

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL  
FROM THE DEPARTMENT OF COMMERCE, COMMUNITY AND ECONOMIC  
DEVELOPMENT**

	)	OAH No. 08-0245-TOB
	)	Agency No. 0500-08-009
	)	
	)	OAH No. 08-0313-TOB
In the Matters of:	)	Agency No. 0500-08-026
	)	
HOLIDAY ALASKA, INC.	)	OAH No. 08-0314-TOB
d/b/a Holiday,	)	Agency No. 0500-08-028
	)	
Respondent.	)	OAH No. 08-0420-TOB
	)	Agency No. 0500-08-010

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**ORDER ON DIVISION’S MOTION *IN LIMINE* AND ALTERNATIVE MOTION TO  
COMPEL**

The Division of Corporations, Business and Professional Licensing has moved, in the alternative, that either all evidence relating to economic impact of a suspension be excluded or that Holiday be ordered to respond fully to the division’s Interrogatory No. 2 and Request for Production Number 1, both of which relate to economic impact. The question of economic impact seems to relate only to Holiday’s facial due process challenge to AS 43.70.075, as distinguished from its as-applied challenge based on equal protection and the other issues in the litigation. The facial challenge is one on which this tribunal will decline to rule, but on which a factual record can be assembled at the hearing for a later ruling in court.<sup>1</sup>

The division’s motion *in limine* rests on three premises: that Holiday waived the right to consideration of economic impact evidence by failing to offer it in moving for summary adjudication; that the ALJ may have intended to exclude the collection of evidence on the facial challenge when he rejected the idea of ruling on facial constitutionality; and that Holiday should not be allowed to offer evidence on a matter on which it has failed to provide discovery. The first premise is unsupportable; the second is not a correct reading of the summary adjudication ruling (although the ALJ apologizes that the ruling was unclear on this point); and the third will be mooted if the discovery responses are provided. Accordingly, the motion *in limine* will be denied.

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<sup>1</sup> See Order Denying Summary Adjudication (Oct. 13, 2008) at 1 & n.1.

With respect to the motion to compel, Holiday makes no argument that its responses to date are adequate. It also states that it “is willing to provide the discovery responses the Division seeks to have compelled and will produce these on November 3, 2008.”<sup>2</sup> The motion to compel will therefore be granted and Holiday will be required to follow through with its willingness to make the responses.

Holiday is entitled to make a record on the facial challenge at the hearing. However, the parties could, if they wish, stipulate NOT to make a record on that issue at the administrative hearing and stipulate that the division will not contend that failure to offer evidence on that issue waives of the issue. An evidentiary hearing on the distinct factual issues that bear on facial constitutionality could then be held, if necessary, in the Superior Court if there is a Superior Court appeal. The potential benefits of such an approach would be that preparations for the upcoming hearing would be streamlined and that the tribunal with jurisdiction to rule on the constitutional challenge would control the assembly of evidence on that challenge. The ALJ is willing to work with the parties to proceed in whichever manner they choose.

IT IS ORDERED that:

- (1) The division’s October 28, 2008 motion *in limine* is denied.
- (2) The division’s October 28, 2008 motion to compel is granted. Holiday is ordered to fully respond to the division’s Interrogatory No. 2 and Request for Production No. 1 by 9:00 a.m. on November 4, 2008. Failure to comply with this order may result in the exclusion of evidence regarding potential economic impact resulting from suspension of Holiday’s tobacco endorsements.

DATED this 1<sup>st</sup> day of November, 2008.

By: Signed \_\_\_\_\_  
Christopher M. Kennedy  
Administrative Law Judge

**Certificate of Service:** The Undersigned certifies that on the 1<sup>st</sup> day of November, 2008, a true and correct copy of this document was emailed to the following: John A. Treptow, counsel for Holiday Alaska, Inc.; and Cynthia Drinkwater, Assistant Attorney General.

By: Signed \_\_\_\_\_  
C. Kennedy

[This document has been modified to conform to the technical standards for publication.]

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<sup>2</sup> Limited Opposition (Oct. 31, 2008) at 6.