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**IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA**

**DEP'T OF BUS. & PROF'L
REGULATION, DIV. OF FLA
CONDO. TIMESHARES, &
MOBILE HOMES,**

Petitioner,

v.

**CASE NO.:
L.T. No.: 14-3734**

BOCA VIEW CONDO. ASS'N, INC.,

Respondent.

PETITION FOR WRIT OF PROHIBITION

**Layne Smith
Fla. Bar No. 712930
General Counsel
Garnett W. Chisenhall
Fla. Bar No. 0184373
Chief Appellate Counsel
Brittany O'Connor Finkbeiner
Fla. Bar. No. 60404
Chief Attorney
Dep't of Bus. & Prof'l Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202
(850) 717-1191; Fax (850) 414-6749
Layne.Smith@myfloridalicense.com
Garnett.Chisenhall@myfloridalicense.com
Brittany.Finkbeiner@myfloridalicense.com**

Attorneys for Petitioner

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PRELIMINARY STATEMENT

Pursuant to Rule 9.100 of the Florida Rules of Appellate Procedure, the Department of Business and Professional Regulation, Division of Florida Condominiums, Timeshares, and Mobile Homes (“the Division”) respectfully petitions the Court for a Writ of Prohibition restraining Administrative Law Judge Todd Resavage of the Division of Administrative Hearings (“DOAH”) from retaining jurisdiction over the Division’s attempt to sanction the Respondent for violating section 718.112(2)(d), Florida Statutes (2013) and Rule 61B-23.0021(2), Florida Administrative Code.

As explained below, DOAH has no jurisdiction over this matter because there are no disputed issues of material fact. Accordingly, section 120.57(1)(i), Florida Statutes, (2013), requires DOAH to relinquish jurisdiction back to the Division.

Unless indicated otherwise, all statutory references will be to the 2013 version of the Florida Statutes unless indicated otherwise.

References to the Appendix accompanying the instant Petition will appear as (Tab # at page #). The Appendix is numbered consecutively, and the page numbers in each citation refer to the handwritten numbers in the lower right-hand corner of each page of the Appendix.

I. BASIS FOR INVOKING THE COURT'S JURISDICTION

This Court has jurisdiction to issue a writ of prohibition under Article V section 4(b)(3) of the Florida Constitution, and Rule 9.030(b)(3) of the Florida Rules of Appellate Procedure. Prohibition is the proper remedy to prevent DOAH from proceeding with a formal administrative hearing when the absence of any disputed issues of material fact deprives it of jurisdiction. See §120.57(1)(i), Fla. Stat. (2014)(mandating that “[a]n order relinquishing jurisdiction shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with supporting and opposing affidavits, if any, that no genuine issue as to any material fact exists.”)(emphasis added). See also Dep’t of Revenue v. Sheraton Bal Harbour Ass’n, Ltd., 864 So. 2d 454 (Fla. 1st DCA 2004)(granting a petition for writ of prohibition because DOAH was acting in excess of its jurisdiction by presiding over a rule challenge proceeding when the rule in question no longer existed); Pulkkinen v. Pulkkinen, 127 So. 3d 738, 741 (Fla. 1st DCA 2013)(noting “[a] writ of prohibition is the proper vehicle for preventing a court from exercising jurisdiction it lacks or from exceeding its jurisdiction.”).

II. STATEMENT OF THE CASE AND FACTS

The Division is the state agency responsible for enforcing the statutes and rules governing condominiums. (Tab A at page 3.)

Boca View Condominiums (“Boca View”) is a residential condominium community containing 72 units and is located Palm Beach County, Florida. (Tab A at page 3.).

The Boca View Condominium Association, Inc. (“the Association”) is an “association” as defined in section 718.103(2), Florida Statutes, and it is responsible for the operation of Boca View Condominiums. (Tab A at page 3.)¹

On July 10, 2014, the Division issued a Notice to Show Cause alleging the Association violated section 718.112(2)(d), Florida Statutes and Rule 61B-23.0021(2) of the Florida Administrative Code by failing to hold an election for Boca View’s 2014 Board of Directors. (Tab A at pages 3-4.)²

¹ Section 718.103(2), Florida Statutes, provides that the term “association” means “in addition to any entity responsible for the operation of common elements owned in undivided shares by unit owners, any entity which operates or maintains other real property in which unit owners have use rights, where membership in the entity is composed exclusively of unit owners or their elected or appointed representatives and is a required condition of unit ownership.”

² Section 718.112(2)(d)1, Florida Statutes (2013), mandated that “[a]n annual meeting of the unit owners shall be held at the location provided in the association bylaws and, if the bylaws are silent as to the location, the meeting shall be held within 45 miles of the condominium property.” Rule 61B-23.0021(2) provides that “[a] regular or general election for purposes of this rule shall be an election to fill a vacancy caused by expiration of a term in office. A regular or general election

The Association responded to the Notice to Show Cause by petitioning for a formal administrative hearing. (Tab B at pages 10-12.) In support of its request for a formal administrative hearing, the Association alleged the following:

The respondent states as a material fact that it was impossible for Boca View to hold an annual meeting by December, 2013. Boca View's Directors and Officers were defending three frivolous lawsuits and one bad-faith Bankruptcy action instituted by homeowners; three (3), including the bankruptcy, by Edward and Eleanor Lepselter and one by Kenneth Gross. In addition, the Board has been defending numerous frivolous Division complaints instigated by Alexander Boburka (such as Case Nos. 2013645616, 201304846); Silvia Janson (Case No. 2013025473); and Alterman (Case No. 2014022342) to only name a few.

(Tab B at pages 10-11.)

The Division referred the case to the Division of Administrative Hearings ("DOAH") on August 15, 2014. (Tab C at page 14.) However, the Division filed a Motion on August 25, 2014 asking DOAH to relinquish jurisdiction back to the Division. (Tab D at pages 16-31.) In support thereof, the Division explained there were no material facts in dispute because the Association had conceded in its Amended Petition that it had failed to timely hold an annual meeting for the election of its 2014 Board of Directors:

shall occur at the time and place at which the annual meeting is scheduled to occur, regardless of whether a quorum is present. Other elections as may be required shall occur in conjunction with duly called meetings of the unit owners, regardless of whether a quorum is attained for the meeting."

3. Respondent filed a Petition Involving Disputed Issues of Material Fact, and subsequently an Amended Petition Involving Disputed Issues of Material Fact, in response to the [Notice to Show Cause] requesting a hearing before the Division of Administrative Hearings pursuant to 120.57(1), Florida Statutes. Respondent's Petition and Amended Petition concede the fact that Respondent failed to hold an annual meeting for the election of the 2014 Board of Directors within the time period specified by statute. This is the only fact that is material to the resolution of this case. A copy of Respondent's Petition is attached hereto as Exhibit "B." A copy of Respondent's Amended Petition is attached hereto as Exhibit "C."

4. Respondent does not deny that it violated the law, but instead states that it committed the violation because its Board of Directors and Officers were defending "frivolous" lawsuits and complaints against unit owners. This case is closely analogous to *Weiss v. Dep't of Bus. & Prof'l Regulation*, 677 So. 2d 98, 99 (Fla. 5th DCA 1996), wherein the court held that a licensee did not raise an issue of material fact sufficient to trigger a formal hearing when he admitted failure to comply with a statutory licensing requirement and attempted to characterize his reason for such failure as a factual dispute.

5. [The Division] asserts that Respondent has not disputed any material fact. Respondent's failure to timely hold an election due to defending what it deems frivolous litigation and complaints is not a material fact, but rather a potential mitigating factor for the Division to consider in a hearing not involving disputed issues of material fact [sic] pursuant to section 120.57(2), Florida Statutes.

(Tab D at pages 17-18.)

The Division closed the Motion by citing section 120.57(1)(i) of the Florida Statutes which mandates that "[a]n order relinquishing jurisdiction shall be rendered if the administrative law judge determines from the pleadings,

depositions, answers to interrogatories, and admissions on file, together with supporting and opposing affidavits, if any, that no genuine issue as to any material fact exists.” (Tab D at pages 18-19.)

Without setting forth any legal reasoning in support of his ruling, Administrative Law Judge Todd Resavage (“the ALJ”) issued an Order denying the Division’s Motion to Relinquish Jurisdiction. (Tab E at pages 33-34.)

On September 23, 2014, the Division filed a Motion asking DOAH to reconsider its denial of the Motion to Relinquish Jurisdiction. (Tab F at pages 36-40.) In support of its request for reconsideration, the Division reiterated that the Association’s assertion that it was impossible to hold a timely election is a mitigating circumstance that can be properly addressed via an informal administrative hearing under section 120.57(2) of the Florida Statutes. (Tab F at pages 38-39.)

The Division also reiterated that there are no material facts in dispute and underscored that point by stating it “is willing to stipulate that the Respondent was the subject of complaints and court cases.” (Tab F at page 39.)

Nevertheless, DOAH issued an Order on October 15, 2014 denying the Division’s Motion for Reconsideration. (Tab G at pages 42-43.) ALJ Resavage justified his ruling by stating “[t]he undersigned concludes that Respondent has asserted a permissible affirmative defense of impossibility of compliance with

section 718.112, Florida Statutes, and Florida Administrative Code Rule 61B-23.0021.” (Tab G at page 42.)

III. THE NATURE OF THE RELIEF SOUGHT

The lack of any disputed issues of material fact results in DOAH having no jurisdiction over this matter. Accordingly, the nature of the relief sought by this Petition is a Writ of Prohibition: (1) restraining DOAH from continuing to exercise jurisdiction over the instant case; and (2) compelling DOAH to comply with section 120.57(1)(i), Florida Statutes, by relinquishing jurisdiction back to the Division.

IV. ARGUMENT

As explained below, the Court should grant the relief requested herein because: (a) section 120.57(1)(i), Florida Statutes, mandates that DOAH relinquish jurisdiction when there are no disputed issues of material fact; and (b) the Division does not dispute any of the claims regarding the Association’s impossibility defense.

A. Section 120.57(1)(i), Florida Statutes, Requires DOAH to Relinquish Jurisdiction When There Are No Disputed Issues of Material Fact.

This Court has unequivocally held that section 120.57(1), Florida Statutes governs formal administrative hearings and applies only when there are disputed issues of material fact. See Rosenzweig v. Dep’t of Transp., 979 So. 2d 1050, 1055 (Fla. 1st DCA 2008)(noting that “[i]f an agency’s action will determine the

substantial interests of a party and there are disputed issues of material fact, a party is entitled to a formal proceeding under section 120.57(1), Florida Statutes.”); Westinghouse Electric Corp. v. Jacksonville Transp. Authority, 491 So. 2d 1238, 1242 (Fla. 1st DCA 1986)(noting that “[i]f there are material issues of fact to be resolved, a formal hearing is required.”).

Formal administrative hearings are conducted by an administrative law judge assigned by DOAH. See §120.57(1), Fla. Stat.

Section 120.57(2), Florida Statutes, governs informal administrative hearings and applies when there are no disputed issues of material fact. See Rosenzweig, 979 So. 2d at 1055 (noting “an informal hearing is appropriate whenever the substantial interests of a party are determined, but no material facts are in dispute.”); Hobe Assoc., Ltd. v. Dep’t of Bus. Regulation, Div. of Fla. Land Sales, Condo., & Mobile Homes, 504 So. 2d 1301, 1305 (Fla. 1st DCA 1987)(noting that “[w]hen material facts are not in dispute, an agency is not required to grant a formal proceeding and is free to insist that the matter be handled by informal proceedings.”).

In contrast to formal administrative hearings, informal administrative hearings are conducted by the agency itself rather than by an administrative law judge. See §120.57(2), Fla. Stat.

Because informal administrative hearings apply when there are no disputed issues of material fact, agencies utilize them in disciplinary cases when a regulated entity does not contest the charges but wishes to explain why the disciplinary measures are unnecessary. In other words, informal administrative hearings afford a regulated entity an opportunity to present mitigating circumstances to the agency. See Autoworld of America Corp. v. Dep't of Highway Safety, 754 So. 2d 76, 77 (Fla. 3d DCA 2000)(noting informal administrative hearings are “similar to pleading guilty to the facts alleged in the administrative complaint, because they are not disputed.”); McGraw v. Dep't of State, Div. of Licensing, 491 So. 2d 1193, 1195 (Fla. 1st DCA 1986)(stating that “[t]o the extent that appellant’s petition for hearing sought to present mitigation, an informal hearing under Section 120.57(2), would have provided a forum more than adequate for such purpose.”).

For example, in Weiss v. Dep't of Bus. & Prof'l Regulation, Div. of Real Estate, 677 So. 2d 98, 99 (Fla. 5th DCA 1996), the Florida Real Estate Commission (“the Commission”) had disciplined the appellant (in part) by requiring him to complete a 60-hour post-licensure education course for real estate brokers. After the appellant failed to complete the course, the Division of Real Estate initiated a new prosecution. Id. However, the appellant (just like the Association in the instant case) never argued that he had completed the course, and the Commission revoked his license following an informal administrative

proceeding. Id. When the appellant argued that the Commission violated his due process and statutory rights by revoking his license without a formal hearing, the Fifth District Court of Appeal held that the Commission

was within its statutory right to proceed with an informal hearing. In *Village Saloon, Inc. v. Division of Alcoholic Beverages and Tobacco*, 463 So. 2d 278, 285 (Fla. 1st DCA 1984), the court wrote that “[w]hen material facts are not in dispute, an agency is not required to grant a formal proceeding, even though requested by the party, and is free to insist that the matter be handled by informal proceeding.” *See also*, § 120.57, Fla. Stat. Here, Weiss never filed an objection to [the Division of Real Estate]’s motion for informal hearing and fully participated in the hearing. We find no error.

Weiss, 677 So. 2d at 99.

In addition to cases in which a regulated entity does not dispute the charges against it, informal administrative hearings are utilized when the only dispute concerns a pure issue of law. *See E.M. Watkins & Company, Inc. v. Bd. of Regents*, 414 So. 2d 583, 589 (Fla. 1st DCA 1982)(stating “[t]he crux of this dispute really involves legal constructions and interpretations applied to the undisputed facts. While these legal issues, i.e., the materiality of the omissions to Watkins’ bid and the propriety of BOR’s rejection of it and the award of the contract to Winchester, may require evidence of agency policy and procedure, these issues are appropriate to a Section 120.57(2) hearing.”); Autoworld, 754 So. 2d at 77 (noting the lack of disputed issues of material fact left “only conclusions

of law to be drawn as to whether the admitted facts constitute a violation of the statutes as charged and penalties to be imposed.”).

Accordingly, when there are no disputed issues of material fact and the only questions to consider are mitigation and/or pure issues of law, section 120.57(1)(i), Florida Statutes, compels DOAH to relinquish jurisdiction to the agency. In other words, DOAH has no jurisdiction to proceed with a formal administrative hearing when there are no disputed issues of material fact. See §120.57(1)(i), Fla. Stat. (mandating that “[a]n order relinquishing jurisdiction shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with supporting and opposing affidavits, if any, that no genuine issue as to any material fact exists.”)(emphasis added); Fairpay Solutions v. AHCA, 969 So. 2d 455, 458 (Fla. 1st DCA 2007)(citing section 120.57(1)(i), Florida Statutes (2005) and stating that “with no genuine issues as to any material fact, DOAH must relinquish jurisdiction back to AHCA.”); Cohen, O.D. v. Dep’t of Prof’l Regulation, Bd. of Optometry, 407 So. 2d 621, 622 (Fla. 3d DCA 1982)(stating that “[i]n our estimation, appellant failed to raise any issue of disputed fact and merely presented matters in mitigation of the charges.”).

Over the years, DOAH has adhered to this rule of law. See Banks v. Dep’t of Corrections, 2008 WL 4974757, *2 (DOAH 2008)(ALJ T. Kent Wetherell, II

relinquishing jurisdiction pursuant to section 120.57(1)(i), Florida Statutes, over an employment discrimination case after finding “[t]he pleadings do not raise any disputed issues of material fact concerning whether Respondent was Petitioner’s employer.”)³; Fla. Elections Comm’n v. Protect Our Children and Michael Sahm, Treasurer, 2009 WL 734700 (DOAH 2009)(relinquishing jurisdiction pursuant to section 120.57(1)(i), Florida Statutes after the respondent failed to respond to a request for admissions)⁴; Zimmerman v. Gulf Harbors Woodlands Ass’n and Dep’t of Env’tl Protection, 2009 WL 5736768 (DOAH 2009)(concluding there was no longer any disputed issue of material fact as to standing and relinquishing jurisdiction pursuant to section 120.57(1)(i), Florida Statutes)⁵; Hospice of Naples, Inc. v. Hope of Southwest Fla., et al, 2006 WL 3542816, *5 (DOAH 2006)(relinquishing jurisdiction pursuant to section 120.57(1)(i), Florida Statutes after concluding there was “no dispute of material fact or a genuine issue as to any material fact existing in this proceeding regarding whether an error occurred when

³ Please refer to Tab H in the Appendix for a copy of the Banks Order.

⁴ Please refer to Tab I in the Appendix for a copy of the Protect Our Children Order.

⁵ Please refer to Tab J in the Appendix for a copy of the Zimmerman Order.

the Agency determined that there is a net need for one additional hospice program in Hospice Service Area 8B.”)⁶.

B. Because There Are No Disputed Issues of Material Fact, the Court Should Prohibit the ALJ from Asserting Jurisdiction Over the Instant Case.

With regard to the instant case, the only fact of consequence is whether the Association held an election for Boca View’s 2014 Board of Directors as required by section 718.112(2)(d), Florida Statutes and Rule 61B-23.0021(2) of the Florida Administrative Code. However, that fact is not in dispute because the Association has never asserted that it held such an election. Accordingly, the instant case is indistinguishable from Weiss, 677 So. 2d 98 in which the Fifth District Court of Appeal ruled that the Florida Real Estate Commission correctly proceeded with an informal administrative hearing after the Weiss appellant never argued that he had completed the 60-hour course.

Because there are no disputed issues of material fact, section 120.57(1)(i), Florida Statutes, compelled the ALJ in the instant case to relinquish jurisdiction to the Division. See Fairpay Solutions 969 So. 2d at 458 (citing section 120.57(1)(i), Florida Statutes (2005) and stating that “with no genuine issues as to any material fact, DOAH must relinquish jurisdiction back to AHCA.”).

⁶ Please refer to Tab K in the Appendix for a copy of the Hospice of Naples Order.

But, during the proceedings below, the Association disputed the black letter law discussed above by asserting there was a disputed issue of material fact over whether it had been possible for the Association to hold an election as required by section 718.112(2)(d), Florida Statutes and Rule 61B-23.0021(2) of the Florida Administrative Code. In other words, the Association argued the affirmative defense of impossibility raised a disputed issue of material fact entitling it to a formal administrative hearing. However and as discussed below, the Association's argument is meritless.

First of all, there are no disputed issues of material fact pertaining to the Association's impossibility defense. During the proceedings below, the Division stated it "is willing to stipulate that the Respondent was the subject of complaints and court cases." See Page 3 of the Petitioner's Motion for Reconsideration of Petitioner's Motion to Relinquish Jurisdiction. That (in and of itself) should have compelled the ALJ to relinquish jurisdiction.

Moreover, even if impossibility were a valid affirmative defense under these circumstances, the lack of any disputed issues of material fact pertaining to the Association's impossibility defense still requires the ALJ to relinquish jurisdiction. For example, in Weaver v. Leon County School Bd., 2002 WL 31125085, *9 (DOAH 2002), the School Board raised the affirmative defense of collateral estoppel by arguing the petitioner had raised the same cause of action in three

previous court proceedings.⁷ The ALJ in Weaver concluded that “[t]he material facts necessary to determine whether the doctrine of collateral estoppel should be applied in this case are not in dispute.” Weaver, 2002 WL at *10. As a result, the Weaver ALJ ruled that “[b]ecause no dispute of material fact necessary to determine whether the doctrine applies [sic], jurisdiction over this matter should be relinquished to the Commission for entry of a final order dismissing this matter pursuant to Section 120.57(1)(i), Florida Statutes.” Id.

Because the Division disputes none of the allegations pertaining to the Association’s impossibility defense, the ALJ in the instant case should have followed Weaver and relinquished jurisdiction.

Furthermore, the alleged impossibility of the Association complying with section 718.112(2)(d), Florida Statutes and Rule 61B-23.0021(2) of the Florida Administrative Code is properly characterized as mitigation or a pure issue of law. In other words, the Association could argue that the alleged impossibility of complying with section 718.112(2)(d) and Rule 61B-23.0021(2) is a mitigating circumstance that should militate against the imposition of any sanctions. The Association could also argue that impossibility (as a matter of law) excuses it from complying with the aforementioned requirements. But, either argument is properly addressed via an informal administrative hearing. See McGraw, 491 So. 2d at

⁷ Please refer to Tab L in the Appendix for a copy of the Weaver Order.

1195 (Fla. 1st DCA 1986)(stating that “[t]o the extent that appellant’s petition for hearing sought to present mitigation, an informal hearing under Section 120.57(2), would have provided a forum more than adequate for such purpose.”); Baker v. Maycom Communications/Sprint-Nextel, 2008 WL 5376903 (DOAH 2008)(ALJ T. Kent Wetherell, II concluding “it is appropriate to relinquish jurisdiction to FCHR pursuant to Section 120.57(1)(i), Florida Statutes, because there are no disputed issues of material fact as to whether Respondent is a ‘public accommodation’ as defined by statute.”)⁸.

Finally, during the proceedings below, the Association cited Rupp v. Dep’t of Health, 963 So. 2d 790, 793 (Fla. 3d DCA 2007) for the proposition that Florida law “does not impose penalties upon an individual for failing to take certain actions which it is physically impossible for that individual to take.” But, even if the Rupp holding applies to the instant case, any question over whether impossibility excuses noncompliance with section 718.112(2)(d), Florida Statutes and Rule 61B-23.0021(2) of the Florida Administrative Code is a pure issue of law that can be addressed through an informal administrative hearing. Again, there are no disputed issues of material fact for an ALJ to resolve because the Division does not dispute any of the grounds on which the Association’s impossibility defense is based. See Weaver, 2002 WL at *10 (ruling that “[b]ecause no dispute of material

⁸ Please refer to Tab M in the Appendix for a copy of the Baker Order.

fact necessary to determine whether the doctrine [of collateral estoppel] applies [sic], jurisdiction over this matter should be relinquished to the Commission for entry of a final order dismissing this matter pursuant to Section 120.57(1)(i), Florida Statutes.”).⁹

CONCLUSION

There are no disputed issues of material fact in the instant case, and the Division does not dispute any of the grounds on which the Association’s impossibility defense is based. Accordingly, the instant case involves nothing other than mitigation and/or a pure issue of law. Under such circumstances, the ALJ in the instant case has no jurisdiction and must (as a matter of law) relinquish jurisdiction back to the Division. See §120.57(1)(i), Fla. Stat. (mandating that “[a]n order relinquishing jurisdiction shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and

⁹ The Division took the position below (and will argue during an informal administrative hearing) that the Association’s impossibility defense (as a matter of law) is meritless. See generally United States v. City of Hoboken, 675 F.Supp. 189, 198 (D.N.J. 1987)(considering an alleged violation of the Clean Water Act and holding “it is simply the case that if a party is a permit holder, the Act makes that party liable whenever the party discharges effluent that violates its permit. **Excuses are irrelevant**; under the Act the party must either achieve the discharge levels it has been allowed, or pay the consequences of its discharge, or stop discharging.”); Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc., 890 F.Supp. 470, 496 (D.S.C. 1995)(ruling that “a violation of an NPDES permit is a strict liability offense. Thus, the reasonableness or bona fides of an alleged violator’s efforts to comply with its permit **is not relevant** in determining whether

admissions on file, together with supporting and opposing affidavits, if any, that no genuine issue as to any material fact exists.”)(emphasis added). See also Sheraton Bal Barbour Ass’n, Ltd., 864 So. 2d 454 (granting a petition for writ of prohibition because DOAH was acting in excess of its jurisdiction by presiding over a rule challenge proceeding when the rule in question no longer existed); Pulkkinen, 127 So. 3d at 741 (noting “[a] writ of prohibition is the proper vehicle for preventing a court from exercising jurisdiction it lacks or from exceeding its jurisdiction.”).

Respectfully submitted on this the 5th day of November 2014.



Garnett W. Chisenhall
Fla. Bar No. 0184373
Chief Appellate Counsel
Dep’t of Bus. & Prof’l Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202
(850) 717-1191; Fax (850) 414-6749
Garnett.Chisenhall@myfloridalicense.com

a violator is liable under the [Clean Water] Act.”)(internal citations omitted)(emphasis added).

CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished via electronic mail to Robert I. Rubin, Esquire; BECKER & POLIAKOFF, P.A.; 625 N. Flagler Drive, 7th Floor; West Palm Beach, Florida 33401 on this the 5th of November 2014.



Garnett W. Chisenhall

CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing Petition complies with the font requirements of Florida Rule of Appellate Procedure 9.100(l).



Garnett W. Chisenhall

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