

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA**

FLYING DOG BREWERY, LLC,

Plaintiff,

v.

THE NORTH CAROLINA ALCOHOLIC
BEVERAGE CONTROL COMMISSION,
A.D. “ZANDER” GUY JR., NORMAN A.
MITCHELL, SR., KAREN L. STOUT,
TERRANCE MERRIWEATHER,

Defendants.

Case No. 5:21-cv-00343-BO

**REPLY IN SUPPORT OF
PLAINTIFF’S MOTION FOR
PRELIMINARY INJUNCTION**

Plaintiff Flying Dog Brewery, LLC hereby replies in support of its Motion for Preliminary Injunction (Dkt. No. 5).

1.0 Introduction

The Alcoholic Beverage Control Commission (ABC) adopted a clearly unconstitutional administrative rule that gives the government the right to suppress speech it deems “undignified, immodest, or in bad taste.” Rule 15b 1003-3(2) governing alcoholic beverage labels is even more clearly unconstitutional than Rule 2(a) of the Trademark Act, which famously fell in the twin cases of *Matal v. Tam*, 137 S. Ct. 1744 (2017) (invalidating the portion of the Act that prohibited registration of “disparaging” trademarks as a violation of the “unconstitutional conditions” doctrine) and *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019) (same for “immoral and scandalous” trademarks). Even in the absence of those unequivocal pronouncements of limitations on governmental power, this regulation was unconstitutional, but those twin cases stomped out any smoldering embers that may have remained in the ashtray of legal analysis that could possibly ever be knocked over into combustible materials, thus re-igniting the way to a government agency lawfully applying the terms “undignified, immodest, or bad taste” to justify a prior restraint on speech.

The commission relied on this unconstitutional “authority” to deny Flying Dog’s right to distribute beer with its chosen label, content, statements, and expressive artwork. The ABC said, in writing, that it was denied under “Rule 15b 1003-3(2).” *See* Dkt. No. 5-4. The reason given was

explained: “... *we were going by the following regulation: As you can see below the image below is seen as inappropriate to many here.*” The ABC then cited the applicable rule, which allows the commission to disapprove labels that are determined by the Commission to be “*undignified, immodest, or in bad taste.*” *Id.* (Highlight and double underlines appear in original).

In their Response to the Motion for Injunctive Relief, the Defendants *now* claim that the label was rejected because it was “*immodest.*” See Def’s brief, Dkt. No. 17, at 1-2. Given that the ABC both highlighted and double-underlined the “*bad taste*” portion of the regulation, the ABC’s revised explanation should not be credited. Nevertheless, whether the rejection was due to it being “in bad taste,” or “immodest” or because it is “inappropriate to many here,” the Constitutional analysis is the same – the regulation itself is unconstitutional and must be struck down.

Defendants argue that the case is moot, because the ABC decided, after being sued and two days before the hearing, that the label has apparently been excised of its immodesty, its bad taste, or its undignified nature. What changed their hearts, other than the instant lawsuit? Did “many here” change their mind about what is “inappropriate?” Of course not, the ABC’s position on denials has been nothing short of adamantly consistent. Of the 318 administrative denials it has rendered under this regulation since 1993, it has heard 5 appeals, and after hearing such administrative appeals, has reversed itself precisely zero times.¹ See Declaration of William Michael Boyer, attached as **Exhibit 6**.

2.0 The Defendants’ Arguments – None are Persuasive

The Defendants make two main arguments – mootness and a lack of a likelihood of success on the merits. As to mootness, they argue that the request for injunctive relief is moot, and argue for dismissal as they claim the entire case is moot. None of these arguments are valid.

¹ Counsel for the Plaintiffs has only surveyed all administrative decisions back to 2013, because that is as far back as decisions are published without Plaintiffs needing to resort to a Public Records Act request. However, it should be safe to assume that an eight year sampling showing precisely zero administrative reviews concerning this regulation resulting in a change of heart to demonstrate that appeals are neither necessary, proper, given any semblance of due process, nor are anything short of futile. And more importantly for the analysis of the voluntary cessation doctrine, are so rare that this reversal stands as the first one in accessible, if not recorded, history. What ennobled this label to such an exalted position? The instant lawsuit and the pang of fear that they finally got caught by someone with the wherewithal to file a lawsuit out of patriotic duty.

2.1 The Request for injunctive relief is not mooted by the 11th hour change of heart

There is no doubt that the ABC’s reversal of its decision is a cynical attempt at thwarting the pending litigation and upcoming preliminary injunction hearing. However, this attempt fails. The unconstitutional regulation still must fall. And the regulation does not provide that once a label is approved that the ABC can not simply issue a new edict that all such sales must end, immediately. The Regulation states “An advertisement or product label... shall not contain any statement, design, device, or representation that: (2) depicts the use of alcoholic beverages in a scene that is determined by the commission to be undignified, immodest, or in bad taste.” It contains no restriction on this being a single-use determination. It apparently does not block the Commission from *sua sponte* reversals of its views, so why would it block re-reversal? There is no reason that the regulation could not be invoked minutes after the hearing to once again prohibit distribution. The Court should reject the ABC’s argument that since it has now decided not to wield the unconstitutional regulation in an unconstitutional manner, at this time, that the injunctive relief sought is no longer needed.

The Supreme Court rejected the ABC’s logic in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 208 L. Ed. 2d 206, 210-211 (2020). In *Roman Catholic Diocese*, the Court clarified that a voluntary reprieve from unconstitutional state action is not grounds for finding mootness. Former Governor Cuomo lifted COVID-19 restrictions on attendance at religious services after a suit was filed. The Supreme Court found that this this did not moot the request for injunctive relief, finding that injunctive relief was still necessary because the applicants remained under threat that the Governor would simply renew the challenged restriction. 208 L. Ed. 2d at 210 (internal citation omitted). Likewise, the ABC has tried to “pull a Cuomo” and moot a case by reversing its unconstitutional actions, while maintaining the authority to re-reverse itself and act unconstitutionally anew, since the regulation itself still stands.

“A motion for preliminary injunction filed before the act to be enjoined has occurred, and subsequently intended to restore the status quo once it has been disturbed, is not moot.” *Di Biase v. SPX Corp.*, 872 F.3d 224, 232 (4th Cir. 2017). However, a preliminary injunction can be utilized to restore, rather than preserve the status quo, and in this case it should do so.

The Fourth Circuit recognizes this logic. In *Aggarao v. MOL Ship Management Co.*, 675 F.3d 355 (4th Cir. 2012), a cargo ship employee was injured, and after providing him medical care for a period, the employer-defendants ceased providing care. *Id.* at 362-63. The employee sought a preliminary injunction to order the defendants to resume providing him medical care. *Id.* at 364. Defendants argued that the injunction sought was improper because it did not preserve the status quo. *Id.* at 378. The Fourth Circuit disagreed, holding that “it is sometimes necessary to require a party who has recently disturbed the status quo to reverse its actions..., [but] such an injunction restores, rather than disturbs, the status quo ante.” *Id.* at 378 (quoting *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1013 (10th Cir. 2004)). The Fourth Circuit remanded the case so that the trial court could consider the request for a preliminary injunction. *Id.* at 378-379.

Similarly, in *Pashby v. Delia*, 709 F.3d 307 (4th Cir. 2013), at issue was North Carolina’s implementation of a new Medicaid policy for at-home care. *Id.* at 313. A change in policy that tightened eligibility requirements for at-home care was set to go into effect on June 1, 2011. *Id.* at 314. Plaintiffs filed suit and moved for a preliminary injunction on May 31, 2011, seeking to prohibit implementation of the stricter requirements. *Id.* at 315. The district court granted the injunction on December 8, 2011, halting application of the new policy at that point. *Id.*

The Fourth Circuit agreed that a preliminary injunction was appropriate. In doing so, it held that because the plaintiffs had filed their preliminary injunction motion before the policy change took effect, the status quo was the status before the change. *Id.* at 320. The preliminary injunction, which halted application of the policy change, thus preserved the status quo. *Id.*

Other courts have likewise concluded that preliminary injunctions can properly restore the status quo after it has been disturbed. *See Savoie v. Merchants Bank*, 84 F.3d 52, 58-59 (2d Cir. 1996) (upholding preliminary injunction that restored the status quo by ordering bank to escrow \$500,000, and noting that logistical hurdles to restoring the status quo were “properly laid at the doorstep of the Bank, which acted precipitously, not the plaintiffs, who appropriately pursued their legal remedies”); *United Steelworkers of Am., AFL-CIO v. Textron, Inc.*, 836 F.2d 6, 10 (1st Cir. 1987) (upholding

preliminary injunction that required defendant to resume paying insurance premium payments, in part because during the “last uncontested status,” defendant had paid premiums).

In this case, Flying Dog filed suit and filed their motion for preliminary injunction before the ABC issued its *sua sponte* reversal. The ABC’s reversal does not moot the motion for preliminary injunction because the status quo remains open for restoration. The District Court can, and should, still enter a preliminary injunction ordering the ABC to restore the status quo and refrain from utilizing 14B NCAC 15B.1003(a)(2) due to its facially unconstitutional restraint against protected expression. The injunction seeks to restore the status quo before 14B NCAC 15B1003(a)(2) was enacted, therefore the motion is not moot.

2.2 The Case is Not Moot

Defendants argue that this case is moot in its entirety because they decided to reverse their decision of denial. This case is not moot, and Flying Dog is entitled to relief.

2.2.1 As to the ABC, the Case is Not Moot

With respect to mootness as to the ABC, they are mistaken. The Defendants have not even considered the doctrine of voluntary cessation. All of the arguments made above about the injunctive relief not being moot, of course, apply to the case in chief. The only argument that the ABC could have as to mooting the entire case would be if the ABC convened and voided 14B NCAC 15B.1003(2). Presuming, however, that they were to do so in the hours between the filing of this brief and the hearing, they would still find no comfort in their unilateral maneuver.

When a defendant asserts that an event has mooted the case, “it bears the heavy burden of persuading the court that there is no longer a live controversy.” *Friends of the Earth, Inc. v. Laidlaw Emtl. Services (TOC) Inc.*, 528 U.S. 167, 189 (2000). The voluntary cessation doctrine “traces to the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior.” *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001). A defendant’s “voluntary cessation of challenged conduct does not ordinarily render a case moot.” *Knox v. Serv. Emp. Int’l Union, Local 1000*, 567 U.S. 298, 307 (2012). “This is to avoid a manipulative litigant immunizing itself from suit indefinitely, altering its behavior long enough to

secure a dismissal and then reinstating it immediately after.” *ACLU of Mass. v. United States Conf. of Catholic Bishops*, 705 F.3d 44, 54-55 (1st Cir. 2013). As the Third Circuit recently explained, “[w]hen a plaintiff seeks declaratory relief, a defendant arguing mootness must show that there is no reasonable likelihood that a declaratory judgment would affect the parties’ future conduct.” *Harnett v. Pa. State Educ. Ass’n*, 963 F.3d 301, 306 (3d Cir. 2020).

Examining the ABC’s handling of the 2018 application of Wicked Weed Brewing Company LLC’s application for its “Lost Toys” beer is illustrative of the ABC’s ability to arbitrarily reverse itself as it pleases, and shows why relying on ABC’s own approval, especially after a rejection, is not sufficient. Wicked Weed applied for and received approval from the ABC for its sour beer, “Lost Toys,” in 2016 and 2017. *See* North Carolina Alcoholic Beverage Control Commission Minutes (Dec. 12, 2018) at VI, attached as **Exhibit 7**. Each year, Wicked Weed did change its label slightly, but the subject remained the same – an illustration of a teddy bear and toys, a play on the beer’s consistency of a hodge-podge of leftover barrels of beer. After two consecutive years of approving the “Lost Toys” label, the ABC decided that teddy bear and toys elements on the label were no longer acceptable and revoked Wicked Weed’s approval. Like the “Lost Toys” label, the ABC could conclude that Flying Dog’s Freezin’ Season label is acceptable today but change its mind tomorrow.

2.2.2 The Case is not Moot as to the Individual Defendants

What happened here is that in the short time that the ABC spent analyzing this issue, it was so obvious to them that the regulation and its application violated the First Amendment that they knew that there would be no defense to the claims, so they quickly reversed themselves to try and evade judicial review. This action lights up the marquee announcing the claims against the commissioners in their individual capacities – it shows that no reasonable commissioner would have supported the use of the regulation at issue.

Accordingly, even if the case were moot as to the ABC, it is not moot as to the commissioners in their individual capacities. *See Flying Dog Brewery, LLLP v. Mich. Liquor Control Comm’n*, 597 F. App’x 342, 355 (6th Cir. 2015) (reversing a grant of qualified immunity in an identical case and noting that by 2009, there was a clear line of Supreme Court commercial speech precedent as well as multiple

Circuit decisions that “*should have placed any reasonable state liquor commissioner on notice that banning a beer label based on its content would violate the First Amendment unless the Central Hudson test was satisfied.*”) Of course, even without this clarity, the commissioners could have even been willfully blind as to the law that the Sixth Circuit found to be crystal clear by 2009 – as they clearly had to reference their own regulation. That regulation is annotated with a reference to a decision, *Daniel W. Shelton t/a Shelton Broers v. NC Alcoholic Beverage Control Commission* (99 ABC 1641), attached as **Exhibit 8**. That decision recommends that the Commission “reconsider the constitutionality of a regulation creating an absolute blanket prohibition on any nudity of any type on beer bottle labels, without regard to whether that nudity is obscene.” *Id.*

2.3 There remains a substantial likelihood of success on the merits

The Defendants’ backup argument is that the motion should be denied due to a lack of likelihood of success on the merits, with the primary argument being that there is, in their opinion, no First Amendment violation because it is commercial speech and the label had to be rejected in order to further the “*clear state interest in limiting children’s exposure to images of this kind*” (Def’t Brief, Dkt. No. 17 at 4). The ABC cites to *Central Hudson Gas & Electric Corp. v. Public Serv. Comm’n of N. Y.*, 447 U.S. 557 (1980) for the proposition that there is a lesser protection to commercial speech, but does not explain why this should be deemed to be commercial speech at all.

The Supreme Court defines commercial speech as speech that “propose[s] a commercial transaction.” *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). This analysis might be applicable to an *advertisement* for the Plaintiff’s beer, but the label itself is artistic expression. Nothing in the label itself “proposes a commercial transaction,” and the regulation itself does not discuss commercial transactions. It simply discusses depictions of the use of alcoholic beverages. 14B NCAC 15B.10034(2). On the other hand, sub-sections 14B NCAC 15B.10034(3) and (4) appear to deal with advertising, thus they might be properly reviewed under the *Central Hudson* test, but not subsection 2.

Even if the Court were to review the regulation under this lower level of scrutiny, the regulation would fail. The *Central Hudson* test requires that a regulation meet a three-part test:

- 1) The government must have a substantial interest.
- 2) The regulation must directly and materially advance the government’s substantial interest.
- 3) The regulation must be narrowly tailored.

See Central Hudson, 425 U.S. at 564. None of the above are met.

There is no “substantial” interest, nor even a rational one in a regulation that requires beer labels to be “dignified” or “modest” or in “good taste.” And there is no loss of First Amendment protections merely because the expression happens to be stuck to a bottle of beer. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (states have a right to regulate alcohol sales, but this does not diminish their obligation to respect the First Amendment when doing so).

The newly-made-up interest in the ABC’s briefing is that there is a “clear state interest” in protecting children from seeing images of genitals. A review of the label would leave an ordinary observer to even wonder what is depicted there at all, is it even human? If it is human, or humanoid, is there depiction of a humanoid penis on it at all? But, assuming, *arguendo* that there is a *conceptual* or *schematic* “penis” on the label hardly throws it into the category of “sexually explicit” art. Further, if children are shopping for beer, there are societal failures that will not be remedied by the censorship of a very abstract, at best, depiction of what could be a penis, could be a tail, or could be nothing at all.

The regulation does not advance the government’s claimed interest in protecting children from images of dangly-things that *might be* conceptual and abstract depictions of penises. Further, even the ABC itself has, in *Shelton v. ABC*, *supra*, already been asked to “*reconsider the constitutionality of a regulation creating an absolute blanket prohibition on any nudity of any type on beer bottle labels, without regard to whether that nudity is obscene.*” There is no such determination here.

As far as narrow tailoring, the regulation does nothing to advance the single rationale that the ABC has put forth – that the regulation is necessary to protect children from sexually explicit content. In fact, the regulation does not even mention children, nor sexually explicit content.

2.4 Irreparable Harm and the Balance of the Equities

The ABC argues that there is no irreparable harm because the 11th hour reversal and approval, done to try to evade judicial review of the unconstitutional regulation, now limits any harm at all. As

discussed above, there is nothing prohibiting the ABC from simply re-reversing itself. The *Wicked Weed* decision shows that the ABC thinks nothing of approving a label on one day, and then in a later batch of beer, revoking the approval due to some inexplicable reason.

Further, the issue here is not simply the financial damages from losing beer sales. If Flying Dog simply wanted to sell beer, it could change the label, and sell the beer – or sell beer with a generic label. But, the decision to enlist Ralph Steadman as the artist of choice for Flying Dog was not simply because he draws pretty pictures. Flying Dog uses its beer to distribute its expression, not its expression to sell beer. *See* Caruso Declaration, Dkt. No. 5-1, at ¶¶ 13-14.

Finally, the equities are not as the ABC cynically states – balancing the state’s interest in “protecting the children from explicit content” versus Flying Dog’s ability to sell beer. (ECF 17 at 5).

3.0 Conclusion

The ABC’s last-minute concession does not change the posture of Flying Dog’s request for relief, and Flying Dog remains entitled to a preliminary injunction.

Dated: September 8, 2021.

Respectfully Submitted,

/s/ Marc J. Randazza
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 8, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I further certify that a true and correct copy of the foregoing document being served via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Marc J. Randazza
Marc J. Randazza

RANDAZZA | LEGAL GROUP

EXHIBIT 6

Declaration of
William Michael Boyer

*NC ABC Commission Meeting Minutes 2013-2021
Appeals and Decisions for Label/Product Disapprovals*

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA**

FLYING DOG BREWERY, LLC,
Plaintiff,

Case No. 5:21-cv-00343

v.

Judge Terrence W. Boyle

**THE NORTH CAROLINA ALCOHOLIC
BEVERAGE CONTROL COMMISSION,
ALEXANDER D. “ZANDER” GUY JR.,
NORMAN A. MITCHELL SR., KAREN L.
STOUT, and TERRANCE L.
MERRIWEATHER**
Defendant(s).

DECLARATION OF WILLIAM MICHAEL BOYER

Pursuant to 28 U.S.C. § 1746, I, William M. Boyer, hereby declares as follows:

1. I am an attorney duly licensed to practice in the State North Carolina and before this Court. I am a managing attorney in the law firm of Boyer Legal, PLLC, which represents Flying Dog Brewery, LLC in this action. I have personal knowledge of the facts stated in this declaration and am competent to testify thereon.
2. This declaration is submitted in support of the instant Plaintiff’s Reply Brief in support of the Motion for Preliminary Injunction.
3. The information relevant to the underlying filing and made pursuant to this declaration is included here as Exhibit A.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 8th Day of September, 2021

/s/ W. Michael Boyer /s/
William Michael Boyer, Esq.

EXHIBIT A

NC ABC Commission Meeting Minutes 2013-2021
Appeals and Decisions for Label/Product Disapprovals

Calendar Year	Commission Meeting Date	Label/Product Approval Appeal Information
2013	No Label/Product Appeals	N/A
2014	December 10, 2014	<ul style="list-style-type: none"> ● “Appeal Staff Disapproval of Malt Beverage Product” <ul style="list-style-type: none"> ○ <u>Importer</u>: Irokos Group, LLC (Boston, MA) ○ <u>Manufacturer</u>: Breuvages Blue Spike, Inc. Montreal, Quebec ○ <u>Disapproved Products</u>: (MOJO – 1.7 OZ., 11.9% ABV) (11.6 OZ., 7.0% ABV) (26 OZ, 11.9% ABV) ○ <u>Code Provision cited</u>: 04 NCAC 02S .0101(4) and 04 NCAC 02S .1005(a) ○ <u>Appeal Disposition</u>: Product Disapproval Upheld
2015	No Label/Product Appeals	N/A
2016	No Label/Product Appeals	N/A
2017	No Label/Product Appeals	N/A
2018	December 12, 2018	<ul style="list-style-type: none"> ● “Appeal of Label Disapproval” <ul style="list-style-type: none"> ○ <u>Manufacturer</u>: Wicked Weed Brewing Company, LLC (Asheville, NC) ○ <u>Disapproved Label</u>: Lost Toys Blend 3 ○ <u>Code Provision Cited</u>: 14B NCAC 15B .1003(a)(4) ○ <u>Appeal Disposition</u>: Label Disapproval Upheld
2019	July 10, 2019	<ul style="list-style-type: none"> ● Moved - Label Rejection Appeal - Hello Kitty (Wine) ● Moved - Label Rejection Appeal – Polygamy (Beer)
	August 14, 2019	<ul style="list-style-type: none"> ● “Label Rejection Appeal” <ul style="list-style-type: none"> ○ <u>Manufacturer</u>: Wasatch Brewery (Salt Lake City, UT) ○ <u>Disapproved Label</u>: Polygamy Beer ○ <u>Code Provision Cited</u>: 14B NCAC 15B .1003(a)(2) ○ <u>Appeal Disposition</u>: Label Disapproval Upheld
	September 11, 2019	<ul style="list-style-type: none"> ● “Label Rejection Appeal” <ul style="list-style-type: none"> ○ <u>Manufacturer</u>: Deutsch Family Wine and Spirits (Stamford, CT) ○ <u>Disapproved Label</u>: Hello Kitty Wine ○ <u>Code Provision Cited</u>: 14B NCAC 15B .1003(a)(4)

		<ul style="list-style-type: none"> ○ <u>Appeal Disposition</u>: Label Disapproval Upheld
2020	No Label/Product Appeals	N/A
2021	February 10, 2021	<ul style="list-style-type: none"> ● Moved - Label Rejection Appeal - Fuck 2020 (Seltzer)
	March 10, 2021	<ul style="list-style-type: none"> ● “Review of Product Registration Denial” <ul style="list-style-type: none"> ○ <u>Manufacturer</u>: Sycamore Brewing, LLC (Charlotte, NC) ○ <u>Disapproved Label</u>: FUCK 2020 ○ <u>Code Provision Cited</u>: 14B NCAC 15B .1003 (a)(2) ○ <u>Appeal Disposition</u>: Label Disapproval Upheld

Total Number (#) of Label/Product Denials*	318
Total Number (#) of Appeals Heard Before Commission	5
Total Number (#) of Label/Product Denials Overturned	0

* This number represents the total number of label/product registration denials viewable on the North Carolina Alcoholic Beverage Control Commission’s Website. There is no specification given as to range of calendar years included. However, the total number (#) of appeals heard, and the total number (#) of denials overturned are indeed manual observations/surveys based on published Monthly Commission Meeting minutes spanning from the calendar year 2013 through July 14, 2021. The picture below is a screenshot taken from the North Carolina Alcohol Beverage Control Commission Website showing the total number of relevant search results, as well as a small cross-section of the total results for “Disapproved” products.

https://abc.nc.gov/Search/ProductSearch

ABC
COMMISSION
NORTH CAROLINA

[About](#) [Contact](#) [ABC Stores](#) [Site Map](#) [Media](#)

Product Search

Search Results (1 - 318 of 318)

Brand	Origin	Product	Fanciful Name	Class	Status
Ushers	England	1824 Particular Ale		Ale	Disapproved
Boonshine	NC	5506 Ale		Ale	Disapproved
St Paul	Belgium	Abbey Ale Triple		Ale	Disapproved
Reverend Nats	USA	Abbey Spice Hard Cid...		Cider	Disapproved
Cambas	Greece	Agiorgitiko Nemea Dr...	Reserve	Red	Disapproved
Rotola	Italy	Aglianico Sannio	Acini Di Strapizzo	Red	Disapproved
Artevelde	Belgium	Ale		Ale	Disapproved
Moorhouses	England	Ale	Blond Bitch	Ale	Disapproved
James Squire	Australia	Ale	Australian Best	Ale	Disapproved
Magic Hat	USA	Ale	Odd Notion	Ale	Disapproved
Hatchet Brewing	NC	Ale	MILF Cream	Ale	Disapproved

EXHIBIT 7

North Carolina
Alcoholic Beverage Control
Commission Minutes

December 12, 2018

(emphasis added)

**NORTH CAROLINA ALCOHOLIC BEVERAGE CONTROL
COMMISSION MINUTES
DECEMBER 12, 2018**

The following narrative summarizes the North Carolina Alcoholic Beverage Control Commission Meeting held at 400 East Tryon Road in Raleigh, North Carolina on December 12, 2018, beginning at 10:00 AM. The meeting was recorded and the disc is on file at the NC ABC Commission within the Legal Division.

ROLL CALL

Chairman A.D. Zander Guy, Jr. welcomed those in attendance and stated he wished to recognize the ABC Commission's employees and subcontractors. Chairman Guy added he, as well as, Commissioner Norman A. Mitchell, Sr. and the ABC Commission would not be able to accomplish all they do without the employees. Chairman Guy also welcomed the industry members in attendance. Chairman Guy wished everyone a safe and happy holiday season.

Chairman Guy called the Commission Meeting to order.

MINUTES OF THE NOVEMBER 14, 2018 COMMISSION MEETING

Chairman Guy asked for a motion to waive the reading of the minutes of the November 14, 2018 meeting into the record. Commissioner Mitchell made a motion to waive the reading of the minutes. Chairman Guy seconded the motion. Motion Passed.

Chairman Guy asked for a motion to approve the minutes of the November 14, 2018 meeting. Commissioner Mitchell made a motion to approve the minutes. Chairman Guy seconded the motion. Motion Passed.

CONFLICTS OF INTEREST

As required by N.C.G.S. § 138A-35, Chairman Guy asked if there were any conflicts of interest or any conditions or facts which might create the appearance of a conflict of interest with respect to any matters on the agenda. Commissioner Mitchell stated he reviewed the agenda and found no conflicts of interest. Chairman Guy stated he found no conflicts of interest.

I. CONTESTED CASES AND OFFERS IN COMPROMISE – 68

Chief Counsel Renee C. Metz requested case number 66 be removed from the agenda. Mrs. Metz explained the permittee had withdrawn the signed Offer in Compromise, as they had hired an attorney and wished to renegotiate the penalty.

Chairman Guy made a motion to remove case number 66 from the agenda to be heard at a later time. Commissioner Mitchell seconded the motion. Motion Passed.

Mrs. Metz stated case number 1, Ambience Special Event Center, was a contested case and no one was present on behalf of the permittee. Mrs. Metz stated this was Assistant Counsel Rachel Spears' case and was for failure to file audit reports. The permittee failed to respond to the Administrative Law Judge's orders to file a prehearing statement and the judge issued a sanctions order, which imposed a cancellation of the permittee's ABC mixed beverages permit.

Mrs. Metz requested the cancellation date to be January 11, 2019 to concur with the suspension dates for the businesses on the agenda.

Chairman Guy made a motion to uphold the Administrative Law Judge's decision of a cancellation of the mixed beverage permit. Commissioner Mitchell seconded the motion. Motion Passed.

Chairman Guy welcomed Mike Fox, the attorney for the Greensboro ABC Board and the Chairman of the NC Board of Transportation.

As no one was present regarding a case, Mrs. Metz asked the Commission to ratify the remaining Offers in Compromise.

Chairman Guy made a motion to ratify the Offers in Compromise. Commissioner Mitchell seconded the motion. Motion Passed.

II. ABC STORE LOCATION – DAVIDSON COUNTY ABC BOARD

Administrator Agnes C. Stevens stated three ABC Boards had requested approval from the NC ABC Commission to open new stores.

Ms. Stevens explained on November 2, 2018, the NC ABC Commission received a request from the Davidson County ABC Board, requesting approval to lease property to open and operate an ABC Store at 12201 North NC Hwy 150 in Davidson County, North Carolina. Audit Investigator Edwin Strickland corresponded with General Manager Kenneth Meredith. Ms. Stevens stated the proposed location would be the first ABC Store for the Davidson County ABC Board.

Ms. Stevens stated it was confirmed the property is zoned Highway Commercial and allows for an ABC Store. There are no personal or financial interests shared between the property owner and the Davidson County ABC Board members. Ms. Stevens stated the proposed site is a 4200 SF suite.

Ms. Stevens added the nearest school, located at 905 Friedberg Church Road, is approximately .3 miles or 1584 feet from the proposed location. The nearest church, Holy Trinity Full Gospel Fellowship Center, is approximately .2 miles or 1056 feet from the proposed location.

Ms. Stevens explained the nearest ABC Store is located at 3188 Peters Creek Parkway in Winston Salem, North Carolina, approximately 3.5 miles from the proposed location and is operated by the Triad Municipal ABC Board.

Ms. Stevens stated notice to the public was properly posted on November 1, 2018 and witnessed by Mr. Strickland on November 7, 2018. Ms. Stevens stated, as of November 21, 2018, the Davidson County ABC Board received one voicemail message from an unknown caller, stating the new store should be

located across the street in a vacant building, not in the shopping center. The NC ABC Commission received the same message via email.

Ms. Stevens stated staff recommended approval of the proposed location.

Chairman Guy asked if anyone was present to speak regarding the proposed location. As no one was present, Commissioner Mitchell made a motion to approve the proposed location upon staff recommendation. Chairman Guy seconded the motion. Motion Passed.

III. ABC STORE LOCATION – GREENSBORO ABC BOARD

Ms. Stevens stated on November 5, 2018, the Greensboro ABC Board requested approval to purchase property to open and operate an ABC Store at 500 Hickory Branch Road in Greensboro, North Carolina. Ms. Stevens stated Audit Investigator Edwin Strickland provided the investigation report.

Ms. Stevens explained the proposed store will replace an existing store located approximately .3 miles away. Ms. Stevens stated the property was zoned appropriately and allows for an ABC Store. Ms. Stevens added there are no personal or financial interests shared between the property owner and the Greensboro ABC Board members.

The Greensboro ABC Board plans to construct a 4500 SF building. Ms. Stevens stated the nearest traditional school, Southwest Guilford Elementary, is located approximately 2.5 miles away. Ms. Stevens explained the Experiential School of Greensboro is temporarily located approximately .4 miles away and will be relocated in early 2019. Additionally, New Horizons Computer Learning Center is located approximately 1 mile away. The nearest church, The Church on 68, is located approximately .4 miles away. Ms. Stevens stated the nearest ABC Store, located at 500 Americhase in Greensboro approximately .3 miles away, will be closed upon the opening of the new store. The two next closest stores are each located approximately 2.9 miles away from the proposed store and are operated by the High Point ABC Board.

Ms. Stevens stated the notice to the public was properly posted at the location on November 1, 2018 and as of November 20, 2018, no objections or concerns have been received by the Greensboro ABC Board. Ms. Stevens stated staff recommended approval of the proposed location.

As no one was present regarding the proposed location, Commissioner Mitchell made a motion to approve the proposed location upon staff recommendation. Chairman Guy seconded the motion. Motion Passed.

Chairman Guy again recognized Mike Fox of the Greensboro ABC Board. Mr. Fox stated the Board believes the proposed location to be a great site in a highly commercial area. Mr. Fox added the new store will be a dramatic upgrade over the existing store. Mr. Fox also thanked the ABC Commission for their support.

IV. ABC STORE LOCATION – MECKLENBURG COUNTY ABC BOARD

Ms. Stevens stated on October 29, 2018, the Mecklenburg County ABC Board requested approval to lease property to open and operate an ABC Store at 4035 Connection Point Blvd in Charlotte, North Carolina. Audit Investigator Edwin Strickland received the information used in the report from Mecklenburg County ABC Board CFO Mike Tully.

Ms. Stevens explained the proposed store will replace the existing store located approximately 2 miles away at 7212 East Independence Boulevard in Charlotte, North Carolina, as it will be closing due to a NC DOT highway expansion. The proposed location will open in the first quarter of 2020 to coincide with the closing of the existing store.

Ms. Stevens explained the property is zoned properly to allow for an ABC Store. Ms. Stevens added there are no personal or financial interests shared between the property owners and the Mecklenburg County ABC Board members.

Ms. Stevens stated the nearest school, McClintock Middle School, is located approximately .8 miles away at 1925 Rama Road. Ms. Stevens explained the two nearest churches are each located approximately .4 miles away. Charlotte the Truth Buddhist is located at 5909 Monroe Road and Kingdom Hall of Jehovah's Witness is located at 5980 Monroe Road. Ms. Stevens stated the current nearest ABC Store, located approximately 1.9 miles away at 7212 East Independence Boulevard in Charlotte, North Carolina, will be closed in 2020 due to the planned NCDOT expansion. The next closest ABC Store is located at 6400 Albemarle Road in Charlotte, North Carolina, approximately 2.9 miles away. Ms. Stevens added both stores are operated by the Mecklenburg County ABC Board.

Ms. Stevens stated the required sign announcing the ABC Board's intention to open an ABC Store was properly posted on October 25, 2018 and witnessed by Mr. Strickland on November 8, 2018. Ms. Stevens stated no objections have been received and added staff recommends approval of the store.

As no one was present to speak to the Commission, Chairman Guy made a motion to approve the proposed location upon staff recommendation. Commissioner Mitchell seconded the motion. Motion Passed.

Ms. Stevens added members of the Davidson County ABC Board, Lorie Clemment and Sherry Piotti were present. They expressed their appreciation to the Commission and stated they were excited to open the first ABC Store for the Davidson County ABC Board.

V. EXEMPTION REQUEST PURSUANT TO G.S. § 18B-1116(b) – APOTHECARY BEVERAGE COMPANY, INC. d/b/a THE CHEMIST; ANTIDOTE, INC. d/b/a ANTIDOTE; DEBRA SHENTON WORD

Mrs. Metz explained The Chemist, a distillery located in Asheville, North Carolina, is 85% owned by Debra Word. Ms. Word is the 100% owner of Antidote, a private club also located in Asheville. Mrs. Metz stated The Chemist opened in June 2018 and produces gin, bierbrand, and apple brandy with approximately 900 barrels produced to date. Mrs. Metz stated the day-to-day operational decisions of Antidote are made by Jonathan David Burritt, the General Manager, who has no financial interest in either corporation.

Mrs. Metz explained, as spirituous liquor must be purchased through the local ABC Board, the exemption is necessary to allow Ms. Word to have ownership interest in both a retailer and a producer. Mrs. Metz added the percentage of The Chemist's product sold at the Antidote would be a small percentage of the products they intend to sell. Mrs. Metz stated staff recommends approval of the exemption request based on the conditions set forth in the petition.

As no one was present to speak regarding the exemption request, Commissioner Mitchell made a motion to follow staff's recommendation and approve the exemption request. Chairman Guy seconded the motion. Motion Passed.

VI. APPEAL OF LABEL DISAPPROVAL – WICKED WEED BREWING COMPANY, LLC

Mrs. Metz summarized, explaining staff reviews requests for product label approval and any questions which might arise are first reviewed by Tami Clifton, director of the Permit and Product Compliance Division. Then, if necessary, Mrs. Metz would review them in the Legal Division. Additionally, Administrator Agnes Stevens would have the ultimate approval or denial of the label.

Mrs. Metz stated a variety of conditions are required by Federal Statutes and Federal Regulations, as well as NC Regulations, regarding what should be prohibited in advertising and on alcohol labels. Mrs. Metz explained a label for a Wicked Weed product, which was very similar to labels approved by a previous administrator, was disapproved by Ms. Stevens after it was presented to her. Mrs. Metz stated Chris Browning, an attorney with Troutman Sanders, was present on behalf of his client, Wicked Weed Brewing.

Ms. Stevens explained the label was a version of a prior label which had been approved by a previous administrator and the Commission. Ms. Stevens stated she had reviewed the label upon the request of staff and it was rejected as there were public health concerns. Ms. Stevens stated the teddy bear and toys depicted on the proposed label might appeal to or confuse children; therefore, the label was not acceptable. Ms. Stevens explained she made the decision regarding the label based upon her authority.

Mr. Browning explained in 2016 and 2017, Wicked Weed produced a unique sour beer, Lost Toys. He stated the product was created from miscellaneous barrels the brewery had accumulated during the year; experimental runs, partial barrels, or products which needed to age to become viable. The barrels were placed in a back corner of the warehouse which the brewmaster referred to as the Island of Misfit Toys. Mr. Browning stated, in 2006[sic], the miscellaneous barrels were first blended and became a unique sour brew.

Mr. Browning provided examples of the labels stating they had previously been approved by the ABC Commission, as well as, the TTB and other states in which labels were submitted and the product was sold. Mr. Browning explained the first label was submitted to the ABC Commission and approved in 2016 for Lost Toys Blend #1. In 2017, the product label for Lost Toys Blend #2 which was slightly different was submitted and approved. Mr. Browning also provided an example of the Lost Toys Blend #3 which was submitted in 2018 and rejected by the NC ABC Commission. Mr. Browning stated this label had been approved by the TTB and in ten other states.

Mr. Browning stated Ms. Stevens rejected the label because she believed it appealed to children. Mr. Browning stated the standard in NC Rule 14B 15B .1003 was a label or advertising should not promote or encourage use by those under 21 years of age, including the representation portraying a person under the age of 21 consuming alcoholic beverages. Mr. Browning added the test should not be whether the label appeals to children and if it were, the NC ABC Commission would be striking labels with cute animals, turtles, butterflies, etc. Mr. Browning again stated the test is whether the label encourages underage drinking and this label does not do that. Mr. Browning stated this was not the case when the previous labels were approved by the Commission, the TTB and other states.

Mr. Browning stated the products are produced from miscellaneous barrels which have been blended into something new and this is reflected in the artwork and the label. Mr. Browning stated the Lost Toys

products have limited points of sale. The products are sold in the Wicked Weed retail shops and high-end bottle shops, not convenience stores or grocery stores. Mr. Browning explained the product is a high-end product and the cost is \$16.00 per bottle of beer. Mr. Browning added the product would not appeal to teenagers or 20 year-olds and it does not promote consumption by people under 21. Mr. Browning stated teenagers would not be encouraged to buy the product because labels with toys would not impress their friends. Mr. Browning stated as far as he was aware, the sale of Lost Toys products to teenagers has never been a problem for Wicked Weed. Mr. Browning stated they are not aware of any minor ever attempting to buy a bottle of Lost Toys or any teenager even wanting a bottle of Lost Toys beer. Mr. Browning stated there is zero reason to believe the label would somehow promote or encourage the sale to or the use by persons under 21 years of age.

Mr. Browning explained failure to approve the label by the ABC Commission, would substantially harm Wicked Weed, as the product has already been brewed and labeled. He added, if the product cannot be sold in North Carolina, his client estimates the damage to Wicked Weed in lost sales would be \$41,000.00. Mr. Browning stated Wicked Weed was acting in good faith based upon the approval of the 2016 and 2017 labels. Mr. Browning added, if the label had not been disapproved, the bottles would now be in stores as they would have been distributed in November as a seasonable beer. Mr. Brown explained \$1.00 from the sale of every bottle was donated to a North Carolina charity in the Asheville region. He added, if the product cannot be sold in North Carolina, it is damaging to Wicked Weed's reputation.

Mr. Browning stated there were First Amendment concerns regarding rejecting the label simply because it was appealing. Mr. Browning provided a copy of the application for approval which was denied by the Commission and the TTB approval of the label and asked the Commission to approve the label.

Chairman Guy asked Mrs. Metz for her comments. Mrs. Metz stated, regarding the First Amendment, there has been tension between the states' right to regulate and commerce's national rights to advertise. Mrs. Metz explained in the advertising rule, reference is made to the Federal Code and what TTB does to approve and disapprove. TTB rules are not concerned with sales to underage persons or if the label is enticing to them; but only consider if the labels are disparaging to their competition, misrepresent content, use names of countries or flags, etc. Mrs. Metz added, the TTB approval is not subjective and some states do not have a label approval process.

Mrs. Metz acknowledged changes in approval may occur; because a label was previously approved, does not mean the administrator must approve it now. Mrs. Metz stated it is possible to put Wicked Weed on notice and allow the sale of the bottled inventory with the understanding the label could not be used in the future. Mrs. Metz explained, as defined in the authoritative statute 18B-100, it is one of the missions of the ABC Commission to protect the public health, safety and welfare. Mrs. Metz stated protection of public health, safety and welfare is subjective. Mrs. Metz added, because there are so many brewers, they attempt to be different to attract attention to their products. Mrs. Metz explained there are many questions and concerns; and, a decision made by a prior administrator does not mean the Commission cannot review it again. The intention is not to harm the industry members, but it is the responsibility of the ABC Commission to protect the public. Mrs. Metz acknowledged there is a definite tension in this country regarding constitutional rights and state rights regarding alcohol.

Commissioner Mitchell inquired if the label is in color. Mrs. Metz stated the provided example shows the actual label.

Ms. Stevens stated it was not disputed whether the Commission has the authority to make a decision regarding approval of a label. Ms. Stevens explained the issue of public health and safety is taken very seriously by this Commission, as shown by the resources and staff dedicated to the Initiative to Reduce Underage Drinking. Ms. Stevens stated a concern regarding this label is a ten year-old child could reach

into the refrigerator and choose a bottle of the product, as they could be easily confused by the toys on the label. Ms. Stevens stated the regulatory authority of the Commission both allows it and requires it to protect the child.

Mr. Browning provided a photograph of a bottle with the label applied. Mr. Browning stated if the depiction of building blocks is an issue, butterflies and turtles should also be removed. Mr. Browning stated the test for labels should not be appeal, but whether it promotes sales to or use by underage persons. He stated it is speculative to think a five year-old would grab a pint-sized bottle of beer. Mr. Browning added parents would store the beer safely. Mr. Browning asked again to allow the labeled bottles in the warehouse to be sold and a new label would be submitted for approval earlier next year.

After conferring with Commissioner Mitchell, Chairman Guy stated as a businessman he understands the issue; however, as an appointed public servant, he has a responsibility to the public welfare and safety of young people. Commissioner Mitchell stated he had no questions and made a motion to deny the appeal as recommended by staff. Chairman Guy seconded the motion. Motion Passed.

Chairman Guy thanked the staff for their work regarding this matter.

VII. PUBLIC HEARING ON PROPOSED PERMANENT DEFINE SPORTS AND ENTERTAINMENT VENUES RULE – RULE 14B NCAC 15B .0101

Chairman Guy stated the public hearing on the permanent Define Sports and Entertainment Venues Rule proposed on September 12, 2018, for which notice of hearing was published October 15, 2018, was opened.

Chairman Guy recognized Walker Reagan, the rules coordinator, to provide an overview. Mr. Reagan provided drafts of the proposed rules to the Commission and explained, on September 12, 2018, the ABC Commission proposed the permanent Define Sports and Entertainment Venues Rule. The proposed rule, the notice of public hearing and notice of public written comment period were filed with the Office of Administrative Hearings on that same date and were published in the NC Register on October 15, 2018. Mr. Reagan stated copies were posted on the Commission website and emailed to the ABC Commission rulemaking committee on September 19, 2018.

Mr. Reagan stated the public hearing was properly noticed for December 12, 2018 and the public comment period would be open through December 14, 2018. Mr. Reagan explained the statutory time period after publication for the public hearing and comment period had been complied with. Mr. Reagan stated no written comments have been received since the proposed rule was published. Mr. Reagan explained, as the public comment period runs through December 14, 2018, the Commission could not consider the adoption of the rule during the December meeting, but would be able to do so at its January 2019 meeting.

Chairman Guy asked if there was anyone present who wished to address the Commission regarding the proposed rule. As no one was present, Chairman Guy closed the public hearing.

VIII. PUBLIC HEARING ON PROPOSED PERMANENT DESTROY DISTRESSED LIQUOR AMENDMENTS RULES – RULES 14B NCAC 15A .1603; .1604; .1701

Chairman Guy stated the public hearing on the permanent Destroy Distressed Liquor Amendments Rules proposed on September 12, 2018, for which notice of hearing was published October 15, 2018, was opened.

Mr. Reagan provided drafts of the proposed rules to the Commission and explained, on September 12, 2018, the ABC Commission proposed the permanent Destroy Distressed Liquor Amendments Rules. The proposed rules, the notice of public hearing and notice of public written comment period were filed with the Office of Administrative Hearings on that same date and were published in the NC Register on October 15, 2018. Mr. Reagan stated copies were posted on the Commission website and emailed to the ABC Commission rulemaking committee on September 19, 2018.

Mr. Reagan stated the public hearing was properly noticed for December 12, 2018 and the public comment period would be open through December 14, 2018. Mr. Reagan explained the statutory time period after publication for the public hearing and comment period had been complied with. Mr. Reagan stated no written comments have been received since the proposed rules were published. Mr. Reagan explained, as the public comment period runs through December 14, 2018, the Commission could not consider the adoption of the rules during the December meeting, but would be able to do so at its January 2019 meeting.

Chairman Guy asked if there was anyone present who wished to address the Commission regarding the proposed rule change. As no one was present, Chairman Guy closed the public hearing.

IX. PUBLIC HEARING ON PROPOSED PERMANENT SPIRITUOUS LIQUOR SPECIAL EVENT PERMIT RULES – RULES 14B NCAC 15C .0101; .0102; .0901; AND .1301-1306

Chairman Guy stated the public hearing on the permanent Spirituous Liquor Special Event Permit Rules proposed on September 12, 2018, for which notice of hearing was published October 15, 2018, was opened.

Mr. Reagan provided drafts of the proposed rules to the Commission and explained, on September 12, 2018, the ABC Commission proposed the permanent Spirituous Liquor Special Event Permit Rules. The proposed rules, the notice of public hearing and notice of public written comment period were filed with the Office of Administrative Hearings on that same date and were published in the NC Register on October 15, 2018. Mr. Reagan stated copies were posted on the Commission website and emailed to the ABC Commission rulemaking committee on September 19, 2018.

Mr. Reagan stated the public hearing was properly noticed for December 12, 2018 and the public comment period would be open through December 14, 2018. Mr. Reagan explained the statutory time period after publication for the public hearing and comment period had been complied with. Mr. Reagan stated no written comments have been received since the proposed rules were published. Mr. Reagan explained, as the public comment period runs through December 14, 2018, the Commission could not consider the adoption of the rules during the December meeting, but would be able to do so at its January 2019 meeting.

Chairman Guy asked if there was anyone present who wished to address the Commission regarding the proposed rule. As no one was present, Chairman Guy closed the public hearing.

**X. PUBLIC HEARING ON PROPOSED PERMANENT TAX STAMP PLACEMENT RULE
– RULE 14B NCAC 15A .1901**

Chairman Guy stated the public hearing on the permanent Tax Stamp Placement Rule proposed on September 12, 2018, for which notice of hearing was published October 15, 2018, was opened.

Mr. Reagan provided drafts of the proposed rules to the Commission and explained, on September 12, 2018, the ABC Commission proposed the permanent Tax Stamp Placement Rule. The proposed rule, the notice of public hearing and notice of public written comment period were filed with the Office of Administrative Hearings on that same date and were published in the NC Register on October 15, 2018. Mr. Reagan stated copies were posted on the Commission website and emailed to the ABC Commission rulemaking committee on September 19, 2018.

Mr. Reagan stated the public hearing was properly noticed for December 12, 2018 and the public comment period would be open through December 14, 2018. Mr. Reagan explained the statutory time period after publication for the public hearing and comment period had been complied with. Mr. Reagan stated no written comments have been received since the proposed rule was published. Mr. Reagan explained, as the public comment period runs through December 14, 2018, the Commission could not consider the adoption of the rules during the December meeting, but would be able to do so at its January 2019 meeting.

Chairman Guy asked if there was anyone present who wished to address the Commission regarding the proposed rule. As no one was present, Chairman Guy closed the public hearing.

**XI. PUBLIC HEARING ON PROPOSED PERMANENT VISIBLE INDOOR ADVERTISING
IN SPORTS ARENAS RULE – RULE 14B NCAC 15B .1006**

Chairman Guy stated the public hearing on the permanent Visible Indoor Advertising in Sports Arenas Rule proposed on September 12, 2018, for which notice of hearing was published October 15, 2018, was opened.

Mr. Reagan provided drafts of the proposed rules to the Commission and explained, on September 12, 2018, the ABC Commission proposed the permanent Visible Indoor Advertising in Sports Arenas Rule. The proposed rule, the notice of public hearing and notice of public written comment period were filed with the Office of Administrative Hearings on that same date and were published in the NC Register on October 15, 2018. Mr. Reagan stated copies were posted on the Commission website and emailed to the ABC Commission rulemaking committee on September 19, 2018.

Mr. Reagan stated the public hearing was properly noticed for December 12, 2018 and the public comment period would be open through December 14, 2018. Mr. Reagan explained the statutory time period after publication for the public hearing and comment period had been complied with. Mr. Reagan stated no written comments have been received since the proposed rule was published. Mr. Reagan explained, as the public comment period runs through December 14, 2018, the Commission could not consider the adoption of the rules during the December meeting, but would be able to do so at its January 2019 meeting.

Chairman Guy asked if there was anyone present who wished to address the Commission regarding the proposed rule. As no one was present, Chairman Guy closed the public hearing.

XII. CONSIDERATION OF ADOPTION OF PERMANENT CHANGE TO ABC COMMISSION WEBSITE ADDRESS RULE – 14B NCAC 15A .0102

Chairman Guy stated the matter before the Commission is the consideration of the amendment of Rule 14B NCAC 15A .0102 to correct the ABC Commission’s website address.

Mr. Reagan explained, in June the Commission adopted a technical amendment to the rule to correct the email address used by the Commission. Mr. Reagan requested the Commission additionally adopt the amendment to 14B NCAC 15A .0102 to correct the ABC Commission’s website address. Mr. Reagan explained, because this is a technical correction and not a policy or substantive change, it is not required to go through the full rule-making process. Mr. Reagan requested the Commission direct the amended rule be filed with the Office of Administrative Hearings and if approved, include it in the Administrative Code. Mr. Reagan stated staff recommended the Commission adopt the amendment to 14B NCAC 15A .0102; direct it to be filed with the Office of Administrative Hearings; and, authorize staff to make any non-substantive changes to the proposed rule as needed.

Commissioner Mitchell made a motion to amend Rule 14B NCAC 15A .0102 to correct the ABC Commission’s website address as presented and the recommendations of staff regarding the rule. Chairman Guy seconded the motion. Motion Passed.

As no one else was present to address the Commission, Chairman Guy thanked those in attendance and also thanked the ABC Commission staff for their hard work. Chairman Guy wished everyone Happy Holidays and a Merry Christmas. And with no further business, the meeting was adjourned by Chairman Guy.

Approved at the January 16, 2019 Commission Meeting

/S/ A.D. “Zander” Guy, Jr.
A.D. “Zander” Guy, Jr., Chairman
N.C. Alcoholic Beverage Control Commission

Respectfully submitted by,

/S/ Caroline Y. Washburn
Caroline Y. Washburn for the Legal Section

EXHIBIT 8

Daniel W. Shelton t/a Shelton Broers v.
N.C. Alcoholic Beverage Control Commission

99 ABC 1641

August 31, 2000

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
99 ABC 1641

DANIEL W. SHELTON)
T/A SHELTON BROERS)
Petitioner,)
v.)
N.C.ALCOHOLIC BEVERAGE)
CONTROL COMMISSION)
Respondent.)

RECOMMENDED DECISION

THIS MATTER came on for a hearing on 25 April 2000 on the Petitioner’s timely filed Petition for a Contested Case Hearing. At the hearing, the Petitioner was represented by counsel, John Keating Wiles, and the Respondent was represented by counsel, Timothy W. Morse. Having considered and deliberated upon the parties’ timely filed Prehearing Statements, the Petitioner’s Substitute Hearing Brief, the testimonial and documentary evidence presented at the hearing, the arguments of counsel, and the additional briefing submitted by counsel pursuant to this Office’s request, this matter is ripe for a recommended decision, and this Office makes the following Findings of Fact, Conclusions of Law, and Recommended Decision to the Respondent agency, the North Carolina Alcoholic Beverage Control Commission:

ISSUES

- 1. Whether the regulation under which Respondent disapproved Petitioner’s beer labels on grounds of depiction of the nude human form exceeds the statutory authority of the Respondent.
- 2. Whether the regulation under which Respondent disapproved Petitioner’s beer labels on grounds of depiction of the nude human form is reasonably necessary to enable the agency to fulfill a duty delegated to it by the General Assembly.
- 3. Whether the Respondent should approve Petitioner’s labels under 4 NCAC 25 .1004(c).

FINDINGS OF FACT

- 1. On 24 September 1999, the Petitioner, Daniel W. Shelton, d/b/a Shelton Broers, submitted two Label/Product Applications to the Respondent, North Carolina Alcoholic Beverage Control Commission (ABC Commission). See Attachments to the Petitioner’s Petition for a Contested Case Hearing, filed 30 November 1999.
- 2. One Application was for the label on the Petitioner’s product, Cantillon Rosé de Gambrinus, and the other application was for the label on the Petitioner’s product Cantillon Gueuze Lambic. See Exhibits A and B, attached to the Respondent’s Prehearing Statement, filed 5 January 2000.
- 3. The Cantillon Rosé de Gambrinus label was admitted into evidence at the hearing and identified as Petitioner’s Exhibit 1-A. T. pp. 7, 27.
- 4. The Cantillon Gueuze Lambic label was admitted into evidence at the hearing and identified as Petitioner’s Exhibit 1-B. T. pp. 7, 27.
- 5. The Cantillon Rosé de Gambrinus label includes drawings of a male figure, clothed in armor and seated with a nude female figure seated on his lap. The female figure has a light raspberry color and holds what appears to be a drinking vessel. The male figure, wearing heavy gloves, is clasping the female figure around her rib cage and lower right arm. The drawing also includes leafy figures surrounding the male and female figures, and the following writing appears on the label, beneath the name of the product (Rosé de Gambrinus): “BLENDED LAMBIC BEER BREWED WITH RASPBERRIES.” T. pp. 13 (Testimony of R. Bailey), 15 (Testimony of D. Alley); Petitioner’s Exhibit 1-A.
- 6. The Cantillon Gueuze label includes a drawing of a young boy, standing on a pedestal or platform, holding his penis with his left hand and urinating. With his right hand, the figure is holding what appears to be a full drinking vessel, and the figure is without clothing. The label also includes writing which, among other things, indicates that the product, a “PRODUCT OF BELGIUM,” is “BREWED AND BOTTLED BY BRASSERIE CANTILLON 1070 BRUXELLES.” T. p. 16 (Testimony of D. Alley); Petitioner’s Exhibit 1-B.

7. This Office takes official notice of the fact that Bruxelles is the French name of the Belgian city known in English as Brussels. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, 287 (1986).
8. On 8 October 1999, the ABC Commission disapproved both applications, citing NCAC 02S.1005(a)(3) in both instances. *See* Exhibits A and B, attached to the Respondent's Prehearing Statement, filed 5 January 2000.
9. On labels which the ABC Commission is authorized to regulate by the General Assembly, the Commission's regulations at 4 NCAC 02S.1005(a)(3) prohibit "any statement, design, device or representation which depicts nudity or is obscene or indecent."
10. One of the well-known features of the city of Brussels, Belgium, is the Mannekin-Pis Fountain (1619), noted for a small bronze statue of a boy urinating and known to the people of Brussels as their "oldest citizen." T. pp. 5-6; Joint Stipulation, ¶ 1.
11. Gambrinus is reputed to have been a medieval Belgian duke who invented beer. T. p. 6; Joint Stipulation, ¶ 2.
12. Expert opinion testimony was received at the hearing from Dr. Rebecca Bailey, Head of the Art Department at Meredith College, who testified as an expert witness in the field of art and community attitudes towards artistic expression. T. pp. 10-11.
13. Dr. Bailey's testimony is helpful to this Office acting as a finder of fact.
14. Dr. Rebecca Bailey testified as to Exhibit 1A that "there are numerous examples of women like this in art history and they are usually personifications, and they personify usually love, beauty, grace, or often nature. And I think that since this is a beer made with raspberries and if you look at her raspberry color, I think she's actually a personification of the harvest in this case rather than a real person; a goddess in other words, a goddess of the harvest." Although it is an original work, the nude female figure depicted on the Cantillon Rosé de Gambrinus label is derivative. Tr. 13.
15. Since the Cantillon Rosé de Gambrinus product is a beer made with raspberries and the nude female figure depicted on that product's label has a raspberry color, she can be construed as a personification of the harvest rather than a real person, or in other words, a goddess of the harvest. T. p. 13 (Testimony of R. Bailey).
16. Since Gambrinus is reputed to have been a medieval Belgian duke credited with inventing beer, and the male figure depicted on the Cantillon Rosé de Gambrinus label is clothed in armor, this Office finds that the Cantillon Rosé de Gambrinus label, taken as a whole, portrays a goddess of the harvest in the lap of the medieval figure credited with inventing beer, and the label thereby invokes the product's heritage and lineage.
17. Other than holding the drinking vessel containing beer, the Cantillon Gueuze Lambic label, which depicts the little boy urinating, is a recognizably close copy of the Manneken-Pis statute located in Brussels, Belgium. T. p. 12 (Testimony of R. Bailey).
18. Since the Manneken-Pis Fountain, with its statue of the little boy urinating, is a well-known feature of the city of Brussels, Belgium, where the Cantillon Gueuze Lambic product is brewed and bottled, and the depiction on the Cantillon Gueuze Lambic label is a recognizably close copy of the Brussels statue, this Office finds that the Cantillon Gueuze Lambic label, taken as a whole, portrays the Brussels origin of the Cantillon Gueuze Lambic beer, and the label thereby invokes the product's lineage and heritage.
19. The Commission rejected these labels solely and specifically because they depicted nudity under the dictionary definition. There was no finding that the labels were obscene. Tr. 16,17.
20. Both the Petitioner's expert in art and community attitudes toward artistic expression and the Respondent's Assistant Administrator (and only witness) testified that the illustrations on these labels do not appeal to the average North Carolinian's prurient interest in sex. Tr. 11, 13, 17.
21. Dr. Bailey testified that that sex is not the major issue with respect to the labels; beer is the major issue. T. p. 11 (Testimony of R. Bailey). This Office so finds.
22. This Office finds that, for an average person in North Carolina, neither of the Petitioner's labels appeals to the prurient interest in sex.

CONTESTED CASE DECISIONS

23. The labels that have disapproved by the Commission have been approved by the Federal agency in charge of such approvals for the Federal government. Tr. 19.
24. The labels that have been disapproved by the Commission are the labels used on these beers in Belgium, their place of origin. Pet. Exh. 2.
25. The only argument advanced by the Commission that disapproval of these labels is in the public interest is that persons, especially children, may be exposed to these labels against their will or inadvertently while the bottles are on grocery store shelves. Tr. 20-21.
26. No evidence was presented that viewing these labels would be harmful to children. The testimony of Dr. Bailey establishes that such depictions of women as found on Exhibit 1A occur frequently in classical art and the stipulations of the parties establish that the Mannekin Pis statue is on public display to adults and children in the ancient city of Brussels Belgium. The undersigned takes official notice of the fact that children visit art museums with their families and on class trips where they would be exposed to art that depicts nudity. This is considered by our society to be a wholesome and educational experience.
27. Copies of the Mannekin Pis statue are for sale at a garden shop in Wendell, N.C. Tr. 12. The undersigned takes official notice of the fact that copies of the Mannekin Pis statue are commonly available for use as back yard statuary.
28. Even assuming some interest in shielding children from these depictions, no grocery store need carry these beers. Approval of these labels only gives Petitioner the opportunity to try to market its beers. It is not tantamount to any requirement that any store stock the beer or that any person buy the beer.

CONCLUSIONS OF LAW

1. On the basis of the preceding Findings of Fact, this Office concludes that the parties are properly before it and this Office has jurisdiction of the subject matter and person.
2. The Commission has been delegated no specific power to prohibit—or allow—nudity on beer labels. The General Assembly has been completely silent on the subject.
3. For its authority for 04 NCAC 02s.1005, the Commission relies on its authority to “[p]rohibit or regulate any advertising of alcoholic beverages which is contrary to the public interest” and other even more general grants of authority (e.g., the power to make rules under §18B-206). Tr. 18-19.
4. Under the law of this State and this country, nudity does not necessarily equal obscenity. See e.g. *Shinall v. Worrell*, 319 F. Supp. 485 (D.N.C. 1970); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S. Ct. 2329 (1997).
5. It must be remembered that our courts have made clear that there is a public interest in the free and unfettered flow, not only of ideas, but also of commerce. See, e.g. *First National Bank of Boston v. Belotti*, 435 U.S. 765, 766, 98 S. Ct. 1407, 1415 (1978); *American Motors Corporation v. Peters*, 311 N.C. 311, 318, 317 S.E. 2d. 351, 357 (1984). It is not in the public interest to absolutely prohibit these labels and thereby impede the flow of ideas and commerce on no stronger grounds than have been put forward to justify such a prohibition.
6. This Office is not empowered to decide constitutional issues; rather, this power is vested exclusively in the Article III courts. See, e.g. *Meads v. North Carolina Department of Agriculture*, -- N.C. --- (No. 139A98, filed 31 December 1998). Though there may well be a serious Constitutional question as to the validity of this regulation, especially in light of *United States v. Playboy*, ___ U.S. ___, 2000 U.S. Lexis 3427 (May 22, 2000), the Constitutional questions must await appeal to the Superior Court.
7. If the particular rule which the ABC Commission has applied in this case, 4 NCAC 2S.1005(a)(3), exceeds the ABC Commission’s statutory authority, then this Office is empowered to declare such a rule void.
8. If the particular rule which the ABC Commission has applied in this case, 4 NCAC 2S.1005(a)(3), is not reasonably necessary to fulfill a duty delegated to it by the General Assembly, then this Office is empowered to declare it void. N.C. Gen. Stat. §150B-33(b)(9)(1999).
9. Though an agency is entitled to deference in its decisions, that deference is based upon the special expertise of the agency. There is no special expertise of the Commission in determining the public’s interest in being exposed or not exposed to nudity.

CONTESTED CASE DECISIONS

10. Though this Office is empowered to declare a rule void, that declaration is still a recommended decision, and the final decision will be made, ironically, by the agency that wrote the rule. *Fearrington v. University of North Carolina*, 126 N.C. App. 774, 487 S.E.2d 169 (1997). That final decision is appealable to Superior Court.
11. Because this Office finds that neither the constitutional nor the statutory claims need be reached if the Petitioner's labels were approved pursuant to 4 NCAC 2S.1004(c), this Office finds that recommending that the ABC Commission approve the Petitioner's labels pursuant to 4 NCAC 2S.1004(c) serves the prudential interest of not deciding questions which may be unnecessary to the resolution of dispute before it.

Based upon the foregoing Findings of Fact and Conclusions of Law the undersigned makes the following:

RECOMMENDED DECISION

1. It is recommended that the Commission reconsider the constitutionality of a regulation creating an absolute blanket prohibition on any nudity of any type on labels on beer bottle labels, without regard to whether that nudity is obscene.
2. It is the recommended decision of this Office that 4 NCAC 2S.1005(a)(3) is void as exceeding the statutory authority of the ABC.
3. It is the recommended decision of this Office that 4 NCAC 2S.1005(a)(3) is void because it is not reasonably necessary to enable the agency to fulfill a duty delegated to it by the General Assembly.
4. It is further the recommended decision of this Office that the Commission use its discretion under 4 NCAC 2S.1004(c), which authorizes the ABC Commission, "upon request and for good cause shown," to "authorize a form of advertising not specifically allowed or authorized by [the Commission's] rules," to approve these two labels and avoid the possibility of invalidation of its regulation.

ORDER

It is hereby ordered that the agency serve a copy of the final agency decision on the Office of Administrative Hearings, P. O. Drawer 27447, Raleigh, NC 27611-7447, in accordance with North Carolina General Statute 150B-36(b).

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. G.S. 150B-36(a).

The agency is required by G.S. 150B-36(b) to serve a copy of the final agency decision on all parties and to furnish a copy to the parties' attorney on record and to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the N.C. Alcoholic Beverage Control Commission.

This the 31st day of August, 2000.

James L. Conner, II
Administrative Law Judge