

labels that are “immodest.” 14B NCAC 15B.1003(a)(2). On July 23, 2021, an employee of the Commission informed Flying Dog that the Freezin’ Season Winter Ale label was inappropriate.

The Complaint does not allege that Flying Dog questioned this determination or sought to discuss the matter further with anyone at the Commission. Instead, it appears that Flying Dog did nothing for more than a month – then on August 26, 2021, filed the Complaint in this case.

Claiming urgency, Flying Dog also requested a temporary restraining order and a preliminary injunction requiring the Commission to approve the label.

On August 27, 2021, this Court denied Flying Dog’s request for a temporary restraining order and set a hearing on Flying Dog’s request for a preliminary injunction.

On September 7, 2021, the Commission sent a letter to Flying Dog’s attorneys stating that the label in question has been approved. (Ex. 1.)

Argument

Flying Dog’s request for a preliminary injunction should be denied for two reasons: (1) the case is moot, and (2) Flying Dog cannot make the showing required to support a preliminary injunction.

I. The Commission Has Approved the Label in Question, Rendering this Case Moot

The Commission has approved the label in question, so Flying Dog is free to market and sell its beer. That is the principal relief requested by the Complaint, rendering the case moot. See N.Y. State Rifle & Pistol Ass’n v. City of New York, ___ U.S. ___, ___, 140 S. Ct. 1525, 1526 (2020) (per curiam) (holding that where governmental defendants took steps so that petitioners received “the precise relief that [they] requested . . . in their complaint,” the case was moot).

Because the case is moot, this Court lacks jurisdiction over it. See S.C. Coastal Conservation League v. United States Army Corps of Eng'rs, 789 F.3d 475, 482 (4th Cir. 2015) (“When a case or controversy ceases to exist, the litigation is moot, and the court’s subject matter jurisdiction ceases to exist also.”). Therefore, this Court should deny Flying Dog’s motion for a preliminary injunction.

II. Flying Dog Cannot Make the Showing Required to Support a Preliminary Injunction

Even if the case were not moot, Flying Dog cannot make the showing necessary to support the issuance of a preliminary injunction.

A. Legal Standard

A strong showing is required to support the issuance of a preliminary injunction. Such an injunction “is an extraordinary remedy never awarded as of right.” Winter v. NRDC, Inc., 555 U.S. 7, 23 (2008). In order to justify a preliminary injunction, a plaintiff “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” Id. at 20. Flying Dog cannot establish these things, as detailed further below.

B. Likelihood of Success on the Merits

Flying Dog cannot succeed on the merits because its case is moot. But Flying Dog is unlikely to succeed on the merits for another reason: it cannot show a violation of the First Amendment. The allegations in this case concern the regulation of a beer label. The Constitution “accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.” Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of N. Y., 447 U.S. 557, 563 (1980). Here, the label appears to show the exposed penis of a cartoon figure. The label

would be visible to children in grocery stores and other retail outlets. There is a clear state interest in limiting children's exposure to images of this kind. The Supreme "Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children." Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 684 (1986). Although the Commission has now approved the label, its previous lack of approval did not violate the First Amendment.

C. Irreparable Harm

A plaintiff is not entitled to a preliminary injunction if it cannot show irreparable harm. Ferring Pharms., Inc. v. Watson Pharms., Inc., 765 F.3d 205, 219 (3d Cir. 2014) ("Absent a showing of irreparable harm, a plaintiff is not entitled to injunctive relief, even if the other three elements are found."). Here, the approval of the label has eliminated risk of any harm, much less irreparable harm: Flying Dog can market its product freely. In any event, a loss of revenue associated with reduced product sales does not qualify as "irreparable" harm. See HCI Techs., Inc. v. Avaya, Inc., 241 Fed. Appx. 115 (4th Cir. 2007) (affirming the denial of a preliminary injunction and noting that even if a company were driven entirely out of business as a result of its inability to sell certain products, the associated damages could be quantified and the harm would therefore not be irreparable).

D. Balance of Equities and the Public Interest

Because the label has been approved, there are no equities to balance and the public interest would not be advanced by a preliminary injunction. Indeed, such an injunction would have no effect at all – which underscores the mootness of the case. If any balancing of interests

were to take place, the state interest in protecting children from explicit content would weigh more heavily than Flying Dog's commercial interests.

Conclusion

For the foregoing reasons, Flying Dog's request for a preliminary injunction should be denied.

Respectfully submitted, this the 8th day of September, 2021.

JOSHUA H. STEIN
Attorney General

/s/ Jeffrey B. Welty

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I electronically filed the **NOTICE OF APPEARANCE** with the Clerk of the Court utilizing the CM/ECF system; this also constitutes service of the document under Local Civil Rule 5.1(e). I further certify that I have on this day, emailed said document to Plaintiff's counsel, addressed as follows:

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This the 8th day of September, 2021.

/s/ Jeffrey B. Welty

Jeffrey B. Welty
Special Deputy Attorney General

A. D. "ZANDER" GUY, JR.
Chairman

TERRANCE L. MERRIWEATHER
DEPUTY COMMISSIONER



COMMISSION MEMBERS
NORMAN A. MITCHELL, SR.
CHARLOTTE

KAREN L. STOUT
BLACK MOUNTAIN

September 7, 2021

Flying Dog Brewery
4607 Wedgewood Blvd.
Frederick, MD 21703

To Whom It May Concern:

This letter acknowledges the approval of additional sizes to the previous approval of the keg collar for the product listed below. Please refer to the product code number for any revisions that may be filed in the future.

Brand Name / Fanciful Name	Varietal / Type	ABV	Size	Product #	Classification
Freezin Season	Winter Ale	7.40	12 oz	00195391B	Beer
Freezin Season	Winter Ale	7.40	15.5 gal	00195391B	Beer
Freezin Season	Winter Ale	7.40	5.16 gal	00195391B	Beer

This product and label approval shall not be construed as approval of the appointment of any North Carolina wholesaler or distributor nor their territorial assignments.

If you have any questions regarding the above, please contact the Product Section at 919-948-7952.

Sincerely,

Cindy Mesino
Product Compliance Specialist
919-948-7918