

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

AB-9979

File: 21-479486; Reg: 23092930

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #9674
1050 West Sunset Boulevard
Los Angeles, CA 90012,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Hubel

Appeals Board Hearing: December 8, 2023
Videoconference

ISSUED DECEMBER 11, 2023

Appearances: *Appellants:* Adam Koslin, of Solomon, Saltsman & Jamieson, as
counsel for Garfield Beach CVS, LLC and Longs Drug Stores
California, LLC;

Respondent: Erica Navarro, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing
business as CVS Pharmacy #9674 (appellants), appeal from a decision of the
Department of Alcoholic Beverage Control¹ suspending their license for ten days, with
execution of the ten-day suspension stayed for one year, upon the condition that no
subsequent disciplinary action occurs in that timeframe, because their clerk sold an

¹ The decision of the Department, July 11, 2023, is set forth in the appendix.

alcoholic beverage to a police minor decoy, in violation of Business and Professions Code² section 25658(a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on November 25, 2009. There is one prior instance of departmental discipline against the license for violation of section 25658(a) that occurred in 2014.

On January 26, 2023, the Department filed a single-count accusation against appellants charging that, on July 19, 2022, appellants' clerk, Ryshanique Washington (the clerk), sold an alcoholic beverage to 18-year-old Regina Barajas (the decoy). Although not noted in the accusation, the decoy was working for the Department at the time.

At the administrative hearing held on April 25, 2023, documentary evidence was received, and testimony concerning the sale was presented by the decoy and Department agent, Kenneth Walraven. Evidence established that Agent Walraven entered the licensed premises in plain clothes followed shortly thereafter by the decoy. The decoy walked to the alcoholic beverage coolers and selected a three-pack of 25-ounce Budweiser beer cans. She walked to the sales counter and presented the beer to the clerk. The clerk scanned the beer and asked the decoy for her identification.

The decoy handed the clerk her true California identification card, showing her to be 18 years old. The card had a vertical orientation, depicted the decoy's correct date of birth, and included a bold, red stripe, which read, "Age 21 in 2025." The clerk looked

² All statutory references are to the Business and Professions Code unless otherwise stated.

at the identification for approximately three seconds and handed it back to the decoy. The clerk did not scan or swipe the identification, nor did she ask the decoy for her age. The clerk proceeded with the sale, and the decoy paid for the beer. After receiving change, the decoy exited the licensed premises with the beer.

Agent Walraven witnessed the entire transaction while posing as a customer approximately 20 feet away. After the transaction concluded, Agent Walraven exited the licensed premises and joined the decoy outside. Agent Walraven then re-entered the licensed premises, contacted the clerk, and identified himself as a peace officer. Agent Walraven explained the violation and brought the decoy back inside.

After the decoy identified the clerk as the person who sold her alcohol, a photograph of the decoy and the clerk was taken. The clerk was cited, and did not appear at the administrative hearing.

On June 5, 2023, the administrative law judge (ALJ) issued a proposed decision recommending sustaining the accusation and suspending appellants' license for ten days. The Department adopted the proposed decision on July 7, 2023, and issued a certificate of decision July 11, 2023. Appellants filed a timely appeal contending that the Department failed to show that appellants' suspension was necessary to protect the public.

DISCUSSION

Appellants contend that the Department has not shown that a suspension "would do anything to protect the public from the operations of appellants' premises."

(Appellants' Opening Brief at p. 5.) Appellants argue that the Department is not empowered to issue any penalty without showing that the discipline is necessary to protect the public. (*Id.* at pp. 5-6.)

Article XX, section 22 of the California Constitution authorizes the Department to take disciplinary action to protect the public:

The department shall have the power, in its discretion, to deny, suspend, or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals.

This general authority, however, does not mean that every violation must be specifically proven to be contrary to public welfare or morals. The criteria for establishing good cause for discipline has been explained as follows:

In order to establish good cause for suspension or revocation of an alcoholic beverage license due to violations of law that do not involve moral turpitude, there must be a rational relationship between the offense and the operation of the licensed business in a manner consistent with public welfare and morals or there must be evidence that the offense had an actual effect on the conduct of the licensed business.

(H.D. Wallace & Associates, Inc. v. Dept. of Alcoholic Bev. Control (1969) 271

Cal.App.2d 589, 593-594 [76 Cal.Rptr. 749].)

In contrast to the position appellants would have us take, previous courts have found that specific findings need not be made on whether conduct charged in an accusation is deleterious to public welfare and morals. In *Schieffelin*, the court found:

To the extent that Schieffelin argues that the Department failed to make a specific finding that its conduct was injurious to public welfare or morals, we note that **both the California Supreme Court and this court have held that a finding that a licensee has violated provisions of the Alcoholic Beverage Control Act is tantamount to a finding of injury to public welfare and morals.** (*Martin v. Alcoholic Bev. etc. Appeals Bd.* (1959) 52 Cal.2d 287, 291 [341 P.2d 296]; *Mercurio v. Dept. Alcoholic etc. Control* (1956) 144 Cal. App. 2d 626, 631 [301 P.2d 474] (*Mercurio*).)

In *Mercurio*, this court held that a finding that licensees had violated a Department rule was in effect a finding that the licensees' acts were contrary to public welfare and morals because the rule itself was an articulation of acts which the Department found to be contrary to public welfare and morals. (*Ibid.*)

Similarly, the Legislature has already determined that the Alcoholic Beverage Control Act is intended “for the protection of the safety, welfare, health, peace, and morals of the people of the State” and that the act involves “in the highest degree” the “moral well-being” of the state and its people. (See Business and Professions Code Section 23001.)[fn.]

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (2005), 128 Cal.App.4th 1195, 1217 [27 Cal.Rptr.3d 766] (*Schieffelin*), emphasis added.)

Here, by finding that appellants violated provisions of the Alcoholic Beverage Control Act, the Department found that appellants’ acts were contrary to public welfare and morals. (*Martin, supra*, at p. 291; *Mercurio, supra*, at p. 631; *Schieffelin, supra*, at p. 1217.) There is no additional requirement that the Department show its discipline was necessary to protect the public, as that it already implied by finding there is an underlying violation.

ORDER

The decision of the Department is affirmed.³

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
SHARLYNE PALACIO, 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.

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:**

GARFIELD BEACH CVS LLC, LONGS DRUG
STORES CALIFORNIA, LLC
CVS PHARMACY 9674
1050 WEST SUNSET BLVD
LOS ANGELES, CA 90012-2102

OFF-SALE GENERAL - LICENSE

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

CERRITOS ENFORCEMENT OFFICE

File: 21-479486

Reg: 23092930

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 July 7, 2023. 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: July 11, 2023

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Alcoholic Beverage Control
Office of Legal Services



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Garfield Beach CVS LLC, Longs Drug Stores	}	File: 21-479486
California LLC	}	
Dbas: CVS Pharmacy 9674	}	Reg.: 23092930
1050 West Sunset Boulevard	}	
Los Angeles, California 90012-2102	}	License Type: 21
	}	
Respondents	}	Word Count: 10,633
	}	
	}	Kennedy Court Reporters
	}	Savauna Ramirez, Court Reporter
	}	Jason Hagen, Video Host
	}	
<u>Off-Sale General License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter by video conference on April 25, 2023.

Erin Lovelace, Attorney, represented the Department of Alcoholic Beverage Control (the Department).

Adam Koslin, Attorney, represented Respondents, Garfield Beach CVS LLC, Longs Drug Stores California LLC.

The Department seeks to discipline the Respondents' license on the grounds that on or about July 19, 2022, the Respondents-Licensees' agent or employee, Ryshanique Washington, at said premises sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: Budweiser beer, to Regina Barajas, an individual under the age of 21, in violation of California Business and Professions Code section 25658(a).¹ (count 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 April 25, 2023.

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

FINDINGS OF FACT

1. The Department filed the accusation on or about January 26, 2023.
2. The Department issued a type 21, off-sale general license to the Respondents for the above-described location on November 25, 2009 (the Licensed Premises).
3. The Respondents have been the subject of the following discipline:

<u>Date of Violation</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
August 14, 2014	14081462	BP §25658(a)	POIC in lieu of 10-day suspension

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

4. Regina Barajas (hereinafter referred to as the decoy or decoy Barajas) was born on January 3, 2004. On July 19, 2022, she was 18 years old. On that date she served as a minor decoy in an operation conducted by the Department.
5. Decoy Barajas appeared and testified at the hearing. On July 19, 2022, she was 5'4" tall and weighed approximately 145 pounds. She wore a black short-sleeved shirt, black shorts and white shoes. Her hair was parted in the middle and pulled back into a ponytail. (Exhibits 3 and 6.) Her appearance at the hearing was similar, except that she wore a blue short-sleeved shirt, and her hair was styled with a braid rather than a ponytail.
6. On July 19, 2022, at approximately 4:45 p.m., Department Agent Walraven entered the Licensed Premises in a plain clothes capacity, followed shortly thereafter by decoy Barajas. Decoy Barajas walked directly to the alcoholic beverage coolers and selected a three-pack of 25-ounce cans of Budweiser beer. (Exhibit 8.) She walked straight to the sales counter and placed the three-pack of beer upon the counter. A female clerk, who was later identified as Ryshanique Washington (hereinafter referred to as the clerk or clerk Washington) stood behind the sales counter and assisted the decoy. (Exhibit 5 – color photograph of clerk Washington.) Clerk Washington scanned the beer and asked decoy Barajas for her identification (ID). Decoy Barajas gave the clerk her valid California ID Card, which has a vertical orientation, depicts her correct date of birth and includes a bold, red stripe which reads, “AGE 21 IN 2025” and a bold, blue stripe which reads, “AGE 18 IN 2022.” (Exhibit 4.) Clerk Washington looked at the ID for approximately three seconds and handed it back to the decoy. Clerk Washington did not scan or swipe the ID and did not ask decoy Barajas for her age. Clerk Washington proceeded with the sales transaction. Decoy Barajas paid for the beer with a 20-dollar bill, received change and exited the store with the three-pack of Budweiser beer and change. (Exhibit 7 – color photograph of the change and three-pack of Budweiser beer

cans.) Agent Walraven posed as a customer, observing, and listening to the above-described sales transaction with an unobstructed view from approximately 20 feet away. After exiting the store decoy Barajas walked to the state security vehicle to rejoin with the outside team of agents.

7. Agent Walraven informed the outside team of officers that a violation had occurred and exited the Licensed Premises. A few minutes later, Agent Walraven re-entered the Licensed Premises, contacted clerk Washington and identified himself as a police officer. Agent Walraven informed clerk Washington of the violation. Another agent brought the decoy back into the Licensed Premises to where Agent Walraven and clerk Washington stood.

8. Agent Walraven asked decoy Barajas who sold her the alcoholic beverage. Decoy Barajas pointed at clerk Washington and identified her as the clerk who sold her the beer. Decoy Barajas and clerk Washington were standing approximately four feet apart, facing each other, at the time of the identification, with no obstruction between them. A photograph of decoy Barajas and clerk Washington was taken after the face-to-face identification. The photograph depicted the decoy holding the Budweiser beer cans and change in her left hand while pointing at clerk Washington with her right hand, and clerk Washington standing to the decoy's left while looking in the direction of the decoy. (Exhibit 6.)

9. After the face-to-face identification a citation was issued to clerk Washington. Clerk Washington was very cooperative during the investigation. Clerk Washington did not appear at the hearing.

10. Decoy Barajas appeared her 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 in the photographs taken of her during the said decoy operation, as well as her appearance and conduct in front of clerk Washington at the Licensed Premises on July 19, 2022, decoy Barajas displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk. Decoy Barajas appeared her age at the hearing and in the photographs taken of her on July 19, 2022.

11. Prior to July 19, 2022, decoy Barajas had participated in approximately 15 minor decoy operations, with each operation including her visiting approximately five separate licensed premises. She found businesses would generally sell alcohol to her. On July 19, 2022, decoy Barajas was comfortable and not nervous conducting the minor decoy operation in the Licensed Premises.

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 Respondents' license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on July 19, 2022, the Respondents-Licensees' employee, clerk Ryshanique Washington, inside the Licensed Premises, sold an alcoholic beverage, to-wit: a three-pack of 25-ounce cans of Budweiser beer, to Regina Barajas, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 1-10.)
5. With respect to the sale to decoy Barajas, the Respondents 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 Respondents argued that since decoy Barajas admitted that on prior decoy operations, she was frequently successful in purchasing alcoholic beverages, "that indicates a decoy whose appearance is more often than not tricking the general public which indicates fundamental fairness [] is not complied with," when selecting decoy Barajas for minor decoy in operations. The Respondents counsel further argued that at the hearing while observing the decoy testify, he opined she was "a very well spoken, very composed very cool, calm and collected young lady," that along with her past success record "indicates that she had a more mature bearing that was more likely than not to trip up unsuspecting licensees."
6. This rule 141(b)(2) argument is rejected. The decoy's rate of purchases was not an indicator the decoy did not meet Rule 141's decoy appearance standard. There was no evidence regarding the circumstances surrounding decoy Barajas' purchases at the other

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

licensed premises she visited and there is no way to tell if the decoy's appearance had any role to play at those other licensed premises. There is no evidence decoy Barajas' minor decoy experience or demeanor had any impact upon her appearance in front of clerk Washington, especially since clerk Washington did not testify. At the time of the operation, decoy Barajas' appearance was consistent with that of a person who was 18 years old; as such she had the appearance generally expected of a person under the age of 21. (Findings of Fact ¶10.)

7. The Respondents further argued the licensees should not be held responsible or liable for the acts and knowledge of clerk Washington because there is no case law that a licensee must be held liable for the acts of its clerks and the actions of the licensees were not shown to be deficient. The Respondents reached this conclusion because clerk Washington asked for the decoy's ID, the clerk was very cooperative during the investigation, and, when speaking with Agent Walraven, she claimed she usually verbally requests the age and birthdate from customers.

8. Respondents' argument is rejected. The clerk's statement to Agent Walraven that she usually verbally requests the age and birthdate from customers is hearsay. Since clerk Washington did not testify, this hearsay statement is unsupported by any other direct evidence and under Government Code section 11513(d), it cannot be used as the basis for a finding. In fact, there was no direct evidence as to any of Respondents' policies or practices, training or otherwise, relating to alcoholic beverage sales to minors. The record is void of any such claimed non-deficiency.

9. Furthermore, well-settled California case law has held that the holder of an alcohol license may be disciplined for the unlawful acts of his/her employees/agents while engaged in the conduct and operation of the business, even though the licensee did not authorize them, and did not have actual knowledge of the activities.³ That a licensee lacks personal knowledge is irrelevant. "The holder of a liquor license has the affirmative duty to make sure that the licensed premises are not used in violation of the law and the knowledge and acts of his employees are imputable to the licensee."⁴ A licensee cannot

³ *Harris v. Alcoholic Beverage Control Appeals Board* (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; *Mack v. Department of Alcoholic Beverage Control* (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633]; *Benedetti v. Department of Alcoholic Beverage Control* (1960) 187 Cal.App.2d 213, 216-217 [9 Cal.Rptr. 525]; *Arenstein v. California State Bd. of Pharmacy* (1968) 265 Cal.App.2d 179, 192, [71 Cal.Rptr. 357].

⁴ *Morell v. Department of Alcoholic Beverage Control* (1962) 204 Cal. App. 2d 504, 514, [22 Cal.Rptr. 405, 411]; *Munro v. Alcoholic Beverage Control Appeals Board* (1960) 181 Cal.App.2d 162, 164 [5 Cal.Rptr. 527]; *Givens v. Department of Alcoholic Beverage Control, supra*, 176 Cal.App.2d 529, 534; *Fromberg v. Department of Alcoholic Beverage Control* (1959) 169 Cal.App.2d 230, 234 [337 P.2d 123]; *Mantzoros v. State Board of Equalization* (1948) 87 Cal.App.2d 140, 144 [196 P.2d 657]; *Swegle v. State Board of Equalization, supra*, 125

draw any protection from his/her claimed lack of knowledge of violations committed by his/her employees/agents or from the fact the licensee has taken reasonable precautions to prevent such violations.⁵ The licensee who has actual or constructive knowledge can be found to have permitted unacceptable conduct. *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 377. If a licensee elects to operate his/her business through employees/agents the licensee must be responsible to the licensing authority for their conduct in the exercise of the license and the licensee is responsible for the acts of his/her agents or employees done in the course of his business in the operation of the license.”⁶

10. The types of misconduct historically imputed to a licensee are those that are foreseeable in the operation of a licensed premises. One such traditional ground is when a clerk sells alcohol to a minor, even though the licensee is not present, he or she is liable for that sale as if he or she had made the sale themselves – the conduct is imputed to the licensee because it is foreseeable and is therefore the type of conduct the licensee has an obligation to prevent.

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

PENALTY

The Department requested the Respondents’ license be suspended for a period of 10 days, with 10 days all-stayed taking into consideration the Respondents’ discipline-free history after the 2014 violation and the following aggravating factors: (1) clerk Washington failed in her due diligence by not asking age-related questions after holding the decoy’s ID Card with clear indicators she was underage; and proceeded with the sale anyway; (2) the decoy’s youthful appearance.

The Respondents argued for a mitigated penalty based on its nearly eight years of discipline-free licensure and clerk Washington’s very cooperative nature during the investigation. The Respondents agreed with the Department’s recommended penalty as just and equitable, but assured the undersigned they would not turn down anything less than a 10-day all-stayed penalty.

Cal.App.2d 432, 438; *Mercurio v. Department of Alcoholic Beverage Control*, *supra*, 144 Cal.App.2d 626, 630; *Cooper v. State Board of Equalization* (1955) 137 Cal.App.2d 672, 678 [290 P.2d 914]; *Endo v. State Board of Equalization* (1956) 143 Cal.App.2d 395, 401-402 [300 P.2d 366].

⁵ *Reimel v. Alcoholic Beverage Control Appeals Bd.* (1967) 252 Cal.App.2d 520, 522 [60 Cal. Rptr. 641].

⁶ *Arenstein v. California State Bd. of Pharmacy* (1968) 265 Cal.App.2d 179, 192, 71 Cal.Rptr. 357.

In assessing an appropriate measure of discipline, the Department's penalty guidelines are in California Code of Regulations, Title 4, Division 1, Article 22, section 144, commonly referred to as rule 144. Under rule 144, the presumptive penalty for a first violation of selling or furnishing an alcoholic beverage to a minor in violation of section 25658 is a 15-day license suspension. Rule 144 also permits imposition of a revised penalty based on the presence of aggravating or mitigating factors.

In balancing the aggravating and mitigating factors, the penalty recommended herein complies with rule 144.

ORDER

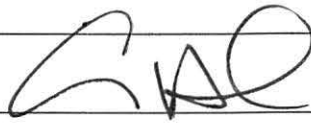
The Respondents' off-sale general license is hereby suspended for a period of 10 days, with execution of 10 days of the suspension stayed upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within one year from the effective date of this decision; that should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in the Director's discretion and without further hearing, vacate this stay order and re-impose the stayed penalty; and that should no such determination be made, the stay shall become permanent.

Dated: June 5, 2023



D. Huebel

Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: _____ 
Date: _____ 07/07/23