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

AB-9953
File: 05-534943; Reg: 21091357

MOET HENNESSEY USA, INC.,
1333 North California Boulevard, Suite 455
Walnut Creek, CA 94596,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto

Appeals Board Hearing: January 20, 2023
Telephonic

ISSUED JANUARY 23, 2023

Appearances: *Appellant:* Carrie L. Bonnington, of Pillsbury, Winthrop, Shaw, and Pittman, LLC, as counsel for Moet Hennessey USA, Inc.,

Respondent: Patrice Huber, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Moet Hennessey USA, Inc. (MHUSA / Appellant), appeals from a decision of the Department of Alcoholic Beverage Control (Department)[1] suspending its license for 15 days (with all 15 days stayed for a period of one year, provided no further cause for discipline occurs during that period), because it furnished and installed vinyl wrap signs for retailers, constituting a thing of value, in violation of Business and Professions Code

[1] The decision of the Department, dated September 6, 2022, is set forth in the appendix.

section 25502, subdivision (a),[2] and California Code of Regulations, title 4, section 106, subdivisions (a) and (c) (rule 106).

FACTS AND PROCEDURAL HISTORY

Appellant's distilled spirits manufacturer agent license was issued on September 25, 2013. There is no record of prior departmental discipline against the license.

On August 25, 2021, an initial accusation was instituted against appellant. On September 3, 2021, the Department filed an 82-count First Amended Accusation, charging 27 violations of section 25502(a), 27 violations of rule 106(a), and 28 violations of rule 106(c). (Exh. D-1.)

Administrative hearings were originally scheduled for December 8 and 9, 2021, but were continued and held on March 1, 2, and 3, 2022. Documentary evidence was received and testimony concerning the violations charged was presented by Department Agent Alisa Thompson and three owners and/or managers of the various investigated premises who testified about four of the 28 off-sale retail premises at issue. No testimony was presented by representatives of the other 24 premises.

Paul David Herman, A.P. Keaton's[3] vice-president of operations, and Meagan Blair, MHUSA's regional brand manager, testified on appellant's behalf.

Testimony established that the accusation resulted from an investigation by Agents Bryant Pender and Alisa Thompson of the Department's Trade Enforcement Unit regarding whether MHUSA and another supplier may have provided free coolers to

[2] All statutory references herein are to the California Business and Professions Code unless otherwise indicated.

[3] A.P. Keaton is a third-party marketing vendor who is contracted with MHUSA to print vinyl wraps and apply them to surfaces in retail premises.

an off-sale retailer. After an initial investigation, the coolers were found to have been properly purchased by the retailers. Nevertheless, the investigation of the 28 off-sale retail premises in Northern California involved here continued for two years, despite there being no evidence of any complaint — from the public or the industry — about the vinyl wraps or how they are furnished, nor any notice to the industry about a change in the applicable laws. The investigation resulted in the instant accusation, charging that the vinyl wrap-style signs advertising MHUSA's products (paid for by appellant and affixed to windows, counters, and coolers by its third-party marketing contractor, A.P. Keaton) constitute a "thing of value" in violation of the tied-house laws in section 25502 and rule 106.

During the investigation, appellant maintains that the Department never articulated a reason for the investigation, what its concerns were, nor alleged that the furnishing of vinyl advertising wraps was unlawful. (Exh. V, at p. 8.) Testimony established that the use of such vinyl wrap-style signs by all types of alcohol beverage suppliers is widespread, and has been common in the industry for over seventeen years. (RT2 13-16; 142; 145; 165.)

Following the hearing, the administrative law judge (ALJ) asked for post-hearing briefs. Both parties submitted briefs, and the matter was submitted for decision on May 20, 2022.

The ALJ then issued a proposed decision on June 20, 2022, sustaining counts 2-6, 8, 11-12, 14-15, 17-18, 20-21, 23-24, 26-27, 29-33, 35-36, 38-48, 50-51, 53-54,

56-57, 59-63, 65-72, 74-75, and 77-81 of the First Amended Accusation;[4] dismissing counts 1, 7, 9-10, 13, 16, 19, 22, 25, 28, 34, 37, 49, 52, 55, 58, 64, 73, 76 and 82 of the First Amended Accusation;[5] and recommending that the license be suspended for a period of 15 days (with all 15 days stayed for a period of one year, provided no further cause for discipline arises during that time). The Department adopted the proposed decision in its entirety on August 26, 2022, and a certificate of decision was issued eleven days later.

Appellant then filed a timely appeal raising two issues: (1) window wraps are permissible signs pursuant to rule 106(b)(3), and do not provide retailers with secondary value in violation of the ABC Act, and (2) furnishing non-window wraps is not a prohibited "thing of value" or free goods. These issues will be discussed together.

DISCUSSION

Rule 106 provides in pertinent part:

> (a) Free Goods. No licensee shall, directly or indirectly, give any premium, gift, free goods, or other thing of value in connection with the sale, distribution, or sale and distribution of alcoholic beverages, and no retailer shall, directly or indirectly, receive any premium, gift, free goods or other thing of value from a supplier of alcoholic beverages, except as authorized by this rule or the Alcoholic Beverage Control Act.
>
> (b) Definitions.
>
> [¶ . . . ¶]
>
> (3) "Sign" means a flat material or a three dimensional unit (other than the advertised product itself) principally bearing a conspicuous notice of the

[4] The sustained counts include 27 violations of section 25502(a), 26 counts of rule 106(a) and nine counts of rule 106(c).

[5] The dismissed counts include one count of rule 106(a) and 19 counts of rule 106(c).

> manufacturer's name, brand name, trade name, slogans, markings, trademarks or other symbols commonly associated with and generally used by the manufacturer in identifying the manufacturer's name or product, with or without other graphic or pictorial advertising representations, whether illuminated or mechanized, including but not limited to posters, placards, **stickers, decals**, shelf-strips, wall panels, shadow boxes, price boards, mobiles, inflatables, dummy bottles, bottle toppers, **case wrappers**, neck ringers, brand identifying statuettes, tap markers, table tents, mirrored signs, plaques and other similar items. A sign advertising distilled spirits or wine shall have no secondary value and be of value to the retailer only as advertising.
>
> [¶ . . . ¶]
>
> (9) "Furnish" as used in this rule means to supply or make available for use as well as the giving or actual transfer of title of an item.
>
> [¶ . . . ¶]
>
> (c) Signs, Displays and Promotional Materials. A supplier shall not give or furnish signs, displays, or promotional materials advertising alcoholic beverages to a retailer, except as permitted by this rule or the Alcoholic Beverage Control Act. . . .

(Cal. Code Regs., tit. 4, § 106, emphasis added.)

Section 25502(a)(2) provides:

> (a) No manufacturer, winegrower, manufacturer's agent, California winegrower's agent, rectifier, distiller, bottler, importer, or wholesaler, or any officer, director, or agent of any such person, shall, except as authorized by this division:
>
> [¶ . . . ¶]
>
> (2) Furnish, give, or lend any money or other thing of value, directly or indirectly, to, or guarantee the repayment of any loan or the fulfillment of any financial obligation of, any person engaged in operating, owning, or maintaining any off-sale licensed premises.

(Bus. & Prof. Code § 25502(a)(2).)

The ALJ found in his decision that vinyl wraps provided to retailers by appellant were a "thing of value" in violation of section 25502 and rule 106 for two reasons, to wit:

free installation of the signs constituted a thing of value, and the perforated vinyl wraps applied to windows had secondary value beyond advertising by increasing privacy. (Det. of Issues ¶¶ 21; 31.)

Appellant contends the decision is wrong as a matter of law and not supported by substantial evidence. It maintains that the vinyl wraps are permitted as advertising under rule 106, and that installation is an integral part of making the advertising available to retailers, and does not constitute a thing of value. We agree.

The issue before the Board in this matter is not a question of fact, where we are bound by the ALJ's findings, but is, instead, a question of law — thus, the Board is not bound by the ALJ's assumptions and conclusions, but considers the question *de novo*:

> It is well settled that the interpretation and application of a statutory scheme to an undisputed set of facts is a question of law [citation] which is subject to de novo review on appeal. [Citation.] Accordingly, we are not bound by the trial court's interpretation. [Citation.]

(*Rudd v. California Casualty Gen. Ins. Co.* (1990) 219 Cal.App.3d 948, 951-952 [268 Cal.Rptr. 624].)

The question for the Board in this matter is whether, as a matter of law, the plain language of section 25502(a)(2) has been violated in this instance.

> The posture of a case in which the sufficiency of the evidence is not disputed is identical to that where the facts before the administrative agency are uncontradicted. In such a case the only issue concerns the conclusions to be drawn from the pertinent facts; the trial court's determination is therefore a question of law. [Citation.] On appeal the court's review is not circumscribed by the substantial evidence rule, but amounts to an inquiry of law.

(*Mixon v. Fair Employ. & Hous. Comm.* (1987) 192 Cal.App.3d 1306, 1311 [237 Cal.Rptr. 884].)

Section 25502 is one of several “tied-house” statutes. As one court informs us of the “purposes” behind the tied-house laws:

> Tied-house statutes are so named because they were enacted to prevent the return of saloons operated by liquor manufacturers, a practice that had been common in the early 1900's. (*Actmedia, Inc. v. Stroh* (9th Cir. 1986) 830 F.2d 957, 959 (*Actmedia*).) The California Supreme Court has explained that the Legislature enacted the tied-house provisions after the repeal of the 18th Amendment to prevent two particular dangers that had been common before Prohibition. (*California Beer Wholesalers Assn., Inc. v. Alcoholic Bev. etc. Appeals Bd.* (1971) 5 Cal.3d 402, 407 [96 Cal.Rptr. 297, 487 P.2d 745] (*California Beer Wholesalers*).) First, the Legislature aimed to prevent "the ability and potentiality of large firms to dominate local markets through vertical and horizontal integration." (*Ibid.*) Second, the Legislature wanted to curb "the excessive sales of alcoholic beverages produced by the overly aggressive marketing techniques of larger alcoholic beverage concerns." (*Ibid.*) The Legislature established a triple-tiered distribution and licensing scheme for alcoholic beverages. (*Ibid.*) Manufacturers were to be separated from wholesalers, and wholesalers were to be separated from retailers. (*Ibid.*) "In short, business endeavors engaged in the production, handling, and final sale of alcoholic beverages were to be kept 'distinct and apart.'" (*Ibid.*, quoting 25 Ops.Cal.Atty.Gen. 288, 289 (1955).) The Legislature intended that firms operating at one level of distribution "were to remain free from involvement in, or influence over, any other level." (*California Beer Wholesalers*, *supra*, 5 Cal.3d at p. 408.)
>
> The drafters of the tied-house provisions believed that if manufacturers and wholesalers were allowed to gain influence through economic means over retail establishments, they would then use that influence to obtain preferential treatment for their products and either the exclusion of or less favorable treatment for competing brands. (*Actmedia*, *supra*, 830 F.2d at p. 966.) Legislators were concerned that such practices would lead to an increase in alcohol consumption as retailers adopted aggressive marketing techniques to encourage customers to purchase the alcoholic beverages they stocked. (*Ibid*.; *California Beer Wholesalers*, *supra*, 5 Cal.3d at p. 407, fn. 7.)

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Schieffelin*) (2005) 128 Cal.App.4th 1195, 1207 [27 Cal.Rptr.3d 766].)

As appellant correctly points out,

> Under the recent *Bogle* Decision [. . .] proper application of the tied-house laws requires consideration of both (I) the alleged practice at issue and (ii) whether that practice encourages the type of favoritism and market domination that the tied-house laws seek to prevent. Here, neither element is met.

(AOB at p. 1, citing *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Bogle*) (2022) 82 Cal.App.5th 337 [298 Cal.Rptr.3d 349].) We agree that under the *Bogle* standard, the decision in this matter fails to support its finding of a tied-house violation with substantial evidence.

The scope of the Appeals Board's review is limited by the California Constitution, statute, and case law. In reviewing the Department's decision, the Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the factual findings and legal conclusions. The Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].) As one court explains:

> If the Department's administrative action declares or applies legal rules, or sets forth conclusions of law which are drawn from adjudicated or undisputed facts, it is subject to review only for insufficiency of the evidence, excess of jurisdiction, errors of law, or abuse of discretion. [T]he discretion exercised by the Department is not absolute but must be exercised in accordance with the law, and the provision that it may revoke [or deny] a license "for good cause" necessarily implies that its decisions

> should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Deleuze*) (2002) 100 Cal.App.4th 1066, 1072 [123 Cal.Rptr.2d 278], citations and internal quotation marks omitted.) This same standard applies to review of the Department's decision to discipline a license. (*Ibid*.)

When it comes to this Board's review of the evidence supporting the factual findings of the decision below, we must adhere to the "substantial evidence" standard:

> There are two aspects to a review of the legal sufficiency of the evidence. First, one must resolve all explicit conflicts in the evidence in favor of the respondent and presume in favor of the judgment all *reasonable* inferences.[fn] [Citation.]
>
> Second, one must determine whether the evidence thus marshaled is substantial. While it is commonly stated that [an appellate court's] "power" begins and ends with a determination that there is substantial evidence [citations],[fn] this does not mean [it] must blindly seize any evidence in support of the respondent in order to affirm the judgment. The Court of Appeal "was not created . . . merely to echo the determinations of the trial court. A decision supported by a mere scintilla of evidence need not be affirmed on review." (*Bowman v. Bd. of Pension Comrs.* (1984) 155 Cal.App.3d 937, 944 [202 Cal.Rptr. 505].) "[I]f the word 'substantial' [is to mean] anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It must be reasonable . . . , credible, and of solid value . . . ." (*Estate of Teed* (1952) 112 Cal.App.2d 638, 644 [247 P.2d 54].)
>
> The ultimate determination is whether a *reasonable* trier of fact could have found for the respondent based on the *whole* record. [Citation.] While substantial evidence may consist of inferences, such inferences must be "a product of logic and reason" and "must rest on the evidence" [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding [Citations].

(*Kuhn v. Dept. of Gen. Services* (1994) 22 Cal.App.4th 1627, 1632-1633 [29 Cal.Rptr.2d 191], emphasis in original.)

In the decision, the ALJ found that violations of section 25502 and rule 106 occurred because the vinyl wraps had secondary value beyond advertising by increasing privacy and because free installation of the signs constituted a thing of value. Specifically, the ALJ made the following finding regarding the privacy point:

> 21. Focusing on respondent's vinyl window signs, the perforated vinyl sheets specifically used to make them had the critical optical feature of permitting those inside to have somewhat of a view of activity outside while those outside have extreme difficulty viewing inside. Thus, it was somewhat analogous to a one-way mirror. That one-way view characteristic provided an element of interior privacy attributable solely to the vinyl material and was completely separate from the advertising information printed on the signs. Respondent printed its window signs using the perforated vinyl sheets because it had that one-way view optical characteristic in addition to being an acceptable medium on which to print its advertisement information. To that extent, respondent's window signs provided a secondary value to the retailers independent of the advertising printed on them. Therefore, respondent's window signs did not meet the strict criteria set forth in rule 106 subdivision (b)(3) and subdivision (c) because they had a secondary value to the retailer beyond their advertising information.

(Det. of Issues ¶ 21.) This conclusion is based primarily on testimony from only one licensee, Mr. Hayer, who mentions the word "security" in his testimony, but also says that the wraps are "see-through":

> I think it's **see-through** from the inside. Outside, you can just see the brand, right, like the Hennessy and the bottles and whatever. […] Most of these are for security, **so you can see outside**. […] so the cashier can keep an eye on what's going on outside. Most of these wraps or anything on the windows easily made [sic], so they have little screens so you can see through. […] It's kind of like a screen usually, whatever this Hennessy sign is. It looks like a poster from the outside.

(RT2 at p. 125, emphasis added.) This testimony does not support the ALJ's finding of secondary value by increasing privacy.

Similarly, the hearsay testimony of Agent Thompson about a second retailer, who told her that the wraps offered security, and the agent's opinion that they did so (RT1 at pp. 70-71), is insufficient to support a finding of enhanced security benefits. We find it troubling that only one of the 28 retailers investigated actually testified on this point, and that no expert testimony was offered — only hearsay and opinion — about the other 27.

The testimony of Mr. Herman, who is employed by A.P. Keaton, is seemingly ignored by the ALJ. He testified: "We use another type of vinyl that's called perforated vinyl that has holes in it, and **the purpose of that is so you can see out through a window for visibility purposes**." (RT2 at p. 161, emphasis added.) There appears to be no actual evidentiary basis for the ALJ's conclusion that the wraps constitute a "thing of value" because they offer some security or privacy benefit beyond being mere advertising. We believe it is an error to maintain that the ALJ's conclusion is based on substantial evidence, when in fact is contradicted by the record. Furthermore, as appellant points out,

> [T]he long-standing industry practice of using perforated sign material for windows simply allows the retailer's windows to continue functioning as windows, whereas the Department's new position would transform the window into a wall (as the window would now be blocked by the solid vinyl advertisement). There is no legal rational or substantial evidence to support such a distinction.

(AOB at p. 2.) We agree that the contradiction which would result from affirming this portion of the decision is unsupportable. As appellant pointed out at oral argument, without being perforated, a wrap would turn windows into walls. But, under the Department's decision, if the wrap is perforated — so that the window continues to

function as a window — suddenly there is a violation, even though the window retains its functionality as a window. This makes no sense.

Regarding the conclusion that providing free installation of the wraps constituted a thing of value, the ALJ found:

> 29. In this instance, the tied-house statutes and rule 106 are targeted to strictly control the relationship among manufacturers, wholesalers, and retailers. Therefore, the statutes and related rules should be construed to accomplish and promote that end. Generally, suppliers cannot give premiums, gifts, free goods, and things of value to retailers. Under section 25611.1 suppliers can "... furnish, give, lend, sell, or rent ..." interior signs to retailers. **Rule 106 permits a wholesaler to furnish interior signs to retailers**. To give, lend, sell or rent an item does not equate to installing an item. In the context of rule l06' s definition of "furnish" to mean "supply" or "make available for use" should be construed narrowly and not broadly. **To "supply" an item or make it "available for use" by another also does not necessarily include, in the context of interior advertising signs, the separate added act of installation, mounting, setting up, or assembly at the retailer's premises**. Considering the overall goal of the tied-house statutes, respondent's supplying or making available for use its interior signs should not be interpreted so broadly as to generally include the additional act of respondent providing the free labor to install, set-up, or mount of its interior signs absent an express indication that such activity is allowed.[fn.]

(Det. of Issues ¶ 29, emphasis added.) The ALJ goes on to explain:

> 30. Rule 106, subdivision (c)(3), states that as to window displays and floor displays: "Displays. A supplier may furnish, install, set up and service signs, promotional materials and decorations as window displays or temporary floor displays in off-sale premises ... " That subsection expressly uses the terms "furnish", "install", and "set up" to describe the extent of actions the supplier can take with respect to window displays and floor displays. **The absence of the terms "install" and "set up" with respect to what a supplier can do with respect to interior signs must mean that while a supplier can "supply" or "make available for use" interior signs, that does not extend to installing or setting up interior signs. If suppliers were generally permitted to "install" or "set up" its interior signs in retail premises, then that activity could have been expressly specified in rule 106, subdivision (c)(1) as to interior signs, but it is not**. Therefore, rule 106 did not permit respondent, or its agent, to perform the free installation or free set up of

> its interior signs in the retail licensed premises as occurred in this matter.[fn.]

(Det. of Issues ¶ 30, emphasis added.)

We disagree with the ALJ's interpretation, which is unsupported and which disregards the explicit language of rule 106(b). The various sections of rule 106 state:

> "Sign" means a flat material or a three dimensional unit (other than the advertised product itself) principally bearing a conspicuous notice of the manufacturer's name, brand name, trade name, slogans, markings, trademarks or other symbols commonly associated with and generally used by the manufacturer in identifying the manufacturer's name or product, with or without other graphic or pictorial advertising representations, whether illuminated or mechanized, **including but not limited to** posters, placards, **stickers, decals**, shelf-strips, wall panels, shadow boxes, price boards, mobiles, inflatables, dummy bottles, bottle toppers, **case wrappers**, neck ringers, brand identifying statuettes, tap markers, table tents, mirrored signs, plaques and other similar items. A sign advertising distilled spirits or wine shall have no secondary value and be of value to the retailer only as advertising.
>
> "Furnish" as used in this rule means to **supply or make available for use as well as the giving or actual transfer of title of an item**.
>
> Interior Signs. A supplier may furnish interior signs advertising alcoholic beverages sold by him to a retailer for use within on-sale or off-sale premises, provided no such sign relating to wine or distilled spirits for use within an on-sale premises shall exceed 630 square inches. **A sign shall be deemed to be an interior sign although placed in a window and primarily visible from outside the premises**. Interior signs furnished by suppliers which advertise distilled spirits and wine shall have no secondary value and be of value to the retailer only as advertising. Suppliers may not directly or indirectly or through an arrangement with an affiliate or other person pay or credit the retailer for displaying the interior sign or for any expense incidental to its operation.

(Cal Code Regs., tit. 4, § 106(b) and (c)(1).)

The ALJ's interpretation, concluding that "supply or make available for use" does not include installing vinyl wraps is contradicted by the second part of the sentence defining "furnish" in rule 106(b)(9) which says: "the giving or actual transfer of the item."

Here, the ALJ ignores the second half of the sentence which we believe encompasses the situation in this matter. The vinyl wraps are given to the licensee when they are installed, and the expense is borne entirely by appellant. This is explicitly permitted under rule 106 under subdivision (b)(9) which states: "'Furnish' as used in this rule means to supply or make available for use **as well as the giving or actual transfer of title of an item**." (Cal Code Regs., tit. 4, § 106(b)(9), emphasis added.) Installation does not constitute a thing of value separate and apart from supplying these interior signs, but is an integral part of furnishing such signage, under the plain language of rule 106. As discussed more fully below, case law instructs us to look at the ordinary meaning of statutes and rules, and to reject interpretations that lead to unreasonable results as they do in this decision. Common sense must prevail.

Furthermore, we fail to see how the decision in any way furthers the purposes of the tied-house laws to eliminate favoritism and market domination by manufacturers and distributors. As in any case involving statutory interpretation,

> [O]ur fundamental task is to determine the Legislature's intent so as to effectuate the law's *purpose*. (*People v. Lewis* (2008) 43 Cal.4th 415, 491 [75 Cal.Rptr.3d 588, 181 P.3d 947].) "We begin with the text of the statute as the best indicator of legislative intent" (*Tonya M. v. Superior Court* (2007) 42 Cal.4th 836, 844 [69 Cal.Rptr.3d 96, 172 P.3d 402), but we may reject a literal construction that is contrary to the legislative intent apparent in the statute or that would lead to absurd results (*Ornales v. Randolph* (1993) 4 Cal.4th 1095, 1105 [17 Cal.Rptr.2d 594, 847 P.2d 560]).

(*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 27 [109 Cal.Rptr.3d 329], emphasis added.)

> Our primary task in interpreting a statute is to ascertain the intent of the Legislature so as to give effect to the purpose of the law. (*Landeros v. Torres* (2012) 206 Cal.App.4th 398, 415 [141 Cal.Rptr. 3d 744].) "We are

> guided primarily by the words of the statute, giving them their ordinary meaning, and look to outside sources only if the statute is ambiguous." (*Ibid*.)

(*Fiorini v. City Brewing Co., LLC* (2014) 231 Cal.App.4th 306, 315 [179 Cal.Rptr.3d 827].) After all, "if a statute is to make sense, it must be read in the light of some assumed *purpose*. A statute merely declaring a rule, with no purpose or objective, is nonsense." (Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed* (1950) 3 Vand.L.Rev. 395, 400, emphasis added, reprinted in Singer, *Statutes and Statutory Construction* (6th ed. 2000) § 48A:08, p. 639.) It is through this lens that the Board must scrutinize the Department's interpretation:

> It is true that an administrative agency's interpretation of its own regulation is entitled to consideration and respect, especially where, as here, the agency has a special familiarity and expertise with the issues. (*Yamaha Corp. of America v. State Bd. of Equalization*19 Cal.4th 1, 11-12 [78 Cal.Rptr.2d 1].) However, **an agency's interpretation of a regulation or statute does not control if an alternative reading is compelled by the plain language of the provision**. (*Redding Medical Center v. Bonta* (1999) 75 Cal.App. 4th 478, 484 [89 Cal.Rptr. 2d 348]; *Motion Picture Studio Teachers & Welfare Workers v. Millan* (1996) 51 Cal. App. 4th 1190, 1195 [59 Cal.Rptr. 2d 608] [the principle of agency deference "does not permit the agency to disregard the regulation's plain language"].) Moreover, while we may defer to an administrative agency's construction of its own regulation, if the language of the rule does not require administrative expertise, we apply the regulation as we understand it. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (1999) 71 Cal.App.4th 1518, 1520 [84 Cal.Rptr.2d 621].) As explained in *Yamaha*: "Courts must, in short, independently judge the text of the statute, taking into account and respecting the agency's interpretation of its meaning, of course, whether embodied in a formal rule or less formal representation. Where the meaning and legal effect of a statute is the issue, an agency's interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth." (*Yamaha, supra*.)

(*Southern Cal. Edison Co. v. Public Utilities Com*. (2000) 85 Cal.App.4th 1086, 1105-1106 [102 Cal.Rptr.2d 684], emphasis added.) "Rules of statutory construction require courts to construe a statute to promote its purpose, render it reasonable, and avoid absurd consequences. [Citation.]" (*Ford v. Gouin* (1992) 3 Cal.4th 339, 348 [11 Cal.Rptr.2d 30].)

The Department's interpretation and application of rule 106 and section 25502(a)(2) in this case are not conducive to the statute or rule's purpose — that is, to prevent manufacturers and distributors from exercising undue influence over retailers and preventing actions which seek preferential treatment for their products. Instead, the decision relies exclusively on pure conjecture to misapply the spirit and letter of the law. Opinions (whether of the ALJ, a licensee, or investigator) are not evidence — they are speculation, and cannot reasonably support findings or conclusions of law. (*Bogle, supra*.) Likewise, misinterpreting the wording of the statute to reach an unreasonable and absurd result, is an abuse of discretion.

The burden of persuasion at the administrative hearing is the preponderance of evidence, and the Department's initial burden of producing evidence is to make a *prima facie* case — that is, to produce sufficient evidence to support a finding in its favor in the absence of rebutting evidence. (See *The Von's Corp.* (2002) AB-7819.) Insufficient evidence was presented in this matter to support the findings sustaining this accusation.

> [T]he discretion to be exercised by the department under section 22 of Article XX of the Constitution "is not absolute but must be exercised in accordance with the law, and the provision that it may revoke [or deny] a license 'for good cause' necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals."

(*Martin v. Alcoholic Bev. Control Appeals Bd.* (1961) 55 Cal.2d 867, 876 [13 Cal.Rptr. 513], quoting *Weiss v. State Bd. of Equalization* (1953) 40 Cal.2d 772, 775 [256 P.2d 1].)

We are deeply troubled by this decision, which turns an almost two-decade practice of advertising in the alcoholic beverage industry, namely vinyl wraps, into an 82-count indictment without any prior notice or warning to the industry that the Department now views the providing and installing of vinyl wraps as a thing of value. This new interpretation of the law is a violation of due process under both the 14th amendment to the United States Constitution, and the laws of the State of California, which require notice and an opportunity to be heard before one suffers governmental deprivation of a fundamental interest. In addition, the Department's new interpretation of rule 106 with a complete lack of notice or the rulemaking procedures required by the Administrative Procedures Act (APA) is most likely a violation of the APA. Finally, the sudden finding of a violation of the tied-house laws in an almost two-decade-long practice, which is widespread in the industry, is the very definition of arbitrary — particularly when it effectively puts a large segment of the vinyl wrap advertising industry out of business.

Here, the Department claims the providing of vinyl wraps triggered the risk of market domination because appellant provided a "thing of value." However, they established no evidence in the record of market domination, undue influence, or favoritism — despite a 17-year history of the providing of such vinyl wraps by appellant. We question how there can suddenly be a risk of market domination when a 17-year practice has identified no actual evidence of these risks. Instead, it appears this

accusation is the result of an over-zealous investigation verging on a fishing expedition. We fail to see how this furthers the objectives of the ABC Act, the purposes of the tied-house laws, or protects the health, safety, welfare and economic well-being of the people of California.

The Department may not act arbitrarily in exercising its discretion. (*Martin, supra*, at p. 876.) Findings must be supported by substantial evidence which is "reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case." (*Toyota, supra* at p. 871.) Here, substantial evidence that appellant supplied a thing of value to the premises involved in this investigation is lacking. Accordingly, we must reverse the Department's decision for being arbitrary, unsupported by substantial evidence, and constituting an abuse of discretion.

ORDER

The decision of the Department is reversed.[6]

SUSAN BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
SHARLYNE PALACIO, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

---

[6] 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*. Service on the Board pursuant to California Rules of Court (Rule 8.25) should be directed to: 400 R Street, Ste. 320, Sacramento, CA 95811 and/or electronically to: abcboard@abcappeals.ca.gov.

APPENDIX

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

IN THE MATTER OF THE ACCUSATION AGAINST:

MOET HENNESSY USA, INC.
1333 NORTH CALIFORNIA BLVD., STE 455
WALNUT CREEK, CA 94596

DISTILLED SPIRITS MANUFACTURER AGENT - LICENSE

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

TRADE ENFORCEMENT UNIT

File: 05-534943

Reg: 21091357

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 26, 2022. 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. The appeal must be filed within 40 calendar days from the date of the decision, unless the decision states it is to be "effective immediately" in which case an appeal must be filed within 10 calendar days after the date of the decision. Mail your written appeal to the Alcoholic Beverage Control Appeals Board, 400 R St, Suite 320, Sacramento, CA 95811. For further information, and detailed instructions on filing an appeal with the Alcoholic Beverage Control Appeals Board, see: https://abcab.ca.gov or call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

Sacramento, California

Dated: September 6, 2022

Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:	
	File: 05-534943
Moet Hennessy USA, Inc. 1333 North California Boulevard, Ste. 455 Walnut Creek, CA 94596	Reg: 21091357 License Type: 05
Respondent	**PROPOSED DECISION**
	Court Rptr: Sharon Cahn, CSR iDepo Reporting Service
	Hearing Date: 3/1/22 Word Count Est: 36,062
	Hearing Date: 3/2/22 Word Count Est: 35,899
Regarding Its Type-05 License Issued Under the California Constitution and the Business and Professions Code	Hearing Date: 3/3/22 Word Count Est: 3,500

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control (hereafter the ALJ), heard this matter via video hearing on March 1, 2022, March 2, 2022, and March 3, 2022. After the parties submitted post-hearing briefs, the matter was submitted for decision on May 20, 2022.

Patricia Huber, Attorney III, and Matthew Gaughan, Attorney III, Office of Legal Services, Department of Alcoholic Beverage Control, represented the Department of Alcoholic Beverage Control (hereafter the Department).

Carrie Bonnington and Derek Mayor, attorneys-at-law, of Pillsbury, Winthrop, Shaw and Pittman, LLP, represented licensee-respondent Moet Hennessy USA, Incorporated (hereafter respondent).

At the hearing, oral evidence, documentary evidence, and evidence by oral stipulation on the record was heard and received. Upon receipt of post-hearing briefs from the parties, the matter was submitted for decision.

INTRODUCTION

1. The Department's First Amended Accusation alleged respondent was subject to discipline under Article XX, section 22, of the California Constitution and section 24200, subdivisions (a) and (b), of the California Business and Professions Code because respondent unlawfully gave its illustrated wrap style signs to 28 specified off-sale general retail licensees throughout northern California in violation of California Code of Regulations, title 4, section 106, subdivision (c).[1] The interior vinyl advertising signs featured respondent's alcoholic beverage products, brand name, or like markings. The Department asserted because those signs were tailor fit to adhere to surfaces in the retailers' premises they had a value or benefit other than merely advertising respondent's products or brand and constituted a thing of value, gift, premium, or free good respondent could not give to retailers.

2. The Department also alleged respondent improperly gave a thing of value, i.e., those same vinyl signs to the same 28 retail licensees, in violation of section 25502, subdivision (a), and California Code of Regulations, title 4, section 106 subdivision (a), because while respondent can supply or make available appropriate interior advertising signs to retailers that did not include respondent supplying free labor to install its interior signs in the retail licensed premises.

3. Respondent contended under section 25611.1 and rule 106: 1) it was allowed to furnish its interior advertising signs to retailers; 2) its interior signs were not improper premiums, gifts, or free goods; and 3) its vendor's installation or mounting of the interior signs at the retail premises was not an improper gift, premium, free good, or other thing of value.

---

[1] All section references are to the California Business and Professions Code unless specified otherwise. All references to rules are to those sections under California Code of Regulations, title 4, unless specified otherwise.

FINDINGS OF FACT

1. The Department filed its First Amended Accusation on September 3, 2021. Thereafter, it received respondent's Notice of Defense requesting a hearing on the accusation and the matter was set for a hearing. (Exhibit 1: pre-hearing pleadings.) The matter was heard via video conference on March 1, 2, and 3, 2022. After the parties' post-hearing briefing, the matter was submitted for decision on May 20, 2022. [2]

2. On September 25, 2013, the Department issued respondent a type-05 distilled spirits manufacturer's agent license for its premises at 1333 N. California Boulevard, Suite 455, Walnut Creek, California (hereafter the licensed premises). [3]

3. Since being licensed, respondent has not suffered any prior disciplinary action against its license.

4. For the last several years, respondent had an advertising program wherein it retained A. P. Keaton, a third-party advertising vendor, to manufacture, supply, and install interior advertisement signs, featuring respondent's brand and products, for display at alcoholic beverage licensed retailers. Respondent worked with A.P. Keaton to develop a menu of generally approved artwork, text, and designs for the interior signs.

5. Respondent offered alcoholic beverage retailers the opportunity to display respondent's interior signs. If a retailer requested respondent's signs, an A.P. Keaton representative would visit the retail premises and, in consultation with the retail licensee, plan what interior signs would be used and where they would be installed. Once a plan for the signs was agreed on, A.P. Keaton, with respondent's approval, would fabricate the signs. Once made, A.P. Keaton would deliver the signs to the retail premises or its personnel would take it to the retailer. A.P. Keaton installers would then install the signs at the retail licensed premises. Respondent paid A.P. Keaton all cost for the design, fabrication, delivery, and installation of the signs. The retailers paid nothing to respondent or to A.P. Keaton for the

---

[2] The Department's closing brief was received marked as Exhibit D-35. Respondent Moet Hennessy USA, Inc., closing brief was received and marked as Exhibit V. The Department's rebuttal brief was received on May 20, 2020 and marked as Exhibit D-36.

[3] As specified in section 23366, a type-05 license is issued to the agent of a distilled spirits manufacturer. The license permits the agent to possess distilled spirits in private or public warehouses; export distilled spirits; cut, blend, mix, flavor and color distilled spirits for his own account or for the account of a distilled spirits manufacturer, manufacturer's agent, rectifier or wholesaler; and sell or deliver distilled spirits only to holders of distilled spirits manufacturer's, rectifier's, or distilled spirits wholesaler's licensee.

interior signs. Neither respondent nor A.P. Keaton paid anything to the retailers for the right or privilege of displaying respondent's signs inside the retail premises. The retailers were not obligated to maintain the signs for any particular time period.

6. Respondent's signs were printed on paper thin pliable vinyl sheets with an adhesive backing. Once the backing was peeled away uncovering the adhesive back side of the sign, it was affixed to surfaces in the retail premises such as walls, the tops or sides of counters, and even ceiling beams. Being very pliable, the signs could be affixed around the edges of the counters for complete coverage and to avoid it peeling away at the edges. They were also affixed on three-dimensional items, curved surfaces, or objects such as refrigerated coolers. As the sign could be affixed to curved surfaces, it was often referred to as a wrap sign, as it could wrap around an item, like a cooler or refrigerator. As the vinyl sign material was thin, sections could be cut out to fit around a display case window or other selected area. Some of the signs were very large covering numerous square feet, such as to cover an entire sales counter area or large section of a wall. Some signs were large banners and could be 20 feet or longer and affixed to walls, ceiling beams, or other finished surfaces.

7. For retail premises' glass panel windows, approximately 48 inches wide by 6-10 feet tall, the signs were printed on similar thin pliable adhesive backed vinyl sheets. However, those sheets were perforated with a pattern of small holes such that when installed on a window, from inside the licensed premises, one could see through the sign's artwork/text and have a view to the outside the licensed premises.[4] However, from outside the licensed premises, one would primarily only see the advertisement and not really be able to see into the interior of the retail premises.

Department's Investigation

8. On June 7, 2019, Alcoholic Beverage Control Agent Thompson (hereafter agent Thompson) and Alcoholic Beverage Control Agent Pender visited a business known as Dave's Liquor at 1347 Olivier Road, Fairfield, California. That business had a type-21 general license.[5] (Count 1)

---

[4] Neither party presented as an exhibit a sample of the material used for respondent's signs or any section of any actual sign found at any involved retail premises.

[5] All of the retail premises in this matter had type-21 off-sale general retail licenses permitting them to retail in beer, wine, and distilled spirits for consumption off the licensed premises.

9. Agent Thompson noticed a small refrigerated cooler inside Dave's Liquor that bore respondent's Hennessy logo and images of its products on the face and side of the cooler. The cooler had a glass door top and contained alcoholic beverages. She learned Dave's Liquor had not purchased the wrap advertisement affixed to the cooler.

10. The licensee told Agent Thompson he purchased the cooler from an ice cream company and that respondent placed the wrap sign on the cooler by or through the wholesaler, Southern Glazer Wine and Spirits (hereafter SGWS).

11. Don Harper, of SGWS, later told Agent Thompson that SGWS participated in the use of the wrap advertisements at Dave's Liquor.

12. Agent Thompson later learned a third-party, A.P. Keaton Company (hereafter A.P. Keaton), actually installed the wrap sign at Dave's Liquor. Alan Crane, of A.P. Keaton, told Agent Thompson A.P. Keaton received orders or a booking form requesting respondent's vinyl signs. They would fabricate and install the signs at the retail businesses. Respondent paid A.P. Keaton for their work related to the signs.

13. Agent Thompson also met SGWS's sales representative Jose Gonzalez. He indicated if the retail store wanted visibility for respondent's products he wrote up a request for respondent's interior signs. He would forward on the order so the signs could be made.

14. Agent Thompson received certain spreadsheets, Exhibits 31, 32, and 33, from respondent confirming it paid A. P. Keaton for the design, production, and installation of interior vinyl signs advertising respondent's name and/or its line of alcoholic beverage products for certain type-21 off-sale general retail licensees in both northern California and southern California.

Follow-Up Inspections

15. Agent Thompson selected 27 northern California type-21 licensees from respondent's spreadsheets and inspected those premises. Generally, she found respondent's interior advertising signs posted in those retail licensed premises. She testified clerks/licensees generally told her they wanted the vinyl advertisements, that they can act as a protective covering, can hide old dirty wraps, and kept the stores nice for the neighborhood. She took photos of the signs at each of the 27 sites. All of the signs consisted of the vinyl wrap style signs.

16. On March 5, 2020, Agent Thompson visited A & P Liquor, license number 553446, at 1101 21St Street, Sacramento, California. There was a Hennessy wrap sign affixed to two areas on the top surface of the counter area. (Exhibit 34q: photo) The manager, John Yoon (hereafter Yoon), said his wholesaler, "Southern", probably provided the wrap and he wanted this new one because the old one was scratched . (Counts 8-10)

17. Yoon testified at the hearing. He has been the store manager for 25 years. He recalled the Hennessy wrap on the counter was installed in 2018 or 2019. It is about 10 feet to 12 feet long. They were offered by the Hennessy salesman who indicated it would have a nice clean look. Yoon was not present when the wrap was installed. He believed it was like a big sticker and will keep it as long as it is not damaged. He thought it might protect his counter top from scratches. The wrap sign has been on the counter about three years already. He paid nothing for the wrap sign or its installation.

18. On March 5, 2020, Agent Thompson visited Tony's Market, license number 607329, at 4011 W. Nichols Avenue, Sacramento, California. There was a Hennessy wrap sign affixed to the top of the sales counter and the vertical public-facing side of the same counter. (Exhibit D34bb: photo). The clerk told Agent Thompson the Hennessy distributor offered the sign and he wanted it because the counter space was dirty. (Counts 71-73)

19. On March 5, 2020, Agent Thompson visited Daly City Jug Shop, license number 591222, at 242 Skyline Plaza, Daly City, California. There were Hennessy signs in the windows of the premises along with signs for other alcoholic beverages. (Exhibit D34x: photo). The signs were approximately 6 feet tall and about 4 feet wide and covered most all of the lower panel window. The licensee told Agent Thompson he wanted the signs because the license was told the sign permitted him to see outside, while those outside could not see the premises' interior. (Counts 65-67)

20. On March 5, 2020, Agent Thompson inspected City Liquor and Food, license number 377374, at 7595 Franklin Blvd., Sacramento, California. There were Hennessy signs affixed to the counter top and side panel area. (Exhibit D34b: photo) (Counts 26-28)

21. On March 5, 2020, Agent Thompson inspected Court Liquors, license number 422479, at 6225 Franklin Avenue, Sacramento, California. There was a Hennessy sign affixed to the sales counter top and to the side face and front face of the counter area. (Exhibit D34e: photo) (Counts 11-13)

22. On March 5, 2020, Agent Thompson inspected Park and Save, license number 443348, at 3041 Rio Linda Boulevard, Sacramento, California. There was a Hennessy sign affixed to the top surface and front vertical side of the sales counter. (Exhibit D34g: photo) (Counts 17-19)

23. On March 5, 2020, Agent Thompson inspected Singh Foods Inc., dba City Food and Liquor, license 462400, at 7121 Franklin Avenue, Sacramento, California. There was a Hennessy sign affixed to the front face of the sales counter and on a side panel. There was a poster advertisement for Courvoisier, posted on another side panel area of the counter but that brand was not carried by respondent. (Exhibit D34h: photo) (Counts 32-34)

24. On March 5, 2020, Agent Thompson inspected Pints and Fifths, license 547362, at 6432 Stockton Road, Sacramento, California. There was a large Hennessy sign posted on the upper portion of a wall. There was also a Hennessy banner that ran down the length of another interior wall. There was also a Hennessy sign affixed to the front face and top of the sales counter. A section of the advertisement that was affixed to the counter was cut so as to not cover up a built-in display window area used to displayed lottery tickets kept beneath the counter top. (Exhibit D34o: photo) (Counts 74-76)

25. On March 5, 2020, Agent Thompson inspected Freeport Liquor, license 563964, at 5041 Freeport Boulevard, Sacramento, California. There was a Hennessy sign affixed to an end of the sales counter. A Hennessy banner was also affixed to the top of the sales counter with one section cut out so that a built-in lottery display window in the top of the sales counter remain viewable and not covered by the sign. There was also a Hennessy banner that ran across the lower end of the front face of the sales counter. (Exhibit D34t: photo)(Counts 23-25)

26. Mr. Balbir Singh (hereafter Singh) testified at the hearing that he owned Freeport Liquor for about seven years and worked there seven days-a-week. He recalled someone came in and offered to wrap his counter after stating it looked bad. The wooden counter was 30 or so years old and the paint was peeling off. Hennessey sent someone to install the wrap and the counter looked better after it was installed. The sign was like a sticker with a peel-off backing. Singh neither paid for the sign nor was it something he would have bought himself. He did not receive any payment, credit, or discounts from respondent for having any of respondent's advertisements in his licensed premises.

27. On March 5, 2020, Agent Thompson inspected the A1 Stop and Shop, license 570166, at 2533 Edison Avenue, Sacramento, California. There was a Hennessy advertisement affixed to the front vertical side of the front counter and one was affixed to a side of the front counter. The top of the counter was covered by a Crown Royal whiskey advertisement. Crown Royal was not carried by respondent. (Exhibit D34u: photo) (Counts 7-9)

28. On March 5, 2020, Agent Thompson inspected GK Discount Liquors, license 575731, at 8484 Florin Road, Sacramento, California. There was a Hennessy banner that ran across the top of a side wall, near the ceiling. On another section, one segment of the banner sign was missing. There was also a Hennessy sign affixed to the front side of a portion of the sales counter. (Exhibit D34v: photo) (Counts 20-22)

29. On March 5, 2020, Agent Thompson inspected Star Mart, license 583049, at 7454 Stockton Boulevard, Sacramento, California. It had a Hennessy sign on the front side of the sales counter that extended around one end of the counter. (Exhibit D34w: photo) (Counts 35-37)

30. On March 5, 2020, Agent Thompson inspected Super 7 Food and Liquor, license 594832, at 9689 Folsom Boulevard, Sacramento, California. Five exterior windows had Hennessy signs. Two of them covered about one half of the window panel and three covered about one fifth of the window panel. The window panels themselves appeared approximately 4 feet wide by 8 feet tall. (Exhibit D34z: photo) (Counts 68-70)

31. On March 10, 2020, Agent Thompson inspected Rana's Shop and Go, license 508892, at 1441 W. March Lane, Stockton, California. There was a Hennessy sign posted on the interior of two exterior windows, making the sign visible from outside of the licensed premises. The signs covered about one quarter of the window panel. The panels appeared to be approximately 4 feet wide and approximately 8 feet to 9 feet tall. (Exhibit D34j: photo) (Counts 38-40)

32. On March 10, 2020, Agent Thompson inspected Michael's Market, license 516837, at 3120 E. Main Street, Stockton, California. It had a Hennessy banner affixed to an interior wall. The banner ran near the top portion of a wall near the ceiling and across a series of refrigerators below. (Exhibit D34k: photo) (Counts 47-49)

33. On March 10, 2020, Agent Thompson inspected BevBox, license 559484, at 8102 Kelley Drive, Ste. J, Stockton, California. It had a Hennessy advertisement affixed on a front panel window and another wrapped around the front panels of two refrigerator-coolers. (Exhibit 34s: photo) (Counts 44-46)

34. Mr. Satinder Paul Hayer (hereafter Hayer) testified at the hearing that he was a partner in the ownership of the store he called Liquor Maxx at 8102 Kelley Drive, Ste. J, Stockton, California. He testified he approved of one Hennessy wrap advertisement to be affixed to a cooler unit. He testified it added some color to the cooler and the sign had been there about one year. He will leave the wrap sign on the cooler until it wears out. He did not want the wrap applied to his counter area. Advertisement wraps were also applied to some windows that are approximately 3 feet wide by 8 feet tall. The wrap can act as a screen. You can somewhat see through it from the inside, but cannot see inside the premises from the outside.

35. On July 3, 2020, Agent Thompson inspected East Town Liquor, license 358142, at 2833 MacArthur Boulevard, Oakland, California. It had a Hennessy sign affixed to the vertical face of the front counter and also on the top surface of the sales counter. (Exhibit D34a: photo) (Counts 50-52)

36. On July 3, 2020, Agent Thompson inspected Two Star Liquor, license 399518, at 2020 MacArthur Boulevard, Oakland, California. It had Hennessy signs posted on the lower portions in three front windows. It also had Hennessy signs affixed on the side panels of the front counter and a banner that ran across and over the area above some of its refrigerated coolers. It also had a Hennessy banner that was affixed to the side of an interior exposed ceiling beam. (Exhibit 34c: photo) (Counts 2-4)

37. On July 3, 2020, Agent Thompson inspected Downtown Liquor, license 427584, at 301 Grand Avenue, South San Francisco, California. It had a Hennessy sign posted in what appeared to be two window outlets or rectangular framed spaces on the exterior of the building. There was no glass in either framed space. The advertisements were affixed on the exterior of the licensed premises, not from the interior facing outward. It also had a Hennessy banner that ran above the main doorway and over the adjacent window next to the doorway. (Exhibit D34f: photo) (Counts 29-31)

38. On July 3, 2020, Agent Thompson inspected State Market Liquor, license 521349, at 707 Willow Street, Oakland. It had a Hennessey sign affixed to the side of a refrigerated cooler and also on the vertical side of a counter area. (Exhibit D-34-l: photo) (Counts 62-64)

39. On July 3, 2020, Agent Thompson inspected Huntsberry Liquor, license 540734, at 10151 Foothill Boulevard, Oakland, California. It had a wall sized Hennessy sign posted on a wall behind a display of chips and snack foods. There was also a Hennessy banner posted on a wall that ran near the ceiling and above a line of refrigerators. There was also a Hennessy sign affixed to a sales counter swinging door. (Exhibit D34n: photo) (Counts 53-55)

40. On July 3, 2020, Agent Thompson inspected Food King Groceries Corp., license 592505, at 8824 International Boulevard, Oakland, California. It had one of respondent's signs affixed towards the top of an interior support beam/column over an interior doorway and in two windows of the licensed premises. (Exhibit D34y) (Counts 59-61)

41. On July 3, 2020, Agent Thompson inspected Four Bells Market, license 604625, at 1065 98th Street, Oakland, California. It had Hennessy signs affixed to the front face of the sales counter and to the top of the counter. There was also a Hennessy banner that was affixed to the top of one wall along the ceiling. (Exhibit D34aa: photo) (Counts 56-58)

42. On July 9, 2020, Agent Thompson inspected Richmond New May Wah Supermarket, license 405061, at 709 Clement Street, San Francisco, California. There was a red colored Hennessy banner affixed to the front side of a sales counter. There was another black colored Hennessy banner affixed to the front and top of another counter area. Another Hennessy sign was posted above an interior doorway. (Exhibit D34d: photo) (Counts 80-82)

43. On July 9, 2020, Agent Thompson inspected the BevMo, license 538942, at 1301 Van Ness Ave, San Francisco, California. There was a Hennessy sign that was affixed to and spanning four large panel windows facing outward. However, due to recent rioting, those windows had been boarded over on the outside so the advertisements could not be seen. There was a different advertisement featuring Belvedere vodka that spanned over a different set of four large panel windows facing outward. (Exhibit D34m: photo) (Counts 77-79)

44. On July 9, 2020, Agent Thompson inspected a Quick Mart, license 553278, at 2480 Skyline Drive, Pacifica, California. There were two Hennessey signs affixed to the exterior of the licensed premises. There was another Hennessy sign affixed to a door. It was affixed to the inside of the glass door with the advertisement facing towards the exterior. There was also a Hennessy banner affixed near the ceiling and ran above no less than six refrigerated coolers. (Exhibit D34p: photo) (Counts 41-43)

45. On July 9, 2020, Agent Thompson inspected Bus Stop Liquors, license 555857, at 2689 San Bruno Avenue, San Francisco, California. There was a Hennessy sign affixed to a display case. There was another Hennessy banner installed near the ceiling and spanning over an aisle way. There was a Hennessy banner that ran near the top of the ceiling above display shelves. It appeared to run in excess of 20 feet. (Exhibit D34r) (Counts 14-16)

46. With respect to the 28 off-sale general retail licensees Agent Thompson inspected in 2020, respondent's spreadsheets indicated the vinyl signs were mostly installed during the 2019-2020 time-frame.

47. Exhibit D-33 specified the price respondent paid A. P. Keaton for the design, manufacture, and installation of the signs at each of the licensed premises on that list. The costs ranged from approximately $750 to $5,000 per premises, presumably based on the number, style, and size of wrap signs installed at the particular retailer.

48. The interior wrap signs respondent installed ranged in size and scope. Some were wrapped around three dimensional objects like a cooler or display unit. Some banner advertisements were affixed like flat posters and would run down a wall and were approximately 18 inches to 24 inches wide and 15 feet to 20 feet or more in length. Some vinyl window advertisements were approximately four feet wide by 6 feet to 10 feet in height and completely or substantially cover an entire window panel. Some signs were affixed to the front side of a sales counter. They were approximately 48 inches in height and could be up to 20 feet or more in length installed all the way down the face of a counter. Some signs were affixed to the top surface of a sales counters and would cover an extended length of the counter top, up to 10 feet or more. The advertisements would usually state "Hennessy" with other text, graphics, or artwork depicting respondent's products.

49. Agent Thompson was not aware of any complaints by third-parties about the wrap advertisements signs.

Respondent's Evidence

50. Paul Hermon (hereafter Hermon), a vice-president of A.P. Keaton, testified regarding its involvement with respondent's advertisement sign program. A. P. Keaton is a company that, among other activities, designs, fabricates, and installs customized advertising signs for its clients, including various alcoholic beverage suppliers, like respondent.

51. Initially, advertisement sign artwork and text are agreed upon with a client, such as respondent, resulting in a client/brand approved menu to work from. Then, upon request, A.P. Keaton would send a representative to the site and assess, in consultation with the business operator, where and what types of interior signs would be used, e.g., on a wall, a window, a countertop, or a refrigerator. On one style of sign they fabricate, the advertising information is printed on one side of a large paper-thin flexible vinyl sheet. The back side of the sheet has an adhesive covered by a pull-away sheet. The flexible sheet is about 3-6 mil. thick and cut from 48 inch to 72 inch wide rolls of sheeting. Signs of various sizes can be produced. Once the advertising information, whether words, images, or both, is printed on one side of the sheet, it is delivered to the retailers premises or taken there by A. P. Keaton installer personnel. They remove the backing and affix the sign, just like a large sticker, on the pre-selected surfaces. Some final trimming of the sign would occur on site as a part of the installation process. Because the signs are like large stickers, they can be affixed to a flat horizontal surface, like a sales counter, a flat vertical surface, like an wall, and even on and around a three dimensional objects, like a refrigerator or freezer. Because the signa can easily adhere to flat or rounded surfaces, it is referred to as a "wrap" or "wrap sign".

52. A.P. Keaton also supplied indoor advertising signs specifically for window application. Window signs were printed on a similar paper thin vinyl sheet and installed on the interior side of glass windows. However, window vinyl sheets are specially perforated. The perforated vinyl used is such that from inside the business one can somewhat see through the sign to the exterior of the premises. This material is used for this safety related attribute so users do not have their view of the outside completely blocked.

53. The interior signs have an estimated service-life of approximately one year. Respondent paid A.P. Keaton all costs related to the design, manufacture, and installation of the signs in the retail stores. Those stores incurred no cost related to respondent's signs. Hermon testified the signs were intended to be used only as advertising signs and were not intended to be used to provide shade or security or have secondary value to the user, e.g. to cover unfinished wood surfaces, to strengthen walls, to cover walls, to preserve counter tops. Display of respondent's signs by retailers was strictly voluntary on the retailer's part.

54. Meghan Blair (hereafter Blair), respondent's regional brand manager, testified respondent carries high end brands of alcoholic beverages such as Hennessy cognac, Dom Perignone champagne, Krug champagne, Ruinart champagne, and Moet & Chandon champagne. Respondent does not sell its products directly to any distilled spirits licensed retailer. They sell their product to distilled spirits suppliers and/or wholesalers who re-sell it to retail licensees.

55. Respondent seeks a luxury appearance and aura for its product line and generally used a black and gold color scheme in its advertising. As respondent's products are more expensive at retail and a target for theft, some retailers keep them locked-up or secured and not displayed on publicly accessible shelves. Therefore, respondent wants to advertise their product to retail customers by displaying its signs at retail licensed premises.

56. Blair was aware of the use of wrap signs for at least the last 15 years. She has worked with their sign vendor, A.P. Keaton, for several years. A.P. Keaton will consult with the retailer about the sign's placement in the retail store, but it is ultimately the retailer's decision to display respondent's signs in their licensed premises. Respondent pays all costs for the signs, including their installation. The retailer pays no cost for them. There is no intent for the signs to be other than advertising for respondent's products. They are not intended for beautification, security, counter-top protection, or wall protection.

LEGAL BASIS OF DECISION AND DETERMINATION OF ISSUES

1. Cause for suspension or revocation of respondent's license exist under Article XX, section 22, of the California State Constitution and Business and Professions Code sections 24200, subdivisions (a) and (b) as alleged in Counts 2, 3, 5, 6, 8 , 9, 11, 12, 14, 15, 17, 18, 20, 21, 23, 24, 26, 27, 32, 33, 35, 36, 38, 39, 44, 45, 47, 48, 50, 51, 53, 54, 56, 57, 59, 60, 62, 63, 65, 66, 68, 69, 71, 72, 74, 75,77, 78, 80 and 81 in the First Amended Accusation because respondent provided/supplied/furnished free installation of its advertising signs at the retail licensees' premises as specified in those counts, in violation of Business and Professions Code section 25502, subdivision (a), and California Code of Regulations, title 4, section 106, subdivision (a).

2. Cause for suspension or revocation of respondent's license exist under Article XX, section 22, of the California State Constitution and Business and Professions Code sections 24200, subdivisions(a) and (b) as alleged in Counts 4, 40, 46, 61, 67, 70, 79 in the First Amended Accusation because respondent's perforated vinyl signs for windows had a secondary value and were of value to the retail licensee beyond mere advertising in violation of California Code of Regulations, title 4, section 106, subdivision (c).

3. Cause for suspension or revocation of respondent's license does not exist under Article XX, section 22, of the California State Constitution and Business and Professions Code sections 24200, subdivisions(a) and (b) as alleged in Counts 1, 7, 10, 13, 16, 19, 22, 25, 28, 34, 37, 49, 52, 55, 58, 64, 73, 76 and 82 in the First Amended Accusation because respondent's unperforated vinyl signs affixed to interior premises surfaces other than windows, e.g. counters, walls, refrigerator-coolers, did not have a secondary value and were of value to the retail licensee only as advertising as specified in California Code of Regulations, title 4, section 106, subdivision (c).

4. As to Counts 29, 30, 31, 41, 42, and 43 in the First Amended Accusation cause for suspension or revocation of respondent's license exist under Article XX, section 22, of the California Constitution and Business and Professions Code sections 24200, subdivisions (a) and (b), as respondent improperly furnished and installed exterior signs at the two licensed premises specified in those counts in violation of Business and Professions Code section 25502, subdivision (a) and California Code of Regulations, title 4, section 106, subdivision (a) and (c).

5. The Department contended respondent improperly gave the involved retailers a free gift, premium, or thing value consisting of the interior vinyl signs respondent affixed to windows, counter surfaces, walls, and objects in the licensed retail premises. It also contended respondent's act or labor of installing the signs, as performed by A.P. Keaton Company, was also not permitted and constituted a further impermissible thing of value respondent gave for free to the retail licensees.

6. Respondent contended its vinyl signs were merely a form of permitted interior signs it could furnish retail licensees. It also contended that under rule 106, its installation of the signs was an integral step in its supplying or making available its signs to the retailers and the installation work did not constitute giving the retailers an improper thing of value.

7. Chapter 15 of the Alcoholic Beverage Control Act, entitled "Tied-House Restrictions", containing sections 25500 to 25512, targets preventing and deterring tied-houses from developing among California alcoholic beverage manufacturers, wholesalers, and retailers by keeping their ownership, functions, and interest separate and distinct from one another.

8. "By enacting prohibitions against 'tied-house' arrangements, [the Legislature] aimed to prevent two particular dangers: the ability and potentiality of large firms to dominate local markets through vertical and horizontal integration [citation] and the excessive sales of alcoholic beverages produced by the overly aggressive marketing techniques of larger alcoholic beverage concerns [citations]." (*California Beer Wholesalers Assn., Inc. v. Alcoholic Bev. etc. Appeals Bd.* (1971) 5 Cal.3d 402, 407 [96 Cal.Rptr. 297, 487 P.2d 745].)

9. One of the tied-house related statutes, section 25502, subdivision (a), states:

> No manufacturer, winegrower, manufacturer's agent, rectifier, California winegrower's agent, distiller, bottler, importer, or wholesaler, or any officer, director, or agent of any such person shall, except as authorized by this division:
> (¶...¶)
>
> (2) Furnish, give, or lend any ... thing of value, directly or indirectly, to, ... any person engaged in operating, owning, or maintaining any off-sale licensed premises.
> (¶...¶)"

10. However, section 25611.1, which is comes from Chapter 16, permits suppliers to provide certain interior advertising signs to off-sale retail licensed premises. That section states, in part:

> Any manufacturer, ... manufacturer's agent, rectifier, distiller,... may furnish, give, lend, sell, or rent:
>
> (a) Interior signs, advertising either wine or distilled spirits, for use in on-sale retail premises, each of which shall not exceed 630 square inches in size. This limitation on the size of interior signs, advertising either wine or distilled spirits, shall not be applicable to off-sale retail premises.
> (¶...¶)
>
> (d) Signs or other advertising matter for exterior use at any on-sale or off-sale retail premises as may be permitted by this division and rules of the department adopted thereto.

11. Section 25502, subdivision (a), and section 25611.1 are refined by rule 106, subdivision (a), that states:

> Free Goods. No licensee shall, directly or indirectly, give any premium, gift, free goods, or other thing of value in connection with the sale, distribution, or sale and distribution of alcoholic beverages, and no retailer shall, directly or indirectly, receive any premium, gift, free goods or other thing of value from a supplier of alcoholic beverages, except as authorized by this rule or the Alcoholic Beverage Control Act.

12. Rule 106, subdivision (c), then focuses on suppliers providing advertising materials to retailers. It states:

> Signs, Displays and Promotional Materials. A supplier shall not give or furnish signs, displays, or promotional materials advertising alcoholic beverages to a retailer, except as permitted by this rule or the Alcoholic Beverage Control Act.

13. As to interior signs, rule 106, subdivision (c)(1), then specifies:

> Interior Signs. A supplier may furnish interior signs advertising alcoholic beverages sold by him to a retailer for use within on-sale or off-sale premises, provided no such sign relating to wine or distilled spirits for use within an on-sale premises shall exceed 630 square inches. A sign shall be deemed to be an interior sign although placed in a window and primarily visible from outside the premises. **Interior signs furnished by suppliers which advertise distilled spirits and wine shall have no secondary value and be of value to the retailer only as advertising.** Suppliers may not directly or indirectly or through an arrangement with an affiliate or other person pay or credit the retailer for displaying the interior sign or for any expense incidental to its operation. (emphasis in bold added)

14. As to what constitutes a sign, rule 106, subdivision (b)(3), states:

> "Sign" means a flat material or a three dimensional unit (other than the advertised product itself) principally bearing a conspicuous notice of the manufacturer's name, brand name, trade name, slogans, markings, trademarks or other symbols commonly associated with and generally used by the manufacturer in identifying the manufacturer's name or product, with or without other graphic or pictorial advertising representations, whether illuminated or mechanized, including but not limited to posters, placards, stickers, decals, shelf-strips, wall panels, shadow boxes, price boards, mobiles, inflatables, dummy bottles, bottle toppers, case wrappers, neck ringers, brand identifying statuettes, tap markers, table tents, mirrored signs, plaques and other similar items.

> **A sign advertising distilled spirits or wine shall have no secondary value and be of value to the retailer only as advertising.** (emphasis in bold added)

15. Rule 106, subdivision (b)(9) specifies: " 'Furnish' as used in this rule means to supply or make available for use as well as the actual giving or actual transfer of title of an item."

16. Rule 106 does not specify what type of material a supplier's interior sign can be made of, e.g. paper, cardboard, poster board, glass, plastic, vinyl, wood, or metal. It does not specify the sign must be made of an opaque, translucent, or transparent material. It neither establishes any limit on the supplier's cost to produce interior signs, nor a limit on the size of interior signs for off-sale premises, nor the number of interior signs a supplier can provide, nor where they can be placed in the interior of a retailer's premises.

17. The evidence established respondent, through A. P. Keaton Co., designed, fabricated, and installed interior vinyl signs tailored to fit in exact spaces or on exact things within the 28 retail licensees' premises specified in the First Amended accusation. Respondent incurred all expenses related to the signs. Respondent paid nothing to the retailers to display its signs in their premises.[6] The retailers paid nothing to respondent for its interior signs or for the ability to display respondent's signs in their premises.

18. Respondent's signs were generally consistent with the physical characteristics and examples of permitted interior signs described in rule 106 (b)(3) in that its signs were made from a flat material, e.g. paper thin vinyl sheets, and conspicuously bore respondent's name, product images, slogans, markings, trademarks or some combination thereof related to respondent's product line.

19. Rule 106, subdivision (b)(3), states signs include such things as "... posters,...stickers, decals,...wall panels ..." It also states signs relating to wine or distilled spirits for use within an on-sale premises cannot exceed 630 square inches. Respondent's signs were essentially large or extra-large posters, decals, or stickers made to fit specific locations or things in the retail premises, e.g. windows, counter tops, counter fronts, wall areas, and beverage coolers. While some of the signs were so large as to cover entire front window panels or span the length of a wall, rule 106 neither expressly limits what type of material interior signs must be printed on nor imposes any size limitation for interior signs for off-sale premises nor imposes any limit on the number of interior signs the supplier can provide the retailer.

---

[6] This included signs posted or installed in windows even though the signs were primarily visible outside of the retail licensed premises. Under rule 106, subdivision (c)(1), those signs are still classified as "Interior Signs".

20. However, rule 106, subdivision (b)(3) requires: "A sign advertising distilled spirits or wine shall have no secondary value and be of value to the retailer only as advertising." Specifically as to interior signs, rule 106 subdivision (c)(1) states: "Interior signs furnished by suppliers which advertise distilled spirits and wine shall have no secondary value and be of value to the retailer only as advertising."

21. Focusing on respondent's vinyl window signs, the perforated vinyl sheets specifically used to make them had the critical optical feature of permitting those inside to have somewhat of a view of activity outside while those outside have extreme difficulty viewing inside. Thus, it was somewhat analogous to a one-way mirror. That one-way view characteristic provided an element of interior privacy attributable solely to the vinyl material and was completely separate from the advertising information printed on the signs. Respondent printed its window signs using the perforated vinyl sheets because it had that one-way view optical characteristic in addition to being an acceptable medium on which to print its advertisement information. To that extent, respondent's window signs provided a secondary value to the retailers independent of the advertising printed on them. Therefore, respondent's window signs did not meet the strict criteria set forth in rule 106 subdivision (b)(3) and subdivision (c) because they had a secondary value to the retailer beyond their advertising information.

22. As to interior vinyl signs installed on counter tops, counter faces, walls, ceiling beams, and other items such as refrigerators or coolers, the Department asserted the signs acted as an added protective film or coating on those surfaces shielding them against added wear and tear therefore providing an added benefit to the retailer beyond the signs' printed advertising message. Obviously, permitted interior signs have to be printed on some type of base material, e.g. paper, cardboard, posterboard, wood, acrylic board, metal, or even thin sheets of vinyl. Rule 106 does not state what material interior signs must be made of and does not prohibit the use of sheet vinyl. There was no evidence respondent's vinyl sheets had any special ingredient, components, or were processed via some specialized manufacturing technique to particularly strengthen them beyond being material suitable for sign making. It was not established the vinyl was used because it was especially or particularly resistant to cuts, scratches, spills, scuffing, routine wear and tear, or especially resistant to sunlight, i.e. ultra violet light. If respondent's sign covered up a retailer's worn counter or a hole in a wall, the same coverage would occur whether the sign was made of respondent's vinyl or some other medium. In one way or another or to one degree or another, any interior sign, whatever it was made of, would provide some added degree of protection to the surface below it. In this instance, that consequence did not equate to respondent's vinyl interior signs having a secondary value within the meaning of rule 106.

23. In terms of respondent's signs conveying a clean or luxury appearance to the retail premises as a secondary value, that is a subjective assessment primarily based on one's aesthetic evaluation of the sign's outward appearance, e.g. it's artwork, imaging, text, color scheme. The secondary value discussed in rule 106 should not, in this instance, be based on that kind of subjective standard.

24. Therefore, it was not established that under rule 106, respondent's interior signs affixed to counters, walls, or other items had a secondary value and were of value to the retailer beyond mere advertising.

25. The Department further contended while respondent could design, produce, and furnish appropriate interior signs to retailers, it was improper for respondent, or its agent, to physically install the interior vinyl signs, whether on windows, walls, counters, refrigerator/cooler units, or other surfaces. Respondent contended it was permitted to provide the labor to install its interior signs.

26. Under section 25611.1 suppliers can "...furnish, give, lend, sell, or rent..." interior signs to retailers. Under rule 106, subdivision (c)(1) respondent can "furnish" interior signs "...to a retailer..." Rule 106, subdivision (b)(9) states: " 'Furnish' as used in this rule means to supply or make available for use as well as the giving or actual transfer of title of an item." The issue is then whether rule 106's definition of "Furnish" as: "...to supply or make available for use as well as giving or actual transfer of title of an item." includes installation.

27. When construing words in a statute, a court should "... begin with the fundamental rule that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. [Citations.] An equally basic rule of statutory construction is, however, that courts are bound to give effect to statutes according to the usual, ordinary import of the language employed in framing them. [Citations.] Although a court may properly rely on extrinsic aids, it should first turn to the words of the statute to determine the intent of [those promulgating the regulation.] [Citations.] If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. [Citations.]" (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698 [170 Cal.Rptr. 817, 621 P.2d 856], internal quotations omitted.)

28. "Generally, the same rules of construction and interpretation which apply to statutes govern the construction and interpretation of rules and regulations of administrative agencies. (*Miller v. United States* 1935 (294 U.S. 435 . . ..)" (*Cal. Drive-in Restaurant Assn. v. Clark* (1943) 22 Cal.2d 287, 292.)

29. In this instance, the tied-house statutes and rule 106 are targeted to strictly control the relationship among manufacturers, wholesalers, and retailers. Therefore, the statutes and related rules should be construed to accomplish and promote that end. Generally, suppliers cannot give premiums, gifts, free goods, and things of value to retailers. Under section 25611.1 suppliers can "...furnish, give, lend, sell, or rent..." interior signs to retailers. Rule 106 permits a wholesaler to furnish interior signs to retailers. To give, lend, sell or rent an item does not equate to installing an item. In the context of rule 106's definition of "furnish" to mean "supply" or "make available for use" should be construed narrowly and not broadly. To "supply" an item or make it "available for use" by another also does not necessarily include, in the context of interior advertising signs, the separate added act of installation, mounting, setting up, or assembly at the retailer's premises. Considering the overall goal of the tied-house statutes, respondent's supplying or making available for use its interior signs should not be interpreted so broadly as to generally include the additional act of respondent providing the free labor to install, set-up, or mount of its interior signs absent an express indication that such activity is allowed.[7]

30. Rule 106, subdivision (c)(3), states that as to window displays and floor displays: "Displays. A supplier may furnish, install, set up and service signs, promotional materials and decorations as window displays or temporary floor displays in off-sale premises..." That subsection expressly uses the terms "furnish", "install", and "set up" to describe the extent of actions the supplier can take with respect to window displays and floor displays. The absence of the terms "install" and "set up" with respect to what a supplier can do with respect to interior signs must mean that while a supplier can "supply" or "make available for use" interior signs, that does not extend to installing or setting up interior signs. If suppliers were generally permitted to "install" or "set up" its interior signs in retail premises, then that activity could have been expressly specified in rule 106, subdivision (c)(1) as to interior signs, but it is not. Therefore, rule 106 did not permit respondent, or its agent, to perform the free installation or free set up of its interior signs in the retail licensed premises as occurred in this matter.[8]

---

[7] As a point of interest, neither party addressed how more routine and common types of signs, posters, stickers, and banners are supplied to retailers, e.g. are they merely delivered to the retailer who post them or does the supplier also install those types of interior signs?

[8] Although, as to "Displays", a supplier can install and set up and service signs as a part of a window display, the perforated vinyl window signs in this matter, as discussed herein, were improper signs because they had a secondary value beyond their advertisement information so could not be installed as part of a window display under rule 106(c)(3).

31. In sum, as to respondent's interior signs: 1) the perforated vinyl window signs were improper because they had a secondary value beyond mere advertisement; 2) the interior vinyl signs affixed to counters, walls, or other three dimensional objects had no secondary value and were of value only as advertisements; and 3) respondent was not permitted to install or set up its interior vinyl signs in the retail licensed premises as occurred herein.

32. As to counts 41-43 regarding signs at the Quick Mart and counts 29-31 regarding signs at Downtown Liquor, a separate discussion is required. The evidence established respondent's signs were posted within a framed space on the exterior of those retailers' buildings, but those were not windows as they had no glass but some other filler or backing. This was unlike other window signs Agent Thompson saw where the interior sign was affixed on the interior of a glass window and primarily visible from the exterior or outside the licensed premises. Therefore, the signs at the Quick Mart and Downtown Liquor were exterior signs not interior signs.

33. As to exterior signs, rule 106, subdivision (c)(2)(A), states: "Except as provided herein, no supplier shall sell, rent, or otherwise furnish an exterior sign to any retail licensee."

34. Rule 106, subdivision (c)(2)(B) states: "Any wholesaler may sell or rent an exterior sign advertising wine or distilled spirits to any licensee at a price not less than the current market price for such sign." Rule 106, subdivision (c)(2)(C), states: "Any wholesaler of beer may sell or rent an exterior sign advertising beer at a price not less than the wholesaler's cost for such sign. Any such sign that is customized for a retailer must be sold by the wholesaler. For purposes of this provision, "cost" shall be as defined in Section 17026 of the Business and Professions Code."

35. As respondent was a manufacturer's agent for distilled spirits, not a wholesaler, it could neither sell, nor rent, nor furnish exterior signs to retailers Quick Mart and Downtown Liquor as it did.

36. Also, as to exterior signs, rule 106, subdivision (c)(2)(D) states:

> No supplier shall place a sign, banner, display or other device advertising alcoholic beverages... on or adjacent to any retail premises or parking lot used in conjunction with any premises; provided however that a supplier may temporarily furnish non-permanent exterior signs, banners and inflatables to organizations to connection with events described in subsections (h) and (i) of this rule.

37. Respondent was thus also not permitted to place its signs on the exterior of the Quick Mart and Downtown Liquor as it did. There was no evidence establishing respondent furnished or posted its exterior signs in connection with the type of events described in subdivisions (h) and (i) that deal with public service/fund raising activities and contests. Therefore, there was sufficient evidence to sustain counts 29-31 and 41-43.

38. Except as set forth in this decision, all other allegations in the accusation and all other contentions made by the parties in the pleadings or at the hearing regarding those allegations lack merit.

PENALTY

1. In assessing a penalty for this matter, the Department's penalty guidelines are in California Code of Regulations, title 4, section 144 (hereafter rule 144). Rule 144 does not recommend a specific penalty for a violation of section 25502 or rule 106. Section 25504 does indicate a violation of section 25500 to 25503 is a misdemeanor.

2. Rule 144 permits consideration of aggravating and mitigating factors when assessing a penalty. It states those factors include, but are not limited to, such variables as prior disciplinary history, prior warning letters, licensee involvement, premises located in high crime area, lack of licensee cooperation in the investigation, appearance and age of minor, continuing course of conduct, length of discipline free licensure, action to correct problem, licensee training, and cooperation by the licensee in the investigation.

3. While the first amended accusation involved numerous counts, the Department recommended a consolidated 15-day license suspension drawing from the penalty recommended in rule 144 for exercising license privileges beyond the scope of the license in violation of section 23300 and 23355. The penalty for violating those sections range from a five-day suspension to license revocation.

4. Respondent recommended the accusation be dismissed and did not make any penalty recommendation in the event some or all of the counts were sustained.

5. The duration of licensure free of discipline being a factor in mitigation under rule 144, respondent has been licensed since 2013 with no prior disciplinary action. That length of discipline free licensure is worth some mitigation.

6. The evidence established respondent primarily intended its interior signs to serve as interior advertising for its products.

7. Rule 106 does not specify what type of material an interior sign can be made of. Respondent did not print its signs on a specifically banned sign material/medium.

8. Rule 106 does not, as relevant to this matter, indicate interior signs must not exceed a specific cost to design and produce. The fact respondent paid a fair sum for the design, fabrication, and installation of its interior signs is not particularly an aggravating factor. Also, rule 106 does not limit the number of interior signs that can be supplied to a licensed retailer.

9. As to interior signs, neither statute nor rule 106 impose any size limit for interior signs for off-sale licensed premises. Therefore, even though some signs respondent installed covered significant square footage, that was not an aggravating factor.

10. Respondent's signs featured respondent's product which the involved retailers could purchase for resale under their type-21 off-sale general retail licenses.

11. There was no evidence respondent paid any involved retailer any money for respondent's ability to display its interior signs at the retail licensed premises.

12. The violations did not involve violence, bodily injury, or disturbance of the public peace.

13. As to any other grounds or argument raised by the parties regarding the measure of discipline, such are found to have no merit.

ORDER

1. Counts 2, 3, 4, 5, 6, 8, 11, 12, 14, 15, 17, 18, 20, 21, 23, 24, 26, 27, 29, 30, 31, 32, 33, 35, 36, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 53, 54, 56, 57, 59, 60, 61, 62, 63, 65, 66, 67, 68, 69, 70, 71, 72, 74, 75, 77, 78, 79, 80, and 81 of the First Amended Accusation are sustained.

2. Counts 1, 7, 9, 10, 13, 16, 19, 22, 25, 28, 34, 37, 49, 52, 55, 58, 64, 73, 76 and 82 of the First Amended Accusation are dismissed.

3. As to each sustained count, respondent's license is suspended for a period of 15 days, with all 15 days of suspension stayed for a period of 12 months commencing the date the decision in this matter becomes final and upon the condition that no subsequent final determination is made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred during the period of the stay. Should such a determination be made, the Director of the Department of Alcoholic Beverage Control may, in the Director's

sole discretion and without further hearing, vacate the stay and impose the 15 stayed-days of suspension, and should no such determination be made, the stay shall become permanent.

4. As all the sustained counts basically related to the same advertising program, just as to different retail licensed premises, and in light of the factors regarding penalty discussed above, the penalty as to each sustained count shall be served concurrently with the other sustained counts.

Dated: June 20, 2022

David W. Sakamoto
Administrative Law Judge

☑ Adopt

☐ Non-Adopt: _____

_____

By: _____

Date: 08/26/22