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

CORRECTED REPLY BRIEF OF APPELLANT DEATH OF THE FOX BREWING COMPANY

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A. The Special Ruling and License Conditions Are Unlawful Guidance

Appellant Death of the Fox Brewing Company and Respondent New Jersey Division of Alcoholic Beverage Control ("ABC") disagree that the 2019 Special Ruling, Aa005a–028a, and subsequent license conditions implementing the Special Ruling, Aa029a–033a, "impose any new or additional requirements that are not included in" the Alcoholic Beverage Control Act.[1] See N.J.S.A. § 52:14B-3a(c).

N.J.S.A. § 33:1-10(1b) ("Section 10(1b)") expressly permits limited breweries to self-distribute and sell for on-site consumption subject to three limitations: all on-site consumption must be done "in connection with a tour of the brewery;" no food shall be sold or restaurant operated "on the licensed premises" by the licensee; and sales for off-site consumption are restricted to no more than 15.5 fluid gallons per person. None of those statutory limitations are challenged here.

In an alleged effort to "guide[]" limited breweries so they "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

[1] Death of the Fox does not only challenge the limitation of 25 on-site special events and 52 private parties as violating the APA. See Rb24. As stated in its opening brief, the entire Special Ruling and license conditions violate the APA. Ab13, 16–18. To avoid confusion, Death of the Fox adopts ABC's citations for the briefs and appendices, with "Rb" referring to ABC's response brief. See Rb5 n.3.

statute's terms and structure,"[2] Rb19, ABC offers three additional authorizing provisions: N.J.A.C. § 13:2-5.1(d) ("social affair" permits); N.J.S.A. § 33:1-74 (off-site event permits); and N.J.A.C. § 13:2-5.1, -5.5 (other temporary permits). ABC provides no authority for the other provisions contained in the Special Ruling and license conditions, and Section 10(1b) is silent regarding them.

License condition one commands that licensees shall give a tour "requir[ing] engagement" "prior to any on-premises consumption." Aa029a, 032a; see also Aa016a. In contrast, Section 10(1b) simply states that on-site consumption may occur "only in connection with a tour of the brewery." ABC defends condition one as "simply explain[ing] to the industry what a 'tour' is and how its logistics can work in practice." Rb22. But by defining "tour" as "a material interaction" that "requires engagement" before on-site consumption can occur, ABC "add[s]…something which is not there." Service Armament Co. v. Hyland, 70 N.J. 550, 563 (1976).

ABC likewise adds something not in the statute with conditions three and seven. See ibid; Aa029a, 032a; see also Aa010a, 023a–025a. Section 10(1b) states that licensees "shall not sell food or operate a restaurant on the licensed premises." The statute defines "restaurant," but not "food." N.J.S.A. § 33:1-1(t). ABC defines

[2] ABC's claim that Section 10(1b) only permits a "small degree of on-premises consumption" is false. The statute permits limited breweries to brew up to 300,000 barrels per year—and Death of the Fox's license up to 50,000, Aa031a ($1250 fee paid)—even though Death of the Fox produces less than 15,000 barrels. See Aa091a. Section 10(1b) contains no direct limits on on-site consumption.

"food" to include coffee, Rb13, but not soda manufactured by a licensee. ABC thus crafts new policy not addressed by the statute or regulation. Aa029a, 032a; Aa010a, 023a–025a. It is unclear how ABC determined that "food" includes some sodas and coffee, given that the statute is silent regarding both. But in doing so, ABC exercised assumed gap-filling authority to define "food," adding restrictions not in the statute. Similarly, ABC adds to the statute's prohibition on licensees selling food and operating a restaurant in asserting that licensees are prohibited from coordinating with food trucks and outside vendors. See Aa029a, 032a; Aa010a, 025a.

License condition 16 does not mirror N.J.A.C. § 13:2-5.1(d) in imposing a limit of 25 "social affair" events per calendar year. Aa030a, 033a. The Special Ruling's additional limitations on those events, see Aa010a, 021a–023a, contain numerous specifics found nowhere in the regulations. See N.J.A.C. § 13:2-5.1.

Likewise, while N.J.S.A. § 33:1-74(a) authorizes ABC to issue "temporary permits," license condition 17's limitation to 12 off-premises events per year has no statutory or regulatory basis. Aa030a, 033a, 086a; see also Aa025a. Instead, ABC admits that the 12-event limit is "analogous" to N.J.A.C. § 13:2-5.1's limit for organizations holding social affairs. ABC's decision to create an "analogous" limit is not guidance but adds "new or additional requirements" in violation of N.J.S.A. § 52:14B-3a(c). Further, in addition to the limit of 12 off-premises events, ABC's list of "[p]ermissible activities off a Limited Brewery Licensed Premises," Aa025a–

028a, contains numerous provisions nowhere found in statute or regulation. Therefore, even when considering the provisions of the Special Ruling and license conditions for which ABC cites direct authority, it has added to those authorities.

The restrictions concerning on-premises special events and private parties do not have "structural" support following the enactment of Section 10(1b). As authority for license conditions 9–15, Aa030a, 032a–033a; see also Aa009a, 015a, 018a–021a, ABC claims they are "firmly anchored" in the legislature's distinctions between manufacturers and retailers by effectuating Section 10(1b)'s "mandate that limited breweries cannot operate restaurants or full-scale retail facilities like bars." Rb24–25. But Section 10(1b) already prevents limited breweries from operating restaurants and bars by prohibiting them from selling food and allowing on-site consumption of only a brewery's products. Limited breweries may not sell other alcoholic beverages, nor may they produce unlimited quantities of their products. By implying that absent ABC's new restrictions limited breweries would operate as restaurants and bars, ABC ignores that such operations are already prohibited.

ABC also permits "events typically seen at restaurants and bars." Rb25. For example, showing regularly scheduled television programs and regular season sports, Aa030a, 032a, are commonplace in restaurants and bars. Likewise, events that ABC includes as "on-premises special events" are the kind of events found at bars and restaurants. See Aa015a. Thus, the limit of 25 events does not prevent

breweries from becoming "full-scale retail facilities," but it does arbitrarily restrict events Section 10(1b) does not prohibit and severely constrains breweries' ability to enjoy the privileges granted by law as a result. Those restrictions and constraints, far from being structurally supported by statute, impose new requirements in violation of N.J.S.A. § 52:14B-3a(c).

The remaining provisions within the Special Ruling—e.g., the specifications for televisions and the idiosyncratic definition for "championship sporting event," Aa014a, 017a—as well as license conditions 4–6 and 8, also find no support in statute or regulation. See also Aa082a. The overwhelming balance of the provisions thus violates N.J.S.A. § 52:14B-3a(c).

If it is true that ABC has not yet actively enforced the restrictions, they are still enforceable on their face and not mere guidance. The nature of government licenses and ABC's own practices and admissions provide further evidence of the restrictions' enforceability. First, ABC's assertions that the restrictions are mere "guidance" and that it did not "create[] any new standards" beyond existing law, Rb26, are contradicted by its seeking to "establish[] a uniform set of standards that are applicable to all limited brewer[ies]." Aa008a. Second, if the Special Ruling was only guidance, it would not claim to "allow 25 on-premises special events and 52 private parties," or "create[] a new permit" for off-premises events. Ibid. Third, the Special Ruling includes several "ORDERED" clauses, including that: (1) the Special

Ruling "establishes the standards for the operation of limited breweries" in the state; and (2) the Special Ruling "shall be incorporated into every limited brewery license…and shall be fully enforceable by the Division." Aa013a. ABC even cautioned limited breweries that it "may…issue warning or fine letters" for violating the Special Ruling, Ra37; and in an email to Death of the Fox, ABC stated that the license conditions "are subject to compliance enforcement." Asa001a.[3]

Death of the Fox's license states that it is "expressly subject to the…conditions set forth therein…." Aa031a. It further states that 18 conditions deriving from the Special Ruling "are imposed on [the] License" and "shall be subject to enforcement." Aa032a. Most of the conditions contain mandatory language as to what Death of the Fox "shall" and "shall not" do. Aa032a–033a. That Death of the Fox would consider such language as guidance with which compliance is voluntary is absurd. Were Death of the Fox to ignore the conditions, it would violate state law and risk suspension or loss of its license and fines. N.J.S.A. § 33:1-2(a) ("It shall be unlawful to manufacture, sell…or distribute alcoholic beverages in this State, except pursuant to and within the terms of a license…").

Because of the plain language of the Special Ruling and Death of the Fox's license, in addition to communications from ABC, Death of the Fox dares not ignore the restrictions. As a result, it sought an exemption from the coffee ban. Ra2–4. That

[3] "Asa" refers to the supplemental appendix included with this reply brief.

would have been unnecessary if the restrictions were mere guidance. The same is true regarding multiple other "relaxations" from specific "rules" set out in the Special Ruling that ABC has granted. See, e.g., Aa082a–089a.

Whether ABC has actively enforced the restrictions within the Special Ruling or license conditions is ultimately immaterial to whether the conditions operate as "new or additional requirements" in violation of N.J.S.A. § 52:14B-3a(c). While appearing as "guidance," the restrictions thoroughly create new and additional requirements for limited breweries not found in statute or regulation. Because the restrictions have not been formally adopted as rules, they are invalid "guidance."

B. The Special Ruling and License Conditions Fail Metromedia

Even if the Special Ruling and license conditions are not invalid guidance, they are rules requiring formal notice and comment. The Supreme Court established a six-part test for determining whether an agency pronouncement is a "rule." Metromedia, Inc. v. Dir., Div. of Taxation, 97 N.J. 313, 331–32 (1984). All six factors are to be weighed.[4] Matter of Request for Solid Waste Utility Customer Lists, 106 N.J. 508, 518 (1987). ABC disagrees that factors 4–6 are met. Rb28.

[4] Contrary to ABC's claim, the fourth and fifth Metromedia factors are not "afforded the most weight" as a general matter. See Rb28. The Supreme Court in Doe v. Poritz, 142 N.J. 1, 97–98 (1995), held that those factors "in this case[] deserve the most weight," and the fourth factor in particular was "the most important…in this instance." Ibid (emphasis added).

Metromedia factor four considers whether agency action "prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from" Section 10(1b). See 97 N.J. at 331. For the reasons discussed above, ABC's restrictions satisfy this factor. While a few specific provisions are modeled on Section 10(1b) and other statutes and regulations, the overwhelming majority go well beyond, and in some cases contradict, the terms and intent of Section 10(1b) in setting out enforceable (and enforced) rules for breweries.

As discussed above, the restrictions "deviate substantially from the explicit or implied standards" of Section 10(1b) because they seek to limit on-site consumption of a brewery's products where the statute does not. See Doe, 142 N.J. at 97. Section 10(1b) limits breweries' retail privileges by allowing sales for off-site consumption of no more than 15.5 gallons per person and permitting sales for on-site consumption subject to production caps specified by license. The only other limited-brewery-specific operational requirements mandate tours and no selling of food. It is thus not "expressly provided by or clearly and obviously inferable from" the statute that tours must be given prior to on-site consumption or that breweries may only host 25 on-premises special events in order to effectuate a brewery's "small degree of on-premises consumption privileges," for example. See Rb31-32. If limited breweries respect production caps, provide tours, and do not sell food or overserve customers, they may sell all their product for on-site consumption that they wish.

Coal. for Quality Health Care v. N.J. Dep't of Banking & Ins., 348 N.J. Super. 272, 298 (App. Div. 2002), is not to the contrary. There, Metromedia's fourth factor was not met where a sample insurance policy "did not define minimum acceptable standards, instead it served as a non-binding example, promulgated to assist, and not prescribe" policy preparation. Importantly, insurers "were free to develop their own…list of services" requiring precertification. Ibid. In contrast, the Court noted that if the sample "specif[ied] a mandatory list of services," then it "would have constituted rulemaking" because "specific types of services requiring precertification are not expressly provided for in the enabling statute." Ibid.

Here, the detailed specifics within the Special Ruling and license conditions go beyond, and in some cases contradict, Section 10(1b). Nor are they merely non-binding examples of permissible activities. ABC intended the Special Ruling to create uniform standards and "rules," and because the restrictions are placed on each brewery's license, they are not "free to develop their own individual" practices that differ from ABC's restrictions.

Metromedia's fifth factor considers whether agency action "reflects an administrative policy that…was not previously expressed in any official and explicit agency determination, adjudication or rule." 97 N.J. at 331. As discussed, aside from a few provisions, the Special Ruling and license conditions do not simply implement Section 10(1b) consistent with previous agency action. Instead, ABC admits that the

restrictions result from ABC's interpretation of the new statute and desire to create uniform standards and rules that did not previously exist. Aa006a–008a, 082a, 086a. ABC's attempt to satisfy this factor by pointing to the generic three-tier system is thus unavailing. Rb35. Instead, ABC's efforts to create uniform rules for the craft brewery industry with the restrictions are the epitome of "an administrative policy that…was not previously expressed" by the agency. See Metromedia, 97 N.J. at 331.

Meeting Metromedia's sixth factor requires agency action to "reflect[] a decision on administrative regulatory policy in the nature of interpretation of law or general policy." 97 N.J. at 332. ABC admits that the Special Ruling and license conditions are the result of the agency's interpretation of Section 10(1b), policy aim to "maintain[] the three-tier industry division," Rb35, and desire to create uniform standards for the industry. The best example of interpretation sufficient to satisfy this factor is ABC's repeated assertion that it seeks to limit on-premises consumption beyond the statute. Reading Section 10(1b) to limit on-premises consumption by restricting events, parties, television number and size, etc., that is not obvious from the statute is quintessentially "in the nature of interpretation of law." The restrictions are therefore "rules," and because ABC does not contest that it has not complied with the formalities of notice and comment required under the APA, they are void.

II. THE LIMIT ON ADVERTISING ON-PREMISES SPECIAL EVENTS VIOLATES THE U.S. AND NEW JERSEY CONSTITUTIONS

ABC misunderstands Death of the Fox's free speech claim, overstates the limits on on-premises events contained in the challenged restrictions, see Rb40, and fails to satisfy scrutiny of its limit on advertising.

ABC acknowledges that no law addresses hosting or advertising events at limited breweries. Rb42. The Special Ruling defines "on-premises special events" as events "promoted or advertised by a Limited Brewery…by way of any type of media, including social media." Aa015a. The Special Ruling and license conditions limit breweries to 25 such events per year. Aa018a, 032a. If a brewery does not advertise, or if it only advertises within the four walls of the brewery or by word of mouth, there is no limit to the number of those events. Likewise, there is no limit on "events announcing the availability of a new release" of a brewery's products. Aa015a; Rb40. In contrast, the Special Ruling and license conditions apply the 25-event limit regardless of whether the event is advertised if it concerns a "live, amplified music performance, DJ appearance, or live-televised championship sporting event displayed or shown" at a limited brewery. Aa018a, 032a.

Death of the Fox's free speech claim is only concerned with the restriction on advertising no more than 25 events that otherwise are not limited by Section 10(1b), the Special Ruling, or license conditions. Properly understood, Death of the Fox targets ABC's limitation on speech, not conduct. Because the right to free speech

enshrined in the U.S. and New Jersey Constitutions may only be limited subject to applicable judicial precedent, ABC's advertising limit must withstand scrutiny.

The test set out in Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 566–67 (1980), establishes that when government restricts commercial speech that "concern[s] lawful activity and [is] not...misleading," then courts must consider: (1) "whether the asserted governmental interest is...substantial;" (2) "whether the regulation directly advances the governmental interest asserted;" and (3) "whether it is not more extensive than is necessary to serve that interest." Ibid. ABC concedes that the requirement of non-misleading speech concerning lawful activity is satisfied. Rb44.

As to Central Hudson's requirement for a substantial interest furthered by the challenged restriction, ABC offers several potential interests. In the Special Ruling, ABC claimed the perceived need to "balance" the interests of limited breweries with other ABC license holders. Aa007a–008a. ABC now disavows that interest. Rb50.

In its place, ABC offers interests in: "providing necessary clarity to the limited brewery industry [on ABC policy and Section 10(1b)] and ensuring the entire alcohol[]…industry operates in accordance with the Act," Rb44–45; "furthering its statutory mandate and the goals contained therein," Rb44; "protecting consumers from the historic societal harms that occur when the three tiers merge," Rb45; and "balanc[ing] and stabilizing the interests within the limited brewery industry," Rb46.

Importantly, none of these interests are offered to justify the advertising limit specifically, but for the Special Ruling and license conditions overall. As a result, ABC does not meet its burden to show its advertising limit furthers any of its interests. See Hamilton Amusement Center v. Verniero, 156 N.J. 254, 269 (1998) (burden on "State to establish the existence of the substantial governmental interest it sought to advance through the [speech restriction].").

Instead, ABC misleadingly claims that "prior to the Special Ruling[]…there was no pre-existing right to engage in commercial speech about [events]." See Rb46. But even if true, that is beside the point.[5] The Special Ruling and license conditions permit Death of the Fox to host unlimited events so long as they advertise no more than 25 in the media, notwithstanding the unchallenged limit of 25 "live, amplified music performance[s], DJ appearance[s], or live-televised championship sporting event[s] displayed or shown" on limited brewery televisions. ABC has thus not satisfied its burden to show that restricting advertising furthers any of its interests in limiting events when those events are not actually limited.

Nor has ABC shown the advertising limit directly advances and is no more extensive than necessary to advance any of its interests. Noting that the advertising limit "is not a complete ban on commercial speech" does not satisfy ABC's burden.

[5] ABC cites no authority that absent express approval, limited breweries may not host events despite Section 10(1b). Regardless, that notion is rejected by the Ninth Amendment to the U.S. Constitution and Art. 1, ¶ 21 of the New Jersey Constitution.

See Rb48. Nor does claiming it "simple common sense" that "providing a list of…permitted conduct" directly advances an interest in providing clarity to licensees on statutory and policy requirements. Rb48. See Edenfield v. Fane, 507 U.S. 761, 770–71 (1993). Such a justification again seeks to shift focus from the advertising limit to the Special Ruling overall, and again overlooks that the Special Ruling only limits advertising of events, not the events themselves. It also assumes without evidence that limited breweries needed clarity as to how many events they could advertise. ABC's claim that limiting advertising of events, but not new products, "decreases the likelihood that limited breweries induce new customers for reasons unrelated to their manufacturer's license," is nonsensical and supported by no evidence. See Rb49; Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 188 (1999) (government must "show that it carefully calculated costs and benefits of burdening speech") (cleaned up). Rather, Section 10(1b) and Death of the Fox's license authorize it to produce up to 50,000 barrels per year and make unlimited sales for on-site consumption. Advertising events to attract customers to Death of the Fox to consume those products thus furthers its license.

While limiting advertising of events—and by result, events themselves—arguably advances an interest in "furthering [ABC's] statutory mandate and the goals contained therein" of overseeing the relaxation of the three-tier system for breweries, Rb44, it is substantially more extensive than necessary. If ABC can

"achieve its interests in a manner that does not restrict speech, or that restricts less speech, [it] must do so." Thompson v. W. States Med. Ctr., 535 U.S. 357, 371 (2002). If ABC has an interest in limiting the number of events, simply limiting the events rather than how many may be advertised, would not restrict speech. The same is true for preventing traditional societal harms of tied houses, like improper inducement, despite the legislature specifically relaxing rules against tied houses for limited breweries. ABC's choice to instead limit speech fails Thompson's command.

CONCLUSION

Because the Special Ruling and license conditions are "rules" not created in compliance with the APA, the Court should declare them void and permanently enjoin them. Alternatively, the Court should declare the limit on advertising only 25 events violates the New Jersey and U.S. Constitutions and permanently enjoin it.

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Respectfully submitted,

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