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

AB-9693
File: 23-532303 Reg: 18086403

BARREL HARBOR BREWING COMPANY, LLC,
dba Barrel Harbor Brewing
2575 Pioneer Avenue, Suite 104,
Vista, CA 92081-8450,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Appeals Board Hearing: November 1, 2018
Ontario, CA

ISSUED NOVEMBER 28, 2018

Appearances: *Appellant*: Dean R. Lueders as counsel for Barrel Harbor Brewing Company, LLC, doing business as Barrel Harbor Brewing.
Respondent: Kerry K. Winters as counsel for the Department of Alcoholic Beverage Control.

OPINION

Barrel Harbor Brewing Company, LLC, doing business as Barrel Harbor Brewing (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for 25 days because its agent or employee sold an alcoholic beverage to a minor, a violation of Business and Professions Code section 25658, subdivision (a).

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1. The decision of the Department, dated March 14, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

On January 2, 2018, the Department filed an accusation charging that appellant's agent or employee sold an alcoholic beverage to a minor on November 27, 2017. The Department mailed the accusation to appellant on February 12, 2018.

On March 12, 2018, appellant filed a Notice of Defense with the Department.

On March 14, 2018, the Department issued a Decision Following Default imposing a penalty of 25 days' suspension.

On March 21, 2018, appellant filed a Motion to Vacate Default Decision with the Department. The following day, the Department filed its Opposition to the Motion to Vacate Default Decision.

On March 23, 2018, while the Motion to Vacate Default Decision was pending before the Department, appellant filed a concurrent Notice of Appeal with this Board.[2]

Ultimately, the Department issued an Order denying appellant's Motion to Vacate Default Decision. The Order was signed on March 23, 2018, and mailed on March 26, 2018.

Appellant then filed this appeal contending (1) the Department should have granted appellant's Motion to Vacate and held a trial on the merits; (2) the penalty is excessive and is not supported by the findings or substantial evidence; and (3) the Department's practice of issuing default warning letters, and its apparent decision to stop issuing them, constitutes an underground regulation and results in unequal treatment of licensees.

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2. In the case of a default decision, an appeal may be filed with the Board concurrently with a Motion to Vacate before the Department. (See *The District Vapor Lounge* (2018) AB-9657, at pp. 3-4.)

DISCUSSION

Appellant asks this Board to reverse the Department's Decision Following Default. It argues that the Department should have granted appellant's Motion to Vacate and held a hearing on the merits. (App.Br., at pp. 5, 9.)

Appellant points out that the Decision Following Default was issued two days after appellant filed a Notice of Defense with the Department. (App.Br., at p. 4.) According to appellant, the fact that the Department's Decision does not find the appellant in default until March 14 indicates the Department "expressly waived the untimeliness" of appellant's Notice of Defense and is "now estopped from arguing otherwise." (App.Br., at p. 4.)

In essence, appellant argues that even if its Notice of Defense was untimely, the Department should have held a hearing on the merits.

Additionally, appellant submits a Request to Supplement Appeal Record and three accompanying documents.

As an initial matter, this Board has jurisdiction to review a Department decision even where no administrative hearing has taken place. (See Cal. Const., art. XX, § 22; see also *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (1987) 195 Cal.App.3d 812, 919 [240 Cal.Rptr. 915] [Board's jurisdiction not limited to review of quasi-judicial decisions following formal hearings].)

This Board's review of a default decision, however, is narrow and strictly limited. Where a motion to vacate is filed, a default decision may only be set aside where the licensee shows good cause. (Gov. Code, § 11520(c).) Good cause includes failure to receive notice (Gov. Code, § 11520(c)(1)) as well as mistake, inadvertence, surprise, or

excusable neglect (Gov. Code, § 11520(c)(2)). Where good cause is found, the agency may vacate the decision and grant a hearing. (Gov. Code, § 11520(c).) Reviewing courts apply the same good-cause standard. (See, e.g., *Med. Bd. of Cal. v. Superior Ct.* (2018) 20 Cal.App.5th 1191, 1193-1194 [229 Cal.Rptr.3d 784].) We apply the same standard here. Where this Board finds good cause, the remedy is remand to the Department for a hearing on the merits. (See Bus. & Prof. Code, § 23085.)

Government Code section 11506(a) provides, in relevant part, that a respondent may file a notice of defense "[w]ithin 15 days after service of the accusation." (Gov. Code, § 11506(a).) Any notice of defense "shall be filed within that period unless the agency in its discretion authorizes the filing of a later notice." (Gov. Code, § 11506(b).) "Failure to file a notice of defense . . . shall constitute a waiver of respondent's right to a hearing, but the agency in its discretion may nevertheless grant a hearing." (Gov. Code, § 11506(c).)

It is undisputed that the Department mailed the Accusation on February 12, 2018. (Exh. 2, Declaration of Service by Mail; see also App.Br., at p. 2; Dept. Reply Br., at p. 2.) Even granting an additional five calendar days under section 1013 of the Code of Civil Procedure, appellant was required to file any notice of defense by March 5, 2018, unless "the agency in its discretion authorize[d] the filing of a later notice." (Gov. Code, § 11506(a) and (b).) It is also undisputed that the Department did not authorize the filing of a later notice of defense in this case. (See generally exhs.; see also App.Br.; Dept. Reply Br.)

According to appellant, it filed its Notice of Defense on March 12, 2018—a full 28 days after the Accusation was mailed, and a week after the final date on which a notice

of appeal could be filed. (App.Br., at p. 2.) Under the statute, the Notice of Defense was not simply untimely; it *could not be filed* without the Department's authorization. (See Gov. Code, § 11506(b).) The Department is not required to accept a late notice of defense. (*Ibid.*)

For purposes of the Department's Decision Following Default dated March 14, 2018, it was legally accurate to state that "[a]ccording to Department records, no Notice of Defense has been filed." (Decision Following Default, at p. 1.) This does not constitute a waiver or admission of any sort. Instead, it represents the Department's refusal to accept appellant's untimely Notice of Defense.

Appellant nevertheless urges this Board to grant relief. It cites *Elston* for the proposition that "the trial court's discretion [under section 473] is not unlimited and must be 'exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." (App.Br., at p. 3, citing *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 232-233 [211 Cal.Rptr. 416].)

Elston, however, interpreted section 473 of the Code of Civil Procedure, which is inapplicable here. Relief from a default decision of the Department can only be obtained under section 11520 of the Government Code. That statute provides that "[t]he agency in its discretion may vacate the decision and grant a hearing on a showing of good cause," which "includes, but is not limited to," failure to receive notice, mistake, inadvertence, surprise, or excusable neglect. (Gov. Code, § 11520(c).)

At no point does appellant explain its failure to timely file a Notice of Defense. (See generally App.Br.) Appellant does not even argue—let alone establish—any of the possible grounds for relief from a default decision outlined in the section 11520. (See

generally App.Br.; see also Gov. Code, § 11520(c).) Appellant's only argument—that relief should be granted because the Department would suffer no prejudice—does not constitute good cause. (See App.Br., at p. 3.) To apply that logic would allow licensees to routinely flout statutory deadlines, provided the Department suffered no prejudice. That position is absurd.

As a matter of law, appellant's Notice of Appeal was not timely, and the Department was not required to accept or acknowledge it. The additional documents appellant supplies in its Request to Supplement Appeal Record are therefore irrelevant, and appellant's Request to Supplement is denied.

II

Appellant contends the findings in this case do not support the penalty imposed. Appellant argues this Board "has an obligation under . . . section 23084 subsections c and d to review a decision of the [Department] to ensure the decision is supported by the findings and that the findings are supported by substantial evidence." (App.Br., at p. 5.) Appellant complains that the Department's Decision Following Default "does not contain any findings about the penalty, let alone any finding of aggravating factors to support such an excessive penalty." (*Ibid.*)

In an appeal on the merits, this Board's review is limited. (See Cal. Const., art. XX, § 22; Bus. & Prof. Code, § 23083.) In such cases, the Board may examine the issue of an excessive penalty if it is raised by the appellant. (*Joseph's of Cal.* v. *Alcoholic Bev. Control Appeals Bd*. (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183].) As this Board has repeatedly stated, findings regarding the penalty imposed are not necessary as long as specific findings are made that support the decision to impose

disciplinary action. (*Williamson v. Bd. of Med. Quality Assurance* (1990) 217 Cal.App.3d 1343, 1346-47 [266 Cal.Rptr. 520].)

As noted in Part I, *supra*, however, this Board's authority to review a default decision is further limited. (Gov. Code, § 11520(c).) The Board may ask only whether there is good cause to grant relief from the default judgment. Where good cause is shown, the Board may remand the case to the Department for a hearing on the merits. (*Ibid.*)

Appellant has cited no law granting this Board authority to review the penalty imposed in a default decision. Based on our independent review of the law, this Board lacks such authority.

III

Appellant contends the Department's past practice of sending default warning letters constituted an underground regulation. (App.Br., at p. 6.) Appellant further argues that by ending its practice of sending default warning letters, the Department simply substituted a new underground regulation. (*Id.*, at p. 7.) According to appellant, this resulted in unequal treatment between licensees, and allowed the Department to "unilaterally pick and choose which licensee will have to follow which default process." (*Id.*, at p. 8.)

For support, appellant relies on *Baluyut*, a California Supreme Court case addressing discriminatory prosecution. (*Ibid*., citing *Baluyut v. Superior Ct.* (1996) 12 Cal.4th 826 [50 Cal.Rptr.2d 101].)

Baluyut, however, is irrelevant. That case addressed discriminatory prosecution "that is 'deliberately based upon an unjustifiable standard such as race, religion, or other

arbitrary classification.'" (*Id*., at p. 831, citing *Oyler v. Boles* (1962) 368 U.S. 448, 456 [82 S.Ct. 501].) Appellant does not allege the Department's decision to end its practice of sending default warning letters was based on any unjustifiable standard. (See App.Br., at pp. 6-9.) Indeed, appellant merely claims that it was "treated differently than other licensees" without reference to any protected class. (*Id.* at p. 9.)

Based solely on appellant's own brief, however, it seems the Department simply stopped issuing default warning letters—a change in practice that appellant *also* contends was an illegal underground regulation. (*Id.*, at p. 7.)

Regardless of whether the Department still issues, or has ever issued, default warning letters, the practice of extending the time to file a notice of defense against an accusation in some cases is not an underground regulation, but rather a proper exercise of the Department's discretion, provided that discretion is not exercised in an arbitrary or discriminatory fashion. The law is clear regarding the 15-day deadline for filing a notice of defense to an accusation. (See Gov. Code, § 11506(a).) While the Department has discretion to "authorize the filing of a later notice"—by sending a default warning letter, for example—it is not required to do so. (Gov. Code, § 11506(b).) In this case, the Department did not send appellant a default warning letter, did not otherwise extend appellant's deadline, and ultimately did not accept appellant's untimely Notice of Defense. Appellant has not shown how the Department's exercise of its discretion in enforcing a statutory deadline in this case was either arbitrary or discriminatory. (See App.Br., at pp. 5-9.)

We see no underground regulation, nor any abuse of the Department's statutory discretion. Appellant's claims lack merit.

ORDER

The decision of the Department is affirmed.[3]

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
MEGAN MCGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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

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

APPENDIX

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

IN THE MATTER OF THE ACCUSATION AGAINST: BARREL HARBOR BREWING COMPANY LLC BARREL HARBOR BREWING 2575 PIONEER AVE STE 104 VISTA, CA 92081-8450 SMALL BEER MANUFACTURER - LICENSE Respondent(s)/Licensee(s) under the Alcoholic Beverage Control Act.	SAN MARCOS DISTRICT OFFICE File: 23-532303 Reg: 18086403 AB: 9693

CERTIFICATION

I, Dominique Williams, do hereby certify that I am a Senior Legal Analyst for the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that annexed hereto is a true, correct and complete record (not including the Hearing Reporter's transcript) of the proceedings held under Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code concerning the petition, protest, or discipline of the above-listed license heretofore issued or applied for under the provisions of Division 9 of the Business and Professions Code.

IN WITNESS WHEREOF, I hereunto affix my signature on April 23, 2018, in the City of Sacramento, County of Sacramento, State of California.

Office of Legal Services

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

IN THE MATTER OF THE ACCUSATION AGAINST: Barrel Harbor Brewing Company LLC Dba Harbor Barrel Brewing 2575 Pioneer Ave, suite 106 Vista, CA 92081-8450 Licensee(s).	**File No.: 23-532303** **Reg. No.: 18086403**

ORDER ON MOTION TO VACATE DEFAULT

Procedural History:

On January 30, 2018, the Department registered an accusation against licensee, alleging a single count that on November 27, 2017, licensee violated Business and Professions Code section 25658(a). The accusation was served on licensee on February 12, 2018.

On March 12, 2018, licensee, through its attorney, faxed a Notice of Defense to the Department's Office of Legal Services.

On March 14, 2018, the Department issued a Decision Following Default ("Decision"). The Decision was served on the parties on March 15, 2018. The Decision found that the violation alleged was established and imposed a 25-day suspension of the license.

On March 21, 2018, licensee's attorney submitted a written Notice of Motion to Vacate Default and Default Decision and Accompanying Motion ("Motion").

On March 22, 2018, counsel for the Department submitted Department's Opposition to Respondent's Motion to vacate Default Decision (Government Code § 11520(c); "Opposition").

Applicable Law:

Government Code section 11506(a) provides, among other things, "Within 15 days after service of the accusation the respondent may file with the agency a notice of defense."

Government Code section 11506(c) provides, in relevant part, "The respondent shall be entitled to a hearing on the merits if the respondent files a notice of defense . . ., and the notice shall be deemed a specific denial of all parts of the accusation . . . not expressly admitted. Failure to file a notice of defense . . . shall constitute a waiver of respondent's right to a hearing, but the agency in its discretion may nevertheless grant a hearing."

Government Code section 11520(a) provides, "If the respondent either fails to file a notice of defense, or, as applicable, notice of participation, or to appear at the hearing, the agency may take action based upon the respondent's express admissions or upon other evidence and affidavits may be used as evidence without any notice to respondent; and where the burden of proof is on the respondent to establish that the respondent is entitled to the agency action sought, the agency may act without taking evidence."

Government Code section 11520(c) provides, "Within seven days after service on the respondent of a decision based on the respondent's default, the respondent may serve a written motion requesting that the decision be vacated and stating the grounds relied on. The agency in its discretion may vacate the decision and grant a hearing on a showing of good cause. As used in this subdivision, good cause includes, but is not limited to, any of the following: (1) Failure of the person to receive notice served pursuant to Section 11505. (2) Mistake, inadvertence, surprise, or excusable neglect."

Analysis:

The accusation in this matter was served by mail on February 12, 2018, thus requiring that a notice of defense must have been filed with the Department no later than March 5, 2018 (15 days plus five additional days for mailing, pursuant to Code of Civil Procedure § 1013(a)). The notice of defense was not filed until March 12, 2018.[1] As such, the notice of defense was not timely and the licensee has thus waived all rights to a

[1] "Filed" here is used loosely. The notice of defense submitted by licensee on March 12 was sent via facsimile at approximately 2:08 pm (according to the facsimile header). However, the Proof of Service does not reflect that it was served on the Department via facsimile. Nor is there any evidence that the Department agreed to accept service via facsimile. Notwithstanding this, the Department did stamp the notice of defense as "received" on March 13, 2018.

hearing. As of March 5, 2018, the Department was entitled to enter licensee's default and to take action based upon such evidence as is in the file without any notice licensee.

Licensee makes several arguments in support of its timely-filed Motion:

1. Notice of defense was filed prior to entry of default:

Licensee argues that the Department "lacked the jurisdiction" to take the default and adopt the Decision because it had received the notice of defense prior to the issuance of the Decision. This assertion is not legally correct. As detailed above, the Department had express legal authority to take licensee's default after March 5, 2018, due to licensee's failure to file a notice of defense. By failing to file its notice of defense within the statutorily mandated time, licensee waived all rights to a hearing. Licensee has cited no law or other authority in support of its contention that the Department lacked jurisdiction to adopt the Decision after licensee failed to file its notice of defense in a timely manner. There is no legal basis to claim that merely because the notice of defense was at some later time received, but before the Decision was issued, the Department is without jurisdiction to take licensee's default and issue the Decision.

Licensee next asserts that the Department is not prejudiced by vacating its Decision and allowing the matter to proceed to hearing, while it "will suffer great prejudice" if no hearing is conducted. Licensee presented no argument or legal authority in support of its contentions. Moreover, whether or not the assertions regarding prejudice are true, neither lack of prejudice to the Department nor prejudice to licensee are "good cause" to vacate the Decision.

2. Default decision is erroneous:

Licensee asserts that an error in the Decision as to the date of service of the accusation is sufficient, without anything more, to warrant vacating the Decision. This claim is based upon the fact that the Decision states that the accusation was served on licensee on January 30, 2018, yet the proof of service establishes that it was in fact served on February 12, 2018. Although licensee asserts that this minor error violates its due process rights, it fails to explain how that is so. Nor does licensee cite any legal authority in support of such a contention. In addition, it is unclear how this error affects anything given the facts of this case. Whether the accusation was served on January 30 or February 12, the notice of defense was not timely filed. That is what matters in determining whether the Department had the legal authority to proceed in this matter without hearing. As such, the error in the Decision can only be characterized as harmless.

3. Default decision is an abuse of discretion and violates Rule 144:

Licensee's argument here is not that the Decision itself was an abuse of discretion, but rather that the discipline imposed (25-day suspension) was an abuse of discretion. While the level of discipline is not a relevant consideration in determining whether good cause exists to vacate the Decision, since licensee has raised the issue it will be addressed.

In support of its assertion, licensee argues that a 25-day suspension falls outside the Department's disciplinary guidelines. This argument is based upon the claim that Rule 144 ("Penalty Guidelines") contains a "requirement" that a 25-day suspension cannot be imposed for a sale of alcohol to a minor that does not occur within 36 months following a prior such violation, and that a 15-day suspension is the "maximum" that the Department may impose. This argument is incorrect.

Nothing in Rule 144 compels the Department to impose a 15-day suspension in this case, and licensee does not cite any language in the Rule that supports its position. As noted by the Department's counsel, "The guidelines are just that—guidelines." As licensee acknowledges, this is not its first violation involving the sale of alcoholic beverages to a minor. While it is true that the first offense occurred over 36 months prior to the instant offense (in fact, it occurred 36 months and 12 days after the first violation), this does not mean the Department is precluded from imposing an aggravated level of discipline based upon licesee's disciplinary history (a specifically delineated aggravating factor in Rule 144).

What this does mean is that the Department cannot treat the instant violation as a "second strike" under Business and Professions Code section 25658.1. However, nothing in section 25658.1, or elsewhere, precludes the use of a prior violation of selling alcohol to minors as an aggravating factor in determining the appropriate level of discipline following a determination that the licensee has subsequently violated the same law. How much time has elapsed since prior disciplinary action was taken is a relevant consideration in determining the appropriate level of discipline in any subsequent case. Here, it is not unreasonable to aggravate the discipline given that the licensee violated the same provision prohibiting the sale of alcoholic beverages to minors a mere 36 months and 12 days prior to the instant violation. While reasonable minds may differ as to what level of discipline is appropriate, an aggravated penalty imposing a 25-day suspension under the facts of this case is not out of the bounds of reason. It is certainly not prohibited by Rule 144 as asserted by licensee.

4. Licensee here was treated differently than other similarly situated licensees:

This issue was not raised in the Motion, but was rather asserted in an email sent on March 22, 2018. While the issue is waived, having not been raised in the Motion, it will be addressed herein. Licensee asserts that the Department sent a different licensee a "warning letter" (warning that the Department would enter a default decision if it did not return a notice of defense or stipulation & waiver within 15 days of the letter, notwithstanding that the licensee was already in default). Licensee further asserts that this warning letter was "mailed to the other licensee one day before ABC asserts Harbor Brewing was in default." This assertion by licensee is false. The warning letter (attached to the email) is dated February 26, 2018. As noted previously, licensee here was not in default until it failed to file a notice of defense by March 5, 2018, a full week after the date of the warning letter.

Furthermore, licensee fails to explain how the two licensees are "similarly situated." First, the cover letter sent to licensee with the service of the accusation and accompanying documents on February 12, 2018, clearly and unequivocally advises licensee that, "The failure to return one of the two documents [notice of defense or stipulation & waiver] within 15 days **will result in the Department entering an administrative default judgment** against your license, which will sustain the charge(s) and impose the same penalty as the pre-hearing settlement offer." (Emphasis added.)

Second, the undersigned advised counsel for licensee by email on March 20, 2018, that the Department had changed its default processing procedures around the end of February. It is thus not surprising to learn that a licensee that was in default prior to the licensee here had its file processed under the procedures in effect before the new procedures were implemented. In and of itself, this does not establish any sort of differential treatment of licensees. It is further noted that there is no legal authority for the "warning letter" previously utilized, and was thus, at best, a courtesy. Licensee here has failed to cite any legal authority for the proposition that this circumstance rises to the level of differential treatment of similarly situated licensees.

Conclusion and Order:

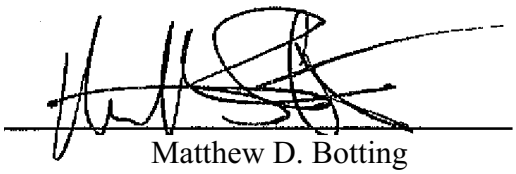
As noted above, Government Code section 11520(c) requires the moving party seeking that a decision following default be vacated to establish good cause for doing so. "Good cause" specifically includes either a failure of the person to receive notice served pursuant to Section 11505, or "mistake, inadvertence, surprise, or excusable neglect." Licensee here does not claim to have not received notice of the accusation. Nor does it claim that the failure to timely file the notice of defense was the result of any "mistake,

inadvertence, surprise, or excusable neglect." Rather, licensee endeavors to establish "good cause" under the catch-all "includes, but is not limited to" language in the section.

For all of the reasons discussed above, licensee has failed to establish good cause to vacate the Decision. As such, the Motion is denied.

Sacramento, California

Dated: March 23, 2018



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST: BARREL HARBOR BREWING COMPANY LLC HARBOR BARREL BREWING 2575 PIONEER AVE, STE 106 VISTA, CA 92081-8450 SMALL BEER MANUFACTURER - LICENSE under the Alcoholic Beverage Control Act.	File: 23-532303 Reg: 18086403 DECLARATION OF SERVICE BY MAIL

The undersigned declares:

I am employed at the Department of Alcoholic Beverage Control. I am over 18 years of age and not a party to this action. My business address is 3927 Lennane Drive, Suite 100, Sacramento, California 95834. On March 26, 2018, I served, by CERTIFIED mail (unless otherwise indicated) a true copy of the following documents:

ORDER ON MOTION TO VACATE DEFAULT

on each of the following, by placing them in an envelope(s) or package(s) addressed as follows:

BARREL HARBOR BREWING COMPANY LLC
HARBOR BARREL BREWING
2575 PIONEER AVE, STE 106
VISTA, CA 92081-8450

DEAN LUEDERS
ACTLEGALLY
P.O. BOX 254491
SACRAMENTO, CA 95865-4491

Joseph Scoleri
Headquarters, Legal - Inter Office Mail

and placing said envelope or package for collection and mailing, following our ordinary business practices. I am readily familiar with this department's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, County of Sacramento, State of California, in an envelope with the postage fully prepaid. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 26, 2018 at Sacramento, California,

Mark Kinyon

X SAN MARCOS DISTRICT OFFICE (INTEROFFICE MAIL)
___ DIVISION OFFICE (INTEROFFICE MAIL)

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BEFORE THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

FOR THE STATE OF CALIFORNIA

IN THE MATTER OF THE ACCUSATION AGAINST: Barrel Harbor Brewing Company LLC DBA: Barrel Harbor Brewing 2575 Pioneer Ave, Ste 104 Vista, CA 92081-8450 Respondent/Licensee, v. Department of Alcoholic Beverage Control.	File No. 23-532303 Reg. No. 18086403 DEPARTMENT'S OPPOSITION TO RESPONDENT'S MOTION TO VACATE DEFAULT DECISION (GOVERNMENT CODE § 11520(c))

I.

SUMMARY OF PROCEEDINGS

On January 30, 2018, the Department of Alcoholic Beverage Control (Department) filed an accusation against respondent. That accusation alleged that a violation of Business and Professions Code section 25658(a), sale of alcohol to a minor, had occurred on November 27, 2017. The accusation further alleged that respondent had

committed a prior violation of 25658(a) on November 15, 2014. A copy of the accusation was served on respondent, by mail, on February 12, 2018.

A timely notice of defense was not received from respondent. On March 15, 2018, respondent was served with the Department's decision following default. Respondent timely filed a "Notice of Motion to Vacate Default and Default Decision and Accompanying Motion." The Department hereby replies in opposition to that motion.

II.

ARGUMENT

A. Respondent Waived Its Right To A Hearing By Not Filing A Notice Of Defense Within The Statutory Time.

Respondent asserts that it is entitled to have the default decision vacated because it filed a notice of defense "well before"[1] the Department entered a default decision. Respondent also asserts that it will "suffer great prejudice by having its right to a hearing on the merits denied." (Respondent's motion, pp. 2-3.) Respondent does not submit any statutory or case law authority explicitly supporting these claims.

Respondent's argument overlooks the fact that it had already waived its right to a hearing almost a week prior to the date it asserts it filed a notice of defense. This is established by the plain language of Government Code section 11506. Subdivision (a) of that section states: "Within 15 days after service of the accusation . . . the respondent may file with the agency a notice of defense." Further, subdivision (c) states: "Failure to file a notice of defense . . . **shall constitute a waiver of respondent's right to a**

[1] This assertion of fact verges on misrepresentation since the notice of defense was received, at best, two days before the default decision was signed. This presumes that the "Notice of Default" referenced in respondent's motion as having been "delivered to [the Department] on March 12, 2018," is meant to actually refer to respondent's *notice of defense.* (Respondent's motion, p. 2.) This is ultimately left unclear due to the fact that respondent's motion is notably lacking any attached exhibits or declarations regarding the facts it asserts.

hearing, but the agency in its discretion may nevertheless grant a hearing." [Emphasis added.]

In the instant case, the accusation was served on respondent, by mail, on February 12, 2018. Respondent therefore had until March 5, 2018 to submit a timely notice of defense. (Gov. Code § 11506, subd. (a); Code Civ. Pro. §1013, subd. (a).) Even by respondent's own assertion that it submitted a notice of defense on March 12, 2018, the notice was submitted *well after* the clear and unambiguous statutory deadline.

Most significantly, respondent's motion fails to provide any explanation or justification for the untimely filing of the notice of defense. Respondent's failure to act within the statutory time period constituted a waiver of its right to a hearing. Respondent's assertion that it will suffer great prejudice as a result of its own unexplained failure to act does not establish good cause under any reasonable measure.

Accordingly, respondent's right to a hearing in this matter is not being denied by the Department. That right was instead waived as of March 6, 2018, solely as a result of respondent's own inaction. The Department was entitled to go forward with the processing of a default as of that date, and the lawfully entered decision following default was signed on March 14, 2018. The mere fact that respondent filed an untimely notice of defense does not serve to establish good cause to vacate the default decision.

B. Respondent's Motion Must Be Denied as It Fails to Establish Good Cause for the Requested Relief.

Subdivision (c) of Government Code section 11520 provides the Department with the option to exercise its discretion to vacate a default decision and grant a hearing, but only on a showing of good cause. The specific criteria enumerated in the statute as supporting a finding of good cause are: (1) "Failure of the person to receive notice served pursuant to Section 11505" and (2) "Mistake, inadvertence, surprise, or excusable neglect." (Gov. Code § 11520, subds. (c)(1) and (c)(2).)

Respondent does not advance any of the enumerated statutory criteria. Instead, respondent's motion asserts as good cause various other grounds which purportedly fall

within the "including but not limited to" catch-all provision of section 11520. However, respondent does not cite any statutory or case law authority demonstrating that such grounds actually constitute good cause. The Department maintains that the grounds presented by respondent fall woefully short of what is required for a finding of good cause.

Respondent initially asserts that "avoiding the risk of reversal on appeal, fairness, or even errors in the Default Decision can, and should, justify good cause to vacate the Default Decision." (Respondent's motion, p. 2.) Two of these factors that respondent suggests "justify good cause" are presented without any additional substantive argument (these being the "fairness" claim and the "appeal" claim). Accordingly, as they are mere assertions without any apparent factual or legal support, there is no basis for the Department to make a finding of good cause based on those two claims.

Respondent then goes on to argue three grounds as purported good cause. In addition to the claim for relief based on the untimely filing of a notice of defense (which the Department has already addressed above), respondent also asserts that the default decision is "erroneous" and "an abuse of discretion and in violation of Rule 144." (Respondent's motion, p. 3.)

Respondent has not provided any evidence to show that the Department's default decision was entered in error. The Department submits that the facts and exhibits as referenced in the default decision, and as summarized above, show that the default decision was lawfully entered. Respondent has therefore failed to prove that there was any prejudicial error in the default decision. Accordingly, respondent's assertion that the default decision contained errors does not support a finding of good cause.

Respondent also expresses disagreement with the period of suspension ordered by the Department. An objection to the Department's lawful penalty imposed in a default decision arguably has no relevance whatsoever to a motion to vacate (particularly where, as here, respondent was on notice that this was the penalty the Department was seeking, based on the stipulation and waiver form mailed to respondent). However, even if one

broadly construes the good cause requirement of Government Code section 11520 to include such a claim, a closer examination of respondent's argument shows that it is ultimately meritless.

Respondent incorrectly asserts that the Department's penalty guidelines have been violated and that "under Rule 144 the penalty should be, at maximum, a 15-day suspension." (Respondent's motion, pp. 3-4.) This is a misrepresentation of the law. As explicitly stated in California Code of Regulations, Title 4, Section 144:

> Deviation from these guidelines is appropriate where the Department **in its sole discretion** determines that the facts of the particular case warrant such a deviation – such as where facts in aggravation . . . exist. [Emphasis added.]

The guidelines are just that – guidelines. The Department's decision was entered based on the facts of the exhibits considered, as is noted in the default decision. The Department was well within its discretion to impose a 25-day suspension solely on the basis that the latest sale of an alcoholic beverage to a minor occurred within three years *and 12 days* of the prior sale to a minor violation. Respondent's own motion acknowledges that a 25658 violation remains a statutory prior for 36-months, during which time the guideline penalty is a 25-day suspension. Imposing the same penalty in regards to the latest violation, which occurred a mere 12-days after the expiration of the three-year statutory period, clearly does not establish an abuse of discretion.

The underlying nature of the case ultimately weighs against the Department exercising discretion to vacate the default, even if respondent had managed to assert meritorious grounds establishing good cause. The offenses involved herein are not mere regulatory or status offenses. Business and Professions Code section 25658(a) is also a criminal offense. It is well established that preventing youth access to alcohol is a significant public safety concern and a primary mission of the Department. This respondent has a recent history of committing a similar offense.

Accordingly, the need to ensure licensee compliance, deter youth access to alcohol, and ensure public safety all weigh against finding good cause to vacate a default decision in a case such as this.[2] Significant and compelling factual and legal grounds should be expected of a respondent who is moving to vacate a default decision in a case such as this. Respondent, however, has offered no good cause whatsoever.

III.

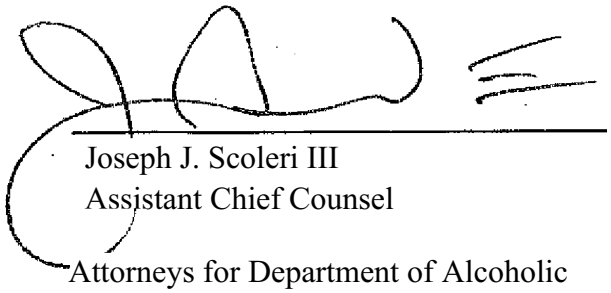
CONCLUSION

For the foregoing reasons, respondent's request should be denied.

Dated: March 22, 2018

Respectfully Submitted,

Jacob L. Rambo
Chief Counsel



Joseph J. Scoleri III
Assistant Chief Counsel

Attorneys for Department of Alcoholic Beverage Control

[2] For the very same reasons, respondent's simultaneously filed request for a reduction in penalty, made pursuant to Business and Professions Code section 24211, should also be denied.

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

IN THE MATTER OF THE ACCUSATION AGAINST: BARREL HARBOR BREWING COMPANY LLC BARREL HARBOR BREWING 2575 PIONEER AVE STE 104 VISTA, CA 92081-8450 SMALL BEER MANUFACTURER - LICENSE under the Alcoholic Beverage Control Act.	File: 23-532303 Reg: 18086403 DECLARATION OF SERVICE BY MAIL

The undersigned declares:

I am employed at the Department of Alcoholic Beverage Control. I am over 18 years of age and not a party to this action. My business address is 3927 Lennane Drive, Suite 100, Sacramento, California 95834. On March 22, 2018, I served, by REGULAR mail (unless otherwise indicated) a true copy of the following documents:

DEPARTMENT'S OPPOSITION TO RESPONDENT'S MOTION TO VACATE DEFAULT DECISION

on each of the following, by placing them in an envelope(s) or package(s) addressed as follows:

BARREL HARBOR BREWING COMPANY LLC
BARREL HARBOR BREWING
2575 PIONEER AVE
STE 104
VISTA, CA 92081-8450

DEAN LUEDERS
PO BOX 254491
SACRAMENTO, CA 95865

MATT BOTTING, ABC GENERAL COUNSEL, VIA IMS

and placing said envelope or package for collection and mailing, following our ordinary business practices. I am readily familiar with this department's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, County of Sacramento, State of California, in an envelope with the postage fully prepaid. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 22, 2018 at Sacramento, California.

Michael Clyde

X SAN MARCOS DISTRICT OFFICE (INTEROFFICE MAIL)
___ DIVISION OFFICE (INTEROFFICE MAIL)

Dean R. Lueders, CSB #145860
ACTlegally
PO Box 254491
Sacramento, CA 95865-4491
Telephone: (916) 476-2110
Facsimile: (916) 501-1470
dean.lueders@actlegally.com

Attorney for Respondent BARREL HARBOR BREWING

BEFORE THE

DEPARTMENT OR ALCOHOLIC BEVERAGE CONTROL

OR THE STATE OF CALIFORNIA

IN THE MATTER. OF THE ACCUSATION AGAINST: BARREL HARBOR. BREWING COMPANY LLC dba BARREL HARBOR BREWING 2575 PIONEER AVE, STE 106 VISTA CA 92081-8450	File: 23-532303 Reg.: 18086403 NOTICE OF MOTION TO VACATE DEFAULT AND DEFAULT DECISION AND ACCOMPANYING MOTION

PLEASE TAKE NOTICE:

The above-mentioned licensee hereby files this Motion to Vacate Default and Default Decision under the provisions of Government Code section 11520, subsection c and hereby requests a hearing on the merits before an Administrative Law Judge.

Due to the short timeframes to file a Motion to Vacate under the provisions of subsection c of Government Code section 11520 (7 days) and, if necessary, an appeal (10 days), it is requested that the Department of Alcoholic Beverage Control ('ABC") consider and issue a ruling on this Motion by the close of busmess on Thursday, March 22, 2018, so, if necessary an appeal can be filed on March 23, 2018.

March 21, 2018

Dean R. Lueders

MOTION

Government Code section 11520 subsection c grants vast authority to vacate a default. By its wording, the grounds on which to grant relief are not limited by section 11520, the section specifically states "includes, but is not limited to, any of the following." Accordingly, avoiding the risk of reversal on appeal, fairness, or even errors in the Default Decision can, and should, justify good cause to vacate the Default Decision.

Notice of Defense was Filed Prior to Entry of Default:

This Motion to Vacate is brought on the ground that the licensee had filed a Notice of Defense well before the Department of ABC entered a default against the license. Specifically, the Notice of Default was delivered to ABC on March 12, 2018. The default was not signed by Mr. Botting, ABC's General Counsel, until March 14, 2018, nor served by mail until March 15, 2018. ABC lacked the jurisdiction to take the licensees default on March 14, 2018, because

there was a Notice of Defense on file. In fact, ABC did not even find the licensee in default until the Decision of March 14, 2018, again after, the licensee had filed a Notice of Defense.

Further, the fact that the Notice of Defense was filed prior to ABC's decision to take the default proves feat there is no prejudice to ABC in vacating fee Default Decision. On the other hand, the licensee will suffer great prejudice by having its right to a hearing on the merits denied. The fact that a Notice of Defense was filed prior to ABC deciding to take the licensees default, is by itself, sufficient to grant this Motion.

Default Decision is Erroneous:

The Default Decision also states "[a]ccording to Department records the Accusation, Notice of Defense, Statement re Discovery and Department's Request for Discovery were served on Respondent-licensee on 1/30/18." The Proof of Service indicates, and Mr. Botting's email of March 20, 2018, confirms, such statement is simply not true or accurate. The undisputed evidence is that said documents were served by mail on February 12, 2018, not January 30, 2018 as stated in the Decision. A Default Decision that deprives a licensee of its due process rights cannot be based on false facts.

Default Decision is an Abuse of Discretion and Violates Rule 144:

Moreover, the Default Decision is based upon an abuse of discretion and in violation of Rule 144 (commonly referred to as the "penalty guidelines"). The penalty imposed by the Default Decision is a 25-day suspension. However, such penalty falls far outside of ABC's penalty guidelines.

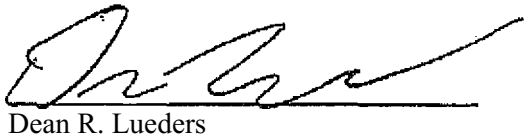
Granted, the licensee had a prior sale to minor violation but such violation, according to the accusation, occurred on November 14, 2014. The alleged sale at issue in the current accusation occurred on November 27, 2017, well after the 36-month requirement contained in Rule 144 to substantiate a 25-day suspension.

Under Rule 144 the penalty should be, at maximum, a 15-day suspension eligible for payment of a POIC. However, it is not, and there is no Finding of Fact or evidence to support a 25-day suspension that is not eligible for a POIC. Again, on this ground alone, this Motion must be granted.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Default be vacated and the licensee granted a hearing on the merits before an Administrative Law Judge.

March 21, 2018



Dean R. Lueders

PROOF OF SERVICE

I am over the age of 18 and not a party to this action. I am a resident of or employed in the county where the mailing occurred; my business address is: PO Box 254491, Sacramento CA 95865.

On March 21, 2018, I served the foregoing document(s) described as:

NOTICE OF MOTION TO VACATE DEFAULT AND DEFAULT DECISION AND ACCOMPANYING MOTION

to the following parties:

Matthew Botting
General Counsel
Department of Alcoholic Beverage Control
3927 Lennane Drive, Suite 100
Sacramento, CA 958634

Fax (916) 419-2599

Jacob Rambo
Joseph Scoleri
Office of Legal Services
Department of Alcoholic Beverage Control
3927 Lennane Drive, Suite 100
Sacramento, CA 958634

Fax (916) 419-2504

☒ I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid;

☐ I caused such envelope to be delivered by hand via messenger service to the address above;

☒ I served a true and correct copy by facsimile during regular business hours to the number(s) listed above. Said transmission was reported complete and without error.

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

DATED: March 21, 2018

Dean Lueders

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

IN THE MATTER OF THE ACCUSATION
AGAINST:

BARREL HARBOR BREWING COMPANY LLC
BARREL HARBOR BREWING
2575 PIONEER AVE
STE 104
VISTA, CA 92081-8450

under the Alcoholic Beverage Control Act.

FILE: 23-532303

REG: 18086403

DECISION FOLLOWING DEFAULT

This proceeding is conducted pursuant to Government Code section 11520. An Accusation against the above-referenced Respondent-licensee was registered by the Department 1/30/18.

According to Department records the Accusation, Notice of Defense, Statement re Discovery and Department's Request for Discovery were served on Respondent-licensee on 1/30/18.

According to Department records, no Notice of Defensehas been filed. Accordingly, it is hereby found that Respondent licensee is in default and the Department makes the following Findings of Fact, Conclusions of Law, and Order:

Exhibits:

1. A true and correct copy of the Accusation registered in this matter is identified and admitted into evidence as Exhibit 1. Official Notice is taken of the license history as outlined in said Accusation.

2. A true and correct copy of the Proof of Service of Notice of Defense, Accusation, Department's Request for Discovery and Statement re Discovery, establishing service on Respondent-licensee, is identified and admitted into evidence as Exhibit 2.

3. A true and correct copy of the Department form ABC-333, Report of Investigation, and related documents are identified and admitted into evidence as Exhibit 3.

Findings of Fact:

1. Pursuant to Exhibit 2 as well as Government Code section 11505 and Miller Family Home, Inc. v. Department of Social Services (1997) 57 Cal.App.4th 488, it is found that Respondent-licensee was properly served with the Accusation, Notice of Defense, Statement re Discovery and Department's Request for Discovery in this matter. No Notice of Defense has been received.

2. Pursuant to Exhibits 1 and 3 it is found that Respondent-licensee did violate the Alcoholic Beverage Control Act.

Conclusions of Law:

1. Pursuant to Finding 1 above, Respondent-licensee has defaulted in this matter and the Department is authorized pursuant to Government Code section 11520 to conduct this default proceeding.

2. Pursuant to Finding 2 above, Respondent-licensee did violate the Alcoholic Beverage Control Act as alleged in said Accusation.

3. That by reason of the foregoing Findings of Fact and Conclusions of Law, grounds for suspension or revocation of such license(s) exist and the continuance of such license(s) would be contrary to public welfare and morals, as set forth in Article XX, Section 22, State Constitution, and Section(s) 24200(a) and (b) of the Business and Professions Code.

Order:

WHEREFORE, it is hereby ordered that Respondent-licensee's license number 523303 be, and hereby is, suspended for a period of 25 days. This decision is hereby adopted and is effective immediately. A representative of the Department will call on Respondent-licensee on or after MAR 26 2018 to pick up the license certificate.

Dated: March 14, 2018

Matthew Botting
General Counsel

Any Motion to Vacate this decision must be made in accordance with Government Code §11520.

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

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

IN THE MATTER OF THE ACCUSATION AGAINST: BARREL HARBOR BREWING COMPANY LLC BARREL HARBOR BREWING 2575 PIONEER AVE, STE 104 VISTA, CA 92081-8450 SMALL BEER MANUFACTURER - LICENSE under the Alcoholic Beverage Control Act.	File: 23-532303 Reg: 18086403 DECLARATION OF SERVICE BY MAIL

The undersigned declares:

I am employed at the Department of Alcoholic Beverage Control. I am over 18 years of age and not a party to this action. My business address is 3927 Lennane Drive, Suite 100, Sacramento, California 95834. On March 15, 2018, I served, by CERTIFIED mail (unless otherwise indicated) a true copy of the following documents:

DECISION FOLLOWING DEFAULT

on each of the following, by placing them in an envelope(s) or package(s) addressed as follows:

BARREL HARBOR BREWING COMPANY LLC
BARREL HARBOR BREWING
2575 PIONEER AVE, STE 104
VISTA, CA 92081-8450

Office of Legal Services
Headquarters - Inter Office Mail

and placing said envelope or package for collection and mailing, following our ordinary business practices. I am readily familiar with this department's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, County of Sacramento, State of California, in an envelope with the postage fully prepaid. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 15, 2018 at Sacramento, California.

Mark Kinyon

Mark Kinyon

X SAN MARCOS DISTRICT OFFICE (INTEROFFICE MAIL)
— DIVISION OFFICE (INTEROFFICE MAIL)