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SUPERIOR COURT OF THE STATE OF NEW JERSEY

APPELLATE DIVISION

IN RE 2019 SPECIAL RULING AUTHORIZING CERTAIN ACTIVITIES BY HOLDERS OF LIMITED BREWERY LICENSES AND 2022 LIMITED BREWERY SPECIAL CONDITIONS	Docket No: A-000212-22 CIVIL ACTION Appeal from State Agency Action by Division of Alcoholic Beverage Control

LETTER BRIEF AND APPENDIX IN SUPPORT OF APPELLANT DEATH OF THE FOX BREWING COMPANY'S MOTION TO SUPPLEMENT THE RECORD

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

On May 28, 2019, the Acting Director of the New Jersey Division of Alcoholic Beverage Control ("ABC") issued a "Special Ruling Authorizing Certain Activities by Holders of Limited Brewery Licenses." Appendix to Motion to Supplement (App.) 001a. Purporting to interpret N.J.S.A. § 33:1-10(1b), the Special Ruling created multiple—and in several cases, severe—restrictions on the permissible activities of New Jersey "limited breweries" (craft breweries). Three years later, in June 2022, ABC imposed all of the Special Ruling's restrictions as 18 enumerated "special conditions" on the licenses of limited breweries. See App. 025a–029a. The conditions made clear that ABC would expect compliance with the new restrictions beginning on July 1, 2022. See ibid.

On September 21, 2022, Appellant Death of the Fox Brewing Company filed and served this appeal challenging the validity of the Special Ruling and license conditions. Death of the Fox's Corrected Opening Brief was filed on December 22, 2022; ABC's response brief was filed on March 31, 2023. In its response brief, ABC argues that it has not taken any steps to enforce the provisions of the Special Ruling or license conditions. App. 066a, 068a, 077a–078a, 081a–082a. This Motion to Supplement the Record includes several ABC documents and communications that provide evidence of ABC's enforcement contrary to ABC's claims of non-enforcement.

ARGUMENT

Pursuant to Rule 2:5-5(b), Death of the Fox Brewing Company moves this Court to supplement the record with the attached ABC documents and communications showing ABC enforces provisions of the Special Ruling and license conditions against New Jersey limited breweries. Counsel for Death of the Fox conferred with counsel for ABC regarding this motion, and ABC opposes it.

Rule 2:5-5(b) permits supplementation of the administrative record "[a]t any time during the pendency of an appeal from a state administrative agency, if it appears that evidence unadduced in the proceedings below may be material to the issues on appeal." Here, ABC repeatedly claims in its response brief that it has not enforced any of the provisions of the Special Ruling or license conditions, and as a result, the provisions are mere guidance. App. 066a, 068a, 077a–078a, 081a–082a. ABC's statements are intended to counter Death of the Fox's argument that the Special Ruling and license conditions go beyond mere guidance and are invalid for failure to comply with the New Jersey Administrative Procedure Act. As such, Rule 2:5-5 authorizes Death of the Fox to supplement the record here because evidence of ABC's enforcement of the Special Ruling and license conditions is "material" to show ABC's claim of non-enforcement is false.

Further, when considering a motion to supplement the record, the Supreme Court looks to "(1) whether at the time of the hearing or trial, the [movant] knew of

the information he or she now seeks to include in the record, and (2) if the evidence were included, whether it is likely to affect the outcome." Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 452–53 (2007) (citing In re Gastman, 147 N.J. Super. 101, 114 (App. Div. 1977)).

First, while there has not been a hearing or trial in this case, Death of the Fox was unaware of the evidence of ABC enforcement it now seeks to include in the record at the time it initiated this appeal and filed its opening brief. See App. 030a–040a. Because of the multitude of express statements of enforcement within the Special Ruling and license conditions themselves, see App. 025a–029a, ABC's argument that the Special Ruling and license conditions are unenforced guidance is surprising. Had Death of the Fox anticipated such an atextual response so inconsistent with the challenged provisions, it would have sought such evidence prior to filing its opening brief. As it stands, it was only upon ABC filing its response brief in this appeal, thus spurring other limited breweries to share the evidence with Death of the Fox, that Death of the Fox learned of the evidence of enforcement.

Second, because ABC defends against Death of the Fox's Administrative Procedure Act claim by, in part, alleging to have never enforced the Special Ruling and license conditions against any limited brewery, evidence showing those claims to be false is "likely to affect the outcome" of this appeal. See Liberty Surplus, 189 N.J. at 453. Cf. Chicago Title Ins. Co. v. Ellis, 2009 WL 1659295, *7–8 (N.J. Super.

Ct. App. Div. 2009) (unpublished, included at App. 104a–111a) (evidentiary document offered to counter statements made by opposing party should have been permitted to supplement the record).

CONCLUSION

Because the evidence of ABC enforcement of the documents challenged in this appeal satisfies the requirements of Rule 2:5-5(b) and the Supreme Court's test under Liberty Surplus Ins., Death of the Fox respectfully requests this Court to grant its Motion to Supplement the Record.

DATED: April 14, 2023.

Respectfully submitted,

/s/ Jonathan M. Houghton

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SUPERIOR COURT OF THE STATE OF NEW JERSEY

APPELLATE DIVISION

IN RE 2019 SPECIAL RULING AUTHORIZING CERTAIN ACTIVITIES BY HOLDERS OF LIMITED BREWERY LICENSES AND 2022 LIMITED BREWERY SPECIAL CONDITIONS	Docket No: A-000212-22 CIVIL ACTION Appeal from State Agency Action by Division of Alcoholic Beverage Control

APPELLANT DEATH OF THE FOX BREWING COMPANY APPENDIX TO MOTION TO SUPPLEMENT, VOL. 1 OF 1

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STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

IN THE MATTER OF	)	
LIMITED BREWERY LICENSEES	)	SPECIAL RULING AUTHORIZING CERTAIN ACTIVITIES BY HOLDERS OF LIMITED BREWERY LICENSES

BY THE ACTING DIRECTOR:

Craft beer brewing in New Jersey is a growing industry. In fact, New Jersey is tied for first place in terms of growth in the American craft beer market. Since the 2012 amendments to N.J.S.A. 33:1-10(1)(b), these businesses have become important to their local economies and many New Jersey residents enjoy their products. There are now over 100 limited breweries in New Jersey. While the Division of Alcoholic Beverage Control (the "Division") supports the growth and success of the limited breweries in this State, there are regulatory issues in this industry that must be addressed. The activities and practices of the limited breweries vary across the State and, in some instances, exceed the privileges of the limited brewery license.

On September 21, 2018, after months of discussions with various stakeholders, the Division issued a Special Ruling Authorizing Certain Activities by Holders of Limited Brewery Licenses ("September 21st Special Ruling"). Almost immediately, the Division learned that a few limited breweries believed that they were not adequately represented in the stakeholder discussions. A media controversy ensued, and on October 2, 2018, the Division announced that

the September 21st Special Ruling would be suspended.[1] The Division had to determine whether the concerns raised in response to the September 21st Special Ruling could be addressed within the framework of the Alcoholic Beverage Control Act (the "Act" or "Title 33"), specifically N.J.S.A. 33:1-10(1)(b).

Since suspending the September 21st Special Ruling, the Division engaged in informal fact finding by meeting with stakeholders such as the New Jersey Beer Guild, the New Jersey Brewers Association (with its newly constituted Board of Directors that includes some of the smaller brewers informally known as the "Main Street Brewers"), the New Jersey Licensed Beverage Association, the New Jersey Restaurant Association, the New Jersey Liquor Store Alliance, and various members of the New Jersey Legislature. The Division also visited numerous limited breweries throughout the State, ranging from the very smallest to the largest breweries, and met with their owners and brewers.

The Division has reinforced its understanding of the craft beer industry and appreciates its challenges. However, based on the plain language of N.J.S.A. 33:1-10(1)(b) and the Division's review of its legislative history, the Division cannot escape its original interpretation that the 2012 amendments to the limited brewery statute were enacted for the purpose of promoting the manufacture of craft beers and creating a demand for these products through limited consumption privileges on the brewery premises. In the Division's view, by requiring consumers to take a tour of the brewery and allowing them to sample the beers produced on-site in a tasting room on the licensed premises, the expectation was that consumers would become more interested in the craft beers and would want to buy them at licensed retail consumption and distribution premises. The Division also believed that, because limited breweries were explicitly prohibited from selling food

[1] By its action today, the Division is hereby vacating the September 21, 2018 Special Ruling.

or operating a restaurant on the licensed premises of the brewery, the Legislature clearly did not intend for the 2012 amendments to establish a new consumption venue at a brewery, with the same privileges as a sports bar or restaurant. This interpretation of legislative intent is bolstered by the fact that the limited brewery statute was codified as a Class A Manufacturer's License in N.J.S.A. 33:1-10, and not as a Class C Retailer's License in N.J.S.A. 33:1-12. The Division carefully considered this distinction at each and every step of its analysis.

The Division's statutory mandate is to oversee the manufacture, sale and distribution of alcoholic beverages and to provide a framework in the industry that recognizes and encourages the beneficial aspects of competition. Accordingly, the Division must balance the concerns of the growing limited brewery sector comprised of 100 licensees against the issues and concerns facing the bars and restaurants that collectively hold approximately 6,000 retail consumption licensees in this State. In attempting to strike this balance, the Division believes that the provisions set forth in Schedule A of this Special Ruling are consistent with the legislative intent and will lead to expanded marketing and exposure of a limited brewery's products, with the expectation that there will be wider availability of these products at the State's restaurants, bars and liquor stores through greater wholesale distribution.[2] Of course, limited brewery licensees that sell their products to retail licensees must comply with all applicable requirements, including but not limited to, completing brand registrations, filing monthly Current Price Lists, and complying with applicable credit and transportation regulations. Limited brewery licensees that sell their malt alcoholic

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[2] The Division recognizes that some limited breweries desire to focus more on promoting on-premises consumption in their tasting rooms, rather than on creating products intended for widespread wholesaling either through the three-tier system or self-distribution. Should a limited brewery have such a business model, a more appropriate approach may be to obtain a restricted brewery license, coupled with a plenary retail consumption license, to be sited at a restaurant immediately adjoining the restricted brewery. See N.J.S.A. 33:1-10(1)(c). The Division is available to meet with limited brewery licensees interested in pursuing that option.

beverages in their tasting rooms also must comply with the Division's labeling requirements at N.J.A.C. 13:2-23.22 and -23.23, as well as all applicable federal labeling requirements.

Pursuant to the Director's authority at N.J.S.A. 33:1-39, the Division is issuing this revised Special Ruling Authorizing Certain Activities by Holders of Limited Brewery Licenses ("Special Ruling"). Based on its experience and expertise, the Division has concluded that the activities and practices allowed by this Special Ruling strike the appropriate balance among the competing sectors of the industry, given the statutory constraints set forth at N.J.S.A. 33:1-10(1)(b). It is the Division's intention to increase stability in the alcoholic beverage marketplace and to foster realistic competition that ultimately will benefit all residents of the State. In addition, by establishing a uniform set of standards that are applicable to all limited brewery licensees operating in this State, these licensees will be able to compete with each other on a level playing field.

This revised Special Ruling is substantially similar to the September 21st Special Ruling, with some changes that are intended to help limited breweries promote their brands and build their businesses. The Special Ruling addresses permissible and impermissible activities that may occur on the licensed premises, allows 25 on-premises special events and 52 private parties to be held on the licensed premises per calendar year, and creates a new permit pursuant to N.J.S.A. 33:1-74 that would authorize limited breweries to participate in 12 events held off of their licensed premises per calendar year.

The important changes to the September 21st Special Ruling are summarized below. Many of the revisions respond to comments received by the Division during its outreach with various stakeholders and to questions posed by current and prospective licensees and from the public. During the review process, the Division received a request from the New Jersey Beer Guild to allow limited breweries to organize and participate in large-scale beer festivals. The Division will

determine whether these types of events would be authorized under Title 33, and will address this issue in a subsequent Special Ruling, Advisory or in regulations.

Summary of Significant Changes

1. The definition of a "tour" has been revised to make the interaction between a limited brewery licensee and patrons more substantive and meaningful. This revision recognizes the statutory requirement that a holder of a limited brewery license may sell malt alcoholic beverages to consumers for on-premises consumption, but only in connection with a tour. For repeat customers, a tour will be required once per year, unless requested by a customer to be conducted more frequently or unless the limited brewery fails to create and maintain a record of a customer's previous participation in a tour. See Section 1(l).
2. With respect to the 25 events that may be conducted on the licensed premises of a limited brewery per calendar year, the Division has defined "on-premises special event" as a one-day event that is advertised or promoted by a limited brewery licensee, or by any vendor on behalf of a limited brewery licensee, through any media, including social media. This type of event will require notification to the Division through ABC Online Licensing System Notification ("ABC POSSE") and will count toward the 25 authorized annual on-premises events. However, live-televised championship sporting events (as defined herein) and live amplified music or DJ performances conducted on a licensed premises will count toward the 25 authorized on-premises events, regardless of whether they are advertised or promoted by a limited brewery licensee or a vendor acting on behalf of a limited brewery licensee. Notification through ABC POSSE for events meeting the definition of "on-premises special event" shall be required beginning on June 3, 2019. See Sections 1(i), 3(a)(1) through 3(a)(3).

3. The Division added a new provision explicitly allowing a maximum of 25 social affair events to occur on the licensed premises of a limited brewery per calendar year. This section does not allow additional events to be held at a limited brewery, but merely codifies what is permitted under current law. See N.J.S.A. 33:1-74; N.J.A.C. 13:2-5.1(d). This provision clarifies that a holder of a social affair permit may bring his/her own wine and malt alcoholic beverages to an event (with the consent of the limited brewery), provided the social affair permittee removes all alcoholic beverages from the premises at the conclusion of the event. Likewise, the host of a private party will also be permitted to bring his/her own wine and malt alcoholic beverages to a private party held at a limited brewery (with the consent of the limited brewery), provided the host removes all alcoholic beverages at the end of the party. No distilled spirits may be sold or served at either social affair events or at private parties. See Sections 3(b) and 3(c).
4. The holder of a limited brewery license is explicitly prohibited from selling food or operating a restaurant on the licensed premises. See N.J.S.A. 33:1-10(1)(b). Based on this statutory prohibition, the Division will not permit a limited brewery licensee to collaborate or coordinate with any food vendor, including food trucks, to provide food for patrons at a limited brewery, or to allow food trucks or food vendors to locate on the licensed premises of the limited brewery. However, menus from local restaurants may be placed on the licensed premises, provided there is no exclusive business relationship between a restaurant and a limited brewery. In addition, food ordered by a patron may be delivered to the brewery premises. *De minimis* types of food as an accommodation to patrons, such as water and single-serve, pre-packaged crackers, chips, nuts and similar snacks will be allowed to be sold or provided gratuitously. See Sections 4(a), (b) and (c), (5)(a) and (b).

5. The Division has combined the two off-site permits established in the September 21st Special Ruling into one permit to be known as "Limited Brewery Off-Premises Event Permit." A limited brewery licensee may obtain this permit to participate in 12 off-premises events per year such as civic or community events (sponsored by a municipality, county or other public entity), athletic events, anniversary events or holiday celebrations off its licensed premises. This permit would authorize a limited brewery licensee to sell by the glass or open container, or provide a four-ounce sample, of the malt alcoholic beverages and sodas manufactured on its licensed premises, for consumption in the area designated by the permit. This permit would also authorize a limited brewery licensee to sell unchilled packaged goods of malt alcoholic beverages manufactured on its licensed brewery premises in the form of four- or six-packs of bottles or cans, not to exceed 72 ounces per patron, for consumption off the event premises. This permit may be issued to limited brewery licensees that do not qualify for a Festival Permit issued in accordance with the Fourth Amended Special Ruling for consumer alcoholic beverage festivals ("Festival Special Ruling"), dated March 7, 2019.[3] The Division believes that allowing limited brewery licensees to participate in off-premises community events is consistent with the legislative intent of promoting brand recognition and creating a demand for these products at retail consumption and distribution licensed establishments. See Section 6. Online applications for the Limited Brewery Off-Premises Event Permit will be available on June 3, 2019 through the ABC Online Licensing System for events to be held 21 days after July 1, 2019. For events scheduled prior to July 22, 2019, complete paper applications (available on the Division's website beginning on June 3, 2019) shall be submitted to the Division. No Limited Brewery Off-Premises Event Permits will be issued for events prior to

[3] Participation in a festival authorized by the Festival Special Ruling will not count toward the 12 off-premises events authorized by Schedule A, Section 6 herein.

June 17, 2019. No Limited Brewery Off-Premises Event Permits will be issued to limited brewery licensees unless the licensee has filed a renewal application with the Division and has paid all applicable renewal fees for the 2019-2020 license term.

Enforcement of Revised Special Ruling

When the Division issued the September 21st Special Ruling, there appeared to be significant confusion among the limited breweries concerning its enforceability. Without question, then as now, the statutory requirements set forth at N.J.S.A. 33:1-10(1)(b), namely that a limited brewery has the privilege to sell its product for on-premises consumption, but only in connection with a "tour" of the brewery, and that a limited brewery shall not sell food (other than the *de minimis* types of food allowed under Sections 4(b) and 4(c) of Schedule A) or operate a restaurant, shall be enforced immediately. Likewise, compliance with all other provisions of the Act and implementing regulations that are applicable to all holders of liquor licenses are strictly enforceable immediately.

With respect to the remaining provisions set forth in Schedule A, they should be viewed as guidance, and absent flagrant or repeated violations, will not be strictly enforced by the Division at this time. However, the provisions in Schedule A represent the Division's reasonable interpretation of permissible and impermissible activities that may be undertaken by limited brewery licensees. In the near future, the Division intends to engage in formal notice and comment rulemaking pursuant to the Administrative Procedure Act at N.J.S.A. 52:14B-4, and will propose these guidelines as regulations. Once adopted, these guidelines will be fully enforceable against all limited brewery licensees.

In the interim, however, until such time as the regulatory process is completed and regulations are adopted, the Division intends to impose the guidelines contained in Schedule A as

special conditions on each limited brewery licensee, beginning with the 2020-2021 license term. See N.J.S.A. 33:1-32. Accordingly, limited brewery licensees should view the provisions set forth in Schedule A as a clear indication of how the Division intends to regulate the activities of limited breweries both on and off their licensed premises, beginning with the 2020-2021 license term, and should structure their business plans accordingly. Limited brewery licensees are encouraged to provide comments to the Division on the guidelines contained in Schedule A, as these comments may be used to inform future regulations implementing N.J.S.A. 33:1-10(1)(b).

Accordingly, it is on this 28 day of May, 2019,

ORDERED that the September 21st Special Ruling that was suspended on October 2, 2018 is hereby vacated; and it is further

ORDERED that, pursuant to N.J.S.A. 33:1-39, this Special Ruling establishes the standards for the operation of limited breweries in the State of New Jersey; and it is further

ORDERED that the provisions of Schedule A are incorporated herein as if set forth fully at length; and is further

ORDERED that, pursuant to N.J.S.A. 33:1-74, every holder of a limited brewery license or Temporary Authorization Permit ("TAP") that wishes to conduct an event off the licensed premises of a limited brewery shall apply for and obtain a Limited Brewery Off-Premises Event Permit; and it is further

ORDERED that, unless regulations have been adopted, beginning with the 2020-2021 license terms, the standards set forth in Schedule A shall be incorporated into every limited brewery license or TAP upon initial issuance and renewal thereof, and shall be fully enforceable by the Division; and it is further

ORDERED that the Director may withdraw or modify this Special Ruling and Schedule A, in the exercise of his discretion.

JAMES B. GRAZIANO
ACTING DIRECTOR

SCHEDULE A

1. Definitions.

(a) "ABC POSSE" means the ABC Online Licensing System Notification for Limited Brewery On-Premises Events.

(b) "Championship sporting event" means any type of professional, collegiate or amateur sporting event or series of events the outcome of which determines the ultimate winner, titleholder or medalist in the sport. Examples include, but are not limited to, Olympics, Kentucky Derby, Indianapolis 500, Pay-Per-View Events, MLB Playoffs and World Series, NFL Playoffs and Superbowl, NBA Playoffs, NHL Playoffs and Stanley Cup, PGA Championships, College Bowl Games, March Madness Tournament Games, World Cup Games, Wimbledon and the US Open.

(c) "Crowler" is a fillable and machine-sealable beer can used to package draft beer for off-premises consumption, which is commonly sold at limited and restricted breweries. A crowler shall not exceed a maximum of 32 ounces.

(d) "Growler" is a glass, ceramic or stainless steel jug used to transport draft beer for off-premises consumption, which is commonly sold at limited or restricted breweries. A growler shall not exceed a maximum size of 128 ounces.

(e) "Licensed premises" means the physical place at which the Limited Brewery license is sited to conduct and carry on the manufacture, distribution, sale and/or consumption of the malt alcoholic beverage produced thereon.

(f) "Limited brewery" is a brewery as described in N.J.S.A. 33:1-10(1)(b).

(g) "Limited brewery off-premises event" for which a Limited Brewery Off-Premises Event Permit is required, means a one-day event that is held off the licensed premises of a Limited Brewery. Examples of "off-premises events" include, but are not limited to:

(1) Civic or community events, such as parades, community days or celebrations, sponsored or organized by a municipality, county, or other public entity or instrumentality. Civic or community events sponsored or organized by a not-for-profit entity, as defined in N.J.A.C. 13:2-5.1(a), do not qualify for a Limited Brewery Off-Premises Permit and the not-for-profit entity must obtain a social affair permit;

(2) Music or arts festivals. Off-premises events that qualify for a Festival Permit pursuant to the Fourth Amended Special Ruling authorizing same, dated March 7, 2019, shall not be considered a "limited brewery off-premises event" and shall not count toward the 12 off-premises events authorized herein;

(3) Athletic events, such as 5K races, mud runs, bike races;

(4) Limited Brewery anniversary celebrations; and

(5) Holiday celebrations, such as July 4th or Memorial Day events.

(h) "Limited brewery off-premises event permit" is a permit authorizing a Limited Brewery to conduct a one-day event off of the licensed premises of a Limited Brewery. Applications for these permits are available via the ABC Online Licensing System.

(i) "On-premises special event," for which ABC POSSE notification is required, means a one-day event that is open to the public and is promoted or advertised by a Limited Brewery licensee, or by any vendor acting on behalf of a Limited Brewery licensee, by way of any type of media, including social media,. Events that are promoted or advertised only by signs posted inside a Limited Brewery and events announcing the availability of a new release of a malt alcoholic beverage for on-premises or off-premises consumption shall not be considered an "on-premises special event" and, therefore, no ABC POSSE notification is required. Examples of "on-premises special events" include, but are not limited to:

(1) Trivia/quizzo/game night;
(2) Arts and crafts/paint and sip;
(3) Live music/DJs/open microphone;
(4) Games of skill;
(5) Educational events and seminars;
(6) Political fundraisers that are not organized by a not-for-profit, as defined in N.J.A.C. 13:2-5.1(a);
(7) Movie or theatrical events;
(8) Animal adoption events, to the extent permitted by local ordinance; or
(9) Yoga or other similar types of classes.

(j) "Other mercantile business" means the buying and selling of goods or merchandise or the dealing in the purchase and sale of commodities that do not serve as an accommodation to patrons and are not related to or incidental to the licensed business.

(k) "Sample" or "sampling" means the selling at a nominal charge or the gratuitous offering of an open container not exceeding four ounces of any malt alcoholic beverage produced on the licensed premises. A "sample" does not include the gratuitous offering of one free drink per patron in a 24-hour period as a gesture of good will.

(l) "Tour" is a material interaction between a patron and brewery staff, taking place on the licensed premises, prior to the sampling or sale of beer for on-premises consumption, covering topics including, but not limited to, the history of the brewery, general brewing process and practice, and production information. Provided there is engagement between brewery staff and a patron, the tour may be guided or self-guided, and may be offered in a pre-recorded video or other interactive media format. Every patron must participate in a tour on initial visit to a brewery, and every year thereafter. A brewery is not required to provide a tour to repeat patrons if a brewery creates and maintains a system that documents that the patron(s) have participated in a tour, unless requested by the patron to be conducted more frequently or unless one year has passed from the date of a tour. Documentation that a patron has participated in a tour shall be retained by a Limited Brewery for three years and shall be made available to the Division upon request.

2. General Requirements.

(a) A Limited Brewery licensee has the privilege to sell its product at retail to consumers for consumption <u>on</u> the licensed premises of the brewery, but only in connection with a tour of the brewery.

(b) A Limited Brewery licensee has the privilege to sell its product at retail to consumers for consumption <u>off</u> the licensed premises of the brewery, in the form of kegs, sixtels, cases, six-packs, growlers, crowlers or other formats, in a quantity of not more than 15.5 fluid gallons per person. No tour is required for off-premises retail sales.

(c) Following a tour, a Limited Brewery licensee may offer a sample of its products to consumers for sampling purposes, or may sell its products, at retail, to consumers for consumption on the licensed premises. A Limited Brewery shall ensure that all patrons, including those attending an "on-premises special event," private party or social affair event held on the licensed premises of a Limited Brewery, participate in a tour, as defined herein, prior to any on-premises consumption of the malt alcoholic beverages brewed by a Limited Brewery on its licensed premises.

(d) Each municipality in which a Limited Brewery is located may establish, by ordinance or resolution, the hours between which the sale of malt alcoholic beverages may be made.

(e) A Limited Brewery licensee is subject to and must comply with all applicable local ordinances.

(f) No more than two television screens shall be permitted on the licensed premises of a Limited Brewery. No screen shall be greater than 65 inches, as measured from corner to corner. If a Limited Brewery licensee has more than two television screens on its licensed premises, these additional screens may be used only to display information about the Limited Brewery or its products.

(g) No Limited Brewery shall use crowd source funding, such as GoFundMe, Indiegogo or similar funding campaigns, as a source of funding to obtain a Limited Brewery license. Nor shall Limited Brewery licensees offer membership programs that offer free or discounted malt alcoholic beverages to members.

(h) A Limited Brewery licensee may engage the services of a mobile bottling or canning service for purposes of bottling or canning the malt alcoholic beverages produced on the licensed premises, provided the area where the bottling or canning is to take place is adjacent to or contiguous with the licensed premises and is permitted by the Division and local ordinance.

(i) All pourers/servers at a Limited Brewery shall receive server training designed to focus on the prevention of over-service to patrons and over-consumption by patrons, and shall be certified by a nationally-recognized server training program.

(j) No Limited Brewery licensee shall deliver the malt alcoholic beverages produced on its licensed premises to consumers' homes.

(k) All Limited Brewery licensees shall comply with all applicable Alcohol and Tobacco Tax and Trade Bureau ("TTB") statutes and regulations.

(l) All Limited Brewery licensees that sell the malt alcoholic beverages produced on their licensed premises to retailers shall comply with the Alcoholic Beverage Control Act and implementing regulations at N.J.A.C. 13:2-16, -20, -21, -23, -24, -33 and -37, unless the context thereof clearly indicates that a particular provision does not apply to Limited Brewery licensees.

(m) All Limited Brewery licensees shall comply with all records creation, maintenance and production requirements of the Alcoholic Beverage Control Act and implementing regulations, including but not limited to those set forth at N.J.A.C. 13:2-23.32.

3. Permissible Activities on a Limited Brewery Licensed Premises.

(a) On-premises Special Events via ABC POSSE.

(1) The Director may authorize a maximum of 25 on-premises special events per calendar year, which are open to the general public, to be held on the licensed premises of a Limited Brewery. An on-premises special event shall not exceed the opening and closing hours of a Limited Brewery.

(2) Any live-televised championship sporting event displayed or shown on the licensed premises of a Limited Brewery shall be considered an on-premises special event for which ABC POSSE notification is required, whether or not it is advertised by way of any media, including social media.

(3) Any live, amplified music performance or DJ appearing on the licensed premises of a Limited Brewery shall be considered an on-premises special event for which ABC POSSE notification is required, whether or not it is advertised by way of any media, including social media.

(4) Beginning on June 3, 2019, to be authorized to conduct an on-premises special event on the licensed premises of a Limited Brewery, a Limited Brewery licensee shall provide ABC POSSE notification to the Division at least ten days prior to the event. Such notification shall include, but not be limited to:

i. Description of special event to occur on licensed premises;
ii. Date and time of event;
iii. Estimated number of people in attendance;
iv. Cover charge for event, if any;
v. Security for event to ensure no consumption by individuals under the legal age and no pass-offs; and
vi. Name, address, and other contact information for outside vendor providing entertainment, if any; and
vii. Statement indicating that this is the [number] on-premises special event held on the licensed premises in the present calendar year.

(5) A Limited Brewery licensee shall not hire a third party promoter to engage or assist in the planning, administration and /or operation of an on-premises event.

(6) For special events requiring ABC POSSE notification, a Limited Brewery licensee shall also provide notification of the event to the clerk and chief law enforcement officer in the municipality in which the Limited Brewery is located, at least ten days prior to the event. Notification may be in any form acceptable to the clerk and chief law enforcement officer.

(7) A Limited Brewery licensee shall ensure that all patrons attending an on-premises special event are in compliance with the tour requirement.

(8) If a Limited Brewery licensee charges participants to attend a special event, the cover charge shall not include any free or discounted alcoholic beverages, and participants shall not be required to purchase any number of alcoholic beverages as a condition of entry to the special event.

(9) For special events involving outside vendor(s) that charge a fee, a participant shall pay the Limited Brewery licensee directly for the cost of attendance, and the Limited Brewery licensee shall pay the outside vendor(s) for their services.

(10) The Limited Brewery licensee shall maintain complete and accurate records of each on-premises special event, including all financial records and disbursements related thereto, conducted on the licensed premises per calendar year, and shall retain these records for five years on its licensed premises. These records shall be made available to the Division upon request.

(b) Private Parties on a Licensed Premises.

(1) A Limited Brewery licensee may allow a maximum of 52 private parties per calendar year to occur on the licensed premises, such as birthdays, weddings, anniversaries, civic/political functions, professional/trade association events, or class reunion/alumni events. Nothing stated herein is intended to limit the number of private parties held on a licensed premises of a Limited Brewery to one per week as long as the total number of private parties allowed per calendar year does not exceed 52.

(2) A Limited Brewery licensee shall ensure that any private party held on the licensed premises shall comply with the following:

i. A private party may be held in an area on the licensed premises of a Limited Brewery, provided that such area is clearly separated from the tasting room by a permanent or temporary structure and is not accessible by or to the general public. Under no circumstances may a member of the general public enter the separate area of the private party, and the Limited Brewery licensee is responsible for ensuring that only private

party guests are permitted in the area separated off for the private party. A Limited Brewery licensee may, in its discretion, close the brewery during a private party;

ii. All guests attending a private party on the licensed premises of a Limited Brewery shall participate in a tour prior to the on-premises consumption of the malt alcoholic beverages manufactured by the Limited Brewery, unless the Limited Brewery licensee can document that a guest has participated in a tour within the previous calendar year. Group tours are permissible;

iii. Subject to the consent of the Limited Brewery, a host of a private party held on the licensed premises of a Limited Brewery may bring his/her own wine and malt alcoholic beverages to be served at the private party, provided said wine and malt alcoholic beverages are removed at the end of the private party. A Limited Brewery licensee shall not permit the host of a private party to serve any distilled spirits on the licensed premises of a Limited Brewery;

iv. A host of a private party may hire an employee of the Limited Brewery licensee to pour the alcoholic beverages served at the party and to provide educational commentary about the malt alcoholic beverages brewed on the licensed premises;

v. No catering permits shall be issued by the Division to plenary retail consumption licensees for alcoholic beverages to be served or sold on the licensed premises of a Limited Brewery at a private party;

vi. A host of a private party shall remove all food brought onto the licensed premises of the Limited Brewery at the end of the party;

vii. Private parties shall be by invitation only. Tickets shall not be sold to attend a private party, nor may the event be advertised to the general public;

viii. No championship sporting events may be broadcast or televised during a private party held on the licensed premises of a Limited Brewery;

ix. The Division may request a copy of the contract and other related documents between the host of the private party and the Limited Brewery licensee; and

x. A Limited Brewery licensee shall provide to the Division, upon request, a post-event accounting for every private party held on the licensed premises, which may include but not be limited to, a signed inventory report showing the sale and disposition of the malt alcoholic beverages sold by the Limited Brewery, and all invoices related thereto.

(c) Social Affair Events on a Licensed Premises.

(1) A Limited Brewery licensee may allow a maximum of 25 social affair events to occur on the licensed premises.

(2) An organization operating solely for civic, religious, educational, charitable, fraternal, social or recreational purposes, and not for private gain, may apply to the Division for a social affair permit for an event to be held on the licensed premises of a Limited Brewery pursuant to N.J.A.C. 13:2-5.1 et seq.

(3) A social affairs permittee conducting an event on the licensed premises of a Limited Brewery shall have the following privileges:

i. To sell tickets for the event that includes the price of malt alcoholic beverages and wine, food and entertainment;

ii. Subject to the consent of the Limited Brewery, to sell and serve wine and malt alcoholic beverages for on-premises consumption only, provided said wine and malt alcoholic beverages are obtained in accordance with N.J.A.C. 13:2-5.1(e) and are removed by the social affair permittee at the end of the event. A Limited Brewery licensee shall not permit the social affair permittee to sell or serve any distilled spirits at a social affair event; and

iii. A social affair permittee may hire an employee of the Limited Brewery licensee to pour the alcoholic beverages sold or served at the social affair event and to provide educational commentary about the malt alcoholic beverages manufactured on the premises of the Limited Brewery.

(4) A social affairs permittee conducting an event on the licensed premises of a Limited Brewery shall not be permitted to:

i. Sell tickets to the social affair event at the door;

ii. Sell the Limited Brewery's malt alcoholic beverages in the form of kegs, sixtels, cases, six-packs, growlers, crowlers or other formats intended for off-premises consumption; and

iii. Hire a third party promoter to engage or assist in the planning, administration and /or operation of the social affair event.

(5) A Limited Brewery licensee shall ensure that events conducted on the licensed premises of a Limited Brewery pursuant to a social affairs permit shall comply with the following.

i. A social affair event may be held in an area on the licensed premises of a Limited Brewery, provided that such area is clearly separated from the tasting room by a permanent or temporary structure and is not accessible by or to the general public. Under no circumstances may a member of the general public enter the separate area of the social affair event, and the Limited Brewery licensee is responsible for ensuring that only attendees of the social affair are permitted in the area separated off for the social affair event;

ii. All guests attending a social affair event on the licensed premises of a Limited Brewery shall participate in a tour prior to the on-premises consumption of the malt alcoholic beverages manufactured by the Limited Brewery, unless the Limited Brewery licensee can document that a guest has participated in a tour within the previous calendar year. Group tours are permissible;

iii. A social affair permittee shall remove all food brought onto the licensed premises of the Limited Brewery at the end of the social affair event;

iv. A Limited Brewery licensee shall not sell its products for off-premises consumption during a social affair event;

v. The Division may request a copy of the contract and other related documents between the social affair permittee and the Limited Brewery licensee;

vi. A social affair permittee shall provide to the Division a post-event accounting for every social affair event held on the licensed premises of a Limited Brewery, which may include but not be limited to, a signed inventory report showing the malt alcoholic beverages sold or donated by the Limited Brewery to the social affair permittee, and all invoices related thereto. The Limited Brewery at which a social affair event was held shall comply with all requests for information by the Division related to the event;

vii. All social affair events held on the licensed premises of a Limited Brewery must be conducted in accordance with N.J.A.C. 13:2-5.1 et seq. Participants attending a social affair event on the licensed premises of a Limited Brewery shall pay the social affairs permittee for the admission price or ticket. The Limited Brewery licensee shall not hire or pay outside vendor(s) for services rendered at a social affair event; and

viii. A social affairs permittee conducting an event on the licensed premises of a Limited Brewery shall comply with special conditions, if any, attached to the permit.

4. Other Permissible Activities on a Licensed Premises.

(a) A Limited Brewery licensee may provide restaurant menus on the licensed premises, provided there is no exclusive business arrangement with any particular restaurant. Food deliveries to a patron at a licensed premises of a Limited Brewery are permissible.

(b) A Limited Brewery licensee may sell soda that is manufactured by the Limited Brewery on the licensed premises for consumption on and/or off the licensed premises. No other commercial brands of beverages that are not manufactured on the licensed premises of a Limited Brewery may be sold.

(c) A Limited Brewery licensee may offer for sale or make gratuitous offering of *de minimis* types of food as an accommodation to patrons, such as water and single-serve, pre-packaged crackers, chips, nuts and similar snacks.

(d) A Limited Brewery licensee may play or provide on the licensed premises background music, radio and video monitors displaying pre-recorded information about the Limited Brewery or topics related thereto.

(e) A Limited Brewery licensee may display or show regularly scheduled television programs, news, movies or regular season sporting events. However, if these broadcasts are advertised in any media, including social media, such that they meet the definition of an "on-premises special event," the Limited Brewery licensee shall provide ABC POSSE notification to the Division pursuant to Section 3(a) above, and shall count such broadcast as an "on-premises special event."

(f) A Limited Brewery licensee may offer for sale suitable gift items and novelty wearing apparel identified with the name of the licensed Limited Brewery.

(g) A Limited Brewery licensee may sell or serve malt alcoholic beverages that are produced by the Limited Brewery for on-premises consumption in outdoor spaces, provided that:

(1) The outdoor space is part of the approved licensed premises;

(2) The outdoor space is fenced in, and the fence is at least three feet high, unless a local ordinance requires a different height;

(3) The outdoor space is monitored by an employee of the Limited Brewery at all times when customers are present;

(4) No permanent or portable tap systems shall be allowed in the outdoor space; and

(5) No wait staff shall be permitted to sell or serve malt alcoholic beverages in the outdoor space

5. Impermissible Activities on a Licensed Premises.

(a) A Limited Brewery licensee shall not sell food, except as permitted in Section 4(b) and (c), or operate a restaurant, as defined at N.J.S.A. 33:1-1(t), on its licensed premises. Other than the *de minimis* types of food described in Section 4(b) and (c), a Limited Brewery licensee shall provide no food, even on a gratuitous basis.

(b) A Limited Brewery licensee shall not collaborate or coordinate with any food vendors, including food trucks, for the provision of food on the licensed premises, and shall not allow food vendors or food trucks to locate on the licensed premises. However, a consumer may bring his/her own food into the tasting room of a Limited Brewery for his/her own consumption.

(c) A Limited Brewery licensee shall not permit "happy hour" or other specially-priced malt alcoholic beverages to be sold on the license premises.

(d) A Limited Brewery licensee shall not mix or sell specialty cocktails using malt alcoholic on the licensed premises.

(e) A Limited Brewery licensee shall not brew or sell coffee on the licensed premises.

(f) A Limited Brewery licensee shall not allow, permit or suffer other mercantile business, such as "pop up" shops, bazaars or craft shows, to occur on the licensed premises.

(g) A Limited Brewery licensee shall not offer a free drink to any patron(s) as a gesture of good will.

6. Permissible Activities off a Limited Brewery Licensed Premises.

(a) The Director may issue a maximum of 12 Limited Brewery Off-Premises Event Permits per calendar year to a Limited Brewery licensee for special events taking place off the licensed premises. A special event held off a licensed premises of a Limited Brewery shall not exceed the opening and closing hours set forth by ordinance for retail consumption licensees in the municipality in which the off-premises event will take place.

(b) The non-refundable fee for each Limited Brewery Off-Premises Event Permit shall be $200 per day.

(c) Beginning on June 3, 2019, online applications for Limited Brewery Off-Premises Event Permits will be available via the ABC Online Licensing System for off-premises events scheduled to be held 21 days after July 1, 2019.

(1) For off-premises events scheduled after July 22, 2019, a Limited Brewery licensee shall submit a complete application at least 21 days prior to the date of the event, and pay the non-refundable permit fee via the ABC Online Licensing System.

(2) For off-premises events scheduled prior to July 22, 2019, but no earlier than June 17, 2019, a Limited Brewery licensee may complete and file a paper application, which will be available on the Division's website at www.nj.gov/oag/abc beginning on June 3, 2019.

(3) The Division may, at its discretion, accept a paper application for off-premises events scheduled up to 14 days prior to the event date. Paper applications shall be made available on the Division's website at www.nj.gov/oag/abc. However, no applications for a Limited Brewery Off-Premises Event Permit will be accepted fewer than 14 days prior to an off-premises event.

(d) Upon receipt of a complete application and payment of fee, the Division may request as in-person conference with the applicant prior to issuance or denial of the permit.

(e) The application for a Limited Brewery Off-Premises Event Permit shall include, but not be limited to, the following:

(1) Complete general information on the Limited Brewery licensee, including license or Temporary Authorization Permit number;

(2) A comprehensive description of the event, including but not limited to:

i. Location of event;
ii. Type of event;
iii. Date, times, ticket and other pricing information;
iv. Description of the kinds of malt alcoholic beverages to be dispensed and cup sizes;
v. A map or detailed sketch of the designated area where the event is to take place;
vi. A detailed security plan to assure general safety, as well as emergency medical assistance. The plan must provide for: age verification to prevent underage consumption; "pass-off" controls; prevention of intoxication; identification of security personnel, duties, numbers and experience; confirmation that all servers shall be employees of the applicant and shall be certified by a nationally-recognized server training program; and
vii. Complete information relating to any entertainment and/or recreational activities provided at the event.

(f) The application shall be endorsed by the clerk and chief law enforcement officer, or their designees, of the municipality in which the event is taking place. If the event is taking place in or on publicly owned or controlled property, the endorsement of the political subdivision that owns or controls the property and the Chief Law Enforcement Officer of the law enforcement entity with jurisdiction over the property shall be obtained. No Limited Brewery Off-Premises Event Permit shall be issued without the required endorsements.

(g) The holder of a Limited Brewery Off-Premises Event Permit shall comply with any and all additional requirements imposed upon the permittee by the municipality in which the event is taking place or other government entity owning or controlling the property on which the event is taking place.

(h) The holder of a Limited Brewery Off-Premises Event Permit shall have the following privileges:

(1) To sell malt alcoholic beverages produced on its licensed premises by the glass or open container for immediate consumption only in the area(s) designated by the Limited Brewery Off-Premises Event Permit;

(2) To provide a sample not exceeding four ounces of malt alcoholic beverages produced on their licensed premises for immediate consumption only in the area(s) designated by the permit. Said sample may be sold for either a nominal charge or may be provided gratuitously;

(3) To sell unchilled packaged goods of the malt alcoholic beverages produced on its licensed premises in the form of four- or six-packs of bottles or cans only, not to exceed a total of 72 ounces per patron, provided that there shall be no consumption of any packaged goods on the premises of the event;

(4) To sell by the glass or open container or to provide samples of sodas produced on their licensed premises; and

(5) To provide entertainment and/or recreational activities within the area(s) designated by the permit.

(i) The holder of a Limited Brewery Off-Premises Event Permit shall not be permitted to:

(1) Provide food, except as otherwise permitted in Section 4(b) and (c), operate a restaurant, or coordinate with any food vendors to sell food in the area(s) designated by the permit. However, nothing stated herein shall prohibit individuals attending the event from bringing food into the area designated by the permit;

(2) Sell any other type of alcoholic beverages or sodas, except those produced on the licensed premises of the permittee; and

(3) A Limited Brewery licensee shall not hire a third party promoter to engage or assist in the planning, administration and/or operation of the off-premises event.

(j) If a Limited Brewery charges participants to attend a special event, the cover charge shall not include any free or discounted alcoholic beverages, and participants shall not be required to purchase any alcoholic beverages as a condition of entry to the special event.

(k) For special events involving outside vendor(s) that charge a fee, a participant shall pay the Limited Brewery licensee directly for the cost of attendance, and the Limited Brewery licensee shall pay the outside vendor(s) for their services.

(l) The Limited Brewery licensee shall maintain complete and accurate records of each off-premises special event, including all financial records and disbursements related thereto, and shall retain these records on its licensed premises for five years. These records shall be made available to the Division upon request.

(m) The holder of a Limited Brewery Off-Premises Event Permit shall comply with special conditions, if any, attached to the permit.

LIMITED BREWERY SPECIAL CONDITIONS

Pursuant to N.J.S.A. 33:1-32 and N.J.S.A. 33:1-39, which set forth the Director's general authority to make rules, regulations, special rulings and findings, and to impose special conditions as may be necessary for the proper regulation and control of the manufacture, sale, and distribution of alcoholic beverages, the following special conditions are imposed on your License. These special conditions derive from the May 28, 2019 Special Ruling Authorizing Certain Activities by Holders of Limited Brewery Licensees ("May 2019 Special Ruling"), and shall be subject to enforcement.

1. A licensee shall ensure that all patrons participate in a tour, as defined in the May 2019 Special Ruling, prior to any on-premises consumption of the malt alcoholic beverages brewed by a Limited Brewery on its licensed premises. A tour requires engagement regarding the manufacturing process between a patron and brewery staff beyond exchanging money for beer. A licensee must provide such a tour prior to allowing any on-premise consumption, including but not limited to consumer sampling, tasting room sales, and service to patrons at an "on-premises special event," private party or social affair event held on the licensed premises of a Limited Brewery. Repeat tours are not required, provided the licensee has a system to maintain evidence that a patron has taken a tour at the brewery within the previous calendar year.

2. A licensee shall not sell food or operate a restaurant, as defined at N.J.S.A. 33:1-1(t), on its licensed premises. However, a licensee may offer for sale or make gratuitous offer of *de minimis* types of food such as water and single-serve, pre-packaged crackers, chips, nuts and similar snacks as an accommodation to patrons. In the case of private parties or social affairs events, the host of these events may bring food onto the licensed premises provided it is removed at the conclusion of the event.

3. A licensee shall not collaborate or coordinate with any food vendor, including food trucks, for the provision of food on the licensed premises, and shall not procure or permit food vendors or food trucks to locate on the licensed premises. A licensee may provide restaurant menus on the licensed premises and may provide vendor lists for private parties or social affairs events, provided that there is no exclusive business arrangement with any particular restaurant or vendor.

4. A licensee shall not mix or sell specialty cocktails using malt alcohol on the licensed premises.

5. All servers must receive server training and be certified by a nationally recognized organization.

6. A licensee shall not offer a free drink to any patron(s) as a gesture of good will nor shall it permit "happy hour" or other specially priced malt alcoholic beverages to be sold.

7. A licensee shall not brew and sell coffee on the licensed premises. A licensee shall not sell soft-drinks on the licensed premises, except for those soft-drinks manufactured on the licensed premises.

8. A licensee shall not allow, permit, or suffer other mercantile business, such as "pop up" shops, bazaars, or craft shows, to occur on the licensed premises, except that it may sell branded merchandise and novelty items as an accommodation to patrons.

9. No more than 25 on-premises special events per calendar year, which are open to the general public, shall be held on the licensed premises of a Limited Brewery. "On-premises special events" are defined in the May 2019 Special Ruling.

10. Any live, amplified music performance, DJ appearance, or live-televised championship sporting event displayed or shown on the licensed premises of a Limited Brewery shall be considered an on-premises special event for which ABC POSSE notification is required, whether or not it is advertised by way of any media, including social media. "Championship sporting event" is defined in the May 2029 Special Ruling.

11. A licensee may display or show regularly scheduled television programs, news, movies, or regular season sporting events subject to copyright and intellectual property laws. However, if these broadcasts are advertised in any media, including social media, then they meet the definition of an "on-premises special event," and the licensee shall provide ABC POSSE notification to the Division and shall count such broadcast as an "on-premises special event."

12. A licensee shall provide ABC POSSE notification, on a form approved by the Director, to the Division at least ten days prior to conducting an on-premises special event.

13. A licensee shall not hire a third-party promoter to engage or assist in the planning, administration and/or operation of any on-premises special event.

14. If a licensee charges participants to attend a special event, the cover charge shall not include any free or discounted alcoholic beverages. Licensee shall not require participants to purchase any number of alcoholic beverages as a condition of entry to the special event. Cover charges and/or participation fees may only be collected directly by the licensee.

15. A licensee may allow a maximum of 52 private parties per calendar year to occur on the licensed premises, such as birthdays, weddings, anniversaries, civic/political functions, professional/trade association events, or class reunion/alumni events. Nothing stated herein is intended to limit the number of private parties held on a licensed premises of a Limited Brewery to one per week as long as the total number of private parties allowed per calendar year does not exceed 52.

16. No more than 25 social affair events may be held at a Limited Brewery's licensed premises in a calendar year.

17. A licensee may obtain a maximum of 12 Limited Brewery Off-Premises Event Permits per calendar year for special events taking place <u>off</u> the licensed premises. A single Off-Premises Event Permit may be issued for an event that is held on a maximum of three consecutive days. The Off-Premises Event Permit is $100 per day. For example, if there is an event with three consecutive days, one permit is required at a cost of $300.

18. Licensees with valid COVID-19 Expansion of Premises Permits may continue selling and serving their malt alcoholic beverages in the outdoor areas, as authorized by those permits. Once the COVID-19 Expansion Permit expires, Section 4(g) of the May 2019 Special Ruling shall apply.

This License Expires: 06/30/2023

State of New Jersey

Department of Law and Public Safety

Division of Alcoholic Beverage Control

2022 - 2023

State Issued

Pursuant to Title 33 of the New Jersey Statutes, A LIMITED BREWERY LICENSE

Is Hereby Granted To DEATH OF THE FOX BREWING COMPANY

119 BERKLEY ROAD
UNITS 3 & 4
CLARKSBORO, NJ 08020

License Number: 3404-11-742-001

This license confers all rights and privileges pertaining thereto, as set further in Title 33 of the New Jersey Statutes, and any amendments thereof and supplements thereto, and is expressly subject to the terms, provisions, limitations, requirements and conditions set forth therein and any rules and regulations promulgated heretofore and hereafter by the Director of the Division of Alcoholic Beverage Control pursuant to Title 33 of the New Jersey Statutes. The license is further subject to the provisions of all municipal ordinances and/or resolutions pertaining thereto which have been or shall have been duly enacted under law.

Effective Date: 07/01/2022

Fee Paid $1250.00

Attest: Director of ABC

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1. A licensee shall ensure that all patrons participate in a tour, as defined in the May 2019 Special Ruling, prior to any on-premises consumption of the malt alcoholic beverages brewed by a Limited Brewery on its licensed premises. A tour requires engagement regarding the manufacturing process between a patron and brewery staff beyond exchanging money for beer. A licensee must provide such a tour prior to allowing any on-premise consumption, including but not limited to consumer sampling, tasting room sales, and service to patrons at an "on-premises special event," private party or social affair event held on the licensed premises of a Limited Brewery. Repeat tours are not required, provided the licensee has a system to maintain evidence that a patron has taken a tour at the brewery within the previous calendar year.

2. A licensee shall not sell food or operate a restaurant, as defined at N.J.S.A. 33:1-1(t), on its licensed premises. However, a licensee may offer for sale or make gratuitous offer of de minimis types of food such as water and single-serve, pre-packaged crackers, chips, nuts and similar snacks as an accommodation to patrons. In the case of private parties or social affairs events, the host of these events may bring food onto the licensed premises provided it is removed at the conclusion of the event.

3. A licensee shall not collaborate or coordinate with any food vendor, including food trucks, for the provision of food on the licensed premises, and shall not procure or permit food vendors or food trucks to locate on the licensed premises. A licensee may provide restaurant menus on the licensed premises and may provide vendor lists for private parties or social affairs events, provided that there is no exclusive business arrangement with any particular restaurant or vendor.

4. A licensee shall not mix or sell specialty cocktails using malt alcohol on the licensed premises.

5. All servers must receive server training and be certified by a nationally recognized organization.

6. A licensee shall not offer a free drink to any patron(s) as a gesture of good will nor shall it permit "happy hour" or other specially priced malt alcoholic beverages to be sold.

7. A licensee shall not brew and sell coffee on the licensed premises. A licensee shall not sell soft-drinks on the licensed premises, except for those soft-drinks manufactured on the licensed premises.

8. A licensee shall not allow, permit, or suffer other mercantile business, such as "pop up" shops, bazaars, or craft shows, to occur on the licensed premises, except that it may sell branded merchandise and novelty items as an accommodation to patrons.

9. No more than 25 on-premises special events per calendar year, which are open to the general public, shall be held on the licensed premises of a Limited Brewery. "On-premises special events" are defined in the May 2019 Special Ruling.

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meet the definition of an "on-premises special event," and the licensee shall provide ABC POSSE notification to the Division and shall count such broadcast as an "on-premises special event."

12. A licensee shall provide ABC POSSE notification, on a form approved by the Director, to the Division at least ten days prior to conducting an on-premises special event.

13. A licensee shall not hire a third-party promoter to engage or assist in the planning, administration and/or operation of any on-premises special event.

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18. Licensees with valid COVID-19 Expansion of Premises Permits may continue selling and serving their malt alcoholic beverages in the outdoor areas, as authorized by those permits. Once the COVID-19 Expansion Permit expires, Section 4(g) of the May 2019 Special Ruling shall apply.

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

LIC. NO.: 3404-11-845-001
AGENCY NO.: S-20-39369, H-2020-52536;

DIVISION OF ALCOHOLIC BEVERAGE CONTROL, Petitioner, v. Craftwerk Orange Brewing Company LLC, Respondent.	)	NOTICE OF CHARGES

Take Notice that under the authority of the Director, as set forth in Alcoholic Beverage Control Act, N.J.S.A 33:1-1, et seq; and the regulations promulgated pursuant thereto, the New Jersey Division of Alcoholic Beverage Control ("Division") will seek to suspend plenary retail license 3404-11-845-001 held by Craftwerk Orange Brewing Company LLC, issued by The Division of Alcoholic Beverage Control, Mercer County, for premises located at 55 S Essex Ave, Orange, NJ 07050, for violation of the aforementioned statute and/or regulations. The Division hereby prefers the following charges and will seek the noted penalty to wit:

1.	On or about 10/31/20, you included in an advertisement or advertising material a statement, illustration, design, device, name, symbol, sign or representation, viz., advertisement for event that violated Director's Special Ruling (coordinated with food truck, two free drinks), which is directly or indirectly; in violation of N.J.A.C. 13:2-24.10(a)1-6.	5-day suspension
2.	On 10/31/20, you sold, served, delivered, or suffered the sale, service, delivery or consumption of alcoholic beverages beyond the scope of your license, in violation of N.J.S.A. 33:1-12, viz., Held event that violated Director's special Ruling (coordinated with food truck, two free drinks);, in an area which was not designated or described by you in your license application as a place to be licensed for the said sale, service or delivery of alcoholic beverages.	10-day suspension
3.	On 10/31/20, you allowed, permitted or suffered a prohibited practice or promotion at your licensed premises, viz., Held event at Limited Brewery that violated Special Ruling (coordinated with food truck, two free drinks); in violation of N.J.A.C. 13:2-23.16.	10-day suspension

The total penalty sought by the Division is 25 days suspension of your license.

The licensee must enter a plea to the charges within 30 days of its receipt.

Failure to do so will result, pursuant to N.J.A.C. 13:2-19.3(c), in the entry of a non-vult plea on your behalf and the Director upon certification by the Division may impose the penalty stated in this Notice of Charges without further notice.

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: _____
Richard E. Karczewski, Jr.
DEPUTY ATTORNEY GENERAL

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

PERMIT NO.: 81465
AGENCY NO.: S-20-39341, H-2020-52342;

DIVISION OF ALCOHOLIC BEVERAGE CONTROL,

Petitioner,

v.

BK Brewing LLC,

Respondent.

NOTICE OF CHARGES

Take Notice that under the authority of the Director, as set forth in Alcoholic Beverage Control Act, N.J.S.A. 33:1-1, et seq; and the regulations promulgated pursuant thereto, the New Jersey Division of Alcoholic Beverage Control ("Division") will seek to suspend permit number 81465 held by BK Brewing LLC, t/a Lone Eagle Brewing, issued by The Division of Alcoholic Beverage Control, Mercer County, for premises located at 44 Stangl Rd, Flemington, NJ 08822, for violation of the aforementioned statute and/or regulations. The Division hereby prefers the following charges and will seek the noted penalty to wit:

1.	On or about various dates, you sold, served, delivered, or suffered the sale, service, delivery or consumption of alcoholic beverages beyond the scope of your license, in violation of N.J.S.A. 33:1-12, viz., failed to disclose on premises events as required by special ruling, in an area which was not designated or described by you in your license application as a place to be licensed for the said sale, service or delivery of alcoholic beverages.	10-day suspension
2.	On 10/8/20, you sold, served, delivered, or suffered the sale, service, delivery or consumption of alcoholic beverages beyond the scope of your license, in violation of N.J.S.A. 33:1-12, viz., held an excess of six off site events in violation of special ruling, in an area which was not designated or described by you in your license application as a place to be licensed for the said sale, service or delivery of alcoholic beverages.	10-day suspension

The total penalty sought by the Division is 20 days suspension of your permit. The Division will seek an additional 10 days suspension based upon aggravating circumstances, therefore the total penalty sought by the Division is 30 days suspension of your permit.

The licensee must enter a plea to the charges within 30 days of its receipt.

Failure to do so will result, pursuant to N.J.A.C. 13:2-19.3(c), in the entry of a non-vult plea on your behalf and the Director upon certification by the Division may impose the penalty stated in this Notice of Charges without further notice.

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: _____
Richard B. Karczewski, Jr.
DEPUTY ATTORNEY GENERAL

From: **NJABC Permits** <njabcpermits@njoag.gov>
Date: Mon, Mar 14, 2022 at 11:36 AM
Subject: Limited Brewery Off-Premises Event Permit Application File 499238
To: hackensackbrewing@gmail.com <hackensackbrewing@gmail.com>, fkatsaroans@hackensackpd.org <fkatsaroans@hackensackpd.org>

To Whom It May Concern:

Please be advised that this event does not qualify for the Limited Brewery Off-Premises Event Permit; this application will be withdrawn and the fees refunded. Please see the attached Special Ruling Authorizing Certain Activities by Holders of Limited Brewery Licenses, specifically Schedule A (g).

The PBA would qualify for a Social Affair Permit, however, if they do not wish to handle the alcohol/obtain this permit, a Plenary Retail Consumption Licensee must be engaged to pull a Catering Permit to serve/sell alcohol at the event.

Should you have questions, please contact ABC Deputy Attorney General Gregory Sullivan at 609.376.2677.

Thank You

NJ ABC Permit Unit

NJ Dept. of Law and Public Safety

Division of Alcoholic Beverage Control

140 E Front St. | PO Box 087 | Trenton, NJ 08625-0087

Office: (609)984-2830

NJ ABC Website: Click Here

From: **NJABC Permits** <njabcpermits@njoag.gov>
Date: Wed, Sep 7, 2022 at 9:28 AM
Subject: Limited Brewery Off-Premises Event Permit Application File 543968
To: hackensackbrewing@gmail.com <hackensackbrewing@gmail.com>

To Whom It May Concern:

Because this event is being hosted by the Bergen County Historical Society, a non-profit organization, the non-profit must obtain a Social Affair for this event, which would disqualify any brewery from attending, according to Special Ruling Authorizing Certain Activities by Holders of Limited Brewery Licenses, specifically Schedule A (g)(1).

> (g) "Limited brewery off-premises event" for which a Limited Brewery Off-Premises Event Permit is required, means a one-day event that is held off the licensed premises of a Limited Brewery. Examples of "off-premises events" include, but are not limited to:
>
> (1) Civic or community events, such as parades, community days or celebrations, sponsored or organized by a municipality, county, or other public entity or instrumentality. Civic or community events sponsored or organized by a not-for-profit entity, as defined in N.J.A.C. 13:2-5.1(a), do not qualify for a Limited Brewery Off-Premises Permit and the not-for-profit entity must obtain a social affair permit;

A copy of the Special Ruling Authorizing Certain Activities by Holders of Limited Brewery Licenses has been attached for your convenience. Should you have any questions regarding this determination, you may contact Deputy Attorney General Gregory Sullivan at 609.376.2677.

The application for the Social Affair has been attached for you to forward to the non-profit organization, if you wish to do so. If the event is 22 days or more away, they may apply online at www.nj.gov/oag/abc. If the non-profit is applying for a permit when the event date is less than 22 days away, a paper application must be fulfilled & submitted; all signatures on the signature page must be *original*. Applications that are submitted without *all* signatures fulfilled will not be considered for review & will be returned. Once completed, the application & fee must be overnighted utilizing any carrier ***other than*** United States Postal Service to:

NJ ABC

Attn: Permit Unit

140 East Front Street

Trenton NJ 08608

Attn: Permit Unit

Thank You

NJ ABC Permit Unit

NJ Dept. of Law and Public Safety

Division of Alcoholic Beverage Control

140 E Front St. | PO Box 087 | Trenton, NJ 08625-0087

Office: (609)984-2830

NJ ABC Website: Click Here

From: **NJABC Permits** <njabcpermits@njoag.gov>
Date: Thu, Sep 22, 2022, 9:46 AM
Subject: Limited Brewery Off-Premises Event Permit Application File 546431
To: 7chieftains@gmail.com <7chieftains@gmail.com>
Cc: lfernandez@hawthornenj.org <lfernandez@hawthornenj.org>, jknepper@hawthornepdnj.org <jknepper@hawthornepdnj.org>

To Whom It May Concern:

Because this event is being hosted by Passaic County Paws Inc, a non-profit organization, the non-profit must obtain a Social Affair for this event, which would disqualify any brewery from attending, according to Special Ruling Authorizing Certain Activities by Holders of Limited Brewery Licenses, specifically Schedule A (g)(1).

A copy of the Special Ruling Authorizing Certain Activities by Holders of Limited Brewery Licenses has been attached for your convenience. Should you have any questions regarding this determination, you may contact Deputy Attorney General Gregory Sullivan at 609.376.2677.

The application for the Social Affair has been attached for you to forward to the non-profit organization, if you wish to do so. If the event is 22 days or more away, they may apply online at www.nj.gov/oag/abc. If the non-profit is applying for a permit when the event date is less than 22 days away, a paper application must be fulfilled & submitted; all signatures on the signature page must be *original*. Applications that are submitted without *all* signatures fulfilled will not be considered for review & will be returned. Once completed, the application & fee must be overnighted utilizing any carrier ***other than*** United States Postal Service to:

NJ ABC

Attn: Permit Unit

140 East Front Street

Trenton NJ 08608

Attn: Permit Unit

Thank You

NJ ABC Permit Unit

NJ Dept. of Law and Public Safety

Division of Alcoholic Beverage Control

140 E Front St. | PO Box 087 | Trenton, NJ 08625-0087

Office: (609)984-2830

NJ ABC Website: Click Here

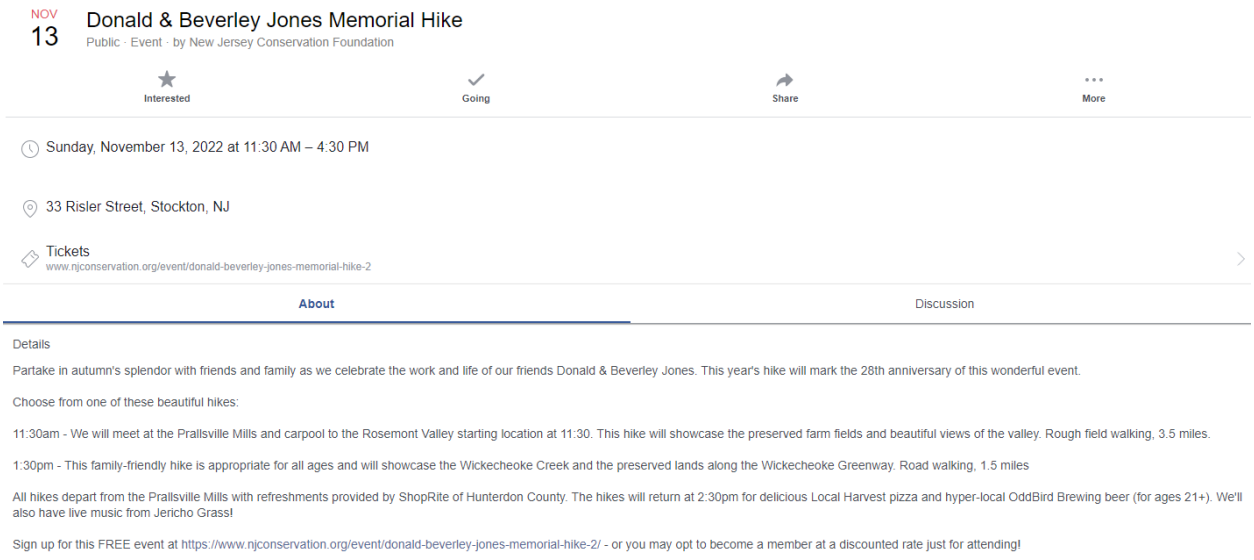
From: NJABC Permits <njabcpermits@njoag.gov>
Date: October 27, 2022 at 12:42:47 PM EDT
To: oddbirdbrewing@gmail.com
Cc: Jaclyn Jiras <Jaclyn.Jiras@njsp.org>, stocktonclerk@aol.com
Subject: Limited Brewery Off-Premises Event Permit Application File 544188

To Whom It May Concern:
Because this event is sponsored by the New Jersey Conservation Foundation, a non-profit organization, the non-profit must obtain a Social Affair for this event, which would disqualify a limited brewery from attending, according to Special Ruling Authorizing Certain Activities by Holders of Limited Brewery Licenses, specifically Schedule A (g)(1). This permit application will be withdrawn & the fees refunded.

> (g) "Limited brewery off-premises event" for which a Limited Brewery Off-Premises Event Permit is required, means a one-day event that is held off the licensed premises of a Limited Brewery. Examples of "off-premises events" include, but are not limited to:
>
> (1) Civic or community events, such as parades, community days or celebrations, sponsored or organized by a municipality, county, or other public entity or instrumentality. Civic or community events sponsored or organized by a not-for-profit entity, as defined in N.J.A.C. 13:2-5.1(a), do not qualify for a Limited Brewery Off-Premises Permit and the not-for-profit entity must obtain a social affair permit;

A copy of the Special Ruling Authorizing Certain Activities by Holders of Limited Brewery Licenses has been attached for your convenience. Should you have any questions regarding this determination, you may contact Deputy Attorney General Gregory Sullivan at 609.376.2677.

The application for the Social Affair has been attached for you to forward to the non-profit organization, if you wish to do so. If the event is 22 days or more away, they may apply online at www.nj.gov/oag/abc. If the non-profit is applying for a permit when the event date is less than 22 days away, a paper application must be fulfilled & submitted; all signatures on the signature page must be *original*. Applications that are submitted without *all* signatures fulfilled will not be considered for review & will be returned. Once completed, the application & fee must be overnighted utilizing any carrier ***other than*** United States Postal Service to:
NJ ABC
Attn: Permit Unit
140 East Front Street
Trenton NJ 08608
Attn: Permit Unit



NOV
13

Donald & Beverley Jones Memorial Hike

Public · Event · by New Jersey Conservation Foundation

Interested | Going | Share | More

Sunday, November 13, 2022 at 11:30 AM – 4:30 PM

33 Risler Street, Stockton, NJ

Tickets
www.njconservation.org/event/donald-beverley-jones-memorial-hike-2

About | Discussion

Details

Partake in autumn's splendor with friends and family as we celebrate the work and life of our friends Donald & Beverley Jones. This year's hike will mark the 28th anniversary of this wonderful event.

Choose from one of these beautiful hikes:

11:30am - We will meet at the Prallsville Mills and carpool to the Rosemont Valley starting location at 11:30. This hike will showcase the preserved farm fields and beautiful views of the valley. Rough field walking, 3.5 miles.

1:30pm - This family-friendly hike is appropriate for all ages and will showcase the Wickecheoke Creek and the preserved lands along the Wickecheoke Greenway. Road walking, 1.5 miles

All hikes depart from the Prallsville Mills with refreshments provided by ShopRite of Hunterdon County. The hikes will return at 2:30pm for delicious Local Harvest pizza and hyper-local OddBird Brewing beer (for ages 21+). We'll also have live music from Jericho Grass!

Sign up for this FREE event at https://www.njconservation.org/event/donald-beverley-jones-memorial-hike-2/ - or you may opt to become a member at a discounted rate just for attending!

Thank You
NJ ABC Permit Unit

NJ Dept. of Law and Public Safety
Division of Alcoholic Beverage Control
140 E Front St. | PO Box 087 | Trenton, NJ 08625-0087
Office: (609)984-2830
NJ ABC Website: Click Here

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-000212-22T1

IN RE 2019 SPECIAL RULING AUTHORIZING CERTAIN ACTIVITIES BY HOLDERS OF LIMITED BREWERY LICENSES AND 2022 LIMITED BREWERY SPECIAL CONDITIONS	CIVIL ACTION On Appeal from State Agency Action by Division of Alcoholic Beverage Control

BRIEF ON BEHALF OF RESPONDENT NEW JERSEY DIVISION OF ALCOHOLIC BEVERAGE CONTROL

Date Submitted: March 31, 2023

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On the Brief

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PRELIMINARY STATEMENT

The 2019 Special Ruling Authorizing Certain Activities by Holders of Limited Brewery Licenses (Special Ruling) at issue here serves to guide limited breweries, like Appellant Death of the Fox Brewing (DOTF), on how to act consistent with certain statutory privileges they enjoy under the current version of the Alcoholic Beverage Control Act, N.J.S.A. 33:1-1 to -103 (Act). Through this Ruling, the New Jersey Division of Alcoholic Beverage Control (ABC) explains how these breweries can enjoy the privileges without running afoul of the current Act's express terms and Legislature's plainly expressed purpose: to encourage economic competitiveness within the industry while also preventing the recurrence of historic societal alcohol abuses. Because the Ruling merely clarifies the parameters of how limited breweries can walk the line between manufacturing and selling their product—something unique to this specific type of license-holder—it does not amount to rulemaking and it thus need not have been promulgated in accordance with the Administrative Procedure Act. Nor do its advertising provisions violate Appellant's First Amendment rights. The 2019 Special Ruling is permissible agency guidance and should be upheld.

Prior to 2012, these limited breweries (colloquially known as "microbreweries") received a Class A manufacturers' license, which prohibited them from engaging in any degree of retail activities. But in 2012, the

Legislature amended the Act to provide a small exception to the tier separations (manufacturers, distributers, and retailers) by allowing microbreweries to engage in highly restricted retail activities to create demand for their products. In an effort to assist the breweries in understanding how these new retail activities could be undertaken consistent with the underlying statute and amendment, ABC issued the Special Ruling. The Ruling explained, for example, how the breweries could adhere to statutory requirements like offering tours of their facilities, holding a limited number of events, and ensuring that food is not offered on site. Without the Ruling, breweries were faced with—and would continue to be faced with—uncertainty in a tightly regulated industry as to how they could safely take advantage of these authorized activities. And although DOTF claims it is aggrieved by the Special Ruling, it is really challenging the Legislature's requirements in the Act itself—which have long distinguished between manufacturers and retailers of alcoholic beverages and have placed substantially different limitations on each.

And because the Special Ruling advises the limited breweries as to their conduct regarding the events they hold, not their speech, it also passes constitutional muster. Adhering to the governing constitutional framework, the Special Ruling's guidance on the advertising of events furthers the substantial governmental interest in maintaining a competitive market while also regulating

an area affecting issues of public health and safety. And a reasonable fit exists between the advertising provision of the Special Ruling and the State's interest.

Accordingly, the Special Ruling should be upheld.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

The Act's express and longstanding statutory terms charge ABC with uniquely broad authority to supervise the alcoholic beverage industry to ensure public health, safety, and welfare, foster moderation, protect consumer interests, maintain trade stability, and encourage industry competition. N.J.S.A. 33:1-3.1(b). Following the Twenty-First Amendment's enactment, which returned to the States the power to establish their own systems to regulate the alcoholic beverage industry, the New Jersey Legislature retained private operation of businesses while surrounding their operation with comprehensive safeguards designed to promote temperance and fair competition. See Grand Union Co. v. Sills, 43 N.J. 390, 399 (1964). After Prohibition, the Act "expressly outlawed the tied house system," wherein alcohol manufacturers acted as distributers and retailers that ultimately promoted "practices unduly designed to increase consumption[.]" Ibid. See also Affiliated Distillers Brands Corp. v. Sills, 56 N.J. 251, 258 (1970) ("tied-houses inevitably result in excessive sales

[1] Because they are closely related, the procedural and factual histories are combined for efficiency and the court's convenience.

stimulation at the retail level, creating a direct conflict with the promotion of temperance."); Heir v. Degnan, 82 N.J. 109, 114 (1980) (alcohol is "subject to intense State regulation" to curb practices that "improperly stimulates sales and thereby impair the State's policy favoring trade stability and the promotion of temperance.").

ABC regulates the manufacture, distribution, and sale of alcohol under a three-tier system that ensures fair competition by separating the privileges of alcohol manufacturers, wholesalers, and retailers from one another. N.J.S.A. 33:1-3, -3.1, -26, -43. Each tier operates under a separate and distinct license: manufacturers have Class A licenses (N.J.S.A. 33:1-10), wholesalers hold Class B licenses (N.J.S.A. 33:1-11), and retailers possess Class C licenses (N.J.S.A. 33:1-12). See Affiliated Distillers, 56 N.J. at 258. The fundamental functioning of this system requires the tiers to be kept separate: "[n]o retail license of any class shall be issued to any holder of a manufacturer's or wholesaler's license, and no manufacturer's or wholesaler's license shall be issued to the holder of a retail license of any class." N.J.S.A. 33:1-26. New Jersey statutes thus reflect a "strong public policy . . . [t]o strictly regulate alcoholic beverages to protect the health, safety[,] and welfare of the people of this State." Zagami, LLC v. Cottrell, 403 N.J. Super. 98, 109 (App. Div. 2008) (quoting N.J.S.A. 33:1-3.1(b)(1)).

A. Limited Brewery Licenses

DOTF is one of approximately 140 limited breweries that manufactures alcoholic beverages under a Class A manufacturing license under N.J.S.A. 33:1-10(1b) (Section 10(1b)). ABC issued DOTF's current limited brewery license with conditions incorporating the 2019 Special Ruling's provisions on July 1, 2022. DOTF bills itself as "New Jersey's first and only craft brewery, coffeehouse and coffee roastery[,]" and its homepage lists prices for each of its sixteen beers by the glass, sixtel, and half keg sold in its tasting room.[2] Its business model focuses upon selling pints of beer on premises, see (Ab7, n7) (calculating lost profits if retailers, rather than a brewery, sells brewery's product by the pint), rather than building its brand to "entice others to distribute its product." Id. at 11.[3] And on July 19, 2019, at DOTF's request due to its asserted business model and expenditures, ABC issued a Special Ruling allowing DOTF to brew and sell coffee on its premises. (Ra1-4). DOTF has not challenged that Special Ruling.

However, DOTF's manufacturing license is separate and distinct from a full retail license, which is issued to, for example, sports bars. N.J.S.A. 33:1-12. Courts strictly construe an alcoholic beverage license because it is

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[2] *Available at* www.deathofthefoxbrewing.com/#streaming-menu.

[3] "Aa" refers to DOTF's corrected appendix, "Ab" refers to its corrected brief, and "Ra" refers to ABC's appendix.

"essentially a permit to pursue there an occupation otherwise illegal." Hickey v. Div. of Alcoholic Beverage Control, 31 N.J. Super. 114, 116 (App. Div. 1954). "The whole machinery of the" Act "is designed to control and keep within limits a traffic which, unless tightly restrained, tends toward abuse and debasement." In re Appeal of Schneider, 12 N.J. Super. 449, 455-56 (App. Div. 1951). Thus, "it is in [the] public interest" that liquor license holders "will abide by the myriad rules and regulations governing their business operations." Zagami, 403 N.J. Super. at 111-12. N.J.S.A. 33:1-32 captures this and authorizes local issuing authorities—and by extension ABC—to "impose any condition or conditions to the issuance of any license," including DOTF's annually renewed license.

A limited brewery licensee has the privilege to brew any malt alcoholic beverages up to a certain quantity; to sell and distribute that product to wholesalers, retailers, and the public; and to maintain a warehouse in the State. N.J.S.A. 33:1-10(1b). This differs from other licenses available. For instance, a plenary brewery licensee—the classic Class A manufacturer—can produce an unlimited amount of product but cannot engage in any retail activities, N.J.S.A. 33:1-10(1a), while a restricted brewery licensee (more commonly known as a brewpub) can brew less product than a limited brewery, but must own a restaurant and hold a plenary retail consumption license. N.J.S.A. 33:1-10(1c).

And to complete the picture, Class C retailers cover a variety of entities, including plenary retail consumption licensees, who can sell any alcohol for on-premises consumption by the glass such as a bar, N.J.S.A. 33:1-12(1), plenary retail distribution licensees who can sell alcohol for off-premises consumption (such as a liquor store), N.J.S.A. 33:1-12(3a), transit vehicles like trains and boats, N.J.S.A. 33:1-12(4), and sporting facility licensees, N.J.S.A. 33;1-12(6). Class A limited brewery licenses are thus not stand-ins for full retail consumption privileges, and licensees are strictly prohibited from operating an establishment with all of the same retail privileges as a Class C licensee. N.J.S.A. 33:1-26; N.J.S.A. 33:1-43.

B. 2012 Act Amendments and 2019 Special Ruling Formation

The Act was amended in 2012 to allow limited breweries a small degree of on-premises consumption—a privilege normally reserved only for retail license holders.[4] Section 10(1b) permits limited breweries to "sell [their products] at retail to consumers on the licensed premises of the brewery for consumption on the premises, but only in connection with a tour of the brewery, or for consumption off the premises in a quantity of not more than 15.5 fluid

[4] Notably, a bill is currently pending in both legislative houses that, if adopted, would likely make this case moot. See S. 3675 (introduced Feb. 28, 2023) (permitting food sales and an unlimited number of on and off-premises events, and eliminating tour requirement).

gallons per person;" and "to offer samples." The statute also prohibits a licensee from selling "food or operat[ing] a restaurant on the licensed premises." N.J.S.A. 33:1-10(1b).

A bill sponsor explained that in enacting the 2012 amendments, the Legislature sought to create an opportunity for "people [to] come, they'll do the tour, they'll try the beer, and if they like it . . . they'll buy a case or a six pack." Revises Privileges of Limited and Restricted Breweries: Hearing on A. 1277 Before the A. Comm. of Law & Pub. Safety, 2012 Leg., 215th Sess. (N.J. 2012) (statement of Sponsor).[5] Moreover, "[p]eople aren't going to go there as a drinking establishment." Id. at 1:23. The Legislature created only a narrow retail exception. Indeed, language proposing a carve out for limited breweries from N.J.S.A. 33:1-43's tied house prohibition (which would have allowed them to operate restaurants) was ultimately deleted in the final bill. Compare A. 1277 (2012) (introduced January 10, 2012) with S. 641 (adopted).

Following the change to allow these manufacturers to have a small degree of on-premises retail consumption, ABC became aware that the "activities and practices of limited breweries" had grown varied, sometimes "exceed[ing] the privileges of the limited brewery license" under the terms of the statute. (Aa5).

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[5] A. Hearing at 1:20, ibid., https://www.njleg.state.nj.us/archived-media/2012/ALP-meeting-list/media-player?committee=ALP&agendaDate=2012-06-07-14:00:00&agendaType=M&av=A.

In keeping with its duty to maintain the three-tier division and trade stability, see Grand Union Co., 43 N.J. at 399 and N.J.S.A. 33:1-3.1 (emphasizing role of tiers in ensuring Legislature's statutory policies regarding reducing consumption and promoting fair competition), ABC began gathering information about the limited brewery industry. Its goal was to help the industry successfully navigate the statutory privileges that the Legislature had granted limited breweries without exceeding those limited privileges or more broadly violating the "tied house" prohibition that the Legislature chose to keep in effect.

For months, ABC discussed these issues with the industry, including how industry could remain compliant with the statutory structure. (Aa5). In 2015, ABC received a list of best practices identified by the Garden State Craft Brewers Guild, a group of New Jersey microbreweries, to ensure limited breweries' compliance with the Act. (Ra5-7). These industry-conceived provisions included prohibiting on-premises food vendors, limiting live sporting events, and allowing de minimis snacks as the Guild recognized a "brewery tasting room is not a bar and should avoid 'bar like' activities[.]" (Ra5, Ra7). ABC subsequently sought additional information and attended several meetings with industry members while drafting the Special Ruling, (Ra8-21), including a meeting with DOTF. (Ra18).

On September 21, 2018, pursuant to N.J.S.A. 33:1-39 ABC issued the "Special Ruling Authorizing Certain Activities By Holders of Limited Brewery Licenses," (2018 Special Ruling) to help guide limited breweries regarding compliance with the 2012 amendments and the rest of the Act.[6] (Aa61-76). The industry then provided more feedback and ABC suspended that Special Ruling on October 2, 2018, for further evaluation. (Aa77-81).

ABC then conducted additional outreach by meeting with microbrewery industry representatives, including the Brewers Guild of New Jersey and the New Jersey Brewers Association, as well as the New Jersey Licensed Beverage Association, the New Jersey Restaurant Association, and the New Jersey Liquor Store Alliance. (Aa6; Ra23-29). ABC also visited many limited breweries to discuss the 2018 Special Ruling. (Aa6; Ra23-26). Industry members continued to provide comments, such as a comment from the New Jersey Licensed Beverage Association supporting the 2018 Special Ruling as a way of maintaining fair competition within the industry. (Ra22).

Then, on May 28, 2019, ABC released the 2019 Special Ruling at issue here that superseded the prior 2018 Special Ruling. ABC continued its industry outreach, answering questions about the Special Ruling and meeting with

[6] N.J.S.A. 33:1-39 authorizes ABC to issue "such special rulings and findings as may be necessary" to oversee "the manufacture, sale and distribution of alcoholic beverages[.]"

businesses. (Ra30-43). The Brewers Guild of New Jersey provided ABC with more comments, including proposed changes and suggestions. (Ra44-53).

C. The 2019 Special Ruling's Provisions

Like the 2018 Special ruling, the May 28, 2019, Special Ruling provides guidance to limited brewery licensees. Its provisions were placed into all limited brewery licenses in 2022, including DOTF's 2022 license, to effectuate the privileges provided under Section 10(1b) and serve as a reminder to the industry about statutory requirements, after the COVID-19 pandemic disrupted normal industry operations. (Aa31-33). The Special Ruling's goal is to "balance" the privileges of the limited brewery sector and to establish uniform guidelines "applicable to all limited brewery licenses" so the limited brewery licensees can "compete with each other on a level playing field." (Aa8). ABC explained that Section 10(1b)'s purpose is to promote craft beer manufacturing by "creating a demand for these products through limited consumption privileges on the brewery premises." Id. at 6. But ABC noted that some limited breweries "desire to focus more on promoting on-premises consumption in tasting rooms, rather than on creating products intended for widespread wholesaling." Id. at 7 n.2. Given the Act's divide between manufacturing and retail privileges, guidance was necessary to ensure continued compliance with the statutory scheme.

To help stabilize the microbrewery industry and ensure compliance with current state statutes, among other goals, the Special Ruling explains the current statutory and regulatory limits governing the limited breweries' privileges, giving particular attention to the minimal retail exceptions provided with these particular manufacturing license privileges.

The Special Ruling contains several provisions related to the operation of limited breweries consistent with their statutory privileges as a manufacturer with limited retail privileges. It confirms that a licensed limited brewery may sell its product produced on the licensed premises for consumption on premises, or offer samples of these products, but only in connection with a tour of the brewery. (Aa20). The Special Ruling also clarifies and explains the term "tour" in N.J.S.A. 33:1-10(1b) and confirms that the statutory tour requirement applies for any event held on the premises. (Aa16, Aa20). It also provides that servers and pourers must receive nationally recognized server training on the prevention of over-service to patrons and over-consumption by patrons. (Aa17).

The Special Ruling further explains that limited breweries are statutorily prohibited from selling or offering any food on the licensed premises, except for certain "de minimis" types of food such as packaged pretzels. Id. at 24. Likewise, the Special Ruling clarifies other specific restrictions related to food, such as on-premises food truck limitations, as that, ABC explained, was akin to

selling food on the licensed premises and would usurp the Legislature's policy judgment. See e.g., id. at 23-25. The Special Ruling also explained that brewing and sale of coffee on the limited brewery premises could not proceed due to the Act's food restriction.

While Section 10(1b) does not provide a privilege to hold events on or off limited brewery premises, the Special Ruling explains that a limited number of events may be held without over-stepping the statutory license privileges, including the express statutory prohibition against limited breweries operating any restaurants. On-premises Special Events are defined as a "one-day event that is open to the public and is promoted or advertised."[7] Id. at 18. A brewery can hold up to twenty-five Special Events per calendar year, and the licensee must report each event to ABC at least ten days prior to the event, inform local law enforcement, and maintain event-related records. The licensee is also prevented from discounting its products based on cover charges paid or other incentives. Id. at 19. Further, certain events are defined as de-facto Special Events, whether advertised or not, such as showing any live-televised championship sporting event and live music. Id. at 18.

[7] Examples given include "Trivia/quizzo/game night; open microphone; games of skill" and similar events. (Aa15).

The 2019 Special Ruling explains licensees' privileges for private parties, social affairs, and off-premises events. Licensees may hold fifty-two private parties per calendar year in an "area clearly separated from the tasting room." Id. at 19. For social affairs events, a brewery can hold up to twenty-five per calendar year, subject to similar restrictions as private parties. Id. at 21-23. Off-premises events may be held up to twelve times per year, but ABC must approve them in advance, and they have reporting requirements, food limitations, and other requirements. Id. at 8, 25-26.

Because the Special Ruling was aimed at promoting greater compliance with already-extant statutory provisions, including the longstanding licensing structure and the new tour requirements and food limitations, the Special Ruling affirmed that all existing statutory and regulatory requirements were immediately enforceable. Id. at 12. As to the remaining Schedule A provisions, ABC explained that they "should be viewed as guidance, and absent flagrant or repeated violations, will not be strictly enforced." Ibid. To date, ABC has not enforced or sought to enforce any Special Ruling provisions that was not already present in the Act or in the agency's own separate regulations.

As ABC explained, the Schedule A provisions that are not already explicitly present in the Act or its regulations were the agency's "reasonable interpretation of permissible and impermissible activities" for licensees, and

ABC indicated it will propose these "guidelines" as regulations in the near future to be "fully enforceable against all limited brewery licensees." Ibid. ABC advised limited breweries to view the Schedule A items as notice of what future regulations will likely require. Id. at 13. As part of this notice, the Special Ruling explains that these restrictions will be placed in licenses as "special conditions" until regulations are adopted, which "shall be fully enforceable." Ibid. The COVID-19 pandemic arose less than a year later and gave rise to unprecedented circumstances impacting all society, including the alcohol industry. Thus, ABC incorporated the Special Ruling's provisions as conditions in the 2022-2023 limited brewery licenses in June, 2022. (Aa29-30).

On October 6, 2022, over three years after the Special Ruling was issued and over three months after DOTF received its 2022-2023 limited brewery license which included the special conditions from the Special Ruling, DOTF filed its amended Notice of Appeal beginning this case. (Aa1-4).

ARGUMENT

POINT I

THE SPECIAL RULING IS PERMISSIBLE AGENCY GUIDANCE AND DOES NOT SATISFY THE METROMEDIA TEST FOR AGENCY RULEMAKING (Responds to DOTF's Point I).

The Special Ruling is an agency guidance document based on significant engagement with numerous microbreweries and designed to inform the limited

brewery industry of the existing statutory and regulatory framework that governs it. ABC has not used the Special Ruling as an independent basis for any enforcement. Furthermore, the Special Ruling does not meet the Metromedia test for agency rulemaking as it is obviously inferable from the statutory scheme and does not express any new agency policies beyond the statute.

A. The Special Ruling is Agency Guidance

Agencies are accorded "wide latitude in improvising appropriate procedures to effectuate their regulatory jurisdiction." Metromedia, Inc. v. Dir., Div. of Tax'n, 97 N.J. 313, 333 (1984). "Administrative agencies possess the ability to be flexible and responsive to changing conditions." In re Pub. Serv. Elec. & Gas Co.'s Rate Unbundling, 167 N.J. 377, 385 (2001) (citation omitted). "This flexibility includes the ability to select those procedures most appropriate to enable the agency to implement legislative policy." Ibid. Thus, "[a]n agency has discretion to choose between rulemaking, adjudication, or an informal disposition in discharging its statutory duty . . . ." Nw. Covenant Med. Ctr. v. Fishman, 167 N.J. 123, 137 (2001).

Deference to an administrative agency is especially appropriate when new legislation is being put into practice or when the agency has been delegated discretion to determine the specialized procedures for its tasks. Ibid. See also Div. of Alcoholic Beverage Control v. Maynards, Inc., 192 N.J. 158, 177 (2007).

This is true for the alcoholic beverage industry: "[t]he right, most extensive in nature, to regulate the field of intoxicating liquors is within the police power of the State, and this power is practically limitless." Blanck v. Mayor & Borough Council of Magnolia, 38 N.J. 484, 490 (1962). "[O]ur courts have held that, in interpreting statutes in this field, meticulous technicalities should not be permitted to thwart the Legislature's effort to keep a public convenience from becoming a social evil and therefore state authorities should be given every opportunity to work out the mandate of the Legislature." Id. at 491.

In 2011, the Legislature expressly recognized agencies' discretion in determining the most effective and appropriate implementation of a legislative action when it codified and explained the use of regulatory guidance documents. N.J.S.A. 52:14B-3a. This 2011 addition to the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -32 (APA), recognizes the long-standing tenet that "administrative agencies may act informally," which can include supervising a regulated industry. In re Request for Solid Waste Util. Customer Lists, 106 N.J. 508, 518-19 (1987). Numerous informal agency documents have been upheld as "guidance" that did not need to go through formal rulemaking processes. See, e.g. Coal. for Quality Health Care v. N.J. Dep't of Banking & Ins., 348 N.J. Super. 272, 300 (App. Div. 2002) (finding an agency-created sample policy constituted guidance); B.C. ex rel. C.C. v. Cumberland Reg'l Sch. Dist., 220

N.J. Super. 214, 234 (App. Div. 1987) (athletic association's document describing responses to various factual scenarios constituted guidance); In re 2019-2020 Emergency Aid Submitted by the Bd. of Educ. of the N. Warren Reg'l Sch. Dist., 2022 N.J. Super. Unpub. LEXIS 627 (App. Div. Apr. 18, 2022) (slip. op. at 16-17) (agency memo explaining application process constituted guidance).[8] (Ra69-70).

As this court explained recently, "[s]ince the statutory definition of a regulatory guidance document conflicts to an extent with the Metromedia test, regulatory guidance documents are less likely to constitute impermissible de facto rulemaking." N. Warren Reg'l Sch. Dist., 2022 N.J. Super. Unpub. LEXIS 627 (slip. op. at 15). (Ra68). Conversely, however, agency documents characterized as guidance can be de facto rulemaking if they establish standards not articulated in the enabling legislation. In re N.J.A.C. 7:1B-1.1, et seq., 431 N.J. Super. 100, 137 (App. Div. 2013) (agency information "prescrib[ing] procedures, agency policies, and directives concerning application submissions and evaluations" deemed a rulemaking), In re Highlands Master Plan, 421 N.J. Super. 614, 629 (App. Div. 2011) (agency resolution waiving prior rules and creating "procedures and standards" for substantive certification affordable

[8] A copy of this opinion is included in Respondent's Appendix pursuant to R. 1:36-3. No contrary unpublished opinions are known to counsel.

housing petitions), In re Adoption of Reg'l Affordable Housing Dev. Program Guidelines, 418 N.J. Super. 387, 395 (App. Div. 2011) (agency resolution setting "specific standards and conditions for regional planning" that COAH will approve is rulemaking).

When agencies issue guidance documents to merely explain or clarify a state or federal law, they need not undertake formal rulemaking. N.J.S.A. 52:14B-2(e), -3a. Guidance documents are permissible if they do not "(1) impose any new or additional requirements that are not included in the State or federal law or rule that the regulatory guidance document is intended to clarify or explain;" or are not (2) "used by the State agency as a substitute for the State or federal law or rule for enforcement purposes." N.J.S.A. 52:14B-3a(c).

Here, the Special Ruling is guidance and satisfies N.J.S.A. 52:14B-3a because it neither seeks to impose on the alcoholic beverage industry any new or additional requirements other than those already in existing statutes and regulations, nor acts as a substitute rule for enforcement purposes. The Special Ruling instead guides the burgeoning limited brewery sector so that it may implement the small degree of on-premises consumption permitted by Section 10(1b), without exceeding the other statutory privileges and restrictions laid out by the current statute's terms and structure and thereby intruding on the statutory rights of industry participants with full retail privileges. (See Aa5). Indeed, the

limited brewery industry itself sought guidance after the 2012 Act amendments to avoid unintentional statutory violations and enforcement. (Ra8-10).

To understand how the Special Ruling guides limited breweries through their licensed privileges, it is vital to reiterate the Act's regulatory scheme and where limited breweries fit in as manufacturers. Through the Act, the Legislature placed a unique mandate upon ABC to supervise the alcoholic beverage industry, N.J.S.A. 33:1-3, and "maintain a three-tier (manufacturer, wholesaler, retailer) distribution system[,]" N.J.S.A. 33:1-3.1(b)(8), as well as maintain competition and trade stability in the industry. N.J.S.A. 33:1-3.1(b)(6), (7). This system upholds the "policy favoring trade stability and the promotion of temperance." Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 11 (2009) (quoting Grand Union Co., 43 N.J. at 404).

As explained above, limited breweries receive a Class A manufacturing license under Section 10(1b) for the privilege to brew their own malt alcoholic beverages in certain limited quantities. They can sell their manufactured product on-premises, provided they give patrons tours and do not sell food or operate a restaurant. Ibid. This manufacturing license costs between $1,250 to $7,500 depending on how much product the limited brewery intends to produce. Class A manufacturing licenses are distinct from Class C retail licenses under N.J.S.A. 33:1-12, which are given to bars, sporting facilities, clubs, liquor

stores, and restaurants. See N.J.S.A. 33:1-26. To preserve the three-tier structure, manufacturing licensees generally cannot hold a retailer license. N.J.S.A. 33:1-26 ("No retail license of any class shall be issued to any holder of a manufacturer's or wholesaler's license"). In passing Section 10(1b) in 2012, the Legislature relaxed the three-tier model to a limited degree by permitting limited breweries to offer a small amount of on-premises consumption (a privilege generally reserved for retail license holders). But the 2012 amendments were the narrow exception to the general rule that manufacturers cannot act as retailers. DOTF thus overreads these exceptions in arguing Section 10(1b) imposes "only two limitations" upon on-site consumption sales and complaining that if it cannot "attract customers to its tap room" then it "will likely be forced to attempt to entice others to distribute its products[.]" (Ab4, 11.) In short, the point of DOTF's manufacturer's license is to manufacture the product and create demand for it for further sale at retail establishments.

Against this backdrop, the Special Ruling explains how limited breweries may implement the 2012 amendment, (Aa6-7), without running afoul of the Act and the myriad restrictions the Legislature left in place at that time. N.J.S.A. 33:1-10(1b). It not only clarifies the three-tier industry division boundaries, but also informs the industry of ABC's expectations under current law, with a view towards future rulemaking. (Aa12-13). Indeed, the Special Ruling expressly

notes that Schedule A's provisions "should be viewed as guidance" that "represent the Division's reasonable interpretation" of the activities the limited breweries could undertake. Ibid.

The Schedule A provisions meet the APA guidance definition as they describe existing statutory and regulatory provisions that already govern limited breweries. N.J.S.A. 52:14B-3a(c)(1). For example, the Special Ruling explains that a limited brewery may sell its product for "consumption on the licensed premises of the brewery, but only in connection with a tour[.]" (Aa16) (emphasis in original). This is explicitly required by Section 10(1b), which says that the licensee may sell its product for on-premises consumption "but only in connection with a tour of the brewery" and the Special Ruling simply explains to the industry what a "tour" is and how its logistics can work in practice.

In a similar vein, the Special Ruling provides guidance regarding how to comply with the Act's plain food sales restrictions. The Special Ruling explains that a limited brewery "shall not sell food . . . or operate a restaurant" on-premises other than for specific and limited exceptions. (Aa23-24). This is explicitly required by Section 10(1b), which says that "[t]he holder of this license shall not sell food or operate a restaurant on the licensed premises," and the Special Ruling clarifies that limited breweries can still provide restaurant menus, sell their own soda, and provide de minimis snacks.

So too for events. The Special Ruling provides that limited breweries, like all other licensees, cannot be the designated host premise for more than twenty-five social affair permittees per year. (Aa10). N.J.A.C. 13:2-5.1(d) explicitly requires this: no "permit [shall] be granted for premises at which 25 prior social affair permits have been issued within the same calendar year."

And the Special Ruling's explanations as to how limited breweries may hold or attend events that are not held on their business premises are also firmly grounded in the Act. Limited breweries may obtain up to twelve "Limited Brewery Off-Premises Event" permits per year. (Aa11). N.J.S.A. 33:1-74(a) permits ABC to issue "temporary permits," such as these, "authorizing the sale of alcoholic beverages for consumption on a designated premises" where the Act is otherwise silent but "it would be appropriate and consonant with the spirit of this chapter to issue a license," ibid., such as an off-premises event. The Special Ruling gives examples of possible permissible off-premises events, including "civic or community events . . . athletic events, anniversary events or holiday celebrations[.]" (Aa11). These permits allow sale and sampling of malt alcoholic beverages off the licensed premises—consistent with Section 74—but do not allow food service, consistent with Section 10(1b). (Aa27-28).[9] And

[9] The off-premises permit fee is $200, which is within the range of fees Section 74 allows, and matches the agency's existing regulations. N.J.A.C. 13:2-5.5.

twelve permits per year incorporates N.J.A.C. 13:2-5.1's analogous limit for civic organizations. The Special Ruling also reminds the industry that these temporary permits require a permit from ABC and local law enforcement endorsement. See N.J.A.C. 13:2-5.1, -5.5 (containing the same requirements). In these varied respects, which DOTF challenges on appeal, the Special Ruling simply explains how limited breweries can readily navigate pre-existing statutory and regulatory provisions.

The Special Ruling contains provisions covering on-premises, social affair events, and private events. DOTF complains specifically that two provisions violated the APA, namely: (1) holding twenty-five on-premises Special Events, defined as a "one-day event that is open to the public and is promoted or advertised" (Aa18), and (2) holding fifty-two private parties per year. As explained above, Special Events include any live music performance or DJ, and any live-televised championship sporting event regardless of whether they are advertised or not, and require advance notice to ABC. Id. at 18-19.

These provisions do not violate the APA because they are permissible guidance. N.J.S.A. 52:14b-3a. First, they are firmly anchored in the sharp distinctions the Legislature has drawn and retained between manufacturers and retailers in the alcoholic beverage industry, even in the limited 2012 amendments' exceptions, as set forth above. The Special Ruling simply gives

effect to the statutory mandate that limited breweries cannot operate restaurants or full-scale retail facilities like bars (N.J.S.A. 33:1-10(1b) and -26) by placing a limit on the number of live-televised championship sporting events, live music and DJ performances, and other similar events typically seen at restaurants and bars. As the industry itself recognized early on, "a brewery tasting room is not a bar[.]" (Ra7). To illustrate, a typical Class A liquor manufacturer would not host live music for the public—advertised or not—as that is a classic event intended to draw customers into a retail facility to remain, which makes little sense for the typical Class A manufacturer that cannot sell liquor on-premises like a Class C retailer. See N.J.S.A. 33:1-26 (manufacturers cannot hold retailer licenses); Grand Union Co., 43 N.J. at 398-99 (retail license restrictions tied to three tier system and historic "abuses in the liquor industry"). A Class A manufacturer cannot claim all the rights and privileges of a Class C retailer, yet reject the financial obligation and regulatory requirements of same without upending the Legislature's policy lines set in the Act.

Second, and independently, these final on-premises event provisions continue to be guidance because ABC has not enforced them. Critically, in keeping with the confines of N.J.S.A. 52:14B-3a(c)(2), the Special Ruling was never meant to constitute anything more than permissible agency guidance and ABC has never relied on it in any agency enforcement action. (Aa12). That

ABC listed the guidance parameters as special conditions in limited breweries' 2022-2023 licenses does not change the guidance's nature, as ABC has never enforced the conditions. The Special Ruling was introduced in May 2019, only a few months before most breweries' licenses would be renewed. However, less than a year later, the COVID-19 pandemic gave rise to unprecedented circumstances, including Executive Orders imposing additional restrictions on breweries. Consequently, ABC added these guidelines to limited breweries' 2022-2023 licenses as additional notice regarding the Act and how limited breweries could comply with it.

The Special Ruling is a guidance document, as ABC neither created any new standards beyond what industry must follow under the statutes and regulations and their structure, nor has the agency used it as a substitute for enforcement of the Act or its regulations. N.J.S.A. 52:14B-3a. Guidance aids the industry in complying with the law, and did not require APA rulemaking.

B. The Special Ruling Also Passes Muster Under Metromedia

While the Special Ruling meets the definition of a guidance document and should be upheld, DOTF asserts that it nonetheless constitutes agency rulemaking under Metromedia. It does not. Distinct from agency guidance, an administrative rule goes beyond clarification and affirmatively regulates some portion of the general public. A rule is an "agency statement of general

applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency." N.J.S.A. 52:14B-2(e). Agency action constitutes rulemaking when it:

> (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group;
>
> (2) is intended to be applied generally and uniformly to all similarly situated persons;
>
> (3) is designed to operate only in future cases, that is, prospectively;
>
> (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization;
>
> (5) reflects an administrative policy that
>
> (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or
>
> (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and
>
> (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.
>
> [Metromedia, 97 N.J. at 331-32.]

In considering whether agency action constitutes rulemaking, each factor need not be present, but rather can "either singly or in combination" determine

"whether the essential agency action must be rendered through rule-making or adjudication." Id. at 332. However, factors four and five are afforded the most weight in the analysis. See Coal. for Quality Health Care, 348 N.J. Super. at 297. These criteria apply equally "whenever the authority of an agency to act without conforming to the formal rulemaking requirements is questioned." In re N.J.A.C. 7:1B-1.1, et. seq., 431 N.J. Super. at 135 (quoting Doe v. Poritz, 142 N.J. 1, 97 (1995)).

Given its advisory purpose, the Special Ruling meets the first three Metromedia factors. It prospectively and uniformly guides the limited brewery industry and explains the existing statutory and regulatory privileges and restraints governing the industry. Meeting these three factors, however, does not make the Special Ruling a rule. See Doe, 142 N.J. at 98 (agency action satisfied the first three Metromedia factors, "however, the remaining factors point strongly in the other direction and, in this case, deserve the most weight."). The Special Ruling does not impose any new requirements not already present or obviously inferable from the Act and its regulations, and thus does not meet Metromedia factors four and five. Additionally, as to Metromedia factor six, many Special Ruling provisions do not interpret law or policy, but merely restate existing statutory and regulatory constraints that already exist.

1. The Special Ruling does not meet Metromedia factor four

To meet the fourth Metromedia factor, an agency action must (1) prescribe a legal standard or directive that (2) is not otherwise expressly provided by or clearly and obviously inferable from the enabling statute. Metromedia, 97 N.J. at 332. Here, the Special Ruling does not mandate specific courses of conduct, and is obviously inferable from the Act and its regulations. Thus, the Special Ruling does not meet the fourth Metromedia factor and is not rulemaking.

i. The Special Ruling does not prescribe a legal standard or directive

The Special Ruling's provisions are guidance, have not been enforced, and do not mandate a certain course of conduct. The Special Ruling thus does not meet the fourth Metromedia factor and is not rulemaking. See Coal. for Quality Health Care, 348 N.J. Super. at 298 (non-binding sample insurance policy was not rulemaking because it did not prescribe a legal standard or directive, or set minimum acceptable standards); Cumberland Reg'l Sch. Dist., 220 N.J. Super. at 234 (guidelines in the form of questions and answers to illustrate suggestive solutions to hypothetical factual situations constituted informal action, not rule-making). While limited breweries are bound by the Act and its regulations, the Special Ruling does not mandate or restrict any specific action separate from what is already statutorily and regulatorily required. For example, the Act requires limited breweries to give a tour before

selling their products for on-premises consumption and prohibits them from selling food or operating a restaurant. N.J.S.A. 33:1-10(1b). Limited breweries must comply with existing temporary permits requirements for events, including off-premises events, and social affair permits, N.J.S.A. 33:1-74; N.J.A.C. 13:2-5.1 to -5.5, and the overarching three tier system. N.J.S.A. 33:1-26.

Though DOTF specifically criticizes the Special Ruling's Special Events and private party elements, these provisions do not meet the first prong of the fourth Metromedia factor because they are merely guidance and have not been independently enforced. Additionally, the Special Ruling does not mandate that limited breweries host or participate in any types of events and does not require any permits for these types of events. Rather, the Special Ruling simply effectuates the statutory mandate that, as manufacturing licenses, limited breweries cannot operate as consumption venues like bars and restaurants (N.J.S.A. 33:1-10(1b) and -26) by placing a limit on the number of live music and DJ performances, and other similar events typically seen at restaurants and bars. See supra at 8. Should a business like DOTF's want to undertake more events to promote the sale and consumption of their products on-premises, other types of licenses are available, such as a restricted brewery license.[10] (Aa7 n.2).

[10] DOTF's complaints about the Special Ruling's alleged impact upon its business ring hollow when one considers that DOTF already has a separate

In keeping with the overarching three tier system and its longstanding purposes, however, Section 10(1b) explicitly restricts the limited brewery license, and both ABC and the industry must abide by those restrictions. See Zagami, LLC, 403 N.J. Super. at 109-10 ("N.J.S.A. 33:1-23 requires the stringent and comprehensive administration of the alcoholic beverage laws[.]"). DOTF can complain to the Legislature, but it cannot justify overturning a guidance document that merely explains how the industry can comply with the sweeping differences between limited brewery and Class C licenses.

ii. The provisions of the Special Ruling are not rulemaking because they are obviously inferable from the Act.

The Special Ruling's provisions are obviously inferable from the enabling statute. Agency directives that are "merely a formalization of the classification requirements explicitly set forth in the statute" do not constitute rulemaking. Doe, 142 N.J. at 97. Those directives are only rulemaking when they "deviate substantially from the explicit or implied standards of the statute[.]" Ibid. (citing A. A. Mastrangelo, Inc. v. Dep't of Env't Prot., 90 N.J. 666 (1982)).

The requirements that limited breweries cannot serve food and must give a tour before any on-premises consumption sales, (Aa6, Aa16), match existing statutory provisions containing the very same standards. Compare ibid. with

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Special Ruling allowing coffee sales on premises, but never sought any other type of relief—Special Rulings or different licenses—from ABC. (Ra1-4).

N.J.S.A. 33:1-10(1b). While the Special Ruling expresses a more relaxed reading of these statutory mandates (the very opposite of what DOTF complains of here) by offering logistic and non-burdensome options to limited breweries, the Special Ruling does not deviate substantially from the statutory tour requirement or restaurant ban. (See Aa16) (a limited brewery need only give repeat customers a tour once a year); (Aa10) (food deliveries from restaurants to a patron are allowed, as are de minimis types of food such as pre-packaged crackers, chips and nuts).

The Special Ruling's provisions guiding events are likewise designed to enumerate the Act and its regulations' already-existing limits. These limitations are obviously inferable from the Act's structure, history, and legislative purpose described above. For instance, the Special Ruling provides that limited breweries may hold up to twenty-five on-premises Special Events and fifty-two private parties per year. (Aa18). These provisions are obviously inferable from the Act because limited breweries can neither operate a restaurant nor hold a full retail license. N.J.S.A. 33:1-10(1b), -26. However, limited breweries are given a small degree of on-premises consumption privileges. Thus, Section 10(1b) provides a limited exception of retail rights to these Class A manufacturers while the Act's general retail limitations apply, and the Special Event and private parties limitations outline how limited breweries may navigate between these

two statutory pillars and ensure coherence of the manufacturing and retail tiers. For the off-premises events, the provision that limited breweries may obtain up to twelve off-premises event permits per year, (Aa11), is obviously inferable from N.J.S.A. 33:1-74(a) (temporary permits), and N.J.A.C. 13:2-5.1 to -5.5 (twelve permits per year). These provisions are closely tailored to the Act and regulations and do not "deviate substantially" from them. Doe, 142 N.J. at 97.

Thus, the Special Ruling does not meet the fourth Metromedia factor.

2. The Special Ruling does not meet Metromedia factor five.

To meet Metromedia factor five, an agency action must reflect an administrative policy that: (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter. Metromedia, 97 N.J. at 332. Here, the Special Ruling explains the existing Act's statutory and regulatory framework so limited breweries can better understand their license and accompanying privileges. The policies set forth in the Special Ruling are based largely on N.J.S.A. 33:1-10(1b), and certain aspects of the Special Ruling explaining the three-tier industry segmentation and industry balancing are long-standing policies. N.J.S.A. 33:1-3.1(b). The Special Ruling thus does not meet Metromedia factor five and is not rulemaking.

Generally, for a directive to declare a new policy, it must not be obviously inferable from statutory or regulatory authority. For example, in In re Request for Solid Waste Utility Customer Lists, 106 N.J. at 512, the Board of Public Utilities (Board) issued an order later challenged as improper agency rulemaking that directed certain solid waste utilities to provide customer lists to the agency. While the Court found that the Board's order met the first three prongs of the Metromedia test and was a general policy intended to cover all solid waste utilities, the order was not rulemaking because it was clearly inferable from the enabling statute and did not change existing agency policy or regulations. Id. at 518 (the directive "neither changes nor interprets Board policy concerning solid waste utilities.").

Here, and as already explained in more detail above, several Special Ruling provisions closely track existing regulations. For example, per the Special Ruling, a limited brewery may host up to twenty-five social affair events on its licensed premises per year. (Aa10). This is closely related to N.J.A.C. 13:2-5.1, which limits the number of social affairs events that any premise can host per year. See also N.J.S.A. 33:1-74 (discussed above). The requirements that limited breweries cannot serve food and must give a tour of the brewery before any on-premises consumption sales, (Aa9, Aa16), are consistent with the existing statutory tour and food standards. See N.J.S.A. 33:1-10(1b).

The on-premises Special Event restrictions are similarly not new expressions of agency policy. The alcoholic beverage industry's three-tier separation is a long-standing State policy. See N.J.S.A. 33:1-3, -3.1, -26. By limiting the number of events that a limited brewery may hold, the Special Ruling gives effect to Section 10(1b), permitting a limited degree of on-premises consumption, while acting consistent with the Legislature's separation between the manufacturing and retail tiers.

Accordingly, the Special Ruling does not meet Metromedia factor five.

3. As a whole, the Special Ruling is a guidance document and thus does not meet Metromedia factor six.

To meet Metromedia factor six, the agency action must reflect "a decision on administrative regulatory policy in the nature of the interpretation of law or general policy." Metromedia, 97 N.J. at 332. Agency action that does not change or interpret its policies is not rulemaking. See In re Request for Solid Waste Util. Customer Lists, 106 N.J. at 518 (the Board's order was not rulemaking because it "neither changes nor interprets Board policy concerning solid waste utilities."). Here, as a guidance document, the Special Ruling's purpose is to effectuate the policies underlying the existing legislative and regulatory requirements governing limited breweries.

The expressions of agency policy are consistent with the well-established policy of maintaining the three-tier industry division the Act requires to assure

both "trade stability and the promotion of temperance." Heir v. Degnan, 82 N.J. 109, 114 (1980). N.J.S.A. 33:1-10(1b) furthers this policy by prohibiting limited breweries from selling food on-premises like restricted breweries and requiring a tour prior to on-premises consumption. See, supra 8. Limited breweries remain bound by the statute and the regulations concerning temporary permits for events, including off-premises events, and social affairs permits, N.J.S.A. 33:1-74; N.J.A.C. 13:2-5.1 to -5.5, and must avoid disrupting the three-tier system. Read as a whole, the Special Ruling simply incorporates all of these requirements into one guidance document and does not meet the sixth factor.

The Special Ruling is not rulemaking because its provisions are obviously inferable from the Act and its implementing regulations, and its policies are firmly rooted in Section 10(1b)'s express language and the three-tier industry division mandated by the Act. While the Special Ruling may meet the first three Metromedia factors, like other permissible agency guidance documents naturally would, the Special Ruling as a whole does not meet the other Metromedia factors and complies with the APA.

Finally, even if the court were to find that specific provisions or portions of the Special Ruling meet enough Metromedia factors to constitute rulemaking, it need not vacate the entire Special Ruling. N.J. Dep't of Envtl. Prot. v. Radiation Data, Inc., 2018 N.J. Super. Unpub. LEXIS 2445, at *42-43 (Super.

Ct. App. Div. Nov. 2, 2018) (noting that "legal determinations that DEP deviated from the APA and Metromedia . . . does not mean that all of the [agency's actions] must be vacated [as] [s]ome of the violations are unaffected" by the Metromedia issue.).[11] (Ra44). Rather, the court may address the provisions separately and vacate only those that it determines constitute rulemaking.

POINT II

THE SPECIAL RULING DOES NOT VIOLATE THE NEW JERSEY OR U.S. CONSTITUTIONS (Responds to DOTF's Point II).

The Special Ruling advises the regulated community about industry conduct, and to the extent it addresses speech, it readily passes constitutional muster. First Amendment protections address speech, not conduct, focusing on restrictions on an existing speech right. Relevant here, the Special Ruling explains limited breweries may hold twenty-five Special Events, which need not be advertised to count toward the limit. This addresses commercial sellers' conduct and to the extent it mentions speech, it provides a venue to engage in commercial speech where none previously existed. Thus, DOTF's free speech claim fails to meet the requirements for establishing a First Amendment claim.

[11] A copy of this opinion is included in Respondent's Appendix pursuant to R. 1:36-3. No contrary unpublished opinions are known to counsel.

Under the U.S. Constitution the government "shall make no law . . . abridging the freedom of speech[.]" U.S. Const., amend. I. The New Jersey Constitution similarly states, "[e]very person may freely speak, write[,] and publish [their] sentiments on all subjects," and bars any law from being "passed to restrain or abridge the liberty of speech or of the press." N.J. Const., art. I, § 6. New Jersey analyzes free speech cases according to federal case law as the two are substantially similar. Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 264 (1998).

While both Constitutions protect speech and expressive conduct, non-expressive conduct is not protected. See generally Spence v. Wash., 418 U.S. 405, 410-11 (1974) (discussing when conduct is expressive enough to have First Amendment protections). Non-expressive conduct, like commercial activities, is an area traditionally left to government control. Expressions Hair Design v. Schneiderman, 581 U.S. 37, 47 (2017).

Commercial speech is only protected if it (1) concerns underlying conduct that is lawful and (2) is itself not misleading or fraudulent. Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980). If the speech meets both prongs, the government must prove (1) it has a substantial government interest in restricting the speech; (2) the restriction directly and materially advances the interest asserted; and (3) the restriction is narrowly drawn so there

is a reasonable "fit between the legislature's ends and the means chosen to accomplish those ends." Bd. of Tr. v. Fox, 492 U.S. 469, 480-81 (1989); Cent. Hudson, 447 U.S. at 566. As the final two prongs require substantially the same analysis, they are often combined into a single "reasonable fit" or "proportionality" prong. See Fox, 492 U.S. at 480; Rubin v. Coors Brewing Co., 514 U.S. 476, 486 (1995).

Here, ABC provided guidance on non-expressive conduct by limited breweries within the three-tier alcoholic beverage industry. DOTF's argument that the Special Ruling restricts limited breweries' existing right to advertise Special Events and is contrary to the 2012 Act amendments (Ab24-25) misunderstands the Act, the Special Ruling's purpose, the legislative intent, and the limited brewery licensee's position as a manufacturer.

A. The Special Ruling Addresses the Conduct, Rather than the Speech, of Manufacturers in the Alcoholic Beverage Industry.

The Special Ruling addresses the limited breweries' conduct and thus is not First Amendment protected commercial speech. To the extent ABC's oversight touches on otherwise protected commercial speech, it is incidental to addressing manufacturers' non-expressive conduct. The Special Ruling provides guidance to limited breweries on what conduct and speech follows the legislative intent behind the amended Act to ensure their compliance within a highly regulated industry.

The Act established ABC and its authority to regulate the alcoholic beverage industry, N.J.S.A. 33:1-3, which includes overseeing the industry's conduct. N.J.S.A. 33:1-39. A holistic review of the Special Ruling shows it continues ABC's role of overseeing conduct. See generally McCann v. Clerk of Jersey City, 167 N.J. 311, 320 (2001) (rules should be read as a whole, with the purpose of effectuating the objectives sought to be achieved by the Legislature). Relevant here, the Special Ruling addresses how limited breweries host Special Events, including, among other things live music, game or trivia nights, and animal adoption events. (Aa15).

The Special Ruling's focus on conduct rather than speech is evidenced in two provisions. First, limited breweries may undertake unlimited event promotions for new product releases, thereby engaging in unlimited commercial speech. Ibid. Second and more relevant here, the Special Ruling focuses not on twenty-five advertisements, but twenty-five Special Events, which need not be advertised to count toward the limit. (See Aa18) (limiting live-televised championship sports events and live music or DJ performances regardless of advertising). (Cf. Aa24). Thus, if a limited brewery decided to host, but not advertise any of the Special Events as defined in the Special Ruling—as, for instance, if the limited brewery hosted twenty-five championship sporting events—the limit would still apply. Likewise, if the limited brewery held a 26th

Special Event, such as a championship sporting event, they would exceed the Special Event limit. Thus, the Special Ruling addresses the conduct of hosting the Special Event, rather than the incidental issue of whether that event happens to be advertised.

The "Special Event" definition combined with the Special Ruling's purpose of overseeing the non-expressive conduct of breweries means any impact on protected commercial speech is incidental. See e.g., Arcara v. Cloud Books, Inc., 478 U.S. 697, 703 (1986) (even when "'speech' and 'nonspeech' elements are combined in the same course of conduct . . . the governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."). The conduct of sellers is an area traditionally subject to governmental control, even if in so doing there can be an incidental effect on speech. Expressions Hair, 581 U.S. at 47. "This is especially true in the case of alcoholic beverages, the regulation of which is within the nearly absolute control of the Legislature." Café Gallery, Inc. v. New Jersey, 189 N.J. Super. 468, 474 (Cty. Ct. 1983) (citing Mazza v. Cavicchia, 15 N.J. 498 (1954). See also Meehan v. Bd. of Excise Comm'rs, 73 N.J.L. 382, 386 (1906) ("The right to regulate the sale of intoxicating liquors. . .is within the police power of the state, and is practically limitless.").

Ultimately, the Special Ruling addresses not the breweries' protected commercial speech, but rather their non-expressive conduct, advising limited breweries about the Act's permitted conduct. Pittsburgh Press Co. v. Comm'n on Hum. Rel., 413 U.S. 376, 385, 389 (1973); Cent. Hudson, 447 U.S. at 563-64. Prior to the Special Ruling, neither the Act nor its rules addressed limited breweries hosting or advertising any Special Events. (Ab25). This makes sense, as the license at issue is a manufacturer's license, where before the 2012 Act amendments, there would be no cause to consider having a Special Event as the public could not consume the product on-premises. So the Class A limited brewery licensees had no right to engage in conduct which is geared towards Class C retail behavior, particularly in light of statutory silence. The Special Ruling clarifies that a limited amount of this conduct is now lawful with the attendant limited amount of speech. Pittsburgh Press, 413 U.S. at 385, 389 (1973); Cent. Hudson, 447 U.S. at 563-64.

Therefore, it is more accurate to say that the Special Ruling advises that limited breweries have increased limited commercial speech privileges, not a reduction in them. Consequently, the Special Ruling is beyond First Amendment commercial speech protection. The Special Ruling limits non-expressive conduct, with only an incidental impact on commercial speech about

said conduct, while expanding the privilege for limited breweries to engage in protected commercial speech.

B. The Special Ruling, to the Extent it Limits Protected Commercial Speech, is Valid under Central Hudson.

Even if provision of the Special Ruling addressing Special Event promotion is entitled to some First Amendment protection, it can be independently upheld under Central Hudson.

The nature of commercial speech makes it less likely to be chilled compared to other forms of speech and is analyzed under a lower level of scrutiny. Va. State Bd. of Pharmacy v. Va. Citizens Council, Inc., 425 U.S. 748, 771-72 n. 24 (1976). See also Cent. Hudson, 447 U.S. at 566. The test is that

> [f]or commercial speech to come within [the First Amendment's protection], it at least must concern lawful activity and not be misleading. Next, [the court] ask[s] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, [the court] must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.
>
> [Id. at 566.]

Commercial speech itself is "linked inextricably" with the commercial transaction proposed, so the state's "interest in regulating the underlying transaction may give it a concomitant interest in the expression itself." Edenfield v. Fane, 507 U.S. 761, 767 (1993) (citing Friedman v. Rogers, 440

U.S. 1, 10, n. 9 (1979); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 477, 457 (1978)). After all, the "entire commercial speech doctrine . . . represents an accommodation between the right to speak and hear expression about goods and services and the right of government to regulate the sales of such goods and services." Edenfield, 507 U.S. at 767 (quoting L. Tribe, American Constitutional Law § 12-15, p. 903 (2d ed. 1988)).

ABC has a substantial interest in providing necessary clarity to the limited brewery industry and ensuring the entire alcoholic beverage industry operates in accordance with the Act, including the three-tier system. See N.J.S.A. 33:1-3.1(b). Even presuming that the Ruling impacts protected speech, it meets all the Central Hudson prongs for a valid limitation on commercial speech.

1. ABC has a substantial government interest in furthering its statutory mandate and the goals contained therein.

Upon meeting the initial threshold prong, the government must assert that it has a substantial interest in limiting the commercial speech. See, Thompson v. Western States Med. Ctr., 535 U.S. 357, 373-74 (2002); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 187 (1999). Here, ABC has a substantial interest in explaining its existing policy and upholding its statutory mandate to ensure industry participants adhere to their statutory limitations, including their limited retail privileges. See N.J.S.A. 33:1-3.1(b)(1), (6)-(8).

Further, the Special Ruling clarifies the amendments to ABC's enabling act. In re Pub. Serv. Elec. & Gas Co.'s Rate Unbundling, 167 N.J. at 384.

The Legislature did not intend the limited brewery licensees to become full-scale licensed retailers, but rather to provide only limited retail privileges. (Aa7, n.2); supra 20-21. Consequently, ABC issued the Special Ruling clarifying the breweries' limited retailer privileges. Also in keeping with ABC's statutory obligation regarding the three-tier system, the Special Ruling provides guidance for all limited breweries, fosters competition among the limited breweries, and helps breweries promote their brands and expand their businesses. (Aa8). See also N.J.S.A. 33:1-3.1(b)(6)-(8). Finally, ABC has an interest in protecting consumers from the historic societal harms that occur when the three tiers merge. Grand Union Co., 43 N.J. at 398-9.

While DOTF argues that the Special Ruling does not further a substantial interest because the Ruling allegedly intended (1) to restrict a non-existent right for limited breweries to engage in commercial speech about a prohibited activity, and (2) to balance the industry at the expense of limited breweries, by engaging in economic protectionism of Class C retailers over Class A limited breweries, (Ab24-25) this reflects a misunderstanding of the Special Ruling and the limited breweries' minimal retail privileges per the 2012 Act amendments.

As previously discussed, prior to the Special Ruling's clarification, the Act did not state limited breweries could host Special Events, and consequently there was no pre-existing right to engage in commercial speech about the same. Further, while ABC statutorily must consider and "balance" the interests of the entire alcoholic beverage industry (see Aa7), ABC was concerned about "balancing" and stabilizing the interests within the limited brewery industry to ensure that all participants were competing on an even playing field. Id. at 4. As this ties back to the three-tier system and the Legislature's grant of minimal retail privileges to limited breweries, it fits directly into ABC's overarching substantial governmental interest. N.J.S.A. 33:1-3.1(b)(2).

2. The Special Ruling's impact on limited breweries' commercial speech is proportional to ABC's substantial interest, as it directly and materially advances the interest and is no more extensive than necessary.

Central Hudson's "reasonable fit" prong considers whether a restriction on commercial speech is proportional to the interest served. Edenfield, 507 U.S. at 767; Sorrell v. IMS Health, Inc., 564 U.S. 552, 572 (2011) (citing Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 662-63 (1994) (the test ensures that "the State's interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message"). The "narrowly tailored" aspect of this prong requires a "fit" between the legislature's goals and the means chosen to accomplish these goals. Fox,

492 U.S. at 480. This fit need not be perfect, nor the least restrictive means, only a "means narrowly tailored to achieve the desired objective," representing "not necessarily the single best disposition but one whose scope is in proportion to the interest served . . . ." Ibid. See also N.J. Dep't of Labor & Workforce Dev. v. Crest Ultrasonics, 434 N.J. Super. 34, 57 (App. Div. 2014) (applying the "narrowly tailored" test)). Cf. Sorrell, 564 U.S. 552; 44 Liquormart, Inc. v. R.I., 517 U.S. 484 (1996). This level of scrutiny recognizes both the deference afforded governmental decisionmakers on what policies will best achieve their goals and that commerce is traditionally subject to government control. Fox, 492 U.S. at 480-81. See also Expressions Hair, 581 U.S. at 47.

Prior decisions offer guideposts for this test. For instance, laws that leave open alternative means of communication, even if some speech is restricted, are upheld. See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 569-70 (2001) (upholding restriction on self-service tobacco displays and requiring tobacco products be placed in a location only accessible to salespersons). Courts also uphold restrictions uniformly applied and consistent with governmental policy. C.f. Greater New Orleans, 527 U.S. at 190 (overturning regulation with extensive exemptions and inconsistent with other state and federal laws that allowed gambling). On the other hand, complete bans on speech are rarely upheld, especially when the underlying conduct could reasonably be addressed

instead. See Rubin, 514 U.S. at 490-91 (limiting alcohol content or using certain advertising language could achieve same effect as limiting promotional language on beer labels).

Here, the Special Ruling is narrowly tailored, clarifying only breweries' conduct and their license scope. It is not a complete ban on commercial speech, as a limited brewery's product speech is unrestricted and the brewery can promote an unlimited number of certain Special Events (as defined) on-premises, as well as promote through outside advertising up to twenty-five Special Events. (Aa15 at (1)(i)). The Special Ruling thus addresses underlying conduct that only incidentally impacts commercial speech. And the Special Ruling is consistent with ABC's long-standing statutory obligation to manage the three-tier system in a manner consistent with Section 10(1b)'s limited retail privileges. It is "simple common sense" that ABC's interest in providing clarity to licensees on permissible conduct will be directly and materially advanced by providing a list of such permitted conduct. Fla. Bar v. Went for It, 515 U.S. 618, 628 (1995) (citing Burson v. Freeman, 504 U.S. 191, 211 (1992)).

Ultimately, Special Events are the types of activities that a typical Class C retailer would undertake, rather than a typical Class A manufacturer. Though the Legislature granted limited breweries minor retail privileges, it did not completely erase the line between manufacturers and retailers. Reducing the

Special Event off-premises advertising, therefore, likely reduces the number of these bar-like activities limited breweries undertake. Further, restricting Special Event advertisements, but not product advertisements, decreases the likelihood that limited breweries induce new customers for reasons unrelated to their manufacturer's license. Consumers interested in trying and later purchasing limited breweries' products will still visit these breweries, but those who only come for retailer events like pub trivia will not. Thus, the Special Ruling makes it less likely that limited breweries will act contrary to their licenses. Rubin, 514 U.S. at 489; United States v. Edge Broad. Co., 509 U.S. 418, 434 (1993).

ABC's interest in protecting against improper inducement has long-standing precedent as a substantial interest which the State may control. See generally Grand Union Co, 43 N.J. 390 (New Jersey addresses the tied house system via conduct). The Legislative policy furthering moderation via the three-tier system is not necessarily to reduce the number of alcoholic beverages consumed, but to prevent consumption induced by industry conduct. The State has a substantial interest in preventing conduct that is more likely than not to induce excess consumption, and it has long been recognized that ABC can limit industry participants' conduct accordingly. Id. at 399.

The Special Ruling addresses non-expressive conduct rather than incidentally related commercial speech. The Special Ruling is narrowly tailored

to balance these interests by expressly permitting unlimited product advertisements and allowing a reasonable number of off-premises advertisements about conduct which may induce customers for Class C retailer activities. See N.J.S.A. 33:1-10(1b), -12; Affiliated Distillers, 56 N.J. at 258.

DOTF's argument as to this combined prong is premised on the incorrect idea that the State's substantial interest was economic protectionism of Class C retailers and promoting temperance by reducing the overall amount of alcohol consumed. (Ab27, 31-32). However, those are not the substantial interests actually asserted here. Edenfield, 507 U.S. at 768; Greater New Orleans, 527 U.S. at 187 ("Enacted congressional policy and 'governmental interests' are not necessarily equivalents for purposes of commercial speech analysis."). The Special Ruling guides limited breweries about their new limited retail privileges, thereby balancing the industry to provide fair competition amongst the limited breweries and ensuring the limited breweries comply with existing law. Thus, DOTF's interpretation of ABC's substantial interests is ultimately irrelevant.

Thus, Special Ruling comports with Central Hudson.

CONCLUSION

For all of the foregoing reasons, ABC's Special ruling should be affirmed.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By: */s/ Kristina Miles*
Kristina Miles
Deputy Attorney General

Dated: March 31, 2023

2009 WL 1659295
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

CHICAGO TITLE INSURANCE COMPANY, Plaintiff–Respondent,
v.
Daniel ELLIS and MS Financial Services, Inc., Defendants,
and
Lehman Brothers Bank, FSB, Plaintiff–Intervenor,
v.
Daniel Ellis, MS Financial Services, Inc., Brenda Rickard, Jamila Davis a/k/a Jamila Baker, Diamond Star Financial Inc., Shaheer Williams, Nick Infantino, United Mortgage Services, Shawn Miller, One Source Mortgage, Carl Dimasi, James Campbell a/k/a Thomas Goldson, Anel Mendez, Brandi Mohammed, Brian Togneri, Darnell Barber, Andrew O'Connell, Michael Bassillo, Necker Jean, TDA Appraisers, John Witty, Gordon Lynn, Witty Appraisals, Majadi Hughes, Roberto Franco, The Real Estate Appraisal Depot, Arisma Theodore, Financial Independent Services, Inc., Smart Realty, Debra Friedman, Keith Alliotts, Jamil Ingram, David Solomon, New Life Investments, Inc., Al Rodd, Hosea Davis, Liddie Davis, Ahmad Abus Kamal, Mohammed Abu Kamal, Melony Rand, Jamila Davis Realty Inc., Laverne Williams, Leon Williams, Defendants,
and
Charles Stanton, Defendant–Appellant.

Argued April 1, 2009.
|
Decided June 16, 2009.

On appeal from Superior Court of New Jersey, Chancery Division, Essex County, Docket No. C–103–03.

Attorneys and Law Firms

Gregory R. Preston argued the cause for appellant (Preston, Wilkins, Martin & Rodriguez, attorneys; Mr. Preston, of counsel and on the brief).

Michael R. O'Donnell argued the cause for respondent (Riker, Danzig, Scherer, Hyland & Perretti, attorneys; Mr. O'Donnell, of counsel and on the brief; Ronald Z. Ahrens and Jonathan M. Sandler, on the brief).

Before Judges STERN, WAUGH and ASHRAFI.

Opinion

PER CURIAM.

***1** Defendant Charles Stanton appeals partial summary judgment against him for $948,433.33 plus interest on plaintiff's claim for default on a mortgage note. Although he had also appealed summary judgment for conversion of $50,000, he abandoned that part of his appeal at the time of oral argument.

We conclude that the trial court erred in disregarding a late-filed certification of defendant Stanton denying that he had signed the mortgage note and also in disregarding inferences that could be drawn from Stanton's deposition testimony. We reverse summary judgment on the breach of contract claim based on the note and remand that claim for trial.

I

A

In December 2003, Lehman Brothers Bank (Lehman) filed a complaint in intervention against defendant Stanton and many others to recover proceeds of mortgage loans made in reliance on fraudulent applications. Plaintiff Chicago Title Insurance Company became subrogated to Lehman's claims after entering into a settlement with Lehman. In 2008, Chicago Title and Stanton filed cross-motions for summary judgment.

The following facts are not in dispute. Beginning in April 2002, two real estate investment consultants, Jamila Davis and Brenda Rickard, conspired with attorney Daniel Ellis and a number of mortgage brokers and real estate appraisers to obtain millions of dollars through fraudulent mortgage

applications. The conspirators would target a multi-million dollar house for sale and enter into a contract to purchase the house in the name of a sham buyer. Unbeknownst to the innocent sellers, the conspirators would forge the sellers' signatures on a second, false contract at a much higher price for the house, sometimes double the true contract price. A mortgage broker participating in the scheme would prepare and submit a false mortgage application using identification and other information provided by the sham buyer but adding false income and other credit information. Appraisers would present false appraisals of the property much higher than its true value. Relying on the false documents, Lehman and other lenders approved mortgage loans in amounts greater than the true contract prices of the houses.

Functioning as the closing attorney, Daniel Ellis would instruct the sham buyer to sign the necessary documents to close the sale. After the mortgage and note and other documents were executed, the sham buyer would receive a large, one-time fee for his participation. Ellis, Rickard, and Davis would then distribute the fraudulently obtained loan proceeds as required to complete the sale, but the excess of the loan would be shared among the conspirators. The sham buyer would not take occupancy of the house or make payments on the mortgage loan. At times, the conspirators would make installment payments on the loan to keep the scheme concealed for some months.

From April to December 2002, the conspirators completed eight such fraudulent transactions for which Lehman lent a total of $22,295,000 in mortgage funds. Eventually, nine persons pleaded guilty pursuant to plea agreements with the federal government. Davis and Rickard were convicted at trial. Charles Stanton was not charged criminally.

***2** Stanton was the named buyer for a house at 7 Cassandra Drive in the Borough of Alpine in Bergen County, and he was also involved with a fraudulent loan and purchase of another house located at 21 Schaffer Road also in Alpine. For 7 Cassandra Drive, Lehman approved a loan of $2,975,000 to Stanton based on a fraudulent contract that listed the price of the house as $4,500,000 and fraudulent appraisals setting approximately that value on the property. The true purchase price of 7 Cassandra Drive was $2,170,000, that is, $805,000 less than the mortgage loan approved by Lehman.

At the request of Jamila Davis, Stanton flew to New Jersey from his home in California and attended a closing on May 31, 2002. Lehman wired the mortgage money to attorney Ellis. Stanton spent thirty minutes to an hour signing a stack of documents at the direction of Ellis. When the signing of papers was completed, Stanton received a check for $50,000 from Brenda Rickard.

Stanton never took possession of the house at 7 Cassandra Drive. He never even saw the house. The conspirators made monthly payments of the Lehman mortgage loan through April 2003. The loan went into default in May 2003.

After the fraud was discovered, Stanton executed a quitclaim deed for 7 Cassandra Drive conveying the property to Lehman. Lehman sold the house for $2,250,000, receiving net proceeds of $2,005,995.38 and leaving a deficiency of $948,433.33 on the mortgage loan it had made in Stanton's name.

B

The issues on appeal arise in part from procedural rulings related to the summary judgment motions. In its amended complaint in intervention, Lehman had charged Stanton with fraud and conspiracy to commit fraud, conversion, breach of contract, and racketeering in violation of *N.J.S.A.* 2C:41–2 (New Jersey's RICO statute). Stanton filed an answer pro se denying Lehman's claims and raising affirmative defenses.

Upon becoming subrogated to Lehman's claims, plaintiff Chicago Title filed a motion for partial summary judgment on count seventeen of Lehman's amended complaint charging Stanton with conversion because of his receipt of $50,000 after the May 2002 closing, and on count thirty charging breach of contract based on the deficiency amount of $948,433.33 on the note for 7 Cassandra Drive. In support of its motion, plaintiff submitted a certification by a representative of Lehman stating generally the nature of the fraudulent scheme, attaching an adjustable rate note and mortgage with signatures purporting to be those of Stanton, and declaring that a deficiency balance remained due on the note. Plaintiff also submitted deposition testimony that Stanton had given in a related foreclosure lawsuit brought by another mortgage lender, MorEquity, Inc., with respect to the second property at 21 Schaffer Road.

After receiving plaintiff's motion, Stanton retained counsel, who filed opposition and a cross-motion for summary judgment. Stanton's submissions were supported only by a certification of his attorney, Gregory R. Preston, referencing

excerpts from Stanton's deposition testimony in which he denied that he knew he was purchasing or obtaining a mortgage loan for either the 21 Schaffer Road or 7 Cassandra Drive properties and also denied that signatures on certain documents were his.

***3** In response to Stanton's papers, plaintiff filed a reply brief and three supporting certifications: from a forensic document examiner, who concluded that the signatures on the mortgage and note for 7 Cassandra Drive were those of Stanton; from co-conspirator Daniel Ellis, who stated that Stanton had signed all the relevant documents himself and that his words and actions at the closing indicated that he fully understood what he was signing; and from a Chicago Title attorney who had interviewed Stanton in 2004, in the presence of an attorney representing Stanton, and who stated that Stanton admitted the authenticity of his signatures on the Cassandra Drive documents.

At oral argument on the motion for summary judgment, attorney Preston requested more time to respond to the three new certifications. The judge denied the request and eventually determined that she would not rely on the new certifications. Instead, she placed heavy reliance on the absence of an affidavit from Stanton attesting to facts in support of his defenses. Mr. Preston argued that Stanton's deposition testimony from the related *MorEquity* litigation was sufficient to establish disputed issues of fact regarding his liability on the Lehman note.

In that deposition, Stanton testified that he became acquainted with Jamila Davis through family, and that she had helped him buy two homes in California. He said that Davis told him she was involved in a development deal in New Jersey to buy and fix old houses. She offered him an unspecified interest in the deal in exchange for his assisting a friend of hers to market songs in the music industry, which was Stanton's line of business. Stanton said he helped Davis's friend and agreed that instead of receiving a commission, the equivalent amount would be invested in Davis's development venture on his behalf.

Stanton testified further that Davis called him to come to New Jersey to sign some papers, which he believed would be for the venture she had described. He came in late May 2002 and attended a closing at which Daniel Ellis and Brenda Rickard presided. He signed a large stack of papers at the direction of Ellis without reading the documents. He believed they related to the home renovation venture. He noticed that his name already appeared to be signed on one or two of the documents and asked for an explanation. His concerns were mollified by Davis's assurance that the documents were legitimate and the one or two containing his signature were needed for approvals in his absence. Stanton also testified that he never even saw the houses at 7 Cassandra Drive or 21 Schaffer Road. When he received the check for $50,000 from Brenda Rickard, he thought it was an initial return on his investment in the home renovation venture.

The deposition transcript reflects that Stanton was shown a number of documents pertinent to the 21 Shaffer Road house, and he denied signing those documents. Although he acknowledged his signature on some documents, he was never shown the note for 7 Cassandra Drive, and consequently, he never testified one way or the other about the signature on that document.

***4** On direct questioning about his knowledge of the sham transactions, Stanton testified as follows:

> Q. Did you understand that you were buying a home personally at 7 Cassandra Drive in Alpine, New Jersey?
>
> A. No, sir.
>
> Q. Did you understand that you were buying a home personally at 21 Schaffer Road in Alpine, New Jersey?
>
> A. No, sir.
>
> Q. Did you ever apply for a mortgage to buy a home at either of those addresses?
>
> A. No, sir.
>
> Q. Did you ever understand that you were signing a mortgage, a note or a mortgage, for a mortgage loan on either of those properties?
>
> A. No, sir.
>
> Q. Did you ever understand you were buying—you were applying for a mortgage loan to purchase either of those properties?
>
> A. No, sir.

This testimony is the heart of Stanton's defense that he was duped by Jamila Davis and others into participating unknowingly in their fraudulent scheme as a sham buyer.

After hearing argument on the summary judgment motions, the judge ruled that plaintiff Chicago Title had established a prima facie case of the debt due on the mortgage note containing what appeared to be Stanton's signature and that Stanton had not presented any evidence to challenge plaintiff's claim that he had signed the note. Attorney Preston's certification in opposition was inadmissible hearsay that could not be used to refute the authenticity of the note. Because Stanton had not submitted his own affidavit or certification denying that his signature was on the note, the court considered plaintiff's motion to be unopposed on that issue. Finding irrelevant Stanton's defense that he was duped into signing the note, the trial judge granted plaintiff's motion for summary judgment and denied defendant's cross-motion.

An order was entered on May 5, 2008, granting partial summary judgment to plaintiff for $948,433.33 plus interest from March 20, 2003, on count thirty for breach of contract, and for $50,000 plus interest from the same date on count seventeen for conversion. The order was designated a final judgment under *Rule* 4:42–2, although not all counts of the complaint even as to Stanton had been decided.

Stanton filed a motion for reconsideration. He attached his own two-page certification in which he declared, "My name and information were used without [my] permission or consent on loan documents to further the fraudulent scheme in connection with loans related to property at 7 Cassandra Drive and 21 Schaeffer [sic] Road...." Most significant, Stanton specifically denied signing the note and the prepayment rider on the Cassandra Drive property.

At oral argument on the motion for reconsideration, the judge determined that she would not consider Stanton's certification because it could and should have been filed with the original summary judgment motions. Citing *Fusco v. Board of Education of the City of Newark,* 349 *N.J.Super.* 455, 462, 793 A.2d 856 (App.Div.), *certif. denied,* 174 *N.J.* 544, 810 A.2d 64 (2002), the judge ruled that Stanton's attempt to file his own certification after summary judgment was granted was a classic "second bite at the apple" and should not be permitted. Alternatively, the judge ruled that Stanton's certification was a sham sworn statement refuting his prior deposition testimony. Relying upon *Shelcusky v. Garjulio,* 172 *N.J.* 185, 201, 797 A.2d 138 (2002), and *Mosior v. Insurance Co. of North America,* 193 *N.J.Super.* 190, 194–95, 473 A.2d 86 (App.Div.1984), the judge said that Stanton's certification would be disregarded because it contradicted his prior testimony. She denied the motion for reconsideration.

II

***5** In reviewing a grant of summary judgment, an appellate court applies the same standard under *Rule* 4:46–2(c) that governs the trial court. *See Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A.,* 189 *N.J.* 436, 445–46, 916 A.2d 440 (2007). The court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co. of Am.,* 142 *N.J.* 520, 540, 666 A.2d 146 (1995).

Rule 4:46–2(c) provides that summary judgment shall be granted when the pleadings, discovery, and affidavits demonstrate that there is no genuine issue of material fact as to the matter challenged and that the moving party is therefore entitled to judgment as a matter of law. When the moving party makes the requisite showing, it is incumbent upon the party opposing summary judgment to come forward with competent proofs demonstrating a genuine issue of disputed fact that must be resolved at trial. *See Triffin v. Am. Int'l Group, Inc.,* 372 *N.J.Super.* 517, 523–24, 859 A.2d 751 (App.Div.2004); *Brae Asset Fund, L.P. v. Newman,* 327 *N.J.Super.* 129, 134, 742 A.2d 986 (App.Div.1999). The court must "sift" and "evaluate" the evidence and consider whether the facts relied upon are supported by admissible evidence in the record or by affidavits or certifications made on personal knowledge. *See Brill v. Guardian Life Ins. Co. of Am., supra,* 142 *N.J.* at 536, 666 A.2d 146; *R.* 1:6–6.

A

Initially, we agree with plaintiff and the trial judge that Stanton has not presented sufficient evidence to establish a defense that he was duped into signing the mortgage note by misrepresentations of Davis and the other conspirators, a defense of fraud in the *factum.* Stanton never pleaded that affirmative defense in his answer, as he was required to do by *Rule* 4:5–4. *See N.J. Mortgage & Inv. Co. v. Dorsey,* 33 *N.J.* 448, 450, 165 A.2d 297 (1960). Nevertheless, his attorney's certification on the original summary judgment motion argued facts that related to such a defense. The facts argued, however, were not sufficient to establish all the elements of a defense of fraud in the *factum.*

A detailed discussion of that common law defense is contained in *Bancredit, Inc. v. Bethea,* 68 *N.J.Super.* 62, 172 A.2d 10 (App.Div.1961). Describing the defense as "a somewhat confused intermingling of tort and contract principles," we said in *Bancredit* that "where the signer of the instrument has been led to believe and does believe that he is signing something of a different character from the note he actually does inscribe, he has not in fact assented to the obligation represented by the paper." *Id.* at 66, 172 A.2d 10.

We also said, however, that the maker of the note must prove that he was not negligent in failing to understand the character and content of the note. *Id.* at 70, 172 A.2d 10. *See also Amsterdam v. DePaul,* 70 *N.J.Super.* 196, 199, 175 A.2d 219 (App.Div.1961) ("Fraud in the *factum* is a good defense to an action on a negotiable instrument as against a holder in due course, provided there has been no negligence on the part of the maker."). *Cf. N.J.S.A.* 12A:3–305(a)(1) (Uniform Commercial Code) ("the right to enforce the obligation of a party to pay an instrument is subject to the following: ... fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms").

***6** The Supreme Court has described "absence of negligence" as "part and parcel of the defense of fraud in the execution of the note." *N.J. Mortgage & Inv. Co. v. Dorsey, supra,* 33 *N.J.* at 450, 165 A.2d 297. It has placed the burden of proof on the maker of the note as to both fraud and absence of his own negligence. *Ibid.*

In *Bancredit, Inc. v. Bethea, supra,* 68 *N.J.Super.* at 70, 172 A.2d 10, and *Amsterdam v. DePaul, supra,* 70 *N.J.Super.* at 198–99, 175 A.2d 219, we described some types of evidence that might prove absence of negligence: the maker's physical or mental inability to comprehend the document, such as blindness, lack of reading glasses when necessary, low intelligence, illiteracy, unfamiliarity with the English language, or unfamiliarity with commercial transactions, or alternatively, physical deception such as substitution of papers.

Here, Stanton alleged no similar inability to read or understand the contents of the mortgage note or physical deception. Although he testified in deposition that he left high school in his last year, he also testified that he was involved in the music business and had a yearly income in six figures. He had previously purchased two homes in California and participated in closings. He certainly knew what a mortgage loan is and, in particular, a mortgage note evidencing a personal debt. He had the ability to determine what he was signing. Stanton never stated a good reason for not examining enough of the documents to understand generally their character and purpose. According to his own testimony, he simply took the word of Jamila Davis that the development venture she offered him was legitimate, and he signed papers at the direction of an attorney who did not represent him under the impression that they were related to that venture. Accepting Stanton's version as true, he has admitted his negligence.

We held in *Bancredit, Inc. v. Bethea, supra,* 68 *N.J.Super.* at 71, 172 A.2d 10, "Ordinarily, one who, though able to read, signs a negotiable instrument in reliance on false representations as to its character, is deemed negligent as a matter of law, thus precluding invocation of the defense of fraud in the *factum* ...." To preserve confidence in commercial paper, we said, "[t]he signer must ... exercise the caution of a reasonably prudent man to determine the character of the paper upon which he has purposefully placed his signature." *Id.* at 66, 172 A.2d 10.

Applying these statements of the law, we conclude that Stanton has not presented sufficient evidence to prove the absence of his own negligence in failing to learn what he was signing. He is charged with knowing the essential character and contents of the mortgage note that he allegedly signed at the closing on May 31, 2002. Based on the summary judgment record, the trial court correctly rejected his defense of fraud in the *factum.*

B

With respect to authenticity of the signature on Lehman's note, the trial court placed heavy reliance on the absence of an affidavit or certification from Stanton denying the signature. The court correctly viewed attorney Preston's certification as inadmissible hearsay and thus not evidential. *See Sellers v. Schonfeld,* 270 *N.J.Super.* 424, 427, 637 A.2d 529 (App.Div.1993). *Rule* 4:46–5 requires that affidavits or certifications on summary judgment motions meet the requirements of *Rule* 1:6–6, which in turn requires that they be "made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify." Mr. Preston's certification was argument of an attorney that should have been submitted as a brief rather than a sworn certification.

***7** In disregarding Stanton's deposition testimony, however, the trial court did not give adequate weight to relevant admissible evidence that arguably permitted an inference that Stanton had not signed the note for 7 Cassandra Drive. In that deposition, Stanton denied having signed the note and other relevant documents for 21 Schaffer Road, and also denied having understood that he was applying for a mortgage and purchasing either 21 Schaffer Road or 7 Cassandra Drive. Viewed most "indulgently" to defendant, *see Judson v. Peoples Bank & Trust Co.,* 17 *N.J.* 67, 75, 110 A.2d 24 (1954), those denials in tandem could arguably lead to an inference that documents related to 7 Cassandra Drive were also forgeries bearing what only appears to be Stanton's signature.

Attorney Preston believed that Stanton's deposition testimony was enough to raise disputed factual issues as to the validity of the mortgage note on 7 Cassandra Drive. Mr. Preston's belief was not adopted by the judge. She determined that a specific, sworn denial of the authenticity of the Cassandra Drive signatures was required from Stanton to raise a genuine issue of fact. Having come to that conclusion, however, the judge should have seen Mr. Preston's belief as not unreasonable and one reached in good faith. Mr. Preston's request to supplement the summary judgment record should have been granted. Instead, the judge held strictly to the motion schedule and the lack of sufficient defense evidence.

We have said consistently over the years that our courts favor deciding cases on their merits. *See Nowosleska v. Steele,* 400 *N.J.Super.* 297, 303, 946 A.2d 1097 (App.Div.2008); *Davis v. DND/Fidoreo, Inc. .,* 317 *N.J.Super.* 92, 100–01, 721 A.2d 312 (App.Div.1998), *certif. denied,* 158 *N.J.* 686, 731 A.2d 45 (1999); *Loranger v. Alban,* 22 *N.J.Super.* 336, 342, 92 A.2d 77 (App.Div.1952). That objective applies to motions for summary judgment. We said in *Sholtis v. American Cyanamid Co.,* 238 *N.J.Super.* 8, 17, 568 A.2d 1196 (App.Div.1989), "Summary judgment motions are useful in terminating patently meritless litigation. But, [ ] a trial is a search for the truth and courts should dispose of cases on their merits ..."

A trial court has discretion to permit or reject a request for adjournment or for leave to submit supplemental evidence on a motion for summary judgment. That discretion should be exercised liberally in favor of gathering all relevant evidence. As we also said in *Sholtis:*

> [A] judge should approach summary judgment motions with a predisposition to acting only with all reasonably determinable information in hand.... [D]iscretion should be exercised to increase, not limit, the likelihood that the information before the court reflects the facts that could be adduced at trial.

Ibid.; accord Ziegelheim v. Apollo, 128 *N.J.* 250, 264, 607 A.2d 1298 (1992); *Vassallo v. Am. Coding & Marking Ink Co.,* 345 *N.J.Super.* 207, 217, 784 A.2d 734 (App.Div.2001); *Baldyga v. Oldman,* 261 *N.J.Super.* 259, 267–68, 618 A.2d 877 (App.Div.1993).

***8** Here, Stanton's attorney requested time to respond to the three new certifications that plaintiff filed in reply to his opposition. Had the request been granted, Stanton would presumably have submitted a certification similar to the one he filed on his motion for reconsideration. The trial judge denied the request for adjournment and supplementation of the record because Stanton should have filed his full opposition in time for the summary judgment hearing. That ruling was a misapplication of the judge's discretion.

We held in *Fusco v. Board of Education, supra,* 349 *N.J.Super.* at 462, 793 A.2d 856, that the trial court had not abused its discretion in refusing to consider a document on reconsideration because the document had been available to plaintiff for the summary judgment motion itself. On the motion for reconsideration, plaintiff had presented the document as newly discovered evidence, and we rejected that characterization. Additionally, we concluded that the document would not have changed the outcome of the summary judgment motion in any event. *See id.* at 463, 793 A.2d 856. In contrast, Stanton's certification here was a direct denial of the authenticity of the note that necessarily affects the outcome of plaintiff's summary judgment motion. Counsel for Stanton did not try to present the certification as newly discovered evidence but explained reasonably that his assessment of issues created by Stanton's deposition testimony and of the adequacy of plaintiff's proofs was the reason for not filing the certification earlier.

On the motion for reconsideration, the trial judge also ruled that Stanton's certification would be disregarded as a sham affidavit. Our standard of review of that ruling is plenary because we have the same record as the trial judge and no credibility determinations are involved based on live witness testimony. The ruling is akin to one for summary judgment. We conclude that the judge's ruling discrediting Stanton's certification was premature and therefore error.

In *Mosior v. Insurance Co. of North America, supra,* 193 *N.J.Super.* at 195, 473 A.2d 86, we said, "Plaintiff cannot create an issue of fact simply by raising arguments contradicting his own prior statements and representations." There, plaintiff had previously submitted a proof of loss on his insurance claim stating that he was totally disabled as of August 1972. In opposition to a motion for summary judgment on statute of limitations grounds, he attempted to argue that his total disability arose in 1983. We concluded that the trial court correctly disregarded his opposition argument.

In *Shelcusky v. Garjulio, supra,* 172 *N.J.* at 193–94, 797 A.2d 138, the Supreme Court explained "the sham affidavit doctrine" as the "practice of disregarding an offsetting affidavit that is submitted in opposition to a motion for summary judgment when the affidavit contradicts the affiant's prior deposition testimony." In the "summary judgment setting," the Court recognized "the tension between allowing parties the opportunity to 'fully expose [their] case' and protecting potential defendants from meritless claims." *Id.* at 199–200, 797 A.2d 138 (quoting *Brill v. Guardian Life Ins. Co. of Am. ., supra,* 142 *N.J.* at 541–42, 666 A.2d 146). The Court said, "The very object of the summary judgment procedure then is to separate real issues from issues upon which there is no serious dispute. Sham facts should not subject a defendant to the burden of a trial." *Id.* at 200–01, 666 A.2d 146.

***9** Considering the competing interests within this framework for the rejection of sworn affidavits, the Court held:

> Courts should not reject alleged sham affidavits where the contradiction is reasonably explained, where an affidavit does not contradict patently and sharply the earlier deposition testimony, or where confusion or lack of clarity existed at the time of the deposition questioning and the affidavit reasonably clarifies the affiant's earlier statement.

Id. at 201–02, 666 A.2d 146. Applying its holding to the facts before it, the Court concluded that the rejected affidavit did not "flatly contradict [ ]" the prior deposition testimony of plaintiff and should have been considered on the summary judgment record. *Id.* at 202–04, 666 A.2d 146.

The same analysis applies to a comparison of Stanton's certification and his earlier deposition testimony. At the deposition, he was never asked whether he signed the note for 7 Cassandra Drive. He neither denied that he did nor admitted it. The later certification does not flatly or sharply contradict the deposition testimony. It supplements it. Furthermore, although plaintiff has provided substantial evidence through the certifications of a forensic document examiner, co-conspirator Daniel Ellis, and an attorney who obtained an admission from Stanton that he had signed the note, plaintiff's evidence does not foreclose the dispute about the authenticity of Stanton's signature but demonstrates that the truth of Stanton's denial will be strongly challenged at trial.

When Stanton's certification is taken into consideration, it points to a crucial disputed issue of fact that precludes summary judgment. Stanton has sworn that he did not sign the mortgage note on 7 Cassandra Drive. If so, he is probably not liable for breach of contract. If he has filed a false certification to avoid summary judgment, remedies are available to plaintiff pursuant to *Rules* 4:46–5(b) and 4:46–6 to recover attorney's fees and other expenses of trial. The truth of Stanton's certification may be revisited after a full consideration of all the available evidence at trial.

III

Summary judgment was erroneously granted on the breach of contract claim because defendant showed sufficient evidence of a disputed issue of material fact as to the authenticity of the signature on the mortgage note. The trial court correctly rejected defendant's affirmative defense of fraud in the *factum,* and defendant has withdrawn his appeal on the conversion claim for $50,000. As to that claim, however, we note in passing that the total loss to Lehman appears to be the deficiency balance on the note, and so, the $50,000 for

conversion should not be an award of money damages in addition to that deficiency amount.

We affirm in part and reverse in part the trial court's order of May 5, 2008. The matter is remanded for further proceedings consistent with this opinion.

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