

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD  
OF THE STATE OF CALIFORNIA**

**AB-9748**

File: 20-510405; Reg: 18086527

SF MARKETS, LLC,  
dba Sprouts Farmers Market  
152 North 2<sup>nd</sup> Street,  
El Cajon, CA 92021,  
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: May 2, 2019  
Ontario, CA

**ISSUED MAY 16, 2019**

*Appearances:*      *Appellant:* Donna J. Hooper, of Solomon, Saltsman & Jamieson, as  
counsel for SF Markets, LLC,

*Respondent:* Alanna Ormiston, as counsel for the Department of  
Alcoholic Beverage Control.

**OPINION**

SF Markets, LLC, doing business as Sprouts Farmers Market, appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> suspending its license for 10 days because its clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

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<sup>1</sup> The decision of the Department, dated September 11, 2018, is set forth in the appendix.

## FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on June 13, 2011. There is no record of prior departmental discipline against the license.

On February 15, 2018, the Department filed a single-count accusation charging that appellant's clerk, Bridget Servin (the clerk), sold an alcoholic beverage to 18-year-old Kennedy Jere Nolta (the decoy) on September 23, 2017. Although not noted in the accusation, the decoy was working for the El Cajon Police Department (ECPD) at the time.

At the administrative hearing held on June 19, 2018, documentary evidence was received, and testimony concerning the sale was presented by the decoy, by ECPD Officer Robert Lesagonicz, and by Aruro Avila, appellant's store manager.

Testimony established that on September 23, 2017, the decoy entered the licensed premises, followed shortly thereafter by Officer Pallandino in plain clothes. The decoy was wearing an audio recording device, so that the officers could monitor her safety, and she carried a purse fitted with a hidden camera. The decoy proceeded to the beer section and selected a six-pack of Bud Light beer in 12-ounce bottles. She took the beer to the register, waited her turn, then presented the beer for purchase. The clerk scanned the beer and asked for the decoy's identification.

The decoy handed the clerk her California driver's license, which had a portrait orientation contained her correct date of birth, showing her to be 18 years of age. It also contained a red stripe indicating "AGE 21 IN 2010." The clerk looked at the ID, then entered something into the register — presumably a birthdate — in order to complete the transaction. The clerk did not ask the decoy any age-related questions. The decoy exited the premises with the beer, then went to the vehicle where law

enforcement officers were waiting and told them what had occurred.

The decoy re-entered the premises with Officer Paladino and Officer Lesagonicz. She pointed out the clerk to the officers from a distance of approximately 10 to 15 feet. Paladino asked the clerk to step away from the register and explained the violation to her. The decoy then identified the clerk as the one who sold her the beer while standing next to her. A photograph of the decoy and clerk was taken, standing less than a foot apart (exh. D-3), and the clerk was issued a citation.

The administrative law judge (ALJ) issued his proposed decision on July 2, 2018, sustaining the accusation and recommending a 10-day suspension. The proposed decision was adopted by the Department on August 14, 2018, and a Certificate of Decision was issued on September 11, 2018.

Appellant then filed a timely appeal contending the record does not support a finding that the face-to-face identification of the clerk complied with rule 141(b)(5).<sup>2</sup>

#### DISCUSSION

Appellant contends that the ALJ's finding that a face-to-face identification took place, in compliance with rule 141(b)(5), is not supported by substantial evidence. (AOB at pp. 6-10.)

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the

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<sup>2</sup> References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

*(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)*

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision. *(Kirby v. Alcoholic Bev. Control Appeals Bd. (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; Harris v. Alcoholic Beverage Control Appeals Board (1963) 212 Cal.App.2d 106 [28 Cal.Rptr.74].)*

Therefore the issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; *Harris, supra*, at 114.)

Rule 141(b)(5) provides:

Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

This rule provides an affirmative defense. The burden is, therefore, on appellant to show non-compliance. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.) The rule requires “strict adherence.” (See *Acapulco Restaurants, Inc.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126] [finding that no attempt, reasonable or otherwise, was made to identify the clerk in that case].)

In *Chun* (1999) AB-7287, this Board made the following observation about the purpose of face-to-face identifications:

The phrase “face to face” means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

(*Id.* at p. 5.)

In *7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, the Board clarified application of the rule in cases where, as here, an officer initiates contact with the clerk following the sale:

As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer's contact with the clerk before the identification takes place causes the rule to be violated.

(*Id.* at pp. 7-8; see also *7-Eleven, Inc./Morales* (2014) AB-9312; *7-Eleven, Inc./Paintal Corp.* (2013) AB-9310; *7-Eleven, Inc./Dars Corp.* (2007) AB-8590; *West Coasts*

*Products LLC* (2005) AB-8270; *Chevron Stations, Inc.* (2004) AB-8187.)

The court of appeals has found compliance with rule 141(b)(5) even where police escorted a clerk outside the premises in order to complete the identification. (See *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Keller)* (2003) 109 Cal.App.4th 1687, 1697 [3 Cal.Rptr.3d 339] [finding that the rule leaves the location of the identification to the discretion of the peace officer].)

More recently, the court found rule 41(b)(5) was not violated when:

the decoy made a face-to-face identification by pointing out the clerk to the officer inside the store while approximately 10 feet from her, standing next to her when the officer informed her she had sold alcohol to a minor, and taking a photograph with her as the minor held the can of beer he purchased from her. She had ample opportunity to observe the minor and to object to any perceived misidentification. The rule requires identification, not confrontation.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (CVS)* (2017) 18 Cal.App.5th 541, 547 [226 Cal.Rptr.3d 527, 531].) The court explained that the exact moment of the identification could not be severed from the entire identification procedure, which included the decoy pointing out the clerk to the police, the decoy accompanying the police officer to the counter, the officer informing the clerk she had sold beer to the minor at his side, and the clerk and decoy being photographed together. (*Id.* at p. 532.) The court said. “The clerk in these circumstances certainly knew or reasonably ought to have known that she was being identified” because of the totality of the circumstances. (*Ibid.*)

The ALJ made the following findings on the face-to-face identification in this case:

9. Nolta exited the Licensed Premises with the six-pack of Bud Light beer. She walked to the vehicle where the law enforcement officers were waiting. Nolta arrived at the vehicle and told them what happened. Nolta

then reentered the Licensed Premises with the officers including Paladino and ECPD Officer Robert Lesagonicz (Lesagonicz). After entering, Nolta went with Lesagonicz to a deli area that was near the entrance and had a sight line to the registers where the clerk was working. Nolta saw the clerk still working at the register and pointed her out to the officers. The distance was about 10-15 feet when Nolta pointed out the clerk, The clerk was in the process of serving other customers at this time.

10. Paladino approached the clerk and had her step away from the register area. The officers and Nolta then congregated at a waiting area with the clerk. At one point during this interaction, Nolta identified the clerk as the seller while standing next to her. Subsequent to that identification, Nolta was then photographed standing next to the clerk while holding the beer she had been sold. (Exhibit D-3) The clerk was identified as Bridget Servin (Servin) during the investigation.

(Findings of Fact, ¶¶ 9-10.) Based on these findings, the ALJ reached the following conclusions:

6. However, there is no credible evidence supporting these assertions by the Respondent that there was a failure to comply with the requirements of either of these sections of rule 141. The Department's inquiry into the 141(b)(5) aspect of compliance was admittedly thin. However, sufficient facts were drawn out to establish that Servin was given an opportunity to learn that Nolta was the underage purchaser at issue, under circumstances that allowed Servin to object to any perceived misidentification. Nolta pointed out Servin in this matter to one of the officers after she reentered. The officer had Servin and Nolta stage in a waiting area in each other's immediate presence. Servin was clearly aware of the investigation and that she had been identified by Nolta. Paladino asked her to point out the seller and Nolta pointed to Servin while she was in her immediate presence. Nolta then stood next to Servin while Nolta held the beer that Servin had sold to her when the photograph was taken. Her close proximity gave Servin ample opportunity to be aware that Nolta was the underage purchaser at issue in this matter. This was clearly compliance with the requirement that Servin be made aware of the identity of the decoy at issue. <sup>[fn.]</sup> Neither the clerk nor any other witnesses for the Respondent testified to rebut the credible evidence presented by the Department that this was a fully compliant identification. (Findings of Fact ¶¶ 4-12.)

(Conclusions of Law, ¶ 6.)

Appellant contends the record does not support the ALJ's findings. We have reviewed the entire record, and while the ALJ is correct that the inquiry into whether

there was compliance with rule 141(b)(5) was a bit thin, it is not entirely non-existent as appellant maintains. Looking at the *entire identification procedure* — including the officers asking the decoy who sold her the beer, the decoy pointing out the clerk to the police from a distance of 10-15 feet, the clerk being informed of the violation as she is asked to come away from the register, and the clerk and decoy being photographed together with the decoy holding the beer — it seems clear that the clerk knew, or reasonably should have known, that she was being identified as the person who sold alcohol to a minor. That is all that is required. As in *CVS, supra*, the clerk here “had ample opportunity to observe the minor and to object to any perceived misidentification.” (*CVS, supra*, at p. 547.) As the Court said, “the rule requires identification, not confrontation.” (*Ibid.*)

As appellant itself points out (AOB at p. 9), it is permissible for the face-to-face identification to be done in pieces — as it was here — so long as the clerk knows or reasonably ought to know that she is being identified as the seller. The ALJ’s findings are supported by substantial evidence and the face-to-face identification in this matter fully complies with rule 141(b)(5). Having reached that conclusion, the Board is prohibited from reweighing the evidence or exercising its independent judgment to overturn the Department’s factual findings to reach a contrary, although perhaps equally reasonable, result. (*Masani, supra.*)

ORDER

The decision of the Department is affirmed.<sup>3</sup>

MEGAN McGUINNESS, ACTING CHAIR  
SUSAN A. BONILLA, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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<sup>3</sup> This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.

# APPENDIX

**BEFORE THE  
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL  
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION  
AGAINST:**

SF MARKETS LLC  
SPROUTS FARMERS MARKET  
152 N 2<sup>ND</sup> STREET  
EL CAJUN, CA 92021

OFF-SALE BEER AND WINE - LICENSE

Respondent(s)/Licensee(s)  
Under the Alcoholic Beverage Control Act

SAN DIEGO DISTRICT OFFICE

*AB-9748*  
File: 20-510405

Reg: 18086527

**CERTIFICATE OF DECISION**

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on August 14, 2018. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

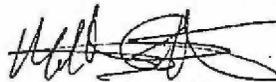
Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after October 22, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: September 11, 2018



Matthew D. Botting  
General Counsel

**BEFORE THE  
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL  
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:

SF Markets LLC	}	File: 20-510405
DBA Sprouts Farmers Market	}	
152 N 2 <sup>nd</sup> Street	}	Reg.: 18086527
El Cajon, California 92021	}	
	}	License Type: 20
Respondent	}	
	}	Word Count: 11,752
	}	
	}	Reporter:
	}	Brywn Whatford CSR# 14234
	}	Kennedy Court Reporting
	}	
<u>Off-Sale Beer and Wine License</u>	}	<b><u>PROPOSED DECISION</u></b>

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at San Diego, California on June 19, 2018 at 1:00 p.m.

John Nguyen, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Donna Hooper, Attorney, represented Respondent SF Markets LLC (Respondent).

The Department seeks to discipline the Respondent's license on the grounds that, on or about September 23, 2017 the Respondent, through their agent or employee, Bridget M. Servin, sold, furnished, or gave alcoholic beverages to Kennedy Jere Nolta, an individual under the age of 21 in violation of Business and Professions Code section 25658(a).<sup>1</sup> (Exhibit D-1)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on June 19, 2018.

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<sup>1</sup> All statutory references are to the Business and Professions Code unless otherwise noted.

## FINDINGS OF FACT

1. The Department filed the accusation on February 15, 2018. (Exhibit D-1)
2. On June 13, 2011 the Department issued a type 20, off-sale beer and wine license to the Respondent for the above-described location (the Licensed Premises).
3. The Respondent's license has no prior record of disciplinary action.
4. Kennedy Jere Nolta (Nolta) was born on May 28, 1999 and was 18 years old on the date the September 23, 2017 decoy operation was conducted. On that date, Nolta served as a minor decoy in an operation conducted by the El Cajon Police Department (ECPD) and the Department at a series of locations, including the Licensed Premises. Nolta became a volunteer decoy for ECPD after taking a one week teen academy with ECPD during the summer of 2017.
5. Nolta appeared and testified at the hearing. On September 23, 2017 her appearance was as depicted in a photograph that was taken that date. (Exhibit D-3) Nolta wore a blue and green striped t-shirt, blue khakis and beige Vans branded sneakers. She wore no hat and her straight hair was parted so that her face was fully exposed. Nolta wore no jewelry or makeup. She had no visible tattoos. Nolta was approximately 5 feet, five inches tall and 120 pounds on the date of the operation. She did not change her clothing or appearance during the decoy operation. Her appearance at the hearing was consistent with her appearance during the operation.
6. On September 23, 2017 Nolta prepared to enter the Licensed Premises to attempt to purchase an alcoholic beverage. Before going in, Nolta was fitted with a device that recorded audio of interactions in the Licensed Premises so that the ECPD officers could monitor her safety. She also wore a Juicy Couture branded purse with a camera hidden in it. ECPD Officer Paladino (Paladino) entered the Licensed Premises at approximately the same time as Nolta but they did not interact while she was inside.
7. Nolta entered the Licensed Premises through sliding doors. She noticed the cash register area to the left and proceeded past them to find the area of the supermarket where the beer was sold. She was not familiar with this store but was able to find the area where the beer was. She selected a six-pack of twelve ounce Bud Light beer bottles. Nolta then went to the register area and stood in one of the lines. She was behind two other customers while waiting. Shortly after finishing with the customer in front of her, Nolta was waited on by the female clerk at the register. Nolta presented the six-pack of Bud Light beer for purchase.

8. The clerk scanned the beer and then asked for Nolta's identification. Nolta gave her California driver's license to the clerk. (Exhibit D-2) The clerk appeared to enter her birth date into the register after she received Nolta's driver's license and looked at it. The clerk proceeded to ring up the beer and told Nolta the cost. She also gave Nolta her identification back. Nolta paid for the beer with the \$10 cash that was provided by ECPD. Nolta was given change, the beer purchase and a receipt. (Exhibit D-4) She then left without any other interaction with the clerk or any other employees of the Licensed Premises. At no point during the transaction did the clerk ask Nolta's age or any age related questions.

9. Nolta exited the Licensed Premises with the six-pack of Bud Light beer. She walked to the vehicle where the law enforcement officers were waiting. Nolta arrived at the vehicle and told them what happened. Nolta then reentered the Licensed Premises with the officers including Paladino and ECPD Officer Robert Lesagonicz (Lesagonicz). After entering, Nolta went with Lesagonicz to a deli area that was near the entrance and had a sight line to the registers where the clerk was working. Nolta saw the clerk still working at the register and pointed her out to the officers. The distance was about 10-15 feet when Nolta pointed out the clerk. The clerk was in the process of serving other customers at this time.

10. Paladino approached the clerk and had her step away from the register area. The officers and Nolta then congregated at a waiting area with the clerk. At one point during this interaction, Nolta identified the clerk as the seller while standing next to her. Subsequent to that identification, Nolta was then photographed standing next to the clerk while holding the beer she had been sold. (Exhibit D-3) The clerk was identified as Bridget Servin (Servin) during the investigation.

11. After the photo with Nolta and Servin was taken, Nolta was escorted back to the law enforcement vehicle the officers were using. Servin was cited. Servin did not testify in this matter to explain what led her to make the sale to Nolta even though she had examined Nolta's California driver's license that showed she was 18 years old. The identification also showed that she was under 21 by the red stripe warning and portrait orientation. (Exhibit D-2)

12. Nolta appeared her chronological age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of Servin at the Licensed Premises on September 23, 2017, Nolta displayed the appearance which would generally be expected of a person less than 21 years of age during her interactions with Servin. Servin did not testify in this matter to explain her age related impressions of

Nolta or why she sold Nolta alcohol after she saw a California Driver's License that clearly indicated Nolta was only 18 years old.

13. Arturo Avila (Avila) testified for the Respondent. He is a store manager for Sprouts Market at the Licensed Premises. He is familiar with the policies and procedures of the Licensed Premises and is actively involved in its operation. The Licensed Premises trained all employees regarding sales of alcohol prior to allowing them to work at registers. Servin had been trained and had prepared a clerks affidavit prior to the sale that was made to Nolta. Her training included the Sprouts Academy block of instruction. (Exhibit L-1) Servin was an employee at the Licensed Premises but she was terminated after the incident pursuant to the Licensed Premises' policy. Servin violated the existing policy that made selling alcohol to a person under 21 a terminable offense. This policy was in place prior to the incident in this matter.

14. The responsibility to prevent underage alcohol sales was regularly communicated to employees. After the incident with Nolta, all of the employees who sell age restricted products had to review the supporting materials in a clerk's affidavit and prepare an updated affidavit even though all new employees reviewed and prepared these upon hire. (Exhibit L-3)

15. Prior to the incident in this matter, the Respondent took other steps to try to prevent underage sales. At the time of the sale made by Servin, the Licensed Premises used a register system that activated during an alcohol sale. When an alcoholic beverage was scanned, the register would prompt the cashier to enter a date of birth. To do this, the policy was to obtain identification from the customer. Based on the receipt in this matter, it appears that Servin entered the year "1919" instead of the correct "1999" for Nolta's birth year. The month and day she entered from Nolta's identification were correct. (Exhibit D-4) Since Servin did not testify, it was unclear whether the entry was an error or an intentional act to allow the sale to occur.

16. The Respondent also continued utilizing a secret shopper program to test that clerks were following proper protocols in making alcohol sales. Further, the Respondent contracted with an outside provider to put its employees through an additional 2 hour block of instruction covering alcoholic beverage sales. (Exhibit L-2)

17. Except as set forth in this decision, all other allegations in the accusation and all other contentions by the parties lack merit.

## CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.
2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.
3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.
4. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on September 23, 2017 the Respondent's clerk, Bridget Servin, inside the Licensed Premises, sold an alcoholic beverage to Kennedy Jere Nolta, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 2-15)
5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141<sup>2</sup> and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondent argued that the face to face identification failed to comply with rule 141(b)(5) and that the decoy's appearance and demeanor did not comply with 141(b)(2). These violations, if established, would each be affirmative defenses.
6. However, there is no credible evidence supporting these assertions by the Respondent that there was a failure to comply with the requirements of either of these sections of rule 141. The Department's inquiry into the 141(b)(5) aspect of compliance was admittedly thin. However, sufficient facts were drawn out to establish that Servin was given an opportunity to learn that Nolta was the underage purchaser at issue, under circumstances that allowed Servin to object to any perceived misidentification. Nolta pointed out Servin in this matter to one of the officers after she reentered. The officer had Servin and Nolta stage in a waiting area in each other's immediate presence. Servin was clearly aware of the investigation and that she had been identified by Nolta. Paladino asked her to point out the seller and Nolta pointed to Servin while she was in her immediate presence. Nolta then stood next to Servin while Nolta held the beer that Servin had sold to her when the

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<sup>2</sup> All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

photograph was taken. Her close proximity gave Servin ample opportunity to be aware that Nolta was the underage purchaser at issue in this matter. This was clearly compliance with the requirement that Servin be made aware of the identity of the decoy at issue<sup>3</sup>. Neither the clerk nor any other witnesses for the Respondent testified to rebut the credible evidence presented by the Department that this was a fully compliant identification. (Findings of Fact ¶¶ 4-12)

7. Nolta testified in this matter and her appearance matched the appearance she presented to Servin on the date of the operation. Her appearance was consistent with a person under the age of 21. There were no unusually mature features in her physical appearance. She looked like a typical, 18 year old in every regard and her clothing was consistent with a person of that age. As previously noted, the clerk did not testify to establish whether there was anything in Nolta's manner or appearance that led Servin to reasonably conclude that she was over 21. The evidence of her demeanor being a factor was not established. The interaction between Nolta and Servin was minimal. Servin asked for her identification and she produced it. Servin did not testify to what led to the sale. Respondent has pointed to no other evidence supporting its position that Nolta's appearance and/or demeanor failed to comply with the requirements of 141(b)(2). Given the totality of the evidence presented by the Department credibly establishing compliance with rule 141(b), the Respondent's assertions that compliance did not occur are unsupported.

## PENALTY

The Department presented this matter as a straightforward violation with no discernable aggravation or mitigation. The standard penalty in this matter would be a 15 day suspension.

The Respondent did present credible evidence showing that established and enforced policies to prevent sales of alcoholic beverages to underage individuals were in place even prior to this incident and that further steps were taken after the sale to Nolta to prevent underage sales. The Respondent has a sustained history without a record of prior discipline. This history appears to be the product of an effort to comply rather than just luck. The Respondent communicated its seriousness to other employees by terminating

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<sup>3</sup> Clarification of what constituted a compliant face to face occurred in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2017) 18 Cal.App.5th 541. In finding that identification compliant, that court ruled, "[h]ere there is no violation of Rule 141, as explained above, because the decoy made a face-to-face identification by pointing out the clerk to the officer inside the store while approximately 10 feet from her, standing next to her when the officer informed her she had sold alcohol to a minor, and taking a photograph with her as the minor held the can of beer he purchased from her. She had ample opportunity to observe the minor and to object to any perceived misidentification. The rule requires identification, not confrontation. The identification here meets the letter and the spirit of Rule 141." *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2017) 18 Cal.App.5th 541,547

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Servin, having all employees go through new training and having them prepare new clerk's affidavits. The Respondent has made a legitimate effort to attempt to comply with the Act and limit errors that might lead to underage sales. All of the above are appropriate factors in mitigation to be weighed in this matter.

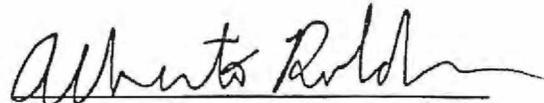
Blunting the significant mitigation in this matter are a few concerns. It is unclear whether Servin's sale to Nolta was an intentional deviation from the Respondent's policies or an error. It is unsettling that a large scale seller like the Respondent could have a system that allows either to easily occur. It is also problematic that, of the materials shared with this court regarding the Respondent's underage sales prevention efforts, none of the materials employees are taught with include training on the features of a portrait style California Driver's license. Had Servin been trained to use these features, she would have recognized that the sale was inappropriate without even having to enter a birthdate.

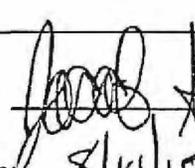
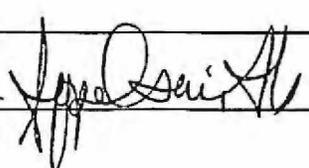
The penalty recommended herein complies with rule 144.

**ORDER**

The Respondents' off-sale beer and wine license is hereby suspended for a period of 10 days.

Dated: July 2, 2018

  
Alberto Roldan  
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By:  & 
Date: <u>8/14/18</u>