

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on April 22, 2016. There is no record of prior departmental discipline against the license.

On May 11, 2018, the Department filed a single-count accusation charging that appellant's clerk, Cezanne Owen (the clerk), sold an alcoholic beverage to 19-year-old Alexis Konstantinidis (the decoy) on January 12, 2018. Although not noted in the accusation, the decoy was working for the Rancho Cordova Police Department at the time.

An administrative hearing was initially set for August 21, 2018 before administrative law judge (ALJ) David W. Sakamoto. Evidence was presented by the Department that the decoy had been subpoenaed to appear, but that she was unable to attend because she was traveling out of state. The Department requested a continuance. The ALJ — finding that good cause existed for a continuance due to unavailability of a necessary witness — granted the continuance over appellant's objection.

A second administrative hearing was held on November 15, 2018 before ALJ Alberto Roldan and the decoy appeared at this hearing. Documentary evidence was received, and testimony concerning the sale was presented by the decoy and Officer Erik Petersen. Rodney Honrada, District Manager for the licensed premises, testified on behalf of appellant.

Testimony established that on January 12, 2018, the decoy entered the licensed premises and located the coolers where she selected a six-pack of 12-ounce bottles of McKenzie's Hard Cider. (Exh. D-2.) The decoy wore a device which allowed the officers to monitor live audio for her safety. The decoy took the six-pack to the register

and waited in line. When it was her turn, the decoy presented the six-pack to the clerk and they exchanged pleasantries. The clerk asked the decoy for her identification and 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 19 years of age), and had a red stripe indicating "AGE 21 IN 2019." (Exh. D-3.) The clerk looked at the license and entered something into the register then completed the sale without asking any age-related questions. The decoy later made a face-to-face identification of the clerk and a photograph of the decoy and clerk was taken (exh. D-4). The underlying facts of the decoy operation are not at issue in this appeal.

The ALJ submitted his proposed decision on November 16, 2018, sustaining the accusation and recommending a 10-day suspension. The Department adopted the proposed decision in its entirety on January 7, 2019 and issued its Certificate of Decision on January 10, 2019.

Appellant then filed a timely appeal contending the ALJ improperly granted a continuance.

DISCUSSION

Appellant contends that the ALJ failed to proceed in a manner required by law when he continued the original hearing without requiring evidence of good cause for a continuance and without requiring proof that the decoy had been properly served with the subpoena. Accordingly, it contends the decision should be reversed. (AOB at pp. 5-10.)

Government Code section 11524, subdivision (a), vests an administrative law judge with authority to grant a continuance upon a showing of "good cause."

In exercising the power to grant continuances in an administrative proceeding, an administrative law judge must be guided by the same principles applicable to continuances generally in adjudicative settings: continuances should be granted sparingly, nay grudgingly, and then only on a proper and adequate showing of good cause. In general, a continuance for a short and certain time is less objectionable than a continuance for a long and uncertain time, and there must be a substantial showing of necessity to support a continuance into the indefinite future. But the factors that influence the granting or denying of a continuance in any particular case are so varied that the judge must necessarily exercise a broad discretion. Since it is impossible to foresee or predict all of the vicissitudes that may occur in the course of a contested proceeding, the determination of a request for a continuance must be based upon the facts and circumstances of the case as they exist at the time of the determination.

(*Arnett v. Office of Admin. Hearings* (1996) 49 Cal.App.4th 332, 343 [56 Cal.Rptr.2d 774].)

The “broad discretion” of the ALJ has been noted to be very broad indeed: Witkin, the leading text writer on California law, has succinctly assessed the discretion as follows:

The factors which influence the granting or denying of a continuance in any particular case are so varied that the trial judge must necessarily exercise a broad discretion. On an appeal from the judgment . . . **it is practically impossible to show reversible error in the granting of a continuance.**

(*Taylor v. Bell* (1971) 21 Cal.App.3d 1002, 1007 [98 Cal.Rptr. 855], citing 4 Witkin, *Cal. Procedure* (2d ed. 1971) Trial, § 7, p. 2865, emphasis added.)

In addition to the “good cause” determination of Government Code section 11524(a), minor decoy hearings are governed by Business and Professions Code section 25666 which provides:

(a) In any hearing on an accusation charging a licensee with a violation of Sections 25658, 25663, and 25665, the department shall produce the alleged minor for examination at the hearing unless he or she is unavailable as a witness because he or she is dead or unable to attend the hearing because of a then-existing physical or mental illness or

infirmity, or unless the licensee has waived, in writing, the appearance of the minor. When a minor is absent because of a then-existing physical or mental illness or infirmity, a reasonable continuance shall be granted to allow for the appearance of the minor if the administrative law judge finds that it is reasonably likely that the minor can be produced within a reasonable amount of time.

(b) (1) Nothing in this section shall prevent the department from taking testimony of the minor as provided in Section 11511 of the Government Code.

(2) This section is not intended to preclude the continuance of a hearing because of the unavailability of a minor for any other reason pursuant to Section 11524 of the Government Code.

(Cal. Bus. & Prof. Code, §25666, emphasis added.)

As explained in an unpublished Court of Appeal decision,² subdivision (b)(2) was added to section 25666 — effective January 1, 2016 — to clarify that sections 25666 and 11524 are not mutually exclusive, but are to be read as working in harmony. The case went on to explain that the amendment to section 25666 did not change the law, but merely clarified what had been the law all along — namely, that the specific reasons for a continuance enumerated in section 25666 did not foreclose other reasons for continuance granted under the penumbra of “good cause” in section 11524.

Although we cannot cite an unpublished opinion as authority, nor rely upon it as precedent, such a case can be used to explain the current state of the law, which is that Government Code section 11524 provides that a continuance may be granted at the decision maker’s discretion, upon a showing of good cause, *in addition to* Business and Professions Code section 25666 requiring that a continuance be granted in specified circumstances, or when the decoy is available.

²*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. & Circle K Stores, Inc.*, 2016 Cal. App. Unpub. LEXIS 5866, (Cal.App.4th Dist., Aug. 8, 2016), which annulled the Board’s decision in *Circle K* (2015) AB-9490 and reinstated the Department’s decision.

Appellant maintains the matter should be reversed for failure of the Department to produce evidence that the decoy was properly subpoenaed. It maintains that Government Code section 11450.20, subdivision (b), requires such proof. That section states, in pertinent part:

A party requesting a continuance based upon the failure of a witness to appear at the time and place required for the appearance or testimony pursuant to a subpoena, **shall prove that the party has complied with this section**. The continuance shall only be granted for a period of time that would allow personal service of the subpoena and in no event longer than that allowed by law.

(Gov. Code § 11450.20(b), emphasis added.) It appears from the record that sufficient evidence was presented to ALJ Sakamoto that the decoy was properly subpoenaed.

(RT I, at pp. 6-9.)

In the decision, ALJ Roldan makes no findings in regard to the continuance granted by ALJ Sakamoto. Case law and past experience instructs us that an ALJ has broad discretion to grant a continuance. When, as here, the decoy was subpoenaed at the police department from which the decoy operation was conducted, but failed to receive notice of the subpoena because she was out of town, and, when a brief continuance of less than three months makes it possible for her to appear and testify, as she is required to do by section 25666, a continuance seems reasonable. This appears to be the quintessential definition of the “good cause” required by section 11524.³

³The Board would note, however, that it has observed that when counsel for the Department requests a continuance it seems always to be granted, whereas requests by Respondents’ counsel are less likely to be favorably received. We believe participants in the Department’s administrative process could benefit greatly from some guidance from the Department on what constitutes “good cause” for a continuance.

Appellant has not demonstrated how the ALJ's granting of the continuance in this case constitutes an abuse of discretion.⁴

ORDER

The decision of the Department is affirmed.⁵

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

⁴Likewise, even if the ALJ abused his discretion, appellant has not shown how it was prejudiced by this continuance.

⁵This 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 ACUSATION
AGAINST:**

99 CENTS ONLY STORES, LLC
99 CENTS ONLY STORE #160
2868 ZINFANDEL DRIVE
RANCHO CORDOVA, CA 95670

OFF-SALE BEER AND WINE - LICENSE

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

SACRAMENTO DISTRICT OFFICE

File: 20-552783

Reg: 18086918

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 January 7, 2019. 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 February 20, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: January 10, 2019



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

99 Cents Only Stores, LLC
DBA 99 Cents Only Store #160
2868 Zinfandel Drive
Rancho Cordova, CA 95670

Respondent

Off-Sale Beer and Wine License

} File: 20-552783

} Reg.: 18086918

} License Type: 20

} Word Count: 17,146

} Reporter:

} Brittany Ann Flores-CSR# 13460
} California Reporting

} **PROPOSED DECISION**

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Sacramento, California on November 15, 2018.

Matthew Gaughan, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Donna Hooper, Attorney, represented Respondent 99 Cents Only Stores, LLC (Respondent).

The Department seeks to discipline the Respondent's license on the grounds that, on or about January 12, 2018 the Respondent's agent or employee, Cezanne Owen, sold, furnished, or gave an alcoholic beverage, to wit: a malt beverage, to Alexis Nicole Konstantinidis, an individual under the age of 21 in violation of Business and Professions Code section 25658(a).¹ (Exhibit D-1)

Oral evidence and documentary evidence was received at the hearing. The matter was argued and submitted for decision on November 15, 2018.

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

FINDINGS OF FACT

1. The Department filed the accusation on May 11, 2018. (Exhibit D-1)
2. On April 22, 2016 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. Alexis Nicole Konstantinidis (Konstantinidis) was born on March 16, 1999 and was 19 years old on January 12, 2018. On this date, Konstantinidis participated in a decoy operation that was conducted by the Rancho Cordova Police Department (RCPD) at the Licensed Premises. Konstantinidis became a volunteer decoy for RCPD after a family member asked her to volunteer. She had volunteered for one decoy operation prior to this one.
5. On January 12, 2018 she appeared as depicted in a photograph that was taken that date. (Exhibit D-4) Konstantinidis wore a plum colored, long-sleeved sweatshirt, blue jeans, and black sneakers. Her straight hair was parted so that her face was fully exposed. Konstantinidis wore no visible jewelry or makeup other than possibly mascara. Konstantinidis wore black-framed, prescription glasses with clear lenses. She had no visible tattoos. Konstantinidis was approximately 5 feet, five inches tall and 110 pounds on the date of the operation. Her appearance when she testified at the hearing was consistent with her appearance during the operation with the exception of wearing contact lenses and dressing more formally.
6. On January 12, 2018 just prior to 6:30 in the evening, Konstantinidis was instructed to enter the Licensed Premises and attempt to purchase an alcoholic beverage. Before going in, Konstantinidis was fitted with a device that transmitted live audio of her interactions in the Licensed Premises so that the RCPD officers could monitor her safety. Konstantinidis then entered the Licensed Premises and searched for where the alcoholic beverages were sold. She located a cooler and selected a six-pack of twelve ounce McKenzie's Hard Cider bottles. (Exhibit D-2) Konstantinidis then went to one of the registers and waited her turn. Konstantinidis was waited on by a female clerk. Konstantinidis presented the six-pack of McKenzie's Hard Cider bottles for purchase. This was the only item that Konstantinidis presented to buy.
7. Konstantinidis and the clerk briefly exchanged pleasantries. After the clerk scanned the six-pack, she asked Konstantinidis for her identification. Konstantinidis handed her California driver's license to the clerk. (Exhibit D-3) The clerk looked at the license and appeared to enter information into the register after she received it from Konstantinidis.

The clerk then proceeded to ring up the six-pack and told Konstantinidis the cost. She also gave Konstantinidis her identification back. Konstantinidis paid for the six-pack with cash. She was then given change and the six-pack. Konstantinidis left without any further interaction with the clerk. At no point during the transaction did the clerk ask Konstantinidis her age or any age related questions.

8. Konstantinidis exited the Licensed Premises with the six-pack of McKenzie's Hard Cider bottles and walked to where the law enforcement officers were waiting. The officers documented the six-pack purchased by Konstantinidis to confirm that it was an alcoholic beverage. They determined that it was a hard cider that was 8% alcohol by volume. (Exhibit D-5) Konstantinidis initially waited at the vehicle with RCPD Officer Jose De La Cruz (De La Cruz) while RCPD Officer Erik Petersen (Petersen) and other officers from the operation were directed to the clerk by De La Cruz.

9. Petersen entered the Licensed Premises and made contact with the clerk. She was later identified as Cezanne Owen (Owen). Petersen was in plain clothes but was wearing a tactical belt that had police gear and his badge affixed to it. In addition, he was wearing a tactical vest that had "POLICE" in letters across the front. The other officers with him were dressed in the same manner. Petersen explained their purpose and detained Owen. Peterson then had Owen walk with him outside of the front door of the Licensed Premises so that Konstantinidis could see her.

10. Konstantinidis approached the area where Petersen was standing with Owen. She stood approximately 10 feet away from Owen. Konstantinidis saw that Owen was the person at the register who had sold her the six-pack. After she was asked about the seller by one of the officers, Konstantinidis identified Owen by looking at her and saying "That's the lady that sold me the alcohol." Subsequent to this identification, Konstantinidis was then photographed standing next to Owen while holding the six-pack she had been sold. The area where the identification and the photograph took place was well lit. (Exhibit D-4)

11. After the photo with Konstantinidis and Owen was taken, Owen was taken to a back office by the officers to avoid disrupting the business taking place at the Licensed Premises. One of the store managers joined Petersen, Owen and the other officers. Owen spoke with Petersen about the transaction. She admitted to making the sale but represented that she had done everything "by the book" in reference to the sales transaction.

12. Petersen then had the manager process a transaction for an alcohol purchase so he could learn how the register system worked. The manager scanned an alcoholic beverage which triggered a screen prompt that required an age to be entered. Konstantinidis' age

was entered into the system prompt. After this age was entered, the screen flashed a warning that said "AGE REQUIREMENT NOT MET." (Exhibit D-6) Had this prompt come up during the actual transaction, it would have prevented the alcohol sale from being completed. Owen did not testify in this matter to explain what led her to make the sale to Konstantinidis even though she had examined Konstantinidis' California driver's license that showed she was 19 years old. The identification also showed that she was under 21 by the red stripe warning and portrait orientation. (Exhibit D-2) Since Owen did not testify, it was unclear whether the entry that was made during the sale to Konstantinidis was an erroneous date or an intentionally wrong date that would allow the sale to occur.

13. Konstantinidis 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 Owen at the Licensed Premises on January 12, 2018, Konstantinidis displayed an appearance which would generally be expected of a person less than 21 years of age during her interactions with Owen.

14. Rodney Honrada (Honrada) testified for the Respondent. He is the district manager for the corporate district that includes the Licensed Premises. He is familiar with the policies and procedures of the Respondent's stores and is involved in their operation. The Licensed Premises required the training of all employees regarding sales of alcohol prior to allowing them to work at registers. The training was done through an online module that then required the employee to pass a test at the conclusion of the module. (Exhibit L-1) The module included training on California's use of portrait oriented identifications to identify underage persons. The Respondent also required all persons purchasing alcohol to be carded regardless of their age. Owen would have received this training prior to the sale that was made to Konstantinidis.

15. Owen was an employee at the Licensed Premises but she was terminated after the sale pursuant to the Respondent's policy. This policy was in place prior to the incident in this matter. Honrada established that the Respondent kept ongoing records at each location to ensure that employees were up to date on their training. (Exhibit L-2) The responsibility to prevent underage alcohol sales was also communicated to employees in sessions like their daily huddles where managers would review and enforce various policies.

16. 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. Section 23004 provides that "alcoholic beverage" includes alcohol, spirits, liquor, wine, beer, and every liquid or solid containing alcohol, spirits, wine, or beer, and which contains one-half of 1 percent or more of alcohol by volume and which is fit for beverage purposes either alone or when diluted, mixed, or combined with other substances.
5. 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 January 12, 2018 the Respondent's clerk, Cezanne Owen, inside the Licensed Premises, sold a six-pack of McKenzie's Hard Cider bottles, an alcoholic beverage as defined by section 23004, to Alexis Nicole Konstantinidis, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 2-13)
6. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141² 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.
7. However, there is no credible evidence supporting either of these assertions by the Respondent. Regarding compliance with rule 141(b)(5), the Department established that Owen was given an opportunity to learn that Konstantinidis was the underage purchaser at issue, under circumstances that allowed Owen to object to any perceived misidentification. Konstantinidis identified Owen from 10 feet away and announced that

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

Owen was the seller. Owen was already aware of the investigation because Petersen had informed her why she was being detained and had walked her out of the Licensed Premises for the face-to-face to occur. As a result, Owen had a reason to pay attention when the identification occurred. Konstantinidis then stood next to Owen and held the six-pack that Owen had sold to her when the photograph was taken. Her close proximity gave Owen ample opportunity to be aware that Konstantinidis was the underage purchaser at issue in this matter. This was clearly compliance with the requirement that Owen be made aware of the identity of the decoy at issue³. 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. Owen raised no concerns after the identification when she talked of the sale itself. (Findings of Fact ¶¶ 4-13)

8. Regarding the challenge that the decoy's appearance and demeanor did not comply with 141(b)(2), Konstantinidis testified in this matter and her appearance matched the appearance she presented to Owen on the date of the operation. Her appearance then and at the hearing was consistent with a person under the age of 21. There were no unusually mature features in her physical appearance. She looked consistent with a 19 year old in her personal appearance. In addition, her clothing was consistent with a person of that age. (Findings of Fact ¶¶ 4-13)

9. As previously noted, Owen did not testify to establish whether there was anything in Konstantinidis' manner or appearance that led Owen to reasonably conclude that she was over 21. The evidence of her demeanor being a factor was not established. The small talk interaction between Konstantinidis and Owen was minimal. Owen then asked for her identification and Konstantinidis produced it. Owen did not testify to what led to the sale. Respondent has not pointed to evidence supporting its conclusion that Konstantinidis' 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 both of these prongs of rule 141(b), the Respondent's assertions that compliance did not occur are unsupported.

³ 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

PENALTY

The Department presented this matter as a straightforward violation with no discernable aggravation. The Department also argued against mitigation even though the Respondent had no prior violations because of the short period of licensure. The standard penalty in this matter would be a 15 day suspension.

The Respondent did present credible evidence showing that it had policies and procedures to prevent sales of alcoholic beverages to underage individuals that were in place prior to this incident. The Respondent also required that all purchasers of alcohol produce identification and the Respondent used a register that compelled cashiers to enter in date of birth information for every alcohol purchase.

It is unclear whether Owen's sale to Konstantinidis was an intentional deviation from the Respondent's policies or an error. The Respondent communicated its seriousness regarding its alcohol sales policies and the responsibility of employees to avoid errors or intentional acts by terminating Owen. 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.

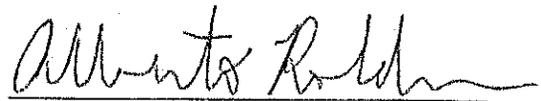
The penalty recommended herein complies with rule 144.

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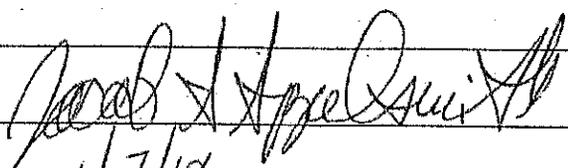
ORDER

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

Dated: November 16, 2018



Alberto Roldan
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: 11/7/18