

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

WASHER & REFRIGERATION)
SUPPLY CO., INC., and DAVID)
L. SMITH, on behalf of)
themselves and all others similarly)
situated,)

Plaintiffs,)

v.)

PRA GOVERNMENT)
SERVICES, LLC, a Virginia)
limited liability d/b/a "Revenue)
Discovery Systems" and/or "RDS")
and/or "Alatax;" and the CITY OF)
WARRIOR on behalf of themselves and)
all other taxing authorities that are)
similarly situated,)

Defendants.)

Case No.: CV-2010-903417.00

SECOND AMENDED AND
RESTATED CLASS ACTION
COMPLAINT

Plaintiffs Washer & Refrigeration Supply Co., Inc. ("WRS"), David L. Smith ("Smith"), and additional Plaintiffs Fun Source, Inc. ("Fun Source") and Hollywood Pool & Spa, Inc. ("Hollywood") on behalf of themselves and as the representatives of the Class, which is defined herein and is a class of Alabama individuals and business entities similarly situated to Plaintiffs, and pursuant to Rule 23 of the Alabama Rules of Civil Procedure, hereby amend and restate their Complaint as follows:

I. INTRODUCTION

1. Plaintiffs bring this action based on Defendants' ongoing, systematic and serial violations of the Alabama Taxpayers' Bill of Rights ("TBOR") and other laws that

protect taxpayers from private auditing and collecting firms known as tax “bounty hunters.”¹

2. Approximately 250 counties and municipalities located within Alabama outsource tax assessment, collection, administration, and appeals services to PRA Government Services, L.L.C., also known as or doing business as “Revenue Discovery Systems” or “RDS,” and doing business in Alabama as Alatax and/or Revenue Discovery Systems. Hereinafter, Defendant PRA Government Services, L.L.C. and the assorted trade names it uses shall be referred to as “RDS.” The contractual arrangements RDS has with counties and municipalities located in Alabama, as well as its own business practices, directly violate Alabama law and deprive Alabama taxpayers of their right to be treated fairly and impartially.

3. Defendant City of Warrior, and other similarly situated taxing authorities, have entered into standard form contractual arrangements with RDS that are illegal and void, and violate the Alabama Constitution and TBOR.

4. Notably, RDS and the taxing authorities it purports to represent have violated the law and Plaintiffs’ due process rights in the following ways:

- by exercising the power to tax in contravention of Article XI Section 212 of the Alabama Constitution of 1901 (the “Alabama Constitution”);
- by entering into illegal and void contractual arrangements;
- by issuing invalid assessments of tax;
- by collecting on assessments that were never properly entered;

¹ See 44 Ala. L. Rev. 321 (1992), *Survey of 1992 Alabama Legislation*, which refers to Section 40-2A-6 of TBOR as the “bounty hunter provision.”

- by improperly and illegally treating “agreements” to enter final assessments as final assessments;
- by collecting taxes when its contracts are null, void and unenforceable;
- by collecting and assessing taxes under false pretenses;
- by collecting and assessing taxes when no legal agreement is in existence;
- by conducting taxpayer audits/examinations when its contracts are null, void and unenforceable;
- by conducting illegitimate Administrative Reviews (defined herein);
- by denying taxpayers of their rights to Administrative Appeals (defined herein);
- by misleading taxpayers into believing RDS’ actions conform to the mandates of TBOR and that the only forum for an appeal of a final assessment is to circuit court;
- by canceling and withholding material information from taxpayers;
- by providing for the payment of fees that are benefit based or contingent upon, or related to, the amount of taxes assessed or collected from taxpayers;
- by conducting multi-jurisdictional audits of taxpayers books and records on a contingency basis with payment due to RDS only if taxes are actually assessed on behalf of a taxing authority;
- by compensating RDS employees through incentive bonuses barred by TBOR;

- by failing or refusing to obtain fidelity and faithful performance bonds for RDS examiners as required by TBOR;
- by unlawfully taking or converting taxpayer property through illegitimate assessments and collections;
- by unlawfully seizing, taking and impairing a taxpayer's property, and slandering the title to such property, through liens and subsequent levy without authority;
- by applying a nonexistent and unduly burdensome standard of review to taxpayers during Administrative Reviews; and
- by committing other wrongful acts.

5. Plaintiffs offer to do equity and ask that the Court take jurisdiction over this matter, and (A) determine and declare that the acts and omissions challenged herein are violative of Alabama law and are in contravention to taxpayers' rights of due process; (B) determine and declare that the contracts and arrangements entered into by RDS with counties and municipalities are void and unenforceable under TBOR; (C) determine and declare that any and all tax assessments, liens, levies and collections entered or performed by RDS are unconstitutional, invalid and void, and constitute an unlawful taking; (D) enter such orders as may be appropriate and necessary to enjoin the Defendants from engaging in further, illegal and improper conduct; (E) determine and provide such relief as may be appropriate to the Plaintiffs and members of the Class, including placing the parties in a position they would have been absent the illegal and unlawful acts and omissions of the Defendants; and (F) award such additional relief,

damages, costs, attorneys fees, and interest as may be recoverable as a result of the wrongful conduct alleged herein.

II. STATEMENT REGARDING JURISDICTION

6. Neither Plaintiffs nor any member of the putative class asserts any federal claims or federal causes of action. Neither Plaintiffs nor any member of the putative class asserts any claim arising under any federal law, whether under the United States Constitution or other federal statutory law. The due process claims and constitutional claims asserted and alleged in this matter are brought solely under, and pertain only to, the Alabama Constitution. Any reference by Plaintiffs herein to the "Constitution" means and refers only to the Alabama Constitution. Further, as already determined by federal courts in this state, any federal jurisdiction over this matter is barred by the Tax Injunction Act. *See Order in Washer & Refrigeration Supply Co., Inc. v. PRA Government Services, LLC, Portfolio Recovery Associates, Inc., C2C Resources, LLC and Muniservices, LLC*, United States District Court for the Middle District of Alabama – Northern Division, Case No. 2:09-CV-1111-WKW.

7. In light of the nature of this action and the claims asserted, jurisdiction is not improper in this Court by virtue of §40-2A-7 of the Alabama Code. Given the facts and nature of the claims asserted in this action, jurisdiction is not only proper in this Court, but this Court is, in fact, the *only* proper forum available to Plaintiffs and the putative class to challenge and obtain relief for the specific *business practices* described herein. In fact, the only way for a circuit court to have jurisdiction over and act upon a challenge to the validity of the assessments in issue herein is to proceed outside the jurisdiction conferred by §40-2A-7. *See, City of Huntsville v. COLSA Corporation*, Case

1091797 (Ala. April 8, 2011). Otherwise, any determination by the Court that the challenged business practices invalidate or void taxpayer assessments would only serve to deprive the Court of jurisdiction and the ability to fashion equitable, injunctive and such other relief as may be appropriate. By way of example, the appropriateness of this Court's jurisdiction is demonstrated by, among other things, the following:

A. As set forth in greater detail herein, RDS's continuing exercise of tax-related functions is unconstitutional and/or illegitimate as a matter of law, leaving taxpayers no alternative but to seek relief in this Court. For the reasons set forth and described herein, RDS lacks authority under the Alabama Constitution to serve as the agent for the counties and municipalities for purposes of determining the amount of tax owed or for purposes of *entering an assessment*. As described herein, RDS's assessments were entered without the participation or knowledge of the applicable taxing jurisdiction. Consequently, Plaintiffs *must* be afforded a venue for recovery outside of §40-2A-7, because those procedures apply only to assessments that were properly issued and entered by a county or municipality under the strict guidelines of TBOR and the Alabama Constitution. This Court must first consider whether the RDS assessments are indeed unconstitutional and improper as alleged by Plaintiffs in their declaratory judgment action.

B. Further, jurisdiction is proper in this Court because this action involves important issues of tax policy that are clearly outside the limited scope of §40-2A-7. Specifically at issue in this case is whether the delegation of certain inherently government functions (e.g., entry of tax assessments and adjudication of tax appeals) can be outsourced to private firms, like RDS, under Alabama law. A related issue is whether a *foreign* company, such as RDS, can be vested with the power to enter tax assessments against Alabama citizens. As described herein, RDS's contracts and its business practices violate the letter and spirit of the Alabama Constitution and of TBOR by allowing a foreign company to enter tax assessments against, and decide the tax appeals of, Alabama citizens. Such practices represent an unconstitutional delegation of

authority to RDS, and a review and adjudication of those practices is only proper in this Court.

C. Several claims asserted by Plaintiffs are not suited for adjudication within §40-2A-7 under any circumstances. For example, RDS has wrongfully imposed liens upon real and personal property belonging to individuals (David L. Smith and his nephews) who are not personally liable for taxes assessed by RDS against WRS. Section 40-2A-7 has no applicability in such circumstances.

D. A primary and overarching claim in Plaintiffs' action is a declaratory judgment that the delegation of certain tax-related functions to RDS is unconstitutional and that RDS's contracts with the various counties and municipalities are void, that RDS's business practices are illegal and unconstitutional, and that all RDS assessments are consequently also void. Section 40-2A-7 was not designed to address declaratory judgment actions or to impose jurisdictional prerequisites on such actions like this one.

E. Additionally, as described herein, many of the claims asserted by the Plaintiffs and the putative class relate to conduct that was concealed by RDS in a manner that would prevent any compliance with §40-2A-7 even if it were applicable.

F. Plaintiffs are entitled to assert a private cause of action for violations of TBOR in light of the fact that (i) TBOR contains clear and convincing evidence of legislative intent to impose civil liability and penalties for a violation of TBOR, and (ii) the power to enforce those penalties are not reserved in TBOR to the Attorney General or any agency. See *Liberty National Life Ins. Co. v. University of Alabama Health Services Found., P.C., et al*, 881 So. 2d 1013 (Ala. 2003)(stating that one claiming a private right of action within a statutory scheme must show clear and convincing evidence of legislative intent to impose civil liability for a violation of the statute).

III. PARTIES

8. Plaintiff and taxpayer WRS is an Alabama corporation with its principal place of business in Jefferson County, Alabama. WRS has been engaged in the sale of

home appliances and parts throughout Alabama since 1952. On or about August 29, 2005, WRS sustained financially devastating losses approaching \$2 Million when Hurricane Katrina destroyed WRS' distribution center in Mobile, Alabama. On November 7, 2005, approximately 70 days after the natural catastrophe, RDS initiated a multi-jurisdictional tax compliance audit on WRS that was conducted in Jefferson County. The audit was conducted on behalf of approximately 143 taxing authorities, (some members of the "Taxing Authority Defendant Class" are specifically identified in footnote 6) and includes Defendant City of Warrior. The audit resulted in a preliminary assessment by RDS of approximately \$60,000.00 in sales taxes, interest and penalties for the tax years 2003-2006, an amount which WRS could not immediately pay. One of the specific assessments purportedly made by RDS included taxes and interest of \$6,413.46 on behalf of the City of Warrior. Devastated by the hurricane and unable to afford the costs of contestment, WRS relied upon certain representations by RDS described more fully hereinafter, and executed an Agreement to Entry of Final Assessment on February 28, 2007 (that agreement failed to inform WRS that RDS never intended to enter a final assessment as represented or that WRS had any right to administratively appeal the final assessment). WRS has recently learned, however, that RDS may have never entered a final assessment, but undertook to and did collect monies from WRS under the guise final assessments had been entered. WRS has made installment payments on the purported taxes as recently as July 2009. RDS was compensated for the multi-jurisdictional audit based upon a contingency of the amount of an alleged assessment it found due to a taxing authority. That is, for example, if no amounts were assessed by RDS for a particular taxing authority, the taxing authority owed RDS nothing, but if an assessment was made,

RDS's compensation was determined by a proportionate share of the assessment. Further, beginning in September 2009 WRS continued to receive assessments from RDS pursuant to the illegal Discovery Contracts described more fully herein. RDS continues to assert taxing jurisdiction over WRS and WRS remains subject to assessments and payment of taxes to RDS on an ongoing basis, though RDS has no authority to assess and collect taxes as a result of the illegal actions complained of herein.

9. Plaintiff Smith is a shareholder in and President of WRS. Smith and his nephews are currently suffering from liens wrongfully placed on their jointly owned real and personal property by RDS and/or agents of RDS for the taxes illegally and allegedly assessed against WRS. (See the RDS lien attached hereto as Exhibit A). The placement of the liens and illegal collection activities occurred on or about February 11, 2009. Smith and WRS are not one and the same and Smith does not conduct business "dba Washer & Refrigeration Supply Co., Inc." as claimed by RDS in the lien. Assessments have never been entered against Smith or his nephews. Smith continues to be harmed and injured by the pendency of the tax liens on his property.

10. Plaintiff Fun Source is an Alabama corporation with its only and principal place of business in Jefferson County, Alabama. On July 15, 2011 RDS entered illegal final assessments against Fun Source on behalf of approximately 17 taxing authorities, including final assessments in the amounts of \$629.57 and \$834 on behalf of Defendant City of Warrior. The final assessments were entered by RDS as a result of an unlawful multi-jurisdiction audit of Fun Source that occurred for a ten (10) year period between 2001 and March 2011. On information and belief, RDS represented over 100 taxing authorities during the course of audit, and the audit was conducted under illegal

contingency arrangements with RDS. Fun Source continues to be subject to tax assessments, collections and audits from RDS on an ongoing and recurring basis, though RDS has no lawful authority to assess and collect taxes as a result of the illegal actions complained of herein.

11. Plaintiff Hollywood is an Alabama corporation with its principal place of business in Jefferson County, Alabama. On June 14, 2011, RDS entered an illegal assessment against Hollywood as a result of an unlawful audit purportedly conducted from August 1, 2007 through July 31, 2010. RDS continues to threaten Hollywood with adverse action, including contempt proceedings, while withholding information due to the public and taxpayers under Alabama's Open Record Act. Hollywood continues to be subject to tax assessments, collections, audits, and threats from RDS on an ongoing and recurring basis though RDS has no lawful authority to assess and collect taxes on behalf of taxing authorities as a result of the illegal actions complained of herein.

12. Defendant RDS is a Delaware limited liability company doing business in Alabama under the trade names "Revenue Discovery Systems," "RDS" and "Alatax." Its principal place of business is in Birmingham, Alabama. It is regularly engaged in providing tax assessment, collection, audit and appeal services to Alabama counties and municipalities. RDS is a "private auditing or collecting firm" as defined in TBOR in *Ala. Code* § 40-2A-3 (a "Private Firm"). RDS is a wholly-owned subsidiary of Portfolio Recovery Associates, Inc. ("PRA"), a publicly-traded entity listed on Nasdaq under the symbol PRAA.

13. Defendant City of Warrior (hereinafter "Warrior" or the "Named Government Defendant") is a municipal corporation formed and existing under the laws

of the State of Alabama. Plaintiffs also seek certification of a Defendant Class consisting of the Named Government Defendant and all other taxing authorities in Alabama that participated in RDS's multi-jurisdiction audits of WRS, Fun Source and Hollywood in Jefferson County. The Named Government Defendant and the absent taxing authority defendants may be collectively referred to herein as the "Taxing Authority Defendant Class." Venue over the Named Government Defendant and the Taxing Authority Defendant Class is appropriate here in that such counties and municipalities regularly conduct business in Jefferson County by and through their specifically designated agent RDS. That business includes on-premise auditing of taxpayers located in Jefferson County, remittance of all taxes from throughout the State of Alabama for the Taxing Authority Defendant Class to RDS in Jefferson County, and the filing of liens in the Jefferson County Probate Court against Jefferson County taxpayers.

14. Plaintiffs bring no claims against and seek no recovery from the entities that have operated under the corporate names Alatax, Inc. or WWHM, Inc. for any of Defendant's wrongful conduct alleged herein. Plaintiffs do seek relief against RDS and the other named Defendants which may use the trade name "Alatax" as a dba.

15. RDS and the Taxing Authority Defendant Class are proper parties to this action brought by the Plaintiffs. Plaintiffs seek relief from RDS directly and from RDS in its capacity as agent for the Taxing Jurisdictions (including the Taxing Authority Defendant Class) which are the principals.² The practices of RDS at issue were conducted by RDS as an express agent of the Taxing Jurisdictions. RDS was hired by the Taxing Jurisdictions as its agent, and RDS's actions were conducted on behalf of the

² The Taxing Jurisdictions and some of the members of the Taxing Authority Defendant Class are specifically identified at paragraphs 47-48 herein.

local Taxing Jurisdictions. As an agent to whom governmental authority and responsibility was delegated, RDS engaged in conduct which violates taxpayers' due process rights. It is well established that private entities are subject to due process violations so long as the private entity is engaged in activity deemed to be "state action." See, e.g., *Focus on the Family v. Pinellas Suncoast Transit Authority*, 344 F.3d 1263 (11th Cir. 2003). RDS, who has been contractually delegated several of the local governments' tax-related responsibilities, is engaged in activity deemed to be "state action."

16. As to the Taxing Authority Defendant Class, Plaintiffs seek injunctive and declaratory relief that their contractual arrangements with RDS are illegal and unlawful as being violative of the Alabama Constitution and TBOR, and that all assessments, collections, enforcement, Administrative Appeals, and Administrative Reviews performed or actions taken by RDS on behalf of the Taxing Authority Defendant Class are void, unenforceable and due to be set aside. Plaintiffs also seek a declaration that RDS' license is due to be forfeited and that RDS be enjoined from conducting business on behalf of the Taxing Authority Defendant Class.

IV. THE TAXING POWER OF GOVERNMENT CANNOT BE DELEGATED TO PRIVATE ENTERPRISE

17. The State of Alabama possesses the power of taxation as an incident of its sovereignty. *Pullman Car & Mfg. Corp. of Alabama v. Hamilton*, 155 So. 616, 618 (Ala. 1934). Counties and municipalities, on the other hand, have no inherent power of taxation of their own. Rather, they have only such power as has been delegated to them by the state. See *Frazier v. State Tax Commission*, 175 So. 402 (Ala. 1937). Under no circumstances, however, may the state or any county or municipality further delegate its taxing power to private enterprise. Commenting on this bedrock principal, the Alabama

Supreme Court has noted that the taxing power of government is simply too “strong and dangerous” to be wielded by individuals or private enterprise. *Collins v. Hollis*, 102 So. 379 (Ala. 1924). Likewise, the framers of the predecessor constitution to the Alabama Constitution of 1901 held the same view, noting that no governmental power is more susceptible to abuse than the taxing power. *Elyton Land Co. v. Mayor and Aldermen of Birmingham*, 7 So. 901 (Ala. 1889). To guard against this abuse, the framers ratified Article XI Section 212 of the Alabama Constitution, which states that “the power to levy taxes shall not be delegated to individuals or private corporations or associations.” As set forth in this Complaint, RDS’ exercise and performance of inherently governmental powers, including the power to levy and enter tax assessments, violates the Alabama Constitution and the due process rights of Alabama taxpayers.

V. ALABAMA TAXPAYERS’ BILL OF RIGHTS

18. TBOR was enacted in 1992 to increase the protective rights of Alabama taxpayers and to establish uniform administrative procedures for the Alabama Department of Revenue (“ADOR”).

19. TBOR complements longstanding taxpayer-favored rules of statutory construction by directing that its provisions “shall be liberally construed to allow substantial justice.” *Ala. Code* § 40-2A-2(1)(a). *See State v. Seals Piano Co.*, 95 So. 451 (1923) holding that taxing statutes should be strictly construed against the taxing authority; *See also Williams v. Pugh*, 129 So. 792 (1930), holding that where the language of a taxing statute is reasonably capable of two constructions, the interpretation most favorable to the taxpayer must be adopted.

20. The requirements of TBOR were directed initially to ADOR. However, the Local Tax Simplification Act of 1998 (“LTSA”) made the statutory mandates of TBOR equally applicable to tax assessments and tax-collection procedures by counties and municipalities. See *GMAC v. City of Red Bay*, 894 So. 2c 650, 653 (Ala. 2004) (citing *Ala. Code* § 11-51-210, as to municipalities and *Ala. Code* § 11-3-11.2, as to counties). LTSA also added the definition of Private Firms to TBOR and set forth clear limitations (consistent with the Alabama Constitution) on the types of tax-related support services that Private Firms can provide to counties and municipalities. As discussed below, TBOR’s limitations on Private Firms reflect the proper reservation of taxing powers to the State, counties and municipalities.

A. The Limited Authority of Private Firms

21. TBOR permits counties and municipalities to hire Private Firms to perform a limited range of tax-administration support services, but properly reserves certain inherently governmental powers to the State, counties, and municipalities. In particular, TBOR provides that Private Firms can administer support services in the nature of (A) *collecting* taxes that have been previously levied and assessed by counties and municipalities, and (B) *auditing* taxpayers’ books and records for the purpose of ascertaining, and then recommending, amounts of tax to be entered as assessments by counties and municipalities. These service limitations are reflected in TBOR’s definition of Private Firm:

(17) PRIVATE AUDITING OR COLLECTING FIRM. Any person in the business of collecting, through contract or otherwise, local sales, use, rental, lodgings or other taxes or license fees for any county or municipality, or auditing any taxpayer, through the examination of books and records, for any county or municipality.

22. Notably, this definition of Private Firm does not contemplate, or purport to empower, Private Firms to enter assessments of tax, to conduct quasi-judicial administrative review hearings and appeals, or to consider petitions for tax refunds, all of which are inherently governmental powers. Instead, several provisions of TBOR indicate that the power to enter assessments and conduct administrative procedures is reserved (appropriately) to the counties and municipalities. For example, as discussed more thoroughly below, *Ala. Code* §§ 40-2A-6(a) and 40-2A-6(c) indicate that Private Firms have only the authority to *propose, assert or recommend* assessments of tax. Noticeably absent from this list of authorized actions are the words “enter” or “entry,” which are the primary terms utilized by TBOR to describe the official act of issuing a tax assessment. (Compare the terms “propose, assert or recommend” to *Ala. Code* § 40-2A-7, which uses the words “enter,” “entered” and “entry” thirty two (32) times to describe the official act of issuing a tax assessment.). Also, *Ala. Code* § 40-2A-6(a) suggests that only counties and municipalities (and not Private Firms) have hearings or appeals officers (“The compensation...payable to any employee or other agent of a [Private Firm] *or to any employee or other agent of the state or county or municipal governing authority serving in the capacity of a hearings or appeals officer* may not be contingent upon... the amount of tax... assessed or collected from the taxpayer”).

23. Plaintiffs adopt and incorporate by reference, as if fully set forth herein, the Motion for Partial Summary Judgment, and supporting submissions, filed on April 20, 2011.

B. TBOR's Bounty Hunter Provision

24. Under TBOR, counties and municipalities can delegate audit and collection services to Private Firms, subject to important proscriptions and limitations. *Ala. Code* § 40-2A-6.

25. *Ala. Code* § 40-2A-6(a), known as the “Bounty Hunter Provision,” prohibits certain contracts and arrangements between counties and municipalities and Private Firms that could incentivize Private Firms to engage in illegal tactics to maximize tax revenues for their clients and revenues for themselves. These prohibited contracts are referred to colloquially as “Bounty Hunter” contracts.

26. One notable proscription in the Bounty Hunter Provision prohibits a county or municipality from entering into “contracts or arrangements for the *examination* of a taxpayer's books and records³ if any part of the compensation or other benefits paid or payable for the services of the private examining or collecting firm” is contingent upon or otherwise related to the amount of tax, interest, court cost, or penalty assessed against or collected from the taxpayer.⁴ The Alabama Administrative Code Section 810-14-1-.36 further provides that “any arrangement whereby the private auditing firm agrees or has an understanding with the taxing authority that all or part of the firm’s compensation will be waived or otherwise not paid if there is no assessment or no collection of tax or if less than a certain amount is assessed or collected is prohibited.”

27. The Bounty Hunter Provision of TBOR contains a second important proscription which prohibits a county or municipality from entering “into contracts or

³ Under TBOR, an “examination of books and records” is not limited merely to an examination of records conducted at a taxpayer’s place of business. See Op. Att’y Gen (August 1, 2005) which addresses issues relating to a private firm’s examination of a taxpayer’s books and records which are located at the tax assessor’s office.

⁴ Under TBOR, there is no “de minimis amount” exception to the prohibition on contingency fees.

arrangements for the *collection* of any tax, interest, court cost, or penalty” with a Private Firm if the Private Firm has *any authority to determine* the amount of tax, interest, court cost, or penalty owed the state, county, or municipal governing authority. Notably, this type of Bounty Hunter contract is prohibited if a Private Firm is given the mere authority to determine an amount of tax; there is no prerequisite that a Private Firm has actually exercised that authority by making a determination of any amount of tax.

28. As a penalty for doing business under either of these Bounty Hunter contracts, TBOR states that any such prohibited “contract or arrangement, if made or entered into, is void and unenforceable” *ab initio*. *Ala. Code* § 40-2A-6.⁵ Moreover, “any assessment or preliminary assessment of taxes, penalties, court costs, or interest proposed or asserted by, or based upon the recommendation of, a private examining or collecting firm compensated under any such contract or arrangement shall be void and unenforceable.” *Ala. Code* § 40-2A-6.

29. The Office of the Attorney General of the State of Alabama analyzed the Bounty Hunter Provision in a recently issued opinion. See Op. Att’y Gen. (August 1, 2005) (the “A.G. Opinion”). The A.G. Opinion states in pertinent part:

Section 40-2A-6 of the Code of Alabama makes a distinction between determining the amount of taxes that are due and owing, which may not be performed by a private entity on a contingency-fee basis, and simply collecting taxes that have been determined to be due by the appropriate tax officials, which may be performed by private entities on a contingency-fee basis. . . . The private contractor is not allowed to review the records and determine the appropriate amount of tax due. . . . *Any discrepancy in the proper amount of taxes due must be determined by the tax assessor.*

⁵ See also *Lucky Jacks Entm’t Ctr., LLC v. Jopat Bldg. Corp.*, No. 1071648, 2009 WL 2002934 (Ala. July 10, 2009), which reaffirms the principle in *Prince v. Prince*, 67 Ala. 565 (1880) that a question of first impression as to the meaning of a statute does not excuse the parties from compliance with the statute so as to render void contracts enforceable. Every party to the contract is required to know the statute’s proper construction. Any such void contract is deemed void and unenforceable from its inception.

CONCLUSION

It is the opinion of this Office that section 40-2A-6 of the Code of Alabama allows the examination of the tax assessor's records by private entities working for a city, county, or state agency on a contingency-fee basis for the purpose of collecting taxes due, *as long as any question concerning the proper amount of the taxes due is determined by the tax assessor.*

30. The A.G. Opinion clearly states that Private Firms (who receive contingency-fees) are absolutely barred from making any determination which impacts the amount of tax owed by a taxpayer. (Again, TBOR mandates that merely possessing the authority to determine the amount of tax is prohibited, even if such authority is not exercised).

31. RDS enters into agreements with Taxing Authorities based upon the promise, representation and understanding that RDS will obtain at least "3 to 1" recovery to cost ratio on any taxpayer examination it conducts, and it closely monitors its examinations to ensure audit findings return a multiple of costs incurred. In fact, RDS requires its unbonded examiners to attain a "3 to 1" recovery to cost ratio in their "Report of Audit Findings," that serves as the basis for assessments against Alabama taxpayers, or face adverse consequences, including termination. Moreover, when initially identifying "Targets" for taxpayer examinations, RDS employees are required to submit an estimate of anticipated findings, and an examination will not be approved unless the estimate reflects at least a "3 to 1" recovery to cost ratio. Finally, RDS enters into illegal arrangements with Taxing Authorities that provide a Taxing Authority will not be charged for a taxpayer examination unless recovery is actually obtained on behalf of the Taxing Authority, and the charge is entirely related to the amount of recovery.

C. Prohibited Compensation under TBOR

32. In addition to prohibiting Bounty Hunter contracts, TBOR establishes important proscriptions on the types of compensation that employees and agents of Private Firms are allowed to receive. Specifically, TBOR prohibits an employee or other agent of a Private Firm from receiving compensation or other benefits “contingent upon, in whole or in part, or otherwise related to, the amount of tax, interest, court cost, or penalty assessed against or collected from the taxpayer” (“Prohibited Compensation”). *Ala. Code § 40-2A-6(b)*.

33. For sound policy reasons, TBOR seeks to deter a Private Firm from paying Prohibited Compensation to its employees by mandating that “any assessment or preliminary assessment of taxes, penalties, court cost, or interest proposed or asserted by or upon the recommendation of a private examining or collecting firm, compensated under any such contract or arrangement, is void and unenforceable.” *Ala. Code § 40-2A-6(c)* (also refer to footnote 5 above regarding the contract being retroactively void).

D. Bonding Requirements under TBOR

34. TBOR also sets requirements for Private Firms to follow with respect to bonding. For example, *Ala. Code § 40-2A-14(b)* and *Ala Code § 40-23-30* require that Private Firms, such as RDS, meet certain strict conditions precedent before engaging in an audit or examination of a taxpayer’s books and records.

35. In particular, *Ala. Code § 40-2A-14(b)* and *Ala. Code § 40-23-30* together provide that each Private Firm shall maintain bonds that meet the following six requirements: (A) a \$5,000 bond shall be obtained with respect to each examiner used by the Private Firm; (B) the bond shall be obtained by the Private Firm that retained the

examiner, not by a parent company or affiliate of the Private Firm; (C) the bond must be obtained prior to the examiner performing examination services upon a taxpayer; (D) the form of the bond must be approved by the Governor of the State of Alabama prior to the performance of examination services; (E) the bond must be both a fidelity bond and a bond that insures the faithful performance of the examiner; and (F) the bond must be executed in favor of the State of Alabama for the benefit of its taxpayers (the "Bond Requirements").

36. As a penalty for circumventing or ignoring the Bond Requirements, *Ala. Code* § 40-2A-14(b) declares that: (A) any contract or arrangement between a self-administered county or municipality and a Private Firm failing to meet the Bond Requirements shall automatically terminate, (B) any assessment or proposed assessment issued by the self-administered county or municipality or its agent as a result of any examination conducted, in whole or in part, by an un-bonded examiner is void, and (C) any Private Firm who utilizes an un-bonded examiner shall forfeit its license granted pursuant to *Ala. Code* § 40-12-43.1 for a period of six months.

37. Under Alabama law, taxpayers have been required to strictly comply with bonding requirements under TBOR. *See State Department of Revenue v. R.L. Garner and Saundria Garner*, 812 So. 2d 380, 384 (Ala. Civ. App. 2001) (the missing signature of the surety on the taxpayer's supersedeas bond did not comport with the unambiguous wording of § 40-2A-9). Similarly, Private Firms such as RDS should be held to the same standard of strict compliance with respect to the Bond Requirements.

E. Taxpayers' Right to an Administrative Hearing and Appeal

38. In addition to providing substantive taxpayer protections, TBOR establishes a taxpayer's right to seek relief from tax assessments entered by counties and municipalities through administrative remedies.

39. Under TBOR, after the entry of a *preliminary assessment* by a county or municipality, a taxpayer may petition for an administrative review of the preliminary assessment (an "Administrative Review"). *Ala. Code* § 40-2A-7(b)(4). The purpose of the Administrative Review is to allow a taxpayer an opportunity to present evidence to support his, her or its challenge to a preliminary assessment, as well as to discuss any errors or omissions that may have occurred during an examination of such taxpayer's books and records by the county, municipality or Private Firm.

40. TBOR provides no specific standard of review in an Administrative Review. Section 40-2A-7(b)(5)(c) of TBOR merely provides that if ". . . upon further review the department [or county or municipality] determines that the preliminary assessment is due to be upheld in whole or in part, the department [or county or municipality] may make the final assessment. . . ."

41. Following the entry of a *final assessment* by a county or municipality, or following the denial of a refund request by a county or municipality, a taxpayer has the right under TBOR to appeal to either (a) an administrative agency of the county or municipality that is similar to the Administrative Law Division of the Alabama Department of Revenue, or to (b) the Circuit Court of Montgomery County, Alabama, or to the circuit court of the county in which the taxpayer resides or has a principal place of business in Alabama (an "Administrative Appeal"). See *GMAC v. City of Red Bay*, 894 So. 2c 650, 653 (Ala. 2004). See also *Ala. Code* § 11-51-191(e)(1), indicating that the

right to an Administrative Appeal exists with respect to a final assessment by a county or municipality, and that such county or municipality shall appoint a hearing officer that shall “function in a manner similar to the Administrative Law Judge of the Department of Revenue” and who must be “impartial and reasonably knowledgeable of the applicable law.” Importantly, an Administrative Appeal of a final assessment enables a taxpayer to challenge a final assessment *without the additional expense* of filing an appeal in circuit court and *without paying the tax or posting a supersedeas bond*. Neither the Alabama Constitution nor TBOR permit Private Firms working on Bounty Hunter contracts to conduct the required administrative proceedings.

42. Under TBOR, a taxpayer’s right to avail himself or herself of the administrative proceedings within the county or municipality is inviolable.

43. To avoid providing taxpayers with due process and appellate remedies under TBOR, however, RDS regularly collects monies from taxpayers when no final assessment has been entered.

V. RDS

44. Plaintiffs allege the following on information and belief:

A. Generally

45. RDS provides privatized tax assessment, collection and administration services to numerous counties and municipalities in Alabama as a Private Firm. RDS’ services cover multiple categories of taxes, including sales and use, business license, insurance premium, alcohol, gas, hotel and motel lodging, rental and lease, tobacco, severance, and others.

46. Pursuant to standard form contractual arrangements with counties and municipalities, RDS' services include *entering* preliminary and final tax assessments, processing tax payments and tax forms, collecting delinquent taxes, identifying businesses that have not paid business license taxes (a service known by RDS as "discovery/recovery"), conducting taxpayer audits, performing compliance actions, entering into promissory notes and conducting Administrative Reviews. RDS also contractually assumes the responsibility to provide Administrative Appeals on behalf of counties and municipalities.

47. RDS reports that it contracts with more than 250 counties and municipalities with taxing authority in Alabama⁶ and processes more than \$740 Million in tax revenues annually.

⁶ RDS contracts with Addison, **Adamsville**, **Albertville**, **Alexander City**, Aliceville, Allgood, Altoona, **Andalusia**, **Anniston**, **Arab**, Ardmore, Ariton, **Arley**, **Ashville**, Ashford, **Athens**, Atmore, **Attalla**, **Auburn**, **Autaugaville**, **Bay Minnette**, Bear Creek, Beatrice, Beaverton, Belk, **Berry**, **Bessemer**, **Blountsville**, **Boaz**, Boligee, **Brantley**, Brent, Brewton, Bridgeport, Brighton, Brilliant, Brookwood, **Butler**, **Calera**, Camden, Camp Hill, **Carbon Hill**, Castleberry, **Cedar Bluff**, Centre, Centerville, **Chelsea**, Chickasaw, Citronelle, **Clay**, **Clanton**, Clayhatchee, Clayton, **Cleveland**, Coaling, Collinsville, **Columbiana**, Coosada, Cordova, **Cowarts**, Creola, **Crossville**, Cuba, **Dadeville**, **Decatur**, **Demopolis**, Detroit, **Dora**, **Dothan**, Double Springs, Douglas, **Eclectic**, Elberta, **Elmore**, **Enterprise**, **Eufaula**, Eutaw, **Evergreen**, **Excel**, **Fayette**, Five Points, Flomaton, **Floral**, **Florence**, Franklin, Forkland, **Frisco City**, **Fulton**, **Fultondale**, Fyffe, **Gadsden**, **Gardendale**, Geiger, Glen Allen, Goodwater, **Gordo**, **Gordon**, Gordonville, Goshen, Greensboro, Guin, Gurley, Hackleburg, Haleyville, **Hamilton**, **Hartselle**, Hayneville, **Headland**, **Heflin**, Henagar, Hillsboro, Hodges, Hurtsboro, Jackson, **Jackson's Gap**, **Jacksonville**, **Jemison**, Kennedy, **Kimberly**, Kinsey, **Lanett**, **Lake View**, **Leeds**, **Leesburg**, Lexington, **Linden**, Lineville, Lipscomb, Lisman, Littleville, Livingston, Loxley, **Luverne**, Lynn, Magnolia Springs, Maplesville, **Marion**, Midfield, **Midland City**, Midway, Millport, Millry, **Monroeville**, **Morris**, Mosses, **Moulton**, **Moundville**, **Mount Vernon**, **Mulga**, Napier Field, New Brockton, **New Hope**, North Courtland, Notasulga, **Ohatchee**, **Oneonta**, **Opelika**, **Opp**, **Ozark**, **Parrish**, Pennington, Phenix City, Phil Campbell, Piedmont, Powell, Priceville, Prichard, Ragland, Rainsville, Red Level, Reform, Rehobath, **Repton**, **Riverside**, Roanake, Rutledge, Samson, Sand Rock, Sandford, Sardis City, **Scottsboro**, **Selma**, **Siverhill**, Smiths Station, **Southside**, Spanish Fort, Steele, Stevenson, Sulligent, Sumiton, Sylvan Springs, Sylvania, **Talassee**, **Tarrant**, **Thomasville**, **Thorsby**, **Town Creek**, **Tuskegee**, Union, Union Springs, Uniontown, Valley, Valley Grande, **Vernon**, **Vestavia Hills**, Vina, **Vincent**, West Jefferson, **Warrior**, **Weaver**, Webb, Wedowee, **West Blockton**, Westover, **Wetumpka**, **Wilsonville**, **Winfield**, Woodland, **Woodstock**, Yellow Bluff, York, **Autauga County**, **Barbor County**, **Blount County**, **Bibb County**, **Bullock County**, **Calhoun County**, **Chambers County**, **Cherokee County**, **Chilton County**, **Choctaw County**, **Clarke County**, **Clay County**, **Cleburne County**, **Coffee County**, **Conecuh County**, **Covington County**, **Dale County**, **Dallas County**, **Elmore County**, **Etowah County**, **Fayette County**, **Greene County**, **Hale County**, **Henry County**, **Houston County**, **Jackson County**, **Lauderdale County**, **Lamar**

48. The counties and municipalities served by RDS (and which are identified in footnote 6 of this Complaint, as amended), together with all other counties and municipalities in Alabama served by RDS but not listed herein, may be referred to herein on a singular basis as a “Taxing Jurisdiction” and collectively as the “Taxing Jurisdictions.” Some of the Taxing Jurisdictions that contracted with RDS and who participated in the multi-jurisdictional audit of WRS are highlighted in bold in footnote 6 and share a direct juridical link that consists of engaging in the same challenged conduct by and through RDS, under the same or similar contractual arrangement with RDS, and jointly participating in a multi-jurisdictional audit of WRS in the same examination at the same time. The highlighted Taxing Jurisdictions in footnote 6 comprise, in part, the Taxing Authority Defendant Class referenced in paragraphs 8 and 13 herein. Additional Taxing Jurisdictions who participated in the unlawful audits by RDS will be identified during discovery.

49. Each Taxing Jurisdiction doing business with RDS is a party to one or more contracts or arrangements with RDS. Some Taxing Jurisdictions do business with RDS under contracts known as Tax Revenue Enhancement Agreements Business License Discovery / Recovery (“Discovery Contract”), while other Taxing Jurisdictions do business with RDS under contracts known as Tax Revenue Enhancement Agreements Revenue Administration (“Administration Contract”). Some Taxing Jurisdictions do business with RDS under both the Discovery Contract and the Administration Contract,

County, Lawrence County, Lee County, Limestone County, Lowndes County, Macon County, Marengo County, Marion County, Marshall County, Monroe County, Morgan County, Perry County, Pickens County, Pike County, Russell County, Sumter County, Tallapoosa County, Walker County, Wilcox County and Winston County.

in which case the contracts constitute a single contractual "arrangement" between RDS and each Taxing Jurisdiction.

50. The Discovery Contract and the Administration Contract are standard form contracts that were drafted and/or approved by PRA and RDS. The contractual terms of the Discovery Contracts and Administration Contracts used in each Taxing Jurisdiction are virtually identical. The Discovery Contract and the Administration Contract empower RDS to reach taxpayers who do not reside in the Taxing Jurisdictions by allowing RDS to determine, and avail itself of, taxable nexus.

51. Because of the long arm of taxable nexus (and the potential for abuse of taxable nexus), Plaintiffs and taxpayers located in *all* jurisdictions (whether within or without a Taxing Jurisdiction) constitute intended third party beneficiaries under the Discovery Contracts and the Administration Contracts.

52. As set forth in greater detail below, RDS' entry of preliminary and final assessments of tax (and RDS' collection of monies when no final assessment of taxes has been entered), as well as RDS's performance of administrative procedures under the Discovery Contracts and Administration Contracts, constitutes a violation of taxpayers' due process rights arising under Article XI Section 212 of the Alabama Constitution.

53. Also, as set forth in greater detail below, the Discovery Contract and the Administration Contract constitute Bounty Hunter contracts that are void pursuant to TBOR. In addition, the Discovery Contract and the Administration Contract are the basis for the payment of Prohibited Compensation, and such compensation scheme renders them void under TBOR.

54. TBOR § 40-2A-6(a) does not allow Private Firms to compartmentalize illegal activities within separate divisions or through separate contracts. Rather, if one type of contract with a Taxing Jurisdiction is deemed illegal and void, then the entire “arrangement,” including all other contracts with that same Taxing Jurisdiction are void

55. Because the Discovery Contract and Administration Contract (i.e., the “arrangement”) are void, RDS’ and its agents’ performance under those contracts are unauthorized and have resulted in invalid assessments, invalid liens, invalid levies, illegally collected taxes, and illegitimate Administrative Reviews in each Taxing Jurisdiction which have harmed taxpayers both within and without the Taxing Jurisdictions.

56. As stated, neither Article XI Section 212 of the Alabama Constitution nor TBOR contemplate the wholesale delegation of sovereign taxing powers to private enterprise, as attempted by the Taxing Jurisdictions and RDS. Perhaps even more troubling is that RDS *has further delegated* sovereign taxing powers to independent contractors such as Atkins & Associates, LLC that, to Plaintiff’s knowledge, (A) violate TBOR in the same manner as RDS, (B) are not licensed as Private Firms under *Ala. Code* §40-12-43.1, and (C) fail to identify themselves to taxpayers as being “twice removed” from the actual Taxing Jurisdiction. These independent contractors then delegate those powers *again* to their own unbonded employees and contractors, thus further widening the gap of accountability between the Taxing Jurisdiction and its revenue agents in the field. In fact, the Taxing Jurisdictions likely have no idea of the number or the names of the unbonded persons who are now serving as their revenue agents, whether as

contractors, sub-contractors or sub-sub-contractors. This lack of accountability has materialized as a pyramid scheme of tax collection that cannot stand.

B. The Discovery Contract

57. An example copy of a standard form Discovery Contract is attached hereto as Exhibit B. Upon information and belief, RDS' Discovery Contract was approved by Judy Scott, a senior executive and general counsel of PRA. PRA's 2008 Annual Report (accessible at url <http://www.portfoliorecovery.com/>) lists PRA's corporate legal department's duties and responsibilities, which include contract and document preparation and review, ensuring compliance with federal and state laws and regulations, and obtaining and maintaining licenses, bonds and insurance. The Discovery Contract represents an impermissible delegation of taxing powers in violation of Article XI Section 212 of the Alabama Constitution and TBOR. RDS and PRA knowingly and intentionally adopted the Discovery Contract which is, on its face, in violation of these laws.

58. Under the Discovery Contract, Taxing Jurisdictions authorize RDS to identify, assess, and collect taxes from taxpayers whom *RDS determines* are operating within a Taxing Jurisdiction without proper business licensing and/or without paying proper taxes (each such taxpayer identified by RDS is referred to as a "Target"). A Target may be located within or without the Taxing Jurisdiction. Throughout every phase of RDS' performance of the Discovery Contract, RDS makes illegal determinations of the amount of tax (including penalties and interest) owed by Targets.

59. As compensation for identifying, assessing and collecting taxes from Targets, RDS is customarily paid an unlawful contingency fee equal to 50% of business license revenue collected from Targets (See Section B(3)(i) of Exhibit B).

60. RDS' determination of the amount of tax owed by Targets, coupled with RDS' receipt of a contingency fee, violates the Bounty Hunter Provision of TBOR.

61. RDS chooses which Targets it will assess without input from a Taxing Jurisdiction. Under the Discovery Contract, RDS' revenues increase in direct proportion to the number of Targets RDS chooses to identify and assess.

62. Section A(1)(iii) of the Discovery Contract provides that RDS will "generate a letter requiring payment, proof of payment, or an appeal" for all Targets identified by RDS (the "Payment Letter"). The Discovery Contract further provides that if a Target does not respond to the Payment Letter, RDS will proceed with "assessment procedures" as allowed by law.⁷ (See Section A(1)(iii) of Exhibit B).

63. The phrase "assessment procedures" undoubtedly refers to either the traditional notion of a preliminary or final assessment prescribed by taxing statutes, or to the common meaning of the word "assess" (i.e., to *determine* the rate or amount of, or to subject to a tax).⁸ Under either interpretation of the phrase "assessment procedures," Section A(1)(iii) of the Discovery Contract authorizes RDS to make some type of assessment-related determinations that affect a Target's tax liability.

⁷ Section 40-2A-7 of TBOR, which states that if a taxpayer fails to submit a tax return the taxing jurisdiction is authorized to *determine* the value or amount of tax owed by a taxpayer based on the most accurate and complete information reasonably obtainable by the taxing jurisdiction. However, RDS is prohibited from exercising that same authority since it receives contingency-fee compensation under the Discovery Contract.

⁸ <http://www.merriam-webster.com/dictionary/assess>

64. Beginning in September 2009, WRS began receiving notices from RDS pursuant to the illegal Discovery Contracts for the Taxing Jurisdictions that have already assessed sales taxes against WRS (the concept of taxable nexus is the same for business license taxes and sales taxes).

Payment Letter

65. RDS mails each Target a Payment Letter along with a blank business license application (an "Application").

66. The Payment Letter alerts Targets that they have been identified by RDS as having conducted business in the Taxing Jurisdiction. Presumably, RDS has already determined the taxable nexus of the Target, or ignored the concept of taxable nexus, prior to sending the Payment Letter. The Payment Letter instructs the Target that the Taxing Jurisdiction's business license ordinance requires anyone who has done any kind of business, trade or profession with the Taxing Jurisdiction to pay a license fee for the privilege of doing so. However, the Payment Letter purposefully omits any discussion of applicable exceptions to this general principal, in particular those relating to taxable nexus.⁹

67. The Payment Letter is signed by an RDS "Collection Officer" which is intended by RDS to carry an implicit threat of subsequent legal action against the Target if taxes are not immediately paid. The Collection Officer's signature also implicitly warns that RDS has determined that the Target's tax liability has accrued and is now due and owing.

⁹ Establishing taxable nexus is a condition precedent to a municipality or county assessing a tax against a taxpayer. Taxable nexus is not a bright line test, as evidenced by cases such as *Yelverton, Inc. v. Jefferson County*, 742 So. 23 1216 (Ala. Civ. App. 1997).

68. Pursuant to Section A(1)(iii) of the Discovery Contract, RDS' Payment Letter notifies each Target that it has an account that must be resolved by either (A) calling RDS on a prescribed assistance hotline for help completing the enclosed application (the "Hotline"), and then remitting payment or (B) providing a written statement to RDS presenting arguments why the Target does not owe a business license tax (a "Written Statement").

69. Although the Payment Letter appears to constitute some type of payment demand tantamount to an assessment (as contemplated in the Discovery Contract), it is unclear on its face whether it constitutes an official preliminary or final assessment from RDS since the words "assessment" or "assess" never appear on the Payment Letter. However, the Payment Letter has several hallmarks of a preliminary assessment. In particular, it is issued from an official tax compliance/collections department, references a taxpayer's "account" with the Taxing Jurisdiction, instructs the Target to remit payment of tax within a set time frame and provides notice that the Target has an option to challenge the Payment Letter.

70. Should it be determined that the Payment Letter constitutes an entry of a preliminary or final assessment under TBOR, the notice and appeal rights of TBOR have been violated. Alternatively, the Payment Letter is an unauthorized and illegal demand for payment. Moreover, the Payment Letter and the assessment process described therein violate TBOR and Article XI Section 212 of the Alabama Constitution.

71. Nowhere in the Payment Letter or on the Application does RDS instruct or advise a taxpayer to seek the assistance of an accountant, lawyer or other professional for help completing the Application, determining taxable nexus, or responding to RDS. Also,

nowhere in the Payment Letter is there a clear and simple written description of the Target's rights under TBOR to challenge the Payment Letter.

Application

72. The Application designed by RDS is misleading, confusing and contradictory. For example, some Applications identify a delinquency date for the underlying business license tax, but mysteriously require the Target to pay a penalty on tax payments received by RDS *before the delinquency date*. RDS officials themselves have been unable to complete the Application because of its confusing nature.

73. Furthermore, the Application requires all Targets to report confidential information that is oftentimes unnecessary for the calculation of tax. For example, Targets who pay only a flat license tax (e.g., \$100.00) *are required* by RDS to report gross-receipts, net sales and deductions even though those items are not used to determine the amount of the license tax.

74. Upon information and belief, RDS creates a "master taxpayer file" on each Target within a Taxing Jurisdiction for the purpose of unlawfully aggregating the unnecessary and confidential information collected through the Application. RDS auditors utilize this master tax file as an on-hand resource during sales and use examinations administered under the Administration Contract. The master tax file gives RDS auditors a "sneak peek" at information normally found in a taxpayer's books and records without having to adhere to procedural limitations set forth in TBOR with respect to examinations of taxpayer books and records. Consequently, this unauthorized review of a taxpayer's books and records may provide an impetus for the launch of a full scale audit of that taxpayer under the Administration Contract.

75. RDS regularly excludes the complete applicable Taxing Jurisdiction's license class/fee schedule from the Payment Letter and Application so that Targets will be forced to call the RDS Hotline for help completing the Application.

76. RDS often includes an abridged list of commonly selected business license classes along with the Application. RDS' inclusion of the abridged business license class/fee schedule with the Application misleads taxpayers into believing that RDS has already pre-selected the classes which may apply to the Target.

77. RDS, by company policy, intentionally leaves out taxpayer instructions from the Payment Letter and Application so that Targets will be forced to call the Hotline for help completing the Application.

Hotline

78. RDS utilizes the Hotline as an opportunity to inform Targets of the amount of tax that RDS determines is owed to the Taxing Jurisdiction. RDS reports that it handles approximately 150,000 taxpayer service calls annually.

79. Targets who call the assistance Hotline are greeted by RDS employees who work in RDS' Discovery department (the "Discovery Analysts"). Discovery Analysts are eligible to receive, and do receive, illegal monthly incentive bonuses from RDS based directly on the amount of business license and other tax revenues collected by RDS. In addition, each Discovery Analyst is subject to an illegal collection goal or quota set by RDS.

80. The monthly incentive bonuses received by Discovery Analysts constitute Prohibited Compensation which improperly incentivizes Discovery Analysts to use inappropriate or illegal tactics to extract maximum tax revenue from Targets.

81. Discovery Analysts – not the Taxing Jurisdiction – regularly make the following determinations during their contacts with the Target: (A) whether the Target has taxable nexus with the Taxing Jurisdiction, (B) which business license class or classes are applicable to the Target, (C) which taxable years are applicable (or not applicable) to the Target (i.e., present taxable year and/or previous taxable years), (D) whether the Target owes penalties and interest, and in what amounts, (E) whether the Target qualifies for an exemption, and (F) whether to waive penalties against a Target. Discovery Analysts regularly compute and enter the amount of tax owed for the Target using the Hotline. Discovery Analysts are not formally trained in the concept of “taxable nexus,” nor are they educated on TBOR.

82. Notably, RDS’ selection of the type of license class or classes applicable to a Target bears directly on the amount of license tax owed by a Target (i.e., there are flat fee classes, gross receipts-based classes, unit based classes, etc.). The difference in the amount of tax paid by a flat-fee taxpayer and a gross receipts-based taxpayer can be in the tens of thousands of dollars.

83. Each of the determinations made by Discovery Analysts over the Hotline directly affects the amount of tax owed by a Target.¹⁰ Consequently, each determination

¹⁰ Under the Discovery Contract, RDS is serving as agent for the taxing jurisdictions pursuant to *Ala. Code* Section 11-51-191, which addresses a taxing jurisdiction’s right to *determine* “that the amount of any business license tax reported on or remitted with a business license remittance form is incorrect, if no business license remittance form is filed within the time prescribed, or if the information provide on the form is insufficient to allow the taxing jurisdiction to *determine* the proper amount of business license tax due.”

made by a Discovery Analyst is illegal under TBOR. Any question that may lead to a taxable consequence should be referred to the Taxing Jurisdiction for its determination of the proper amount of tax owed (as required by TBOR and the A.G. Opinion). The conversation between a Target and a Discovery Analyst on the Hotline gives RDS its desired opportunity to determine, and potentially overstate, the amount of tax owed by a Target.

84. Discovery Analysts instruct Targets to complete the Application in accordance with the determinations made by Discovery Analysts over the Hotline.

85. The information solicited by Discovery Analysts from Targets over the Hotline is considered by RDS to be a "taxpayer record" which is examined by RDS. Accordingly, RDS is conducting examination services under the Discovery Contract that are prohibited by TBOR because RDS receives prohibited contingency fees.

86. Assuming arguendo that RDS is authorized under the Alabama Constitution and TBOR to waive penalties, RDS has an arbitrary company policy of permitting only one waiver per taxpayer. Such an arbitrary policy violates TBOR and taxpayers' right to waivers provided under *Ala. Code* § 40-2A-11 (TBOR does not arbitrarily limit each taxpayer to 1 waiver).

RDS' Receipt of Applications and Tax Payments

87. When RDS receives a completed Application or tax payment (whether received from a Target who called the Hotline or from a Target who chose not to call the Hotline) RDS – not the Taxing Jurisdiction – makes the following additional determinations of the amount of tax owed to a Taxing Jurisdiction: (A) whether a Target has remitted the proper amount of tax, (B) whether a Target has remitted an

underpayment of tax, (C) whether a Target has remitted a late payment of tax, and (D) whether the Target overpaid the tax.

88. If RDS determines that a Target underpaid the tax or remitted a late payment, RDS sends an invoice to the Target for additional amounts of tax determined to be owed to the Taxing Jurisdiction. (See Section A(4) of Exhibit B). This process violates TBOR. RDS should refer these issues to the Taxing Jurisdiction for its determination of the proper amount of tax owed.

89. If it is determined that the invoices constitute the entry of either preliminary assessments or final assessments, the invoices should be clearly identified as such, and the failure to do so is a violation of TBOR.

90. Targets are not informed that the invoices constitute the entry of either preliminary assessments or final assessments, or that the Target has a right to challenge the invoice-assessment under TBOR.

91. If RDS determines that a Target remitted an overpayment, RDS (pursuant to company policy) does not notify the Target of the overpayment or the procedure by which the Target can make a claim for refund, as required under TBOR. Instead, RDS secretly retains the overpayment and takes its fifty percent (50%) contingency fee on the overpaid amount. RDS' failure or refusal to notify Target's of a potential refund violates *Ala. Code* § 40-2A-13(h) of TBOR. As a penalty for failing to alert the Target of Target's right to a refund, RDS is subject to forfeiture of its license granted pursuant to *Ala. Code* § 40-12-43.1 for a period of six (6) months. *See Ala. Code* § 40-2A-13(h).

92. Moreover, the Discovery Contract's indemnification provision expressly contemplates that RDS be indemnified for all of its duties thereunder, including its *determination of tax*:

To the full extent allowed by law, [Taxing Jurisdiction] hereby agrees to indemnify and hold AlaTax harmless from any claims and against all costs, expenses, damages, claims and liabilities, *relating to the determination of taxes* due from taxpayers, the collection thereof and any refunding related thereto. (See Section B(6) of Exhibit B).

93. PRA and RDS have benefited greatly from the violations of law committed by Defendants under the Discovery Contract in the form of dividends and distributions of profits illegally obtained from Alabama taxpayers.

Written Statement/Administrative Remedies

94. Under the Discovery Contract, Taxing Jurisdictions have illegally delegated to RDS the responsibility of providing a TBOR-compliant review and appeals process to Targets who disagree with RDS' Payment Letter and subsequent assessments. To wit, Section B(2) of the Discovery Contract provides:

Review and Appeal Process: RDS has adopted and will use a *review and appeals* process which is based on the Alabama Taxpayers' Bill of Rights Act and Uniform Revenue Procedures Act codified at Title 40, Chapter 2A, Code of Alabama, 1975, as amended.

95. Unlike the Discovery Contract, which refers to both a Target's right to *appeal* and RDS' responsibility to provide a TBOR-compliant review and *appeal* process, the Payment Letter uses the phrase "written statement" which is a term not found in the Discovery Contract or in TBOR. The Payment Letter does not provide Targets with any required notices respecting Administrative Reviews or Administrative Appeals under

TBOR. Furthermore, Written Statements are submitted for RDS' consideration, not for the consideration of the Taxing Jurisdiction.

96. RDS – and not the Taxing Jurisdiction – determines whether a Target's Written Statement has enough merit to forestall further assessment and collection efforts by RDS.

97. RDS' authority under the Discovery Contract to review Written Statements and make determinations on the merits violates TBOR because RDS receives contingency fees under the Discovery Contract.

98. The review and appeal process conducted by RDS under the Discovery Contract violates TBOR and other laws.

99. RDS' contingency fee-based revenues and incentive based compensation plan for Discovery Analysts financially incentivizes RDS, and the Discovery Analysts, to rule against Written Statements and to overstate the amount of tax owed by Targets.

100. Moreover, to the extent RDS may provide an Administrative Review or Administrative Appeal of a business license tax that was initially collected through the efforts of a Discovery Analyst, such process represents yet another way RDS "determines" taxes collected through the Discovery Contract.

C. The Administration Contract

101. An example copy of a standard form Administration Contract is attached hereto as Exhibit C. Upon information and belief, RDS' Administration Contract was approved by PRA's corporate legal department. The illegal collections, audit and administrative services of the Administration Contract are overseen by MuniServices in California. RDS, PRA and MuniServices knowingly and intentionally adopted the

Administration Contract, which is, on its face, in violation of Alabama law. The Administration Contract represents an impermissible delegation of taxing authority in violation of Article XI Section 212 of the Alabama Constitution and TBOR. Plaintiff WRS has suffered from unlawful sales tax assessments prosecuted by RDS through illegal Administration Contracts in multiple Taxing Jurisdictions.

102. Under the Administration Contract, Taxing Jurisdictions authorize RDS to enter preliminary and final tax assessments, collect and process tax payments and tax forms, collect delinquent taxes, conduct taxpayer audits through an examination of books and records, initiate compliance actions and conduct Administrative Reviews and Administrative Appeals on their behalf.

103. Like the Discovery Contract, RDS makes determinations under the Administration Contract that affect the amount of tax owed by Targets at nearly every step of the process (i.e., audits, reviews and appeals, payment processing, etc).

104. Like the Discovery Contract, the Administration contract indicates that counties and municipalities have illegally delegated the responsibility of providing TBOR-compliant Administrative Reviews and Administrative Appeals to RDS.

105. A portion of RDS' compensation under the Administration contract is contingent upon the amount of tax collected from taxpayers, or stated another way, such compensation is waived or not paid if less than a certain amount of taxes are collected (the "Administration Contingency Fee"). The Administration Contingency Fee is earned each time RDS collects and processes a tax payment. The Administration Contingency Fee typically equals \$2.00 per transaction processed. In violation of *Ala. Admin. Code* § 810-14-1-.36, RDS agrees to waive or not receive fees to the extent they exceed a

percentage of taxes collected (typically 1.50% or 1.85%). RDS is incentivized to process a greater number of returns at higher tax rates and categories to maximize its fees.

106. The Administration Contract authorizes RDS to determine the amount of taxes owed by a taxpayer in the following ways: (A) by determining whether a taxpayer has taxable nexus with the Taxing Jurisdiction, (B) by conducting an examination of a taxpayer's books and records, (C) by determining whether a taxpayer has remitted the proper amount of tax, (D) by determining whether a taxpayer has remitted an underpayment of tax, (E) by determining a taxpayer has overpaid a tax, (F) by determining whether a taxpayer has remitted a late payment of tax, and (G) by determining whether to waive penalties against a taxpayer. All such authority is impermissible because RDS collects taxes pursuant to the Administration Contract.

107. If RDS determines that a taxpayer underpaid the tax or remitted a late payment, RDS sends an invoice to the taxpayer for additional amounts of tax determined to be owed to the Taxing Jurisdiction. (See Section A(4) of Exhibit C). This process violates TBOR. RDS should refer these issues to the Taxing Jurisdiction for its determination of the proper amount of tax owed.

108. If the invoices sent by RDS to taxpayers constitute the entry of an assessment,

109. Taxpayers are not informed that the taxpayer has a right to challenge the invoice-assessment under TBOR.

110. Each of the determinations made by RDS under the Administration Contract directly affects the amount of tax owed by a taxpayer and the amount of revenues enjoyed by RDS from the Administration Contract.

111. The Administration Contract constitutes a Bounty Hunter contract because it is a contract or arrangement that authorizes RDS to examine a taxpayer's books and records, on one hand, and then receive compensation contingent upon or otherwise related to the amount of tax assessed against or collected from taxpayers, on the other. Alternatively, the Administration Contract constitutes a Bounty Hunter contract because it is a contract or arrangement for collections that authorizes RDS to *determine the amount of tax* owed by a taxpayer, and then receive compensation contingent upon or otherwise related to the amount of tax assessed or collected from a taxpayer

112. In jurisdictions that contract with RDS under both the Discovery Contract and the Administration Contract, the contracts constitute a single Bounty Hunter contractual "arrangement" that is void and unenforceable under TBOR. Further, the contingency arrangement in conducting multi-jurisdiction audits renders all resulting assessments and levies void, unlawful and unenforceable.

113. PRA and RDS have benefited greatly from the violations of law committed by Defendants under the Administration Contract. PRA receives dividends and distributions from RDS revenues that were illegally obtained from Alabama taxpayers.

114. RDS also collects monies from taxpayers that are never assessed. Neither the Discovery nor the Administration Contracts permit the collection of monies for taxes not assessed, and RDS acts without authority or right by doing so.

D. Fidelity and Faithful Performance Bonds

115. RDS has failed to satisfy a single Bond Requirement. Therefore, RDS is in violation of TBOR. Therefore, the Discovery Contracts, Administration Contracts and

all other contracts and arrangements between RDS and Taxing Jurisdictions are deemed terminated as of the date RDS first utilized an unbonded examiner and all assessments or proposed assessments issued by RDS or the Taxing Authorities conducted by an unbonded examiner are deemed void. TBOR does not mandate that a taxpayer sustain an actual loss or assert a claim prior to challenging the sufficiency of the bond. RDS actively conceals from taxpayers that its examiners are unbonded and, in fact, refuses to produce bonds upon a taxpayer's request.

116. As a further consequence of failing to meet the Bond Requirements, TBOR mandates that RDS' license granted pursuant to *Ala. Code* § 40-12-43.1 is due to be forfeited for a period of six (6) months.

117. Plaintiffs adopt and incorporate by reference, as if set out fully herein, the Motion for Summary Judgment, and supporting submission, filed on April 6, 2011.

E. Administrative Reviews and Administrative Appeals

118. In violation of Article XI Section 212 of the Alabama Constitution, the Discovery Contract and Administration Contract confer upon RDS the authority and obligation to perform Administrative Reviews and Administrative Appeals. Despite this unconstitutional delegation, RDS fails or refuses to provide Administrative Reviews and Administrative Appeals to some or all taxpayers.

119. To the extent RDS does provide Administrative Reviews and Administrative Appeals to some taxpayers, those Administrative Reviews and Administrative Appeals are conducted by RDS in violation of TBOR.

120. Rebecca Adams (“Adams”), head of RDS’ auditing and administrative review department, is responsible for overseeing Administrative Reviews conducted by RDS. Adams reports directly to an officer of MuniServices, a subsidiary of PRA regularly engaged in *contingency-fee* discovery/recovery services and audits in California. Remarkably, MuniServices is charged with ensuring that RDS operations comply with TBOR (which prohibits contingency fees). Plaintiffs submit that this structure is the proverbial fox guarding the hen house.

121. Once a taxpayer requests an Administrative Review, Adams assigns the crucial role of “hearings officer” to an individual who regularly performs services for RDS as an auditor. RDS’ hearings officers receive no special schooling or additional education to qualify them to serve as a hearings officer. RDS hearing officers are required to review the work of their colleagues. RDS hearings officers are also put in the awkward position of reviewing audits and findings overseen by Adams, their superior.

122. Administrative Reviews conducted by RDS are typically conducted without any presence or participation from Adams or any official from the applicable Taxing Jurisdiction.

123. During Administrative Reviews, RDS hearings officers incorrectly apply an RDS-friendly standard of review that is not contemplated in TBOR. To wit, RDS hearings officers believe the results of preliminary assessments are to be deemed “prima facie correct” during the Administrative Review. Importantly, TBOR provides for no such standard of review during an Administrative Review.

124. At the conclusion of an Administrative Review, the hearings officer will issue a memorandum opinion of his or her findings. The memorandum is characterized

by RDS hearings officers as a “recommendation” (the “Review Recommendation”) that is intended for Adams’ sole consideration. Hearings officers believe that the Review Recommendation will be duly considered by Adams, then accepted or rejected in whole or in part.

125. Although Adams is vested with the ultimate authority and responsibility to accept or reject the Review Recommendation, she summarily and routinely adopts the Review Recommendations from the hearings officer without substantive review. Such a failure or refusal to properly consider the Review Recommendation (a) deprives taxpayers of due process, and cannot result in fair treatment for taxpayers, and (b) illustrates the dysfunctional nature of RDS’ Administrative Review process.

126. After rubber stamping the Review Recommendation, Adams enters a final assessment against the taxpayer. A copy of a sample form Notice of Final Assessment issued by RDS is attached hereto as Exhibit D. Importantly, the Notice of Final Assessment is prepared, approved, signed and entered by Adams and another employee of RDS; nowhere does the Taxing Jurisdiction or its officers sign and enter the assessment.

127. Except for when Adams herself conducts an Administrative Review, a taxpayer has no opportunity to present arguments directly to Adams as the chief hearing officer and ultimate decider of tax.

128. RDS has taken the position that it is not bound by the provisions of TBOR and recent case law¹¹ which guarantee a taxpayer a right to an Administrative Appeal. Alternatively, RDS intentionally misleads taxpayers into believing that Administrative Appeals are unavailable. For instance, the typical Notice of Final Assessment issued by

¹¹ See *GMAC v. City of Red Bay*, 894 So. 2d 650, 653 (Ala. 2004).

RDS informs taxpayers of their right to appeal to circuit court, but omits any reference to an Administrative Appeal through RDS. The Notice of Final Assessment states in pertinent part:

You have the right to appeal this assessment to circuit court. The appeal must be made within thirty (30) days of the final assessment date and pursuant to the provisions of Act 92-186. *See attached for additional explanation of your appeal rights.*

129. The attachment of appeal rights referred to in the preceding paragraph consists of a one page document entitled "Final Assessment of Appeal Rights Code of Alabama 1975, 40-2A-7(5) (the "Summary of Appeal Rights)" (sic). An ambitious taxpayer who attempted to research the cited statute, instead of relying on the Summary of Appeal Rights, would discover that TBOR does not include a Section 40-2A-7(5).

130. Like the Notice of Appeal, the Summary of Appeal Rights details the procedures for filing an appeal in circuit court, but omits any reference to an Administrative Appeal. On information and belief, RDS has purposefully omitted any reference to an Administrative Appeal in order to force a quick dispensation of the case.

131. A taxpayer reading a Notice of Final Assessment and the Summary of Appeal Rights would likely conclude that the only forum for appeal is circuit court (where the tax, interest and penalties must be paid in full or the supersedeas bond must be posted). Therefore, RDS has willfully deprived taxpayers of a right to an Administrative Appeal (where no tax or bond is required).

132. Since the inception, and as a direct result, of the current litigation against RDS, RDS now purports to offer appeal rights from final assessments to an unidentified "administrative officer" appointed by RDS. The administrative officer, however, is a

paid employee or agent of RDS and, as such, cannot exercise a fair, impartial and independent review of the actions of RDS. The lack of independence and impartiality violates the due process rights of Alabama taxpayers.

133. The recent change in business practice providing for the appointment of an “administrative officer” also constitutes an admission by RDS that its prior assessments, wherein no administrative appeal alternative was provided, violates the requirements of TBOR and all such prior assessments should be declared null, void and unenforceable.

F. Prohibited Compensation

134. RDS pays Prohibited Compensation to its employees and agents, including Discovery Analysts, Adams, hearings officers and audit administrators. Each RDS employee’s or agent’s bonus plan is under the control and supervision of PRA in Norfolk, Virginia. PRA is, therefore, charged with ensuring that such bonus plan will not violate TBOR.

135. The Prohibited Compensation paid to Discovery Analysts includes a monthly bonus based on a percentage of total contingency fee revenues collected by Discovery Analysts for any given month. This bonus pool is unique to Discovery Analysts and is not generally available to other employees of RDS.

136. The Prohibited Compensation paid to Adams includes an annual incentive bonus. Adams’ bonus is awarded through an incentive compensation plan reserved exclusively for management level employees (the “Management Bonus Plan”). The amount of Prohibited Compensation paid to employees of RDS pursuant to the Management Bonus Plan is determined by PRA.

137. Adams' unwillingness to overturn RDS hearing officers appears to be directly tied to the Prohibited Compensation she receives in her capacity as the chief hearings officer.

138. The revenues or profits from which the Management Bonus Plan is paid are derived from tax revenues collected by RDS, and specifically include contingency fee revenues paid to RDS pursuant to the Discovery Contracts and the Administration Contracts. Accordingly, those contingency fee revenues are a component of the Management Bonus Plan and offer incentives based on tax collections.

139. Moreover, a ruling for a taxpayer on an Administrative Review could adversely affect Adams' compensation under the Management Bonus Plan and the bottom line performance of her employer, RDS. It is noteworthy that in cases where a business license tax assessment originates through RDS' Discovery department, as much as fifty cents of every dollar of tax, interest or penalty struck from a preliminary assessment as a result of an Administrative Review would represent lost revenues for RDS.

G. Disparate Taxpayer Success Rates

140. The lack of objectivity and impartiality created by RDS' Prohibited Compensation scheme, coupled with the profit-driven Bounty Hunter contracts, have resulted in a shockingly low taxpayer success rate on administrative remedies sought through RDS. On information and belief, RDS hearings officers overrule only 1 out of every 500 audits performed by RDS. Accordingly, a taxpayer has an approximately .2% chance of prevailing on an administrative remedy sought through RDS. Remarkably, on

information and belief, RDS' president believes this low taxpayer success rate is consistent with taxpayer success rates nationwide.

141. By comparison, according to the Administrative Law Division of ADOR, taxpayers successfully obtained refunds in 45% of the administrative appeals conducted by and through the Administrative Law Division from 1995 through 2008. (See cover letter and spreadsheet of statistics from ADOR attached hereto as Exhibit E). Thus, in an unbiased hearing, a taxpayer is two hundred and twenty-five (225) times more likely to find success at ADOR than in front of RDS. The difference in the two rates is staggering and is attributable to RDS' Prohibited Compensation scheme and its profit-driven Bounty Hunter contracts.

H. Other Violations

142. RDS utilizes employees, agents, Discovery Analysts, auditors and hearings officers who are unfamiliar with TBOR, applicable regulations promulgated by ADOR, and the A.G. Opinion. Their unfamiliarity with applicable law has contributed to RDS' violation of law and of taxpayers' rights.

143. Some, if not most, Discovery Contracts and Administration Contracts have initial terms greater than three years, which violates TBOR's three-year limitation on examination and collection contracts. *Ala. Code* § 40-2A-12. All services provided after the third year of such Administration Contract or Discovery Contract are illegal. The Administration Contract attached hereto as Exhibit C contains an illegal five year term.

144. Ironically, RDS' contract auditors and examiners do not have valid business licenses in Taxing Jurisdictions where they perform services under the Administration Contract.

145. RDS unlawfully collects monies from taxpayers, by mistake or under false pretenses, when assessments have never been entered.

146. RDS also illegally conducts taxpayer audits on behalf of Taxing Jurisdictions after its contracts with Taxing Jurisdictions have expired by its terms or by operation of statute.

VI. CLAIMS AGAINST TAXING AUTHORITY DEFENDANT CLASS

147. Plaintiffs allege the following on information and belief:

A. Taxing Authority Defendants

148. The Named Government Defendant is a Taxing Jurisdiction that has entered into Discovery Contracts and/or Administrative Contracts with Defendant RDS.

149. According to RDS, the Named Government Defendant, as well as the other Taxing Jurisdictions, are indispensable parties to this action and must be designated as party defendants. Consequently, Plaintiffs, on behalf of themselves and other taxpayers who are similarly situated, assert claims against the Named Government Defendant and the Taxing Authority Defendant Class for all matters herein alleged.

150. As a result of the acts and omissions complained of herein, the contracts and arrangements between the Taxing Authority Defendant Class (including the Named Government Defendant) and RDS are due to be terminated and declared illegal and unenforceable. Further, all tax assessments, penalties, interest, liens, levies, and collections entered or undertaken in connection with the contracts and arrangements

between the Taxing Authority Defendant Class and RDS are due to be deemed and declared as invalid, void, unenforceable, and constitute unlawful takings.

151. The Named Government Defendant here, like absent members of the Taxing Authority Defendant Class, provided a standard form "Letter of Introduction" to RDS to present to taxpayers located throughout the State. *See* Exhibit F hereto. The Letter of Introduction informs a taxpayer that the Taxing Jurisdiction has contracted with RDS, and purports to authorize auditors to review and audit the taxpayer's books and records. RDS uses the Letters of Introduction to conduct multi-jurisdiction audits on behalf of all the Taxing Jurisdictions it represents. For example, RDS purported to represent at least 143 different taxing authorities when it conducted its multi-jurisdiction audit at WRS's place of business in Jefferson County. As a result of the same audit, RDS purportedly entered assessments against WRS on behalf of the 143 Taxing Jurisdictions identified, in part, as composing the Taxing Authority Defendant Class. For the Named Government Defendant, RDS purported to enter assessments against WRS in the amount of \$6,413.46 on behalf of the City of Warrior. A billing summary reflecting some of the identities of the Taxing Authority Defendant Class and the assessments made by RDS against WRS for each is attached hereto as Exhibit G. The total of the purported final assessments resulted in a lien in the amount of \$60,243.94 being filed in Probate Court of Jefferson County by RDS on behalf of at least some of the members of the Taxing Authority Defendant Class, including the Named Government Defendant. As a result of the illegal audit of Fun Source, RDS entered assessments on July 15, 2011 in the amount of \$629.57 and \$834 on behalf of the City of Warrior and other members of the Taxing Authority Defendant Class.

B. Defendant Class

152. The Named Government Defendant will fairly and adequately represent the interests of the Taxing Authority Defendant Class. Specifically, the Named Government Defendant's interests are aligned with the Taxing Authority Defendant Class, in that the Named Government Defendant has the same interests at stake in place as absent members of the Taxing Authority Defendant Class.

153. The Named Government Defendant will adequately protect and look out for the interests of the absent members of the Taxing Authority Defendant Class in that (a) they have all acted or failed to act in the same manner; (b) they have all entered into unconstitutional, void, illegal and unlawful contractual arrangements with RDS; (c) they all owe the same duties, responsibilities and obligations to affected taxpayers; (d) they all conduct business with RDS under the same or substantially same contractual arrangements; (e) they all are subject to the same laws and statutes relating to taxation and contract; (f) they have all unlawfully and illegally allowed RDS to enter, enforce and collect tax assessments that are due to be declared void and unenforceable as a result of the conduct alleged herein; (g) they all improperly authorized RDS to conduct Administrative Reviews and Administrative Appeals; (h) they all improperly authorized RDS to conduct multi-jurisdiction audits that are illegal and unlawful; and (i) they are all subject to the same form of relief and remedies.

154. Additionally, in support of a defendant class, Plaintiffs show that (a) the defendant class of similarly situated taxing authorities is more than 100, making joinder of all taxing authorities impractical; (b) the defenses, arguments, and positions of the Named Government Defendant will be typical of and share commonality with the

defenses, arguments, and positions that would be asserted by an absent taxing authorities; (c) common questions of law and fact are overarching and outweigh any individual issue of law or fact that may necessitate individual inquiry; and (d) a defendant class is the most economical and efficient method to address the issues raised herein.

155. Accordingly, Plaintiffs request that a Taxing Authority Defendant Class be certified and defined as follows:

All municipal and county taxing authorities in the State of Alabama that entered into a written contract with RDS and participated in the multi-jurisdiction audits of Plaintiffs.

156. Plaintiffs request that Named Government Defendant City of Warrior be named and found as adequate representative of the defendant class.

VI. CLASS ALLEGATIONS

157. Plaintiffs bring this action individually and as representatives of the Class, which is defined as all Alabama citizens in Alabama or Alabama business in Alabama entities that (A) have had taxes assessed (or allegedly assessed) or collected by or through RDS or its agents, (B) have had tax returns or tax information processed by RDS, (C) have received a Payment Letter or other communication in the form of an assessment from RDS or its agents, (D) have been audited or examined by RDS or its agents, (E) have had liens placed on their property by or through RDS or its agents, (F) have participated in Administrative Reviews or Administrative Appeals conducted by RDS or its agents, or (G) have been deprived of an Administrative Review or Administrative Appeal by RDS or its agents, as further described above. Excluded from the Class are Defendants, their affiliates, agents, employees, representatives, and legal counsel.

158. Numerosity (Ala.R.Civ.P.23(a)(1)): The members of the Class are so numerous and geographically dispersed that joinder of all members is impracticable. On information and belief, Plaintiffs allege that there are thousands of members of the Class in the Taxing Jurisdictions throughout Alabama.

159. Commonality (Ala.R.Civ.P.23(a)(2)): Common questions of law and fact exist as to all members of the Class. These common questions include, but are not limited to:

- a. Whether the delegation of certain tax related activities as defined herein violates the Alabama Constitution and taxpayers' due process rights;
- b. Whether the Discovery Contract and Administration Contract are void *ab initio* pursuant to TBOR;
- c. Whether preliminary assessments, agreements to enter final assessments, final assessments, and tax liens entered by RDS are void pursuant to TBOR or violations of taxpayers' due process rights under the Alabama Constitution;
- d. Whether RDS has failed or refused to conduct Administrative Reviews and Administrative Appeals in violation of TBOR;
- e. Whether Administrative Reviews and Administrative Appeals conducted by RDS were conducted in violation of TBOR;
- f. Whether RDS wrongfully represents and indicates that the only forum to appeal a final assessment is in circuit court;
- g. Whether RDS pays Prohibited Compensation to its employees and agents in violation of TBOR;

h. Whether the due process, contract and other constitutional rights of Plaintiffs and others similarly situated have been violated by the actions of Defendants as described herein;

i. Whether contingency payments to RDS for multi-jurisdictional audits renders all assessments, levies, collections and actions taken therefrom void, illegal and unenforceable;

j. Whether Defendants fail to meet and comply with the statutory Bond Requirements in violation of TBOR;

k. Whether Defendants must cease such imposition, collection and receipt of such void taxes and return Plaintiffs and Class Members to the position they enjoyed prior to the illegal and unlawful conduct;

l. Whether agreements to enter final assessments are enforceable final assessments;

m. Whether promissory notes entered into based upon void and unlawful assessments (or when no assessments were entered) are void and unenforceable; and

n. Whether monies can be collected on assessments never entered.

159. Typicality (Ala.R.Civ.P.23(a)(3)): Plaintiffs' claims are typical of the claims of absent members of the Class in that Plaintiffs' claims and injuries arise out and relate to the same practices Plaintiffs are challenging on behalf of the Class.

160. Adequacy of Representation (Ala.R.Civ.P.23(a)(4)): The named Plaintiffs will fairly and adequately represent and protect the interests of the Class. Plaintiffs have

no interests that are antagonistic to the absent class members. Plaintiffs are represented by capable counsel that have experience in complex, class litigation.

161. Rule 23(b)(1)(A) Class: Class certification is appropriate under Ala. R. Civ. P. 23(b)(1)(A) because the prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which establish incompatible standards of conduct for Defendants.

162. Rule 23(b)(2) Class: Class certification is also appropriate under Ala. R. Civ. P. 23(b)(2) with respect to Plaintiffs' demands for injunctive and declaratory relief against Defendants because Defendants have acted on grounds generally applicable to the Class as a whole, thereby making injunctive and declaratory relief appropriate.

163. Rule 23(b)(3) Class: Class certification is also appropriate under Ala. R. Civ. P. 23(b)(3) with respect to any relief that may be available to restore and make whole the Plaintiffs and members of the class, and because common questions of fact or law will predominate in determining the outcome of this litigation and because maintenance of the action as a class action is a superior manner in which to coordinate the litigation.

COUNT ONE

Declaratory Judgment-Unconstitutional Delegation

164. Plaintiffs adopt and incorporate all previous allegations in full.

165. As described herein, the taxing and appeal-resolution authority delegated to RDS under the Discovery Contract and Administrative Contract (and any other similar contracts) violates the Alabama Constitution and Plaintiffs' right to due process on a

fundamental level. Article XI, Section 212 of the Alabama Constitution states clearly that “the power to levy taxes shall not be delegated to individuals or private corporations or associations.” Flowing from this constitutional provision is the notion that inherently governmental functions, particularly those requiring application of tax laws and the exercise of discretion (i.e., the entry of tax assessments and the adjudication of administrative tax appeals), may not be delegated or outsourced to private firms, including those organized under foreign laws, like RDS.

166. TBOR’s provisions are consistent with this constitutional principle; nowhere in TBOR is a private firm authorized to engage in tax administration beyond (i) the mere collection of taxes determined to be due by the local taxing authority and (ii) the rendering of auditing and accounting support services to local taxing authorities. TBOR reserves the inherently governmental aspects of tax administration to the state and local governments in Alabama. The business model employed by RDS, including RDS’s Discovery Contract and Administration Contract, plainly violate the letter and spirit of TBOR by allowing a foreign limited liability company (and its numerous subcontractors of unknown domicile) to enter a tax assessment against, and decide the tax appeal of, Alabama citizens and Alabama businesses.

167. This business model and the RDS contracts represent an unconstitutional delegation of authority to RDS, pitting the desire for private profits against the public good. Consequently, Plaintiffs, on behalf of themselves and the putative class, request the Court to enter an Order declaring, on behalf of Alabama citizens and entities, that the RDS business model described herein, and its Discovery Contracts and Administrative Contracts (and any other similar contracts) relating thereto, violate Article IX Section 212

of the Alabama Constitution and the due process rights of Alabama citizens and Alabama entities.

COUNT TWO
Declaratory Judgment-Discovery Contract

168. Plaintiffs adopt and incorporate all previous allegations in full.

169. As previously alleged, under RDS' Discovery Contract, Plaintiffs and taxpayers located within and without each Taxing Jurisdiction constitute intended third-party beneficiaries.

170. RDS' Discovery Contracts and business practices related thereto are violative of TBOR and related Alabama law for the reasons outlined herein, including, but not limited to:

- a. RDS' Discovery Contracts constitute improper Bounty Hunter contracts that are void pursuant to TBOR;
- b. The compensation scheme contemplated under RDS' Discovery Contracts renders such contracts void pursuant to TBOR;
- c. Under its Discovery Contracts, RDS makes illegal determinations as to amounts of taxes owed in violation of TBOR;
- d. RDS improperly utilizes the Payment Letter (which may constitute the entry of a preliminary or final tax assessment), Application, and Hotline to determine and obtain amounts of taxes in violation of TBOR;
- e. The Administrative Review and Administrative Appeal process conducted and/or contemplated under RDS' Discovery Contracts is violative of TBOR; and

f. The Discovery Contract and Administration Contract together constitute a single "arrangement" between RDS and a Taxing Jurisdiction.

171. Because RDS' Discovery Contracts are void and its business practices related thereto are improper, RDS' and its agents' performance under those contracts are unauthorized and have resulted in invalid assessments, invalid liens, invalid levies, illegally collected monies or taxes, and illegitimate administrative practices.

172. Therefore Plaintiffs, on behalf of themselves and the putative class, request the Court enter an Order declaring, on behalf of all Alabama citizens and entities, that RDS' Discovery Contracts and arrangements are void and unenforceable pursuant to TBOR, that Defendants' practices conducted in relation to its Discovery Contracts are common, uniform, improper, and violative of TBOR and related Alabama law as alleged in this Complaint, and determine and declare that any and all tax assessments, liens, levies, and collections performed in relation to Defendants' Discovery Contracts are invalid, void, and constitute unlawful takings.

COUNT THREE
Declaratory Judgment - Administrative Contract

173. Plaintiffs adopt and incorporate all previous allegations in full.

174. As previously alleged, under the Administrative Contract, Plaintiffs and taxpayers located within and without each Taxing Jurisdiction constitute intended third-party beneficiaries.

175. RDS' Administrative Contracts and business practices related thereto are violative of TBOR and related Alabama law for the reasons previously outlined herein, including, but not limited to:

- a. RDS' Administrative Contracts constitute improper Bounty Hunter contracts that are void pursuant to TBOR;
- b. The compensation scheme contemplated under RDS' Administrative Contracts renders such contracts void pursuant to TBOR;
- c. Under its Administrative Contracts, RDS makes illegal determinations as to amounts of taxes owed in violation of TBOR;
- d. RDS improperly utilizes its invoices (which may constitute the entry of a preliminary or final tax assessment) to determine and obtain amounts of taxes in violation of TBOR;
- e. The Administrative Review and Administrative Appeal process conducted and/or contemplated under RDS' Administrative Contracts is violative of TBOR; and
- f. The Discovery Contract and Administration Contract together constitute a single "arrangement" between RDS and a Taxing Jurisdiction.

176. Because RDS' Administrative Contracts are void and its business practices related thereto are improper, RDS' and its agents' performance under those contracts are unauthorized and have resulted in invalid assessments, invalid liens, invalid levies, illegally collected monies or taxes and illegitimate administrative practices.

177. Therefore, Plaintiffs, on behalf of themselves and the putative class, request the Court enter an Order declaring, on behalf of all Alabama citizens and entities, that RDS's Administrative Contracts and arrangements are void and unenforceable pursuant to TBOR, that Defendants' practices conducted in relation to its Administrative Contracts are common, uniform, improper, and violative of TBOR and related Alabama

law as alleged in this Complaint, and determine and declare that any and all tax assessments, liens, levies, and collections performed in relation to Defendants' Administrative Contracts are invalid, void, and constitute unlawful takings.

COUNT FOUR
Declaratory Judgment - Prohibited Compensation

178. Plaintiffs adopt and incorporate all previous allegations in full.

179. As previously alleged, RDS' Discovery and Administrative Contracts are void and violative of TBOR because RDS and its agents or employees receive fees that are contingent upon, or related to, the amount of taxes assessed or collected from taxpayers. Further, RDS' Discovery and Administrative Contracts formulate the basis for the payment of Prohibited Compensation in violation of TBOR. As alleged herein, RDS routinely compensates employees, including Discovery Analysts, hearing officers and auditors, through incentive bonuses in clear violation of TBOR.

180. Therefore Plaintiffs, on behalf of themselves and the putative class, request that the Court enter an Order declaring, on behalf of all Alabama citizens and entities, that RDS' compensation scheme to itself and to its employees or agents is violative of TBOR and related Alabama law, that such arrangements and business practices are void and unenforceable under TBOR, and determine and declare that any and all tax assessments, liens, levies, and collections performed by Defendants are invalid, void, and constitute unlawful takings.

COUNT FIVE
Declaratory Judgment - Bond Requirements

181. Plaintiffs adopt and incorporate all previous allegations in full.

182. As previously outlined herein, TBOR establishes requirements for Private Firms to follow with respect to bonding.

183. As previously alleged herein, RDS has violated the Bond Requirements by failing and/or refusing to obtain fidelity and faithful performance bonds for each of their examiners as required under TBOR.

184. Therefore Plaintiffs, on behalf of themselves and the putative class, request the Court enter an Order declaring, on behalf of all Alabama citizens and entities, that RDS has failed to meet or comply with the Bond Requirements of TBOR and that, in accordance with TBOR, RDS' Discovery Contracts, Administrative Contracts and any other contracts relating to the administration, examination of taxpayer records, or collection of taxes for taxing authorities are void and deemed terminated as of the date RDS first utilized an un-bonded examiner; that all assessments made pursuant to such contracts, arrangements or practices are void; and that RDS forfeits its license for a period of six (6) months for each violation.

COUNT SIX
Injunctive Relief

185. Plaintiffs adopt and incorporate all previous allegations in full.

186. Plaintiffs, on behalf of themselves and the putative class, seek injunctive relief enjoining RDS, the Named Government Defendant and the Taxing Authority Defendant Class from engaging in any conduct that is declared by this Court, or that it otherwise found to be, violative of TBOR, the Alabama Constitution, or controlling statutory law in Alabama. Additionally, Plaintiffs, on behalf of themselves and that putative class, seek injunctive relief: (A) enjoining all Defendants from engaging in any further conduct that is declared by this Court, or that is otherwise found to be, improper,

illegal, or violative of TBOR, the Alabama Constitution, or related statutory law in Alabama; (B) invalidating and removing all liens against real and personal property of Plaintiffs and taxpayers imposed by Defendants where such liens are declared by this Court, or that are otherwise found to be, improper, illegal, or violative of TBOR, the Alabama Constitution, or related statutory law in Alabama; (C) returning all real and personal property of Plaintiffs and taxpayers seized, controlled, or in the possession of Defendants where such actions are declared by this Court, or that are otherwise found to be, improper, illegal, or violative of TBOR, the Alabama Constitution, or related statutory law in Alabama; (D) enjoining all Defendants from using or relying upon taxpayer information obtained, directly or indirectly, from RDS pursuant to the Discovery Contracts and Administration Contracts that are declared void by this Court; (E) enjoining RDS from conducting business as a Private Firm in the State of Alabama; and (F) requiring the Defendants to restore and replace Plaintiffs and members of the putative class to the position they were in before the illegal and unlawful acts complained of herein.

COUNT SEVEN
Violation of Due Process

187. Plaintiffs adopt and incorporate all previous allegations in full.

188. The contractual arrangements and business practices described herein violate Alabama law and deprive taxpayers of due process rights afforded to them under the Alabama Constitution. As described in this Complaint, RDS and other Defendants have violated due process rights afforded to Plaintiffs and class members under the Alabama Constitution in the following ways:

- a. by exercising the power to tax in contravention of Article XI Section 212 of the Alabama Constitution;
- b. by entering into illegal and void contractual arrangements with counties and municipalities;
- c. by entering invalid assessments of tax;
- d. by conducting illegitimate Administrative Reviews and Appeals;
- e. by denying taxpayers of their rights to Administrative Appeals;
- f. by misleading taxpayers into believing the only forum for an appeal of a final assessment is to circuit court;
- g. by receiving fees that are contingent upon, or related to, the amount of taxes assessed or collected from taxpayers;
- h. by compensating employees through incentive bonuses barred by TBOR;
- i. by failing or refusing to obtain fidelity and faithful performance bonds for each RDS examiner as required by TBOR;
- j. by unlawfully taking taxpayer property through illegitimate assessments, promissory notes and collections;
- k. by unlawfully seizing, taking and impairing a taxpayer's property without due process, and slandering the title to such property, through liens and subsequent levy without authority;
- l. by applying a nonexistent and unduly burdensome standard of review to taxpayers during Administrative Reviews and Appeals;
- m. by assessing or collecting taxes when contracts with taxing authorities are void or expired;

- n. by employing or using administrative officers or judges that have conflicts, and are not impartial or unbiased; and
- o. by committing other wrongful acts.

189. As a result of Defendants' violation of Plaintiffs' due process rights, Plaintiffs and class members seek any and all available relief and remedies.

COUNT EIGHT
Breach of Contract

190. Plaintiffs adopt and incorporate all previous allegations in full.

191. Assuming arguendo that the Discovery Contracts and Administration Contracts are not void, Defendants have breached those contracts.

192. As previously alleged, under the Discovery Contracts and Administration Contracts, Plaintiffs and taxpayers located within and without each Taxing Jurisdiction constitute intended third-party beneficiaries.

193. As a result of Defendants' systematic and widespread breach of these contracts, as set forth and outlined in this Complaint, as amended, Plaintiffs have been damaged.

194. Plaintiffs and class members seek any and all available relief and remedies for Defendants' improper practices.

COUNT NINE
Slander of Title

195. Smith adopts and incorporates all previous allegations in full.

196. Through their systematic, widespread, and illegal practices and violations of TBOR and other Alabama laws, Defendants have issued invalid tax assessments and have attached, with malicious intent, improper liens to real and personal property owned

by Smith and other class members to which Defendants have no colorable claim. The underlying assessments on which the liens are based are due to be declared illegal, void and unenforceable. Further, no assessments were entered against Smith or other owners of the property subject of the liens.

197. As a result of Defendants' illegal actions, Defendants have slandered the title to real and personal property owned by Smith and other Class members. Such conduct occurred when no taxes were assessed, or after the time period for administrative appeals had expired, so Smith and members of the class have no opportunity to challenge or seek redress administratively, for the illegal collection activities challenged herein.

198. As a result of Defendants' illegal collection activities and slander of title, Smith and class members seek any and all available declaratory and injunctive relief, compensatory and punitive damages, including a disgorgement of all monies improperly assessed and collected, as well as such additional amounts as may be necessary to compensate victims of Defendants' improper practices.

COUNT TEN
Fraud, Suppression and Concealment

199. WRS adopts and incorporates all previous allegations in full.

200. On or about February 28, 2007, WRS entered into an agreement with RDS that would authorize RDS to enter a final assessment for taxes allegedly owed in the approximate amount of \$60,000. In connection with the agreement, RDS represented that it had properly conducted an examination of WRS' books and records, that it was authorized to enter assessments in the amount it claimed were due and owing on behalf of the Taxing Jurisdictions it represented, that final assessments would be entered in accordance with and subject to TBOR, that the agreement would not preclude the appeal

of the final assessments to be entered, that the only avenue of appeal would be to the circuit court, and such appellate right would be available upon entry of the final assessment.

201. At the time such representations were made, however, RDS knew them to be false and further withheld and suppressed material information from WRS that RDS was under a duty to disclose by virtue of special circumstances. Those special circumstances are RDS' statutory duties and obligations under TBOR to treat Alabama taxpayers fairly, honestly, and in accordance with the minimum protections afforded by TBOR. In the alternative, RDS had a duty to fully communicate and disclose the material information it withheld as a result of speaking/representing "half-truths" to WRS.

202. The representations were made to induce WRS to enter into an agreement for the entry of final assessment and sign promissory notes in favor of RDS and the taxing jurisdictions it represents. WRS reasonably relied upon the false representations by entering into an agreement for entry of final assessment, executing promissory notes and making payments of monies on taxes never assessed.

203. At the time of the agreement of entry of final assessment, execution of promissory notes, and receipt of payments from WRS, RDS knew and never disclosed that (i) it never intended to enter final assessments against WRS; (ii) it had no authority to collect monies for assessments not entered; (iii) it was operating under illegal contingency arrangements with the Taxing Jurisdictions it purported to represent; (iv) it did not have valid contracts in force with all the Taxing Jurisdictions it purported to represent; (v) its examiners were unbonded; (vi) appellate rights would not be afforded in

accordance with TBOR; and (vii) the monies it claimed were owed were not actually owed. This vital information was solely in the possession of RDS and WRS had no independent means of obtaining or verifying such material information.

204. WRS detrimentally relied upon and was misled by the suppression and concealment of the material information, and would never have signed the agreement for entry of final assessment, executed promissory notes, or made payments of monies to RDS if the material information had been disclosed. RDS' conduct is part of a widespread scheme and pattern of affirmative misrepresentations to Alabama taxpayers and a deliberate course of conduct of withholding material and important information from Alabama taxpayers for which it had a duty to disclose.

205. WRS has been damaged by the conduct alleged herein. WRS did not learn of, and could not have discovered through reasonable efforts, RDS' misrepresentations, fraud, improper conduct, concealment or suppression until a time within six (6) months of commencing its lawsuit against RDS. Indeed, WRS only learned after the commencement of its lawsuit of certain fraudulent conduct, such as the fact RDS never entered, and never intended to enter, final assessments against WRS.

COUNT ELEVEN

Money Paid by Mistake/Money Had and Received

206. Plaintiffs adopt and incorporate all previous allegations in full.

207. WRS, Fun Source, and similarly situated taxpayers have paid money to RDS by mistake or RDS has been paid and received money from WRS, Fun Source, and similarly situated taxpayers that were not properly due and owed. Specifically, WRS, Fun Source, and other similarly situated taxpayers have paid money on taxes that were never assessed, should not have been assessed or were improperly assessed. WRS, Fun

Source, and similarly situated taxpayers have been damaged as a result of the forgoing acts and omissions.

COUNT TWELVE
Breach of Promissory Notes

208. WRS adopts and incorporates all previous allegations in full.

209. On or about February 28, 2007, WRS entered into promissory notes with RDS and the Taxing Jurisdictions it purports to represent. The promissory notes provided that final assessments would be entered and were made with the agreement that WRS would be afforded rights, remedies, and protections mandated by TBOR. RDS and the Taxing Jurisdictions it purports to represent breached the promissory notes in that final assessments were never entered and the rights, remedies, and protections provided under TBOR were never made available to WRS and other similarly situated taxpayers. As a direct and proximate result of the breaches, WRS and similarly situated taxpayers have been damaged by paying monies not owed.

COUNT THIRTEEN
Unjust Enrichment/Disgorgement Against RDS

210. Plaintiffs adopt and incorporate all previous allegations in full.

211. RDS has collected monies from Plaintiffs and similarly situated taxpayers without legal right and justification, without proper authority, under false pretenses, and has been unjustly enriched by its illegal and unlawful conduct. Such monies in equity and good conscience should not be retained by RDS.

212. Plaintiffs were not aware of and had no reason to know of RDS' unlawful and illegal conduct complained of herein, until a period within six (6) months of the filing of this action.

213. Plaintiffs request that RDS be required to disgorge all ill-gotten gains and profits as a result of its illegal and unlawful conduct.

COUNT FOURTEEN
Violation of Alabama Open Records Act

214. Hollywood adopts and incorporates all previous allegations in full.

215. RDS purports to represent governmental jurisdictions and serves as a governmental agency on behalf of the taxing authorities it purports to represent. RDS operates as a quasi-governmental tax assessment and collection division for the governmental authorities it purports to represent. RDS is the functional equivalent of the Taxing Jurisdictions it purports to represent. As such, RDS is required to make non-taxpayer specific information available to the general public and Alabama taxpayers over whom it purports to impose, audit and collect taxes.

216. Hollywood and other similarly situated taxpayers have made demand for information pertaining to RDS' governmental operations, relationships and actions as to which Alabama taxpayers and the general public has a right to know.

217. RDS has failed or refused to provide such information as a part of its scheme and plan to cover up and conceal important information from taxpayers and the general public.

218. Hollywood requests a declaration that RDS is subject to Alabama's Open Record Act and that RDS' actions constitute a violation of the Alabama Open Record Act. Hollywood also requests such other relief, including reasonable attorneys' fees, as may be appropriate.

COUNT FIFTEEN
Alternative 40-2A-7 Appeal/Refund Claim

219. Fun Source adopts and incorporates all previous allegations in full.

220. In the alternative to the previous claims set forth herein, if the July 15, 2011 assessments against Fun Source by RDS on behalf of Warrior are determined to be valid and enforceable, Fun Source alleges there was an insufficient taxable nexus to support the assessments made by RDS on behalf of Warrior.

221. Fun Source adopts and incorporates, as fully set out herein, the correspondence of Grant McDonald attached hereto, collectively, as Exhibit H. Because of the lack of a taxable nexus with Warrior, Fun Source is entitled to a recovery, with interest, monies it was forced to pay.

222. In addition to being unlawful, the audit and assessments entered by RDS were based on arbitrary, capricious, and abusive conduct, with no legitimate standards, guidelines or oversight.

223. Also, the preliminary assessments were reviewed by RDS without proper authority or appointment; by persons that are biased and prejudiced against taxpayers; by unqualified persons with inherent conflicts that are paid advocates of RDS and then purport to serve as impartial hearing officers or judges on the same matters they were paid to advocate for RDS.

224. Fun Source paid under protest the final assessments entered by RDS on behalf of Warrior within thirty (30) days of July 15, 2011 and has filed a notice of appeal within thirty (30) days of July 15, 2011.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray as follows:

- A. That this Honorable Court determine that this action may be maintained as a class action under Rule 23 of the Alabama Rules of Civil Procedure;
- B. That this Honorable Court determine that a Taxing Authority Defendant Class can be maintained in this action;
- C. That judgment be entered for Plaintiffs and members of the Class against Defendants for wrongful conduct and violations of Alabama as requested in this Complaint;
- D. That the Court award injunctive relief against Defendants in the form requested in this Complaint;
- E. That the Plaintiffs and the Class be awarded compensatory and punitive damages as may be appropriate and recoverable;
- F. That attorneys for Plaintiffs be awarded attorney's fees and that Plaintiffs be awarded court costs; and
- G. That the Plaintiffs and members of the Class have such other, further or different relief, including interest, as the case may require and the Court may deem just and proper under the circumstances.

PLAINTIFFS DEMAND TRIAL BY STRUCK JURY

/s/ Charles A. McCallum, III
Charles A. McCallum, III

OF COUNSEL:

R. Brent Irby
McCallum, Hoaglund, Cook & Irby, LLP
905 Montgomery Highway, Suite 201
Vestavia Hills, Alabama 35216
Telephone: (205)824-7767
Facsimile: (205)824-7768
Email: cmccallum@mhcilaw.com and birby@mhcilaw.com

CERTIFICATE OF SERVICE

This is to certify that on August 11, 2011, a true and correct copy of the foregoing was filed with the Clerk of the Court using the CM/ECF system, which automatically notifies counsel as follows:

Robert H. Rutherford
John R. Chiles
R. Frank Springfield
Zachary D. Miller
Burr & Forman, LLP
420 North 20th Street, Suite 3400
Birmingham, Alabama 35203
Telephone: (205)251-3000
Facsimile: (205)458-5100
Email: robert.rutherford@burr.com
jchiles@burr.com
fspringf@burr.com
zmiller@burr.com
Attorneys for Defendants PRA Government Services, LLC

James S. Ward
Ward & Wilson, LLC
2100 SouthBridge Parkway
Suite 580
Birmingham, Alabama 35209
Telephone: (205)871-5404
Facsimile: (205)871-5758
Email: jward@wardwilsonlaw.com
Attorney for Defendant City of Warrior

/s/ Charles A. McCallum, III
COUNSEL


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CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
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Exhibit A



2317 Third Avenue North, Suite 200
Birmingham, Alabama 35203


NOTICE OF TAX LIEN

800.556.7274 • 205.324.0088 • 205.423.4099 fax
www.ravds.com

Sections 40-28-20, et seq., Code of Alabama 1975, which became effective on January 1, 1984,
Requires that tax liens of the State of Alabama be recorded in the places indicated below:

Filed in the office of Judge of Probate:

Jefferson County Probate
716 Richard Arrington Jr Blvd N
Birmingham, AL 35203


20090223000227050 1/1
Bk: LR200960 Pg:23312
Jefferson County, Alabama
I certify this instrument filed on
02/23/2009 11:51 27 AM NOTICE
Judge of Probate- Alan L. King

**NOTICE OF TAX LIEN FOR RDS, A DULY AUTHORIZED
REPRESENTATIVE OF MULTIPLE JURISDICTIONS WITHIN
THE STATE OF ALABAMA**

Taxpayer: I.D. 63-0399307

Address:
David L. Smith
DBA Washer & Refrigeration Supply Co Inc
PO Box 10181
Birmingham, AL 35202
Parcel Numbers: 28-17-0-1-20-RR-0, 39.3.3.1.3.002.RR.0, 39.3.3.1.4.RR.0, 39.3.4.2.3.RR.0, 39.3.4.2.4.RR.0

Mailing address:
Washer & Refrigeration Supply Co Inc
PO Box 10181
Birmingham, AL 35202

20090223000227050 1/1
Bk: LR200960 Pg:23312
Jefferson County, Alabama
02/23/2009 11:51 27 AM NOTICE
Fee - \$5.00

Total of Fees and Taxes-\$6.00
MRE56

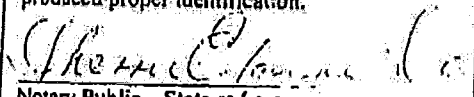
Kind of Tax: Sales Tax
4/01/2003-3/31/2006

Amount of Lien*: \$ 61,172.35

Other charges: Additional interest accrues at
Prevailing rate.

Pursuant to the Tax Enforcement and Compliance Act, Sections 40-29-20, et seq., Code of Alabama 1975, RDS, Inc. a
duly authorized representative of jurisdictions within the State of Alabama certifies that the above-named Taxpayer is
indebted to multiple jurisdictions in the above amount for the payment of which the County claims a lien upon all
property and rights to property belonging to said Taxpayer. DONE on this the 17th day of February 2009.

BY: _____
Charles S. Dear
Authorized Representative
RDS

This instrument was acknowledged before me
on the 17th day of February 2009. This
person is personally known to me or has
produced proper identification.

Notary Public - State at Large
State of Alabama


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CV-2010-903417-00
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
ANNE-MARIE ADAMS, CLERK

Exhibit B

Tax Revenue Enhancement Agreement Business License Discovery/Recovery

This agreement made as of the 9th day of July 2007, by and between PRA Government Services d/b/a AlaTax (and/or its affiliates) and City of Alabama, an Alabama CITY ("CITY").

A. Business License Cross Examination Services

1. Cross Examination Services include:
 - i. Cross-examining two or more City lists. These lists could include: current business license data, sales tax data, property tax lists and telephone directories at least once a year.
 - ii. Properties/entities that are not in one or all of the databases are presumed unlicensed.
 - iii. AlaTax will generate a letter requiring payment, proof of payment, or an appeal for all properties/entities presumed unlicensed. If no response, AlaTax will call the property/entity before proceeding with assessment procedures. If no response to the letter or call, AlaTax will proceed with assessment procedures as allowed by City law.
2. Taxpayer Remittance: Taxpayers will remit payments to City of P.O. Box 830725, Birmingham, AL 35283-0725. Upon reasonable notice to CITY, AlaTax may change the P.O. Box for City of payments. CITY will be responsible for renewals. AlaTax will provide a list to CITY.
3. Deposit Process: Deposits are made to the extent that funds have been received, via Automated Clearing House of the amounts required by law to the designated recipients as instructed by the CITY in accordance with the law.
4. Posting Process: Taxpayer accounts are posted with payment information captured in the AlaTax revenue system. Additional information such as net sales, deductions, credit sales, measure of tax, name change and address change are captured and added to payment data and taxpayer master file (as determined necessary by AlaTax). Late payments (postmarked by U.S. Postal Service after due date) are invoiced at penalty amounts required by law. Under payments are invoiced for remaining tax due plus any required penalties.
5. Notification, Reporting to CITY:
AlaTax will provide CITY with timely reports including, but not limited to, payment listings showing all monies received, a detail and summary reconciliation report that corresponds to CITY'S account numbers and all fees paid to AlaTax.

B. General Provisions

1. Taxpayer service: AlaTax will provide a taxpayer assistance number for taxpayer questions.
2. Review and Appeal Process: AlaTax has adopted and will use a review and appeals process which is based on the Alabama Taxpayers' Bill of Rights Act and Uniform Revenue Procedures Act codified as Title 40, Chapter 2A, Code of Alabama, 1975, as amended.
3. Consideration for Cross Examination Services:
 - i. AlaTax Fee for Cross Examination Services: AlaTax will receive fifty percent (50%) of business license revenue collected by AlaTax.
 - ii. AlaTax fees for copies of business license applications: AlaTax will receive an amount equal to \$1.75 per business license application mailed or faxed to the City. AlaTax will provide at no additional cost a detailed payment listing that includes taxpayer name, address, schedule number, and license year.

AlaTax.
City Contract 2007

4. **Company Audit:** Once a year AlaTax will have an auditor prepare an Independent Service Auditor's Report on Controls Placed in Operation and Tests of Operating Effectiveness. This report is commonly called a SAS 70 Type II report and will be made available upon request.
5. **Term of the Agreement:** This agreement shall be for a term of three years following the date of execution. Either party shall have the right to terminate this Agreement in the event of a material breach by the other party. Any such termination may be made only by providing ninety (90) days written notice to the other party, specifically identifying the breach or breaches on which termination is based. Following receipt of such notice, the party in breach shall have thirty (30) days to cure such breach or breaches. In the event that such cure is not made, this Agreement shall terminate in accordance with the initial ninety (90) days notice.
6. **Indemnity:** To the full extent allowed by law, CITY hereby agrees to indemnify and hold AlaTax harmless from any claims and against all costs, expenses, damages, claims and liabilities, relating to the determination of taxes due from taxpayers, the collection thereof and any refunding related thereto.
7. **Entire Agreement:** This Agreement constitutes the entire agreement between the parties hereto and supersedes any prior understandings or written or oral agreements between the parties respecting the subject matter contained herein. Said Agreement shall not be amended, altered, or changed, except by a written Agreement signed by both parties hereto.
8. **Invalidity:** If any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision thereof, and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained thereof, and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.
9. **Effective Date:** The effective date for the performance of services under the terms of this agreement shall commence July 1, 2007.

IN WITNESS WHEREOF, the parties hereto as of the date first above written have duly executed this Agreement.

AlaTax

By: Kennan Walcott
Its: President

City of

By:
Its:

Proposed pricing contained herein valid for 60 days from date of issuance. Issued

AlaTax


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Exhibit C

Tax Revenue Enhancement Agreement Revenue Administration

This agreement made as of the 9th day of July 2007, by and between PRA Government Services d/b/a RDS/AlaTax (and/or its affiliates) and City of Alabama, an Alabama CITY ("CITY").

A. Remittance Processing Services

1. **Taxes Processed:** RDS/AlaTax will perform remittance processing for sales, use and any other taxes designated by CITY.
2. **Taxpayer Notification and Remittance:** RDS/AlaTax will send individualized tax forms to all known taxpayers. Taxpayers will remit payments to City of Alabama P.O. Box 830725, Birmingham, AL, 35283-0725. Upon reasonable notice to CITY, RDS/AlaTax may change the P.O. Box for City of Alabama payments.
3. **Deposit Process:** Deposits are made to the extent that funds have been received, via Automated Clearing House of the amounts required by law to the designated recipients as instructed by the CITY in accordance with the law providing for each type of tax collected.
4. **Posting Process:** Taxpayer accounts are posted with payment information captured in the RDS/AlaTax revenue system. Additional information such as net sales, deductions, credit sales, measure of tax, name change and address change are captured and added to payment data and taxpayer master file (as determined necessary by RDS/AlaTax). Late payments (postmarked by U.S. Postal Service after due date) are invoiced at penalty amounts required by State code. Under payments are invoiced for remaining tax due plus any required penalties.
5. **Notification, Reporting to CITY:**
 - i. RDS/AlaTax will provide CITY with monthly reports including, but not limited to, payment listings showing all taxes received, printout related to net receipts reported, a general ledger distribution that corresponds to CITY'S account numbers and all fees paid to RDS/AlaTax. These reports to be provided by the 10th of the month following the tax month.
 - ii. RDS/AlaTax will attend Council meetings at such times as may be reasonably requested by CITY.

B. Compliance Services

1. **Taxes Reviewed:** RDS/AlaTax will perform compliance services for sales, use and other taxes designated by CITY under Remittance Processing Services. RDS/AlaTax will provide delinquency notification and follow-up. This includes correspondence, calls, and collection procedures and the related documentation. Delinquency policies and procedures will be applied consistently and within all applicable tax laws.
2. **Conduct of Compliance Services:** To assure that all taxpayers are treated fairly and consistently and all compliance services are performed in a similar manner, RDS/AlaTax representatives who perform compliance services will use a similar compliance plan for each compliance service conducted. All funds due from compliance services will be remitted to CITY in the same manner as provided for pursuant to Section A.3 above.

C. General Provisions

1. **Taxpayer service:** RDS/AlaTax will provide a taxpayer assistance number for taxpayer questions. RDS/AlaTax will provide informational brochures for placement in CITY offices, Chamber of Commerce offices, libraries and any other facilities. This information will also be available on the Internet at www.alatax.com.

RDS/AlaTax,
City Contract 2007

2. **Review and Appeal Process:** RDS/AlaTax has adopted and will use a review and appeals process which is based on the Alabama Taxpayers' Bill of Rights Act and Uniform Revenue Procedures Act codified as Title 40, Chapter 2A, Code of Alabama, 1975, as amended.
3. **Consideration for Remittance Processing Services, Revenue Analysis Services and Compliance Services:** RDS/AlaTax will receive an amount equal to Two Dollars (\$2.00) per account per transaction OR 1.85% of gross revenues collected, whichever is lower for providing Remittance Processing Services and Revenue Analysis Services.
4. **Audit Services:**
 - i. **RDS/AlaTax Audit Services:** Audit Services include all preparation for the performance of an audit, any research or statistical analysis performed in relation to an audit, examination of the books and records of the taxpayer, an assessment of the amount due (if any), and all services related to closing an audit.
 - ii. **RDS/AlaTax Fee:** RDS/AlaTax will receive an amount based on an hourly rate of sixty dollars (\$60) for audit services, without any contingent fees whatsoever. If overnight travel outside the State of Alabama is required, RDS/AlaTax will pay the auditor, and bill the CITY for its portion of travel expenses. CITY agrees to pay the amount of these fees when due, regardless of any recovery.
 1. **Billing Increment:** Time will be recorded in 15-minute intervals (.25 hours);
 2. **Shared Audit Fees:** When audits for CITY overlap with audits for other RDS/AlaTax clients or clients of RDS/AlaTax Affiliates, the fees will be shared as follows:
 - a. **Travel Time:** travel time, expenses, and a daily per diem amount for each audit is distributed evenly among the clients reviewed for each audit.
 - b. **Interview Time:** time billed during the initial interview of each audit is distributed evenly amongst the clients reviewed for each audit – during this process the auditor determines which clients will actually be audited for and billed Audit Time as follows:
 - i. **Audit Time:** time billed during the actual audit stage of each audit is billed according to actual time spent working for each client;
 - ii. **No Double Billing:** In no event will the overlapping audits combined require payment for more than 100% for any one RDS/AlaTax representative.
5. **Company Audit:** Once a year RDS/AlaTax will have an auditor prepare an Independent Service Auditor's Report on Controls Placed in Operation and Tests of Operating Effectiveness. This report is commonly called a SAS 70 Type II report and will be made available upon request.
6. **Term of the Agreement:** This agreement shall be for a term of five years following the date of execution. Either party shall have the right to terminate this Agreement in the event of a material breach by the other party. Any such termination may be made only by providing ninety (90) days written notice to the other party, specifically identifying the breach or breaches on which termination is based. Following receipt of such notice, the party in breach shall have thirty (30) days to cure such breach or breaches. In the event that such cure is not made, this Agreement shall terminate in accordance with the initial ninety (90) days notice.
7. **Indemnity:** To the full extent allowed by law, CITY hereby agrees to indemnify and hold RDS/AlaTax harmless from any claims and against all costs, expenses, damages, claims and

liabilities, relating to the determination of taxes due from taxpayers, the collection thereof and any refunding related thereto.

8. **Entire Agreement:** This Agreement constitutes the entire agreement between the parties hereto and supersedes any prior understandings or written or oral agreements between the parties respecting the subject matter contained herein. Said Agreement shall not be amended, altered, or changed, except by a written Agreement signed by both parties hereto.
9. **Invalidity:** If any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision thereof, and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained thereof, and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.
10. **Effective Date:** The effective date for the performance of services under the terms of this agreement shall commence July 1, 2007 with collection of June taxes to be remitted on or before July 20, 2007.

IN WITNESS WHEREOF, the parties hereto as of the date first above written have duly executed this Agreement.

RDS/AlaTax

By: Kennan Mitchell
Its: President

By:
Its:

RDS/AlaTax
City Contract 1007


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JEFFERSON COUNTY, ALABAMA
ANNE-MARIE ADAMS, CLERK

Exhibit D

c/o RDS/AlaTax
-YS-

RL/AlaTax
COMPLIANCE DIVISION
on behalf of

NOTICE OF
FINAL
ASSESSMENT

Code of Alabama 1975, 40-2A-7(b)(1)b

TYPE OF TAX: Business License
TAX PERIOD: 2004-2008

ACCOUNT #
TAXPAYER ID #

A Preliminary Assessment was entered on [redacted] and sent to you certified mail. You failed to file a Petition for Review of the Preliminary Assessment within the time allowed and the assessment is being made final. Under provisions of the Code of Alabama, 1975, as amended, the above listed jurisdiction enters a final assessment of the tax liability described:

ADDITIONAL TAX DUE
PENALTY
INTEREST
LESS AMOUNT PAID
BALANCE NOW DUE


You have the right to appeal this assessment to circuit court. The appeal must be made within thirty (30) days of the final assessment date and pursuant to the provisions of Act 92-186. See attached for additional explanation of your appeal rights.

Entered:

Assessment Prepared By:


Sherric Dale, Audit Administrator

Assessment Approved By:


Rebecca Adams, CPA
Director of Auditing

KEEP THIS PART FOR YOUR RECORDS

RETURN THIS PART WITH PAYMENT

TAXPAYER:

ACCOUNT #:

TYPE OF TAX: Business License
TAX PERIOD: 2004-2008

MAIL TO: Tax Trust Account
Attn: Sherric Dale
2317 3rd Avenue North
Birmingham, AL 35203
PHONE: (205)324-0088 ext 34251
FAX: (205)423-4099

PAY THIS AMOUNT

Final Assessment Appeal Rights
Code of Alabama 1975, 40-2A-7(5)

The Alabama Taxpayers' Bill of Rights and uniform Revenue Procedures Act guarantees you certain rights of appeal regarding your final assessment. If you intend to appeal your final assessment, you must do so within thirty days from the date of issuance. (If you mail your appeal through the U.S. mail, it will be considered as timely filed if it is postmarked within the thirty day time period, unless the 30th day falls on a weekend or U.S. holiday. In such cases, the next working day would apply).

You may elect to appeal your final assessment to the circuit court. This may be done in either Montgomery County, Alabama, or in the circuit court of the Alabama County in which you reside or have your principal place of business. The written appeal should contain your name, address, telephone number, type of tax, and tax period(s) being appealed.

If you choose to appeal to circuit court, you must file your written notice of appeal within thirty days of the final assessment date with the court clerk where you file your appeal and mail a copy of such appeal to the following address:

Tax Trust Account
ATTN: Sherrie Dale
2317 3rd Ave North
Birmingham, AL 35203

Additionally, if you elect to appeal, you must either pay the assessment in full or post a supersedes bond with the court in double the amount of the assessment. However, if you have a total net worth of \$20,000 or less, you may qualify for a special exception, which provides for the filing of an appeal without either paying the assessment or posting a bond first (Section 40-2A-7(b)(5), Code of Alabama 1975). For more information on this exception, you should contact the court clerk in which you plan to make your appeal.

If you do not wish to appeal this final assessment, your payment for the total amount should be attached to the notice and forwarded to the address shown on the final assessment. A final assessment, which is not appealed, is as conclusive as a judgment of a circuit court. The above listed jurisdiction may proceed with collection by execution, garnishment, or levy as provided by Section 40-29-23, Code of Alabama 1975.


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JEFFERSON COUNTY, ALABAMA
ANNE-MARIE ADAMS, CLERK

Exhibit E



BILL THOMPSON
CHIEF ADMINISTRATIVE LAW JUDGE

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION
Montgomery, Alabama 36104

2 N. JACKSON ST., SUITE 301
MONTGOMERY, ALABAMA 36104
(334) 954-7195
FAX # (334) 954-7199

Re: Administrative Law Division Appeal Statistics

Dear

The attached spreadsheet is a breakdown of appeals to the Alabama Department of Revenue's Administrative Law Division from 1995 until 2008. The first column of the spreadsheet shows the number of appeals docketed in each year.

The second column shows the number of Final Orders entered in each year affirming a final assessment or a denied refund, which would be considered a "win" for the Department. That occurred in 29% of the appeals:

The fourth column shows the number of Final Orders entered either voiding or reducing the amount of a final assessment; or granting a taxpayer a refund. That would be considered a "win" for the taxpayer, and occurred in 45% of the appeals.

The fifth column is obvious. The parties settled the case. That occurred in 3% of the appeals.

The final two columns show appeals that were dismissed either at a taxpayer's request or at the Department's request. These could involve appeals that were dismissed for lack of jurisdiction (usually untimely appeals), or simply because the taxpayer decided not to pursue the appeal. That occurred in 16% and 8% of the appeals, respectively.

I hope this has been helpful.

Sincerely,

Dana Raybon
Executive Assistant to the
Chief Administrative Law Judge

**ADMINISTRATIVE LAW DIVISION
DISPOSITION OF APPEALS
1995-2008**

| Year | # of Appeals Docketed | Assessment Affirmed | | Assessment Reduced or Voided Refund Granted (45%) | Parties Settled (3%) | Dismissed at | | Dismissed at Department Request (8%) |
|--------------|--------------------------|---------------------|----------------------|--|-------------------------|------------------------|-------------------------|---|
| | | Refund Denied (29%) | Refund Granted (16%) | | | Taxpayer Request (16%) | Department Request (8%) | |
| 1995 | 387 | 135 | | 139 | 32 | 48 | | 25 |
| 1996 | 405 | 130 | | 113 | 16 | 60 | | 19 |
| 1997 | 390 | 132 | | 87 | 15 | 51 | | 18 |
| 1998 | 444 | 134 | | 130 | 17 | 64 | | 18 |
| 1999 | 515 | 114 | | 135 | 17 | 59 | | 23 |
| 2000 | 711 | 136 | | 156 | 17 | 68 | | 29 |
| 2001 | 951 | 160 | | 344 | 70 | 66 | | 41 |
| 2002 | 823 | 83 | | 255 | 14 | 75 | | 46 |
| 2003 | 1061 | 166 | | 510 | 4 | 193 | | 97 |
| 2004 | 949 | 313 | | 360 | 9 | 142 | | 70 |
| 2005 | 1227 | 309 | | 537 | 4 | 207 | | 106 |
| 2006 | 1182 | 389 | | 501 | 8 | 150 | | 79 |
| 2007 | 978 | 276 | | 448 | 5 | 172 | | 88 |
| 2008 | 954 | 205 | | 443 | 6 | 169 | | 86 |
| Total | | 2682 | | 4158 | 234 | 1524 | | 745 |


 ELECTRONICALLY FILED
8/11/2011 12:18 PM
CV-2010-903417-00
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
ANNE-MARIE ADAMS, CLERK

Exhibit F

Mayor
Frank Lee Cox
(256) 586-8128



City Clerk
Tony Willis
(256) 586-3544

July 31, 2008

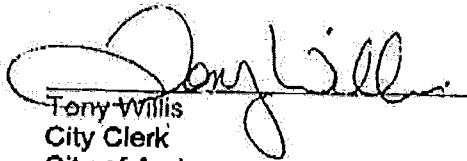
RE: Letter of Introduction

To Whom It May Concern:

The City of Arab has contracted with RDS/Alatax to perform taxpayer examination services (auditing) on behalf of the City of Arab.

Auditors are authorized to review and or audit the records of businesses required to remit one or more of any applicable taxes. Your cooperation is appreciated during this review. For verification of the identity of an auditor, you may contact the audit department of RDS/Alatax at 205-423-4132.

Sincerely,


Tony Willis
City Clerk
City of Arab

Date: 7-31-08

Blount County Commission



220 Second Avenue East, Room 106
Oneonta, Alabama 35121

TEL: (205) 625-4160
FAX: (205) 625-5961
commission@co.blount.al.us

Judge David Standridge
Chairman
David Cochran
District 1
Robert Ballard
District 2
Tom Ryan
District 3
Waymon Pitts
District 4
Chris Green
Administrator

September 30, 2009

RE: Letter of Introduction

To Whom It May Concern:

Blount County has contracted with RDS to perform taxpayer examination services (auditing) on behalf of Blount County.

Auditors are authorized to review and or audit the records of businesses required to remit one or more of any applicable taxes. Your cooperation is appreciated during this review. For verification of the identity of an auditor, you may contact the audit department of RDS at 205-423-4126.

Sincerely,

Ralph Q. Mitchell, Jr.
Administrator, Blount County

Date: 10-15-09


 ELECTRONICALLY FILED
8/11/2011 12:18 PM
CV-2010-903417.00
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
ANNE-MARIE ADAMS, CLERK

Exhibit G



AlaTax Local Government Services
Sales, Use and Business Tax Division

REVISED

Washer & Refrigeration Supply Co.
910 28th Street North, Birmingham, AL 35203
Washer & Refrigeration Supply Co.
910 28th Street North, Birmingham, AL

FEIN/SSN: 630399307
State Acct#: 011180
Local Acct#: 011180

Period: 04/01/2003 thru 03/31/2006 (36 mths)
Auditor:
Auditor:
Interest Date: 01/31/2007

Billing Summary

Sales Tax

Audit: Sales Tax
Adjustment Schedules: Sales Tax

| | Code | Tax Type | Tax | Interest | Penalty | Total | |
|----|------|-------------------------------------|----------|----------|---------|----------|----|
| 1 | 7003 | Barbour County S&U | 26.89 | 10.34 | 0.00 | 37.33 | 1 |
| 2 | 7004 | Blbb County Sales | 145.50 | 44.52 | 0.00 | 190.02 | 2 |
| 3 | 7005 | Blount County Sales | 1,328.93 | 378.02 | 0.00 | 1,704.95 | 3 |
| 4 | 7008 | Calhoun S&U (Uninc. & PJ Oxdt, BM) | (64.87) | (9.14) | 0.00 | (74.01) | 4 |
| 5 | 7009 | Chambers County S&U | 38.50 | 8.15 | 0.00 | 44.65 | 5 |
| 6 | 7011 | Chilton County S&U | 224.05 | 75.23 | 0.00 | 299.28 | 6 |
| 7 | 7012 | Choctaw County S&U | 30.21 | 4.98 | 0.00 | 35.19 | 7 |
| 8 | 7013 | Clarke County S&U | 4.29 | 0.71 | 0.00 | 5.00 | 8 |
| 9 | 7014 | Clay County Sales | 215.73 | 36.54 | 0.00 | 251.27 | 9 |
| 10 | 7015 | Cleburne County S&U | 74.29 | 13.05 | 0.00 | 87.34 | 10 |
| 11 | 7016 | Coffee County S&U (all education) | 47.28 | 8.73 | 0.00 | 57.01 | 11 |
| 12 | 7018 | Conecuh County S&U | 5.49 | 0.99 | 0.00 | 6.48 | 12 |
| 13 | 7020 | Covington County Sales | 504.12 | 89.67 | 0.00 | 593.69 | 13 |
| 14 | 7023 | Dale County S&U (ex Divl & Oz) (all | 87.03 | 9.90 | 0.00 | 96.93 | 14 |
| 15 | 7024 | Dallas County S&U | 184.30 | 24.06 | 0.00 | 188.36 | 15 |
| 16 | 7026 | Elmore County S&U (all ed) | 407.52 | 84.99 | 0.00 | 472.51 | 16 |
| 17 | 7028 | Etowah County S&U | 981.32 | 194.32 | 0.00 | 1,175.64 | 17 |
| 18 | 7029 | Fayette County S&U | 98.02 | 28.81 | 0.00 | 126.83 | 18 |
| 19 | 7033 | Hale County S&U | 169.36 | 40.14 | 0.00 | 199.50 | 19 |
| 20 | 7034 | Henry County S&U | 72.58 | 12.04 | 0.00 | 84.60 | 20 |
| 21 | 7035 | Houston County S&U | (81.48) | (8.01) | 0.00 | (59.49) | 21 |
| 22 | 7038 | Jackson County S&U (All Education) | 2,165.72 | 687.95 | 0.00 | 2,833.67 | 22 |
| 23 | 7038 | Lamar County S&U | 78.94 | 13.68 | 0.00 | 90.62 | 23 |
| 24 | 7039 | Lauderdale Co S&U (ex Florence) | 741.03 | 122.82 | 0.00 | 863.85 | 24 |
| 25 | 7040 | Lawrence County S&U | 347.97 | 82.69 | 0.00 | 430.66 | 25 |
| 26 | 7042 | Limestone S&U | 6,808.14 | 1,031.33 | 0.00 | 7,837.47 | 26 |
| 27 | 7043 | Lowndes County S&U | 88.00 | 8.19 | 0.00 | 66.28 | 27 |
| 28 | 7044 | Macon County S&U | 183.33 | 29.53 | 0.00 | 212.86 | 28 |
| 29 | 7046 | Marengo County S&U | 6.13 | 0.77 | 0.00 | 6.90 | 29 |
| 30 | 7047 | Marion Co S&U (ex Winfield) | 65.14 | 19.71 | 0.00 | 84.85 | 30 |
| 31 | 7048 | Marshall Co S&U (ex Albv, Arab, Bo | (49.12) | 7.44 | 0.00 | (41.68) | 31 |
| 32 | 7050 | Monroe County Sales | 172.07 | 28.09 | 0.00 | 200.76 | 32 |
| 33 | 7052 | Morgan Co (Uninc) ST | 1.70 | 0.16 | 0.00 | 1.86 | 33 |
| 34 | 7053 | Perry County Sales | 5.80 | 0.93 | 0.00 | 6.53 | 34 |
| 35 | 7054 | Pickens County S&U | 92.67 | 31.45 | 0.00 | 124.12 | 35 |
| 36 | 7055 | Pike County S&U | 217.79 | 38.37 | 0.00 | 256.10 | 36 |
| 37 | 7062 | Tallepoosa County Sales | 488.05 | 96.82 | 0.00 | 584.87 | 37 |
| 38 | 7067 | Winston County Sales | 33.88 | 10.20 | 0.00 | 44.08 | 38 |
| 39 | 7723 | Dale County S&U (in DM & Oz) (all | 77.30 | 13.41 | 0.00 | 90.71 | 39 |
| 40 | 7726 | Elmore County S&U (CL of Prattville | 171.89 | 20.80 | 0.00 | 192.69 | 40 |
| 41 | 7739 | Lauderdale Co S&U (in Florence) | 361.89 | 49.06 | 0.00 | 410.95 | 41 |
| 42 | 7741 | Lee County S&U (In Aub Op & PC) (| 213.06 | 32.37 | 0.00 | 245.43 | 42 |



AlaTax Local Government Services
Sales, Use and Business Tax Division

REVISED

| | | |
|---|--|---|
| Washer & Refrigeration Supply Co. 910 28th Street North, Birmingham, AL 35203 Washer & Refrigeration Supply Co. 910 28th Street North, Birmingham, AL | FEIN/SSN: 630399307 State Acct#: 011180 Local Acct#: 011180 | Period: 04/01/2003 thru 03/31/2006 (36 mths) Auditor: Auditor: Interest Date: 01/31/2007 |
|---|--|---|

Billing Summary

Sales Tax

| Code | Tax Type | Tax | Interest | Penalty | Total | | |
|------|----------|-----------------------------|------------|------------|-------|-------------|----|
| 43 | 7747 | Marion Co S&U (In Winfield) | 2.64 | 0.72 | 0.00 | 3.36 | 43 |
| 44 | 9107 | Mulga S&U | 6.20 | 1.96 | 0.00 | 8.16 | 44 |
| 45 | 9108 | Woodstock S&U | 3.69 | 1.59 | 0.00 | 5.28 | 45 |
| 46 | 9116 | Elmore, Town of S&U | 47.41 | 6.93 | 0.00 | 54.34 | 46 |
| 47 | 9130 | Adamsville S&U | 1,238.30 | 469.71 | 0.00 | 1,708.01 | 47 |
| 48 | 9152 | Decatur S&U | (2,161.06) | (120.77) | 0.00 | (2,271.83) | 48 |
| 49 | 9159 | Chelsea S&U | 68.65 | 15.98 | 0.00 | 74.61 | 49 |
| 50 | 9300 | Dadeville S&U | 66.64 | 31.19 | 0.00 | 117.83 | 50 |
| 51 | 9304 | Eufaula S&U | 80.96 | 31.04 | 0.00 | 112.00 | 51 |
| 52 | 9305 | Berry S&U | 25.19 | 5.19 | 0.00 | 30.38 | 52 |
| 53 | 9307 | Hartselle S&U | 4,562.35 | 986.31 | 0.00 | 5,548.66 | 53 |
| 54 | 9311 | Anniston S&U | 1,339.63 | 252.20 | 0.00 | 1,591.83 | 54 |
| 55 | 9316 | Heflin S&U | 19.15 | 3.92 | 0.00 | 23.07 | 55 |
| 56 | 9320 | Selma S&U | 657.25 | 96.16 | 0.00 | 753.41 | 56 |
| 57 | 9321 | Enterprise S&U | 135.66 | 14.62 | 0.00 | 150.28 | 57 |
| 58 | 9325 | Ashville S&U | 109.73 | 43.98 | 0.00 | 153.71 | 58 |
| 59 | 9331 | Vernon S&U | 85.19 | 23.97 | 0.00 | 89.16 | 59 |
| 60 | 9333 | Vestavia Hills S&U | 231.70 | 34.69 | 0.00 | 266.39 | 60 |
| 61 | 9335 | Tuskegee S&U | 549.96 | 88.63 | 0.00 | 638.59 | 61 |
| 62 | 9336 | Bessemer S&U | 1,421.01 | 159.08 | 0.00 | 1,580.09 | 62 |
| 63 | 9337 | Warrior S&U | 5,581.81 | 631.65 | 0.00 | 6,413.46 | 63 |
| 64 | 9338 | Wetumpka S&U | 422.53 | 68.86 | 0.00 | 491.39 | 64 |
| 65 | 9339 | Ozark S&U | 231.93 | 40.14 | 0.00 | 272.07 | 65 |
| 66 | 9346 | Dora S&U | 699.96 | 206.68 | 0.00 | 906.64 | 66 |
| 67 | 9354 | Bay Minette S&U | 65.20 | 22.17 | 0.00 | 87.37 | 67 |
| 68 | 9358 | Alexander City S&U | 1,617.15 | 332.03 | 0.00 | 1,949.18 | 68 |
| 69 | 9359 | Hamilton Sales | 52.83 | 17.47 | 0.00 | 70.30 | 69 |
| 70 | 9360 | Gardendale S&U | (8,926.74) | (1,340.69) | 0.00 | (10,267.43) | 70 |
| 71 | 9363 | Tallassee S&U | 63.86 | 15.95 | 0.00 | 79.81 | 71 |
| 72 | 9368 | Columbiana S&U | 1.60 | 0.12 | 0.00 | 1.72 | 72 |
| 73 | 9370 | Wilsonville S&U | 26.47 | 8.42 | 0.00 | 34.89 | 73 |
| 74 | 9373 | Monti S&U | 3,304.69 | 521.60 | 0.00 | 3,826.29 | 74 |
| 75 | 9376 | Jacksonville S&U | 268.19 | 57.50 | 0.00 | 325.69 | 75 |
| 76 | 9378 | Vincent S&U | 76.04 | 20.59 | 0.00 | 96.63 | 76 |
| 77 | 9380 | Altoona S&U | 40.70 | 8.86 | 0.00 | 49.56 | 77 |
| 78 | 9381 | Marion S&U | 1.69 | 0.27 | 0.00 | 1.96 | 78 |
| 79 | 9384 | Boaz S&U | 716.88 | 135.43 | 0.00 | 852.31 | 79 |
| 80 | 9388 | Auburn S&U | 570.71 | 84.74 | 0.00 | 655.45 | 80 |
| 81 | 9393 | Gordo S&U | 25.39 | 4.24 | 0.00 | 29.63 | 81 |
| 82 | 9394 | Frisco City S&U | 6.02 | 0.43 | 0.00 | 6.45 | 82 |
| 83 | 9395 | Eclectic S&U | 320.43 | 56.12 | 0.00 | 376.55 | 83 |
| 84 | 9397 | Albertville S&U | 413.11 | 127.18 | 0.00 | 540.29 | 84 |
| 85 | 9400 | Headland S&U | 20.37 | 5.79 | 0.00 | 26.16 | 85 |
| 86 | 9401 | Leeds S&U | 602.73 | 83.29 | 0.00 | 686.02 | 86 |
| 87 | 9405 | Thomasville S&U | 12.19 | 4.04 | 0.00 | 16.23 | 87 |



AlaTax Local Government Services
Sales, Use and Business Tax Division

REVISED

| | | |
|--|---------------------|--|
| Washer & Refrigeration Supply Co. 910 28th Street North, Birmingham, AL 35203 | FEIN/SSN: 630399307 | Period: 04/01/2003 thru 03/31/2006 (36 mths) |
| Washer & Refrigeration Supply Co. 910 28th Street North, Birmingham, AL | State Acct#: 011180 | Auditor: |
| | Local Acct#: 011180 | Auditor: |
| | | Interest Date: 01/31/2007 |

Billing Summary

Sales Tax

| Code | Tax Type | Tax | Interest | Penalty | Total | |
|----------|------------------------|----------|----------|---------|----------|-----|
| 88 9406 | Attalla S&U | 2,683.19 | 252.29 | 0.00 | 2,935.48 | 88 |
| 89 9408 | Oneonta S&U | 13.83 | 2.44 | 0.00 | 16.27 | 89 |
| 90 9410 | Scottsboro S&U | 2,719.86 | 584.14 | 0.00 | 3,304.00 | 90 |
| 91 9414 | Moulton S&U | 72.74 | 21.88 | 0.00 | 94.40 | 91 |
| 92 9416 | Clanton S&U | 662.98 | 222.73 | 0.00 | 885.71 | 92 |
| 93 9417 | Butler, Town of S&U | 30.21 | 4.98 | 0.00 | 35.19 | 93 |
| 94 9418 | Fultondale S&U | 650.70 | 160.08 | 0.00 | 710.78 | 94 |
| 95 9423 | Monroeville S&U | 9.75 | 1.90 | 0.00 | 11.65 | 95 |
| 96 9429 | Parrish S&U | (25.60) | (5.42) | 0.00 | (31.02) | 96 |
| 97 9432 | Evergreen Sales | 3.55 | 0.64 | 0.00 | 4.19 | 97 |
| 98 9436 | Carbon Hill GR (Sales) | 22.66 | 9.13 | 0.00 | 31.79 | 98 |
| 99 9440 | Weaver S&U | 42.31 | 4.05 | 0.00 | 46.36 | 99 |
| 100 9448 | Arab S&U | 1,709.55 | 539.76 | 0.00 | 2,249.31 | 100 |
| 101 9455 | Florence S&U | 2,533.42 | 343.40 | 0.00 | 2,876.82 | 101 |
| 102 9458 | Winfield S&U | 7.91 | 2.15 | 0.00 | 10.06 | 102 |
| 103 9461 | Moundville S&U | 68.60 | 5.50 | 0.00 | 72.10 | 103 |
| 104 9473 | Calera S&U | 1,311.04 | 207.53 | 0.00 | 1,518.57 | 104 |
| 105 9488 | Fayette S&U | 81.23 | 25.35 | 0.00 | 106.58 | 105 |
| 106 9496 | Mount Vernon S&U | 634.21 | 227.35 | 0.00 | 861.56 | 106 |
| 107 9496 | Cleveland S&U | 318.79 | 64.22 | 0.00 | 383.01 | 107 |
| 108 9499 | Midland City S&U | 82.79 | 9.17 | 0.00 | 91.96 | 108 |
| 109 9607 | Jemison S&U | 1.67 | 0.50 | 0.00 | 2.17 | 109 |
| 110 9613 | Gordon GR (Sales) | 152.44 | 30.32 | 0.00 | 182.76 | 110 |
| 111 9618 | Lanett S&U | 110.87 | 18.11 | 0.00 | 128.98 | 111 |
| 112 9622 | Town Creek S&U | 0.65 | 0.14 | 0.00 | 0.79 | 112 |
| 113 9624 | Florala S&U | 74.23 | 12.82 | 0.00 | 86.85 | 113 |
| 114 9625 | Tarrant S&U | 255.90 | 87.75 | 0.00 | 343.65 | 114 |
| 115 9628 | Opp S&U | 225.88 | 42.04 | 0.00 | 267.90 | 115 |
| 116 9630 | Cedar Bluff S&U | 264.39 | 25.35 | 0.00 | 289.74 | 116 |
| 117 9631 | Andalusia S&U | 198.53 | 34.41 | 0.00 | 230.94 | 117 |
| 118 9632 | Chatchee S&U | 748.11 | 148.17 | 0.00 | 894.28 | 118 |
| 119 9633 | Excel S&U | 21.82 | 4.12 | 0.00 | 25.74 | 119 |
| 120 9636 | Blountsville S&U | 228.42 | 70.66 | 0.00 | 299.07 | 120 |
| 121 9640 | Thorsby S&U | 7.51 | 1.28 | 0.00 | 8.79 | 121 |
| 122 9642 | Arley GR (Sales) | 8.27 | 3.36 | 0.00 | 11.63 | 122 |
| 123 9644 | Kimberly S&U | 8.28 | 1.32 | 0.00 | 9.58 | 123 |
| 124 9651 | Luverne S&U | 26.11 | 4.06 | 0.00 | 30.17 | 124 |
| 125 9653 | Dolhan S&U | (363.37) | (68.18) | 0.00 | (431.53) | 125 |
| 126 9657 | Brantley S&U | 4.05 | 0.69 | 0.00 | 4.74 | 126 |
| 127 9659 | Repton S&U | 1.84 | 0.34 | 0.00 | 2.28 | 127 |
| 128 9663 | Opelika S&U | 61.49 | 7.19 | 0.00 | 68.68 | 128 |
| 129 9664 | Athens S&U | 5,939.91 | 1,727.29 | 0.00 | 7,667.20 | 129 |
| 130 9669 | Crossville S&U | 66.31 | 13.78 | 0.00 | 80.09 | 130 |
| 131 9670 | Silverhill S&U | 1.13 | 0.11 | 0.00 | 1.24 | 131 |
| 132 9682 | Jacksons Gap S&U | 3.79 | 1.14 | 0.00 | 4.93 | 132 |



AlaTax Local Government Services
Sales, Use and Business Tax Division

REVISED

| | | |
|--|---------------------|--|
| Washer & Refrigeration Supply Co. 910 28th Street North, Birmingham, AL 35203 | FEIN/SSN: 630399307 | Period: 04/01/2003 thru 03/31/2006 (36 mths) |
| Washer & Refrigeration Supply Co. 910 28th Street North, Birmingham, AL | State Acct#: 011180 | Auditor: |
| | Local Acct#: 011180 | Auditor: |
| | | Interest Date: 01/31/2007 |

Billing Summary

Sales Tax

| Code | Tax Type | Tax | Interest | Penalty | Total | |
|--------------------|-------------------------|------------------|------------------|-------------|------------------|-----|
| 133 9683 | Demopolis S&U | 6.90 | 0.89 | 0.00 | 8.79 | 133 |
| 134 9693 | West Blocton GR (Sales) | 11.91 | 4.94 | 0.00 | 16.85 | 134 |
| 135 9695 | Lindon S&U | 3.30 | 0.43 | 0.00 | 3.73 | 135 |
| 136 9696 | Gadsden S&U | (5,400.58) | (532.07) | 0.00 | (5,932.65) | 136 |
| 137 9700 | New Hope Sales | 364.91 | 48.97 | 0.00 | 414.88 | 137 |
| 138 9701 | Southside S&U | 133.64 | 25.19 | 0.00 | 158.83 | 138 |
| 139 9725 | Leesburg S&U | 654.18 | 68.50 | 0.00 | 723.68 | 139 |
| 140 9727 | Riverside S&U | 213.52 | 32.03 | 0.00 | 245.55 | 140 |
| 141 9730 | Cowarts S&U | 25.50 | 5.24 | 0.00 | 30.74 | 141 |
| 142 9754 | Lakeview S&U | 5.53 | 0.92 | 0.00 | 6.45 | 142 |
| 143 9767 | Clay, Town of S&U | 0.84 | 1.20 | 0.00 | 11.04 | 143 |
| Total (143) | | 48,948.40 | 11,295.54 | 0.00 | 80,243.84 | |


 ELECTRONICALLY FILED
8/11/2011 12:18 PM
CV-2010-903417-00
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
ANNE-MARIE ADAMS, CLERK

Exhibit H



Carr, Riggs & Ingram, LLC
2100 6th Avenue South
Suite 300
Birmingham, Alabama 35205

Mailing Address:
P.O. Box 55765
Birmingham, Alabama 35255

(205) 933-7822
(205) 933-7944 (fax)
www.cricpa.com

January 6, 2009

Ms. Gail Christopher, CRE
Alatax
114 Bryn Hurst Drive
Chelsea, Alabama 35043

Re: Fun Source, Inc.

Dear Ms. Christopher:

Section 40-12-224 dealing with leasing or renting tangible personal property provides:

The provisions of this article shall be administered and the tax herein levied shall be collected in accordance with the procedures set forth in Article 1 of Chapter 23 of this title for administering and collecting the tax therein levied, and for such purposes there are hereby incorporated into this article by reference the provisions of Sections 40-23-7 through 40-23-12, Section 40-23-25, Section 40-23-27 and Sections 40-23-30 and 40-23-31, together with the definitions applicable to said sections contained in Section 40-23-1; provided, that wherever in the said provisions the term "gross proceeds of sales" or "gross receipts" shall appear, the same for the purposes of this article shall be construed to mean "gross proceeds" as defined in this article; provided further, that a sale of tangible personal property to any person engaging in the business of leasing or renting such tangible personal property to others, if such tangible personal property is purchased for the purpose of leasing or renting it to others under a transaction subject to the tax levied in this article, shall be deemed to be a "wholesale sale" or a "sale at wholesale" for the purpose of administering Article 1 of Chapter 23 of this title and Section 40-23-60; provided further, that a sale of tangible personal property previously purchased at wholesale for the purpose of leasing or renting under a transaction subject to the privilege or license tax levied in this article shall be deemed to be a "retail sale" or a "sale at retail" for the purpose of administering Article 1 of Chapter 23 of this title and Section 40-23-60, regardless of whether such sale is to the person who theretofore leased or rented the said tangible property or to some other person; provided further, in the event of the repeal of Article 1 of Chapter 23 of this title, such repeal shall not operate to eliminate the tax collection procedures contained therein to the extent they are incorporated in this article by reference, unless the legislation providing for such repeal shall clearly indicate such a result. (Underscoring added).

Section 40-23-31 is a section contained in Article 1 of Chapter 23. That section provides:

Department to make rules and regulations. 40-23-31 The Department of Revenue shall from time to time promulgate such rules and regulations for making returns and for

ascertainment, assessment and collection of the tax imposed hereunder as it may be deemed necessary to enforce its provisions; and upon request shall furnish any taxpayer with a copy of such rules and regulations. The department may adopt rules and regulations providing for the issuance of permits to manufacturers to purchase tangible personal property without the payment to the vendor of the sales tax, and providing for such manufacturer to report and pay such tax directly to the department, in instances where the department determines that it is practically impossible at the time of purchase for such manufacturer or his vendors to determine with any degree of certainty the applicability of such tax, and that such provisions will facilitate and expedite the collection of the tax which may be due from such consumer; and such provisions may also be made applicable to persons engaged in the business of mining, quarrying, compounding or processing tangible personal property, railroads, transportation companies and others.

One of the regulations issued by the department under Article 1 of Chapter 23 is Regulation Section 810-6-3-.51. The regulation provides:

810-6-3-.51(1) The Department of Revenue is the collecting agency for many municipalities in Alabama levying a true sales and use tax or a gross receipts tax.

810-6-3-.51(2) Where a municipality levies a true sales and use tax under the provisions of Section 11-51-200, Code of Alabama 1975 as amended, the sellers located in the municipality are required to collect the municipal sales tax on retail sales of tangible personal property in the same manner as the state sales tax as the tax is a consumer tax. If the sale is made and as a part of the sales agreement the seller is required to deliver the item purchased outside the taxing jurisdiction of the municipality, the sale is exempt from the tax. If the seller whose place of business is located outside the municipality has salesmen soliciting orders within the municipality, the seller is required to collect and remit the sellers use tax on retail sales of tangible personal property in the same manner as an out-of-state seller who has salesmen soliciting orders in Alabama and who files a state sellers use tax return. It does not matter how delivery is made.

810-6-3-.51(3) The gross receipts tax which the department is required to collect under the provisions of Section 11-51-180, Code of Alabama 1975 as amended, is more commonly referred to as sales tax. This tax is levied upon the seller for the privilege of making retail sales of tangible personal property in the municipality levying the tax. If a sale and delivery of tangible personal property is made within the municipality, the tax is due. If the sale is made and as part of the sales agreement the seller is required to deliver the item purchased outside the taxing jurisdiction of the municipality, the tax is not due. If a seller who is located outside the municipality levying the tax has salesmen soliciting orders within the municipality, the seller is required to remit tax on retail sales of tangible personal property provided the seller delivers the item in his or her own equipment or by common carrier F.O.B. destination, title passing in the taxing jurisdiction of the municipality. If the sale is made F.O.B. point of origin, title passing outside the taxing jurisdiction of the municipality, the gross receipts tax is not due.

810-6-3-.51(4) A municipality that levies a gross receipts tax does not levy a use tax. Therefore, purchaser does not owe use tax on purchases if in a gross receipts jurisdiction.

Section 11-51-204 of the Code provides:

11-51-204(a) The governing body of a municipality making or enforcing a levy or assessment of taxes under the provisions of this article shall from time to time adopt by ordinance such rules and regulations for making returns and for ascertainment, assessment, collection, and administration of any taxes levied under the provisions of this article as it may deem necessary to enforce its provisions and, upon request, shall furnish any taxpayer with a copy of those rules and regulations.

11-51-204(b) Except as provided in this article, any interpretations, rules, and regulations adopted or utilized by the governing body shall not be inconsistent with any rules and regulations which may be issued or promulgated by the Department of Revenue from time to time pursuant to the Alabama Administrative Procedure Act, for the corresponding state tax.

The Alabama Civil Appeals Court in Yelverton's, Inc. v. Jefferson County, 742 So. 2d 1216 (Ala. Civ. App. 1997) held in part as follows:

Out of this interpretation arose the "physical presence" test used by the Department, as incorporated in its regulation on municipal taxation, Regulation 810-6-3-.51. The Department applies that regulation to counties as well as to municipalities. The regulation states:

"(2) Where a [county] levies a true sales and use tax . . . the sellers located in the [county] are required to collect the sales tax on retail sales of tangible personal property in the same manner as the state sales tax If the sale is made and as a part of the sales agreement the seller is required to deliver the item purchased outside the taxing jurisdiction of the [county], the sale is exempt from the tax. *If the seller whose place of business is located outside of the [county] has salesmen soliciting orders within the [county], the seller is required to collect and remit the seller's use tax on retail sales of tangible personal property in the same manner as an out-of-state seller who has salesmen soliciting orders in Alabama It does not matter how delivery is made.*" (Emphasis added.)

State Department of Revenue Reg. 810-6-3-.51. Under the regulation, **Yelverton's**, as an out-of-county seller, would not have to collect Jefferson County use tax *unless* it had salespersons soliciting orders in Jefferson County.

The Department has the power to promulgate regulations necessary for the enforcement of the sales and use taxes. Ala. Code 1975, § 40-23-31. The Department's interpretation of the regulations and statutes it is charged with enforcing should be given great weight and deference by this court unless that interpretation is contrary to the plain wording of the statute or regulation. Farmer v. Hypo Holdings, Inc., 675 So. 2d 387, 390 (Ala. 1996). In light of our review of the sales and use tax statutes and of the Department's regulations, we

cannot say that the Department's interpretation of those statutes and regulations is contrary to their plain wording. Therefore, we agree with the Department that **Yelverton's** is not required to collect Jefferson County use tax in this situation under the state use tax statutes and the Department's regulations.

III. MUST JEFFERSON COUNTY USE THE STATE INTERPRETATION OF NEXUS IN DECIDING THE TAX LIABILITY OF OUT-OF-COUNTY RETAILERS WHO DELIVER GOODS IN JEFFERSON COUNTY?

Yelverton's does not have the required nexus with Jefferson County under the Department's regulations and the state sales and use tax statutes. Therefore, it would not be required by the Department to collect Jefferson County use tax on sales to Jefferson County residents. However, Jefferson County asserts that **Yelverton's** must collect Jefferson County sales tax on any sales closed within the county because the county is self-administered, and, therefore, the county can interpret nexus its own way, regardless of the state's interpretation.

Jefferson County correctly argues that Act 405 authorizes it to develop its own tax regulations. Section 9 of that Act gives the commissioner of licenses (known in Jefferson County as the revenue director) the right to "fix regulations not in conflict with the provisions of this act." However, the Act also provides that the taxes to be imposed by the counties are to "generally *parallel* the provisions of the State sales and use tax." Act 405, § 2 (emphasis added).

In statutory construction, this court must "ascertain and effectuate legislative intent as expressed in the statute." Alabama Farm Bureau Mutual Casualty Insurance Co. v. City of Hartselle, 460 So. 2d 1219, 1223 (Ala. 1984). "To ascertain that intent, we must first focus our attention on the language of the [statute], and we must give effect to the intent clearly expressed therein if the language is unambiguous." City of Millbrook v. Tri-Community Water System, [Ms. 2951456, March 21, 1997] So. 2d , (Ala. Civ. App. 1997)(citing Hartselle, 460 So. 2d at 1223). "Words used in the statute must be given their natural, plain, ordinary, and commonly understood meaning." Hartselle, 460 So. 2d at 1223. Because the statute in question is a taxing statute, it must be "strictly construed against the taxing power"; and "where the language of a taxing statute is reasonably capable of two constructions, the interpretation most favorable to the taxpayer must be adopted." *Id.*

Although the Act clearly allows Jefferson County to develop its own regulations, the Act also requires that those regulations not conflict with the provisions of the Act. In light of the fact that the legislative intent section of the Act clearly states that the taxes created under the Act are to "generally parallel" their state counterparts, we must decide what the term "generally parallel" means as it is used in the Act and whether Jefferson County can interpret the concept of nexus differently than does the Department.

According to the Oxford English Dictionary (1961), the word "parallel," as a verb, means "to be parallel or equal to; to correspond or be equivalent to; to come up to, equal, match." In addition, "parallel," as a noun, is defined, among other

things, as "[a] thing or person agreeing with another in essential particulars; something precisely analogous, comparable, or of equal worth or force; a counterpart, equal, match." *Oxford English Dictionary* (1961). The legislative intent of Act 405, in light of the meaning of "parallel," is that the taxes imposed by the county under the Act be equal or similar in all "essential particulars" to the state sales and use taxes.

Other sections of the Act also indicate that the Legislature intended that the sales and use taxes imposed by the county parallel the state's tax scheme. For example, the preamble to the Act states that the sales tax created by the Act should "generally parallel[] the state sales tax, [and be levied] upon persons engaged in said county in the business of selling tangible personal property at retail." In addition, Section 3(b) of Act 405 indicates that the sales tax applies to those sellers doing business in the county. Both of these provisions illustrate that the Act requires that a seller engaged in business in the county collect county sales tax, much like the state statute requires that a seller engaged in business in the State of Alabama collect state sales tax. Similarly, Section 4(a) of the Act imposes a use tax on those consumers who "store, use or otherwise consume in the county" items purchased at retail, "regardless of whether the retailer who made the sale is or is not engaged in business in the county." This section underscores the difference between a sales tax, which is imposed on a seller doing business in the county when it makes a sale in the county, and a use tax, which is imposed not on the sale of a good, but instead on the use, storage, or consumption of a good within the county.

In addition, besides the fact that the Act requires that the county taxes parallel the state taxes, the Act indicates that "the procedures specified in [the sales and use tax] statutes are incorporated herein by reference." Act 405, § 2. Section 4(d) of the Act states:

"All provisions and procedures with respect to the . . . determination of the amount of tax due . . . provided for in the State use tax statutes with respect to the State use tax shall be applicable to the tax levied [under this Act]. . . . Any procedure or provision involving the State Department of Revenue which is incorporated herein by reference to the State use tax statutes shall be deemed to apply"

(Emphasis added.) Under the Act, then, the county taxes should parallel the state sales and use tax, and the procedures used by the county for determining taxes due and the like should mirror the procedures used by the Department.

Finally, we note that the Legislature has given the Department "general and complete supervision and control" over state sales and use taxation *and* over "taxes for . . . counties." Ala. Code 1975, § 40-2-11(1). The Department is also charged with the duty "to confer with, advise, and direct the several county [tax officials]." Ala. Code 1975, § 40-2-11(3). When we consider both the authority granted the Department by the Legislature and the clear legislative intent that the county sales and use taxes parallel the state sales and use taxes, we must conclude that Jefferson County cannot interpret the state sales and use tax statutes differently from the Department.

IV. CONCLUSION

In light of our decision that Jefferson County cannot interpret the concept of nexus differently from the way the Department interprets that concept, we preterm discussion of all other issues raised by *Yelverton's*. On remand, the trial court is to enter a final judgment ordering that all moneys paid by *Yelverton's* as taxes, interest, and penalties, be refunded.

We realize that the sales transactions at issue in this case escape county taxation. However, that is the result obtained under the state sales and use tax statutes and the Department's regulations. In summary, a seller (*Yelverton's*) would be required to collect its local county (Walker) sales tax unless it delivered the purchased item into another taxing jurisdiction (Jefferson County). On an item delivered into another taxing jurisdiction, the seller would be required to collect the other taxing jurisdiction's use tax only if the seller has nexus with the other taxing jurisdiction. If the seller does not have nexus, it could not be required to collect the other taxing jurisdiction's use tax on an item delivered into that taxing jurisdiction; the seller could not collect the local county sales tax on that item either, because the sale of that item was not closed within the local county.

Judge Thompson in Crown Housing Group, Inc. Best Home Center 70 Skyland Blvd. East Tuscaloosa, Al 35405-4099 V. State Of Alabama stated in part the following:

Notwithstanding my opinion on the issue, as stated above, *Yelverton's* is still the law of the land and must be followed. Amici are thus correct that based on the holding in *Yelverton's*, the Taxpayer cannot currently be required to collect local tax in a municipality or county in which it does not have a physical business location or salesmen soliciting in the jurisdiction.

In Diversified Sales, Inc. P.O. Box 560 Trussville, Al 35173-0560, Taxpayer, v. State Of Alabama Department Of Revenue, Judge Thompson wrote in part, as follows:

The Taxpayer argues that even if the flooring materials were subject to municipal use tax, it did not have sufficient contact, or nexus, with the municipalities to be subject to the municipalities' taxing jurisdictions. The Taxpayer cites *Yelverton's Inc. v. Jefferson County*, 742 So.2d 1216 (Ala. Civ. App. 1997) cert. quashed 742 So.2d 1224 (Ala. 1999), in support of its position. In *Yelverton's*, the Court of Civil Appeals relied on Dept. Reg. 810-6-3-.51(2) in holding that a taxpayer located outside of a local taxing jurisdiction in Alabama has nexus with the local jurisdiction for sales and use tax purposes only if it has salesmen soliciting sales in the local jurisdiction.

The Administrative Law Division recently addressed the holding in *Yelverton's* in *Crown Housing Group, Inc. v. State of Alabama*, S. 06-399 (Admin. Law Div. O.P.O. 7/26/2007). The primary issue in *Crown Housing* was whether a mobile home retailer was liable for local tax on mobile homes sold to customers in various local taxing jurisdictions in Alabama.

Citing *Yelverton's*, the taxpayer (and amici) argued that the taxpayer did not have nexus with the various local jurisdictions because the taxpayer did not have a place of business or salesmen soliciting in the jurisdictions.

In deciding *Crown Housing*, I respectfully disagreed with the *Yelverton's* Court's due process nexus analysis. I nonetheless held that *Yelverton's* was controlling, and consequently, that the mobile home dealer did not have nexus with the various local jurisdictions because it did not have an outlet or salesmen in the jurisdictions. The relevant portion of the Order in *Crown Housing* is quoted below.

The Court next addressed the constitutional issue of whether *Yelverton's* had nexus with Jefferson County so as to be subject to the County's taxing jurisdiction. The Court noted that in the interstate context, the nexus issue involves both the Due Process Clause and the Commerce Clause, but that in the intrastate context, only due process must be satisfied. The Court then held that for nexus to exist "there must be a [connection] sufficient to provide a business nexus with Alabama - by agent or salesmen, or at a very minimum, by an independent contractor within the State of Alabama." *Yelverton's*, 742 So.2d at 1221, quoting *State v. Lane Bryant, Inc.*, 171 So.2d 91, 93 (Ala. 1965).

The Court determined that the Department had incorporated the above "physical presence" nexus test in Department Reg. 810-6-3-.51(2). Specifically, the Court focused on the following statement in Reg. 810-6-3-.51(2) - "If the seller whose place of business is located outside of the (county) has salesmen soliciting orders within the (county), the seller is required to collect and remit the seller's use tax on retail sales" in the jurisdiction. *Yelverton's* 742 So.2d at 1221. The Court treated the above statement as the Department's position concerning nexus for local tax purposes; that is, a business physically located outside of a county has nexus with the county only if it has salesmen soliciting in the county. The Court consequently held that *Yelverton's* did not have nexus with Jefferson County because it did not have salesmen in the County.

Finally, the Court found that Jefferson County could not interpret the concept of nexus differently from how the Department interpreted nexus in Reg. 810-6-3-.51(2). The Court thus held that *Yelverton's* was not liable for either Jefferson County sales tax or use tax on the appliances it sold at retail in Jefferson County. The Court recognized that based on its decision, *Yelverton's* sales in Jefferson County would escape all County taxation, but "that is the result obtained under the state sales and use tax statutes and the Department's regulations." *Yelverton's*, 742 So.2d. at 1223.

The Court of Civil Appeals' decision in *Yelverton's* must be followed because it is the latest Alabama appellate court case on point. However, I respectfully disagree with the decision for the reasons explained below.

I also respectfully disagree with the Court's nexus analysis in *Yelverton's*. The Court correctly noted that only "the due process portion of the nexus analysis is applicable to transactions in intrastate commerce." *Yelverton's*, 742 So.2d at 1220. The Court then cited Reg. 810-6-3-.51(2) as the Department's position that an out-of-county seller has nexus with the county only if it has salesmen in a county. That statement is correct - an out-of-county retailer has nexus with the county if it has salesmen soliciting in the county. But the regulation does not state, and should not be construed as stating, that an out-of-county seller has nexus *only* if it has salesmen in the county. Rather, as discussed below, that is only one situation in which an Alabama retailer located outside of a local taxing jurisdiction could have due process nexus with the local jurisdiction.

In any case, the "physical presence" due process nexus standard applied by the Court in *Yelverton's* was no longer applicable when the case was decided in 1997. As noted, the U.S. Supreme Court held in *Quill* in 1992 that for due process nexus purposes, a physical presence is not required. Rather, the test is only whether the taxpayer had "fair warning" that its activities may subject it to tax in the jurisdiction. *Yelverton's*, 742 So.2d at 1221, n. 3, quoting *Quill*, 112 S.Ct. at 1911. The U.S. Supreme Court held in *Quill* that because *Quill* advertised in North Dakota and regularly delivered goods to North Dakota customers, it had "purposefully directed its activities at North Dakota residents," and thus had nexus with the State for due process purposes. *Quill*, 112 S.Ct. at 1911.

The *Yelverton's* Court refused to apply the *Quill* due process nexus standard because the issue of whether the Department should change its regulation in accordance with *Quill* was not before it. See again, *Yelverton's*, 742 So.2d at 1221, n. 3. However, even if Reg. 810-6-3-.51(2) did constitute the Department's definitive nexus position, that position - that a foreign taxpayer must have salesmen in a local jurisdiction to have nexus with the jurisdiction - is clearly contrary to the prevailing due process nexus standard as pronounced in *Quill*, and should be rejected. Just as a Department regulation must be rejected if it is contrary to a statute, *Ex parte City of Florence*, 417 So.2d 191 (1982), a regulation that states a position that is contrary to a pronouncement of the U.S. Supreme Court should also be rejected.

Yelverton's had due process nexus with Jefferson County under the prevailing *Quill* nexus standard. As stated in *Quill*, if an out-of-jurisdiction taxpayer "purposefully avails itself of the benefits of an economic market in the forum (jurisdiction), it may subject itself to the (jurisdiction's) in personam jurisdiction even if it has no physical presence in the (jurisdiction)." *Quill*, 112 S.Ct. at 1910. Due process is satisfied if a taxpayer has "fair warning that (its) activity may subject (it) to the jurisdiction of a foreign sovereign." *Quill*, 112 S.Ct. at 1911, quoting *Shaffer v. Heitner*, 433 U.S. at 218 (Stevens, J. concurring in judgment).

Yelverton's repeatedly and purposefully availed itself of the economic market in Jefferson County by advertising in the County, making numerous sales to customers in the County, and delivering its merchandise to those customers in the County. *Yelverton's* substantial activities in Jefferson County clearly gave it fair warning that it would be subject to the County's taxing jurisdiction sufficient to satisfy due process.

The above analysis is supported by the Illinois Supreme Court's holding in *Brown's Furniture, Inc. v. Wagner*, 665 N.E.2d 795 (Ill. 1996), cert. denied (1996 Lexis 5449) S.Ct. (1996). *Brown's* operated a furniture store in Missouri. It advertised in Illinois and sold merchandise to Illinois residents, which it delivered into that State in its own trucks. The Illinois Supreme Court, relying on the U.S. Supreme Court's holding in *Quill*, held that *Brown's* numerous deliveries into Illinois were sufficient to establish both Commerce Clause and due process nexus with that State. "Through its deliveries, *Brown's Furniture* is physically present in Illinois on an almost continuous basis, directly competing with in-state retailers in establishing and maintaining a market for its furniture sales in Illinois. We conclude that *Brown's Furniture* has met the *Complete Auto* substantial nexus requirement." *Brown's Furniture*, 665 N.E.2d 795 (1996).

If an out-of-jurisdiction retailer's numerous deliveries of merchandise into a jurisdiction establish both Commerce Clause and due process nexus with the jurisdiction, as in *Brown's Furniture*, then certainly *Yelverton's* numerous deliveries of its appliances to customers in Jefferson County constituted (at least) due process nexus sufficient to subject *Yelverton's* to the County's taxing authority.

Citing *Miller Brothers v. Maryland*, 74 S.Ct. 535 (1954), amici argue that "[m]ere delivery of merchandise into a taxing jurisdiction by a seller does not constitute a sufficient nexus with the taxing jurisdiction to impose a duty on the seller to collect and remit the local sales or use tax, even if the retailer employs its own delivery vehicles." Brief of amici curiae at 6. That statement is correct based on the holding in *Yelverton's*. As indicated, however, the statement is not a correct application of the prevailing and controlling due process nexus standard.

The U.S. Supreme Court held in *Miller Brothers* that a Delaware retailer's occasional delivery of goods into Maryland, without more, did not give the retailer due process nexus with Maryland. But *Miller Brothers* was decided before *Quill*, in which the Court changed its due process analysis so that now a foreign taxpayer's exploitation of a jurisdiction's economic market is sufficient for due process nexus. I agree with the following statement by the Illinois Supreme Court in *Brown's Furniture* - "Because *Quill* made clear that under contemporary due process doctrine a company is no longer required to be physically present within a state before use tax collection duties may be imposed, the continued authority of *Miller Brothers* is in considerable doubt."

Brown's Furniture, 665 N.E.2d at 803.

In summary, an Alabama retailer located outside of a local taxing jurisdiction is subject to local sales tax in the jurisdiction if it makes retail sales closed in the jurisdiction (or local use tax if the local sales tax is not paid). The harder question is whether the out-of-jurisdiction seller also has due process nexus with the local jurisdiction. That must be decided on a case-by-case basis, and depends on whether the retailer's activities in or relating to the local jurisdiction are sufficient under *Quill* to give the retailer fair warning that its activities would subject it to the jurisdiction's taxing authority.

Applying the above principles to the facts in *Yelverton's*, I would have found that *Yelverton's* was subject to Jefferson County sales tax on its numerous retail sales in the County. I would have also found that *Yelverton's* extensive exploitation of the County's economic market gave *Yelverton's* (at least) due process nexus with the County, as necessary for intrastate transactions. I would have accordingly voided Reg. 810-6-3-.51(2) to the extent it could be construed as being contrary to the above findings; provided, I would have applied the holding prospective only to give Alabama retailers fair warning of when and where local sales or use tax should be collected.

Notwithstanding my opinion on the issue, as stated above, *Yelverton's* is still the law of the land and must be followed. Amici are thus correct that based on the holding in *Yelverton's*, the Taxpayer cannot currently be required to collect local tax in a municipality or county in which it does not have a physical business location or salesmen soliciting in the jurisdiction.

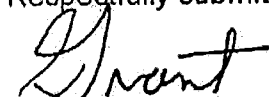
In summary, Fun Source, Inc. does not have a physical business location in your county, nor does it have a salesman soliciting in your jurisdiction and therefore does not have nexus.

Section 40-12-224 provides that the rental tax shall be administered under Article 1 of Chapter 23, Reg. 810-6-3-.51 was issued under Article 1 of Chapter 23; therefore, making the rental tax inapplicable to Fun Source, Inc. based on the facts and circumstances since it does not have a physical location or a salesman soliciting in your county.

Section 11-51-204 provides that your county must follow the state's regulations. In the Yelverton case, the Court pointed out that some transactions can escape county taxation due to the state's regulations, but pointed out that this is the result obtained under the state's sales and use tax statute and the department's regulations.

Based on the above, I see no reason for you to waste your time or the taxpayer's time in calculating any rental tax since under the above authority, none can be due.

Respectfully submitted,


Grant McDonald

vtw

cc: Gerald Hacker



CRI CARR
RIGGS &
INGRAM
CPAs and Advisors

August 31, 2010

Rebecca Byrd, MPA
Alabaster Municipal Revenue Office
10052 Highway 119
Alabaster, Alabama 35007

Re: Fun Source Rental, Inc.
Your Taxpayer ID No. 22042

Dear Ms. Byrd:

Fun Source Rental, Inc. (Fun Source) rents amusement type equipment to persons and organizations in Jefferson and surrounding counties. Fun Source does not have a physical location in any place other than Jefferson County nor does it have a salesman soliciting in any jurisdiction.

Fun Source understands that rental tax shall be collected in accordance with the sales tax statutes. Fun Source understands this after reading §40-12-224 Code of Alabama. This section provides:

The provisions of this article shall be administered and the tax herein levied shall be collected in accordance with the procedures set forth in Article 1 of Chapter 23 of this title for administering and collecting the tax therein levied, and for such purposes there are hereby incorporated into this article by reference the provisions of Sections 40-23-7 through 40-23-12, Section 40-23-25, Section 40-23-27 and Sections 40-23-30 through 40-23-31, together with the definitions applicable to said sections contained in Section 40-23-1:

provided, that wherever in the said provisions the term "gross proceeds of sales" or "gross receipts" shall appear, the same for the purposes of this article shall be construed to mean "gross proceeds" as defined in this article:

provided further, that a sale of tangible personal property to any person engaging in the business of leasing or renting such tangible personal property to others, if such tangible personal property is purchased for the purpose of leasing or renting it to others under a transaction subject to the tax levied in this article, shall be deemed to be a "wholesale sale" or a "sale at wholesale" for the purpose of administering Article 1 of Chapter 23 of this title and Section 40-23-60;

Carr, Riggs & Ingram, LLC
2100 16th Avenue South
Suite 306
Birmingham, Alabama 35205

Mailing Address:
P.O. Box 56766
Birmingham, Alabama 35255

(205) 923-7822
(205) 923-7944 (fax)
www.cripe.com

provided further, that a sale of tangible personal property previously purchased at wholesale for the purpose of leasing or renting under a transaction subject to the privilege or license tax levied in this article shall be deemed to be a "retail sale" or a "sale at retail" for the purpose of administering Article 1 of Chapter 23 of this title and Section 40-23-60, regardless of whether such sale is to the person who theretofore leased or rented the said tangible property or to some other person;

provided further, in the event of the repeal of Article 1 of Chapter 23 of this title, such repeal shall not operate to eliminate the tax collection procedures contained therein to the extent they are incorporated in this article by reference, unless the legislation providing for such repeal shall clearly indicate such a result.

Once Fun Source determined that the rental tax is governed by the sales tax statute, it is necessary to determine if Fun Source has nexus within your taxing jurisdiction. This led Fun Source to Reg. 810-6-3-.51. This regulation provides:

(1) The Department of Revenue is the collecting agency for many municipalities in Alabama levying a true sales and use tax or a gross receipts tax.

(2) Where a municipality levies a true sales and use tax under the provisions of Section 11-51-200, as amended, the sellers located in the municipality are required to collect the municipal sales tax on retail sales of tangible personal property in the same manner as the state sales tax as the tax is a consumer tax. If the sale is made and as a part of the sales agreement the seller is required to deliver the item purchased outside the taxing jurisdiction of the municipality, the sale is exempt from the tax. If the seller whose place of business is located outside the municipality has salesmen soliciting orders within the municipality, the seller is required to collect and remit the sellers use tax on retail sales of tangible personal property in the same manner as an out-of-state seller who has salesmen soliciting orders in Alabama and who files a state sellers use tax return. It does not matter how delivery is made.

(3) The gross receipts tax which the department is required to collect under the provisions of Section 11-51-180, as amended, is more commonly referred to as sales tax. This tax is levied upon the seller for the privilege of making retail sales of tangible personal property in the municipality levying the tax. If a sale and delivery of tangible personal property is made within the municipality, the tax is due. If the sale is made and as part of the sales agreement the seller is required to deliver the item purchased outside the taxing jurisdiction of the municipality, the tax is not due. If a seller who is located outside the municipality levying the tax has salesmen soliciting orders within the municipality, the seller is required to remit tax on retail sales of tangible personal property provided the seller delivers the item in his or her own equipment or by common carrier F.O.B. destination, title passing in the taxing jurisdiction of the municipality. If the sale is made F.O.B. point of origin, title passing outside the taxing jurisdiction of the municipality, the gross receipts tax is not due.

(4) A municipality that levies a gross receipts tax does not levy a use tax. Therefore, purchaser does not owe use tax on purchases if in a gross receipts jurisdiction.

Since the City of Alabaster is not the State of Alabama, Fun Source wants to make sure that you are required to follow the Alabama rules and regulations. This led Fun Source to a reading of §11-51-204. This Section provides:

(a) The governing body of a municipality making or enforcing a levy or assessment of taxes under the provisions of this article shall from time to time adopt by ordinance such rules and regulations for making returns and for ascertainment, assessment, collection, and administration of any taxes levied under the provisions of this article as it may deem necessary to enforce its provisions and, upon request, shall furnish any taxpayer with a copy of those rules and regulations.

(b) Except as provided in this article, any interpretations, rules, and regulations adopted or utilized by the governing body shall not be inconsistent with any rules and regulations which may be issued or promulgated by the Department of Revenue from time to time pursuant to the Alabama Administrative Procedure Act, for the corresponding state

Fun Source wants to make sure that it has a correct understanding of the nexus question which led Fun Source to YELVERTON'S, INC. v. JEFFERSON COUNTY, Alabama, 742 So 2d 1216, 05/09/1997. This case in part provides:

Out of this interpretation arose the "physical presence" test used by the Department, as incorporated in its regulation on municipal taxation, Regulation 810-6-3-51. The Department applies that regulation to counties as well as to municipalities. The regulation states:

"(2) Where a [county] levies a true sales and use tax ... the sellers located in the [county] are required to collect the sales tax on retail sales of tangible personal property in the same manner as the state sales tax If the sale is made and as a part of the sales agreement the seller is required to deliver the item purchased outside the taxing jurisdiction of the [county], the sale is exempt from the tax. If the seller whose place of business is located outside of the [county] has salesmen soliciting orders within the [county], the seller is required to collect and remit the seller's use tax on retail sales of tangible personal property in the same manner as an out-of-state seller who has salesmen soliciting orders in Alabama It does not matter how delivery is made." (Emphasis added.)

State Department of Revenue Reg. 810-6-3-51. Under the regulation, Yelverton's, as an out-of-county seller, would not have to collect Jefferson County use tax unless it had salespersons soliciting orders in Jefferson County.

The Department has the power to promulgate regulations necessary for the enforcement of the sales and use taxes. Ala. Code 1975, Section(s) 40-23-31. The Department's interpretation of the regulations and statutes it is charged with enforcing should be given great weight and deference by this court unless that interpretation is contrary to the plain wording of the statute or regulation. Farmer v.

Hypo Holdings, Inc., 675 So. 2d 387, 390 (Ala. 1996). In light of our review of the sales and use tax statutes and of the Department's regulations, we cannot say that the Department's interpretation of those statutes and regulations is contrary to their plain wording. Therefore, we agree with the Department that Yelverton's is not required to collect Jefferson County use tax in this situation under the state use tax statutes and the Department's regulations.

III. MUST JEFFERSON COUNTY USE THE STATE INTERPRETATION OF NEXUS IN DECIDING THE TAX LIABILITY OF OUT-OF-COUNTY RETAILERS WHO DELIVER GOODS IN JEFFERSON COUNTY?

Yelverton's does not have the required nexus with Jefferson County under the Department's regulations and the state sales and use tax statutes. Therefore, it would not be required by the Department to collect Jefferson County use tax on sales to Jefferson County residents. However, Jefferson County asserts that Yelverton's must collect Jefferson County sales tax on any sales closed within the county because the county is self-administered, and, therefore, the county can interpret nexus its own way, regardless of the state's interpretation.

Jefferson County correctly argues that Act 405 authorizes it to develop its own tax regulations. Section 9 of that Act gives the commissioner of licenses (known in Jefferson County as the revenue director) the right to "fix regulations not in conflict with the provisions of this act." However, the Act also provides that the taxes to be imposed by the counties are to "generally parallel the provisions of the State sales and use tax." Act 405, Section(s) 2 (emphasis added).

In statutory construction, this court must "ascertain and effectuate legislative intent as expressed in the statute." *Alabama Farm Bureau Mutual Casualty Insurance Co. v. City of Hartselle*, 460 So. 2d 1219, 1223 (Ala. 1984). "To ascertain that intent, we must first focus our attention on the language of the [statute], and we must give effect to the intent clearly expressed therein if the language is unambiguous." *City of Millbrook v. Tri-Community Water System*, [Ms. 2951456, March 21, 1997] So. 2d, (Ala. Civ. App. 1997) (citing *Hartselle*, 460 So. 2d at 1223). "Words used in the statute must be given their natural, plain, ordinary, and commonly understood meaning." *Hartselle*, 460 So. 2d at 1223. Because the statute in question is a taxing statute, it must be "strictly construed against the taxing power"; and "[w]here the language of a taxing statute is reasonably capable of two constructions, the interpretation most favorable to the taxpayer must be adopted." *Id.*

Although the Act clearly allows Jefferson County to develop its own regulations, the Act also requires that those regulations not conflict with the provisions of the Act. In light of the fact that the legislative intent section of the Act clearly states that the taxes created under the Act are to "generally parallel" their state counterparts, we must decide what the term "generally parallel" means as it is used in the Act and whether Jefferson County can interpret the concept of nexus differently than does the Department.

According to the Oxford English Dictionary (1961), the word "parallel," as a verb, means "[t]o be parallel or equal to; to correspond or be equivalent to; to come up

to, equal, match." In addition, "parallel," as a noun, is defined, among other things, as "[a] thing or person agreeing with another in essential particulars; something precisely analogous, comparable, or of equal worth or force; a counterpart, equal, match." Oxford English Dictionary (1961). The legislative intent of Act 405, in light of the meaning of "parallel," is that the taxes imposed by the county under the Act be equal or similar in all "essential particulars" to the state sales and use taxes.

Other sections of the Act also indicate that the Legislature intended that the sales and use taxes imposed by the county parallel the state's tax scheme. For example, the preamble to the Act states that the sales tax created by the Act should "generally parallel[] the state sales tax, [and be levied] upon persons engaged in said county in the business of selling tangible personal property at retail." In addition, Section 3(b) of Act 405 indicates that the sales tax applies to those sellers doing business in the county. Both of these provisions illustrate that the Act requires that a seller engaged in business in the county collect county sales tax, much like the state statute requires that a seller engaged in business in the State of Alabama collect state sales tax. Similarly, Section 4(a) of the Act imposes a use tax on those consumers who "stor[e], use or other[wise] consum[e] in the county" items purchased at retail, "regardless of whether the retailer who made the sale is or is not engaged in business in the county." This section underscores the difference between a sales tax, which is imposed on a seller doing business in the county when it makes a sale in the county, and a use tax, which is imposed not on the sale of a good, but instead on the use, storage, or consumption of a good within the county.

In addition, besides the fact that the Act requires that the county taxes parallel the state taxes, the Act indicates that "the procedures specified in [the sales and use tax] statutes are incorporated herein by reference." Act 405, Section(s) 2, Section 4(d) of the Act states:

"[A]ll provisions and procedures with respect to the ... determination of the amount of tax due ... provided for in the State use tax statutes with respect to the State use tax shall be applicable to the tax levied [under this Act].... Any procedure or provision involving the State Department of Revenue which is incorporated herein by reference to the State use tax statutes shall be deemed to apply...."

(Emphasis added.) Under the Act, then, the county taxes should parallel the state sales and use tax, and the procedures used by the county for determining taxes due and the like should mirror the procedures used by the Department.

Finally, we note that the Legislature has given the Department "general and complete supervision and control" over state sales and use taxation and over "taxes for ... counties." Ala. Code 1975, Section(s) 40-2-11(1). The Department is also charged with the duty "[t]o confer with, advise, and direct the several county [tax officials]." Ala. Code 1975, Section(s) 40-2-11(3). When we consider both the authority granted the Department by the Legislature and the clear legislative intent that the county sales and use taxes parallel the state sales and use taxes, we must conclude that Jefferson County cannot interpret the state sales and use tax statutes differently from the Department.

IV. CONCLUSION

In light of our decision that Jefferson County cannot interpret the concept of nexus differently from the way the Department interprets that concept, we preterm discussion of all other issues raised by Yelverton's. On remand, the trial court is to enter a final judgment ordering that all moneys paid by Yelverton's as taxes, interest, and penalties, be refunded.

We realize that the sales transactions at issue in this case escape county taxation. However, that is the result obtained under the state sales and use tax statutes and the Department's regulations. In summary, a seller (Yelverton's) would be required to collect its local county (Walker) sales tax unless it delivered the purchased item into another taxing jurisdiction (Jefferson County). On an item delivered into another taxing jurisdiction, the seller would be required to collect the other taxing jurisdiction's use tax only if the seller has nexus with the other taxing jurisdiction. If the seller does not have nexus, it could not be required to collect the other taxing jurisdiction's use tax on an item delivered into that taxing jurisdiction; the seller could not collect the local county sales tax on that item either, because the sale of that item was not closed within the local county.

In an attempt to make sure that Yelverton's is still the law, Fun Source read CROWN HOUSING GROUP, INC. BEST HOME CENTER 70 SKYLAND BLVD. EAST TUSCALOOSA, AL 35405-4099, Taxpayer, v. STATE OF ALABAMA DEPARTMENT OF REVENUE., S. 06-399, 07/26/2007.

Judge Thompson in his opinion had the following to say in part:

Notwithstanding my opinion on the issue, as stated above, *Yelverton's* is still the law of the land and must be followed. Amici are thus correct that based on the holding in *Yelverton's*, the Taxpayer cannot currently be required to collect local tax in a municipality or county in which it does not have a physical business location or salesmen soliciting in the jurisdiction. However, because the Taxpayer failed to appeal the local assessment entered by the Department, it must pay the amount due in full and then petition for a refund.

Since Fun Source does not have nexus in your taxing jurisdiction, it is not liable for your proposed rental tax.

Please call me if we need to discuss this matter further.

Sincerely,

Grant McDonald

vtw

Enclosure: POA

cc: Greg Hacker



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June 25, 2011

Jonathan V. Gerth, Esquire
Administrative Hearing Officer
Revenue Discovery Systems
2317 3rd Ave. N., Suite 200
Birmingham, Alabama 35203

Re: Fun Source, Inc.
Rental Tax
Account #022042

Dear Mr. Gerth:

I have read the cases and rulings cited in your June 14, 2011 letter. Five of the cases you cite in your letter (Miller Bros. Co. v. Maryland, 347 U.S. 340 (U.S. 1954); Int'l Shoe Co. v. Wash., 326 U.S. 310 (U.S. 1945; World-Wide Volkswagen Corp. v. Woodson; 444 U.S. 286 (U.S.1980); Burger King Corp. v. Rudzewic, 471 U.S. 462 (U.S. 1985) and Quill Corp. v. N.D., 504 U.S. 298 (U.S. 1992)) have no applicability in the issues raised against fun source Inc. These cases would be applicable if the issues arose in the states of Maryland, Washington, Washington, Oklahoma, Florida or North Dakota. Most likely these cases would be applicable in most other states in the United States, but not Alabama because of Ala. Admin. Code r. 810-6-3-.51. This regulation provides:

(1) The Department of Revenue is the collecting agency for many municipalities in Alabama levying true sales and use tax or a gross receipts tax.

(2) Where a municipality levies a true sales and use tax under the provisions of Section 11-51-200, Code of Ala. 1975, as amended, the sellers located in the municipality are required to collect the municipal sales tax on retail sales of tangible personal property in the same manner as the state sales tax as the tax is a consumer tax. If the sale is made and as a part of the sales agreement the seller is required to deliver the item purchased outside the taxing jurisdiction of the municipality, the sale is exempt from the tax. If the seller whose place of business is located outside the municipality has salesmen soliciting orders within the municipality, the seller is required to collect and remit the sellers use tax on retail sales of tangible personal property in the same manner as an out-of-state seller

who has salesmen soliciting orders in Alabama and who files a state sellers use tax return. It does not matter how delivery is made.

(3) The gross receipts tax which the department is required to collect under the provisions of Section 11-51-180, Code of Ala. 1975, as amended, is more commonly referred to as sales tax. This tax is levied upon the seller for the privilege of making retail sales of tangible personal property in the municipality levying the tax. If a sale and delivery of tangible personal property is made within the municipality, the tax is due. If the sale is made and as part of the sales agreement the seller is required to deliver the item purchased outside the taxing jurisdiction of the municipality, the tax is not due. If a seller who is located outside the municipality levying the tax has salesmen soliciting orders within the municipality, the seller is required to remit tax on retail sales of tangible personal property provided the seller delivers the item in his or her own equipment or by common carrier F.O.B. destination, title passing in the taxing jurisdiction of the municipality. If the sale is made F.O.B. point of origin, title passing outside the taxing jurisdiction of the municipality, the gross receipts tax is not due.

(4) A municipality that levies a gross receipts tax does not levy a use tax. Therefore, purchaser does not owe use tax on purchases if in a gross receipts jurisdiction.

The history of this regulation follows: Adopted August 15, 1974. Filed September 28, 1982. Amended: Effective January 10, 1985. Filed with LRS January 10, 1994. Certification filed with LRS March 30, 1994, effective May 4, 1994. Amended: Filed September 15, 1998; effective October 20, 1998.

You cite *Boswell v. Paramount Television Sales, Inc.*, 291 Ala. 490 (Ala. 1973). This case is not applicable because it was decided long before regulation 810-6-3-.51 was adopted.

You cite *Dial Bank v. State of Alabama Admin. Law Div.*, Dkt. No. 95-289 and *Graduate Supply House, Inc. v. State of Alabama Admin. Law Div.* Dkt. Do S. 05-571. The issues in the *Dial Bank* case are as follows:

The franchise tax issues are:

(1) Is the Alabama foreign franchise tax constitutional;

(2) Did the Taxpayer have nexus with Alabama during the years in issue so as to be subject to Alabama's taxing jurisdiction;

(3) Was the Taxpayer "doing business" in Alabama during the years in issue, and thus subject to Alabama's foreign franchise tax levied at Code of Ala. 1975, § 40-14-41; and,

(4) If the Taxpayer had nexus with and was doing business in Alabama, did the Department properly compute the Taxpayer's "capital employed" in Alabama for the subject years. This issue involves whether the Taxpayer is required to provide the Department with a composite 50-state apportionment spreadsheet.

The corporate income tax issues are:

(1) Did the Taxpayer have nexus with Alabama during the years in issue. (See franchise tax issue (2));

(2) Was the Taxpayer "doing business" or "deriving income from sources in Alabama", and thus subject to Alabama's corporate income tax levied at Code of Ala. 1975, §§ 40-18-2(3) and 40-18-31;

(3) If the Taxpayer was otherwise subject to Alabama corporate income tax, was the Taxpayer exempt from said tax pursuant to Code of Ala. 1975, § 40-18-32(a)(9). That statute exempts from Alabama income tax all banks and other financial institutions that are subject to the Alabama financial institution excise tax ("FIET") levied at Code of Ala. 1975, § 40-16-4; and,

(4) If the Taxpayer was subject to Alabama corporate income tax, and was not exempt under § 40-18-32(a)(9), did the Department properly apportion the Taxpayer's income to Alabama in the subject years. Again, this involves the 50-state apportionment spreadsheet issue.

Judge Thompson in his opinion and preliminary order in the Dial case did not mention regulation 810-6-3-.51 nor did he mention Yelverton's, Inc. v. Jefferson County, 742 So. 2d 1216 (Ala. Civ. App. 1997) following is a summary of the Yelverton case:

(a) Yelverton's is an appliance store located in Walker County, Alabama. Yelverton's delivers appliances to out-of-county customers either by United States mail, by common carrier, by its own delivery trucks, or by direct shipments from the manufacturer.

(b) Jefferson County decided that Yelverton's had the required nexus with the county and was liable for Jefferson County sales tax.

(c) The court held that Jefferson County must follow the same nexus definitions and restrictions as contained in the Alabama Department of Revenue regulation, even though Jefferson County collects its own local sales and use tax. Department of Revenue regulations provide that an out-of-county seller would only have to collect Jefferson County use tax if it had salespersons soliciting orders in Jefferson County.

(d) Jefferson County filed a petition for writ of certiorari with the Alabama Supreme Court on July 11, 1997. 97 STN 137-H (July 17, 1997).

(e) On August 6, 1999, the writ of certiorari was quashed as improvidently granted. The quashing of the writ does not constitute an approval by the Court of "all the language, reasons, or statements of law in the opinion of the Court of Civil Appeals."

In the Graduate Supply House, Inc. the state assessed rule tax for October 2001 through January 2004. Judge Thompson in his Opinion and Preliminary order had the following to say concerning nexus.

For sales and use tax purposes, a taxpayer must have some "minimal business nexus" with Alabama to be subject to Alabama's taxing jurisdiction. *State of Alabama v. MacFadden-Bartell Corp.*, 194 So.2d 543, 546 (Ala. 1967). The U.S. Supreme Court has also held that to be subject to tax in a state, a taxpayer must have a "substantial nexus" with the state. *Complete Auto Transit, Inc. v. Brady*, 97 S.Ct. 1076 (1977). And for sales and use tax purposes, the Supreme Court has held that a taxpayer must have a physical presence in the state. *Quill Corporation v. North Dakota*, 112 S.Ct. (1992); *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 87 S.Ct 1389 (1967).

The physical presence mandated by Quill does not require that actual employees of a taxpayer must be in the state. Rather, sufficient nexus is established if the taxpayer is conducting or engaging in business activities through independent contractors or agents acting on behalf of the taxpayer in the state. *Script, Inc. v. Carson*, 80 S.Ct. 619 (1960); *MacFadden-Bartell*, supra. "The crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales." *Tyler Pipe Indus. V. Washington*

State Dept. of Revenue, 107 S.Ct. 2810, 2821, quoting the Washington Supreme Court, 715 P 2d 123, 126 (1986). See also, State of Louisiana v. Dell International, Inc., et al, So:2d (2006).

The facts needed to decide this issue are not sufficiently developed. The parties agree that the Taxpayer had no offices or employees in Alabama during the period in issue. The Department contends, however, that "the Taxpayer has representatives operating within the State of Alabama taking orders and is therefore subject to" Alabama tax. Department's Answer at 2.

The Taxpayer's CPA denies that the Taxpayer had agents or representatives acting on its behalf in Alabama during the period. The CPA claims that the "representatives" referred to by the Department were actually employees of another company, L.G. Balfour. He argues that the Taxpayer sold the items in issue to the Balfour representatives, who in turn resold the items to the ultimate customers in Alabama.

The CPA claims that the Balfour representatives solicited and took orders from the ultimate customers in Alabama, and also determined the price to be paid by those customers. If a customer ordered an item from a Balfour representative, the representative in turn ordered the item from the Taxpayer in Mississippi. The Taxpayer charged the representative its fixed wholesale price for the item. It then delivered the item to the representative, who delivered it to the end customer in Alabama.

The Department introduced the examiner's audit report into evidence at the December 6 hearing. However, the report does not explain or identify the Taxpayer's activities in Alabama, except to state "that the taxpayer sold merchandise to purchasers located within the State of Alabama." Department's September 9, 2004 Revised Confidential Audit Report at 3. The Department also introduced approximately 20 Taxpayer invoices (Dept. Ex. 1) into evidence, all of which show purchasers with an Alabama address.

The Taxpayer's CPA contends that the individuals listed on the invoices are the Balfour representatives that the Taxpayer sold the items to. He submitted an April 28, 2004 letter (Taxpayer Ex. 1) from the Taxpayer to the Department examiner which identified the various Balfour representatives. The letter also indicated that Balfour had reported and paid Alabama tax to the Department on the items in issue.

The purchasers listed on the invoices are identified as Balfour representatives in Taxpayer Ex. 1. Some of those Balfour representatives are also listed as "salesman" on some of the invoices to the educational institutions. However, no salesman is listed on invoices showing Auburn University and Oxford High School as the buyers. Also, invoices to the Fayette Kiwanis Club and to Gene's Choir Robes, Etc. show the salesman as "House." There is no Balfour representative by that name listed on Taxpayer Ex. 1.

If the facts as stated by the Taxpayer's CPA are correct, then the Taxpayer is not liable for Alabama sales tax or use tax because it was selling the items to the Balfour representatives at wholesale for resale. Items sold at wholesale in Alabama are not subject to either Alabama sales tax or Alabama use tax. *Paramount-Richards Theatres v. State*, 55 So.2d 812 (Ala. 1951). The issue of nexus would be irrelevant in that case, but the Taxpayer also would not have had nexus with Alabama because the Balfour representatives were independent purchasers, not representatives or agents conducting business on behalf of the Taxpayer in Alabama.

There is no evidence, however, indicating how the Taxpayer's rental transactions were structured. When asked what would happen if an Alabama customer did not return a rented item, the Taxpayer's CPA stated:

Mr. Stafford: That's -- I would assume they would have a claim against the representative or the school or -- I'm not sure the rental is done by the rep. I'm not sure they don't sell the caps and gowns to the rep. That's a good -- I need to -- I probably needed to nail that down a little better. I'm not sure they don't sell the cap and gown to the rep.

Administrative Law Judge: Okay. Ms. McNeill, anything in the audit report to specify how they operate.

Ms. McNeill: No. We've got a bunch of purchase order receipts I probably need to submit into evidence. But they -- Balfour is not listed anywhere. It's listed R.M. Hendrick Graduate Supply House all to Alabama addresses.

If the Taxpayer sold the items to be rented to the Balfour representatives, who then rented them to the ultimate customers in Alabama, the Taxpayer again would not have nexus with Alabama. However, the Taxpayer would have nexus if it was renting the items in Alabama, either to the Balfour representatives or to the ultimate customers through the Balfour representatives as its agents, in which case it would have nexus pursuant to *Scripto* and *Tyler Pipe*.

The opinion again does not discuss regulation 810-6-3-.51, or *Yelverton's, Inc. v. Jefferson County*, 742 So. 2d 1216 (Ala. Civ. App. 1997).

Your letter also refers to Ala. Admin. Code r. 810-6-5-.09(8) this regulation provides: When a lessor (i) is located outside Alabama, (ii) leases tangible personal property to a lessee within Alabama and (iii) the leased property is used in Alabama; the total gross proceeds from the lease of tangible personal property in this state are subject to rental tax. This regulation assumes the lessor has nexus in Alabama.

An official at a community ballpark calls Fun Source, Inc. and requests rental equipment for a Saturday. Fun Source, Inc. delivers the equipment Saturday morning and picks it up the following Monday. Fun Source, Inc. should not be subject to the same tax in a specific town that a rental company doing business in that town is subject.

Your letter in dealing with regulation 810-6-5-109 states "any interpretation which will allow for a lessor to escape the rental tax on property leased occurring outside of their physical location which serve only to create a nonsensical loophole in the tax levy by the taxpayer could avoid the tax altogether, without the imposition I may come complimentary tax on the lease". In the *Yelverton* case the court of civil appeals of Alabama had the following to say "We realize that the sales transactions at issue in this case escape county taxation. However, that is the result obtained under the state sales and use tax statutes and the Department's regulations."

In 2007 Judge Thompson begin dealing with the *Yelverton's* decision in his opinions. A summary of two of his opinions both issued in 2007 (*Crown Housing Group, Inc. v. Alabama Dept. of Rev.* Docket No. S. 06-399 (Dept. of Rev., Admin. Law Div. July 26, 2007). and *Diversified Sales, Inc. v. Alabama Dept. of Rev.* 201-229 (Dept. of Rev., Admin. Law Div. Sept. 4, 2007). 201-229 (Dept. of Rev., Admin. Law Div. Sept. 4, 2007)) follows:

(a) The Alabama Department of Revenue has called into question which legal standard should govern intrastate nexus decisions, a standard set by *Yelverton's*. In *Crown Housing*, the taxpayer sold mobile homes in counties in which it had neither a sales outlet nor salesmen operating, which under *Yelverton's* meant that it was not liable for the local tax. The Department of Revenue, however, assessed a number of taxes, including local (county-level) sales and use tax. The taxpayer appealed other taxes that were imposed, but not the local tax.

(b) Although not appealed, the ALJ nevertheless analyzed whether the local tax was appropriately imposed "to give the Taxpayer guidance for the future." The ALJ stated that he would have followed *Yelverton's*, under which the tax should not have been imposed, but went on to express his disagreement with the conclusion of *Yelverton's*.

(c) In addition to disagreement with certain interpretations of state statutes, the ALJ disagreed with *Yelverton's* constitutional nexus analysis. In particular, the ALJ believed that the "'physical presence' due process nexus standard ... was no longer applicable when the case was decided in 1997." According to the ALJ, the U.S. Supreme Court held in *Quill* that "the test is only whether the taxpayer had 'fair warning' that its activities may subject it to the tax in the jurisdiction." Because *Yelverton's* standard--requiring salesmen in the local jurisdiction for tax nexus--is "clearly contrary" to *Quill*, it should be rejected.

(d) If the ALJ's standard were followed, the taxpayer in *Yelverton's* would have been subject to the sales tax. It "purposefully avail[ed] itself of the benefits of an economic market in the forum" when it made numerous sales and delivered merchandise to customers in the taxing county. These substantial activities in the county "clearly [would have given] it fair warning that it would be subject to the County's taxing jurisdiction sufficient to satisfy due process."

(e) *Diversified Sales*, the second case, differed only in that the taxpayer did appeal the imposition of local sales tax. The ALJ held that although the tax applied as a matter of state law, the taxpayer lacked nexus under the *Yelverton's*: it had neither a sales outlet, nor salesmen soliciting orders, in the jurisdiction at issue. Quoting in its entirety the nexus analysis from *Crown Housing*, the ALJ again expressed his disagreement with *Yelverton's*, but applied it nonetheless. Ala. Admin. Code r. 810-27-1-4-.19 (2006).

A summary of the *Lanzi* case you cite in your letter (*Lanzi v. Alabama Dept. of Revenue*, Admin. Law Div. Dkt. No. 02-271 (September 26, 2003)) follows:

(a) Taxpayer was a Georgia resident who owned 62.5% limited partnership interest in an Alabama family investment partnership that was formed to hold and invest the taxpayer family's investment securities. The general partners, who were all Alabama residents, managed the partnership's investments and worked with financial consultants in Alabama and other states. Taxpayer stipulated that he had only a passive limited-partnership interest in the partnership and took no part in its management. The interest in the Alabama limited partnership was the taxpayer's only connection to Alabama.

(b) For the audit years, Taxpayer reported and paid Georgia income tax on his pro rata share of the partnership's income. The Alabama Department, however, determined that the taxpayer's income was from property owned or business transacted in Alabama and issued an income tax assessment. Taxpayer argued that he did not have sufficient nexus with Alabama for the state to tax his income without violating the Due Process and Commerce Clauses.

(c) The Administrative Law Judge ("ALJ") concluded that Alabama lacked the nexus necessary to subject the taxpayer's Alabama-source income to tax. The circuit court, however, reversed the decision of the ALJ. While the ALJ focused on the connection of the taxpayer to Alabama for purposes of taxing his pro rata share of the partnership income, the circuit court instead focused on the connection of the income to the state. According to the circuit court, a person purposefully earning substantial Alabama-source income through an Alabama entity knowingly assumes the risk that the state of Alabama will exercise some jurisdiction over that Alabama income. Therefore, under this reasoning, if the income is from Alabama sources, it is taxable by Alabama, regardless of where the nonresident partner is located.

(d) On appeal, the court of civil appeal reversed the circuit court's decision, holding that Alabama could not tax the nonresident taxpayer's income from the Alabama partnership. Under Alabama case and statutory law, the state may tax a nonresident's income from intangible personal property, such as a partnership interest, only if (i) the taxpayer has established a commercial domicile in the state; or (ii) the intangible property acquires a business situs within the state. The court concluded that because the taxpayer had no other contacts with Alabama other than his limited-partnership interest, the above rule did not apply to the taxpayer, and thus, Alabama could not tax the taxpayer's income.

(e) The appellate court also analogized the case to *Shaffer v. Heiter*, 433 U.S. 186 (1977), in which the U.S. Supreme Court held that the Due Process Clause prohibits a state from asserting jurisdiction over a nonresident shareholder solely on the basis of the nonresident's ownership of stock in a domestic corporation. The appellate court concluded that because a nonresident's interest in a limited partnership is directly analogous to a nonresident's ownership of stock in a corporation, mere ownership of a limited-partnership interest therefore does not provide sufficient minimum contacts with the forum state for purposes of judicial jurisdiction. Alabama therefore could not tax the taxpayer's income.

(f) The appellate court further noted that its holding is limited to tax years before 2001. Effective January 1, 2001, the Alabama legislature enacted a new law that requires a nonresident partner to consent to personal jurisdiction in Alabama for purposes of paying taxes on Alabama-source income or, failing that, requires the partnership to pay the income tax on behalf of the nonresident partner. See Ala. Code § 10-18-24.1(c). The appellate court's ruling did not reach the constitutionality of the statute. *Ashe Carson Co. v. State*, 128 Ala. 108, 35 So. 38.

(g) The Alabama Supreme Court has denied the Department's petition for review.

The Code of Ala. § 40-12-224 dealing with leasing and the renting tangible personal property provides:

The provisions of this article shall be administered and the tax herein levied shall be collected in accordance with the procedures set forth in Article 1 of Chapter 23 of this title for administering and collecting the tax therein levied, and for such purposes there are hereby incorporated into this article by reference the provisions of Sections 40-23-7 through 40-23-12, Section 40-23-25, Section 40-23-27 and Sections 40-23-30 and 40-23-31, together with the definitions applicable to said sections contained in Section 40-23-1; provided, that wherever in the said provisions the term "gross proceeds of sales" or "gross receipts" shall appear, the same for the purposes of this article shall be construed to mean "gross proceeds" as defined in this article; provided further, that a sale of tangible personal property to any person engaging in the business of leasing or renting such tangible personal property to others, if such tangible personal property is purchased for the purpose of leasing or renting it to others under a transaction subject to the tax levied in this article, shall be deemed to be a "wholesale sale" or a "sale at wholesale" for the purpose of administering Article 1 of Chapter 23 of this title and Section 40-23-60; provided further, that a sale of tangible personal property previously purchased at wholesale for the purpose of leasing or renting under a transaction subject to the privilege or license tax levied in this article shall be deemed to be a "retail sale" or a "sale at retail" for the purpose of administering Article 1 of Chapter 23 of this title and Section 40-23-60, regardless of whether such sale is to the person who theretofore leased or rented the said tangible property or to some other person; provided further, in the event of the repeal of Article 1 of Chapter 23 of this title, such repeal shall not operate to eliminate the tax collection procedures contained therein to the extent they are incorporated in this article by reference, unless the legislation providing for such repeal shall clearly indicate such a result.

One of the sections referred to in section 40-12-224 is Code of Ala. § 40-23-31 this section provides:

The Department of Revenue shall from time to time promulgate such rules and regulations for making returns and for ascertainment, assessment and collection of the tax imposed hereunder as it may be deemed necessary to enforce its provisions; and upon request shall furnish any taxpayer with a copy of such rules and regulations. The department may adopt rules and regulations providing for the issuance of permits to manufacturers to purchase tangible personal property without the payment to the vendor of the sales tax, and providing for such

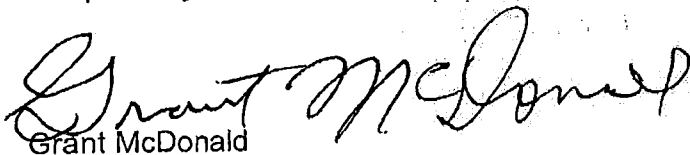
manufacturer to report and pay such tax directly to the department, in instances where the department determines that it is practically impossible at the time of purchase for such manufacturer or his vendors to determine with any degree of certainty the applicability of such tax, and that such provisions will facilitate and expedite the collection of the tax which may be due from such consumer; and such provisions may also be made applicable to persons engaged in the business of mining, quarrying, compounding or processing tangible personal property, railroads, transportation companies and others.

Regulation 810-6-3-.51 statutory authority is sections 40-23-31 and 40-23-83.

It may be true that the issue at hand may be subject two constructions and if this is the case the construction most favorable to the taxpayer must be adopted (Williams v. Pugh, 24 Ala. App. 57 (Ala. Ct. App. 1930); Yarborough Bros. v. Phillips, 209 Ala. 341; 96 So. 414. State v. New Florence O. Co., 19 Ala. App. 194, 95 So. 913; State v. Roden Coal Co., 197 Ala. 407, 73 So. 5 and Ashe Carson Co. v. State, 138 Ala. 108, 35 So. 38.

Fun Source, Inc. believes the proposed assessment should be set aside in its entirety without getting into the questions of RDS conduct over the past four years and where RDS has exceeded its authority granted under the code of Alabama.

Respectfully submitted,


Grant McDonald

vtw

cc: Greg Hacker and Gerald Hacker