

IN THE CIRCUIT COURT  
FIFTH JUDICIAL CIRCUIT  
IN AND FOR MARION COUNTY, FLORIDA

FABIAN LEWIS, LLC, a Florida  
limited liability company,

Plaintiff,

CASE NO.: 13-1244-CAG

v.

DEPARTMENT OF REVENUE,

Defendant.

SUMMONS


THE STATE OF FLORIDA:  
To Each Sheriff of the State:

YOU ARE COMMANDED to serve this summons and a copy of the  
complaint or petition in this action on the following Defendant:

DEPARTMENT OF REVENUE  
c/o Marshall Stranburg, Interim Executive Director  
2450 Shumard Oak Blvd.  
Tallahassee, FL 32399

Served 4/13/13 at 1000A in and  
Svd 4/15/13 at 67P.m by

IMPORTANT

 Chris J. Colson #142  
Certified Process Server, 2nd Judicial Crct of Florida

A lawsuit has been filed against you. You have 40 calendar days after this summons is served on you to file a written response to the attached Complaint with the Clerk of this Court. A phone call will not protect you. Your written response, including the case number given above and the names of the parties, must be filed if you want the Court to hear your case. If you do not file your response on time, you may lose the case, and your wages, money, and property may thereafter be taken without further warning from the Court. There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may call an attorney referral service or legal aid office (listed in the phone book).

If you choose to file a written response yourself, at the same time you file your written response to the Court you must also mail or take a carbon copy or photo copy of your written response to the "Plaintiff(s)/Plaintiff(s)'s Attorney" named below.

DATED on March 29<sup>th</sup>, 2013.

DAVID ELLSPERMANN  
As Clerk of the Court  
BY: J. DELGADO  
As Deputy Clerk

In accordance with the Americans with Disabilities Act, persons with disabilities needing a special accommodation to participate in this proceeding should contact the individual or agency sending the notice at 445 N.E. 8<sup>th</sup> Avenue, Ocala, FL 34470; telephone number: 1-352-732-8622, not later than seven (7) days prior to the proceedings. If hearing impaired, (TDD) 1-800-955-8771, or Voice (V) 1-800-955-8770, via Florida Relay Service.

IMPORTANT

Usted ha sido demandado legalmente. Tiene 20 días, contados a partir del recibo de esta notificación, para contestar la demanda adjunta, por escrito, y presentarla ante este tribunal. Una llamada telefónica no lo protegerá. Si usted desea que el tribunal considere su defensa, debe presentar su respuesta por escrito, incluyendo el número del caso y podría ser depuesto de sus ingresos y propiedades, o privado de sus derechos, sin previo aviso del tribunal. Existen otros requisitos legales, Si lo desea, puede usted consultar a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a una de las oficinas de asistencia legal que presenta su respuesta ante el tribunal, deberá usted enviar por correo o entregar una copia de su respuesta a la persona denominada abajo entregar una copia de su respuesta a la persona denominada abajo como "plaintiff(s)/Plaintiff's Attorney" (Demandante o Abogado del Demandante).

IMPORTANT

Des poursuites judiciaires ont été entreprises contre vous.. Vous avez 20 jours consécutifs à partir de la date de l'assignation de cette citation pour déposer une réponse écrite à la plainte ci-jointe auprès de ce tribunal. Un simple coup de téléphone est insuffisant pour vous protéger. Vous êtes obligé de déposer votre réponse écrite, avec mention du numéro de dossier ci-dessus et du nom des parties nummées ici, si cela est requis, vous risquez de perdre la cause ainsi que votre salaire, votre argent, et vos biens peuvent être saisis par la suite, sans aucun préavis ultérieur du tribunal. Il y a d'autres obligations juridiques et vous pouvez requérir les services immédiats d'un avocat. Si vous ne connaissez pas d'avocat, vous pourriez téléphoner à un service de référence d'avocats ou à un bureau d'assistance juridique (figurant à l'annuaire de téléphones)

Si vous choisissez de déposer vous-même une réponse écrite, il vous faudra également, en même temps, que cette formalité, faire parvenir ou expédier une copie de votre réponse écrite à "Plaintiff(s)/Plaintiff(s)'s Attorney" (Plaignant ou à son avocat) nommé ci-dessous.

R. Gregg Jerald, Esquire  
Florida Bar No.: 0021019  
LANDT, WIECHENS, LAPEER, AYRES & JERALD  
445 N.E. 8<sup>th</sup> Avenue  
Ocala, Florida 34470  
(352) 732-8622

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DEPARTMENT OF REVENUE,

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CASE NO.: 13-1244-CAG

COMPLAINT

COMES NOW, the Plaintiff, FABIAN LEWIS, LLC, a Florida limited liability company (hereinafter "Fabian Lewis"), by and through its undersigned attorneys, and sues the Defendant, DEPARTMENT OF REVENUE (hereinafter the "Department"), and in support thereof alleges as follows:

GENERAL ALLEGATIONS COMMON TO ALL COUNTS

1. This is a cause of action for damages which exceed \$15,000.00, exclusive of interest, cost and attorney's fees.
2. This Court has jurisdiction pursuant to Article V, Section 20 of the Florida Constitution and section 72.011, Florida Statutes.
3. At all times material hereto Plaintiff, Fabian Lewis, LLC, has been a Florida limited liability company operating and maintaining its principal place of business in Marion County, Florida.
4. Defendant, Department of Revenue, is a government agency of the State of Florida charged with sales tax assessment, enforcement and collection, among other duties and responsibilities.

5. Fabian Lewis operates three (3) car wash facilities in Marion County, Florida, and has registered sales tax numbers for the collection and payment of sales tax for each car wash facility.

6. On or around August 13, 2012, the Department notified Fabian Lewis that it was initiating a sales tax audit of the company to cover the period from July 1, 2009 through June 30, 2012, pursuant to Chapter 212, Florida Statutes (hereinafter the "sales tax audit"). A true and correct copy of the Notice of Intent to Audit Books and Records is attached hereto as Exhibit "1".

7. Fabian Lewis complied with the sales tax audit in its entirety.

8. On February 22, 2013, the Department issued a Notice of Proposed Assessment (hereinafter the "Notice") in which the Department claims that Fabian Lewis owes total tax in the amount of \$87,598.72, plus interest through the date of the Notice of \$12,354.77, for a total amount owed pursuant to the Notice of \$99,953.49 (the "Balance Due"). The Balance Due has accrued interest at the rate of \$16.80 per day since February 22, 2013. A true and correct copy of the Notice is attached hereto as Exhibit "2".

9. Fabian Lewis does not dispute the portion of the assessed tax and accrued interest totaling \$29,575.35 (hereinafter the "undisputed portion"), and has issued payment to the Department this date for that amount which is inclusive of interest through the date of filing this action as required by section 72.011(3)(a), Florida Statutes.

10. Fabian Lewis expressly disputes the remaining Balance Due, including interest accrued through the date of filing this Complaint, in the sum of \$70,949.19 (hereinafter the "disputed portion"), and has tendered the disputed

portion into the registry of the Court on this date in accordance with section 72.011(3)(b)(1), Florida Statutes.

11. The disputed portion of the balance due consists of sales tax the Department claims to be entitled to as a result of a car wash product, Tri Foam Wax NS (hereinafter the "Tri Foam"), which is incorporated into a certain car wash offered by Fabian Lewis to its customers.

12. It is the Department's contends that the Tri Foam provides a "protective film or coating" to vehicles undergoing car washes in which the Tri Foam is incorporated and such washes are thus taxable events pursuant to section 12A-1.006(16)(b), Florida Administrative Code.

13. However, it is the position of Fabian Lewis, as well as the manufacturer of the Tri Foam along with its representatives and agents, that the Tri Foam - particularly in the manner it is implemented during the Plaintiff's car wash tunnel process - does **not** provide a protective film and/or coating to vehicles and that the Tri Foam is not intended to be incorporated into vehicles in a significant way.

14. Furthermore, Fabian Lewis maintains documentation, as is known to the Department, which distinguishes the washes that incorporate the Tri Foam from other, taxable, wash and/or wash jobs. Accordingly, the car washes that incorporate the Tri Foam, and which the Department seeks to recover sales tax here, does not, in fact, create a taxable event and the disputed portion of the Balance Due should be rejected by this Court.

15. Fabian Lewis has retained the law firm of Landt, Wiechens, LaPeer, Ayres & Jerald, LLP, to represent it in this action and is obligated to pay said firm a reasonable fee for its services.

### COUNT I

16. Fabian Lewis realleges and incorporates by reference herein paragraphs 1 through 15 above.

17. This is a cause of action to protest the disputed portion of the Balance Due resulting from a sales tax audit conducted by the Department as provided and authorized by section 72.011(1)(a), Florida Statutes.

18. The disputed portion of the Balance Due constitutes sales tax and interest charged on car washes that incorporated the Tri Foam. The Department contends that the Tri Foam leaves a protective film or coating on vehicles, thereby causing a taxable event, however, the manufacturer of the Tri Foam has confirmed to both Fabian Lewis and the Department's auditor that, to the contrary, the Tri Foam does not leave a protective film or coating on vehicles in which it is utilized and, accordingly, those car washes incorporating the Tri Foam do not create a taxable event. Moreover, the Tri Foam is not intended to be incorporated into vehicles upon which it is applied in a significant way.

19. Fabian Lewis has deposited the disputed portion of the Balance Due, along with all accrued interest through the date of filing, into the registry of the Court and remitted the undisputed portion of the Balance Due, along with all interest through the date of filing, to the Department, as required by law.

20. Fabian Lewis has suffered significant financial damage and loss as a result of the loss of use of the disputed portion of the Balance Due as set forth

in the Notice. By this protest of the Notice Fabian Lewis requests that the Court determine that the disputed portion of the Balance Due is illegal, invalid, and has been improperly assessed against Fabian Lewis because the car washes incorporating the Tri Foam do not leave a protective coating on vehicles and, as a result, do not create a taxable event.

WHEREFORE, the Plaintiff, Fabian Lewis, respectfully requests that the Court enter judgment determining that the Tri Foam does not provide a protective film or coating on vehicles utilizing the wash in which the Tri Foam is included and such washes incorporating the Tri Foam do not create a taxable event, that as a result the disputed portion of the Balance Due is not properly collectable by the Department, ordering the monies paid into the registry of the Court by Fabian Lewis returned to it, and for such other and further relief as this Court deems just and proper.

## COUNT II

22. Fabian Lewis realleges and incorporates by reference herein paragraph 1, and 3-15 herein.

23. This is an action for declaratory relief pursuant to Chapter 86, Florida Statutes.

24. The Department seeks the collection of the disputed portion of the Balance Due set forth in the Notice and, as support for their position, alleges that all car washes sold by Fabian Lewis incorporating the Tri Foam as part of the wash process provide a protective coating or film to the vehicles receiving the wash, thereby resulting in a taxable event.

25. To the contrary, however, the manufacturer of the Tri Foam, along with its agents and representatives, have inspected the materials which make up the Tri Foam and have extensive knowledge of the Fabian Lewis car washes as it pertains to where in the wash cycle and tunnel the Tri Foam is utilized during the process. The manufacturer of the Tri Foam, its agents and representatives, have notified both Fabian Lewis and the Department, that it is their opinion that the Tri Foam does not provide a protective coating or film on vehicles to which it is applied during Fabian Lewis car washes utilizing the Tri Foam.

26. Furthermore, the Tri Foam is not intended to be incorporated into the vehicles upon which it is used in any significant way.

27. Finally, Fabian Lewis maintains documentation, which is known and has been provided to the Department, which distinguishes the wash job which incorporates the Tri Foam from other, taxable, wash and/or wax jobs.

28. Accordingly, it is Fabian Lewis position that the car washes utilizing the Tri Foam do not create a taxable event.

29. Fabian Lewis requests that the Court establish whether the Tri Foam provides a protective coating or film upon vehicles on which it is incorporated and whether the Tri Foam is intended to be incorporated into the vehicles in a significant way so as to create a taxable event.

30. This dispute is not being prosecuted to satisfy the curiosity of Fabian Lewis, but rather, to fix its legal rights in light of the disputed portion of the Balance Due set forth in the Notice which the Department seeks to recover from Fabian Lewis.



WHEREFORE, Fabian Lewis respectfully requests that this Court enter judgment declaring as follows:

a. That the Tri Foam, as it is applied in the Fabian Lewis car washes in which it is utilized, does not provide a protective film or coating to vehicles utilizing such car wash;

b. That the Tri Foam is not intended to be incorporated into the vehicles receiving said product in any significant way;

c. That the car washes in which the Tri Foam is used are not taxable events under section 12A-1.006(16)(b), Florida Administrative Code;

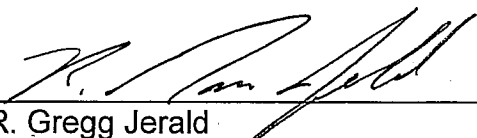
d. That the Department is not entitled to collect the disputed portion of the Balance Due as set forth in the Notice;

e. That all monies deposited into the registry of the Court are to be returned and refunded to Plaintiff, Fabian Lewis, LLC; and

f. For such other and further relief as this Court may deem just and proper.

DATED this 28<sup>th</sup> day of March, 2013.

LANDT, WIECHENS, LaPEER, AYRES  
& JERALD, LLP



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