

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

AB-9876

File: 21-518462; Reg: 19089229

BEVERAGES AND MORE, INC.,
dba BevMo!
7070 Marketplace Drive
Goleta, CA 93117,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: October 1, 2020
Telephonic

ISSUED OCTOBER 5, 2020

Appearances: *Appellant:* Adam N. Koslin, of Solomon, Saltsman & Jamieson, as
counsel for Beverages and More, Inc.,

Respondent: John P. Newton, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Beverages and More, Inc., doing business as BevMo! (appellant), appeals from a decision of the Department of Alcoholic Beverage Control (Department)¹ suspending its license for 25 days because its clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

¹ The decision of the Department, dated April 10, 2020, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 17, 2012. There is one prior instance of departmental discipline against the license for a violation of Business and Professions Code section 25658(a).

On September 16, 2019, the Department filed a single-count accusation charging that on January 12, 2019, appellant's clerk, Cesar Ramos (the clerk), sold an alcoholic beverage to 19-year-old Alexia Soliz (the decoy). Although not noted in the accusation, the decoy was working for the Santa Barbara Sheriff's Office (SBSO) at the time.

At the administrative hearing held on January 22, 2020, documentary evidence was received and testimony concerning the sale was presented by the decoy and by SBSO Dep. Justin Schroeder. Testimony on behalf of appellant was presented by assistant store manager, Andrew Marasigan, and area manager, Susan Hensley.

Testimony established that on January 12, 2019, the decoy entered the licensed premises, followed shortly thereafter by Dep. Schroeder. The decoy selected a six-pack of Bud Light beer and took it to the counter. The clerk scanned the beer and asked to see the decoy's identification (ID). She handed the clerk her California driver's license, which had a portrait orientation, contained her correct date of birth (showing her to be 19 years old), and a red stripe indicating "AGE 21 IN 2020." (Exh. 4.) The clerk swiped the ID through the register and it made a beeping sound which was audible to Dep. Schroeder. The clerk swiped the ID through a second machine to verify its validity then completed the sale without asking any age-related questions. The decoy exited the premises with the beer and her change. Dep. Schroeder observed the transaction from inside the store.

Dep. Schroeder approached the clerk, identified himself, and asked the clerk if he was aware that he just sold alcohol to a minor. The clerk said he was not. Upon further questioning, the clerk said he made the sale without verifying the decoy's age because he was working fast. He also acknowledged hearing the register beep, but said that it did not prevent him from making the sale. The clerk did not testify at the hearing.

The decoy re-entered the premises with several SBSO officers and was asked by Dep. Schroeder to identify the person who sold her the beer. She pointed at the clerk and said that he had. A photograph was taken of the decoy and clerk together (exh. 5) and the clerk was issued a citation. Initially, the clerk was suspended from his job, but his employment was subsequently terminated.

On February 10, 2020, the administrative law judge (ALJ) issued a proposed decision sustaining the accusation and recommending a 25-day suspension. The Department adopted the proposed decision on April 6, 2020, and a certificate of decision was issued on April 10, 2020.

Appellant then filed a timely appeal contending it was error to conclude it "permitted" the sale when it had implemented extensive prophylactic measures to prevent the sale of alcohol to minors. Appellant's preventive measures include: posting a notice at each register describing the penalties for selling alcohol to a minor; posting a sign at the entrance stating that unaccompanied minors are not permitted in the premises; asking for identification from all persons who appear to be under 40; conducting training for employees every six months; issuing daily reminders to employees to check identification; and having a register that beeps if an ID shows a person is under 21. Appellant maintains these preventive measures were thwarted by a

rogue employee whose actions should not be imputed to the licensee. (AOB at pp. 7-10.)

DISCUSSION

Both this Board and the courts have consistently found that a licensee may be held liable for the actions of his agents or employees.

The owner of a liquor license has the responsibility to see to it that the license is not used in violation of law and as a matter of general law the knowledge and acts of the employee or agent are imputable to the licensee. [Citation.]

(*Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 172, 180 [17 Cal.Rptr. 315].) The *Laube* court noted:

A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly.

(*Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779].) Similarly, in *Reimel* the court stated:

[A] licensee can draw no protection from his lack of knowledge of violations committed by his employees or from the fact that he has taken reasonable precautions to prevent such violations. There is no requirement . . . that the licensee have knowledge or notice of the facts constituting its violation. [Citations.]

(*Reimel v. Alcoholic Bev. Control Appeals Bd.* (1967) 252 Cal.App.2d 520, 522 [60 Cal. Rptr. 641], internal quotations omitted.)

The doctrine of *respondeat superior* provides that an employer or principal is vicariously liable for the wrongful conduct of his or her employees or agents committed within the scope of the employment or agency. (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967 [227 Cal.Rptr. 106].) And, it is well-settled in alcoholic beverage case law that an agent or employee's on-premises knowledge and

misconduct is imputed to the licensee/employer. (See *Yu v. Alcoholic Bev. Control Appeals Bd.* (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].)

Appellant argues that *Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Board* (1999) 76 Cal.App.4th 570 [90 Cal.Rptr.2d 523] (*Santa Ana*) supports its argument that the acts of an agent or employee should not be imputed to his or her employer when the employer has instituted extensive measures to prevent the unlawful acts.

The ALJ reached the following conclusions on this issue:

6. The Respondent also argued that an equitable exception should apply and the accusation should be dismissed based on its efforts to prevent sales of alcohol to minors. The cases cited by the Respondent do not support this argument. In *Harris v. Alcoholic Beverage Control Appeals Board*,^[fn.] the court of appeal held that a licensee is responsible for the actions of its employees, even if it does not have personal knowledge of those actions. *McFaddin San Diego 1130, Inc. v. Stroh*,^[fn.] on the other hand, dealt with illegal activity conducted by patrons without the knowledge of the employees. The court dismissed the accusation on the basis that, since the employees were unaware of the illegal activity, the licensee could not be held liable for such activity. In this case, Ramos was an employee, not a patron, and his actions are attributable to the Respondent.

7. The seminal case in this area is *Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Board*.^[fn.] In that case, the licensee had extensive policies designed to prevent any violations of the law. The employee not only took great pains to circumvent those policies, but hid his illegal actions from the licensee. The court dismissed the accusation on the grounds that, under the circumstances, it was inappropriate to hold the licensee responsible for the employee's actions.

The Respondent's policies in this case were nowhere near as extensive as the licensee's in *Santa Ana Food Mart*. Moreover, Ramos did not take any steps to hide the sale or circumvent the Respondent's policies. Rather, Ramos made a straightforward sale of alcohol to Soliz. Accordingly, the Respondent is liable for the sale to Soliz.

(Conclusions of Law, ¶¶ 6-7.) We agree with the ALJ's conclusions.

The case cited by appellant, *Santa Ana*, is clearly distinguishable from the matter at hand. In *Santa Ana*, a clerk surreptitiously purchased food stamps at one-half their face value from a confidential informant working for the United States Department of Agriculture. The clerk was arrested moments after the sale and was immediately fired by her on-duty manager. The court found that the Department had abused its discretion when it suspended appellant's license, holding that a single criminal act of an employee ***unrelated to the sale of alcohol***, would not be imputed to an employer who had taken extensive measures to protect against criminal acts of its employees. (*Santa Ana, supra* at 76 Cal.App.4th at 575.) This is not that case.

The *Santa Ana* case teaches us that there is only one exception to the general rule that employee knowledge is imputed to a licensee. The exception only arises in cases where there is “no per se nexus” between the licensee's sale of alcoholic beverages and the unlawful employee action. (*Santa Ana, supra* at 76 Cal.App.4th at 575.) Even then, the narrow exception applies only when the circumstances meet four required elements: 1) the employee commits a single criminal act unrelated to alcohol sales, 2) the licensee has taken strong steps to prevent and deter such crime before the criminal action took place, 3) the licensee is unaware of the criminal act beforehand, and 4) license discipline has no rational effect on public welfare or morals. (*Santa Ana, supra* at 76 Cal.App.4th at 576.)

In the instant case, the clerk's actions fail the *Santa Ana* test for an exception to the doctrine of *respondeat superior*. Here, in spite of appellant's laudable efforts to institute procedures to prevent the sale of alcohol to minors, we obviously cannot say this incident was unrelated to alcohol sales. Similarly, we cannot say that license

discipline has no rational effect on public welfare or morals when the purpose of the ABC Act is clearly stated, in pertinent part, as being:

. . . the protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages.

(Bus. and Prof. Code § 23001.)

We agree with the ALJ that appellant's argument — that the acts of an agent or employee should not be imputed to his or her employer when the employer has instituted extensive measures to prevent the unlawful acts — cannot be extended to the facts of this case. Here, in spite of prophylactic measures to prevent the sale of alcohol to minors, the fact that the register allowed the clerk to make the sale, even after it beeped to indicate that the decoy was under 21, leads us to conclude that the accusation must be sustained.

A licensee is responsible for the actions of its employees, even if it does not have personal knowledge of those actions. (*Harris, supra*, 197 Cal.App.2d at 180 [“the California rule is settled that the single act of an employee of a licensee is sufficient to impose sanctions upon the licensee”].) Appellant is responsible for the actions of its clerk in the course and scope of his employment.

ORDER

The decision of the Department is affirmed.²

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

² 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 APPEAL BY:

BEVERAGES & MORE, INC.
DBA: BEVMO!
7070 MARKETPLACE DR
GOLETA, CA 93117

OFF-SALE GENERAL - LICENSE

VENTURA DISTRICT OFFICE

File: 21-518462

Reg: 19089229

AB: 9876

Respondent(s)/Licensee(s)
under the Alcoholic Beverage Control Act.

CERTIFICATION

I, Yuri Jafarinejad, 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 July 10, 2020, 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:**

BEVERAGES & MORE, INC.
BEVMO!
7070 MARKETPLACE DR.
GOLETA, CA 93117

OFF-SALE GENERAL - LICENSE

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

VENTURA DISTRICT OFFICE

File: 21-518462

Reg: 19089229

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 April 6, 2020. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

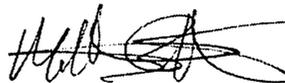
Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date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

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

On or after May 21, 2020, a representative will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: April 10, 2020



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Beverages & More, Inc.	}	File: 21-518462
dba BevMo!	}	
7070 Marketplace Dr.	}	Reg.: 19089229
Goleta, California 93117	}	
	}	License Type: 21
Respondent	}	
	}	Word Count: 6,900
	}	
	}	Reporter:
	}	Shelby Maaske
	}	Kennedy Court Reporters
	}	
<u>Off-Sale General License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Santa Barbara, California, on January 22, 2020.

Latrice R. Hemphill, Attorney, represented the Department of Alcoholic Beverage Control.

Adam N. Koslin, attorney-at-law, represented respondent Beverages & More, Inc.

The Department seeks to discipline the Respondent's license on the grounds that, on or about January 12, 2019, the Respondent, through its agent or employee, sold, furnished, or gave alcoholic beverages to Alexia Soliz, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on January 22, 2020.

FINDINGS OF FACT

1. The Department filed the accusation on September 16, 2019.

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

2. The Department issued a type 21, off-sale general license to the Respondent for the above-described location on July 17, 2012 (the Licensed Premises).
3. The Respondent's license has been the subject of the following discipline:

<u>Date Filed</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
06/27/2017	17085685	BP §25658(a)	15-day susp.

The foregoing disciplinary matter is final. (Exhibit 2.)

4. Alexia Soliz was born on May 20, 1999. On January 12, 2019, she served as a minor decoy during an operation conducted by the Santa Barbara Sheriff's Department. On that date she was 19 years old.
5. Soliz appeared and testified at the hearing. On January 12, 2019, she was 5'1½" and weighed 155 pounds. She was wearing jeans, a black t-shirt with a plaid shirt over it, and Converse tennis shoes. She was wearing earrings and a nose ring. Her hair was in a bun. (Exhibits 3 & 5.) Her appearance at the hearing was the same.
6. On January 12, 2019, Soliz entered the Licensed Premises. Dep. J. Schroeder entered a few moments later. Soliz went to the beer section, selected a six-pack of Bud Light beer, and took it to the counter. The clerk, Cesar Ramos, scanned the beer. Ramos asked to see her ID and she handed him her California driver license. (Exhibit 4.) Ramos swiped the ID through the register, which made a beeping sound. He swiped it through a second machine, then continued with the sale. Soliz paid for the beer, Ramos gave her some change, then she exited with the beer.
7. Dep. Schroeder contacted the clerk and identified himself. He asked Ramos if he was aware that he had sold alcohol to a minor. He said he was not. Soliz re-entered the Licensed Premises with various deputies. Dep. Schroeder asked her to identify the person who sold her the beer. Soliz pointed to Ramos and said that he had. Soliz and Ramos were approximately three feet apart at the time. A photo of the two of them was taken (exhibit 5), after which Ramos was cited.
8. Ramos indicated that he was working very fast and did not verify Soliz's age. He further indicated that the register will buzz, but will not prevent a sale.
9. Andrew Marasigan, the Assistant Store Manager at the Licensed Premises, saw a deputy speaking to Ramos on January 12, 2019. One of the deputies told him to keep ringing up customers since a line had formed. Marasigan subsequently wrote an incident report and spoke to his superiors. Ramos was initially suspended, then terminated.

10. The Licensed Premises has a series of signs posted on the counter. These included signs setting forth the fines and penalties for selling alcohol to minors and reminders that purchasers of alcohol and tobacco products must be at least 21 years of age. (Exhibits A-C.) A sign on the door indicate that unattended minors are not permitted inside. (Exhibit D.) Marasigan and other employees keep an eye out for patrons who appear to be underage. If they see any, they will ask for ID.

11. All employees undergo training regarding sales of alcohol when first hired. The Respondent's policy is to card anyone who appears to be under the age of 40. The training includes a section on preventing sales of alcohol to minors, including the proper forms of ID. (Exhibit F.) Employees must read and sign the Respondent's Policy Regarding Alcoholic Beverage Sales. (Exhibit G.) This training is not repeated, but there is additional training every six months. There also are daily reminders to check ID, to verify the expiration date of the ID, to verify the photos on the ID, and to scan or swipe the ID. All employees were re-trained following this incident.

12. The register cancels a transaction when a minor's ID is swiped and a receipt pops up. There is no way to continue with the sale from this point. Clerks can avoid swiping an ID by using the "No ID Required" button when an alcoholic beverage is rung up.

13. The Licensed Premises uses till sheets which are supposed to signed by the clerks working each register. The till sheets have a space which is supposed to be filled in with the date on or before which a customer must be born in order to purchase alcohol. The till sheets also included a statement that the clerks have been trained and will not sell alcohol to anyone under the age of 21. The till sheets are supposed to be signed every day. This policy was not enforced before this incident, but is now strictly enforced. Ramos' till sheets for December 2018 have all of these features. However, all but three do not have the "Born Before" date filled in (and those three list 2018 as the year), none have been signed by the cashier, and none have been signed by manager. (Exhibit E.)

14. Soliz learned of the decoy program from her sister, who worked for one of the deputies. Soliz visited 20 locations on January 12, 2019, of which three sold alcohol to her.

15. Soliz appeared to be 19 years old—her actual age—at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in the Licensed Premises on January 12, 2019, Soliz displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Ramos.

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

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.
2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.
3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.
4. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that, on January 12, 2019, the Respondent's employee, Cesar Ramos, inside the Licensed Premises, sold an alcoholic beverage to Alexia Soliz, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-8 & 14-15.)
5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)² and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondent argued that Soliz was an experienced decoy who appeared older. This argument is rejected. There was nothing about Soliz's appearance or experience which made her appear older than her actual age. Rather, her appearance was consistent with that of a typical 19 year old and, therefore, she had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 15.)
6. The Respondent also argued that an equitable exception should apply and the accusation should be dismissed based on its efforts to prevent sales of alcohol to minors. The cases cited by the Respondent do not support this argument. In *Harris v. Alcoholic Beverage Control Appeals Board*,³ the court of appeal held that a licensee is responsible for the actions of its employees, even if it does not have personal knowledge of those actions. *McFaddin San Diego 1130, Inc. v. Stroh*,⁴ on the other hand, dealt with illegal

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

³ 197 Cal. App. 2d 172, 17 Cal. Rptr. 315 (1961).

⁴ 208 Cal. App. 3d 1384, 257 Cal. Rptr. 8 (1989).

activity conducted by patrons without the knowledge of the employees. The court dismissed the accusation on the basis that, since the employees were unaware of the illegal activity, the licensee could not be held liable for such activity. In this case, Ramos was an employee, not a patron, and his actions are attributable to the Respondent.

7. The seminal case in this area is *Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Board*.⁵ In that case, the licensee had extensive policies designed to prevent any violations of the law. The employee not only took great pains to circumvent those policies, but hid his illegal actions from the licensee. The court dismissed the accusation on the grounds that, under the circumstances, it was inappropriate to hold the licensee responsible for the employee's actions.

The Respondent's policies in this case were nowhere near as extensive as the licensee's in *Santa Ana Food Mart*. Moreover, Ramos did not take any steps to hide the sale or circumvent the Respondent's policies. Rather, Ramos made a straightforward sale of alcohol to Soliz. Accordingly, the Respondent is liable for the sale to Soliz.

PENALTY

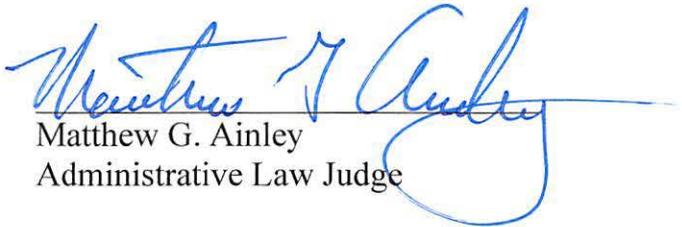
The Department requested that the Respondent's license be suspended for a period of 25 days since this was the Respondent's second sale of alcohol to a minor in just over two years. The Respondent argued that a mitigated penalty was warranted based on their policies and procedures—which are designed to prevent sales to minors—and the stricter enforcement implemented since the sale in this case. While the Respondent's actions are commendable, it is disconcerting that two sales to minors could take place in the span of 26 months. The penalty recommended herein complies with rule 144.

⁵ 76 Cal. App. 4th 570, 90 Cal. Rptr.2d 523 (1999).

ORDER

The Respondent's off-sale general license is hereby suspended for a period of 25 days.

Dated: February 10, 2020


Matthew G. Ainley
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>4/6/20</u>