift to the customer the risk of loss posed by a cancellation of the trip by the sponsor--a risk that might be better addressed by Respondent's purchase of commercial business interruption insurance.

16. Respondent claims that the trip was cancelled by RTDC too close to the departure date to entitle Petitioner to any refund. The Contract contains a section called "Cancellation Fees." This section provides for increasing cancellation fees based on the proximity of the cancellation to the trip departure date. The Contract provides a 10% cancellation fee "if cancelled" more than 90 days prior to departure, 20% cancellation fee "if cancelled" between 89 and 35 days prior to departure, and 100% cancellation fee "if cancelled" within 34 days prior to departure. The Contract fails to specify if this provision applies to cancellations at the instance of the consumer or the trip sponsor, but the graduated fee reflects the greater value of a trip cancelled well in advance of the trip departure date, so that the trip can be resold. Obviously, a trip cancelled by a sponsor cannot be resold, so the

cancellation fee provision applies only to a cancellation by a customer and does not shield Respondent from liability in this case.

17. Lastly, Respondent relies on a section of the Contract called "Responsibility--Limitation of Liability." Provisions in this section warn that Respondent acts as an agent for a trip sponsor, such as the railroad, from which Respondent purchases the travel services. Although Respondent makes every effort to select the best providers of travel services, Respondent does not control their operations and thus

CANNOT BE HELD LIABLE FOR ANY PERSONAL INJURY, PROPERTY DAMAGE OR OTHER CLAIM which may occur as a result of any and/or all of the following:

(1) the wrongful, negligent or arbitrary acts or omissions on the part of the independent supplier, agent, its employees or others who are not under the direct control or supervision of [Respondent];
[or]

* * *

(3) loss, injury or damage to person, property or otherwise, resulting directly or indirectly from any Acts of God, dangers incident to ... medical epidemics, quarantines, ... delays or cancellations or alterations in itinerary due to schedule changes, or from any causes beyond [Respondent's] control. ... In case of overbooking, [Respondent] will only be liable for refund [sic] the charged amount to the guest. [Respondent] shall in no event be responsible or liable for any direct, indirect, consequential, incidental, special or punitive damages arising from your interaction with any retailer/vendor, and [Respondent] expressly disclaims any responsibility or liability for any resulting loss or damage.

18. The "Responsibility--Limitation of Liability" provisions are general disclaimers of liability for various forms of damages arising out of the acts and omissions of third parties or forces outside the control of Respondent,

such as the pandemic. These provisions represent a prudent attempt to avoid liability for damages, such as the lost opportunity to visit a gravely ill relative who has since died, that may amount to many multiples of the price paid for a trip.

19. Complementing these general provisions limiting Respondent's liability, other provisions limit Respondent's liability to the payment of a refund of the purchase price of a trip cancelled by the sponsor. The section immediately following the "Responsibility--Limitation of Liability" section is the "Reservation of Rights" section, which provides: "The company [i.e., Respondent] reserves the right to cancel any tour without notice before the tour and refund the money in full and is not responsible for any direct or indirect damages to the guest due to such action." As noted above, the Contract omits any mention of Respondent's principal, so as to Respondent in the place of its undisclosed principal; thus, a provision referring to a cancellation of the tour by Respondent includes a cancellation of the tour by Respondent's principal.

20. As cited by Petitioner in the Prehearing Statement, the other relevant provision is in the "Prices, Rates & Fares" section and states that, if a customer cancels, any refund to which the customer is entitled, under the above-cited cancellation fee provisions, will be dependent on then-current exchange rates, but "[i]n the event that a tour is canceled through no action of the Client, the Client will receive a full refund of US\$."⁴ This provision entitles a consumer to: 1) a refund and 2) a refund in U.S. dollars, presumably unadjusted for currency fluctuations since the payment. At the hearing, Respondent's principal tried to construe the "US\$" provision as a reference to the currency to which a consumer is entitled to be paid when a consumer cancels a trip under conditions in which the customer is entitled to a refund, but this construction ignores that the cited clause applies to

⁴ An identical "US\$" provision is found at the end of the section called "A Note About Cancellation for All Tours/Reservations."

cancellations occurring through no action of the consumer and imposes on Respondent the obligation to make a "full refund" in such cases.

CONCLUSIONS OF LAW

21. DOAH has jurisdiction. §§ 120.569, 120.57(1), and 559.929(3).

22. The defense of a lack of personal jurisdiction is inapt in an administrative proceeding in which a respondent has timely requested and fully participated in a formal hearing. Section 120.569(1) requires all orders to be "delivered or mailed" to each party at the address of record,⁵ but the issue of service arises only if a party fails timely to file a request for a hearing, because section 120.569(2)(c) generally requires the dismissal of a petition that has not been timely filed. Once a party has preserved its right to a formal hearing, any shortcomings in the means of service lose their importance, because, unlike the judicial action between two private litigants, the regulated party is exercising, pursuant to its registration, its privilege to provide regulated services.

23. The defense of a lack of subject matter jurisdiction is based on two grounds. First, Respondent argues that this proceeding is a breach of contract action, for which exclusive jurisdiction lies in the courts. Not every dispute involving a contract necessarily vests jurisdiction in the courts. The determinative question is whether the dispute requires, per se, an adjudication of the parties' legal rights and responsibilities under the contract, in which case exclusive jurisdiction lies in the courts, or whether the dispute involves the exercise of administrative jurisdiction, as to which the parties' rights and responsibilities under the contract are subordinate to determining the availability of the statutory administrative remedy for prohibited acts and omissions. In this case, the Department is exercising its jurisdiction over a seller of travel to ensure that it satisfies its indebtedness

⁵ Section 120.60(5) requires service of an administrative complaint by personal service, certified mail, or, in some cases, publication, but only in a proceeding to discipline a license.

to a consumer arising out of any injury that the consumer may have suffered due to the seller's fraud, misrepresentation, breach of contract, financial failure, or other violation of the Act; and, absent a timely payment, to order the seller's surety to pay the claim out of the surety bond. *Compare Vincent J. Fasano, Inc., v. Sch. Bd. of Palm Bch. Cty.*, 436 So. 2d 201, 202-03 (Fla. 4th DCA 1983) (per curiam) (an administrative proceeding cannot produce an adjudication of the corporations' legal rights and responsibilities, but must necessarily remain "within the framework of the powers conferred upon the agency").

24. Second, Respondent argues that the Department has not taken intended agency action, as contemplated by section 120.569(1). This defense fails to consider the Department's June 12 letter, which notifies Respondent that, if it failed timely to request a formal hearing, the Department would adjudicate Petitioner's claim, order Respondent to pay the claim, and, in the absence of timely payment, order the Surety to pay the claim on the Bond. The June 12 letter constitutes intended agency action or, in the language of section 120.569(1), notifies Respondent of a proceeding in which the Department was determining its substantial interests.

25. Alternatively, an absence of intended agency action does not preclude administrative jurisdiction. Section 559.929(3) advises that the Department is merely a "nominal" party, and Respondent's defense of a lack of subject matter jurisdiction appears to turn on the low-profile role of the Department in this proceeding. However, in several types of administrative proceedings, an agency is not even a nominal party and does not notify the nonagency party of intended agency action, even though the agency retains final order authority. *See, e.g.*, § 604.21 (right to administrative hearing for any person injured by a dealer in agricultural products; intended agency action as in present case); § 320.641(3) (right to administrative hearing for a motor vehicle dealer adversely affected by a manufacturer's proposed adverse action on franchise agreement; no intended agency action); § 760.11(1) (right to

administrative hearing for any person aggrieved by a covered person's violation of Florida Civil Rights Act; arguable intended agency action in the form of finding of reasonable cause). In at least three types of proceedings, the legislature has vested final order authority in a DOAH administrative law judge and dispensed with need for an(other) agency. *See* § 552.40 (exclusive remedy of administrative hearing for person whose real or personal property has been injured by use of explosives in mining construction materials); § 394.467(7) (exclusive remedy of administrative hearing for residential facility that proposes continued involuntary placement of person under the Baker Act); §§ 766.303 and 766.304 (exclusive remedy of administrative hearing for person seeking monetary award under the Florida Birth-Related Neurological Injury Compensation Plan).

26. Constitutional limitations aside, DOAH acquires subject matter jurisdiction over matters that the legislature assigns to DOAH for hearing. If a particular matter fails to fit within the intended-agency-action template of section 120.569(1), the legislature may nevertheless mandate administrative jurisdiction, typically by requiring adjudication of the matter pursuant to section 120.569 or chapter 120. As the legislature enacted section 120.569(1), so it may enact a statute that provides for an administrative hearing under section 120.569(1), even though the dispute does not otherwise satisfy the requirements of section 120.569(1).

27. As a creation of statute, an administrative proceeding must conform to its enabling legislation. *See, e.g., Fiat Motors of N. Am., Inc. v. Calvin*, 356 So. 2d 908 (Fla. 1st DCA 1978). Subject matter jurisdiction therefore exists only to the extent that the party seeking relief has invoked the jurisdiction of the agency or DOAH in compliance with the relevant statutes. Here, section 559.929(3) requires Petitioner to file with the Department a claim in the form of an affidavit against a registered seller of travel in connection with the purchase and sale of travel services within 120 days after

the alleged injury. The claim for \$8600.40 meets each of these requirements, so subject matter jurisdiction attaches to this claim.

28. On the other hand, there is no subject matter jurisdiction for the claim for \$75: Petitioner never submitted the claim in the form of an affidavit to the Department, and, of course, the Department did not transmit this claim to DOAH for a formal hearing. As Respondent contends, an administrative proceeding is not a breach of contract action, as to which the underlying complaint may be freely amended or supplemented. A party's ability to amend a charging pleading in an administrative proceeding depends on statutory jurisdiction for the portion of the claim that is new, so Petitioner's claim for a refund of the \$75 for the side trip must be denied.

29. Petitioner has the burden of proving his claim by a preponderance of the evidence. *Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778 (Fla. 1st DCA 1981); § 120.57(1)(j).

30. A "seller of travel" is a person who offers prearranged travel services for a fee, commission, or other consideration. § 559.927(11). A seller of travel must register with the Department, § 559.928(1), and, unless exempt, post a performance bond in the amount of \$25,000 in most cases. § 559.929(1)(a). The bond is for the use and benefit of any consumer whom the seller of travel has "injured by [the seller's] fraud, misrepresentation, breach of contract, or financial failure, or any other violation of [the Act]."

31. A consumer meeting these criteria may file a claim against the seller's bond. The claim "must be submitted in writing on an affidavit form adopted by [D]epartment rule" within 120 days after an alleged injury, discovery of injury, or judgment. Proceedings on a claim are governed by chapter 120, and the Department is only a nominal party to any proceeding under sections 120.569 and 120.57. § 559.929(3).

32. The seller of travel has 30 days within which to pay the consumer any "indebtedness" determined to be owing by the Department in a final order. Absent a timely payment, the Department shall demand payment from the

surety that issued the bond. Absent a payment by the surety, the Department may file an action in circuit court. § 559.929(5).⁶

33. The Act does not define the allowable elements of a seller's "indebtedness" that may be adjudicated by the Department's final order. But separation-of-power case law prohibits an administrative remedy for most, if not all, forms of unliquidated damages. *See, e.g., Broward Cty. v. La Rosa*, 505 So. 2d 422 (Fla. 1987). But where the seller has breached a contract provision calling for a refund, the indebtedness is clear--a refund.

34. Section 559.929(3) imposes liability on a seller of travel for any fraud, misrepresentation, breach of contract, financial failure, or other violation of the Act that has injured a purchaser of travel services. In the subject case, Respondent's principal misstated the facts twice--first, in its March 19 email to Petitioner and, second, in its April 21 email to the credit card issuer. However, the March 19 misstatement lacks materiality. Nothing came of Respondent's attempt to induce Petitioner to make a firm offer in response to the "offer" of RTDC. The April 21 email may have induced the credit card issuer not to credit the amount in dispute to either party, but even this misstatement is immaterial because it has not yet clearly injured Petitioner. Nor is there any evidence of Respondent's financial failure. As detailed in the Findings of Fact, Respondent's liability in this case arises out of its failure to honor the Contract, which calls for Respondent to refund to Petitioner his purchase price for the two tickets for the April 1 POWAWIWT.

35. The final detail is the amount of the refund. As noted above, there is no jurisdiction over the \$75 payment. Although jurisdiction attaches to the remaining payments totaling \$8600.40, Petitioner has not proved that Respondent's indebtedness extends to the \$1911.20 that was debited from Petitioner's account, credited to Respondent's account, and later debited from

⁶ The Department is also authorized to impose discipline against a registered seller and its registration, § 559.9355, and to pursue broad civil relief. § 559.936. A violation of any provision of the Act subjects the seller to prosecution for a misdemeanor or, in rare cases, a felony. § 559.937.

Respondent's account. Respondent is not indebted to Petitioner for this sum because, due to Petitioner's initiation of the dispute process under his credit card agreement, Respondent does not presently possess the \$1911.20. Under these circumstances, it would be unfair to require Respondent to "refund" that which it does not have--and possibly allow Petitioner to recover this amount twice--especially when the uncertainty that attaches to the present status of this sum arises from Petitioner's decisions to effect a self-help refund and not to dismiss the credit card dispute once he pursued relief under the Act. Nothing in this paragraph is intended, though, to insulate Respondent from further claims by Petitioner, the Department, or the state attorney's office, in an administrative or judicial forum,⁷ if the credit card issuer again issues a credit to Respondent's account for this amount or any part of it and Respondent does not promptly refund such credit to Petitioner.

RECOMMENDATION

It is

RECOMMENDED that the Department enter a final order directing Respondent to pay Petitioner the sum of \$6689.20 within 30 days of the date of the order and, absent timely payment, directing the Surety to pay Petitioner the sum of \$6689.20 from the Bond.

⁷ Perhaps the recommended and final orders in this case will persuade the credit card issuer to issue the credit for the \$1911.20 to Petitioner, who is entitled to this disputed sum. But, if Respondent regains possession of this disputed sum and refuses to refund it to Petitioner, the Department may wish to consider suspending or revoking Respondent's certificate or referring the matter to the Miami-Dade County State Attorney's Office. See the preceding footnote.

DONE AND ENTERED this 9th day of November, 2020, in Tallahassee, Leon
County, Florida.



ROBERT E. MEALE
Administrative Law Judge
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Filed with the Clerk of the
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this 9th day of November, 2020.

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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.